



Review of the Crown Proceedings

Act 1950

Submission to the Law Commission

September 2014



For a better working life

New Zealand Public Service Association

Te Pūkenga Here Tikanga Mahi

Review of the Crown Proceedings Act 1950: Submission to the Law Commission

Introduction

Who we are

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 58,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

PSA submission

General Comments

The PSA thanks and commends the Commission for actively seeking our views and for its openness in engaging with us on the Issues Paper.

In preparing this submission we sought the views of PSA members working in agencies likely to be at the sharp end of some of the proposals canvassed in the Issues Paper; those working for Child, Youth and Family Services at the Ministry of Social Development, the Probation Service at the Department of Corrections, the Ministry of Education and the Ministry for Primary Industries.

We received a strong response from members. Some wrote to state their support for continued indemnity from civil liability for public servants and others contributed more substantive comment which is attached as appendix 1. We also encouraged members to make submissions directly to the Commission and we understand that a number have done so.

PSA members working at the Ministry for Primary Industries have made a separate strong and well-reasoned submission, which the PSA commends and adopts. In addition, we submit below on direct liability for the Crown and summarise the views contributed by other PSA members on the liability of Crown employees.

PSA view of the main proposals

We agree that it is timely to review the Crown Proceedings Act 1950 (the Act) to better reflect the way in which New Zealand is currently governed and we support the principles adopted in the review.

The PSA supports allowing for the Crown to be directly liable in tort.

The PSA strongly supports retaining the current immunity of Crown employees from prosecution for good faith actions. If the Commission recommends changes to the State Sector Act and Crown Proceedings Act that remove this then we will submit strongly against such proposals at select committee.

The Crown should be directly liable in Tort

The PSA supports allowing for the Crown to be directly liable in tort.

This is consistent with the rule of law

It is consistent with the rule of law that government be subject to the same legal rules as private individuals, and should be accountable to injured citizens for its actions. An important aspect of this concept is that the application of ordinary principles of law to government be placed in the hands of the courts, which are perceived to be independent of government and therefore capable of awarding an appropriate remedy to an injured plaintiff. Having taken this as a start point, it is then possible to recognise particular instances where the Crown may require some unique powers and immunities to govern effectively, and to provide accordingly. The scope of those powers and immunities should be carefully defined and should not be broader than is necessary to achieve the particular policy and purpose for which they have been granted. A review of existing immunities will be likely necessary.

Parties injured by “Systemic Failure” should not be left without redress

As the Commission has noted, sole reliance on vicarious liability of the Crown is problematic when there is no particular officer or servant who has committed a tort, but rather a “systemic failure” has occurred in that the government department as a whole has failed. In our view it is right and fair that the law recognise that the Crown owes obligations to the citizens it serves, and that there is no possibility that parties injured by departmental failure could be left uncompensated.

Direct Crown liability also avoids the difficulties encountered by the plaintiff in the *Couch v Attorney-General (Couch)* case, making for much more straightforward litigation, and removes the need to perhaps unfairly target the actions of a particular public servant in order to advance a case.

With settlements, privacy and accountability should be balanced

While we are in favour of the Crown being able to enter into voluntary settlement agreements, as other litigants are able, we believe the confidentiality of this process needs to be tailored so as to balance the need for public accountability while reasonably protecting the privacy of the individual plaintiff concerned.

Immunity, limited to good faith actions, is the most appropriate protection from civil liability for Crown employees

While we understand the pure academic appeal of making Crown employees liable in tort, we submit that in any real and practical sense this is not the best policy option.

Crown employees are in a different position to private employees

In the main, citizens choose whether or not to become customers or clients of private businesses. They are also likely to have a choice of provider for whatever service or good they are seeking. In many cases Crown employees carry out duties of such a nature that legislation has been required to enable them. These are not popular jobs and Crown employees need to be able to undertake them without fear or favour.

Strong accountability arrangements are already in place

We understand the desire to ensure accountability of Crown employees for their actions, however multiple forms of accountability already exist and these already produce the desired result. New Zealand already has one of the most highly regarded public services in the world in terms of integrity. We rank first in the world for transparency¹. And New Zealanders' satisfaction with their experience of public services is high².

Accountability arrangements within Departments are strong. The employment relationship and agency codes of conduct oblige Crown employees to carry out their duties in good faith, fairly, impartially, responsibly and in a trustworthy manner. Statutory duties must be carried out in accordance with guidance and policy and in many cases require several levels of sign off.

If there are concerns about the strength of accountability arrangements around particular groups of Crown employees then these are best addressed through reviewing those particular arrangements, rather than through reducing protections for all Crown employees.

Backing Crown employees to carry out their duties, in good faith, produces better services to citizens

Accountability systems within agencies are strong to the point where they arguably interfere with employees' ability to innovate and be responsive to their clients' needs. Public servants are the human face of the Crown. Leaving Crown employees open to being sued for carrying out their duties in good faith risks incentivising undesirable risk aversion and a culture of narrow compliance rather than responsiveness to clients' needs. This is not in the public interest.

¹ <http://www.transparency.org.nz/2013/National-Integrity-System-Assessment-New-Zealand-2013>

² <http://www.ssc.govt.nz/nzers-experience>

The public service needs to be able to attract and retain an appropriately skilled and qualified workforce

We have received substantial comment from PSA members that leaving them open to being sued for carrying out their roles in good faith would be a very real disincentive to take up difficult statutory roles, especially regulatory roles such as social workers, frontline case managers, probation officers, fisheries officers, customs and biosecurity officers, education advisors, tax inspectors, bailiffs, labour inspectors and health and safety officers.

These are tough roles and they are not highly paid. The people who work in them are motivated by their desire to make a difference. The public would not be well served if the removal of the current immunity discouraged good people from taking up these roles.

Liability for good faith actions would have a disproportionate effect on some Crown employees on their families

If Crown employees who are sued are left to arrange and pay for their own defence then many are likely to be unable to meet the interim associated costs. There would also be no guarantee that their employer would indemnify them or that if it did so that this would be timely. Even if costs are eventually awarded they may not be in full and it is unlikely that they would be paid in time to prevent significant hardship to the Crown employee and their family.

Some Crown employees might be driven (or perhaps well advised) to seek to protect their family's financial interests by arranging, for example, for the family home to be safeguarded by being held in a family trust. Others who had not taken such steps could risk losing everything. This would seem oppressively harsh given that the Crown employee in this situation would have only been doing their job – in good faith.

The indemnity option could set up a conflict of interest between the employer and Crown employee

The indemnity option would require the employee to engage and instruct their own counsel, independent of that engaged by their employer. It may be that counsel for the employee and counsel for the Crown may have different objectives and take different approaches to the litigation. The balance of power in the employment relationship is already squarely with the Crown and the employee would be left defending him or herself on two fronts simultaneously.

The PSA strongly supports retaining the current immunity from prosecution for good faith actions. If the Commission recommends changes to the State Sector Act and Crown Proceedings Act that remove this then we will submit strongly at select committee against any such proposals.

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2014 Crown Proceedings Act Review comments from members

Number of comments sent direct to PSA: 84. All supporting retention of immunity from civil liability.

<p>I believe that in acting in good faith on behalf of our employer, following the guidelines and policy, it is not right for staff to be penalised personally in the case of a client suing if they find a decision not to their liking.</p>
<p>I don't believe staff should be sued if acting in good faith</p>
<p>I defiantly do not support option "B", we have a challenging job at the best of times and have on-going expectations. I would only support option "A", and would hope that as Public Servants our employer would act in good faith.</p>
<p>As the title implies – a public servant works for the public on behalf of the state. It is not a personal relationship.</p>
<p>In light of the tragic shootings of our colleagues in Ashburton yesterday, public servants who were no doubt doing their job in good faith, who in their right mind would want to do the work we do if the spectre of being personally sued hung over us as well. I can't see the point in the changes given that we are liable anyway if it is shown we have acted without good faith or negligently.</p>
<p>I support option A. Option B is entirely untenable. I have a family to support and cannot meet the costs of legal action while I wait for my employer to reimburse me. Further if I have been acting in good faith, I do not see why I or my family should need to endure the stress of legal action which in essence relates to my employer's business.</p>
<p>– I cannot believe there would be consideration to option B in the highly contentious and risky role that we undertake. We work hard with high risk dangerous offenders. To know I could be personally liable to be sued is an outrage. I make my decisions based on the department of corrections guidelines and in consultation with my managers and colleagues.</p>
<p>Often public servants are instructed or directed to act in a particular way or deliver a particular message as part of the organisational stance. Leaving public servants open to a culture of law suits may inhibit the public servant's capacity to carry out their role as a public servant. Leaving public servant open to law suits when they are working in good faith or as directed/instructed focuses additional personal and professional stress on the public servant and ultimately their family. That is a public servant is further punished for carrying out their role. It is NOT acceptable for the financial cost of such an action by someone in the sector to be borne by the public servant and their family</p>
<p>I am totally opposed to the ideas that as a public servant I could be sued. It would certainly make me think twice about even working for the public service.</p>
<p>This could open up a can of worms...</p> <ul style="list-style-type: none"> • Teachers getting sued by parents for their child's low academic achievement • Police getting sued by criminals for hurting them during an arrest • Corrections staff being sued because an offender kills someone on parole
<p>There are already ombudsmen, commissioners, court processes i.e. coronial court etc. that have ways calling people to be accountable. If it is of a criminal nature then the police and judiciary would be involved anyway. There are internal disciplinary systems as well.</p>
<p>I think this law change could create a climate of fear and add additional performance pressure to public servants who then might start refusing to do any risk activities that could cause them to be sued.</p>

In either case, public servants who do not act in good faith (for example in bad faith or negligently) can be sued personally. This is currently the case.

Whilst I have no reason to worry about because I am not negligent and always work in good faith, neither option would appeal to me for the following reasons (*two reasons not reproduced here as contained identifying information*):

- At the end of the day, all work is checked by a Service Manager. They are paid much higher than a Probation Officer – if accountability is an issue, then ultimately are they not responsible? Or you could go on to say that the District Manager is accountable, or Regional Manager.

I seriously believe that this is utterly inappropriate and if anyone tried to sue me for whatever reason, I should not have to fork out costs to defend myself in the line of duty given the complex situations we are dealing with every day.

On top of this, our Government are supposed to be setting our country good examples and modelling good behaviours. Are they going to be held to account and can they be sued personally if they are negligent of their country affairs?

I am really really worried if Statutory social workers could be kept financially liable for the work they do on behalf of the State.

Knowing that I could be sued, even though I was acting in good faith and following proper processes and procedures, would seriously affect my performance. If such an action was taken against me, even though my employer would have to meet the cost of defending me, it would negatively impact on my ability to focus on any further work until things were resolved. That is, output would be seriously down. I would not like working with this possibility hanging over my head.

Seriously! We have to work according to the rules, follow regulations and protocol. We do not get paid the big bucks the big guns are receiving, yet get hung out to dry. So what exactly are the top executives receiving this salary for? Why is it honest hardworking people whom are doing their jobs in 'good faith' have to worry about this as well. Where's the integrity of the organisation or is there none? Negligence is a whole new different ballgame and if proven, so be it but we know sometimes the so called negligence can also be from receiving bad advice from Managers whom suddenly are jumping on the negligence bandwagon. On the other hand, an actual negligent staff member sometimes have the right people in their court and things come right for them . Lucky them.

At the same time, if this goes through, members will be paying more in fees, seeing as how everyone has got to be prepared for possibly being sued

The reason is that if we were personally liable for doing a job in good or bad faith for that matter, it would drastically change the way probation officers did their job. It would make an already stressful role even more stressful, create suspicion around 'would the department back me up' that sort of thing. We would all go back to covering our butts, no reducing re-offending. And lastly – this would make us more like the USA, where the only one that benefits is the lawyer!

I am not sure the reason behind the review and submission however having had friends who had had to go through the personal grievance process with employers I have seen how difficult and financially draining it was to fight through the court process.

I also lived in America and did not enjoy the process of having to sue a restaurant where I was injured to get my medical costs covered. I would hate our society to go further down this track.

However my main concern is that if the public servant has to pay for their legal costs and then be reimbursed this would put undue pressure on most people financial resources (let's face it we are not paid huge salaries) which could cause the employee to then become so stressed they actually do not function properly in their job. The result could be that the employer then has the opportunity to say the employee is not fit and then not reimburse the funds. There is too high a risk the employee may end up fighting the allegations in court and then also fighting the employer.

My experience of legal teams within MSD is they are highly competent and know our business very well. What if the employee has to use legal services who don't understand our business this would lessen the chances of a successful outcome for the employee.

I refer to the following paragraph in the Law Commission review of the propose changes. I have experience situations as a public servant where when something goes wrong, everyone else "run for cover" involved (supervisors, managers, etc...). I would fear that in such situation even if the employee was to be indemnified for the costs he or she would still be left possibly to bear the brunt of the legal action being taken against them and this is not acceptable. Employees could become the easy targets of failures due to systemic deficiencies (such as adequate support and supervision).

Effect of threat of personal liability

Employees who are indemnified by the Crown remain at risk of having litigation brought against them for their actions. This creates a risk that the threat of liability could lead to these employees conducting their work in an overly cautious or risk-averse way, and leave them feeling exposed. Without a protection against potential personal liability, it might be difficult to attract employees into public service positions. Immunities remove these risks by preventing the possibility of proceedings, allowing Crown employees to undertake their work without

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the fear of personal liability. On this view, the scrutiny and personal pressure threatened or actual litigation would entail is an unjustified interference with the ability of Crown employees to carry out their functions, even if the financial cost were to be met via an indemnity. An immunity provides more effective protection from this perspective, as it would shield Crown employees from even the possibility of being named as a defendant, let alone having to undergo the process of being sued and found to have breached obligations.

As an auditor I often am in the position of recovery of crown funds that have been incorrectly claimed. No one likes to receive this information. While I do not see any reason as to why someone might want to sue, I am carrying out duties as directed by my employer and would not like to be held personally liable for my employer's direction.

A culture of blame and penalties for failure does not necessarily lend itself well to taking ownership, learning from mistakes and fixing things. It is probably more likely to contribute to 'duck 'n' cover', 'dodge 'n' dive'.

If someone is victimised by the actions of the state or its agents it would be fair and reasonable to expect some form of compensation. Perceivably, however, an entire industry could be built around suing for damages and could become a lucrative trade with its own pitfalls

Public servants work in an environment that often involves doing things in the course of their duties that can be unpopular as agents of the state who are required to enact and enforce law and public policy.

This is exacerbated by a climate of under resourcing which can lead to further issues. For example, things are likely to be missed, short cuts taken, etc. where there are insufficient resources. Public servants will do the best they can with the resources they have. I believe that they already come under too much pressure to deliver more for less and are then given to take personal responsibility for short falls or less than ideal performance. In effect blaming the under-resourced public servant at the bottom of the food chain despite not having the right tools to do the job. It would be unfair to add this additional pressure into the mix. It is important to be accountable, however, often the accountability should be aimed at the system which can be flawed or is unable to be responsive to the needs of all.

A good case in point would be social workers with high and complex case loads. For years social workers have complained about unmanageable case loads, many social workers have left due to this and the level of accountability associated with it. On social work members behalf the union has been seeking a 'work load management tool' for many years. Although social workers have voiced their concern about the workload and called for additional resources including EFT positions they have consistently been informed that these will not be forth coming. I have personally observed colleagues working extra hours (gifting) to keep up with the work load. Those not willing or able to gift work hours are left open to the sorts of risk that could see them vulnerable to being sued. The work load management project was consistently stalled and I believe that this was at least in part due to resourcing issues that were known to exist and how the project would impact on this by highlighting needs. Now that a work load management tool has been forthcoming it is of little surprise that very quickly it was identified that more social work staff were required.

Option B, if nothing else, presumes an ideal world where the public service is well resourced in terms of qualified and trained personnel, manageable workloads, adequate supervision/line management, effective policy and practice. This is not the case and New Zealand has a culture of demonising and blaming the public service for poor outcomes. This is magnified with the public service being subject to the whims of politicians and government of the day policy which tend to view public services as bloated bureaucracies wasting public monies. I am clearly against Option B.

I just wanted to add my support to opposing the changes suggested by the Law Commission and advise that I support option A. It is ludicrous to alter this policy to place public servants in the firing line should a member of the public take exception to the staff member working with them. In my line of work decisions and actions taken can be extremely unpopular with certain family members and this does place us at risk. The current status quo of having our employer in place to protect us from the unnecessary trauma of court proceedings should anything come to eventuate is key in helping us to feel secure in our challenging line of work. We have more than enough things to concern us without adding that into the mix.

In regards to the new civil liability proposal I would like to make my views known. I support option A in relation to civil liability of public servants and believe that if a law is passed that would allow public servants to be sued personally, many of our public servants will become targets for disgruntled people that we are managing whether we are managing them in good faith or not. What is good faith and how do we prove good faith. If society are aware that our organisations and Government Departments that we are working for are no longer supporting us if there was a legal battle, we potentially become targets. One things for certain, I certainly wouldn't want to be working in the public sector if this goes ahead.

I have no money to pay and then wait for reimbursement.

<p>Why would one public servant as in I assume who proposing this law change are a public servant themselves, suggest a proposal that could not in all good faith be best for a public servants overall. Imagine the stress of being sued personally additionally as a social worker it could impact upon your registration as social worker and Membership of ANZASW.</p> <p>If the government wants public servants and good quality who are looking at a career as public servant, then the public servant needs to have confidence they will be backed and are safe.</p>
<p>The work is tough enough as it is without this additional pressure.</p>
<p>Our profession struggles to attract good employees in the first place should the law change to option B I for one would not be interested in working for a government dept. where I am placed at additional risk and expense. Should such a possibility been pointed out to me at the start of my social work training I would have strongly considered other areas of career, at this stage of my career it would make working for an NGO very appealing</p>
<p>This issue has caused some concern. As a new social worker to CYF, I believe I was the best person for the job at the time and in believing this, CYF have then decided to support me whilst I am employed with them. Which means ensuring that I do not bring the Ministry into disrepute purposefully and they in turn support any and all decisions I make.</p> <p>If I am to be sued for believing I made the right decision, based on all the information that has been gathered and the Ministry believe that I should pay costs, I would then think twice about the Ministry speaking on my behalf on matters pertaining to my job and the role that I play.</p> <p>How can they perceive to speak for me and not support me.</p> <p>If we are one then let us be one, but if they choose to reprimand me for doing my job in accordance to our policies and procedures, then this is not an employer I wish to be working for</p>
<p>I certainly would not have the time or the money to get caught up in this kind of litigation. While it says that our employer will reimburse costs – who knows how long it would take.</p>
<p>I would like to register my concern at the changes the Law Commission are proposing to the liability of Government employees in that they could be potentially sued by others. As a Government employee who adheres to the Code of Conduct, the vision and the principles of the Department for which I work, I believe that I carry out my duties always in good faith, adhering to the rules, guidelines, manuals and instructions given to me, and I do not accept that it is reasonable for persons to be able to sue me personally in respect of these duties. I believe that the stress, potential publicity and impact on myself and my family of being sued would outweigh the fact of my employer meeting the costs.</p> <p>Employees act in good faith, their practice is prescribed and directed by policy. Breaching policy would breach the code of conduct, therefore employees have very little choice about directed statutory work.</p>
<p>I would not have minded option B except for the wording...”employer is obliged to”. To me this is not a ‘definite’.</p>
<p>This allows the organisation to investigate the incident, if it is found the employee was in breach or of in appropriate conduct. Then the organisation would then deal with that separately. Employees are not here as a scape-goat for the policies and procedures that are imposed on us to implement from the powers at be.</p>
<p>There are many public servants who need to ‘front/lead’ contentious discussions from time-to-time. We do so in the knowledge that we are representing our employing department/Minister and their policies and accept that we have an obligation to do so in good faith. There is also an expectation of the employer/Minister that we do carry-out those functions as part of our roles as required.</p>

If we carry-out our roles, which may from time-to-time require contentious engagement, then surely we should be able to expect the employer to back us – obviously provided we meet our obligations of ‘good faith’. If the legislation is changed then;

1. In the knowledge that we could be sued personally, what happens to our employment if we refuse to participate in ‘contentious’ forums, as part of our role?
2. If we do refuse to undertake a function in a contentious setting and are then ‘directed’ to undertake that function by the employer, does this mean that the liability then defaults to the employer?
3. If Option ‘B’ was introduced – how many employees could meet the interim cost of litigation until it was resolved and what time delay would there likely be before the employer reimbursed it?
4. If Option ‘B’ was introduced - what guarantee would there be of reimbursement, when the employer could clearly try to prove ‘breach of faith’ to avoid the cost and at what overall financial and emotional cost to the employee or their family?

My view is that we all do our utmost to act in good faith as state employees (I have for 40+ years) – but if employers expect us to represent them in contentious situations, then they need demonstrate the same good faith by supporting us – either that, or don’t put us in those situations in the first place. At the end of the day we do our jobs to meet government objectives, not our personal objectives – so why should we be held personally accountable?