Law Commission

Reforming the law

Administrative Redress: Public Bodies and the Citizen

Summary of Consultation Paper 187

July 2008

ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN

INTRODUCTION

1.1 The Consultation Paper, *Administrative Redress: Public Bodies and the Citizen*, looks at when and how citizens should be able to obtain redress from the state for seriously substandard administrative action.

1.2 Early consideration of the subject-matter of this project started in October 2004 with the release of a Discussion Paper. That set out some of the potential deficiencies in the current legal regime.

1.3 The Lord Chancellor approved the project, to be preceded by a scoping exercise, in the Law Commission's Ninth Programme of Law Reform in March 2005. A Scoping Paper was published in October 2006. The Scoping Paper set out our preliminary thoughts on the area and concluded that the substantive project should consider the general question:

> When and how should the individual be able to obtain redress against a public body that has acted wrongfully?

1.4 Since the release of the Scoping Paper, we have held two academic seminars, one in April 2007 and another in March 2008, where various aspects of the project were subjected to rigorous examination. Given the government's strong interest in this project, we also established a Government Consultation Group. This Group provided a forum to discuss the potential impact of reform on financial resources and service delivery.

HOW TO USE THIS SUMMARY

1.5 We are very keen to hear the views of members of the public, public servants and anyone who has been affected by the issues raised in the Consultation Paper. In the Consultation Paper, we make a series of proposals and come to certain conclusions. It is of primary importance to emphasise that these are all provisional on the results of this consultation process.

1.6 This summary highlights some of the key issues that we are exploring in the inquiry. For comprehensive treatment of the current law, please see the Law Commission Consultation Paper, *Administrative Redress: Public Bodies and the Citizen*.[1]

HOW TO NAVIGATE THROUGH THE CONSULTATION PAPER

1.7 The Consultation Paper is split into seven Parts with three Appendices. In summary, those parts are:

(1) Part 1: Introduction, which sets out the background to the inquiry.

[1] Available at: www.lawcom.gov.uk/remedies.htm.

(2) Part 2: Overview, which provides a brief summary of the Consultation Paper.

(3) Part 3: The current position for redress, which sets out the current law in judicial review and tort with regard to obtaining redress from public bodies.

(4) Part 4: Liability in public and private law, which analyses problems in the current law and sets out our proposed reforms.

(5) Part 5: Relationship between ombudsmen and court-based options, which sets out how these two mechanisms should interrelate and suggests reforms that would increase access to the ombudsmen.

(6) Part 6: Effect on public bodies, which seeks to assess some of the costs and benefits that implementing the scheme outlined in Part 4 would have on public bodies.

(7) Part 7: Summary of specific points for consultation, which collates the consultation questions contained in the other Parts of the Consultation Paper.

(8) Appendix A: Principles underlying reform, which develops the principle of "modified corrective justice" that forms the backdrop to our reforms.

(9) Appendix B: The impact of liability on public bodies, which analyses the academic literature on administrative reactions to changes in liability.

(10) Appendix C: Judicial review case research, which sets out a series of cases, drawn from recent actions in the Administrative Court, where it is felt that a claimant would fulfil the requirements of our reformed system.

THE CURRENT LEGAL LANDSCAPE

THE FOUR PILLARS OF ADMINISTRATIVE JUSTICE (Consultation Paper paragraphs 3.1 to 3.90)

1.8 In our view, the current legal landscape for administrative redress can be divided into four broad pillars.

Pillar 1	Pillar 2	Pillar 3	Pillar 4
Internal mechanisms for redress, such as formal complaint procedures	External, non-court, avenues of redress, such as public inquiries and tribunals	Public sector ombudsmen	Remedies available in public and private law by way of a court action.

1.9 Recourse to internal mechanisms such as formal complaints procedures should be the starting point for almost all citizens seeking redress. In the vast majority of cases this will be the preferable method of resolving any issues for two reasons. First, it is more cost effective than any of the other avenues for obtaining redress. Second, in many cases it is more expeditious.

1.10 In some circumstances, recourse to a complaints procedure will not resolve the matter. This may be because the aggrieved citizen wants vindication in a public setting or because there is a fundamental disagreement over the nature of the complaint.

1.11 In these instances, the complaint could be dealt with by recourse to the second pillar of administrative redress, which consists of external procedures such as tribunals or public enquiries. Tribunals, in particular, have inherent benefits as a mechanism for obtaining administrative redress. Many tribunals have specialist knowledge of a particular area. They do not have to be guided through the legal or regulatory background. Also, tribunals are less formal than a court. This reduces the need for legal representation and the consequent costs to the claimant, the public body and, possibly, the Legal Aid budget.

1.12 Our position is that use of the tribunals system is preferable to recourse to the courts. The very creation of a tribunals system was intended to meet the demands of aggrieved citizens where they had suffered as a result of deficient administrative action.

1.13 Complaints about maladministration may be made to the public sector ombudsmen. These are a vital part of the system for administrative redress. In many situations the nature of an ombudsman's investigation renders it preferable to a court-based action.

1.14 In order to encourage the use of ombudsmen as a source of administrative redress, we propose the reform of two existing mechanisms: "the statutory bar" and the "MP filter".

1.15 The statutory bar operates such that if a complainant has already attempted to obtain, or could obtain, a legal remedy, then they may well be barred from bringing a complaint to the ombudsman. At the time of its creation, the ability to obtain redress in a court was more limited and the statutory bar was intended to prevent the ombudsmen's jurisdiction overlapping with that of the courts. Over time, the range of possible actions has expanded and now the bar can lead to suitable complaints being denied access to the ombudsmen.

1.16 The MP filter only applies to the Parliamentary Ombudsman. This may have initially been seen as a way of safeguarding the constituency role of MPs. However, over time the role and importance of the Ombudsman has changed and the MP filter can now be seen as an unnecessary barrier to deserving complainants seeking redress.

1.17 The Law Commission suggests these reforms to facilitate access to the ombudsmen. We also suggest that two further reforms would be useful in the context of the relationship between ombudsmen and courts. First, a specific power for a court to stay proceedings, where it feels that the claim would be more appropriately handled by an ombudsman. Secondly, a power for an ombudsman to make a reference on a point of law to a court.

1.18 Whilst these three pillars are suitable for the vast majority of claims, there are some cases, whether due to the remedy sought or the intrinsic nature of the claim, where the claimant requires the intervention of a court. These residual cases are dealt with either through an application for judicial review in public law or a private law action in tort.

ANALYSIS OF THE CURRENT SYSTEM FOR REDRESS

Public Law (Consultation Paper paragraphs 3.95 to 3.101; 4.14 to 4.33)

1.19 Judicial review is a specific form of court-based action in which the court reviews the legality of administrative action. Where the court finds that administrative action was unlawful, because it was illegal, irrational or involved procedural impropriety, the court has the discretion to award a range of remedies. These remedies do not include compensation, except where the claimant can show that damages would ordinarily have been awarded in private law or the action is brought under section 8 of the Human Rights Act 1998.

1.20 A further complexity comes from the role of EU law in this area. Damages can be awarded where a Member State caused a claimant's loss by infringing their rights through a sufficiently serious breach of EU law. Therefore, whilst damages are available in EU Law, they are only available on a very limited basis in domestic law, and such availability does not take into account the seriousness of the breach. This does not seem to us to meet the demands of either justice or clarity in a legal system.

1.21 Having regard to examples drawn from existing case law, our preliminary view is that this situation is clearly problematic. The addition of a monetary remedy to those already available may be required to provide a satisfactory set of remedies in an individual citizen's case. A clear example would be where a public body wrongfully revokes a licence to engage in some form of economic activity, such as to operate a fishing vessel or a taxi cab. To remedy this failure in full would require that the revocation of the licence be overturned *and* the citizen paid compensation for the income lost as a result of the erroneous decision.

Private Law (Consultation Paper paragraphs 3.102 to 3.177; 4.34 to 4.71)

1.22 The analysis of private law considers three different actions that can be brought against public bodies: negligence; misfeasance in public office; and breach of statutory duty. Additionally, we consider the general nature of damages in private law and the potentially unjust operation of the rule on joint and several liability in the context of public bodies.

Negligence (Consultation Paper paragraphs 3.116 to 3.163; 4.35 to 4.58)

1.23 In outlining and then analysing the tort of negligence, we have paid particular attention to the changing way in which the courts have been prepared to impose a duty of care between individuals and public bodies. We show that the current system has developed in a haphazard and complicated fashion, which has often led to protracted litigation ending in the House of Lords.

1.24 This has led to periods of unpredictability that serve neither the needs of the aggrieved citizens nor those of public bodies. Over time, although there have been both expansive and conservative periods, there has been a general expansion of liability in this area.

1.25 We argue that the current situation is plainly unsatisfactory. First, the complicated and piecemeal development of the tort makes it difficult for public bodies to predict future liabilities. This severely impedes the efficient allocation of limited resources. Second, in certain situations individuals are unable to obtain redress where they have been subject to administrative behaviour that falls far below that expected of a public body.

1.26 On the basis of our analysis, the Consultation Paper suggests reform of the tort of negligence, so as to create a system that properly addresses the needs of both citizens and public bodies.

Misfeasance in public office (Consultation Paper paragraphs 3.107 to 3.109; 4.88 to 4.91; 4.105 to 4.106)

1.27 Recent developments in the tort of misfeasance in public office have severely weakened this tort's usefulness. The need to show "malice" in the activity of an individual for which the public body can be held liable sets a very high liability threshold.

1.28 A concern for public bodies is the political nature of the action. Public bodies are rightly concerned about being labelled "malicious". This could lead to an overly defensive strategy in relation to the settlement of claims.

1.29 On this basis, we suggest there may well be merit in abolishing the tort altogether.

Breach of statutory duty (Consultation Paper paragraphs 3.110 to 3.115; 4.72 to 4.87; 4.105 to 4.106)

1.30 In analysing the role of breach of statutory duty in the context of public bodies, we draw a distinction between the statutory duties that a public body is placed under in a similar way to individuals or companies (for instance, relating to the health and safety of its employees) and those relating to the provision of public services (such as a statutory duty to house the homeless). Whilst we do not seek to change the operation of the former, we find clear problems with the system for redress in relation to the latter.

1.31 The current law for breach of statutory duty fails to meet the requirements of aggrieved individuals. In particular, the development of the requirement to show a Parliamentary intention that compensation should be payable when the duty has been breached has defeated almost all claims.

1.32 The tort is also unsatisfactory for public bodies. Once a court finds that the statutory regime envisages the payment of compensation then *all* breaches of the statutory duty give rise to monetary liability. This does not allow the court to consider the magnitude of the administrative failure or the reasons behind it. We suggest that this inflexibility is unsatisfactory.

1.33 As with misfeasance in public office, the Consultation Paper suggests that in this context the tort could be abolished and replaced with a system that more clearly meets the requirements of both citizens and public bodies.

Joint and several liability (Consultation Paper paragraphs 3.176 to 3.177; 4.64 to 4.71)

1.34 Our examination of the operation of joint and several liability suggests that there are certain problems with its operation in relation to public bodies. The rule on joint and several liability is that any party found to be responsible for the loss sustained by a claimant is liable for all of that loss, irrespective of the magnitude of its role in the claimant's loss.

1.35 In the Consultation Paper, we consider certain situations drawn from existing case law where the strict operation of this rule could create an unjust draw on public resources. Take, for example, a failure by a regulator. Say an institution is run fraudulently, such that it collapses and members of the public lose large amounts of money. Although the failure of the regulator to successfully perform its task would be a factor which contributed to the losses suffered by the public, it is not the primary reason for the collapse — that is the fraud itself. Under the current rule, if liability were imposed on the regulator, then it would have to pay out compensation far beyond its actual culpability for causing any losses.

1.36 We suggest that the effect of this is to create an impetus to bring actions against public bodies such as regulators. We provisionally propose that the inflexibility of this rule should be altered, so that courts can assess the relevant culpability of the public body and apportion any award appropriately.

Conclusions on the existing state of the law (Consultation Paper paragraph 4.92)

1.37 Having analysed the current state of the law in relation to damages in both public and private law, we feel that the law has developed in a clearly unsatisfactory manner. In both public and private law, there is a lack of any underlying principle or foundational structure that could lead to a simpler and more predictable system. We argue that the current position serves neither the interests of claimants nor those of public bodies.

1.38 In the light of this, we suggest that there is an argument for the reform of the system for redress in both public and private law.

Developing a new regime (Consultation Paper paragraphs 4.9 to 4.11; Appendix A)

1.39 In developing a structure for potential reform, we draw heavily on the principles of modified corrective justice and a comparative analysis of the regimes in place in other jurisdictions. Particularly useful has been material on the development of

damages in EU law and the Court of Justice's requirement that a breach of EU law be "sufficiently serious"[2] before liability can be applied.

1.40 Through our conception of "modified corrective justice", we have sought to develop a principled approach that properly reflects the special position of public bodies and affords them appropriate protection from undeserving claims. The discussion of modified corrective justice is contained in Appendix A of the Consultation Paper. Briefly, we found that:

(1) In general, the principle of corrective justice underpins the relationship between the state and individual claimants;

(2) However, in certain circumstances the normal principle of corrective justice needs to be modified. This is in order to take into account certain features of the relationship between the state and potential claimants;

(3) In relation to monetary compensation, the relationship between the state and an individual claimant has a different moral complexion to the relationship between private individual claimants;

(4) An individual's relationship with and expectations of the state are such that they should look first to non-monetary remedies against the state;

(5) However, where compensation is in issue and the state is the respondent, there is a moral case for limiting liability to particularly serious conduct;

(6) This modification only applies where the state is undertaking "truly public" activity. Therefore, it does not apply where the impugned activity could equally have been carried out by a private individual.

SUGGESTED OPTIONS FOR REFORM (Consultation Paper paragraphs 4.93 to 4.209)

1.41 Drawing on our analysis of modified corrective justice and in light of developments in EU law, we suggest the creation of a specific regime for public bodies based on a series of individual elements. At the core of these individual elements would be a requirement to show "serious fault" on the part of the public body. We feel this properly addresses the needs of claimants and public bodies.

Action in public law (Consultation Paper paragraphs 4.96 to 4.98)

1.42 We suggest that damages should be available in judicial review if the claimant satisfies our elements of conferral of benefit, serious fault and causation. These are summarised below. However, an award of damages would serve as an ancillary remedy in judicial review and could only be claimed alongside the existing remedies. In keeping with other remedies available in judicial review, damages would be discretionary in the public law scheme.

[2] This was developed in the Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for transport ex parte Factortame (No 3)* [1996] ECR I-1029.

Action in private law (Consultation Paper paragraphs 4.99 to 4.100)

1.43 Our suggested approach in private law is to place certain activities, which can be regarded as "truly public", in a specialised scheme. Within this scheme, the claimant would have to satisfy the same requirements as the public law scheme in order to establish liability. The general effect of these reforms would be to restrict liability in some areas and widen the potential for liability in others. This reflects our attempts to strike a balance between the following competing demands:

(1) Setting the boundaries in which citizens may obtain redress where they are subject to seriously substandard administrative action; and

(2) Appreciating that public bodies are subject to a wide range of competing demands and are thus in a special position. This means that imposing general negligence liability may not be in the interests of justice as it could adversely affect the activities of the public body and therefore harm the general public.

1.44 Cases that do not satisfy the "truly public" test would be determined by the ordinary rules of negligence.

ELEMENTS OF THE LAW COMMISSION SCHEME (Consultation Paper paragraphs 4.101 to 4.104)

1.45 As the elements suggested for the public and private law schemes are essentially the same, the Consultation Paper deals with these together in Part 4. However, we are not proposing a merging of judicial review with private law actions against public bodies. Cases would still be brought either as an application for judicial review in the Administrative Court or as a private law action in the civil courts. The various elements of that scheme may be summarised as a series of questions:

(1) Was the public body engaging in a "truly public" activity?[3]

(2) Is the claim justiciable?

(3) Does the legal regime confer a benefit on the claimant?

(4) Does the claim show "serious fault" on the part of the public body?

(5) Are the normal rules on causation satisfied?

(6) Should the normal rules on joint and several liability be modified in respect to this claim?

(7) How should the general rules on damages be applied in respect to the claim?

(8) Does the public body have a specific statutory immunity from claims?

[3] The "truly public" requirement would only operate in the private law scheme. As judicial review only concerns administrative action then there seemed to be little benefit in developing a special test for the public law scheme.

1.46 In proposing these options for reform, we have tried to present a balanced package. The options should not, therefore, be considered in isolation but rather as a system for ensuring that the small number of meritorious claimants who did not find redress through internal or external non-court mechanisms can obtain redress.

Analysis of Individual Elements (Consultation Paper paragraphs 4.110 to 4.132)

1.47 Part 4 of the Consultation Paper examines these elements in greater detail. Briefly summarised, these are set out in the next paragraphs of this document.

"Truly public" activity (Consultation Paper paragraphs 4.110 to 4.132)

1.48 It is not intended that all activities of public bodies come within the public law and private law schemes. In fact many activities of public bodies concern mundane operational matters which we think should not come within the scheme. Examples would be the employment relationship between a Primary Care Trust and a nurse, or a local authority placing a stationery order. These activities, it seems to us, differ from such actions as setting a policy relating to hospital provision in a given area or the exercise of powers of stop and search by the police. Consequently, there needs to be a filtering mechanism that isolates activities that are unique to public bodies – which we regard as truly public activities – from activities that can be undertaken by private individuals.

1.49 Truly public activity would be a critical test in the private law scheme since it would determine whether the case was subject to the ordinary rules of negligence or the serious fault requirement before liability could be imposed. In approaching this issue, the test for truly public has to take into account the nature of the UK constitution and particularly the different roles played by statute and the prerogative.

1.50 We provisionally propose the following as the test for "truly public":

> An act or omission of the public body is to be regarded as "truly public" if:
>
> (a) the body exercised, or failed to exercise, a special statutory power; or
>
> (b) the body breached a special statutory duty; or
>
> (c) the body exercised, or failed to exercise, a prerogative power.
>
> A "special statutory power" is a power that allows the public body to act in a way not open to private individuals.
>
> A "special statutory duty" is a statutory duty placed on the public body that is specific to it and is not placed on private individuals.

1.51 The operation of the concept of "special statutory powers" would capture many of the activities of public bodies that are unique to government and which we feel should be placed within the proposed scheme. For instance, the power to stop and search under Part 5 of the Terrorism Act 2000 is something that only public officials can do; members of the general public cannot *demand* to go through another citizen's belongings – though they can ask.

1.52 However, "special statutory powers" does not capture all the activities that we consider to be "truly public" when undertaken by a public body. For instance, the concept of "special statutory powers" would not include the building and organisation of hospitals, providing libraries or housing the homeless. Such activities can be, and frequently are, conducted by individuals, businesses or charities, without recourse to a special statutory power allowing them to engage in the activity. However, in these situations, the individual, business or charity has freely chosen to undertake the activity.

1.53 This raises a critical difference between that situation and the provision of similar services by public bodies. In many situations, Parliament places specific statutory duties on a public body to undertake the activity; it is not a matter of choice. For example, Part 7 of the Housing Act 1996 places specific duties on local authorities in relation to the provision of advisory schemes and accommodation for the homeless. We suggest that a statutory duty to engage in a particular activity that is placed on a public body should be termed a "special statutory duty" and the activity should be considered "truly public".

1.54 Finally, some duties are imposed on the public at large, or on certain sections of the public – for instance company directors. The final limb of the test would exclude these by excluding duties that are also placed on private individuals.

Conferral of Benefit (Consultation Paper paragraphs 4.133 to 4.142)

1.55 The conferral of benefit test operates to restrict the possible ambit of both public and private law actions. It asks whether the legal regime in which the public body acted, or failed to act, operated to confer a benefit on individuals and whether the harm suffered by the individual was of a similar nature to the benefit that the regime conferred.

1.56 A legal regime could confer a benefit on an individual claimant where a statute placed a duty on a public body in respect of certain individuals. For instance, where a statute places on a housing authority the duty to provide interim housing to someone who is temporarily homeless, it confers a benefit on those individuals the housing authority has reason to believe are temporarily homeless. Similarly, where legislation provides for a compulsory licensing scheme before individuals can engage in the activity covered by the statute, this will confer a benefit upon those individuals who seek to use the scheme.

1.57 When considering the type of harm suffered, where a regulatory scheme has as its clear purpose the protection of interests of a particular kind then this should not be taken as protecting interests of a different nature. For example, the relevant "benefit" conferred by schemes for the inspection/certification of residential buildings, aircraft or sea vessels is limited to the protection of the health and safety of individuals. A benefit is not conferred with respect to the

protection of the claimant's property or his or her economic interests that are not immediately consequential upon personal injury.

Serious Fault (Consultation Paper paragraphs 4.143 to 4.167; Appendix C)

1.58 Once the claimant has shown that the legislative scheme underlying the truly public activities of the public body conferred a benefit on the claimant, the next stage is to show that the public body acted in such a serious substandard manner as to justify the court awarding redress.

1.59 Drawing on our analysis of domestic, comparative and EU law, the Consultation Paper suggests that the required level of fault should be characterised as "serious fault". This would involve conduct that fell *far* below the standard expected in the circumstances.

1.60 In assessing whether the relevant conduct met the requirements of serious fault, we consider that certain established factors be taken into account. These factors would include:

(1) The risk or likelihood of harm involved in the conduct of the public body;

(2) The seriousness of the harm caused;

(3) The knowledge of the public body at the time that the harm occurred that its conduct could cause harm, and whether it knew or should have known about vulnerable potential victims;

(4) The cost and practicability of avoiding the harm;

(5) The social utility of the activity in which the public body was engaged when it caused the harm. This would include factors such as preventing an undue administrative burden on the public body;

(6) The extent and duration of departures from well-established good practice; and

(7) The extent to which senior administrators had made possible or facilitated the failure or failures in question.

1.61 We felt that further guidance on the operation of any serious fault test is provided by reference to the "sufficiently serious" test already in operation in judicial review where the claimant alleges a breach of EU law. In assessing this, the European Court of Justice has usefully identified a number of factors which are relevant to the characterisation of a breach as "sufficiently serious":

(1) the clarity and precision of the rule breached;

(2) the measure of discretion left by that rule to the national or Community authorities;

(3) whether the infringement and the damage caused was intentional or involuntary;

(4) whether any error of law was excusable or inexcusable;

(5) the fact that the position taken by a Community institution may have contributed towards the omission; and

(6) the adoption or retention of national measures or practices contrary to Community law.

1.62 Mere fault on the part of a public body is established where it is clear that the public body, having regard to the above factors, should not have acted in the manner that caused harm to the claimant, or should have taken appropriate steps to prevent such harm occurring. However, "serious fault" would only be established where the behaviour goes beyond mere administrative failure but engages these factors in an aggravated manner. For example, where the potential harm to the citizen was particularly grave or the departure from the principles of good administrative practice clearly blameworthy.

1.63 In order to furnish examples of where the action of a public body would or would not amount to "serious fault", we have drawn on judgments of the Administrative Court in 2007. We analysed all applications for judicial review where there was a substantive hearing in a relevant matter. This comprised a dataset of 310 cases. Of these 310 actions, the application for judicial review was successful in 121 cases. Of these 121, 18 were found to meet the criteria so as to merit a finding of "serious fault" on the part of the public body. Examples drawn from this analysis are given in Part 4, with the detailed analysis of the 18 cases being set out in Appendix C.

1.64 Of the "serious fault" cases, only 9 satisfied the other elements of our scheme. Furthermore, in situations where the claimant would not already have been able to recover damages, the cases that fulfilled the requirements of our scheme would only have lead to relatively small awards.

Joint and several liability (Consultation Paper paragraphs 3.176 to 3.177; 4.190 to 4.196)

1.65 As explained earlier, we feel that this rule operates unduly harshly in relation to public bodies. Consequently we suggest that the normal rule be reformed. The following are possible options for mitigating the rule on joint and several liability in the "truly public" sphere:

(1) A strict rule of full proportionate liability. Apportionment would follow automatically in cases that satisfy the "truly public" test.

(2) Imposing a minimum threshold for a concurrent wrongdoer's comparative fault. The public body respondent would benefit from proportionate liability only if its comparative fault fell below a certain percentage, for example 51 or 60%.

(3) Giving the courts discretion to abandon the joint and several liability rule in truly public cases.

1.66 Our provisional preference is for option 3. The extent of the public body's responsibility would be the principal factor to be taken into consideration by the court in deciding whether to exercise the discretion.

Pure economic loss (Consultation Paper paragraphs 3.168 to 3.175; 4.177 to 4.189)

1.67 We are keen to invite discussion on the possibility of recovery for pure economic loss within our proposed regimes. Pure economic loss is financial loss which is not consequent on either physical injury or property damage.

1.68 We acknowledge that this is a difficult issue. However, the paradigm case of administrative illegality is the unlawful refusal of a licence causing financial loss. If there were no liability for financial loss as a result of seriously substandard administrative action, we provisionally suggest that this would reduce the effectiveness of any reform and fail to meet the requirements of a principled system for administrative redress.

1.69 However, it is critical that any reform does not impose an undue burden on public funds. In our view, the proposed conferral of benefit test and the suggested reforms to the principle of joint and several liability are likely to operate so as to suitably limit recovery for pure economic loss.

Movement between the systems (Consultation Paper paragraphs 4.197 to 4.205)

1.70 We suggest that there is a real difference between the nature of a judicial review action and a private law claim. In most cases it would be clear whether the substance of the claim was principally about obtaining a prerogative remedy or about obtaining compensation. In the former case, judicial review would be the more appropriate avenue, whilst a private law action would be more appropriate in the latter case.

1.71 A key concern is to not create an excessive burden on the Administrative Court. Whilst we think that the inclusion of a monetary award may be necessary in some judicial review cases, the aim is not to prompt a massive expansion in litigation. In order to prevent claimants from making applications for judicial review in situations where it is really compensation that is being sought, we provisionally propose that any award should be ancillary to one of the existing remedies.

1.72 Courts have wide powers of case management and we suggest that these could be used to transfer cases to the more appropriate forum where it seems to the court that this is necessary.

Conclusions on reform of public and private law (Consultation Paper paragraphs 4.207 to 4.208)

1.73 The current law relating to the liability of public bodies is uncertain and over complicated. In some places it is too restrictive to claimants and in other areas, public bodies are faced with an ever-increasing burden on public resources.

1.74 In exploring the issues raised by our analysis of the current position, we are not attempting to change government policy on promoting the use of internal complaints procedures and non-court mechanisms such as ombudsmen. Indeed, our approach underlines its importance. However, we recognise that regardless of the forms of alternative dispute resolution available, there will still be some instances where aggrieved parties will go to court. When they do so, the system

they encounter should be capable of delivering justice for claimants, while properly recognising the public benefit of the activities of public bodies.

OMBUDSMEN

1.75 As set out above, we think that whilst the ombudsmen system works very well as presently constituted, there are four reforms to the system that would improve access to the system.

Power to stay proceedings (Consultation Paper paragraphs 5.27 to 5.38)

1.76 We suggest that courts should have a specific power to stay proceedings where they think that a case, or a specific issue within a case, would be more appropriately dealt with by an ombudsman's investigation. The effect of this change would be to require an individual to bring suitable claims to an ombudsman before approaching a court.

1.77 The claimant would be at liberty to revive court proceedings if there remained any point of law that still required adjudication.

MP Filter (Consultation Paper paragraphs 5.76 to 5.88)

1.78 In the light of our criticisms of the MP filter, we think that this should be removed. Though the filter was put into place in order to protect the Ombudsman from being overloaded, the ombudsman system has developed substantially over time and it would have capacity to handle any increase in complaints caused by removal of the filter. An alternative position would be to adopt a dual approach and allow direct access but also allow MPs to refer claims arising out of their constituency business to the Ombudsman.

Statutory Bar (Consultation Paper paragraphs 5.55 to 5.75)

1.79 We feel that the current statutory bar can unjustly prevent individuals complaining to the ombudsmen. As such, we suggest that the current statutory bars should be repealed. Our provisional view is that the ombudsmen should be able to conduct an investigation where, in all the circumstances of the case, it is in the interests of justice to investigate the claim.

Power to refer a point of law (Consultation Paper paragraphs 5.39 to 5.53)

1.80 A final suggestion, not related to access, is to give ombudsmen the power to refer questions of law to a court. This system would be modelled on the current procedure in EU law, where a court of a Member State can make a reference to the Court of Justice in Luxembourg asking it to clarify a point of EU law. Whilst we do not envisage this system being used very often, we feel it would be a useful adjunct to the ombudsmen's current powers.

ASSESSING THE EFFECTS (Consultation Paper paragraphs 6.1 to 6.55; Appendix B)

1.81 A key part of this project has been to attempt to assess the effects that any change in liability would have on the behaviour of public bodies. Unfortunately, there is little empirical evidence on the effects of liability on administrative behaviour, although there are some studies currently underway. However, there is some information available, and we have used that to inform our analysis. We also hope that consultees will be able to provide further information on this issue.

Effect of reforms (Consultation Paper paragraphs 6.3 to 6.36; Appendix B)

1.82 Our suggested reforms seek to achieve a fairer balance between the legitimate claims of aggrieved citizens and the need to promote effective public administration and avoid imposing unacceptable burdens on public funds. More broadly, reforming this area of law to make it clearer and more principled is of benefit to all concerned, and it should reduce the need for complicated, and consequently expensive, litigation.

1.83 From the point of view of the Government, taking no action may be a high-risk strategy. It is always possible that the House of Lords, or the new Supreme Court, will remove common law restrictions on liability and continue the historic widening of the tort of negligence.

Defensive administration and administrative disruption (Consultation Paper paragraphs 6.37 to 6.39; Appendix B)

1.84 There is a concern that any possible expansion in liability would lead to the disruption of administrative behaviour. This is a concern about the way in which changes to liability impact on the way in which administration is conducted, leading to "administrative disruption".

1.85 By "administrative disruption" we mean a concept distinct from "defensive administration". Administrative disruption occurs when there is an increase for whatever reason of the burdens placed on civil servants or other public officials in the conduct of their business. This is different from "defensive administration", which describes the situation when, following a change in the liability regime, the performance of a public body is inhibited – for example, it backs away from certain policy goals or reduces service delivery – because it seeks to reduce its potential to be exposed to liability.

1.86 We accept that it is possible that changes made to the way public bodies act can cause administrative disruption. However, there is little or no evidence to suggest that changes to liability automatically lead to defensive administration. Furthermore, we suggest that steps can be taken to reduce administrative disruption to a minimum. We believe that activities such as appropriate training and the effective communication of the suggested changes to highlight the outcomes that the changes are intended to achieve would be particularly effective.

1.87 It is obvious that the notion of administrative disruption has implications for our project. It is an important issue for us to consult on so as to formulate a strategy that would keep any disruption to a minimum, if it could not be removed altogether.

SUMMARY OF CONSULTATION QUESTIONS

1.88 For convenience, the specific points for consultation from Parts 4, 5 and 6 of this Consultation Paper are set out below.

1.89 We strongly encourage all interested parties to respond to us on the following consultation points. We would also welcome views on the "modified corrective justice" principle which we have adopted to guide our options for reform in this Consultation Paper.

Part 4 – Liability in Public and Private Law

Overview of Current Problems

1.90 We would welcome comments on our analysis in paragraphs 4.36 to 4.57 of the development of the duty of care in relation to public bodies. (paragraph 4.58)

1.91 We invite comments on the operation of joint and several liability in the context of litigation against public bodies. (paragraph 4.71)

1.92 We would welcome more data on the frequency of use of misfeasance in public office as a cause of action, and we would welcome views as to whether, and if so when, it remains a useful cause of action. (paragraph 4.91)

Options for reform

1.93 Should the torts of misfeasance in public office and breach of statutory duty be abolished? (paragraph 4.106)

1.94 We would welcome comments from consultees on this formulation of "truly public" activity in relation to statutes and suggestions on other ways that such a test could be formulated (paragraph 4.124)

1.95 We invite comments on our formulation of the "truly public" activity test in paragraph 4.131 and whether it would act as a suitable "gatekeeper" to our private law scheme. (paragraph 4.132)

1.96 We invite commentary on the operation of the proposed "conferral of benefit" test, in the context of the scheme set out in this Consultation Paper. (paragraph 4.142)

1.97 We invite comments on the possible operation of a "serious fault" regime in the context of the scheme outlined in the Consultation Paper. (paragraph 4.167)

1.98 Is the approach to causation outlined in paragraphs 4.168 to 4.172 satisfactory? (paragraph 4.173)

1.99 Should the discretionary nature of judicial review remedies be preserved for damages in the public law context? (paragraph 4.175)

1.100 Based on our discussion in paragraphs 4.176 to 4.188, we would welcome comments on the recovery of pure economic loss:

(1) In the public law scheme;

(2) In the private law scheme. (paragraph 4.189)

1.101 Do consultees agree that the courts should have discretion to abandon the joint and several liability rule in "truly public" cases, or do consultees prefer another technique for mitigating the rule? What factors do consultees think should guide the courts in exercising their discretion? (paragraph 4.196)

Part 5 – Relationship between Ombudsman and court-based options

1.102 Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum? What problems do consultees see with the operation of the stay as described in paragraphs 5.31 to 5.37? (paragraph 5.38)

1.103 Do consultees think that the ombudsmen should have the power to make references to the court of points on law as described in paras 5.43 to 5.46? (paragraph 5.47)

1.104 Do consultees think that references from the ombudsmen should bypass the permission stage before proceeding to the Administrative Court? (paragraph 5.53)

1.105 Do consultees agree that the statutory bar should be modified both in cases where legal proceedings have been commenced and where there is a potential remedy before the court? Do consultees agree that this should be done so that the default position is that ombudsmen have discretion to investigate regardless of the availability of a legal remedy? (paragraph 5.75)

1.106 We invite the views of consultees on our provisional proposal to abolish the MP filter. Do consultees consider that the filter should be abolished outright, or that there should be a "dual system" which would allow complainants the option of making a complaint through an MP or of seeking direct access to the Parliamentary Ombudsman? (paragraph 5.88)

Part 6 – Effect on Public Bodies

1.107 We would welcome any further information from consultees on the quantitative and qualitative effects of imposing liability on public bodies. (paragraph 6.19)

1.108 We would welcome suggestions as to the feasibility and possible structure of a public law pilot programme for a limited number of central government departments. (paragraph 6.32)

1.109 We would be grateful for comments on the phenomenon of administrative disruption and its relevance to our provisional proposals. (paragraph 6.55)

HOW TO RESPOND

1.110 The Law Commission would be grateful for comments on its proposals before 7 November 2008.

1.111 Comments may be sent either –

By post to:

Keith Vincent
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 2BQ
Tel: 020-7453-1293
Fax: 020-7453-1297

By email to:

administrativeredress@lawcommission.gsi.gov.uk

1.112 We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. Those who wish to submit a confidential response should contact the Commission before sending the response. We will disregard automatic confidentiality disclaimers generated by an IT system.

1.113 This consultation paper is available free of charge on our website at: http://www.lawcom.gov.uk/docs/cp187.pdf.