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Commission**  
Reforming the law

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# **Administrative Redress: Public Bodies and the Citizen**

## **Analysis of Consultation Responses**

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26 May 2010

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**THE LAW COMMISSION**  
**ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN**  
**ANALYSIS OF CONSULTATION RESPONSES**  
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# **PART 1**

## **INTRODUCTION**

- 1.1 Eighty responses were received. This figure includes written responses as well as those made orally in meetings and seminars. Appendix A contains a list of consultees. Appendix B contains a table setting out each consultee's response to specific questions. Recent academic and judicial commentary on our proposals can be found in Appendix C.
- 1.2 The structure of the analysis is as follows. Specific points for consultation listed in Part 7 of the consultation paper are analysed in turn. The total number of consultees who responded to each question appears below that question. Where possible, the proportions that agreed and disagreed with the provisional position are then given, followed by extracts from responses that deserve individual attention. Responses to "modified corrective justice" are addressed in Part 5, as are the arguments concerning the purpose of individual redress mechanisms.
- 1.3 Some of the points contained in Part 7 of the consultation paper are very general,<sup>1</sup> and it has not been possible to construct meaningful agree/disagree categories. Outside these instances it should be noted that the British and Irish Ombudsman Association expressed "its full support for the proposals contained in the consultation paper". As a result, it is deemed to have agreed with each and every proposal.
- 1.4 It is difficult to analyse the responses from David Mayer, Denise Rowley and Kevin Gray. The issues raised in their response did not relate to our provisional proposals and consequently we have not been able to consider them in this analysis.

<sup>1</sup> Pure economic loss, qualitative and quantitative effects of imposing liability on public bodies, administrative disruption and the operation of the "truly public" test in relation to statutes.

# PART 2

## LIABILITY IN PUBLIC AND PRIVATE LAW

### OVERVIEW OF CURRENT PROBLEMS

#### 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)

#### SUMMARY

- 2.1 Twenty-two consultees gave their comments. Seven were broadly in agreement with the analysis. Fifteen disagreed either wholly or in part.
- 2.2 Three specific issues recurred in the responses
  - (1) The Paper's treatment of a large and complex topic was said to be too brief and incomplete.
  - (2) The Paper's conclusions as to (i) the continual expansion of government liability; and (ii) the uncertain and unprincipled nature of the jurisprudence on the law of negligence were said to be drawn too hastily, without taking sufficient account of the common law's incremental method.
  - (3) The general case for changing the *status quo* as regards the liability of public authorities in private law was said not to be made out.

#### RESPONSES

##### *Responses that supported the Law Commission's analysis*

- 2.3 Lord Justice Carnwath considered the analysis of the defects of the existing law "admirable", agreeing that that:

The attempts of the courts to define a manageable but principled role for the tort of negligence in the public field have been particularly unsuccessful.

- 2.4 Mr Justice Silber agreed that:

It cannot be left to the law of negligence to provide a predictable and consistent approach to the liability of public bodies for administrative redress. Its boundaries are controversial; the *Van Colle* case shows that four judges considered that the claimant had [a] good claim, but five Law Lords disagreed. It is unlikely that in the future predictable and consistent decision[s] would be reached and so it is necessary to establish a free-standing remedy.

- 2.5 The Professional Contractors Group observed that:

Tort law has proved not to allow for satisfactory redress in the event of a grievance against [HM Revenue and Customs] ... the courts will not be willing to break the new ground of imposing a [general] duty of care on HMRC.

2.6 The Professional Contractors Group concluded that:

The proposals to make damages available via judicial review would, if implemented, therefore be extremely helpful.

*One consultee questioned whether the analysis paid sufficient attention to the moral difference between causing harm and failing to confer a benefit*

2.7 Professor Robert Stevens criticised the Law Commission's approach:

In starting from the position that the "underlying rationale of the tort of negligence in all cases is to provide compensation for those who suffer loss as a result of the negligence of others" [it] fails to take seriously the basic moral difference between someone negligently making someone else worse off, and negligently failing to confer a benefit upon another.

*Several consultees asked what the Law Commission's position is on intentional torts*

2.8 At the seminar held at the British Institute of International and Comparative Law one of the issues raised was whether the "serious fault" regime also covered intentional torts. The Commission's position was that it did not. However, actions for assault, battery and false imprisonment remain significant in relation to public authorities, not least the police. Paragraph 3.104 of the consultation paper acknowledged this, but did not firmly place the other torts outside the suggested scheme. A number of responses expressed concern about this matter.

2.9 The Association of Child Abuse Lawyers asked whether "trespass against the person (assault, battery and false imprisonment) [were] excluded from the debate".

2.10 Professor Robert Stevens argued that:

The logic of the proposals is that they should apply to all torts. If the "modified" corrective justice argument were truly accepted, those torts which require no proof of fault appear even more anomalous when applied to public bodies...Why should the negligent injuring of a pedestrian by a police officer now be subject to a regime of serious fault, whilst the creation of an offensive smell or noise remain governed by the general law?

*One consultee argued that the incremental approach of the courts in developing the law of negligence must not be ignored*

2.11 Paul Mitchell drew attention to the fact that:

The analysis of the development of duty of care focuses exclusively on the general principle. It leaves out the important counter-theme of cautious, category-based development...The counter-theme is particularly important, because it highlights the means by which negligence has been able to accommodate its general principles to the multiplicity of situations in which it operates.

*Several consultees expressed doubts about the Paper's reliance on the defects it identified in the current law*

- 2.12 The Law Reform Committee and the Constitutional and Administrative Law Bar Association were not persuaded of the merits of reform:

The application to public bodies of the law relating to negligence has proved to be uncertain and productive of litigation and...future developments *may* increase the exposure of public bodies. The same is true, however, of the application of the law relating to negligence in other areas. But such uncertainty is not a reason for abolishing the tort and replacing it with a different form of liability, either in respect of the activities of public bodies or the activities of others. In part such uncertainty is generated by, and can be regarded as the price that has to be paid for, the need to apply the law relating to negligence sensitively to differing innumerable circumstances in which persons suffer avoidable loss or damage. Generally that process of adaptation is one that is probably best achieved by judicial development of the common law.

- 2.13 Colm O'Conneide expressed the following view:

The Paper correctly notes that the case-law concerning liability for negligence in this area lacks conceptual clarity. However, the incremental extension of the scope of liability of public authorities in cases such as *Phelps* and *Smith* represents a relatively tried and tested common law method of regulating the imposition of liability in negligence cases. The consultation paper does not examine in detail why reliance on this standard method for determining negligence liability is deficient or otherwise lacking when it comes to the context of public authority liability...The question of private law remedies needs to be decoupled from the public law analysis: the attempt to establish a common framework in this consultation paper has resulted in a set of proposals which cut across the grain of much of the existing basis of negligence liability.

- 2.14 Professor Michael A Jones said:

I was also surprised, to say the least, to see that one of the principal concerns that appears to be driving the Law Commission's proposals is the financial impact of potential liability on public bodies (para. 6.15 comments that "from Government's point of view, the status quo is a high-risk option in the medium to long term". This is a highly tendentious assertion, given the Consultation Paper's complete inability to quantify both the costs and benefits of its proposals or the costs and benefits of the status quo).

- 2.15 Tom Hickman urged caution in drawing conclusions from the fact that this area has given rise to so many judgments of the House of Lords:

This may reflect the fact that public authorities are less willing to settle claims than private companies. It may also reflect the potential implications of the action for other public bodies – which [are] not of concern to private companies. It should also be remembered that a huge number of claims are brought against public authorities every year and that the issues that are considered by the appeal courts are very much on the fringes of liability for negligence.

*A few consultees doubted that there has been an unpredictable expansion of liability of public bodies*

- 2.16 Tom Cornford suggested that the consultation paper contained:

A perfunctory review of the case law on public authority negligence which reaches the highly contestable conclusion that the general tendency of the law in the area is towards an expansion of liability.

- 2.17 The Association of Child Abuse Lawyers disagreed with our:

Assertion at paragraph 2.7 that negligence is “uncertain and unprincipled...in relation to public bodies” and [that] this has been “coupled with the unpredictable expansion of liability over recent years”. We would argue that the law of negligence is in fact steps behind the increasing role that Parliament has legislated for public bodies’ own involvement in people’s lives, for example social care and child protection.

- 2.18 With regard to malfeasance, the Association of Police Lawyers stated:

Despite a sometimes held perception of a greatly increasing compensation environment the Metropolitan Police had fewer cases and paid out less in compensation in 2007/8 than in 2000/1.

- 2.19 The Association of Personal Injury Lawyers did not agree that liability against public bodies is continually expanding. It argued that:

In those cases [cited at paragraphs 4.42-4.48 of the Consultation Paper] that have been successful this is generally upon the basis of the public body having a positive duty to act in some way and where there has been “specific” reliance upon it. The public body is thereby assuming responsibility sufficient to create a duty of care and there is a particular relationship with an individual or individuals.

- 2.20 Addressing the strengths and weaknesses of the Law Commission's analysis, Professor Stephen Bailey wrote that it:

Rightly emphasises that developments have been inconsistent, complex and influenced by context. It is, however, overstating the position to identify a "movement towards expanding the liability of emergency services" (para 4.43) based on *Kent v Griffiths*, a case where liability could properly be based (on the facts) on conventional principles of detrimental reliance. The scope of the duty of maintenance (para 4.46) has in fact expanded and contracted over time. There is little evidence that *Stovin v Wise* is "vulnerable"; certainly not as regards the scope of the statutory duty of maintenance. Finally, the law is certainly complicated, but the outcomes [are] not all that difficult to predict, given the current preoccupation not to impose liability outside *Hedley Byrne* situations. If anything, in recent years the law has become clearer.

- 2.21 The Association of Police Lawyers was of the opinion that:

There does not seem to be any compelling reason to change the status quo. The recent [House of Lords] decision in *Smith v Chief Constable of Sussex* ... [has] reinforced the previous [House of Lords] decisions in *Hill* and *Brooks*, i.e. there has not been an expansion of liability in "failing to protect" cases. The CA decision in *Thompson and Hsu v The Commissioner* (1998) brought a more sensible tariff approach to damages and curbed the excessive damage awards which were seen in the 1990s.

- 2.22 The House of Lords handed down their judgment in *Smith v Chief Constable of Sussex Police*<sup>1</sup> after the consultation paper had been finalised.

<sup>1</sup> *Van Colle v Chief Constable of the Hertfordshire; Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.

*Van Colle/ Smith*

- 2.23 *Van Colle v Chief Constable of Hertfordshire* concerned a claim under sections 6 and 7 of the Human Rights Act 1998. In *Smith v Chief Constable of Sussex* the respondent (Mr Smith) relied solely on the common law, claiming damages against the Chief Constable in the tort of negligence. Following a prolonged campaign of threats and violence, Mr Smith was attacked and severely injured by his former partner. The police took no effective steps in investigating his initial complaints, despite having been approached on several occasions. Mr Smith's claim against the police was struck out at first instance, but his appeal succeeded before the Court of Appeal. As Lord Bingham put it, both cases raised the same question:

If the police are alerted to a threat that D may kill or inflict violence on V, and the police take no action to prevent that occurrence, and D does kill or inflict violence on V, may V or his relatives obtain civil redress against the police, and if so, how and in what circumstances?<sup>2</sup>

- 2.24 The House of Lords reversed the Court of Appeal's ruling, holding that no duty of care was owed to the claimant. Lord Bingham dissented in *Smith*, arguing that the case fell within "the liability principle":

If a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.<sup>3</sup>

*Some consultees took issue with the structure and presentation of the analysis*

- 2.25 Paul Mitchell saw the Commission's criticism of the current position as:

Overstated, and ... a significant amount of the appearance of uncertainty or lack of principle is due to presentation in the Consultation Paper.

- 2.26 Professor Robert Stevens' response adopted a thematic approach to this area of the law, concluding that:

Following *Gorringe* it is untenable to argue that there has been a continued increase in the scope of government liability. In fact, the principles of liability have been returned to those which were applicable in the 1940s.

<sup>2</sup> *Van Colle v Chief Constable of the Hertfordshire; Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.at [1].

<sup>3</sup> *Van Colle v Chief Constable of the Hertfordshire; Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225.at [44].

*One consultee did not agree with the analysis of duty of care in the context of pure economic loss*

2.27 Paul Mitchell said:

There are not three methods for ascertaining whether a duty is owed to prevent purely economic loss. That is what the Court of Appeal had said in *Customs and Excise Commissioners v Barclays Bank plc* [2004] EWCA Civ 1555...the House of Lords said that they were wrong...the tests are not “merely indicative”. The assumption of responsibility test, if satisfied, is conclusive.

2.28 Paul Mitchell further pointed out that the decision in *Barclays Bank*:

Indicated how the tests should be developed, and seems to have stabilised the law. In one recent Court of Appeal case, Chadwick LJ said that, given the House of Lords’ decision in *Barclays Bank*, there was no need to engage in analysis of the leading cases all over again.

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

***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)***

SUMMARY

2.29 Twenty-four consultees gave their views on joint and several liability. Sixteen were in general agreement with the proposal, eight disagreed.

RESPONSES

*Several consultees supported the proposal, and some suggested how it might be put into practice*

2.30 The Government agreed that:

It is worth exploring whether the courts should have discretion to abandon the rule. The Law Commission suggests that the discretion should be limited only to “truly public” cases, but as it looks further at how best to frame any such discretion, the Law Commission may conclude that it can and should include some instances beyond the “truly public”.

2.31 Mr Justice Silber argued that:

Joint and several liability might serve the interests of claimants but it means that the total loss is recovered against the “last man standing”.

2.32 As a precedent, Mr Justice Silber suggested:

Some sort of test such as is set out in section 2(1) of the Civil Liability (Contribution) Act 1978 would be appropriate as it requires the court to award such sum “as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question”.

2.33 Zurich Financial Services agreed that the courts should have a discretion to abandon the joint and several liability rule in “truly public” sectors, and suggested the following factors should be taken into account:

The ability of the other tortfeasors to meet their judgment obligations and the equity of a legitimate claimant not being compensated.

The reason why other tortfeasors cannot satisfy a judgment debt (for example, deliberate insolvency, low limit of indemnity, no insurance cover).

The claimants’ conduct. Have they simply included the public body in a speculative piece of litigation, in the knowledge that they have the deepest pockets or are the last existing solvent party involved in legacy claims?

The budgetary implications if a small district or parish council is forced to satisfy the full judgment.

The proportion of liability that is ultimately allocated to the public body – if it is below a certain threshold say 30% there should not be joint and several liability.

2.34 The Commission for Social Care Inspection welcomed the proposal, noting that “the concept of proportionality is of particular interest to [us] where its dealings with private sector regulated care services are concerned”.

2.35 Weightmans LLP commented that:

It is not unusual for a public authority to have to seek contribution from a third party, whether this be another local authority or a contractor who they have employed. This is often expensive and time-consuming. An apportionment of damages based on culpability would therefore be helpful.

2.36 The Public Administration Select Committee made the point that:

The wider obligations that public bodies owe to society become more difficult to sustain, the greater the *absolute* amount of compensation being sought. Where a small sum is involved, whether a public body is liable for 10% or 100% will have no impact on their ability to provide public services. A claim for even a small fraction of a large sum may, however, have a significant impact. It follows that in many circumstances, to provide full redress for an individual harmed by substandard administrative action will have little or no impact on a public body's ability to fulfil its "wider obligations".

2.37 In the experience of the Public Administration Select Committee:

Public bodies sometimes use "wider obligations" as a defence against paying compensation in circumstances in which these obligations are not a sufficiently relevant consideration. [Therefore the Public Administration Select Committee] strongly supports the suggestion that any decision to abandon the joint and several liability rule should be available only at the discretion of the courts.

*One consultee found the argument relating to subrogation (paragraph 4.69 of the consultation paper) more compelling than the concern that public bodies are often respondents of last resort*

2.38 In a joint response, a number of academics from York Law School argued that:

Certainly, public authorities may find themselves the defendant of last resort in cases where others (who might be referred to as the main wrongdoer) are insolvent or otherwise impossible to pursue. But in the sorts of instances referred to in the paper, particularly in 4.67, courts will impose a duty under the *Caparo* test only in those circumstances where there are positive reasons why the defendant should owe a duty to protect the claimant, including a reason why the public authority should owe a duty to protect the claimant from the wrongdoing of third parties...As such, it seems not entirely appropriate to object that the "real" or "main" perpetrator in such cases is not the public authority: protection from the wrongdoing of others is by definition (or should be) the purpose of the duty, where it exists. Why should such cases be seen as any more unfair towards public authorities than cases which do not involve another third party? In other words, why is it more inappropriate to hold a public authority liable for failure to protect the claimant from the wrong of another person, than to hold the public authority liable for failure to mitigate the effects of dyslexia, or a misdiagnosed disease, for example? The issue is whether a positive duty is owed or not.

- 2.39 Regarding the insurance principle of subrogation, the academics from York Law School were more positive:

We would add that there are instances (such as *Stovin v Wise* and *Gorringe v Calderdale*) where the courts have been ready to take into account the existence of subrogation as an element in its reasoning, and has been keen to avoid displacing liability from insurers, to local authorities. We think there are good grounds however for taking forward reform proposals in respect of the applicable principles in respect of subrogation.

*A number of consultees argued that the proposal would cause considerable injustice to deserving claimants*

- 2.40 The Association of Personal Injury Lawyers saw the rule on joint and several liability as ensuring that:

The innocent victim is fully compensated. If, however, we accept the arguments raised in this paper and [the defendant] is a public body, and that public body is only responsible proportionately in some way, the innocent victim would suffer by not being able to recover full compensation. [The Association of Personal Injury Lawyers believes] this is fundamentally unjust.

We do not agree that the joint and several liability principle should be abolished, particularly in the case of personal injury and death actions.

- 2.41 In a similar vein, The Association of Child Abuse Lawyers submitted “that it is better for an even partially guilty party to pay than no one at all”.

- 2.42 Professor Robert Stevens observed that:

If liability is apportioned between wrongdoers, the victim’s position becomes more and more precarious the more wrongs which are committed against him. In principle, the claimant’s position should not worsen, and each individual defendant’s position improve, according to the number of wrongdoers...if I am the victim of a wrong, a wrongdoer should not be able to escape or reduce his liability by showing that I am also the victim of another wrong committed by someone else.

*One consultee asked why the proposal was limited to public authorities*

- 2.43 Colm O’Cinneide wondered:

Why this reform should be confined to public authorities alone. Any such proposal needs to be the subject of a separate consultation exercise.

*Two consultees ascribed the perceived need to reform the rule on joint and several liability to the Law Commission's other proposals*

2.44 Professor Robert Stevens pointed out that:

The problem the Law Commission identifies arises *because of [the Law Commission's] proposals*. If the basic moral difference between (i) injuring someone and (ii) failing to protect from injury is to be abandoned or blurred so that liability can *generally* be imposed upon a public body in case (ii), joint and several liability appears unjust.

2.45 Professor Stephen Bailey made a similar point, stating that:

It would only be appropriate to reconsider the impact of joint and several liability if negligence liability [of public bodies in relation to omissions] were to be expanded. It is not desirable that it should be.

*One consultee considered the implications for funding litigation if the rule on joint and several liability is disapplied*

2.46 Tom Hickman suggested the proposal may well mean that:

Much litigation is not cost effective because the public authority is only 20% responsible for the harm, for instance. The proposed reform could therefore extinguish the vast majority of public authority liability because it would not be cost effective to bring claims, and because of the uncertainty about estimating the cost of likely recovery. Moreover, would the [Legal Services Commission] be prepared to fund claims on this basis?

***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)***

***Should the tort of misfeasance in public office [...] be abolished? (paragraph 4.106)***

SUMMARY

2.47 Thirty consultees referred to the tort of misfeasance in public office. Nine were in agreement with the Law Commission's proposal to abolish it, twenty-one were against.

2.48 One important issue which was raised concerned actions against the police. These often include allegations of misfeasance or bad faith. The true defendant in such cases would be the police officer alleged to have taken the wrong decision. If misfeasance were abolished, it is argued, the claimant would be unable to impugn the conduct of the individual police officer.

2.49 It was difficult to tell from some responses whether their authors agreed or disagreed with the Law Commission's proposals. The general thrust of their argument was that misfeasance in public office remains a useful cause of action which should not be lightly uprooted.

## RESPONSES

*A number of consultees identified circumstances in which misfeasance remains a useful, and sometimes the only, cause of action*

2.50 The Association of Police Lawyers found the Law Commission's proposals "surprising", as "abolition could leave some claimants who cannot allege negligence or malicious prosecution, without a remedy".

2.51 The Association of Personal Injury Lawyers pointed out that:

Whilst [the tort] does not create a huge burden on public bodies it remains a useful check on public servants. We would argue therefore that there seems very little justification for its abolition.

2.52 The Association of Personal Injury Lawyers drew attention to the fact that the tort "remained a relevant legal issue in two recent cases": *Ashley v Chief Constable of Sussex* [2008] UKHL 25 and *Hussain v Chief Constable of West Mercia Constabulary* [2008] EWCA Civ 1205.

2.53 Professor Stephen Bailey argued that the tort of misfeasance in public office:

Is an entirely appropriate cause of action to be available. The deliberate (or in specific circumstances reckless) infliction of loss by a public official should be actionable in tort...This tort should remain for the worst cases. If, however, one starts from the premise that the victims of loss should be compensated, the tort is of little use as it is so difficult to establish. It would not be needed if the proposed new liability regime were established.

2.54 Weightmans LLP stated that:

Misfeasance in a public office claims are extremely rare. They are normally made against police forces. A typical constabulary would only see a litigated claim of any substance once every two or three years. Most private law causes of action are covered by false imprisonment, malicious prosecution, assault or negligence. It is, however, useful for a claimant to have recourse to this tort where they are alleging malice which falls outside a prosecution and is therefore not covered by malicious prosecution. An example might be malicious objection to bail conditions or where a malicious investigation is launched against them which does not lead to a prosecution.

*One consultee identified the benefits of pleading misfeasance in claims brought against the police*

2.55 In a meeting with the Association of Police Lawyers, it was suggested that an action for misfeasance allows the claimant to pin liability on the individual police officer whose acts or decisions are impugned. Unlike negligence claims which are brought vicariously against the relevant Chief Constable or Commissioner of the Metropolitan Police Force, misfeasance gives the victim of deliberate abuse of public office the chance to hold the officer *personally* responsible. Coupled with the power to award exemplary damages where the defendant's actions were oppressive, arbitrary or unconstitutional, the action:

Serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.<sup>4</sup>

*Several consultees expressed disquiet at amalgamating deliberate wrongdoing within the “serious fault” scheme*

- 2.56 Professor Carol Harlow distinguished between cases of grave fault and those involving wilful wrongdoing. As regards the latter, Professor Harlow argued that the law needs to be able to single them out and provide sanction:

In my view therefore, the action for misfeasance should not be abolished unless steps are taken to provide for cases of “malfeasance”, perhaps by aligning them with exemplary damages.

- 2.57 Colm O’Cinneide suggested that the tort of misfeasance in public office was still “of potential importance”, since it:

Carries with it a connotation of serious wrongdoing: abolishing this cause of action eliminates the possibility of bringing a legal action with the express aim of identifying the challenged fault in question as constituting behaviour of exceptional wrongness.

- 2.58 Professor Colin Reid did not reach a certain conclusion, but suggested that:

Claims currently proceeding as misfeasance might be accommodated under other headings in a reformed structure, removing the need for misfeasance as a separate basis of liability. In considering this, though, the need for the law to allow a clear route for recovery in the face of deliberate, as opposed to negligent, harm must not be forgotten...If a robust system that covers the deserving cases currently proceedings under these headings is introduced, then these torts could be abolished.

*Some consultees thought the “conferral of benefit” threshold would exclude clearly meritorious claims that currently fall under misfeasance*

- 2.59 Roderick Bagshaw saw misfeasance as useful in cases where:

A public officer intentionally abuses a statutory power in order to harm a claimant even if the statutory power was not part of a legislative scheme intended to “confer a benefit” on the claimant (indeed the misfeasance tort can also be used where the power does not exist at all, and the official has merely pretended that it does). This situation will not fall within the paper’s proposed “serious fault” scheme (which requires “conferral of benefit”), but the paper offers no substantial argument as to why the law should be changed so as to allow public officials to behave in such a way without incurring liability.

2.60 Professor Mark Aronson gave an Australian example:

The Commonwealth government's drugs regulator paid out roughly \$50m in settlement of a misfeasance claim by the CEO of a drug company that was put out of business by heavy-handed action on the part of the regulator. The out of court settlement was reached after the trial judge intimated that he was about to find that the regulator had pretended that there was an emergency (warranting action without observance of natural justice) when in fact (and to its knowledge) there had been no emergency. Shareholder and other third party claims are now being formulated. As I read the Commission's proposals, none of these actions would be possible under its suggested regime. So far as the relevant legislation aims to "confer benefits"...those benefits are conferred on the general public, not the drug companies.

*A few responses questioned whether the Law Commission's case for abolition of misfeasance was sufficiently robust*

2.61 The Association of Child Abuse Lawyers argued that:

Reliable statistics of the incidence of [claims involving allegations of misfeasance] need to be analysed before consideration can be given as to whether the tort should be abolished.

2.62 Professor Mark Aronson wondered whether the fact that allegations of misfeasance in public office have rarely succeeded could be "a testament to the propriety of public service standards".

2.63 Professor Robert Stevens found it difficult to understand how the fact that:

Few claims [for misfeasance in public office] have been brought...provides any support for abolition. Few prosecutions for the offence of treason take place, but it could not seriously be suggested that this provides a reason for the abolition of this crime.

2.64 Tom Hickman had "no doubt" that this "important cause of action should not be disturbed", adding that:

It is unsafe to judge how frequently this cause of action is utilised by the reported cases. Many claims or allegations of misfeasance [are] made in correspondence with public bodies, or settle without reaching trial. Indeed, the most egregious acts of misfeasance will never reach the pages of the law reports.

2.65 Browne Jacobson LLP suggested that where misfeasance is pleaded:

The embarrassment factor is often sufficient to cause a public body to enter into negotiations, so that cases are not, ultimately, heard in court.

- 2.66 The Law Reform Committee and the Constitutional and Administrative Law Bar Association did not consider that:

Any sufficient case has been made for the abolition of the tort of misfeasance in public office...the Commission has not provided a justification for the abolition of exemplary damages in [...] such cases nor for the abolition of the tort in the cases of “truly public” activities where the relevant scheme is not intended to confer a benefit on the claimant or someone in his position. Nor has the Commission addressed the position of those apparently acting in public office who abuse their position who may themselves be liable under this tort, or for whose activities a public authority may be vicariously liable, in areas which may fall under the rubric “truly public”. In addition the Commission has provided no justification for the abolition of the tort in areas which would *not* fall to be classified as “truly public” where liability now exists.

## **SUGGESTED OPTIONS FOR REFORM**

### ***Should the tort of breach of statutory duty be abolished? (paragraph 4.106)***

#### SUMMARY

- 2.67 Twenty-eight responses mentioned this proposal. Eight consultees were in favour of it, twenty were against.
- 2.68 Some consultees misread the proposals, expressing concern about the abolition of liability for all statutory duties, whereas no such proposal was advanced in the consultation paper. Others criticised the Law Commission’s evidence relating to the frequency with which breach of statutory duty is used for not including cases that are successfully settled where the law is clear.

#### RESPONSES

*Some consultees agreed with the proposal, but pointed to circumstances where the tort will continue to play a role*

- 2.69 Professor Stephen Bailey agreed that the tort of breach of statutory duty should be abolished, “except where a statute expressly provides for a cause of action or, otherwise, is designed to protect the health and safety of individuals”.
- 2.70 The Professional Contractors Group agreed that:

It is not satisfactory for claimants to be obliged to demonstrate that Parliament intended a breach of a duty to be actionable.

- 2.71 However, they also expressed reservations:

About the general abolition of the tort of breach of statutory duty: it should still be open to Parliament to impose duties and make breaches of them actionable under tort law, thus setting a lower bar for claimants in defined areas than would be available under the “serious fault” regime.

*One consultee was not clear about the scope of the proposal*

2.72 The Professional Contractors Group would be:

Interested to see more information on the limited circumstances in which the Law Commission envisages retaining this tort.

*One consultee did not see the new scheme as an adequate substitute for breach of statutory duty*

2.73 Duncan Fairgrieve said:

One clear difference is to be found in the mental element: the new scheme demands a very high degree of fault ... unlike the tort of breach of statutory duty where the standard of breach depends upon the language of the statute.

*One consultee took issue with the evaluation of the case law in this area as “uncertain”*

2.74 Professor Robert Stevens argued that:

No review of the current law is undertaken to establish the proposition that it is uncertain when the courts will interpret that a statutory duty does create a private right in favour of individuals...even if it were accepted that the law is unsatisfactorily uncertain, the solution would be to set out the rules of construction in legislation, as the Law Commission previously proposed.

*A number of consultees did not see the number of reported cases involving the tort as indicative of an unduly restrictive approach*

2.75 Professor Robert Stevens saw the dearth of reported cases as “evidence that an area of law is well settled and gives rise to few disputes worthy of litigation”.

2.76 Similarly, the Association of Personal Injury Lawyers suggested that the statistic cited at paragraph 4.78 of the consultation paper relating to reported cases involving a successful claim for breach of statutory duty is:

Misleading ... as it relates purely to cases successfully concluded at trial and reported. The paper overlooks the fact that the vast majority of thousands of successful personal injury claims made by employees every year will include allegations of breach of statutory duty.

2.77 Professor Neil Foster found the Law Commission’s reliance on the dearth of reported cases problematic, for the figures are said to be artificially limited to successful claims in England and Wales. Two recent appeals, both from Scotland, were not taken into account: *Robb v Salamis (M & I) Ltd*<sup>5</sup> and *Spencer-Franks v Kellogg Brown and Root Ltd*.<sup>6</sup>

<sup>5</sup> [2006] UKHL 56, [2007] 2 All ER 97.

<sup>6</sup> [2008] UKHL 46, [2009] 1 All ER 269.

*A few consultees suggested that the analysis contained in the consultation paper was incomplete, raising matters they found worthy of further attention*

2.78 Professor Mark Aronson believed:

It is most unwise of the Commission to be recommending abolition of statutory causes of action that it has not investigated on an individual basis.

2.79 Professor Carol Harlow agreed on this point.

2.80 Professor Robert Stevens pointed out:

The Paper does not refer to the Canadian Supreme Court's decision in *Saskatchewan Wheat Pool* [1983] 1 SCR 205, which cut back breach of statutory duty in favour of a general negligence principle, nor to the great difficulties and criticism that this has led to.

2.81 In *Saskatchewan Wheat Pool*, the defendant loaded infested wheat onto a ship. As a result, the Canadian Wheat Board suffered losses which the Canadian Government sought to recover in reliance on the Canada Grain Act which prohibited the discharge of infested grain. The Supreme Court of Canada held that the Government could not succeed. In arriving at this decision, the Supreme Court effectively abolished the action of breach of statutory duty as an independent tort, subsuming it in the law of negligence. One of the articles submitted in the course of consultation argued that:

*Saskatchewan Wheat Pool* was wrongly decided, and has left a "statutory-duty-shaped" hole in Canadian civil jurisprudence which the courts are filling by either illegitimately extending the law of negligence ... or in other ways.<sup>7</sup>

2.82 Neil Foster took issue with the citing of *Rice v Secretary of State for Trade and Industry*<sup>8</sup> as a case involving breach of statutory duty, arguing instead that was "clearly a claim in negligence".

2.83 Tom Hickman asked:

Does the Law Commission really want to bar recovery for breach of the Bill of Rights where cruel punishment is inflicted by agents of the State (Article 12)?

<sup>7</sup> Neil Foster, *Private Law and Public Goals: The Continuing Importance of the Action for Breach of Statutory Duty* Paper presented at the Obligations IV Conference, Singapore (23-25 July 2008) p 20. See also L Klar, "Breach of Statute and Tort Law" in J W Neyers, E Chamberlain and S G A Pitel (eds) *Emerging Issues in Tort Law* (2007) pp 31 to 61.

<sup>8</sup> [2007] EWCA Civ 289, [2007] ICR 1469.

***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)***

SUMMARY

- 2.84 Most responses commented on the “truly public” test generally, rather than specifically in relation to statutes. However a few consultees addressed this point directly.

RESPONSES

- 2.85 Tom Cornford considered it strongly arguable that:

All the statutory powers possessed by statutory authorities must be exercised in pursuit of overarching statutory duties, even if those duties are not very clearly spelled out. This would mean that practically everything a statutory authority did was truly public ... [it is argued that this would include] teaching in state schools and the provision of health care by the NHS.

- 2.86 Regarding “medical treatment provided as part of the National Health Service”, the Law Reform Committee and the Constitutional and Administrative Law Bar Association contended that this would be a “truly public” activity, citing the Commission’s definition of “special statutory duty”.

- 2.87 Professor Stephen Bailey commented:

The analysis of “special statutory powers” fails to recognise that there are two distinct reasons why a power may be conferred on a public body. The first is where power is needed to interfere with the rights of citizens. The second is to enable a corporate public body that does not have the powers of a natural person (eg local authorities) to function at all. It can be accepted that powers of the first kind are indeed special (whether exercised by public bodies or private individuals). But here there is no need for a special tort liability regime. ample tort remedies [are] already available. The conferral of powers for the second reason ... is a wholly inadequate justification for imposing a special tort regime.

***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)***

SUMMARY

- 2.88 Twenty-five consultees offered comments on the “truly public” test. It is difficult to pigeon-hole these into the agree/disagree categories. However it could be said that four were broadly in agreement with the Law Commission’s formulation; twenty-one disagreed or otherwise raised significant concerns.

2.89 Several example scenarios were given in the responses where, their authors suggest, it is unclear whether the “truly public” test is satisfied:

- (1) Ambulance service responding to emergency calls;
- (2) NHS doctor taking decisions regarding scheduling under the mental health laws;
- (3) Public-private partnerships used to deliver services or functions;
- (4) Regulatory controls imposed by contract, eg planning agreements;
- (5) An authority regulating rugby scrums;
- (6) Highway maintenance duties/powers of public bodies and private persons;
- (7) Overlapping common law and statutory powers of the police;
- (8) General power to arrest someone reasonably suspected of being in the act of committing an imprisonable offence.

#### RESPONSES

*One consultee was concerned about the inclusion of omissions on the same basis as acts within the definition of “truly public”*

2.90 Beachcroft LLP said:

This appears to fail to take into account the wide range of public bodies. Acts are necessarily a finite class, whereas the list of any public body’s failure to act would be close to infinite. Almost all public bodies have to limit their acts to the cases they consider of the highest priority, knowing very well that if resources allowed there would be other almost equally deserving cases. Should a regulator (say, the Charity Commission) even in principle be liable on the same basis for failing to supervise any given charity as it would be for wrongful active supervision? This is inviting legal scrutiny of the operational (and this means financial) decisions of a public body in a new and very intrusive way.

2.91 One consultee suggested that the “truly public” label ought to be discarded in favour of “essentially public”

2.92 Mr Justice Silber stated that he would prefer:

Such terminology as “essentially public”. The use of the words “truly public” suggests that there are some public issues which are “untruly public”.

*One consultee proposed an alternative to the “truly public” concept based on an amendment moved to clause 1 of the Compensation Bill in its passage through the House of Lords in 2005/6*

2.93 As part of its alternative gatekeeper to the private law scheme, Beachcroft LLP suggested the following definition of “public or other body”:

- (1) The Crown;
- (2) Government departments;
- (3) NHS bodies;
- (4) Local councils;
- (5) Any public or local authority constituted by or under an Act; or
- (6) Any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person’s public official functions.

*One consultee suggested harmonising the definition of “truly public” with the meaning of “public authority” under the Human Rights Act 1998*

2.94 Lord Justice Carnwath stated that “truly public” is:

An acceptable working title but defining this concept is a big challenge. There needs to [be] some coherence with the similar terms in the Human Rights context, and the opportunity should be taken to put the law back on track following *YL v Birmingham* [2007] UKHL 27.

*One consultee questioned the justification for limiting the serious fault scheme to “truly public” activities*

2.95 Professor Robert Stevens asked:

If we truly accepted the Paper’s premise as to why the law of torts needs to be modified where the defendant is a public body, what is the justification for limiting reform to “public activities”? None is presented.

*Several consultees doubted that the “truly public” test would be workable in practice*

2.96 Professor Carol Harlow did not find it possible to define:

With any precision the concept of a “public activity”, less still “a truly public activity”...The question then becomes whether the price in the shape of “border disputes” is worth paying? In the case of the “exclusive” jurisdiction in judicial review, the courts ultimately decided it was not. I rather suspect that the same problem would be posed and the same answer arrived at here.

2.97 The Law Reform Committee and the Constitutional and Administrative Law Bar Association considered that the “truly public” test is likely to “produce results that are anomalous and unjustifiable”. Regarding what counts as a public body, they pointed out that:

In many cases it will no doubt be obvious which bodies are to be regarded as public. But the definition of what counts as “truly public” requires a public body to be capable of identification independently of whether it has a special statutory power of special statutory duty. If a body cannot be so identified as a public body then the definitions proposed are circular (since the definition of the terms “special statutory power” and “special statutory duty” require a comparison to be made between what powers and duties the body in question has and what those who are not public bodies may or must do)...The absence of a definition [of a “public body”] in the Commission’s proposals makes any assessment of their practical impact more difficult.

2.98 Thompsons Solicitors saw the “truly public” test as having “ill defined limits”. The Association of Personal Injury Lawyers found that the formulation is likely to lead to “extensive satellite litigation”. While a bedding-down period is to be expected with any new statutory tort regime, there is little reason to think that the “truly public” test would be particularly uncertain in its application.

2.99 Professor Stephen Bailey believed that:

There are in truth very few activities that are *intrinsically* peculiar to the state; their distribution between public and private sector is the product of the political circumstances of the moment rather than driven by principle...the search for a hard dividing line between activity which is “truly public” and that which is not is fundamentally flawed and unworkable.

2.100 Regarding the statement at paragraph 4.114 of the consultation paper that “a private body exercising a public function, such as a private company providing a prison, should be treated as if it were a public body performing that function”, the The Association of Child Abuse Lawyers observed that:

This will act as a windfall for the insurers of those private companies engaged in running prisons for the profit of their shareholders.

2.101 Professor Mark Aronson submitted that:

If an act or omission is of such a nature that its second-guessing is properly said to lie beyond a court’s competence or proper role, then that should be a sufficient reason for denying the applicability of any duty of care. I cannot see how the “*publicness*” of either the actor or the function has helped one to reach that conclusion.

*One consultee considered the “truly public” test inappropriate in cases where the power to act is absent altogether*

- 2.102 The Law Reform Committee and the Constitutional and Administrative Law Bar Association also submitted:

The definitions proposed appear to overlook the case where a public body considers that it has a statutory or prerogative power or a statutory duty which it simply does not have. A case of doing something in the complete absence of any power does not apparently fall within the proposed definitions of a “truly public activity”.

*One consultee gave an example from mental health law*

- 2.103 Professor Mark Aronson gave the example of a NHS medical authority:

Failing to exercise proper care in the exercise of its function to determine whether a patient should be scheduled under the Mental Health laws. Scheduling is certainly a function that requires special statutory authority, and would therefore fall within the Commission’s definition of a “truly public” function. But why should it be exercised with less than the standard of professional care reasonably expected of the psychiatric profession? ... True, the scheduling function must be performed – the doctors cannot choose to avoid the exercise entirely. But that is because it is their job, not because the job is inherently more difficult to review according to a normal negligence standard.

*One consultee asked whether the “truly public” test would cover paramedics responding to emergency calls*

- 2.104 Duncan Fairgrieve said:

One argument would be that this is a “truly public” activity (there are no “private” organisations providing emergency services). On the other hand, one could argue that giving medical attention to an accident victim during transport to hospital is very similar to the medical care that will be provided by doctors on admission to hospital.

*One consultee gave what are perceived to be problematic examples of borderline public/private disputes*

- 2.105 Professor Colin Reid asked whether the new regime would create anomalies in the following circumstances:

Where partnership arrangements between public and private sector bodies are used to deliver services or functions, where special “joint vehicles” or publicly-owned companies are created for particular projects (cf. *R (Beer) v Hampshire Farmers Market Ltd* [2004] 1 WLR 233), where what are in effect regulatory controls are imposed through contractual form, eg planning agreements, or through the powers of an authority as landowner (cf *R v Somerset CC, ex parte Fewings* [1995] 1 WLR 1037).

*One consultee gave the example of a sports rule-setting organisation*

- 2.106 Professor Mark Aronson gave the example of a body responsible for formulating the rules governing scrums in rugby which:

Fails to promulgate rules requiring scrums to be safer...Why should its failure to answer the Commission's criterion of "truly public" render it susceptible to a more demanding negligence regime than if it had been a body exercising statutory or prerogative power? And if the body were to be transformed into a statutory body, why should that event make it liable for its failure to promulgate safer rules, even if only for acts or omissions that were "seriously" at fault?

*One consultee asked about the extent to which the proposed scheme would affect highway cases*

- 2.107 The Association of Child Abuse Lawyers noted that:

Highway maintenance is described as a truly public activity in the paper and tripping cases would therefore be subject to the proposed higher liability regime .... But private un-adopted roads are maintained by private individuals. Does therefore the "truly public" activity only apply to specific duties of public bodies under the Highways Act? But compensation claims in tripping actions are also founded in nuisance and negligence which can be brought against private as well as public bodies. So is this truly a "public law" function?

*One consultee believed the "truly public" test would be problematic where statutory powers overlap with common law powers*

- 2.108 Paul Mitchell anticipated that the test would be:

Very difficult to apply where statutory powers have been superimposed on common law rules. For instance, the general common law power to prevent breaches of the peace (*Albert v Lavin* [1982] AC 546) overlaps with the powers given under [the] Criminal Law Act 1967 s.3. If a police officer were to be negligent in acting to prevent a breach of the peace, and caused injury would this be regarded as exercising the general common law power, or the "specific" statutory power? [Is] arresting someone reasonably suspected of being in the act of committing an imprisonable offence not "truly public" because a private citizen can arrest in such circumstances? Or searching someone *with their consent*? This would leave arrest for *past offences*, and coerced searches, where only the police have power, a "truly public" activity.

*Two consultees were concerned about the scope of “truly public” as regards children’s homes*

2.109 The Association of Personal Injury Lawyers asked:

What are the principles that would apply to a children’s home run by the state as opposed to one run by a charity or private company – for example, Barnardo’s?

2.110 The Association of Child Abuse Lawyers expressed the same concern:

Would a child abused in local authority care therefore have a higher test of liability to overcome than a child abused in a Barnardo’s home?

*One consultee asked whether the proposals would apply to higher education institutions*

2.111 The Department for Innovation, Universities and Skills (now the Department for Business Innovation and Skills), inquired whether “Higher Education Institutions...count as public bodies”.

***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)***

#### SUMMARY

2.112 Twenty-one consultees offered their views on the “conferral of benefit” test. Six were in agreement with the test as formulated by the Law Commission, fifteen objected to it.

2.113 Those who expressed dissatisfaction with this part of the consultation paper were not all opposed to the need for a test of this kind *in principle*. More common was the suggestion that the wording – “conferral of benefit” – was defective, not least because it is too narrow to offer redress to obviously deserving claimants.

#### RESPONSES

*A few consultees took issue with the test as it is worded in the consultation paper*

2.114 Professor Stephen Bailey was of the view that the “conferral of benefit” test is “bedevilled by the same difficulties as the current law on breach of statutory duty and is unworkable”.

2.115 Colm O’Cinneide drew attention to the possibility that “benefit” could:

Readily be interpreted narrowly as requiring the conferral of some specific form of protection or support for a distinct group of individuals. This could rule out the imposition of liability in a case such as *Smith* ... [“benefit” needs to be] avoided and alternative wording used.

2.116 Professor Robert Stevens suggested that:

Under the law's present approach it is not enough that the legislation is intended to benefit individuals, it must be intended to confer a right upon them. Without a right, where is the wrong? ... [Therefore the Law Commission's scheme would] involve a remarkable expansion of liability.

*Some consultees identified difficulties with the application of the "conferral of benefit" test in the context of regulatory failure*

2.117 Zurich Financial Services stated:

[We] do not understand how the "conferral of benefit" test would operate in practice. Every piece of legislation is enacted in the public interest. The legislation relating to taxi licensing is intended to confer benefit on members of the public, as is any legislation regulating deposits at banks.

2.118 Beachcroft LLP argued that it was very hard to see how the test would work for regulatory bodies:

Is the regulation of a charity "intended to protect" the charity's interests or not? Or, if the [Medicines and Healthcare Products Regulatory Agency] grants a marketing authorisation for a pharmaceutical product, is that "intended to promote" the manufacturer's interests, or not? In each case, it seems to us that the answer is...no, the purpose of regulation is to serve the public, not to serve the interests of the regulated. But the point is unclear and bound to be litigated.

2.119 The Law Reform Committee and the Constitutional and Administrative Law Bar Association agreed that there is at present a gap in liability concerning:

Those functions that enable public bodies to authorise activities which are unlawful in the absence of their authorisation. Generally it is in this area that the law is deficient. A paradigm case of a gap that needs to be addressed...is the wrongful non-issue of a licence to engage in a remunerative activity. There are also problems where a public body unlawfully discharges its regulatory functions causing loss to those whom the functions were intended to protect. The Commission's proposals will not remedy these deficiencies in law. This is in part because of the requirement (which the Commission's proposals incorporate) that the legal regime in which the public body acted, or omitted to act, must be one intended to confer a benefit on the claimant (or a class of whom the claimant is a member). Regulatory schemes are not created by Parliament for the purpose of conferring a benefit or a privileged position on those who may be authorised to do things under them. Regulatory schemes are imposed to ensure that certain activities are only conducted by persons and/or in a manner that protects the public or certain members of it.

- 2.120 Roderick Bagshaw argued that in situations where the claimant “alleges that he would have been better off if the public defendant had better controlled the activities of some third party” the proposed scheme may result in a very significant extension of potential liability:

[This situation] raises particular problems where a particular regulatory scheme is intended to protect a category of vulnerable people but it is equally obvious that such a scheme can never protect *all* members of the category (eg building control will not catch all rogue builders, trading standards will not catch all rogue traders). Will the intention to benefit the category (with a simultaneous knowledge that all members cannot be benefited) count as a situation where “the legislative scheme objectively was intended to protect or promote the claimant’s interest”? If so, the extension of *potential* liability is likely to be very significant [as the issue of “serious fault” would have to go to trial].

*One consultee argued that “conferral of benefit” is ill-suited to be applied to schemes designed to protect a class of people, where the claimant is feared to be one of the types of individuals the scheme is designed to protect against*

- 2.121 Roderick Bagshaw mentioned by way of an example a case where the claimant’s name is unnecessarily entered on the child protection register, preventing him or her from working with vulnerable children:

In such cases it is, at best, awkward, to say that the scheme is intended to “confer a benefit” on the *suspect*.

*One consultee discussed section 39 of the Road Traffic Act 1988 and the scheme for distribution of housing grants*

- 2.122 Zurich Financial Services cited *Gorringe v Calderdale Metropolitan Borough Council*<sup>9</sup> and suggested that the duty under section 39 to provide a suitable programme of measures designed to aid road safety is “not justiciable, but could be said to confer a benefit to the public”.

- 2.123 Zurich Financial Services also stated:

Currently we would assume there is no private law remedy for breach of the statute, but under a conferral of benefit and serious [fault] there may be.

*One consultee discussed the example of an order restricting cattle movement*

- 2.124 Tom Cornford suggested that:

It is not the purpose of the relevant legislation to confer a benefit. But the harm to the farmer might arise (as it did in the real case, *Banks*) from breach of principles of procedural propriety whose purpose is to protect the interests of people, like the farmer, subject to the exercise of coercive governmental power.

<sup>9</sup> [2004] UKHL 15, [2004] 1 WLR 1057.

2.125 He also criticised the “conferral of benefit” test on the basis that it:

Overlook[s] the fact that in many cases, public authorities cause harm not by their failure to confer a benefit but by the wrongful exercise of their powers of coercion...[In EU law, it is argued] the rule of law breached need not be a rule contained in the EC Treaty or in legislation; it can be one of the general principles of law which govern the exercise of administrative power such as the principle of proportionality or legitimate expectations or non-discrimination...[The relevant category in English law would be] a rule of public law for the protection of the individual.

*One consultee considered the application of “conferral of benefit” to tax laws*

2.126 The Professional Contractors Group expressed its concern that the “conferral of benefit” test:

May operate in too restrictive a way, as outlined in paragraph 4.183 [of the consultation paper]. The tax system and the laws around [HM Revenue and Customs’] operations are not designed to protect taxpayers against pure economic loss, but to allow them to meet their lawful obligations. That [HM Revenue and Customs] should not cause the taxpayers loss is largely implicit rather than explicit in existing law...: this should not represent a barrier to claiming damages for pure economic loss under the “serious fault” regime.

*One consultee pointed out the implications of the test for the land registration scheme*

2.127 According to the Land Registry the proposals would require it to:

Review the Land Registration Act and Rules – to determine whether the underlying legislative scheme confers rights and benefits on the individual claimant.

***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)***

SUMMARY

2.128 Thirty-three consultees offered their comments on the operation of a “serious fault” regime. Eight responses did not foresee any significant problems, or agreed with the analysis set out in the consultation paper; twenty-five identified difficulties with the operation of the regime, or disagreed with the concept entirely.

2.129 Some consultees said that the serious fault requirement lacked justification in principle. Others also argued that the kind of factual investigation that would be involved in applying the serious fault test would detrimentally affect case management. If the courts were reluctant to dispose summarily of unfounded claims brought under the new regime, then the costs of subsequent disclosure and a full trial on the facts would be out of proportion to the issues at stake.

## RESPONSES

*One consultee suggested supplementing the test with a further requirement*

2.130 Beachcroft LLP said:

We would suggest adding to the list a heading which would require the court to consider the benefits to others of the action under challenge. It is clearly relevant to consider not only harm to the claimant but benefits to others.

*Some consultees believed the standard of liability has been set too high*

2.131 Discussing *Osman v UK*,<sup>10</sup> the Association of Personal Injury Lawyers stated that:

The [European Court of Human Rights]...soundly rejected the Government's argument that there was a requirement to prove "gross dereliction" or "wilful disregard" of duty".

2.132 The Association of Personal Injury Lawyers went on to submit that the "serious fault" proposals:

Would introduce a similarly rigid standard that is too high, goes too far and effectively elevates the burden of proof in tortious claims against a public body to a criminal standard rather than a civil one. For example, if a police driver driving under a "blue light" kills a pedestrian they will be held liable in tort...only if their standard of driving is such that it would be sufficient to sustain a charge of manslaughter... [the Association of Personal Injury Lawyers] believes this to be fundamentally wrong.

2.133 Duncan Fairgrieve asked:

Why is such a high hurdle required?...The crux [of the Law Commission's reasoning], that general negligence liability could adversely affect activities of public bodies, runs contrary to the conclusion in Annex B of the paper, which examines in detail the evidence of this very issue ("the impact of liability on public bodies"), and concludes that it is "simply not possible to make an accurate general statement as to the likely outcome of any given change in liability on a range of public bodies". It is therefore difficult to rely upon this reason to justify the new "serious fault" standard.

<sup>10</sup> (2000) 29 EHRR 245 (App No 23452/94).

2.134 Duncan Fairgrieve further argued:

In another section of the Consultation Paper, it is argued that following the “modified corrective justice” principle, there is a “moral case for limiting [compensation] to particularly serious conduct where the state is the respondent”. Again, this statement, and the appeal to morality, does not explain why the *Bolam* standard is of insufficient seriousness in professional negligence cases. Why is an additional standard of seriousness required?

*One consultee suggested borrowing the test from gross negligence manslaughter*

2.135 Mr Justice Silber suspected “it will be difficult in distinguishing when a ‘fault’ becomes a ‘serious fault’”. He asked whether consideration has been given to using:

The widely acclaimed test for gross negligence manslaughter which is that the defendant’s acts or omissions were “so reprehensible as to amount to gross negligence”?

*One consultee argued that there is a risk that application of the “serious fault” test would illegitimately extend the court’s power to determine priorities for public authorities*

2.136 Tom Cornford argued that in the Law Commission’s analysis factors (4) the cost and practicability of avoiding the harm, and (5) the social utility of the activity in which the public body was engaged would lead to:

A judgment by the court that one function was more important than the other, that given a choice as to which of the two activities to prioritise, the authority should choose the activity in relation to which there was a finding of liability...the inclusion of factors (4) and (5) as part of the new standard thus threatens to usurp the role of public law in determining the priority to be accorded the different activities of an authority and by so doing, to raise in a new form the problem that has for so long bedevilled the relationship between public law and negligence.

*One consultee suggested an alternative to “serious fault”*

2.137 Noting the Law Commission’s reasons for choosing the corrective justice rationale, Tom Cornford asserted that:

A much more defensible way of limiting liability would be to withhold a remedy where it could be shown that, despite the best efforts of the defendant authority, having to pay damages would harm the provision of services to the public. By contrast, to confine liability to only those cases in which there is outstandingly bad conduct on the part of the authority would lead to a remedy being withheld in cases in which there was no reason to suppose that granting it would harm such provision.

- 2.138 Tom Cornford suggested an alternative test based on public law unlawfulness. In this the limiting or controlling element was a power to withhold damages where to grant them would stultify the performance of the defendant authority's functions.

*One consultee was concerned that the proposals may discourage settlement in judicial review cases*

- 2.139 The Government pointed out:

A public body will often be willing to settle where it is clear that a claimant has good grounds for judicially reviewing its decision. But where a claim for damages is also made under the new scheme, the public body might well be more reluctant to admit wrong doing of any kind.

*Two consultees envisaged the test causing difficulties for the Administrative Court*

- 2.140 The Government was concerned that:

If the court has to assess a claim for damages, there may be complex issues of fact, which would lead the case to run on for some time.

- 2.141 The Association of Police Lawyers suggested that the Law Commission's proposals relating to damages in judicial review would:

Lead to a fundamental change in [the Administrative Court's] function with the risk that its review role would be undermined...the Commission's proposals would complicate the current system which, on the whole, works well. If the award of damages becomes routine the assessment of them, following an examination of live evidence to resolve factual disputes, would involve greater preparation, longer hearings, delay and increased costs.

*One consultee asked whether small damages claims could be dealt with by county courts*

- 2.142 The Land Registry argued that:

If the amounts [of damages] claimed are small, we cannot see why County Courts could not deal with claims for damages. Additionally, the process for instituting judicial review is complex and a simplified County Court claim may be more appropriate given the small amounts involved.

*A few consultees were concerned about the potential impact of the test on the civil courts' workload, as well as the costs and delay in dealing with allegations of serious fault*

2.143 The Government submitted that:

Under the current regime, there are many claims which can be rejected at a very early stage on the grounds that no duty of care is owed, for example, in the policing context. Under the Law Commission's proposed regime, it would be necessary to fight those claims to a much later stage – it is likely that most cases would turn on serious fault which might well have to be resolved with the submission of evidence, including in some cases, expert evidence. The need to continue to fight these cases to a later stage would create additional costs both for public bodies and also for the courts – and the diversion of resources on the part of public bodies would inevitably have an impact on other areas of work.

2.144 Professor Robert Stevens put forward the view that:

The “control device” of asking whether the public body is guilty of “serious fault” is, as a matter of policy, wholly inadequate to stem the flow of claims which would result from the enactment of these proposals. The modern approach of *Stovin* and *Gorringe*, as recently reasserted by the House of Lords in *Van Colle*...enables the court to strike out claims that public bodies have not conferred benefits upon individuals, absent a statutory right to the contrary. It is virtually always possible to argue that the failure to confer a benefit, such as the failure to paint a SLOW sign on a road, was serious. Actions will then have to proceed to trial, with a consequent ballooning of claims. A claimant will always be able to proceed to the stage of requiring a public body to make discovery of all material relevant to his claim, simply by asserting that the public body was seriously at fault in failing to confer a benefit upon him.

2.145 Paul Mitchell commented that:

The replacement of duty of care by serious fault as the control test for the liability of public authorities shifts the focus from a question of law (duty) to a question of fact (fault). The importance of that shift is that, whilst a claim can be struck out on the basis that the pleaded allegations show no duty of care, there is no striking out procedure for questions of fault.

*Several consultees questioned the analogy drawn with EU law*

2.146 Professor Robert Stevens drew a distinction:

Between serious culpability and the violation of an important duty or right. By serious fault the Paper seems to mean the former: a degree of blameworthiness greater than mere negligence. The ECJ jurisprudence concerns violation of important norms, not degrees of culpability higher than mere negligence. The European approach lends no support at all for what is proposed here.

2.147 Professor Carol Harlow did not see the parallel with EU law as “entirely exact”:

It is contestable whether Member State liability for non-transposition and implementation of EU law is in fact fault liability: many commentators see it as non-fault based. However this may be, the question normally asked today is “Did the Member State *manifestly and gravely* disregard limits on its discretion?”, a test based on judicial review, which links illegality to liability. Since the gravity test refers to *breach* not *damage*, it is of course capable of being interpreted as fault liability but the “sufficiently serious breach” test does not operate entirely as a fault test. [In the *British Telecom* case] the main reason why the action failed was...because the law was hard to comprehend. Often it is a test based on outcome: the more serious the damage, the more serious the breach...the test may be appropriate in cases of regulatory [liability] but, used more widely as a standard for breach of care, I have my doubts.

2.148 Roderick Bagshaw found the “serious fault” test ambivalent:

The paper appears to oscillate between an understanding of “serious fault” which sees it as a higher degree of fault than ordinary negligence (see, for example, Diagram 2 on p121) and an understanding similar to the EU concept of “serious breach”, where a serious *error of law* can constitute “serious fault” *even if* there was no fault in reaching that misunderstanding (for example, it was a result of apparently competent, but incorrect, legal advice)...*this* sort of “fault” is not currently covered by the tort of negligence. Thus the suggestion that the scheme only creates liability in some sub-set of cases where negligence could already be proved is misleading...Of course, a case can be made for compensating those who have suffered as a result of serious errors of law, but it is not a case that can be based on so-called “modified corrective justice”, because such liability *does not attach* to private individuals.

...In the seminar at the [British Institute of International and Comparative Law] I understood Commissioner Parker to confirm that the paper’s intention was indeed to allow liability to be based on *either* of these senses of “serious fault”...But liability for “serious fault” of the “serious error of law” type makes the nature of the proposed scheme very different from that suggested in, for example, Diagram 2 on p. 121, because *this* sort of “fault” is not currently covered by the tort of negligence. Thus the suggestion that the scheme only creates liability in some sub-set of cases where negligence could already be proved is misleading.

*One consultee thought that more prominence should have been given to comparative analysis*

2.149 Colm O’Cinneide noted that:

There is little analysis of how continental European systems approach the question of the tort liability of public authorities, or award damages in the context of administrative review actions. This is a significant gap, especially since many continental systems make provision for a more expansive approach to obtaining redress in the form of damages from public authorities than has been adopted in the UK, and the German and French approaches in particular have been influential in shaping the EU jurisprudence.

*One consultee discussed the position of the HM Revenue and Customs*

2.150 The Professional Contractors Group suggested that the proposals:

Represent an improvement in relation to the current position, but do not go as far as we would ideally like.

2.151 Mindful “that this change will be rolled out across all public bodies”, it suggested as a possibility the “combination of a ‘serious fault’ regime and a set of additional safeguards introduced specifically for [HM Revenue and Customs]”. One of these might be an “automatic compensation mechanism”:

When an investigation occurs and the taxpayer’s affairs are found to be in order, [HM Revenue and Customs] should be liable to make up any and all such losses, at the “standard” rates of the taxpayer’s average remuneration from their business ... [Another set of safeguards may consists in] a set of appeal rights, made available such that any action by [HM Revenue and Customs] may be appealed on grounds of reasonableness.

*One consultee made a case for a restitutionary measure of damages in certain instances*

2.152 The Law Reform Committee and the Constitutional and Administrative Law Bar Association noted:

Cases in which a public body has a statutory duty to provide a person (or class of person of whom the claimant may be one) with a benefit. This is an area in which the tendency has been to regard judicial review as a sufficient remedy, and to deny any claim in damages for any loss suffered, for any breach of duty. In many cases, the effect of this approach is merely to deny the person adversely affected by the breach of statutory duty compensation for any loss or damage which he or she may suffer as a result of the delayed performance of the duty which he or she could secure by a claim for judicial review...The lack of any liability in damages is even less acceptable where the public body has itself benefited financially through its own breach of duty.

In such cases there is a case for enabling a person who has been deprived of any benefit as a result of any breach of statutory duty to recover, as damages for that breach, the amount by which the public body would otherwise be enriched by its own breach of duty.

*Two consultees preferred a residual monetary remedy in public law*

2.153 Michael Fordham QC said:

There is no need for a superimposed framework of confining legal principle: no doubt, context will be everything. There is no cause for a legal precondition involving heightened legal impropriety. The relevant unlawfulness is the same unfairness, unreasonableness or unlawfulness which will have meant that the judicial review claim is being allowed and appropriate remedies are being considered. Requirements of “serious” breach of “manifest” error should be avoided. This is not domestic *Francovich*. Very importantly, it is misleading to refer to “damages” or “compensation”. This is not tort law. This is public law.

2.154 Similarly, Tom Hickman suggested an alternative to the proposed new power to award damages in judicial review proceedings:

The unfairness arising from the absence of a damages remedy could be simply corrected by conferring on the courts a discretionary power analogous to that under s.8 of the Human Rights Act 1998 to award damages where it is just and appropriate. Such awards would be modest, as shown by the Human Rights Act cases. Moreover, it could take account – as tort claims currently cannot – of the often disproportionate burden placed on public authorities where they are not the primary wrongdoer but where the primary wrongdoer is a man of straw or is insolvent / wound-up.

*Some consultees did not consider it anomalous that no damages were currently available in judicial review*

- 2.155 Beachcroft LLP strongly disagreed with the proposal to introduce a damages remedy into domestic judicial review:

We consider that the proposal proceeds from a number of fundamental misconceptions, principally the idea that there is an individual interest in lawful administration, and the assumption that such interest as there is requires financial compensation as a remedy...We are simply unmoved by the example given in paragraph 4.28 of the paper of the taxi driver who loses his licence and cannot receive financial compensation. The interest here is not the taxi driver having a licence, it is the effective operation of a licensing system that ensures that only suitable people are allowed to drive taxis. Yes, it is the taxi driver who suffers financial loss if his licence is revoked, but the scheme did not exist in order to provide him with an opportunity to make a financial gain. We would argue he has no more legitimate interest in the lawful operation of the scheme than do taxi users, other drivers, the local police, or for that matter the community at large. The fact that his harm is financial seems wholly irrelevant, other than that it means it is quantifiable.

- 2.156 Professor Robert Stevens said that:

The reason why damages are not currently available [as a remedy for judicial review] has not been understood. If I wish to claim damages, I must show that I have suffered a wrong. I must show that it is my rights which have been violated...When a claimant seeks judicial review, he is not standing upon his own personal or private right. He is enforcing a *public* duty. Just as my duty not to be cruel to animals is not owed to any particular person, *public* duties are not owed to specific individuals. An individual is given standing to enforce the public duty by judicial review, in the same way that individuals have standing to bring private prosecutions...So, where the claimant can in addition show that the breach of the public duty also constitutes a violation of his private rights he should be able to claim damages. The Administrative Court does have power to award damages where the public body's conduct has also violated a private right of the claimant [Supreme Court Act 1981, s 31(4); Civil Procedure Rules, r 54.3].

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

SUMMARY

- 2.157 Nine consultees responded to the question regarding causation. Six considered the Law Commission's approach satisfactory, three did not.
- 2.158 Observations on this issue were very limited and, with one or two exceptions, consisted in a "yes/no" answer.

## RESPONSES

### *One consultee distinguished between different sets of causation principles*

2.159 Tom Hickman considered that the consultation paper's treatment of causation:

Overlooks the fact that different causation principles are applied in relation to different torts. In misfeasance, false imprisonment and trespass all [losses] directly flowing from harm can be recovered. This is not the case in negligence where there are requirements of proximity and foreseeability.

This is fundamentally important because if the more restrictive test of recovery is meant, the ability to recover would be greatly reduced (eg in relation to regulatory failures).

### *One consultee was dissatisfied with our approach to causation*

2.160 Paul Mitchell argued:

The test of causation, although not central to the Commission's proposals, is presented so sketchily as to be misleading. There is a very important set of principles on when a chain of causation is broken, which are not mentioned at all. Also, remoteness is presented as an aspect of causation; that is not the orthodox understanding of the law.

### *One consultee agreed with the approach to causation as regards the private law scheme, but not as regards public law*

2.161 In relation to the public law scheme Beachcroft LLP argued that the approach is not satisfactory, for it would require the Administrative Court to consider complex factual issues, which would be:

A very significant change to the way in which claims are formulated and presented. Clearly this has very significant implications for public bodies in terms of the likely cost of defending claims as well as the distinct possibility, if not likelihood, that more detailed examination of the facts of individual cases in this way is likely to breed a more interventionist approach on the part of the administrative court to the substance of judicial review claims.

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

#### SUMMARY

2.162 Twelve responses contained mention of the discretionary nature of judicial review remedies. Eleven consultees were in favour of preserving this approach for damages, one was against.

2.163 As with the question concerning causation, this issue did not generate much comment; consultees frequently limited themselves to a brief indication of their opinion.

## RESPONSES

*One consultee did not believe that the system would be workable if an award of damages were made discretionary*

2.164 Mr Justice Silber did not agree that:

The discretionary nature of [the] judicial review remedy should be a pre-condition for damages in the public law context. Judicial review is not permitted where alternative remedies are available. Is a claim for the new tort to be doomed to failure because the defendant could argue that a claim could have been brought against him in negligence?

*One consultee urged that consideration be given to public funding*

2.165 The Public Law Project welcomed the proposal, but argued that:

Claimants who are publicly funded are least likely to benefit from any damages award due to the operation of the legal aid statutory charge, and to the fact that public funding is unlikely, in any event, to continue where the only outstanding matter is that of a modest award of damages.

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

***In the public law scheme;***

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

## SUMMARY

2.166 Consultees were not asked a specific question regarding pure economic loss. Instead, they were invited to comment on the matter at large. It would be artificial, therefore, to divide the responses into agree/disagree categories.

## RESPONSES

*Several consultees were critical of what they saw as a significant extension of liability*

2.167 Browne Jacobson LLP considered that permitting recovery in respect of pure economic loss could have a “catastrophic effect upon the finances of public bodies”:

The position of bodies, such as the National Health Service Litigation Authority, exercising its duties in respect of the pharmacy licenses, should be carefully considered. The potential for pure economic loss flowing from any finding under the scheme would be huge. In addition to that, having the threat of a damages award available, the pharmaceutical companies would take the health bodies responsible for licensing to task at every turn.

2.168 Professor Robert Stevens considered that:

No persuasive reason is given for the expansion of liability of public bodies so that all loss suffered by individuals should be potentially actionable.

2.169 Professor Robert Stevens did not agree that there is currently any “exclusionary rule” in respect of pure economic loss, arguing as follows:

Where my loss is not consequential upon the infringement of a right, i.e. where it is “pure”, I have no claim because I have suffered no wrong. It would require corrective justice to be completely abandoned, not modified, for this not to be true.

2.170 Professor Stephen Bailey was of the opinion that:

There should be no new free standing basis for the award of damages for economic loss outside existing categories.

2.171 However, Professor Bailey recommended one change:

Where the facts found by a court on an application for judicial review would be sufficient to justify a *recommendation* by an ombudsman for an award of compensation it should not be necessary for the matter to be reinvestigated from scratch by an ombudsman. If the point is conceded or obvious, the court should be empowered to make a declaration to that effect. Otherwise the papers should be referred to an ombudsman for consideration with any additional investigation undertaken as necessary.

*One consultee considered the position of HM Revenue and Customs*

2.172 The Professional Contractors Group argued:

Much of the difficulty caused to taxpayers by [HM Revenue and Customs] can be characterised in terms of pure economic loss: the need to buy insurance products and spend time dealing with [HM Revenue and Customs] investigations founded on false suspicions and basic misunderstanding of business practices counts as pure economic loss; in more extreme cases, businesses can face litigation costs (which may ultimately be recouped, but unless and until this is settled there are cashflow implications) and an inability to make investment in case they need additional funds to fight a tax case further, or settle a possible tax liability.

2.173 The Professional Contractors Group suggested that it is therefore fair and just that:

Compensation should be available for pure economic loss when that loss exceeds reasonable costs for complying with lawful tax taxpayer’s actions have caused loss to the Exchequer (that is, through the non-payment of tax owed in law) [HM Revenue and Customs] are empowered to charge penalties and interest.

# **PART 3**

## **RELATIONSHIP BETWEEN OMBUDSMEN AND COURT-BASED OPTIONS**

### **STAY OF COURT PROCEEDINGS**

*Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum? (paragraph 5.38)*

#### SUMMARY

- 3.1 Thirty-five responses commented on the stay provision. Twenty-four consultees agreed with the proposals, eleven disagreed.

#### RESPONSES

*A number of consultees gave their own reasons for supporting the proposal*

- 3.2 The Government agreed that:

There is merit in exploring further the statutory frameworks governing the ombudsmen ... it may be worth looking further at whether there are cases before the courts which would benefit from being stayed and referred to the ombudsmen for possible investigation. The Government would envisage that there would be only a limited number of such cases, and that a decision to stay proceedings for referral to an ombudsman would only be made with the consent of the parties. Further, the Government would envisage that acceptance of a case by an Ombudsman would mean that there could not be a further appeal to the courts if the complainant was unhappy with the Ombudsman's decision. In looking at these issues, it would be necessary to look carefully at projected costings, the implications for resources and how the proposals would work in practice. It would also be critical to...ensure that any new procedures could not be exploited by those wanting to create delay. This might require specific exemptions.

- 3.3 Mr Justice Sullivan wrote:

A significant proportion of certain types of claim in the Administrative Court would be equally well, if not better, dealt with by Ombudsmen. Alleged failures to properly assess/make provision for an individual Claimant's needs in the social welfare, health and education fields are obvious examples. In such cases, where the public body will continue to be responsible for providing a service, so that the parties will have to "live with each other" following resolution of the dispute, the corrosive effects of adversarial litigation are most unfortunate.

- 3.4 The Local Government Ombudsman agreed with the proposal, and suggested that “the effectiveness of such referral orders should, however, be reviewed after an appropriate period”. It argued, further, that:

The rules governing such referrals should make it quite clear that the claimant will only be permitted to return to the court on exhausting the LGO investigation procedure, and then only on a point of law. Claimants should not be permitted to seek the intervention of the court in relation to the Ombudsman’s ongoing investigation.

- 3.5 Richard Kirkham described the proposal as a “sensible solution” to the existing “bias in the system towards pursuing a dispute by way of judicial review”:

Thus, despite the Civil Procedure Rules being designed to encourage parties to pursue [Alternative Dispute Resolution], the 3 month time limit for judicial review often renders the ombudsman route an all or nothing option for the potential claimant.

*Some consultees considered whether the court’s case management powers were sufficient without the need for an explicit stay provision*

- 3.6 The Housing Law Practitioners’ Association were not convinced that:

The Courts require a specific power to stay proceedings pending a referral to the Ombudsman. The court’s current powers are sufficient to enable this to be done in an appropriate case.

- 3.7 Tom Hickman noted that “courts already stay claims”, but acknowledged that there is:

Value in having an explicit legislative power for the court to do so. A stay should generally be ordered on the papers at the permission stage and parties should be able to resist this at an oral hearing. Moreover the courts [could be conferred] an explicit power to order a stay at any stage of the proceedings for the matter to be considered by an Ombudsman...the court could stay a claim after determining the merits but before granting a final order. There may then be some possibility of an Ombudsman considering the issue of remedy and recommending compensation. That would bypass the bar on the courts awarding damages in judicial review claims [absent] a private law cause of action.

*Two consultees saw the proposals as creating a potential hierarchy of dispute resolution mechanisms*

- 3.8 Professor Carol Harlow was “not entirely convinced” that the proposed arrangements would work satisfactorily:

Although over the years some courts have attempted to fit ombudsmen into a hierarchy with courts standing at the top, the two systems are in reality very different in character and it would be a backward step indeed to push ombudsmen into the position now occupied by tribunals of “court substitute”.

3.9 Professor Mark Aronson noted that:

The Commission proposes integrating its court-based scheme into its Ombudsman-based scheme, with a requirement that plaintiffs make prior resort to the Ombudsman before proceeding to trial in court. On that basis, I suspect that the Commission's court-based scheme will evolve in practice [...] its new court-based compensation powers being used in a broad-brush way to enforce the Ombudsman's recommendations for ex gratia compensation.

***What problems do consultees see with the operation of the stay as described in paragraphs 5.31 to 5.37? (paragraph 5.38)***

*Several consultees did not see the ombudsman as an informal alternative to court*

3.10 Browne Jacobson LLP suggested:

Public bodies are very likely to engage lawyers to advise during the ombudsman's process especially if an officer's or professional person's judgment (and thus reputation and livelihood) is at stake...It is not easy for a complainant to articulate his or her complaint well before an ombudsman. The complainant is likely to have less support and guidance during this process. It is typically the more educated complainant whom we encounter before the ombudsman.

3.11 Zurich Financial Services argued:

Like employment tribunals, which were supposed to expedite hearings without lawyers (which does not happen), the reality is that parties would wish to be represented before the ombudsman...This would mean that there is very little saving either in time or costs compared with the current speeded up process.

3.12 At a seminar organised by the Advice Services Alliance, participants expressed concern about the power to stay. They felt that its use may lead to the claimant losing representation where the legal aid certificate does not extend to ombudsman work.

*A number of consultees adverted to the possibility that a complainant may not be willing to engage with the Ombudsman's investigation*

3.13 The Local Government Ombudsman agreed that:

The element of compulsion implicit in this proposal could mean that the claimant would be unwilling to engage with the ombudsman's investigation process. It is difficult to predict how much of a problem this would present in practice. But if an individual whose case had been referred to a Local Government Ombudsman (LGO) refused to cooperate with our investigation to the point where the investigation was no longer fruitful, the LGO would have to consider using general discretion to discontinue his or her involvement, and the matter would then return to court.

3.14 The Public Law Project argued:

An ombudsman's investigation is dependent on interviews with all the parties and usually results in proposals of a resolution on the basis of what the parties are likely to agree to. If one party has not even accepted that the ombudsman should investigate, this would seriously undermine the effectiveness and validity of the investigation and its conclusions.

3.15 The Land Registry considered the complaints process, which includes recourse to an Independent Complaints Reviewer, and argued as follows:

The Ombudsman will usually expect a complainant to have first been to the [Independent Complaints Reviewer] before taking the matter on for Ombudsman review. The Ombudsman's approach is to decline to review issues for which there is a statutory/judicial route for redress. It seems to be that part of the reason for this is to ensure that the Ombudsman's focus is on maladministration by public bodies as opposed to determining substantive issues of dispute or claims between parties...The proposals [regarding stay] could dilute this value. The role of the Ombudsman may be out of line with internal and independent complaints procedures. Parties through this proposal could be compelled to have their matters/issues...considered by the Ombudsman which may not be helpful as the [Independent Complaints Reviewer] and ombudsmen work best if the complainant participates in the process.

3.16 The Administrative Justice and Tribunals Council agreed that a stay provision would be useful, but added:

The ombudsmen should retain their discretion to decide whether or not to accept a complaint for investigation. The complainant's willingness to engage with the ombudsmen may be an influential but not determinative factor in the exercise of that discretion. The ombudsmen's discretion is an important check on use of the stay because a claimant's choice of forum should not be usurped in circumstances where they consider that an investigation is inappropriate.

*One consultee discussed homelessness appeals to the county court*

3.17 A collection of academics from York Law School said:

One area which appears to have been overlooked is appeal to the county court in homelessness cases. These used to provide a significant proportion of judicial review cases, but since 1996 have effectively been a form of judicial review in the county court. Homelessness decision-making is also often subject to complaint to the local government ombudsman. Some homelessness decisions do not fall within the appeal provisions and must still be judicially reviewed, yet it would seem anomalous for those to fall within a potential stay, while those going to the county court do not.

*A few consultees discussed the impact the power to stay may have on the Ombudsman's procedure and resources*

3.18 Mr Justice Silber agreed that the stay provision would be useful, and had only one reservation: "whether the Ombudsmen have the capacity and resources to take on the additional cases".

3.19 The Local Government Ombudsman considered, further, that:

Should have access to accurate and authoritative advice and information on the ombudsman's jurisdiction before deciding on a stay and referral. This is especially important where the jurisdiction of the ombudsman is discretionary, and the detailed practices of the public sector ombudsmen may differ. It would be a wholly undesirable outcome if the court referred a matter to an ombudsman, who then decided not to initiate an investigation on jurisdictional grounds.

## REFERENCES ON POINTS OF LAW

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

### SUMMARY

3.20 Twenty-eight consultees supported this proposal, one did not.

### RESPONSES

*Some consultees drew attention to the territorial remit of the Parliamentary Commissioner for Administration*

3.21 Regarding the territorial remit of the Parliamentary Commissioner for Administration, the Parliamentary and Health Service Ombudsman suggested that in relation to the Law Commission's proposals on stay and references, he or she should:

Engage with those responsible for the administration of the Courts in Northern Ireland and Scotland.

3.22 Professor Colin Reid referred to:

The odd constitutional position of the Parliamentary Commissioner for Administration...if the proposals...are accepted, when a Scottish taxpayer complains about the Revenue and Customs, would there be the power to refer the case to the courts in England?

*One consultee argued that exercise of the power to make references should not have to be funded by the claimant*

3.23 A collection of academics from York Law School suggested:

The ombudsman is the applicant in such cases and ... while the public sector body should if they wish to oppose the application fund their own costs, the normal outcome of such an application would be no costs order.

*Several consultees called for further consideration of how the process is expected to operate in practice*

3.24 Mr Justice Silber asked whether “a procedure [could] be adopted which is similar to the case stated procedure...?”.

3.25 The Public Law Project welcomed the proposal, adding:

The input of parties and the effect of such input will need to be considered further, given the usually greater resources available to defendants compared with claimants.

3.26 Cheshire Fire & Rescue Service expressed concern that, if a hearing is involved, there would be a “potential cost to a public authority in defending a point of law”.

3.27 At the seminar organised by the Advice Services Alliance, participants raised several issues about the reference process: the circumstances in which the Ombudsman would decide that a reference is or is not necessary; who would draft the reference and how; how the court would decide the point of law, ie independently or after an adversarial process; what would be the status of the court’s decision; the likelihood of an increase of judicial review claims against the Ombudsman; costs.

*One consultee disagreed with the proposal*

3.28 Zurich Financial Services said:

Arguments of law would require legal representation thus taking it outside the ombudsman remit.

3.29 Conversely, the Administrative Justice and Tribunals Council argued:

[The power] would serve to complement the ombudsmen’s functions and utility without compromising their non-judicial role. Complainants would not need to initiate separate proceedings specifically for the purpose of obtaining determination of unresolved or disputed points of law nor would they bear the cost of making referrals.

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

SUMMARY

3.30 Twenty responses discussed this issue. Fourteen consultees were in favour of the proposal for references to bypass permission; six were against it.

RESPONSES

*A number of consultees gave reasons for bypassing the permission stage*

3.31 Mr Justice Sullivan saw no need for a permission stage because:

The procedure would be more akin to an appeal by case stated. Once the case has been stated by the decision taker, there is no need to obtain the Court’s permission to pursue the appeal.

3.32 The Parliamentary and Health Service Ombudsman argued that:

If the process of seeking references is to function efficiently and without delaying the Ombudsman investigation unduly, it will be essential that the process of seeking a reference can bypass the permission stage.

3.33 Tom Hickman agreed on the basis that:

Issues would arise as to who would represent the parties and the Ombudsman in such a referral and who would pay for such representation.

3.34 The Local Government Ombudsman suggested an alternative:

Instead of imposing a permission requirement on ombudsman referrals to the court...there is a periodic review between the public sector ombudsmen and appropriate representatives of the Administrative Court so that any practical problems can be ironed out administratively.

*One consultee saw as essential the Administrative Court's ability to exercise docket control*

3.35 Mr Justice Silber felt strongly that:

Permission should be required before proceeding to the Administrative Court. This would overcome the risk that some Ombudsmen, who are not lawyers, might well refer to the Administrative Court inappropriate questions or ill-defined issues or hopeless applications. This would give the Administrative Court judge the opportunity to seek clarification or amendment of the case sent by the Ombudsman.

## **STATUTORY BAR**

***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? (paragraph 5.75)***

### SUMMARY

3.36 Two questions were asked in paragraph 5.75, so for ease of exposition they are treated separately. Thirty-one responses commented on the statutory bar proposal. Twenty-six consultees favoured modification as proposed; five objected to it.

## RESPONSES

*Some consultees pointed to potential resource implications of the proposal*

3.37 The Government was concerned that our proposals would:

Result in more complaints coming before the ombudsmen, with consequent resource implications both for the ombudsmen themselves and for public bodies. This needs to be carefully thought through and properly costed to enable the proposals to be considered by reference to objective assessment and on the basis of full facts...As regards the statutory bar, the Government considers that this is an important mechanism for preventing duplication between the courts and the ombudsmen...but nonetheless accepts that there may be confusion about when the existing discretion to disapply the statutory bar should operate.

3.38 Colm O’Cinneide considered that the Law Commission’s reforms regarding the ombudsman should be:

Accompanied by a wide-ranging review of the funding, status, profile and structure of the various ombudsman institutions. If ombudsmen are to play a similar role in the UK as they successfully do in the Nordic countries, a wholesale review of how they operate in the UK context is required.

3.39 On a similar note, the Association of Child Abuse Lawyers questioned whether:

The Government is likely to commit sufficient resources to the ombudsman scheme in order to deal with the huge influx of claims when the [statutory] bar [is removed].

*One consultee highlighted the territorial remit of the Parliamentary Commissioner for Administration*

3.40 The Parliamentary and Health Service Ombudsman considered it important that the “Law Commission’s final proposals should include the work of the Health Service Ombudsman [for England] and take account of its separate territorial remit”.

*One consultee argued that the current statutory bar in the Local Government Act 1974, s 26(6) relating to a right of appeal, reference or review to a statutory tribunal, and a right of appeal to a Minister will also need to be changed*

3.41 The Local Government Ombudsman said this would:

Give the [Local Government Ombudsman] more discretion, particularly in cases where the complainant may have resorted to a tribunal or exercised a right of appeal to a Minister.

*One consultee gave an example of how injustice can be caused to complainants falling in the jurisdictional gap between the Ombudsman and the court system*

3.42 Veronica Howard states that the Ombudsman should be able to

Consider a complaint where there are clearly issues that could not be addressed by the government body who had dealt with the complaint originally [in this case the Planning Inspectorate].

3.43 Veronica Howard's response relates to a "gap" encountered in the jurisdiction of the Local Government Ombudsman. Despite the fact that the Planning Inspectorate had been unable to deal with the part of the complaint concerning the way in which the local council had dealt with Veronica Howard, the Ombudsman declined jurisdiction in respect of that part. The Ombudsman considered that:

The fact that the statutory appeal does not and cannot cover all of the injustice claimed by the complainant does not provide, of itself, a reason for him to entertain your complaint.

***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)***

#### SUMMARY

3.44 Twenty-three responses agreed with the default position as proposed. One consultee considered that the proposal may result in considerable delay, especially in immigration and tax assessment cases.

#### RESPONSES

*Some consultees expressed concern about ombudsmen having a broad unstructured discretion to investigate*

3.45 The Government expressed a tentative concern about delay:

The Government wonders whether the proposals might be used by those who have an interest in pursuing litigation in order to create delay, for example, an illegal immigrant who is seeking to avoid removal or a taxpayer who is seeking to avoid paying tax. The proposals regarding the Parliamentary Ombudsman give rise to particular concern in this respect. Currently, the default rule is that the Parliamentary Ombudsman may not investigate a complaint where the complainant has or had a legal remedy. The Law Commission proposes to change this to a general interests of justice test that applies irrespective of whether the person has or had a legal remedy. The effect of this would be to give the complainant an additional avenue for redress (in this case, cost free to the complainant, although not to the public purse) which does not currently exist, and which might be used to create delay.

3.46 Mr Justice Silber suggested that there would have to be:

Clearly structured rules of discretion because otherwise there is a risk that parties would use both the ombudsman procedure and the courts with the obvious duplication of effort and resources as well as delay.

3.47 Professor Colin Reid agreed with the proposals, and added a similar proviso:

The proposal for a structured rather than wholly open discretion on this point also seems appropriate since in many cases use of the legal or statutory remedy will still be the strongly preferable option.

*Some consultees gave reasons for thinking that such concerns were misplaced*

3.48 The Local Government Ombudsman responded to such concerns as follows:

The paper refers to the risks of delay, duplication of effort and inconsistency. Ombudsmen are already alert to these issues and have a wide discretion not to initiate or to discontinue an investigation, and would use this to minimise any such concerns.

3.49 The Parliamentary and Health Service Ombudsman agreed with the default position, and argued further that:

The greater danger at present is that complainants will fall through the “remedy gap” rather than find themselves spoilt for remedial choice. In cases where it is clear either to the courts or the Ombudsman that a case has in fact been commenced in the wrong forum, the court’s ability to stay proceedings and the ability of the Ombudsman to exercise the residual discretion not to investigate will help avoid any duplication of jeopardy.

## **MP FILTER**

***We invite the views of consultees on our provisional proposal to abolish the MP filter. (paragraph 5.88)***

### **SUMMARY**

3.50 The general issue of abolition is dealt with first. Whether or not a dual system should replace it is considered second. Thirty-two consultees responded on the first issue, and all but one were in agreement with the proposal to abolish the MP filter in its present form.

3.51 Whilst strong support was expressed in many responses, reasons given by consultees largely reiterated the points made in the consultation paper.

## RESPONSES

*One consultee pointed to the continuing significance of the MP filter for the Parliamentary Commissioner for Administration's relationship with Parliament*

- 3.52 Professor Carol Harlow disagreed with the proposal for the following reasons:

The question of the "MP filter" has little or nothing to do with redress and reads as "tacked on" to a paper that deals with other matters...Whether a step should be taken which would undoubtedly have the effect of weakening the link between Parliament and its *Parliamentary Commissioner for Administration* is primarily a question for the House of Commons and more particularly the Public Administration Select Committee, to which the [Parliamentary Commissioner for Administration] in any event has full access.

- 3.53 On the other hand, the Public Administration Select Committee said:

We have long recommended the abolition of the MP filter, as it has been shown to be a barrier to access to the Parliamentary Ombudsman service. A clear majority of MPs favoured the abolition of the filter in summer 2004, according to the results of a survey that we and the [Parliamentary and Health Service Ombudsman] conducted jointly at the time.

***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)***

## SUMMARY

- 3.54 Twenty-four responses considered the alternatives. Sixteen consultees preferred a "dual system", eight favoured outright abolition.

## RESPONSES

*Several consultees preferred a dual system because it recognised the importance of the relationship between Parliament and the Parliamentary Commissioner for Administration*

- 3.55 The Parliamentary and Health Service Ombudsman suggested that the MP filter was:

At least in part, an acknowledgement of [the] close constitutional relationship between my Office and Parliament ... [A dual system would allow MPs to] retain, in partnership with the Ombudsman, an important part in the handling of their constituents' grievances.

- 3.56 The Public Administration Select Committee agreed with the “dual track” approach and suggest that:

There might perhaps be a case for extending this “dual track” approach to [the Parliamentary Ombudsman’s] work as Health Service Ombudsman, given that MPs’ constituency work increasingly extends to public service issues which are not a direct ministerial responsibility.

- 3.57 The Public Administration Select Committee stated that the Parliamentary Ombudsman:

Relies on [the Public Administration Select Committee], and on MPs more widely, to apply political pressure to the Government where it is unwilling to accept her recommendations. It is in the Parliamentary and Health Service Ombudsman’s interests to maintain a close working relationship with MPs, and to keep them aware of her work...without a notification requirement, the removal of the MP filter would mean that MPs would no longer automatically be aware of issues referred to the Parliamentary and Health Service Ombudsman by their constituents. There is...a case for such a notification requirement.

- 3.58 The Public Administration Select Committee suggested:

There should be a provision for complainants (as well as MPs) to opt out of the notification requirement...[The Law Commission] might consider whether MPs should have the option of being notified in cases where the Parliamentary and Health Service Ombudsman does not accept jurisdiction over a complaint, as well as in those cases where she does. This is in view of their wider interest in their constituents’ experience of public services, and in monitoring how the Parliamentary and Health Service Ombudsman performs her role.

- 3.59 Richard Kirkham argued:

The link between the Parliamentary Ombudsman and Parliament has been one of the main reasons for the success of the office, both in providing effective redress and adding to the system of accountability in the UK constitution. A large reason for the strength of this link is the MP filter, so to retain it, even if only in a weakened form, would be an important symbolic nod to the importance of the Parliamentary input into the ombudsman’s work.

For the same reason, I think it would be appropriate to require the Parliamentary Ombudsman to inform MPs of complaints received from their constituents.

*One consultee favoured the “outright abolition of the MP filter”, but added conditions that in appearance resemble a dual system*

3.60 Professor Colin Reid suggested placing two conditions on outright abolition:

- a) a requirement on the Ombudsman to notify MPs of non-frivolous complaints received and b) the potential for MPs to refer cases to the Ombudsman (with the complainant’s permission).

*A number of consultees did not see the need for a dual system*

3.61 Participants at the Advice Services Alliance seminar pointed out that there is already provision for a third party (including an MP) to make a complaint on behalf of another person.

## **PART 4**

### **EFFECT ON PUBLIC BODIES**

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

#### SUMMARY

- 4.1 The effects of imposing liability on public bodies were given close scrutiny in several responses, though there was little by way of quantitative analysis. The concept of administrative disruption was barely mentioned. The public law pilot scheme received majority support. However, few suggestions were made as to how it could be conducted.

#### GENERAL CONCERNS

*One consultee was anxious about the potential financial impact of any changes*

- 4.2 The Government identified what it saw as a very significant difficulty with the proposal, that is:

The potentially huge financial impact of any changes. As is stated in the consultation paper (para 6.9), there are no comprehensive figures setting out the present cost of providing redress, making it difficult to quantify the impact of amending the law. However, the sheer scale of the figures quoted (para 6.10) indicate the potential difficulties for the public purse...of particular concern given the severity of current problems with the financial services system are challenges to regulatory decisions.

*One consultee explored options for limiting the liability of public bodies*

- 4.3 The Public Administration Select Committee argued that public bodies are:

Indiscriminately exposed to society and thereby to potential claims for economic and other loss. You should consider closely whether the elements of the scheme that you set out could lead to successful claims against public bodies via the private law on an unaffordable scale. Might one option be that the courts could be allowed to take into account the amount of money being claimed, either on an individual basis or across a class of individuals, when deciding whether a particular case qualifies under your suggested scheme? For example, should courts have discretion to cap compensation in circumstances where full payment might cause a substantial diversion of resources? Or might it be better to give the courts a power to order compensation but leave it to the Government to establish and implement a compensation scheme where the costs are likely to be high?

*One consultee was troubled by the perceived lack of empirical evidence to support the proposals*

4.4 Professor Robert Stevens asserted that:

The proposals are not based upon any empirical evidence of a problem...No evidence is produced to show whether the delivery of public services will improve or worsen under the proposals for change. Diagrams (paragraphs 6.8, 6.14) are produced to consider the costs and benefits of these proposals, but these tell us nothing as they lack any scale, as is presumably inevitable without any attempt to gather data having been undertaken.

*One consultee cited the findings of a recent empirical study in support of the Law Commission's analysis in Part 6 of the consultation paper*

4.5 Drawing on a recently published research report,<sup>1</sup> Professor Maurice Sunkin concluded that its findings:

Reinforce the statement the Law Commission drew that research does not support "the claim that any imposition of liability would lead to an overly defensive strategy on the part of public bodies".

On the contrary both the quantitative and qualitative findings suggest that litigation may drive improvements in quality as measured by the government's performance indicators.

This, of course, is not to say that litigation and its consequences do not impose costs or cause disruption, but it does suggest that these effects may be exaggerated and that they do not necessarily impair the ability of public authorities to meet their broader performance goals.

*One consultee considered the potential impact of the proposals on the Land Registry*

4.6 The Land Registry noted that:

Damages would represent a separate though overlapping liability to indemnity under Schedule 8 of the Land Registration Act 2002...on current figures, the impact of damages may be minimal. Furthermore the tests suggested to satisfy payment of damages appear to present a fairly high threshold. That said a contingency budget would need to be established and administered.

<sup>1</sup> Maurice Sunkin, Lucinda Platt, Todd Landman, Kerman Calvo, *Impact of public law litigation on the quality and delivery of services provided by local authorities in England & Wales*.

## QUALITATIVE EFFECTS

*A number of consultees emphasised the advantages of judicially enforced pecuniary redress*

- 4.7 The Parliamentary and Health Service Ombudsman stated that:

It is frequently the payment of compensation that focuses the minds of public servants and leads to real learning and real improvements in public services.

- 4.8 The Public Administration Select Committee agreed with this assessment.

- 4.9 Some of the participants at the Advice Services Alliance seminar suggested that the courts, rather than ombudsmen, have the greatest effect on administrative behaviour. In their experience, the threat of legal proceedings alone has on occasion had the desired effect on local authorities. It was also argued that restitutionary damages, if made available, may remove the potential incentive for some public bodies to avoid compliance with their legal duties.

*One consultee gave an example of how the practices of public bodies can be affected in unforeseen ways*

- 4.10 The Association of Police Lawyers suggested that:

Although *Osman* did not give rise to a wave of litigation, it had a noticeable effect on the police working culture. Sometimes the mere risk of litigation improves working practices.

*One consultee did not see “defensive administration” as a significant problem*

- 4.11 Professor Michael A Jones said:

If the risk of liability causes potential defendants to consider, and take steps to avoid, negligently causing physical injury to others then the law achieves its primary purpose. The entitlement to compensation arises only on breach of the duty, but ideally the defendant should exercise that reasonable degree of care which would avoid breaching the duty in the first place. In other words, deterrence is a *perfectly proper and desirable* consequence of the rules on civil liability.

- 4.12 As to the “detrimental effects of ‘defensive practice’”, Professor Jones argued:

Since the tort of negligence requires only that defendants exercise *reasonable care*, it is difficult to demonstrate that defendants are required to exercise excessive care. If they do in fact exercise excessive care (and there is no empirical data to support such an assertion) then this is, arguably, simply an irrational over-reaction to the risk of claims. It is not clear why the irrational over-reaction of defendants should result in removing the primary rights of potential victims of negligence.

*In some recent judgments the courts have closely scrutinized public authorities' assertions as to defensive practices*

- 4.13 In *Van Colle*, Lord Brown discussed the possibility that the police may become over-zealous in pursuing potential suspects if a duty of care were imposed:

If liability could arise in this context (but not, of course, with regard to the police's many other tasks in investigating and combating crime) the police would be likely to treat these particular reported threats with especial caution at the expense of the many other threats to life, limb and property of which they come to learn through their own and others' endeavours. They would be likely to devote more time and resources to their investigation and to take more active steps to combat them. They would be likely to arrest and charge more of those reportedly making the threats and would be more likely in these cases to refuse or oppose bail, leaving it to the courts to take the responsibility of deciding whether those accused of making such threats should remain at liberty. The police are inevitably faced in these cases with a conflict of interest between the person threatened and the maker of the threat. If the police would be liable in damages to the former for not taking sufficiently strong action but not to the latter for acting too strongly, the police, subconsciously or not, would be inclined to err on the side of over-reaction. I would regard this precisely as inducing in them a detrimentally defensive frame of mind.<sup>2</sup>

*One consultee suggested that enhancing claimants' remedies against HM Revenue and Customs may lead to systemic benefits, whilst recognising the risks of "defensive administration"*

- 4.14 The Professional Contractors Group argued that:

More readily available redress, in which taxpayers could have more confidence, could encourage aggrieved taxpayers to obtain redress, which would in turn improve the confidence of taxpayers in the system.

- 4.15 The Professional Contractors Group suggested that there are presently "significant levels of general dissatisfaction" with HM Revenue and Customs, and:

The description of "street-level bureaucrats" at paragraphs B.49 and B.50 [of the consultation paper] tallies well with [HM Revenue and Customs'] officers already; it may well be therefore that legal changes would have little impact in the face of other pressures ... [but given the low base] any move would very likely have the effect of reducing the risk of harm to the taxpayer from [HM Revenue and Customs] action.

4.16 Still, the Professional Contractors Group noted that:

Defensive administration could, however, occur with deleterious effects: a risk-averse [HM Revenue and Customs] might respond by increasing its demands for information from taxpayers, or seeking changes to the law to reduce its complexity in a way that would result in general tax increases.

4.17 The Professional Contractors Group concluded as follows:

Redress mechanisms should not be designed with the primary intention of inciting behavioural change: for this to be achieved, structures, processes and cultures within the affected body should be changed directly.

*One consultee considered the effects of public sector insurance*

4.18 The Association of Child Abuse Lawyers noted that:

The availability of insurance is not dealt with in any great detail...but public bodies are often insured and so it is often not the taxpayer who is footing the bill. The scheme proposed by the Law Commission would operate as a windfall to insurers.

*One consultee considered the mechanisms whereby the relevant "law" is directed to the relevant decision makers*

4.19 The Citizens Advice Bureau emphasised the importance of effective feedback loops, ensuring that ombudsmen decisions and court judgments are channelled to the relevant decision-makers, so as to have a positive effect on administrative behaviour.

*One consultee highlighted the importance of collective actions and collective judgments as a form of redress*

4.20 The Citizens Advice Bureau suggested that these practices would reduce individual litigation and the role of contingency fee actors. It pointed out that another method for seeking redress on behalf of a pool of claimants is by way of a "super-complaint" mechanism, as contained in section 11 of the Enterprise Act 2002.

<sup>2</sup> *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225 at [132].

## QUANTITATIVE EFFECTS

*A number consultees explained the difficulties they envisage in calculating costs and benefits of reforms to public authority liability*

- 4.21 Professor Michael A Jones suggested that it is very likely that most quantitative information would be provided by public bodies “pointing out the effect on their resources of compensation claims”:

It is extremely doubtful that respondents will provide data on the quantitative and qualitative *benefits* of imposing liability for negligence. How many accidents have been avoided because defendants, mindful of their potential liability, have exercised a proper degree of care? How many lives have been saved? What social and economic costs have been avoided? This is not information that is readily available or easy to obtain, but it should be factored into any enquiry into possible reform of the law making it more difficult for claimants to succeed in respect of personal injuries.

- 4.22 The Association of Personal Injury Lawyers noted that:

In analysing the costs involved in implementing any of the proposals...one has to remember to add into the equation the long term effects of serious personal injury. If an injured claimant cannot recover compensation from a public body...then greater costs are going to be incurred by the state in looking after that injured claimant for the rest of his life.

- 4.23 On a similar note, the Association of Child Abuse Lawyers argued that the consultation paper:

Does not deal with the “hidden costs” [of the claimant being unable to obtain compensation] – personal injury/abuse victims who are injured as a result of the state’s “public only” functions and who are not compensated...will nevertheless need to resort to welfare benefits, local authority care services, NHS treatment etc and there will be an opportunity lost for the Department for Work and Pensions to recoup their expenditure on benefits paid.

*One consultee considered a potentially detrimental effect of the reforms on the police*

- 4.24 The Association of Police Lawyers considered that:

There is a real danger that the new statutory system would expand liability and divert resources from core police business.

***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)***

SUMMARY

- 4.25 Nine consultees gave their views on the pilot programme. Six consultees were – in principle – in favour of the proposal; three were against it. The other responses did not contain much detailed consideration of the matter.

RESPONSES

*One consultee doubted that there would be Parliamentary time to introduce a pilot programme*

- 4.26 The Government explained:

As the Law Commission notes, Government accounting rules would require a statutory footing for such a scheme. The Government questions whether it would be realistic to expect that Parliamentary time could be found for such legislation, given all the other pressures to legislate.

*One consultee was anxious that a pilot programme would raise false expectations*

- 4.27 The Government was concerned that:

The purpose of this pilot would be to gather evidence as to the efficacy of the policy, rather than (as would normally be the case) to test the mechanics of delivering a policy. There would therefore be a danger of raising expectations about the state of development of the proposals and how likely it would be that they would be introduced.

*Some consultees did not agree that the programme should be limited to central government*

- 4.28 Beachcroft LLP commented:

Central government departments are not representative of other public bodies in terms of the nature of claims, the way in which claims are formulated and handled and the subject matter of claims. Therefore the results of the proposed pilot would need to be treated with considerable caution. Further, knowledge that a scheme was a pilot would be likely to influence the behaviour of lawyers and judges within it. It seems unlikely that much useful information would be gathered.

- 4.29 Cheshire Fire & Rescue Service agreed with the idea of a pilot programme, but asked whether the results would be more useful if it was organised:

Not only in a few Central Government Departments, but across a small number, but a variety of public bodies as the issues may differ in different contexts.

*One consultee was opposed to a pilot programme on grounds of fairness*

4.30 Professor Robert Stevens stated it would be:

Unfair on the individuals adversely affected to use them, or more precisely their rights, as a means to an end in this way.

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

SUMMARY

4.31 Barely any detailed comment was made in the responses on this matter.

RESPONSES

*One consultee believed that the deleterious effects of administrative disruption could be overstated*

4.32 The Public Administration Select Committee argued that:

Administrative disruption is a genuine risk, but one that in our experience tends to be overstated by administrators, who can find it hard to implement reasonable but perhaps uncomfortable changes in their working practices and organisational culture.

*One consultee identified the diversion of resources from a public authority's core functions as one of the unfortunate effects of the risk of liability*

4.33 Beachcroft LLP said:

We do not recognise the essentially optimistic view taken of administrative disruption/defensive administration. We are certainly aware of public bodies whose procedures for carrying out their functions have to be very substantially over-engineered because of a willingness of claimants to feign inability to engage with the body, and a willingness of the administrative court to remit matters for consideration on procedural grounds. It should, but alas probably does not, go without saying that this over-engineering comes at a cost, namely time and money wasted on administration which could otherwise have been spent on the public body's core functions.

*One consultee considered it likely that in commercial judicial review the impact of a right to claim damages could be disastrous*

4.34 Beachcroft LLP stated:

Here doubtful public law claims are already in use in an attempt to frustrate regulatory action, the claimant knowing very well that even the most hopeless claim, if advanced with enough vigour, will put the public body to considerable time and expense to defend...The resources which can be tied up in these claims, and/or in reaching decisions which can be defended against the all-too-often unrealistic expectations of the administrative court, already exert a strong deterrent effect on public bodies "taking on" well financed private companies.

# PART 5

## MISCELLANEOUS

### THE PURPOSE OF INDIVIDUAL REDRESS MECHANISMS

*One consultee challenged our theoretical framework by stating that the justification for redress is the continuous improvement of public services*

5.1 The Government argued:

The question of when and how an individual should be able to obtain redress from a public body is an important one since it concerns the accountability of public bodies for their actions. In individual cases, redress may be appropriate to resolve a specific issue. But at a more fundamental level, it is about improving public services - the overarching purpose of redress policy is to ensure that public bodies learn from their mistakes and provide a better and more consistent service, thus benefiting the public as a whole.

*One consultee placed emphasis on dispute resolution outside the court*

5.2 The Government argued:

This comes back to the key issue of improving public service. As part of their accountability to the public, public bodies need to promote a mature, two-way dialogue on what has happened when an individual is unhappy and seeks redress. Litigation, although appropriate in some extreme circumstances, is generally not the best mechanism for achieving this. For the dialogue to work, the public body must be genuinely committed to listening to individuals and to delivering improvements. A threat of litigation, particularly large damages claims, could change the nature of the debate from an open one to a debate that is influenced by the legal ramifications.

### MODIFIED CORRECTIVE JUSTICE

#### SUMMARY

5.3 The theoretical discussion in Appendix A of the consultation paper was generally well regarded by consultees. Notwithstanding objections to *modified* corrective justice, the Commission's argument in favour of retaining the framework of *corrective* justice was widely endorsed.

5.4 A number of responses identified distributive justice as relevant to reforming the law on the liability of public authorities.

## RESPONSES

*One consultee applied basic principles of economics to public authorities*

- 5.5 Professor Michael A Jones drew on the general principle of economics that:

Wherever possible the economic activity that generates a cost should “internalise” that cost (i.e. have to pay the cost). In so far as activities create “externalities” they distort the market, in that others have to pick up the tab for their activities and so there is likely to be an overproduction of those goods/services...Compensation for injuries arising from road traffic accidents involving transport companies is then part of the price paid for the goods we all buy.

- 5.6 Professor Jones then applied this “polluter pays” principle to public authorities:

At its crudest, if it is in the public interest ([or maybe] taxpayers’ interest?) to perform a particular public service and in carrying out that service others are injured, there is no good reason that taxpayers should not pay the compensation to those who have been injured. It is simply part of the price of providing the service...It is one thing to say that there is a public interest in something happening or not happening, it is an entirely different matter to say that individuals injured by public officials *negligently* seeking to meet the public interest should have to bear the cost of the damage inflicted in the public’s name.

*One consultee did not agree that “modified corrective justice” has a role to play so far as private law is concerned*

- 5.7 The Association of Personal Injury Lawyers observed that:

Tort law is concerned with the protection of the rights of the individual and there is no justification for public bodies to be subject to a different scheme.

*Two consultees raised doubts about the reach of modified corrective justice*

- 5.8 Professor Robert Stevens stated that:

The Paper offers no persuasive argument as to why Dicey’s fundamental starting point of equality before the law should be departed from.

- 5.9 Professor Stevens then commented:

Corrective justice looks to the fairness as between claimant and defendant. The ultimate source of the funds with which payment is made by a public body which has committed a wrong is neither here nor there, just as it is with any other defendant...if we genuinely accepted that corrective justice is undermined because the taxpayer is the ultimate source of compensation, so that someone who has not committed a wrong is bearing the cost, why does this not dictate that liability for torts committed in the carrying out of public activities should be completely abolished?

- 5.10 The Association of Personal Injury Lawyers argued that the Law Commission had drawn a false distinction between a defendant who is a police officer driving under a “blue light” and an unqualified drink driver:

The consequences for the injured victim are exactly the same. Why, then, is there a moral case for limiting the liability of the police driver to particularly serious conduct, especially when they are a professional with a special skill, such that their standard of care should be much higher?

*Some consultees did not see corrective justice as the only relevant theoretical basis for determining the liability of public authorities in tort*

- 5.11 Professor Stephen Bailey argued that the:

Invocation of the principle of corrective justice may well be a necessary condition for recognition of tort liability, but it is not necessarily a sufficient condition.

- 5.12 Elaborating on this, Professor Bailey said:

It is not the case that all harm inflicted by D on C as a result of D’s fault gives rise to a claim. It is very well established that even though it can be argued that as between C and D it would be just for D (eg “a person at fault”) to compensate C (eg an “innocent victim”) for harm inflicted on him or her, nevertheless other considerations, such as the effect on third parties or the wider public interest, may make it inappropriate to recognise a liability in tort. Much (if not all) of the law on the duty of care in negligence reflects this...Many torts involve explicitly the balancing of competing interests worthy of protection (eg private nuisance; defamation). It is accordingly insufficient to invoke “corrective justice” as the sole basis for imposing tort liability. It is particularly doubtful to invoke it as a reason for *extending* public body liability by comparison [to] the liability of other defendants.

- 5.13 Paul Mitchell agreed with the consultation paper’s rejection of the economic analysis, but remained unsatisfied that:

This, in effect, left only corrective justice as the alternative...[The courts] think differently: at the fair, just and reasonable stage of the *Caparo* test the factors to be considered are not limited to those relevant to corrective justice, and in *White v Chief Constable of the South Yorkshire Police* [1999] AC 455 Lord Hoffmann expressly referred to the importance of distributive justice...if Parliament does take an interest in the subject, it seems unlikely that it will confine itself to corrective justice.

5.14 Developing a similar strand of thought, Professor Robert Stevens submitted that:

It cannot simply be assumed that it is appropriate that public funds should be distributed to those such as the farmer or taxi driver...There is a difficult question of distributive justice which must be faced. Would it be better for public funds to be used to make such payments, or would the same funds be better spent in other ways, such as upon more school books?

*Some consultees argued that the Law Commission had failed to provide any convincing theoretical basis for its proposals:*

5.15 On this subject, Annette Morris argued:

The principle of modified corrective justice is, in my view, a hollow one. The notion that corrective justice needs to be modified in the context of public bodies is informed by political views and pragmatic concerns but these are not discussed in any detail in the paper. I believe we would be much better to have an explicit debate about the politics of tort in relation to public bodies and the need for a pragmatic response.

5.16 Tom Cornford criticised the serious fault scheme on a similar basis:

The Law Commission's notion of fault lacks any determinate character; it is vacuous. This vacuity is connected with a failure of diagnosis. In describing what is wrong with the current law of administrative liability, the paper reaches no clear conclusion about what the deficiency consists in...The menu of factors propose[d] has an ad hoc quality...corrective justice is the principle that one who wrongfully causes harm to another has a duty to repair that harm. In order to arrive at the conclusion that corrective justice calls for a remedy in a particular case, one has to have a clear idea of which instances of causing harm are wrongful. This is precisely what the paper lacks.

5.17 Professor Michael A Jones also criticised our theoretical reasoning as being an inadequate justification for our proposals:

There are many bodies whose remit is to be concerned about the costs of providing public services, whether taxpayers get value for money, whether services could be more efficiently delivered, and so on. It never occurred to me that this was part of the Law Commission's remit. If the law creates obstacles to efficiency because it is outdated, or unprincipled, and therefore needs reform, that is one matter. However, to take the view that there should be reform of the law with a view to reducing the burden on public bodies, *simply because they are public bodies and financed by the taxpayer*, seems to me to go far beyond the proper remit of the Law Commission.

# APPENDIX A

## LIST OF CONSULTEES

- A.1 The following consultees responded to the consultation paper:
- (1) Ann Abraham (Parliamentary and Health Service Ombudsman)
  - (2) J D Abrams
  - (3) Administrative Justice and Tribunals Council
  - (4) Advice Services Alliance
  - (5) Professor Mark Aronson (The University of New South Wales)
  - (6) Association of Child Abuse Lawyers
  - (7) Association of Personal Injury Lawyers
  - (8) Association of Police Lawyers
  - (9) Roderick Bagshaw (Magdalen College, The University of Oxford)
  - (10) Professor Stephen Bailey (The University of Nottingham)
  - (11) Joint response of the Bar Council and the Constitutional and Administrative Law Bar Association
  - (12) Beachcroft LLP
  - (13) Birmingham City Council
  - (14) British and Irish Ombudsman Association
  - (15) Browne Jacobson LLP
  - (16) Professor Peter Cane (Australian National University)
  - (17) Lord Justice Carnwath
  - (18) Joint response of Jane and Stuart Carruthers
  - (19) Cheshire Fire and Rescue Services
  - (20) Citizens' Advice Bureau
  - (21) Commission for Social Care Inspection
  - (22) Tom Cornford (University of Essex)
  - (23) Department for Innovation, Universities and Skills

- (24) Margaret Doyle
- (25) Eversheds
- (26) Duncan Fairgrieve (British Institute of International and Comparative Law)
- (27) David Farningham
- (28) Financial Ombudsman Service
- (29) Michael Fordham QC
- (30) Neil Foster (The University of Newcastle, Australia)
- (31) Kevin Gray
- (32) Trevor Griffiths
- (33) Professor Carol Harlow (The London School of Economics)
- (34) Tom Hickman
- (35) Housing Law Practitioners' Association
- (36) Veronica Howard
- (37) Institute of Legal Executives
- (38) Ryan Iskandar
- (39) Professor Michael A Jones (The University of Liverpool)
- (40) Richard Kirkham (The University of Sheffield)
- (41) Land Registry
- (42) Legal Services Commission
- (43) Local Government Ombudsman
- (44) David Mayer
- (45) Merseyside Fire and Rescue Authority
- (46) Ministry of Justice on behalf of Government
- (47) Paul Mitchell (King's College London)
- (48) Tracy Morgan
- (49) Annette Morris (Cardiff University)

- (50) Mangala Murali
- (51) National Audit Office
- (52) NHS Litigation Authority
- (53) Colm O'Conneide (University College London)
- (54) Oswestry Borough Council
- (55) Professional Contractors Group
- (56) Professor Colin Reid (The University of Dundee)
- (57) Public Administration Select Committee
- (58) Public Law Project
- (59) Public Service Ombudsman for Wales
- (60) Public Service Ombudsman Watch
- (61) Resolution (formerly Solicitors Family Law Association)
- (62) Professor Francis Rose (The University of Bristol)
- (63) Denise Rowley
- (64) Shelter
- (65) Mr Justice Silber
- (66) Professor Lionel Smith (McGill University)
- (67) Professor Robert Stevens (University College London)
- (68) South Central Strategic Health Authority
- (69) South West Strategic Health Authority
- (70) Southwark Law Centre
- (71) Mr Justice Sullivan
- (72) Hugh Stoner
- (73) Professor Maurice Sunkin (The University of Essex)
- (74) Brian Thompson
- (75) Thompsons Solicitors
- (76) Weightmans LLP Solicitors

- (77) Welsh Assembly Government
- (78) Joint response from academics at York Law School
- (79) Zurich Financial Services

# APPENDIX B TABLE OF RESPONSES

	Duty of care analysis	Joint and several liability	Misfeasance	Statutory duty	"Truly public" test generally	"Conferral of benefit" test	"Serious fault" regime	Causation	Discretionary nature of JR	Stay provision	References on points of law	Bypass permission stage	Statutory modification	Default position	MP filter abolition	Abolition outright or "dual" system	Pilot scheme
Government		Agree					Disagree			Agree							
K Gray																	
V Howard										Disagree			Agree				
Land Registry																	
PCG	Agree		Agree	Disagree		Disagree	Agree								Agree		
APIL	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Agree		Disagree							
Weightmans		Agree	Disagree	Agree	Agree	Disagree	Disagree	Agree	Agree	Agree	Agree	Disagree	Agree	Agree	Agree	Dual	Agree
T Cornford	Disagree				Disagree	Disagree	Disagree										
Thompsons					Disagree		Disagree										
C Reid			Agree							Agree	Agree	Agree	Agree	Agree	Agree	Dual	
P Mitchell	Disagree				Disagree		Disagree	Disagree									
Resolution								Disagree									
BIOA	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree		Agree
S Bailey	Disagree	Disagree	Disagree	Agree	Disagree	Disagree	Disagree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Dual	
C O'Connell	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree		Agree								
ACAL	Disagree		Disagree	Disagree	Disagree	Disagree	Disagree			Disagree							
Fire & rescue																	
L Smith																	

	Duty of care analysis	Joint and several liability	Mistake	Statutory duty	"Truly public" test generally	"Conferral of benefit" test	"Serious fault" regime	Causation	Discretionary nature of JR	Stay provision	References on points of law	Bypass permission stage	Statutory bar modification	Default position	MP filter abolition	Abolition outright or "dual" system	Pilot scheme
Oswestry BC																	
SCSHA																	
D Rowley																	
P Cane																	
DIUS																	
Police	Disagree	Agree	Disagree	Agree			Disagree										
R Stevens	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree										Disagree
D Mayer										Agree	Agree	Agree	Agree	Agree	Agree	Outright	
SWSHA										Agree	Agree	Agree	Agree	Agree	Agree		
M Aronson			Disagree	Disagree	Disagree					Agree	Agree	Agree	Agree	Agree	Agree		
Sullivan J										Agree	Agree	Agree	Agree	Agree	Agree		
H Stoner										Agree	Agree	Agree	Agree	Agree	Agree		
LGO										Agree	Agree	Agree	Agree	Agree	Agree		
CSCI		Agree								Agree	Agree	Agree	Agree	Agree	Agree	Outright	
Birmingham		Agree	Agree	Agree	Agree	Agree	Agree	Disagree	Agree	Agree	Agree	Disagree	Disagree	Agree	Agree	Dual	
FOS							Agree			Agree	Agree	Agree	Agree	Agree	Agree	Dual	
A Abraham							Disagree			Agree	Agree	Agree	Agree	Agree	Agree	Dual	
Welsh Assly					Disagree	Disagree	Disagree			Agree	Agree	Agree	Agree	Agree	Agree	Dual	Agree
Carnwath LJ	Agree	Agree	Agree	Agree	Disagree	Agree	Agree	Agree	Disagree	Agree	Agree	Agree	Agree	Agree	Agree	Dual	
Silber J	Agree	Agree	Agree		Disagree	Agree	Disagree	Agree	Disagree	Agree	Agree	Disagree	Agree	Agree	Agree	Dual	
HLPA							Disagree			Disagree	Agree	Agree	Agree	Agree	Agree		

	Duty of care analysis	Joint and several liability	Mistake	Statutory duty	"Truly public" test generally	"Conferral of benefit" test	"Serious fault" regime	Causation	Discretionary nature of JR	Stay provision	References on points of law	Bypass permission stage	Statutory bar modification	Default position	MP filter abolition	Abolition outright or "dual" system	Pilot scheme
PASC		Agree								Agree	Agree	Agree	Agree	Agree	Agree	Dual	
PSOW										Agree	Agree	Agree	Agree	Agree	Agree		
ASA							Disagree			Disagree					Agree	Outright	
Shelter							Disagree			Disagree					Agree	Outright	
PLP <sup>1</sup>									Agree	Disagree	Agree		Agree	Agree	Agree	Outright	
Southwark LC										Disagree			Agree	Agree	Agree	Outright	
M Doyle										Disagree			Agree	Agree	Agree	Outright	
CAB										Disagree			Agree	Agree	Agree	Outright	
Eversheds								Agree		Disagree	Agree	Disagree	Agree	Agree	Agree	Outright	
NAO										Agree	Agree	Agree	Agree	Agree	Agree		
T Griffiths																	
LRC & ALBA	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree										
Carol Harlow		Agree	Disagree	Disagree	Disagree					Disagree					Disagree		
D Farningham			Agree								Agree		Agree		Agree	Dual	
PSOW										Disagree	Agree	Agree	Disagree		Agree	Dual	

<sup>1</sup> Takes into account the response PLP submitted in writing, and comments made on its behalf at the ASA seminar.

	Duty of care analysis	Joint and several liability	Mistake	Statutory duty	"Truly public" test generally	"Conferral of benefit" test	"Serious fault" regime	Causation	Discretion any nature of JR	Stay provision	References on points of law	Bypass permission stage	Statutory bar modification	Default position	MP filter abolition	Abolition outright or "dual" system	Pilot scheme
R Iskandar		Agree															
N Foster				Disagree													
R Bagshaw		Disagree	Disagree	Disagree	Disagree		Disagree			Agree	Agree		Agree	Agree	Agree	Outright	
York Law <sup>2</sup>	Disagree		Disagree	Disagree	Disagree												
M Sunkin		Agree	Disagree	Disagree	Disagree	Disagree	Disagree	Agree	Agree		Disagree	Disagree	Disagree				Agree
Zurich			Disagree	Disagree	Disagree	Disagree											
B Jacobson	Disagree		Disagree	Disagree	Disagree	Disagree		Agree	Agree	Agree	Agree	Agree	Agree	Agree	Agree	Dual	
AJTC																	
F Rose <sup>3</sup>	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree										Disagree
Beachcroft	Agree	Agree	Disagree	Disagree	Disagree	Agree	Agree		Agree								
NHS		Agree	Agree	Disagree	Disagree	Disagree	Disagree										
D Fairgrieve			Disagree	Disagree													
B Thompson																	
Cheshire F&R	Agree	Agree			Agree	Agree	Agree			Agree	Agree		Disagree				

<sup>2</sup> This is a joint response from D T Arvind, Professor Stuart Bell, Professor Caroline Hunter and Professor Jenny Steele.

<sup>3</sup> Agrees with points made by R Stevens.

	Duty of care analysis	Joint and several liability	Mistake	Statutory duty	"Truly public" test generally	"Conferral of benefit" test	"Serious fault" regime	Causation	Discretionary nature of JR	Stay provision	References on points of law	Bypass permission stage	Statutory bar modification	Default position	MP filter abolition	Abolition outright or "dual" system	Pilot scheme
R Kirkham										Agree	Agree		Agree	Agree	Agree	Dual	
T Morgan			Disagree	Disagree	Disagree			Disagree			Agree	Agree	Agree	Agree	Agree	Dual	
A Morris				Agree		Disagree					Agree						
ILEX	Disagree									Agree	Agree		Agree	Agree			
LSC		Agree	Agree						Agree	Agree	Agree	Disagree	Agree	Agree		Dual	
Carruthers	Agree			Agree							Agree		Disagree				Agree
M Jones <sup>4</sup>	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree	Disagree				Agree						Disagree
M Murali			Disagree	Disagree			Agree	Agree	Agree	Agree	Agree		Agree	Agree		Dual	Agree
T Hickman	Disagree		Disagree	Disagree	Disagree		Disagree	Agree		Agree	Agree	Agree	Agree	Agree		Dual	
M Fordham			Disagree	Disagree			Disagree			Agree	Agree	Agree	Agree	Agree		Dual	
J D Abrams							Disagree										

<sup>4</sup> In "full and complete agreement with the whole of [the responses of R Stevens and APIL]".

## APPENDIX C

### ACADEMIC AND JUDICIAL COMMENTARY

- C.1 The consultation paper was mentioned both in academic commentary and court judgments. Unless the author made plain an intention to treat the views expressed as a formal response, they did not form part of this analysis. Indeed, some views were published several months after the consultation deadline, which made their consideration impractical.

#### **Judicial mention of our proposals**

- C.2 The decision in *Van Colle / Smith* was addressed at paragraphs 2.38-2.41 above. At the end of his judgment Lord Phillips briefly referred to the consultation paper:

The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts. For this reason I have been pleased to observe that the Law Commission has just published a Consultation Paper No 187 on “Administrative Redress: Public Bodies and the Citizen” that directly addresses the issues raised by this appeal.<sup>1</sup>

- C.3 In *Savage v South Essex Partnership NHS Foundation Trust*<sup>2</sup> the House of Lords was concerned with a claim under Article 2 of the ECHR. In explaining the standard of liability of a hospital in whose care a detained mental patient had committed suicide, Baroness Hale addressed the argument that the *Osman* approach would encourage defensive practices and made passing reference to the Consultation Paper:

<sup>1</sup> *Van Colle v Chief Constable of the Hertfordshire Police, Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225 at [102].

<sup>2</sup> [2009] 2 WLR 115, [2008] UKHL 74.

Mr Faulks argued that applying the Osman / Keenan approach to tragedies such as this would work to the detriment of patients. It would encourage hospitals to be too restrictive of their patients' liberty for fear that they might commit suicide or otherwise come to harm. Remarkably little is known about the effect of potential legal liability upon the actions of public authorities generally: see Law Commission Consultation Paper No 187, *Administrative Redress: Public Bodies and the Citizen*, Appendix B, of 17 June 2008. But it is hard to understand how applying the Osman / Keenan approach in these cases can add to the hospitals' difficulties. They already face potential liability in negligence if they fail to take reasonable care of their patients. The Osman / Keenan test is different from and in practice more difficult to establish than negligence.<sup>3</sup>

### **Academic commentary on our proposals**

C.4 Several articles discussing our proposals were formally submitted as consultation responses:

- (1) M Fordham, "Monetary Awards in judicial review" [2009] *Public Law* 1;
- (2) T Cornford, "Administrative redress: the Law Commission's consultation paper" [2009] *Public Law* 70;
- (3) R Kirkham, "Quiet Moves Towards Proportionate Dispute Resolution: The Law Commission's Paper on Administrative Redress" (2008) *Journal of Social Welfare and Family Law* 30(2), 163.

C.5 Other pieces, which have not considered in the analysis, include the following:

- (4) C Brasted, J Potter, "Damages in Judicial Review: The Commercial Context" [2009] *Judicial Review* 53;
- (5) J Morgan, "Policy reasoning in tort law: the courts, the Law Commission and the critics" [2009] *Law Quarterly Review* 215;
- (6) L Blom-Cooper, "When the private lawyer should go public" [2009] *Public Law* 195;
- (7) S Lawson, "Redress in the balance?" (2008) *Law Society Gazette*, 27 Nov, 10

<sup>3</sup> *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115, [2008] UKHL 74 at [99].

- C.6 Sir Louis Blom-Cooper's Comment in *Public Law* evaluates the House of Lords' decision in *Jain*<sup>4</sup> (see paragraph 2.201 above), and suggests that the consultation paper ought to have prompted a modest extension in the duty of care owed to the claimants:

Lord Scott might have been further prompted to develop that common law remedy with a reference to the Law Commission's consultation paper...in which the Commission addressed the question whether the Administrative Court should be able to award a monetary remedy to a successful judicial review claimant. The Commission's answer was an unequivocal yes. That prompting might have tipped the scales in favour of a modest change in tort law. Despite their Lordships' inclination in *Watkins v Secretary of State for the Home Department* against a development of public law tort, it might have tempted their Lordships (as developers of the common law) to reverse the Court of Appeal's dubious decision in *Martine v South East Kent Health Authority*.<sup>5</sup>

- C.7 The article by Brasted and Potter is an attempt to highlight the impact our proposals may have in the field of "commercial judicial review".
- C.8 Morgan evaluates the policy reasons given in *Smith* for refusing to impose a duty of care on the police. Whilst criticising the House of Lords' reliance – in the absence of evidence – on "essentially empirical claims" about the risk of adverse behavioural impact of liability, Morgan does not suggest that policy arguments are unsuitable for judicial determination:

The real question requires a *comparison* of the judicial and legislative processes' suitability for handling such arguments. The Law Commission's evident difficulty in estimating the impact of its proposals for reforming public authority liability throws into doubt any assumption that the legislative process must necessarily be superior. Indeed, the wider criticism of regulatory impact assessments shows a pervasive problem across Government, and not an unusual failing by the Law Commission. The judicial consideration of policy arguments anyway seems unavoidable, in the real world where law reform cannot be the concern of Parliament alone.<sup>6</sup>

<sup>4</sup> *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853.

<sup>5</sup> L Blom-Cooper, "When the private lawyer should go public" [2009] *Public Law* 195, 198.

<sup>6</sup> J Morgan, "Policy reasoning in tort law: the courts, the Law Commission and the critics" [2009] *Law Quarterly Review* 215, 221.

C.9 Stephen Lawson's article summarises some of the points made in the responses of the Association of Personal Injury Lawyers and Resolution, concluding:

Never before has it been suggested that the rights of an innocent victim should be affected by whether the wrongdoer is a government body or a private individual. In the consultation, the commissioners also appear to suggest that the state should have a special privileged position whenever there are two "wrongdoers", with the state not being jointly and severally liable for paying compensation to victims.

In the interests of justice — as opposed to saving the government money — it is to be hoped that the commissioners will be persuaded by the powerful submissions made on behalf of citizens by bodies such as APIL and Resolution.