

# Protection from Civil Liability for Crown Employees

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This submission is made on behalf of employees of the Ministry for Primary Industries (Manatū Ahu Matua) who are members of the Public Service Association (Te Pūkenga Here Tikanga Mahi) in response to the Law Commission's Issues Paper 35: *A New Crown Civil Proceedings Act for New Zealand*. It is limited to the issue of immunity or indemnity to civil liability for Crown employees. The contact person in regard to this submission is Tania Cameron (PSA National Delegate):

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## Q8 Do you prefer the option of an immunity or an indemnity from legal suit for Crown employees?

We prefer immunity over indemnity. We submit that immunity achieves the best balance between relevant public policy considerations. Immunity is also consistent with other legislative provisions under which Ministry for Primary Industries employees are afforded protection from liability for actions carried out in good faith in the course of their employment.

## Analysis

### Public Policy Considerations

The Issues Paper (at 6.14) frames the question as *“how best to achieve the aim of providing a remedy to be paid by the Crown to those who have been wronged, while still protecting Crown employees acting in good faith.”* We consider the underlying issues are complex and answering the question requires balancing several public policy considerations:

- Crown employees must be able to carry out their role effectively, **without fear or favour**.
- Crown employees should be incentivised to do their best and to this end should be **accountable** for their acts and omissions.
- Complaints and lawsuits should encourage **improvements to systems and processes** where any such complaints or law suits are upheld.
- There should be a **consistent approach** to protections afforded individual Crown employees.
- The general public must have **access to justice** and redress, including the ability to recover damages.

### Without fear or favour

Hogg and Monahan<sup>1</sup> summarise the arguments in favour of some degree of immunity for state sector employees, including:

- *“... a damages award ... is an unpredictable and usually disproportionately severe penalty to impose on a person who has acted in good faith in the intended execution of his or her duties.”*; and

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<sup>1</sup> Peter Hogg and Patrick Monahan *Liability of the Crown* (3<sup>rd</sup> ed, Carswell, Ontario, 2000) at 191.

- “... the risk of personal liability could lead to overly cautious (risk-averse) behaviour on the part of Crown servants whose jobs call for vigorous action but who are fearful of being sued.”

The Deputy Prime Minister and the Minister of State Services have also noted that one public policy objective behind immunity is that of public servants being able “to undertake their functions without being too conservative or unduly risk-averse, and to do so without fear or favour.”<sup>2</sup> This is part of the rationale behind the wording of the current s 86 of the State Sector Act 1988.

### *Certainty of protection*

The Issues Paper proposes certainty around indemnity for individual employees to address concerns about the financial risks to Crown employees posed by the threat of a law suit. The Issues Paper acknowledges (at 6.28) that this is dependent upon costs being covered as they come due, though it does not explore this risk in detail or propose solutions to it. We submit that an individual employee might have to cover significant costs prior to any indemnity being honoured, leaving him or her out of pocket in the interim.

The Issues Paper fails to identify other matters that will impact on the certainty of protection. One such matter is the potential for the Crown to dispute liability for legal costs, which could lead to significant delays to payments being made under the indemnity, if at all. Such disputes might relate to the extent of costs incurred, for example due to the choice of legal representative.

The Crown might be expected to also be named as a defendant, as a plaintiff will usually seek to ensure they sue someone who is able to pay any resulting damages. In such instances, there is also the potential for a conflict between the Crown’s interests and the employee’s interests.

Whether named as a defendant or not, the Crown might dispute whether the employee qualified for the indemnity. The issue of whether an employee acted in good faith and in the course of their duties might arise even under the existing immunity provision. However, in the event of an indemnity, this could lead to the employee having to be involved in two separate legal proceedings – the substantive claim and a subsequent action involving the employee and the Crown. This could result in a drawn out and costly process for the Crown and the employee without any additional benefits to the original plaintiff.

### *Remaining threat of personal liability*

We submit that the fear of being named and having to take part as a defendant in a legal action itself can significantly impact how an employee undertakes his or her role. This fear is not addressed by an indemnity for any costs and potential damages. Without immunity, the subsequent risks to Crown employees’ performance of their roles remain.

One situation where immunity or indemnity could make difference is where the Crown employee is a manager signing off on decisions or advice under delegated authority. In these instances, managers are often called on to act mainly in reliance on another person’s advice as managers are not the subject matter experts. Without immunity from civil liability, managers are more likely to second guess the advice they are given, which could cause significant delays. So, with overly risk

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<sup>2</sup> *Better Public Services Paper 6: Amendments to the State Sector Act 1988* [SEC (12) 26] 4 May 2012, at paragraph 89.

averse employees and managers, there could also be an impact on productivity and timeframes, increasing the costs of running public services. This would not be in the public's best interests.

The dynamics created if immunity was replaced with an indemnity could also impact on employment relationships. There would be a tendency for the necessary trust between managers and their staff to be eroded as managers became more risk averse. At the same time, individual employee's productivity could tend to drop, resulting in disadvantage during performance reviews, for example.

There are also a variety of situations where members of the public might use the threat of legal action to intimidate or impede MPI employees in the course of their duties, from employees writing policy advice to biosecurity staff questioning passengers at airports. We consider an immunity offers the best protection against such attempts at intimidation and best ensures that employees act in a way that is not overly risk averse.

### *Impact on recruitment*

Another public policy objective that the Deputy Prime Minister and State Services Minister noted in regard to the rationale behind immunity was:

*"Government departments must be able to attract and recruit able and qualified employees who are able to carry out the Crown's core functions without fear of liability for their actions being undertaken in good faith in the course of their employment."*<sup>3</sup>

The Issues Paper touches on this matter, but does not explore it any detail. We consider that it is in the public interest that able employees are attracted to work in the public sector. We submit that an immunity better ensures and supports this than does an indemnity.

### **Accountability**

The Issues Paper suggests (at 6.16) that if an employee is not held accountable, he or she *"has less incentive to take responsibility for [his or her] actions."* We accept that employees should be accountable for their acts and omissions. However, we submit that the current wording of s 86 provides for sufficient accountability and encourages individual responsibility.

Crucially, s 86 only provides protection for acts and omissions done in good faith and *"in pursuance or intended pursuance of their duties, functions or powers."* Crown employees are not protected where they have acted in bad faith or where their actions and omissions are unrelated to the pursuance of their duties, functions or powers. Section 86 also provides immunity only to civil liability; Crown employees remain criminally liable (unless afforded protection under other statutes).

It is not uncommon for complainants or plaintiffs to see an acknowledgement of the wrong as an important part of the process. In reaching a settlement, a complainant could require an apology from the individual employee(s) involved. This is a type of accountability that is preserved under immunity.

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<sup>3</sup> *Better Public Services Paper 6: Amendments to the State Sector Act 1988* [SEC (12) 26] 4 May 2012, also at paragraph 89.

Additionally, Crown employees owe obligations to their employer and can be held accountable for acts and omissions that breach those obligations. So, there are several ways in which individual Crown employees may be held accountable without being personally liable in civil proceedings.

### *Nature and focus of the litigation*

The Issues Paper suggests (at 6.35) that if a Crown employee is not personally liable, his or her actions would “*not face scrutiny in the same way as they would if the employee were the subject of the proceedings.*” Further, the Issues Paper suggests, this could have the consequence of removing “*some of the incentive for an employee to exercise an appropriate level of care in his or her work.*”

We submit that the employee’s actions would face the same level of scrutiny under either an immunity or an indemnity. The actions or omissions that give rise to the claim are the same regardless of whether it is the employee or the Crown who is the defendant and a wrong still has to be proved. We submit that this, combined with the fact that immunity relies on acting in good faith, means that employees have sufficient incentive to exercise care in their roles under the current provision.

Additionally, in the event of a trial, the immunity will not protect Crown employees from having to give evidence. An immunity may have the advantage that an employee may be more inclined to be completely frank when giving evidence in the knowledge that they are immune from liability. In the case of the indemnity, this is less clear (see above discussion under ‘Certainty of protection’).

### **Improvements to systems and processes**

An employer is in the best position to ensure that processes and systems are designed to protect against errors being made. In our view, systemic problems are more likely to be identified where the Crown is the defendant and individual employees are not. This is because focusing entirely on the actions of individual employees, as is more likely the case with personal liability, can mask underlying systemic and process issues that may exist in organisations.

Therefore, we submit that providing Crown employees with immunity is more likely to result in positive changes to avoid problems arising again in future. This could extend to better incentivising employers to ensure that the best employees are recruited and that all employees have appropriate skills and training to perform their roles.

### **Consistency**

We submit that in the interests of equality there should be consistency in the protection given to public sector employees, regardless of which entity employs them. Ministry for Primary Industry employees have civil immunity (and often criminal immunity) under the provisions of various pieces of legislation. These are summarised in Table 1. Other agencies have similar provisions which apply to their employees, many of which were noted by the Law Commission in 1997.<sup>4</sup>

### *Public versus private employees*

There is an underlying principle that the state, and its employees, is under the law. So, it might be argued that Crown employees ought also to be treated consistently with private sector employees and be able to be sued personally. In our view, however, there is a distinction to be made between private sector and Crown employees.

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<sup>4</sup> New Zealand Law Commission (May 1997) Report 37: *Crown Liability and Judicial Immunity, A response to Baigent’s case and Harvey v Derrick*. Wellington, New Zealand.

Although there may be instances where the acts or omissions are not peculiar to Crown employees, there are many instances where there are no analogous responsibilities in the private sector. As the Issue Paper notes (at 6.13), "...Crown employees undertake activities that have little parallel in the private sector, often in circumstances of conflict or difficulty." There is also a strong public interest in Crown employees being able to undertake their core roles without fear or favour.

In regard to the principle of equality, the Law Commission previously proposed a necessity test:<sup>5</sup>

*"The Crown and other public bodies should have no power or immunity beyond those of the citizen, **except to the extent necessary to allow its public functions to be duly performed.** Anything more would impact adversely on the right of the citizen; anything less would impair the efficiency of government by inhibiting public officials in the proper performance of their functions."* [emphasis added]

It is submitted that a civil immunity for state sector chief executives and employees limited to good faith actions and omissions is the extent necessary to ensure that they are not inhibited "*in the proper performance of their functions.*" In some cases, 'the extent necessary' means that this protection needs to be extended to criminal liability, as happens under various statutes.

## Access to justice

Under the current legislation, the Crown remains liable for acts and omissions of its employees who are immune under s 86 of the State Sector Act. The Issues Paper envisages scenarios where neither the Crown nor the employee would be liable if the protection remains in the form of an immunity. We submit no such instances would occur under the current wording of the provision, or if they do, they would equally occur under an indemnity.

If an employee's acts or omissions are done in bad faith and/or are not related to their duties, functions or powers, they remain personally civilly (and criminally) liable and s 86 has no practical effect. Section 6(4A) of the Crown Proceedings Act would not be relevant; Crown liability in tort would be determined under the other provisions of s 6. If the employee's acts are done in good faith and in pursuance of their duties, functions or powers, they have immunity. If the employee would otherwise have been liable in tort, the Crown would be liable under s 6(1)(a).

The Crown will always be in the better position to pay any damages awarded and costs awarded. Therefore, a plaintiff's financial interests are at least as well protected under an immunity as under an indemnity.

Additionally, the overall costs and court time could well be less with only the Crown named as defendant. For example, if both the Crown and employee are sued, each will likely have their own lawyer. Each lawyer will have his or her own case to present and questions to ask. Typically, where plaintiffs are awarded costs, these do not cover the full costs incurred. The longer a trial goes for, the higher the costs, and the more they could offset any damages awarded to the plaintiff.

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<sup>5</sup> New Zealand Law Commission (May 1997) Report 37: *Crown Liability and Judicial Immunity, A response to Baigent's case and Harvey v Derrick*. Wellington, New Zealand.

### *Constitutional significance of suits against Crown employees*

The Issues Paper suggests (at 6.33) suits against individual employees “*may be seen to be a check on misuse of power*”. As immunity is limited to civil liability for actions and omissions in good faith, it is submitted that the “*check on misuse of power*” is largely unaffected by the current provisions. For the reasons discussed above under ‘Accountability’, it is also submitted that sufficient other checks remain to ensure that Crown employees are held responsible for their actions.

### *Effect on litigation against the employee and the Crown*

We submit that any changes to the Crown Proceedings Act 1950 should preserve the right of the public to sue the Crown, in spite of any immunity for Crown employees under s 86 of the State Sector Act. We consider that this best ensures that plaintiffs have an enforceable remedy. As noted in the paper (at 6.38), although no cases have yet been taken under the current provisions, similar provisions in New South Wales “*seem to work well enough*”.

### **Queensland Approach**

In February this year, new legislation was passed in Queensland, Australia, amending the Public Service Act 2008 (Qld) (see below). This legislation is broader than s 86 of the State Sector Act and provides a general immunity to public servants, not limited to good faith actions and omissions. But, it also provides that where a state employee has acted otherwise than in good faith and with gross negligence, the state may recover contribution from the employee.

Under this approach, no question arises for the plaintiff as to whether an employee was acting in good faith. That is an issue between the employee and employer should the employer seek contribution. The plaintiff is able to issue proceedings against the state and thus has the benefits of a defendant with funds to pay any award of damages. The employee is also held accountable by the state’s ability to recover some of the costs incurred.

We are not advocating that New Zealand should necessarily adopt this approach. We are noting this development in the law as an indication that the trend elsewhere may be towards wider protection for state sector employees, rather than narrower.

**Table 1: Immunity provisions relevant to Ministry for Primary Industries employees**

<b>Provision</b>	<b>Covering Whom?</b>	<b>Liability</b>	<b>Crown Liability</b>
s98 Animal Products Act 1999	Animal product officer, official assessor, “recognised person employed under the State Sector Act” 1988	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause	Not generally specified
s158(1) Animal Welfare Act 1999	Inspectors and auxiliary officers (compliance officers)	Immunity from liability (not stated whether it includes criminal liability) for acts or omissions in good faith	Liability despite employee immunity (s158(2))
s163 Biosecurity Act 1993	Inspectors and others acting under the Biosecurity Act	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause (also applies to s97A of the Hazardous Substances and New Organisms Act 1996)	In relation to loss or damage to goods, no civil liability where good faith and reasonable care in the custody, treatment, handling or quarantine of the goods (s164)
s23 Driftnet Prohibition Act 1991	Enforcement (Compliance) officers	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause	“The Crown shall not be held directly or indirectly liable...unless the enforcement officer or person concerned would himself or herself incur liability for the act or omission...”(s23(2))
s220(1) Fisheries Act 1996	Fishery officers, fishery inspectors	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause	“The Crown may not be held directly or indirectly liable ....unless the officer, inspector or person would himself or herself incur liability for the act or omission.” (s220(4))

<b>Provision</b>	<b>Covering Whom?</b>	<b>Liability</b>	<b>Crown Liability</b>
s39 Food Act 1981	Persons acting under the authority of the Act	Immunity from civil and criminal liability unless acted in bad faith or without reasonable care	Not specified
s351 Food Act 2014	All MPI employees	Immunity from civil and criminal liability for acts and omissions in good faith and with reasonable cause, and for acts and omissions done or omitted under a requirement of the Food Act 2014	References s6 of the Crown Proceedings Act 1950. Section 6(4) states: "any enactment which negatives or limits the amount of liability of any government department or officer of the Crown shall...apply in relation to the Crown as it would have applied if the proceedings against the Crown had been proceedings against that department or officer."
s13 Forests Act 1949	Forestry officers and other MPI employees	Immunity from liability (not stated whether it includes criminal liability) for anything done in good faith	Not generally specified
s66 Meat Board Act 2004	Persons acting under the authority of the Act	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause.	Not generally specified
s56 National Animal Identification and Tracing Act 2012	All MPI employees, NAIT officers	Immunity from civil and criminal liability for acts and omissions in good faith and with reasonable cause, and for acts and omissions done or omitted under the Act. No actions for loss or damage resulting from reliance on information received from, or collected or held by any such person	Not generally specified

<b>Provision</b>	<b>Covering Whom?</b>	<b>Liability</b>	<b>Crown Liability</b>
s165 Search and Surveillance Act 2012	Persons obtaining and executing examination orders, production orders, search warrants, and surveillance device warrants	Immunity from civil and criminal liability for any act done in good faith and, in the case of executing an order, if the execution is carried out in a reasonable manner	The Crown is immune from civil liability in tort where the employee is immune (s167)
s166 Search and Surveillance Act	Persons exercising entry, search or surveillance powers	Immunity from civil and criminal liability for acts done in good faith if the power is exercised in a reasonable manner and the person believe on reasonable grounds that the preconditions for the exercise of that power have been satisfied	The Crown is immune from civil liability in tort where the employee is immune (s167)
s86 State Sector Act	All employees	Immunity from civil liability for good-faith actions or omissions	Liability despite employee immunity (s6(4A) Crown Proceedings Act)
s83 Wine Act 2003	Wine officers	Immunity from civil and criminal liability unless acted or omitted to act in bad faith or without reasonable cause	Not specified

## Queensland provision

### 26C Civil liability of State employee for engaging in conduct in official capacity

(1) A State employee does not incur civil liability for engaging, or for the result of engaging, in conduct in an official capacity.

(2) If subsection (1) prevents liability attaching to a State employee, the liability attaches instead as follows—

- (a) if paragraph (b) does not apply—to the State;
- (b) if, at the time the State employee engaged in the conduct, the person did so as a member of a body corporate or the governing body of a body corporate, or as a person who was employed by, appointed by or a delegate of, a body corporate—the body corporate.

(3) If liability attaches to the State under subsection (2)(a), the State may recover contribution from the State employee but only if the conduct was engaged in—

- (a) other than in good faith; and
- (b) with gross negligence.

(4) If liability attaches to a body corporate under subsection (2)(b), the body corporate may recover contribution from the State employee but only if the conduct was engaged in—

- (a) other than in good faith; and
- (b) with gross negligence.

(5) In a proceeding under subsection (3) or (4) to recover contribution, the amount of contribution recoverable is the amount found by the court to be just and equitable in the circumstances.

(6) In this section—

**civil liability**, of a State employee for engaging, or for the result of engaging, in conduct in an official capacity, means liability of any type for the payment of an amount by the State employee because of—

- (a) a claim based in tort, contract or another form of action in relation to the conduct or result, including, for example, breach of statutory duty or defamation and, for a fatal injury, includes a claim for the deceased's dependants or estate; or
- (b) a complaint made under a law that provides a person may complain about the conduct or result to an entity established under the law, other than a complaint to start criminal proceedings, including, for example, a complaint under the *Justices Act 1886*; or
- (c) an order of a court to pay costs relating to a proceeding for an offence against a law in relation to the conduct or result, unless the proceeding was for an offence by the State employee.

*Examples of types of liability—*

- a liability because of an agreement or an order under the *Anti-Discrimination Act 1991* or the *Australian Human Rights Commission Act 1986* (Cwlth) requiring payment of an amount to a complainant (however described) under the Act

- a liability because of an obligation under an agreement to settle a proceeding, or an order of a court or tribunal, to do something that involves paying an amount, including an obligation to rectify damage to a building or to publish an apology in a newspaper

**conduct** means an act or an omission to perform an act.

**engage in conduct in an official capacity** means engage in conduct as part of, or otherwise in connection with, a person's role as a State employee, including, for example, engaging in conduct under or purportedly under an Act.

*Example of a State employee engaging in conduct in an official capacity—*

A State employee makes a decision in relation to an application for a licence.

**State employee** see section 26B(4).