

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 17 October 2022

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Senator Paul Scarr asked the following question:

Senator SCARR: Okay. And then paragraph 14 of the explanatory memorandum: the concept is that if you're currently meeting the standard under section 106, which would give you the shield of vicarious liability, as an employer or a PCBU then you should be, for all intents and purposes, discharging your obligations under the positive duty. Is that correct?

Ms Murray: We think generally yes, that would be the case. Again, it's about individual circumstances. And we note that vicarious liability doesn't always apply. But yes, generally you would think that if you're discharging that obligation then you are likely to be meeting your obligations under the positive duty.

Senator SCARR: Okay. Can that be made clearer, do you think? Can you just take that on notice, whether or not there could be note in the act or something—a signpost—to perhaps indicate that to people?

Ms Murray: Yes, we can take that on notice.

The response to the question is as follows:

The positive duty in the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 is intended to align with section 106 of the *Sex Discrimination Act 1984*, which relates to the vicarious liability of employers for unlawful acts done by their employees or agents. Under this provision, an employer is not liable for the unlawful conduct of their employees or agents if they have taken 'all reasonable steps' to prevent their employees from engaging in the conduct.

The department is of the view that in practice, the measures taken by an employer to satisfy the positive duty would generally be similar to those required to demonstrate that they have taken 'all reasonable steps' to avoid vicarious liability. The department notes that this is ultimately dependent on individual circumstances.

The department is of the view that the relationship between the positive duty and vicarious liability provision should be contained in guidance material to be produced by the Australian Human Rights Commission.