

Vicarious Liability Policy Advice



Policy Number: 43

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Purpose

1. The purpose of this policy is to provide information in relation to the circumstances in which the Territory may be vicariously liable for the acts or omissions of its employees and outline the administrative arrangements and responsibilities of matters where an action is contemplated, anticipated or made against an employee or the Territory.

Application

2. This policy contains a set of whole-of-government guidelines issued by the Head of Service and applies to all employees engaged under the *Public Sector Management Act 1994* (PSM Act). For the purpose of this policy, employees are defined as including executives, permanent officers, temporary employees, and casual workers.

Key Legislative Provisions

3. Section 9 of the PSM Act sets out the standard of conduct that is expected of all public sector employees. Employees are expected to exhibit the highest standards of conduct to ensure the integrity of the ACTPS is maintained. Failure to act with due care and diligence may lead to misconduct and disciplinary action being taken against the employee.
4. Clause 7 of the Law Officers (General) Legal Services Directions 2012 (the Legal Services Directions) provides information on the provision of assistance provided to employees by the ACT Government Solicitor in relation to legal proceedings.
5. The ACT Insurance Authority (ACTIA) administers the Territory's self-insurance and insurance arrangements in accordance with its functions under the *Insurance Authority Act 2005*.

Understanding Vicarious Liability

6. Most claims against the Territory by third parties relate to allegations of wrongful acts or omissions by employees. Generally, they are based on the tort of negligence, which involves a failure on the part of one person to take reasonable care to avoid a risk of harm (injury or property damage) to another.
7. Vicarious liability is the liability of one person for the actions or omissions of a second person. Vicarious liability is recognised by the law as arising in a number of relationships, including that of employer and employee. An employer may be vicariously liable for the actions and omissions of employees where those actions and omissions were in the course of employment.
8. This means that a person who has suffered harm (such as personal injury or property damage) as a result of negligence on the part of an employee who is performing duties in the course of their employment may make a claim against the employer rather than the employee.
9. The doctrine of vicarious liability does not prohibit a person from making a claim against an employee but there is normally no advantage to them in doing so.
10. Public servants are obliged to do their job with reasonable care and diligence (as well as impartially and honestly) (see section 9 of the PSM Act). The Territory may be vicariously liable, despite this

obligation, even where a Territory employee has failed to take reasonable care, other than in the exceptional circumstances discussed below.

11. An employer is not vicariously liable where the employee's action or omission was not in the course of employment. Mostly, it will be clear whether this is the case, for example, where the relevant act or omission occurred after hours, on a weekend or while the employee was on leave and had no connection with their employment.
12. However, the nature of an act or omission which occurred while an employee was working or at their place of employment may be such as to take it outside the employment relationship. An employer will not ordinarily be vicariously liable for criminal, fraudulent or malicious acts which might occur at the workplace, or which otherwise have a connection with employment. The rationale for this is that the act was outside the course of employment.
13. The Legal Services Directions provide that a Territory employee acting in the ordinary course of employment in good faith will generally be indemnified by the Territory in respect of any liability to third parties. The Territory will not indemnify an employee in some stated circumstances which include where the employee's conduct was criminal, malicious, reckless or so unreasonable that it could not reasonably be considered to be within the scope of employment. The factors relevant to whether or not the Territory is vicariously liable are also relevant to whether or not an employee will be indemnified in accordance with the Legal Services Directions. Each matter is considered in light of its own circumstances.

Procedure

14. The procedure section of this advice is intended to provide clarity in relation to the indemnity process. Where a claim is made against an individual (i.e. the individual is named in the proceedings), procedural advice should be sought from ACTIA.
15. ACTIA must be notified of any action, claim, or legal proceedings that have been commenced by a third party against the Territory or an employee (where the claim relates to something the individual has done or omitted to do in the course of their employment) as soon as possible.
16. Where the Territory is given notice of an action, claim, or legal proceedings that has been commenced by a third-party against an employee, the Territory's decision regarding indemnity for the employee will be dependent on the facts and circumstances relating to the claim, primarily the conduct of the employee in light of the Legal Services Directions and the matters discussed at paragraph 13 above.
17. The Legal Services Directions further provide that:
 - a. A decision whether to provide indemnification and assistance to an employee is a matter for the employee's directorate in consultation with the Government Solicitor.
 - b. Employees may only be indemnified where they agree that the proceedings will be controlled by the Territory (represented by the Government Solicitor). Employees are required to work cooperatively with the Government Solicitor in respect of the proceedings and provide all assistance required by the Territory, in the conduct of the matter.
 - c. The Territory may refuse to provide indemnification in circumstances where the employee has failed to notify the Territory of the proceedings, within a reasonable time of becoming aware of them.
18. In circumstances where the Territory provides indemnification to an employee, the Territory (represented by the Government Solicitor) will assume conduct of any claim on behalf of the employee and meet all relevant costs. This includes the legal costs of defending the claim, as well as any damages awarded by a Court, or agreed between the Territory and any other party, by way of negotiated settlement.

Responsibilities

19. **Employees** are responsible for:
 - a. carrying out their duties with reasonable care and diligence in accordance with the PSM Act and ACTPS Code of Conduct;
 - b. notifying their supervisor if an event or incident occurs that may give rise to liability;
 - c. notifying their supervisor as soon as they become aware of any legal proceedings (or there is a threat or possibility of legal proceedings being brought against them), or proceedings associated with their professional obligations or qualifications;
 - d. working cooperatively with the Government Solicitor/ACTIA in respect of any matter where the Territory has agreed to indemnify the employee and where the Territory has assumed conduct of the matter, and providing assistance as required.
20. **Supervisors** are responsible for:
 - a. notifying the head of the directorate/agency of any legal proceedings brought against an employee or the Territory;
 - b. working cooperatively with the employee and the Government Solicitor in respect of any legal proceedings and providing assistance as required.
21. **Directors General (or equivalent)** are responsible for:
 - a. notifying ACTIA of every matter that they become aware of, where an action is contemplated, anticipated (such as where the circumstances indicate that a claim is likely) or made directly against an employee or the Territory itself;
 - b. following advice from the Government Solicitor, determining if the directorate/agency will agree to indemnify an employee, in relation to an action taken against an employee.
22. **Government Solicitor** is responsible for:
 - a. providing assistance in accordance with clause 7 of the Legal Services Directions (including advice to directorates and agencies in relation to indemnification);
 - b. representing the Territory in relation to matters on behalf of employees, where indemnity has been agreed by the Territory;
 - c. providing legal advice to directorates, agencies, and where relevant, ACTIA.
23. **ACTIA** is responsible for:
 - a. consistent with ACTIA's statutory functions, assuming conduct of matters where a claim is made, and the Territory has agreed to indemnify an employee;
 - b. providing instructions to the Government Solicitor, where ACTIA have conduct of the matter;
 - c. satisfying or settling claims in relation to Territory risks/liabilities;
 - d. administering the Territory's self-insurance and insurance arrangements on behalf of the Territory.

Consultation

24. This policy was developed in consultation with ACTIA, the Government Solicitor and the Workforce Capability and Governance Division, Chief Ministers, Treasury and Economic Development Directorate.

References

25. The relevant legislation, policy and employment arrangements underlying this policy are:
- a. [Public Sector Management Act 1994](#)
 - b. [ACTPS Code of Conduct](#)
 - c. [Law Officers \(General\) Legal Services Directions 2012](#)
 - d. [Insurance Authority Act 2005](#).

Further Information

26. If you have further questions about the application of this policy, please contact the Whole of Government Industrial Relations and Public Sector Employment team, Workforce Capability and Governance, Chief Minister, Treasury and Economic Development Directorate on eba@act.gov.au

Review

27. This policy is due for review 3 years from the last issued or reviewed date, or earlier where there are changes that affect the operation of the policy.

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Approval Authority

28. This policy is approved by:

Dr Damian West
Deputy Director-General
Workforce Capability and Governance
Chief Minister, Treasury and Economic Development Directorate
On behalf of the Head of Service
08 February 2023