

**The Law Commission**  
Consultation Paper No 187

**ADMINISTRATIVE REDRESS: PUBLIC  
BODIES AND THE CITIZEN**

**A Consultation Paper**



# THE LAW COMMISSION

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 17 June 2008, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on its proposals before 7 November 2008. Comments may be sent either –

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by email to the above address, in any commonly used format.

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

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

<sup>1</sup> Professor Elizabeth Cooke was appointed a Law Commissioner with effect from 3 July 2008, in succession to Mr Stuart Bridge. This consultation paper was finalised on 17 June 2008.

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# **PART 1**

## **INTRODUCTION**

### **INTRODUCTION**

- 1.1 This Consultation Paper deals with the question: when and how should the individual be able to obtain redress from a public body that has acted in a substandard manner?

### **HISTORY OF THE PROJECT**

- 1.2 The origins of this project lie in the consultation exercise we undertook in preparing our Ninth Programme of Law Reform.
- 1.3 As a part of this exercise, we published a discussion paper, Monetary Remedies in Public Law, in October 2004.<sup>1</sup> The Ninth Programme was published in March 2005, following approval by the Lord Chancellor. The Ninth Programme made provision for a scoping study to be undertaken as a preliminary step to a substantive law reform project. The scoping paper, Remedies against Public Bodies,<sup>2</sup> was published in October 2006 and sought to delineate the scope of the project.

### **INITIAL CONSULTATION**

- 1.4 As this project is directly concerned with the liability of public bodies, we recognised during the preparation of this Consultation Paper that it was important to conduct early discussions with public bodies across central and local government.
- 1.5 During autumn 2006, we set up a government contact group comprising representatives from a number of government departments, the Local Government Association and the police. Meetings with the contact group helped us to understand how the current law affects public bodies and what the effect of any reforms might be.
- 1.6 In autumn 2007, a draft Consultation Paper was circulated within the government consultation group for comment from interested public bodies. The feedback received from this process raised the specific concerns that any changes to the current regime for liability in tort or judicial review could lead to “defensive administration” by public bodies and cause an unjustifiable expansion in government liability.
- 1.7 This Consultation Paper seeks to address these concerns within the context of creating a clear, simple and just system of redress for individuals who have suffered loss due to substandard administrative action.
- 1.8 To further our understanding of alternative mechanisms to court-based remedies, we have met the Parliamentary Commissioner for Administration, the Welsh Public Service Ombudsman and the Local Government Ombudsman to discuss

<sup>1</sup> Monetary Remedies in Public Law: Discussion Paper (11 October 2004).

<sup>2</sup> Remedies against Public Bodies: A Scoping Report (10 October 2006).

issues relating specifically to the relationship between ombudsmen and the courts.

- 1.9 We also had the advantage of a well-attended seminar with a range of academics on 26 April 2007. In addition, Justice David Ipp of the New South Wales Court of Appeal kindly agreed to speak at a seminar organised in association with the London School of Economics on 12 March 2008. Justice Ipp, who was responsible for the report that preceded the reform of negligence in Australian jurisdictions in 2002, spoke on the current state of negligence laws in Australia.
- 1.10 We would like to record our particular thanks to Donal Nolan and Tom Cornford, both of whom very helpfully gave us access to unpublished material.<sup>3</sup>

### **RESPONDING TO THIS CONSULTATION PAPER**

- 1.11 This Consultation Paper deals with issues of vital importance to public bodies and the public at large. The question of when individuals should be able to obtain redress from public bodies necessitates fine balances of public policy and justice.
- 1.12 In this Consultation Paper, we suggest various options for reform which appear to us to offer a principled and balanced way forward. These are difficult issues. The proposals we present are tentative and provisional. Others will prefer to see the balances between public and private interests struck in different ways. Even those who agree with the broad thrust of our approach will see different ways of working out the details. We will be undertaking a wide consultation process in order to gather as many different views and information as possible. Details of how to respond can be found on the inside front page.

<sup>3</sup> D Nolan, "The Reach of Breach: Breach of Duty as a Control Mechanism in Negligence" (forthcoming); T Cornford, *Towards a Public Law of Tort* (forthcoming).



## **PART 2 OVERVIEW**

- 2.1 At the outset, we wish to emphasise that everything contained in this Consultation Paper is provisional and depends on the responses to consultation.
- 2.2 This project examines the mechanisms through which claimants can obtain redress from public bodies for substandard administrative action. In undertaking this project, we have been guided by two fundamental conclusions. The first is that, in principle, claimants should be entitled to obtain redress for loss caused by clearly substandard administrative action. The second is that special consideration should be given to the role played by public bodies when considering when and under what terms they should be liable for such losses.
- 2.3 Part 3 starts the discussion of redress by analysing the various mechanisms currently available for aggrieved citizens who are seeking redress for substandard administrative action. We divide these mechanisms into four broad pillars of administrative justice. The first pillar consists of internal mechanisms for redress, such as formal complaint procedures. The second pillar is composed of external non-court avenues of redress, such as public inquiries and tribunals. The third pillar consists of the public sector ombudsmen. Finally, the fourth pillar is formed by the remedies available in public and private law by way of a court action.
- 2.4 Our general view is that, while the vast majority of complaints are handled effectively in the first three pillars, there are a comparatively small number of “residual” complaints where the involvement of the courts is necessary. Therefore it is vital to consider the appropriateness and effectiveness of court-based remedies.
- 2.5 The analysis of court-based remedies is divided between those available in judicial review and in private law. In private law, we focus on the torts of misfeasance in public office, breach of statutory duty and negligence.
- 2.6 Part 4 builds on the analysis in Part 3 to highlight certain defects in the current law relating to court-based remedies. In judicial review, we consider that it is incorrect that damages are available in situations covered by EU law and by the Human Rights Act 1998 but are not available in other situations solely covered by domestic law.
- 2.7 In private law, we consider that the current situation is unsustainable. The uncertain and unprincipled nature of negligence in relation to public bodies, coupled with the unpredictable expansion of liability over recent years, has led to a situation that serves neither claimants nor public bodies. Furthermore, we believe that recent developments in the torts of misfeasance in public office and breach of statutory duty render them unsuitable in relation to public bodies in the modern era.

- 2.8 In light of this, we suggest that there is a strong argument for the reform of court-based administrative redress in both public and private law. In developing the structure of potential reform, we have drawn heavily on the principle of modified corrective justice. By “modified corrective justice”, we mean a model of “corrective justice” that properly reflects the special position of public bodies and affords them appropriate protection from unmeritorious claims.
- 2.9 Part 4 goes on to suggest specific reforms of court-based redress in both public and private law. This would involve the creation of a specific regime for public bodies based around a series of individual elements. At the core of these individual elements would be a requirement to show “serious fault” on the part of the public body. We feel this would properly address the concerns of public bodies and the needs of claimants.
- 2.10 We provisionally suggest that damages should be available in judicial review if the claimant satisfies the elements of conferral of benefit, serious fault and causation. However, an award of damages would serve only as an ancillary remedy in judicial review and could only be claimed alongside the prerogative remedies. In keeping with other remedies available in judicial review, damages would be discretionary in the public law scheme.
- 2.11 Our suggested approach in private law is to place certain activities, which can be regarded as “truly public”, in a specialised scheme. Within this scheme, the claimant would have to satisfy the same requirements as the public law scheme in order to establish liability. The general effect of these reforms would be to restrict liability in some areas and widen the potential for liability in others. This reflects our attempts to strike a balance between the following competing demands:
- (1) Setting the boundaries in which citizens may obtain redress where they are subject to serious substandard administrative action; and
  - (2) Appreciating that public bodies are subject to a wide range of competing demands and are thus in a special position. This means that imposing general negligence liability may not be in the interests of justice as it could adversely affect the activities of the public body and therefore harm the general public.
- 2.12 Cases that do not satisfy the “truly public” test would be determined by the ordinary rules of negligence.
- 2.13 The other significant reform we suggest in Part 4 is to modify the operation of the general rule of joint and several liability in private law as it applies to public bodies, since it can operate in a particularly unjust way. For example, a failure in a public body’s regulatory oversight is often not the direct cause of the claimant’s loss, which may be the wrongdoing of another, but the public body may have to bear the loss in its entirety.
- 2.14 Allowing for a relaxation of the rule where the respondent is a public body will allow for an equitable apportionment of damages. After the requirement to show serious fault on the part of the public body, this constitutes a further limitation of liability. In addition, the normal rules relating to contributory negligence would

apply, which would allow for an award to be reduced if the claimant was partly to blame.

- 2.15 The object of these reforms is to improve the public and private law systems to ensure they appropriately reflect the special nature of public bodies and balance those considerations with the interests of claimants. However, improving the court-based system is only part of this project. The other significant part is to facilitate the resolution of cases through non-court mechanisms, consistent with the Government's commitment to alternative dispute resolution.
- 2.16 As we note in Part 3, the public sector ombudsmen are an important pillar of administrative justice in their own right. While internal complaint mechanisms resolve a huge amount of individual cases, the ombudsman can undertake large-scale investigations into systemic issues and make findings and recommendations that can effect widespread administrative change. As such, the ombudsmen can play a crucial role in improving administrative action to the benefit of both public bodies and claimants.
- 2.17 In order to encourage the role of the ombudsmen in providing administrative redress, Part 5 makes two main suggestions for reform. First, we suggest the creation of a power to stay actions, encouraging claimants to submit suitable claims to the ombudsmen before attempting to obtain a legal remedy through the courts. Second, we suggest that access to the ombudsmen be improved by modifying the "statutory bar" in relation to all ombudsmen and removing the MP filter in relation to the Parliamentary Commissioner for Administration (Parliamentary Ombudsman).
- 2.18 We recognise that any changes to the liability regimes for public bodies have the potential to cause concern to both claimants and public bodies themselves. In Part 6 we address some of these concerns by considering the potential costs and benefits for public bodies. We also draw on research contained in Appendix B to address concerns that liability leads to defensive practices. Lastly, Part 6 notes the range of options available to government if there is particular concern relating to liability exposure in specific areas. These would include the possibility of statutory immunities, such as that which exists for the Financial Services Authority under section 102 of the Financial Services and Markets Act 2000, or statutory caps for individual claims.
- 2.19 Unfortunately, in the absence of reliable empirical data in this area, what Part 6 cannot do is to quantify the resource implications of our suggested reforms. The lack of empirical data in this area is of particular concern to the Law Commission and a specific request for information on the possible consequences of changes in liability is made in Part 6.
- 2.20 In summary, the substance of the reforms proposed by the Law Commission are found in Parts 4 and 5, with Part 3 providing the broader context of the project. For convenience, Part 7 sets out the consultation questions in a single place.

# **PART 3**

## **THE CURRENT POSITION FOR REDRESS**

### **INTRODUCTION**

- 3.1 In the scoping paper, Remedies Against Public Bodies, published in October 2006, the Law Commission set out the central question to be addressed in this project: when and how should the individual be able to obtain redress against a public body that has acted wrongfully? In seeking to address some of the issues raised by that question, this Part considers the variety of mechanisms currently available for individuals claiming redress from public bodies. In broad terms, we will consider four pillars of administrative justice.
- 3.2 Consistent with the government's current emphasis on internal complaint handling and alternative dispute resolution methods, the first mechanism to be considered concerns internal complaint schemes. These are seen as providing an informal, efficient and inexpensive resolution of complaints for both the complainant and public body involved.
- 3.3 The second pillar of administrative justice considered in this paper is that provided by tribunals and, occasionally, public inquiries. These external mechanisms for administrative review are currently being reformed by the Tribunals, Courts and Enforcement Act 2007.
- 3.4 The third pillar to be considered covers the public sector ombudsmen. Although they could be seen as falling within the second pillar, as they too offer a non-court based form of redress, it is our view that the nature and significance of the ombudsmen are such that they should be seen as a system of justice in their own right.
- 3.5 The fourth, and final, pillar of the administrative justice system is the courts. While the first three pillars of redress are vital to providing an effective system of administrative accountability, these non-court avenues will not be able to provide appropriate redress in all cases. In practice, there will be cases that for various reasons require the court's attention.
- 3.6 Before turning to an examination of these mechanisms for obtaining redress, it is important to consider two preliminary questions. First, what is the impetus behind the need to provide for redress? And second, why is it important to consider non-court based remedies? These questions are addressed below.

### **GENERAL PRINCIPLES OF GOOD GOVERNANCE AND ACCOUNTABILITY**

- 3.7 The impetus providing redress to claimants for unlawful or negligent administration lies in the aims of improving administrative action and decision-making, promoting good governance and achieving accountability and transparency in public administration. These aims are consistent with the Government's current Service Transformation Agenda, the reform programme

designed to raise standards of service, reduce inequalities and increase responsiveness to users.<sup>1</sup>

- 3.8 Complaint handling plays a vital role in achieving these goals. Receiving, investigating and resolving complaints has the potential to expose systemic failures in administrative behaviour and to improve shortcomings in the standard or responsiveness of service delivery. The provision of effective mechanisms for redress is also an integral part of good governance and such mechanisms should be subject to the same high standards of responsiveness, accountability and transparency as administrative action as a whole. In this sense, providing an effective system of redress to claimants is not just *consistent* with good governance and administrative accountability, it is a *manifestation* of them.

### **BENEFITS OF NON-COURT REMEDIES**

- 3.9 Complaints will best fulfil their roles in redressing citizens' grievances and improving administration if there are suitable internal and external review mechanisms in place to deal with them. While courts are one form of external review, in many situations they are not the most appropriate mechanism to meet these twin needs.
- 3.10 First, court-based systems do not always offer the types of remedies or solutions desired by the claimant. Other external review and complaint-handling mechanisms can provide more appropriate and tailored remedies for claimants. Secondly, non-court dispute resolution mechanisms, particularly ombudsmen, can be more effective at highlighting systemic administrative problems and therefore can have a greater impact on the quality of public service delivery than the courts. Thirdly, court-based systems can be expensive and even more time-consuming.

### **Achieving claimants' objectives**

- 3.11 The reasons why complaints are made are complex and sector-specific.<sup>2</sup> While financial compensation is an important motivating factor, studies show that in practice, claimants often have a hierarchy of objectives. In many cases, in addition to monetary redress, claimants seek reassurance that their particular case has been given appropriate consideration and that the law has been applied correctly and fairly.<sup>3</sup>
- 3.12 Complaints can be motivated by a desire to obtain recognition of the fact that the complainant has been mistreated. Parallels may be drawn with empirical research on clinical negligence litigation, which has shown that many individuals who have been poorly treated simply want an investigation into the mishandling

<sup>1</sup> D Varney, *Service transformation: A better service for citizens and businesses, a better deal for the tax payer* (2006) p 3.

<sup>2</sup> Research suggests that claimants are less likely to be interested in compensation in cases concerning clinical negligence, children, discrimination, unfair police treatment and immigration than in cases concerning welfare benefits, consumer, personal injury and money and debt claims. See: P Pleasance, A Buck, N Balmer, R O'Grady, H Genn, M Smith, *Causes of Action: Civil Law and Social Justice* (2004).

<sup>3</sup> R Berthoud and A Bryson, "Social security appeals: what do the claimants want?" (1997) 4 *Journal of Social Security Law* 17, 38.

of their case and, where appropriate, an explanation and an apology.<sup>4</sup> A number of studies have shown that for the majority of claimants, what is really at issue is an opportunity to express dissatisfaction or to voice a grievance, without actually requesting a specific outcome.<sup>5</sup>

- 3.13 These outcomes cannot necessarily be delivered through litigation. Claimants are restricted in the remedies they can claim and it may be that a court simply does not have the jurisdiction to grant claimants what they desire. Even where claimants want financial compensation, currently the courts are only able to award monetary damages in a narrowly defined set of circumstances, which cover precise heads of loss. In the tort of negligence the overarching rationale for granting damages is to restore the claimant to the position he or she was in immediately prior to the defendant's negligence; it is not to achieve a moral vindication of the claimant's rights<sup>6</sup> or to punish or "make an example of" the public body.<sup>7</sup> Tort law is generally also of little use to those who wish to recover compensation for worry or emotional distress.<sup>8</sup>

### **Improving overall administration**

- 3.14 Empirical research suggests that a large proportion of claimants litigate in the hope that it will lead to a change in administrative behaviour and help ensure that mistakes are not repeated.<sup>9</sup> Courts are not necessarily the most appropriate mechanism to achieve these aims. Frequently litigation is piecemeal and fact-sensitive. A court's consideration of a particular case does not permit it to undertake a wide-ranging review of the relevant administrative or professional practices. Further, the giving of a judgment in a case is not necessarily an appropriate way for messages to be transmitted to bureaucratic organisations.
- 3.15 By comparison, non-court redress mechanisms can be better suited to achieving wider administrative improvements. They are able to offer the more structured

<sup>4</sup> See J Allsop, "Two Sides to Every Story: Complainants' and Doctors' Perspectives in Disputes about Medical Care in a General Practice Setting" (1994) 16 *Law and Policy* 165; R Kyffin, G Cook and M Jones, *Complaints Handling and Monitoring in the NHS: A Study of 12 Trusts in the North West Region* (University of Liverpool Institute of Medicine, Law and Bioethics 1997); C Vincent, M Young and A. Phillips, "Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action" (1994) 343 *The Lancet* 1609, 1612.

<sup>5</sup> Above.

<sup>6</sup> Damages, however, may be awarded to vindicate private rights, for example, in defamation: see *Downtex v Flatley* [2004] EWHC 333 (QB), [2004] All ER 454.

<sup>7</sup> Punitive damages can be awarded, in order to punish and deter the wrongdoer, in limited circumstances: H McGregor, *Macgregor on Damages* (17th ed 2003) paras 11-011 to 11-031. However, it is hard to see when they could be available in negligence: see para 11-015.

<sup>8</sup> See further *Alcock v Chief Constable for South Yorkshire* [1992] 1 AC 310. Exceptions to this principle are damages for bereavement and damages where the claimant's suffering manifests itself as clinically diagnosed psychiatric injury. Both exceptions are tightly controlled – see for example, *White v Chief Constable of South Yorkshire* [1998] 3 WLR 1510.

<sup>9</sup> In one study, as many as 74% of respondents said that they had complained in order to prevent the conduct complained of from happening again: R Kyffin, G Cook and M Jones, *Complaints Handling and Monitoring in the NHS: A Study of 12 Trusts in the North West Region* (University of Liverpool Institute of Medicine, Law and Bioethics 1997). See also J Allsop, "Two Sides to Every Story: Complainants' and Doctors' Perspectives in Disputes about Medical Care in a General Practice Setting" (1994) 16 *Law and Policy* 165.

and constructive feedback needed to tackle institutional failure and recurring problems.<sup>10</sup> The need for such feedback is in the common interests of claimants and public bodies alike, since public bodies are keen to avoid “repetitive cycles of mistakes”.<sup>11</sup>

### **Time and cost of litigation**

- 3.16 Litigation will often represent the most time-consuming and resource-intensive means of resolving disputes. For claimants, the high costs and anxiety of litigation often hamper access to court. For public bodies, the burden on resources and the confrontational nature of litigation are major considerations. This confrontational nature may make litigation particularly unsuitable for resolving disputes in more sensitive spheres of administration, such as child welfare and education. In these situations, it is in the common interests of both defendants and claimants to preserve a good working relationship during and after dispute resolution.

### **Incorporating alternative dispute resolution**

- 3.17 Concerns about the costs of litigation have resulted in greater recognition of the utility of alternative redress mechanisms.<sup>12</sup> The Government considers that “courts should be the dispute resolution method of last resort” and has made a formal commitment to use alternative dispute resolution (ADR) in all suitable cases.<sup>13</sup> Government is keen to ensure that “problems can be solved and potential disputes nipped in the bud long before they escalate into formal legal proceedings”.<sup>14</sup> These sentiments have been echoed by the judiciary.<sup>15</sup>
- 3.18 The Civil Procedure Rules (CPR) and the courts also actively promote alternative dispute resolution. Alternative dispute resolution is defined broadly by the CPR as a “collective description of methods of resolving disputes otherwise than through the normal trial process”.<sup>16</sup> These include “a variety of ombudsman schemes and regulatory schemes”<sup>17</sup> as well as mediation. Recourse to ADR is encouraged in various ways. Courts may sometimes come under a duty to recommend ADR to litigants. Courts can further the overriding objective to deal with cases justly by

<sup>10</sup> See Parliamentary and Health Service Ombudsman, *Principles of Good Administration* (2007), <http://www.ombudsman.org.uk/pdfs/pgs.pdf> (last visited 16 June 2008).

<sup>11</sup> National Audit Office, *Citizens Redress: What citizens can do if things go wrong with public services* (2004-05) HC 21 paras 3.22 to 3.27.

<sup>12</sup> Notably, Lord Woolf, *Access to Justice: Interim Report* (1995); Lord Woolf, *Access to Justice: Final Report* (1996).

<sup>13</sup> See Department of Constitutional Affairs, *Monitoring the Effectiveness of the Government's commitment to using Alternative Dispute Resolution* (July 2002) Part 1, [http://www.dca.gov.uk/civil/adr/adrrep\\_0102.htm](http://www.dca.gov.uk/civil/adr/adrrep_0102.htm) (last visited 16 June 2008).

<sup>14</sup> Department of Constitutional Affairs White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (2004) Cm 6243.

<sup>15</sup> See for example, *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; *Dunnett v Railtrack plc* [2002] EWCA Civ 303, [2002] 1 WLR 2434; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002; *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124.

<sup>16</sup> Civil Procedure Rules, Glossary.

<sup>17</sup> See generally M Supperstone, D Stilz and C Sheldon, “ADR and Public Law” [2006] *Public Law* 299.

“encouraging parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure”.<sup>18</sup> The parties themselves are also under a similar duty to help the court in furthering the overriding objective.<sup>19</sup> To this end there is provision for a months stay of proceedings where the parties request this, or the court considers it appropriate for the purposes of ADR.<sup>20</sup>

- 3.19 Where a party has unreasonably refused an offer of ADR, the court has the discretion to impose a costs sanction. It may do this by departing from the standard default rule in civil litigation, which is that the successful party is ordinarily entitled to recover its legal expenses from the other side. For a costs sanction to apply, it will be for the unsuccessful litigant to prove that their opponent’s refusal to have recourse to ADR was “unreasonable” in all the circumstances.<sup>21</sup>
- 3.20 In addition to measures under the Civil Procedure Rules to encourage alternative dispute resolution the government has promised, as part of its ADR Pledge, that ADR “will be considered and used in all suitable cases wherever the other party accepts it”. In particular, “departments will improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure”.<sup>22</sup> Local authorities are also required to offer ADR schemes for disputes relating to special educational needs.<sup>23</sup>

#### ***Alternative remedies and judicial review***

- 3.21 The commitment to ADR in the public law sphere is said to be of “paramount importance” and “failure to adopt it, in particular when public money is involved, [is] indefensible”.<sup>24</sup> The default position is that judicial review is a “legal recourse of last resort” and appropriate only where all alternative remedies have been exhausted.<sup>25</sup> This applies whether the alternative remedy is an unused statutory appeal, a statutory complaints procedure or even recourse to the ombudsman.<sup>26</sup>

<sup>18</sup> Civil Procedure Rules, r 1.4(1) and r 1.4(2)(e) respectively.

<sup>19</sup> Civil Procedure Rules, r 1.3.

<sup>20</sup> Civil Procedure Rules, r 26.4.

<sup>21</sup> Case law has developed a number of factors on which this assessment is made: see in particular *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 at [16] to [28].

<sup>22</sup> See Department of Constitutional Affairs, *Monitoring the Effectiveness of the Government’s commitment to using Alternative Dispute Resolution* (July 2002) Part 1, [http://www.dca.gov.uk/civil/adr/adrrep\\_0102.htm](http://www.dca.gov.uk/civil/adr/adrrep_0102.htm) (last visited 16 June 2008).

<sup>23</sup> See Bailey, Jones and Mowbray, *Cases, Materials and Commentary on Administrative Law* (4th ed 2005) p 95.

<sup>24</sup> *R (on the application of Cowl) v Plymouth CC* [2001] EWCA Civ 1935, [2002] 1 WLR 803 at [1] and [25]. See also *Anufrijeva v Southwark LBC* [2003] EWCA 1406, [2004] QB 1124.

<sup>25</sup> *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067 at [27]. See also the Judicial Review Pre-Action Protocol, para 3.

<sup>26</sup> See the case law cited by M Fordham, *Judicial Review Handbook* (4th ed 2001) p 582.



- 3.22 The rule requiring the prior exhaustion of alternative remedies may be explained by reference to a variety of factors.<sup>27</sup> First, there is the need to respect the intention of Parliament. If Parliament has put in place a comprehensive and self-contained statutory regime for appeals, then it would be an abuse of process for a claimant to allow the time limit to expire under that statutory regime and then seek to introduce a collateral challenge by way of judicial review.
- 3.23 Secondly, courts are wary of intruding upon the remit of specialised statutory bodies which may be better equipped to resolve complex disputes of fact. This may partly be for procedural reasons, since appellate tribunals can take oral evidence and allow cross-examination of witnesses in a way that is still rare in the Administrative Court. Furthermore, the appellate body will often possess expertise and experience in a technical field of administration, as is the case, for example, with the General and Special Tax Commissioners.
- 3.24 Thirdly, requiring claimants to exhaust alternative remedies before seeking judicial review helps relieve pressure on the High Court. This is considered desirable as judicial review applications raising points of general interest should be resolved speedily.
- 3.25 On the other hand, courts may choose to proceed with judicial review if they consider that it is the more appropriate method in the interests of the case. Regard will be had to such factors as speed, expense and finality of the alternative processes and the desirability of a ruling on a point of law, among others.<sup>28</sup>

#### ***Alternative remedies and liability in tort***

- 3.26 The availability of alternative remedies may also have a bearing on the way in which a court determines a claim for damages in negligence.<sup>29</sup> The court has grappled with the issue of whether a common law duty of care can co-exist alongside alternative remedies. Courts tend to deny a duty of care where there exists an express statutory remedy, although the case law is not without its difficulties. The same is not necessarily true where the alternative remedy consists of a complaint to the ombudsman or even judicial review.<sup>30</sup>

<sup>27</sup> See C Lewis, "The Exhaustion of Alternative Remedies in Administrative Law" (1992) 51 *Cambridge Law Journal* 138, 139. See also the discussion in *R v Panel on Take-overs and Mergers ex parte Guinness plc* [1990] 1 QB 146 at 177.

<sup>28</sup> *R v Falmouth and Truro Port Health Authority ex parte South West Water Ltd* [2001] QB 445.

<sup>29</sup> See generally C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) paras 4.55 to 4.73.

<sup>30</sup> Above paras 4.61 to 4.62. See also *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 672; *Barrett v Enfield County Council* [2001] 2 AC 550; see also *A v Secretary of State for the Home Department* [2004] EWHC 1585 (Admin), [2004] All ER 91.

## INTERNAL PROCEDURES

### Formal complaints

- 3.27 A formal system for dealing with complaints is a routine feature of modern administrative practice. Formal complaints could also be seen as the starting point of all non-court avenues of redress.
- 3.28 The definition of what constitutes a formal complaint varies greatly across central and local government. Most public bodies, however, adopt an inclusive formulation covering any written or spoken expression of dissatisfaction with the public body's action, lack of action or standard of service.<sup>31</sup> There has in recent years been a significant increase in public sector complaints,<sup>32</sup> encouraged by the broader effort to deliver public services with a greater emphasis on consumer satisfaction.<sup>33</sup>
- 3.29 Within central government, most complaints systems adhere to a two-tier model. A complainant's first port of call should be front-line staff at a local level and only thereafter should the grievance be pursued at a departmental customer services unit.<sup>34</sup> Some departments and agencies have an independent complaints tier at the apex of their complaints structure, composed of senior officials who are often appointed externally.<sup>35</sup>
- 3.30 Local bodies are also encouraged to put in place complaints systems as part of their constitution. Many bodies adopt a three-stage system: it is possible to complain to front-line staff, a senior officer and the chief executive or an independent complaints handler. These are not necessarily progressive stages; complaints that are more serious or complex may proceed directly to the second or third levels.<sup>36</sup>
- 3.31 Central governmental complaints systems have advantages and disadvantages as compared with litigation. The major advantages are that they are cheaper and more expeditious than litigation. A recent survey of a number of departments found that, on average, the internal cost of processing a complaint in central

<sup>31</sup> For central government see National Audit Office, *Citizens Redress: What citizens can do if things go wrong with public services* (2004-05) HC 21 para 2.5. For local authorities, see the Local Government Ombudsman, *Running a Complaints System: Guidance on Good Practice 1*, <http://www.lgo.org.uk/pdf/guide1.pdf> (last visited 16 June 2008).

<sup>32</sup> T Williams and T Goriely, "A Question of Numbers: Managing Complaints Against Rising Expectations" in M Harris and M Partington (eds), *Administrative Justice in the 21<sup>st</sup> Century* (1999) 99, p 101.

<sup>33</sup> See the Citizen's Charter, *Raising the Standard* (1991) Cm 1599 and Parliamentary Health Service Ombudsman, *Principles of Good Administration* (2007), <http://www.ombudsman.org.uk/pdfs/pgs.pdf> (last visited 16 June 2008).

<sup>34</sup> National Audit Office, *Citizens Redress: What citizens can do if things go wrong with public services* (2004-05) HC 21, para 1.6.

<sup>35</sup> Examples include the Adjudicator's Office for tax disputes against HM Revenue and Customs and the Independent Case Examiner for complaints against the Child Support Agency.

<sup>36</sup> The Local Government Ombudsman has issued guidance on these systems. Local Government Ombudsman, *Running a Complaints System: Guidance on Good Practice 1*, <http://www.lgo.org.uk/pdf/guide1.pdf> (last visited 16 June 2008).

government was £155 and most complaints were resolved within 20 days.<sup>37</sup> In addition, it was estimated that the majority of complaints were “cleared up, amicably settled or at least better explained to citizens so that they are content with their treatment” at the first stage of the two-step process.<sup>38</sup>

- 3.32 There are, however, disadvantages with central government complaints systems, primarily in relation to accessibility. The research found that individuals do not always know to whom to address their complaint, nor indeed the relevant process for lodging a complaint.<sup>39</sup> Furthermore, some bodies have adopted a narrow meaning of “complaint” *in practice*, screening out those grievances which are not written, as well as those relating to wider systemic failure.<sup>40</sup> Finally, there is a perception that government complaints systems are not as expeditious or as generous in terms of financial compensation as consumer complaints departments in the private sector.<sup>41</sup>

### Internal reviews

- 3.33 Where public bodies have concerns about service delivery, they have the capacity to conduct an internal review on the issues. These can occur as a result of individual complaints or at their own instigation. To this extent, they can be seen as a “naturally occurring administrative procedure” or a tool for development of effective decision-making processes.<sup>42</sup>
- 3.34 The process of internal review is sector-specific and can depend largely upon the statute involved. In general, the practice of internal review is speedier and less expensive than review by an external body such as a court. The reviewer is also an expert, who will be “familiar with the nuances of discretionary decision making”.<sup>43</sup> It has been commented that internal review “locate[s] initial responsibility for correcting administrative decisions within the area responsible for those decisions” and can therefore be “good for morale” and “promote systemic reform from within”.<sup>44</sup>
- 3.35 The drawbacks of internal reviews include the absence of an oral hearing, and the lack of independence and impartiality, as in some areas the review may be

<sup>37</sup> See National Audit Office, *Citizens Redress: What citizens can do if things go wrong with public services* (2004-05) HC 21 at paras 2.14 and 3.25 (respectively), which note that time targets for responses are met in around 80 – 100% of cases.

<sup>38</sup> National Audit Office, *Citizens Redress: What citizens can do if things go wrong with public services* (2004-05) HC 21, para 1.6.

<sup>39</sup> Above, paras 4.2 to 4.6.

<sup>40</sup> Above, para 2.8.

<sup>41</sup> Above, para 4.12.

<sup>42</sup> M Harris, “The place of formal and informal review in the Administrative Justice System” in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999) 42, p 44.

<sup>43</sup> J Scampion extracted in M Harris, “New Procedures” in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999) 156, p 159.

<sup>44</sup> Above, p 160. Scampion notes that the quality of decision-making may be effectively monitored under a system of internal review. See also M Harris, “The place of formal and informal review in the Administrative Justice System” in M Harris and M Partington (eds) *Administrative Justice in the 21st Century* (1999) 42, pp 51-54.

conducted by the primary decision-maker. On this basis, an internal review does not constitute an independent and impartial tribunal for the purposes of Article 6(1) of the European Convention on Human Rights.<sup>45</sup>

### **Mediation**

- 3.36 Mediation is the umbrella term used to describe a range of processes, including arbitration, conciliation, early neutral evaluation, expert determination and negotiation. These processes typically exhibit certain common features. All are confidential, involve a neutral third party and are voluntary, with the parties retaining the freedom to disengage at any time.<sup>46</sup>
- 3.37 One of the primary advantages of mediation is that it can help preserve a continuing relationship between parties. Studies have found that the conciliatory or “therapeutic” nature of the process leaves parties more satisfied with the overall result and better able to maintain good relationships.<sup>47</sup> Another attractive feature of mediation is that it can provide litigants with a wider range of solutions than those available via litigation. This may include “an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so”.<sup>48</sup>
- 3.38 While some suggest that mediation offers a cheaper and speedier alternative to litigation, it is unclear whether this is borne out in the figures.<sup>49</sup> Although the Government has reported significant costs savings, this may be attributable to the fact that compensation under mediated settlements tends to be at significantly reduced amounts.<sup>50</sup> What is clear is that where mediation is attempted, the settlement rate is often substantial.<sup>51</sup>

<sup>45</sup> Bailey, Jones and Mowbray, *Cases, Materials and Commentary on Administrative Law* (4th ed 2005) p 92.

<sup>46</sup> M Supperstone, D Stilitz and C Sheldon, “ADR and Public Law” [2006] *Public Law* 299, 300.

<sup>47</sup> H Genn, “The Central London County Court Pilot Mediation Scheme Evaluation Report” (2001) 67 *Arbitration (the Journal of the Chartered Institute of Arbitrators)* 109.

<sup>48</sup> *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 at [15] (Dyson LJ).

<sup>49</sup> See discussion in H Genn, “The Central London County Court Pilot Mediation Scheme Evaluation Report” (2001) 67 *Arbitration (the Journal of the Chartered Institute of Arbitrators)* 109.

<sup>50</sup> For example, the Department of Constitutional Affairs has reported cost savings of £28.8 million in 2004-05 and £120.7 million in 2005-06. The latter figure, however, takes account of a claim for £50 million which was ultimately settled for £1.8 million. See Department of Constitutional Affairs, *Annual Report 2005/2006: Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution* (2007) p 3, [http://www.dca.gov.uk/civil/adr/adr\\_reports.htm](http://www.dca.gov.uk/civil/adr/adr_reports.htm) (last visited 16 June 2008). See also H Genn, above.

<sup>51</sup> Under the Central London County Court Scheme this was 62%: H Genn, above. The comparable figure under the Government's ADR pledge for 2005-06 was 72%.

- 3.39 Empirical studies into ADR pilot schemes and the Government's own review of ADR indicate a number of difficulties associated with the mediation process.<sup>52</sup> These difficulties include reluctance by parties to agree to mediation where it has been offered.<sup>53</sup> This can be because of a lack of confidence in the ability of mediators to handle complex legal and evidential issues, as well as the perception that agreeing to mediation is a sign of weakness.
- 3.40 In the public law context, mediation can raise particular issues. First, the confidential nature of mediation can be counterproductive to the requirements of accountability and transparency in public service delivery. A court hearing is sometimes more appropriate when guidance on issues of general importance or on points of law is required. Processes that take place behind closed doors can raise suspicions of covering up administrative failure by quietly "purchasing illegality".<sup>54</sup>
- 3.41 Secondly, it is arguable that there are often significant power imbalances between citizens and the State, which mediators can be ill equipped to address and may even magnify.<sup>55</sup> The extent to which this is a problem in practice depends largely upon how robust individual mediators are in ensuring that individuals are not put under undue pressure.<sup>56</sup> In some ways this can be seen as a question of training, rather than of principle.

#### **Statutory compensation schemes**

- 3.42 Parliament has created a large number of sector-specific compensation schemes, which vary widely in their size and purpose. Most, however, tend to be large-scale and are designed to provide relief on a long-term basis for on-going problems, such as compensation for compulsory acquisition of land<sup>57</sup> and the Criminal Injuries' Compensation Scheme.<sup>58</sup>
- 3.43 While there is no standard model for statutory compensation schemes, they typically exhibit a number of common features. First, compensation is often awarded on a no-fault basis. Relieving claimants from having to establish wrongdoing is often justified on grounds of solidarity and collective responsibility.

<sup>52</sup> In particular, see H Genn, "The Central London County Court Pilot Mediation Scheme Evaluation Report" (2001) 67 *Arbitration (the Journal of the Chartered Institute of Arbitrators)* 109, for examination of a pilot scheme. See also Department of Constitutional Affairs webpage, *Monitoring the Effectiveness of the Government's Commitment to ADR – Annual Reports*, [http://www.dca.gov.uk/civil/adr/adr\\_reports.htm](http://www.dca.gov.uk/civil/adr/adr_reports.htm) (last visited 16 June 2008).

<sup>53</sup> See H Genn, above. The report found that in only 5% of cases was recourse had to mediation. This compares to the Department of Constitutional Affairs notes that in 2002-2003, only 27% of offers to mediate by government departments were accepted by claimants: [http://www.dca.gov.uk/civil/adr/adrrep\\_0203.htm](http://www.dca.gov.uk/civil/adr/adrrep_0203.htm) (last visited 16 June 2008).

<sup>54</sup> C Harlow, *State liability: Tort Law and Beyond* (2004) p 105.

<sup>55</sup> See H Genn, "The Central London County Court Pilot Mediation Scheme Evaluation Report" (2001) 67 *Arbitration (the Journal of the Chartered Institute of Arbitrators)* 109.

<sup>56</sup> M Supperstone, D Stilitz and C Sheldon, "ADR and Public Law" [2006] *Public Law* 299, 312.

<sup>57</sup> See the Land Compensation Acts 1961 and 1973.

<sup>58</sup> See the Criminal Injuries Compensation Act 1995; discussed in P Cane, *Atiyah's Accidents, Compensation and the Law* (7th ed 2006) ch 12.

Secondly, many schemes allow recovery in respect of a wide range of losses, some of which would ordinarily be disregarded by courts of law. Thirdly, statutory schemes tend to award compensation at fixed tariffs or within pre-set brackets, which can lead to lower awards than those given by the courts. It is sometimes argued that capping awards enables a more efficient management of public expenditure.<sup>59</sup>

- 3.44 Statutory compensation schemes perform a valuable function in providing remedies in particular areas; they identify specific situations in which it is accepted that the citizen should receive compensation. Such schemes have, however, been criticised in a number of respects. They can adopt a less generous approach to quantifying compensation. Their eligibility criteria are sometimes criticised for being under-inclusive and excluding borderline claimants. No-fault schemes have been criticised for being open to abuse by fraudulent claims and for providing “free insurance” for negligent officials.<sup>60</sup> Notwithstanding these criticisms, such schemes are an important part of the government’s ability to provide redress for large-scale issues on a principled and measured basis.

#### **Ex gratia payments**

- 3.45 A public body may also provide redress by making an offer to compensate individuals whom they have injured, on a voluntary (or ex gratia) basis without admitting legal liability.
- 3.46 The practice of offering ex gratia payments remains largely informal, frequently – though not solely – consisting of one-off payments made in an ad hoc fashion. In some cases, government departments have developed their own policies on ex gratia payments,<sup>61</sup> whereas in others, permanent compensation funds are put in place.<sup>62</sup> Local bodies are encouraged to offer redress on an ex gratia basis and even to form a “corporate policy on remedies”.<sup>63</sup> They have been given express statutory powers to offer payment in cases where they consider that an individual has been “adversely affected” as a result of their “maladministration”.<sup>64</sup> The

<sup>59</sup> D Cohen, “Tort Law and the Crown: Administrative Compensation and the Modern State” in K Copper-Stephenson and E Gibson (eds), *Tort Theory* (1993) p 361.

<sup>60</sup> See generally C Harlow, *State Liability: Tort Law and Beyond* (2004) p 88; and P Cane, *Atiyah’s Accidents, Compensation and the Law* (2006) chs 12, 15, 16 and 18.

<sup>61</sup> For example, the HM Revenue and Customs has a Code of Practice. See HM Revenue and Customs, *Complaints and putting things right*, <http://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf> (last visited 16 June 2008). See also the Prison Service Order on Finance discussed in D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) p 253.

<sup>62</sup> Examples include the funds set up to compensate recipients of contaminated blood products and victims of NvCJD: see P Cane, *Atiyah’s Accidents, Compensation and the Law* (2006) p 107.

<sup>63</sup> The Local Government Ombudsman, *Remedies: Guidance on Good Practice* 6, p 1, <http://www.lgo.org.uk/pdf/remedies.pdf> (last visited 16 June 2008). See also Cabinet Office, *How to Deal with Complaints*, <http://archive.cabinetoffice.gov.uk/servicefirst/1998/complaint/b5intro.htm> (last visited 16 June 2008).

<sup>64</sup> The Local Government Act 2000, s 92.

overall result is that there are currently a “bewildering number” of administrative compensation schemes.<sup>65</sup>

- 3.47 In an attempt to introduce some consistency in the approach of public bodies to ex gratia payments, HM Treasury has set out extensive guidance, in the context of accounting for Government expenditure.<sup>66</sup> In general, this guidance urges a cautious approach to ex gratia payments, reminding departments that “it is important that these payments are made in the public interest, objectively and without favouritism”,<sup>67</sup> and that, as for other public services, “good management, efficiency, effectiveness and value for money are key goals”.<sup>68</sup> Departments must obtain prior authorisation from HM Treasury before offering a payment. HM Treasury’s involvement being considered necessary to promote consistency and to prevent individual departments setting repercussive and expensive precedents, both internally and elsewhere in the public sector.<sup>69</sup>
- 3.48 Departments may offer ex gratia payments where there has been maladministration or poor service,<sup>70</sup> including where this has been discovered by the public body independently of an ombudsman’s report or even an official complaint. They may also consider it appropriate to offer compensation where, more generally, they “fail to meet their standards, or where they fall short of reasonable behaviour in relation to those they do business with”.<sup>71</sup>
- 3.49 Much is left to the discretion of each department in the creation and implementation of ex gratia schemes. Ministers may decide upon both the coverage of the scheme and the levels of compensation to be paid out under it.<sup>72</sup> They may introduce changes to an ex gratia scheme, or withdraw it without notice or consultation.<sup>73</sup> They also retain considerable latitude when interpreting the

<sup>65</sup> See D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) p 250; Select Committee on the Parliamentary Commissioner for Administration, *Maladministration and Redress, First Report* (1994-95) HC 112.

<sup>66</sup> See HM Treasury, *Managing Public Money* (2007) ch 4, [http://documents.treasury.gov.uk/mpm/mpm\\_ch4.pdf](http://documents.treasury.gov.uk/mpm/mpm_ch4.pdf) and Annex 4.14: [http://documents.treasury.gov.uk/mpm/mpm\\_annex4.14.pdf](http://documents.treasury.gov.uk/mpm/mpm_annex4.14.pdf) (last visited 16 June 2008).

<sup>67</sup> HM Treasury, *Managing Public Money* (2007) ch 4, para 4.11.

<sup>68</sup> HM Treasury, *Managing Public Money* (2007) Annex 4.14, para A.4.14.14.

<sup>69</sup> HM Treasury, *Managing Public Money* (2007) ch 2, para 2.1.7, [http://documents.treasury.gov.uk/mpm/mpm\\_ch2.pdf](http://documents.treasury.gov.uk/mpm/mpm_ch2.pdf) (last visited 16 June 2008) and Annex 4.14, paras A.4.14.8 and A.4.14.15.

<sup>70</sup> See HM Treasury, *Managing Public Money* (2007) Annex 4.14, para A.4.14.1; Parliamentary and Health Service Ombudsman, *Principles for Remedy* (2007) p 16.

<sup>71</sup> HM Treasury, *Managing Public Money* (2007) ch 4, para 4.12.4.

<sup>72</sup> See HM Treasury, *Managing Public Money* (2007) Annex 4.14, para A.4.14.10 and box A4.14A for factors which may be taken into account by public sector organisations in deciding on financial compensation.

<sup>73</sup> That is, unless there was a legitimate expectation that the scheme would not be withdrawn without notice or consultation. See *R (on the application of Niazi) v Secretary of State for the Home Department* [2007] EWCA Civ 1495 (Admin), [2007] ACD 75.

eligibility criteria under their scheme. However, decisions in relation to such a scheme are subject to judicial review.<sup>74</sup>

- 3.50 Ex gratia schemes may provide for compensation to be paid out for personal injury and property damage and also extends to any sort of injustice or hardship including both financial and non-financial loss.<sup>75</sup> As to the level of compensation, HM Treasury's guidance states that a department should provide such compensation as it considers "fair, reasonable and proportionate".<sup>76</sup> This will normally mean sufficient compensation to restore claimants to their position prior to the maladministration or service failure.<sup>77</sup>

## EXTERNAL PROCEDURES

- 3.51 All of the redress procedures discussed above are internal to the public body that made the decision or engaged in the action or practice in the first instance. In addition to these internal mechanisms, there are a number of external avenues of redress that are still non-judicial, in that they do not involve recourse to the courts. This includes tribunals, public inquiries and ombudsmen. Tribunals and enquiries are dealt with in this section, ombudsmen in the next.

### Tribunals

- 3.52 Citizens can seek redress for certain types of administrative action in the tribunals system. Tribunals may or may not award compensation. They can provide a full review of the merits of administrative decisions and may have the power to award other remedies.
- 3.53 The classic role for tribunals is to adjudicate disputes between the citizen and the state, although there are also very important tribunals determining "citizen to citizen" disputes (like the Employment Tribunals). There are now over 70 tribunals, some of which play a very significant role in the administrative justice system; the Asylum and Immigration Tribunal and the Social Security and Child Support Appeals Tribunal being examples. Tribunals determine more than 500,000 disputes a year between private individuals and individuals and the state.<sup>78</sup> Tribunals are creatures of statute and have grown up "in an almost entirely haphazard way",<sup>79</sup> which resulted in "a collection of tribunals, mostly

<sup>74</sup> For example, see the litigation in relation to ex gratia schemes set up to compensate soldiers and civilians interned in Far Eastern camps during World War Two: *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin), [2002] All ER 409; *R (Association of British Civilian Internees: Far East Region) v Secretary for Defence (ABCIFER)* [2003] EWCA Civ 473; [2003] QB 1397; and *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213.

<sup>75</sup> HM Treasury, *Managing Public Money* (2007) Annex 4.14, para A.4.14.1 and box A4.14A.

<sup>76</sup> Above para A.4.14.8.

<sup>77</sup> Above para A.4.14.1.

<sup>78</sup> *Hansard* (HC), 5 March 2007, vol 457, col 1296.

<sup>79</sup> Sir Andrew Leggatt, *Tribunals for Users – One System, One Service: Report of the Review of Tribunals* (16 August 2001) para 1.3, <http://www.tribunals-review.org.uk> (last visited 16 June 2008).



administered by departments, with wide variations of practice and approach, and almost no coherence”.<sup>80</sup>

- 3.54 This lack of uniformity was highlighted in Sir Andrew Leggatt’s 2001 report *Tribunals for Users – One System, One Service*. Leggatt proposed wide ranging reforms, including unifying Tribunals and ensuring Tribunal independence by severing the administration of Tribunals from sponsoring departments and creating a single Tribunals service within the then Lord Chancellor’s Department.<sup>81</sup> The Government adopted the Leggatt recommendations, which led to the Tribunals, Courts and Enforcement Act 2007. The Act unifies the Tribunals system and enables future reform of the Tribunals system by providing for the transfer of existing Tribunals into the new system.
- 3.55 The Act creates a First-Tier Tribunal and Upper Tribunal, headed by the newly created position of the Senior President of Tribunals.<sup>82</sup> It is envisaged that “the basic pattern of appeal rights will for the most part remain as they are now when jurisdictions transfer to the new tribunal”.<sup>83</sup> The applicants will generally be able, with permission, to challenge a decision of the First-Tier Tribunal before the Upper Tribunal on an error of law, with the possibility of appealing to a court on a point of law only.<sup>84</sup> The Act also replaces the Council on Tribunals with the Administrative Justice and Tribunals Council. This Council will oversee the administrative justice system and, in particular, the relationships between the courts, tribunals, ombudsmen and alternative dispute resolution.

### **Public Inquiries**

- 3.56 While not usually providing resolution for individual complaints, public inquiries can play an important role in investigating matters which have caused public concern. In a consultation paper entitled “*Effective Inquiries*”, the Department of Constitutional Affairs suggested that public inquiries “have helped to restore public confidence through a thorough investigation of the facts and timely and effective recommendations to prevent recurrence of the matters causing concern”.<sup>85</sup> It was suggested that “many inquiries have helped to bring about valuable and welcomed improvements in public services”.<sup>86</sup>
- 3.57 Public inquiries can be instigated by a Minister under the Inquiries Act 2005, which makes provision for “Ministers to set up formal, independent inquiries relating to particular events which have caused or have potential to cause public

<sup>80</sup> Sir Andrew Leggatt, *Tribunals for Users – One System, One Service: Report of the Review of Tribunals* (16 August 2001) para 1.3, <http://www.tribunals-review.org.uk> (last visited 16 June 2008).

<sup>81</sup> *Tribunals, Courts and Enforcement Act 2007, Explanatory Notes*, para 11.

<sup>82</sup> The Senior President designate of Tribunals is Lord Justice Carnwath.

<sup>83</sup> *Tribunals, Courts and Enforcement Act 2007, Explanatory Notes*, para 107.

<sup>84</sup> Above, para 106.

<sup>85</sup> See Department of Constitutional Affairs, *Consultation Paper: Effective Inquiries* (May 2004), Executive Summary, <http://www.dca.gov.uk/consult/inquiries/index.htm#part1> (last visited 16 June 2008).

<sup>86</sup> See Department of Constitutional Affairs, *Consultation Paper: Effective Inquiries* (May 2004), Annex B, <http://www.dca.gov.uk/consult/inquiries/index.htm#part1> (last visited 16 June 2008).

concern, or where there is public concern that particular events may have occurred”.<sup>87</sup> Inquiries can also be instigated under Ministerial powers in subject-specific legislation, such as the Police Act 1996, or can be conducted on a non-statutory basis.

### **OMBUDSMAN SCHEMES**

- 3.58 The third pillar of administrative justice is composed of the ombudsmen. There are now no fewer than 43 ombudsmen members of the British and Irish Ombudsmen’s Association. These include many ombudsmen schemes that are essentially a part of a regulatory regime for a particular market or other activity. There are also what might be termed “hybrid” ombudsmen, such as the Independent Housing Ombudsman, which deal with complaints from both private and public bodies, or intermediate bodies such as housing associations.
- 3.59 Central to our concerns are the generalist public sector ombudsmen. They have jurisdiction to investigate complaints about the administrative actions of public bodies. The key schemes for this purpose are:
- (1) the Parliamentary and Health Service Ombudsman,<sup>88</sup> whose broad remit covers complaints against central government;
  - (2) the Local Government Ombudsman who covers local authorities in England; and
  - (3) the Public Services Ombudsman for Wales who acts as a single integrated public sector ombudsman.
- 3.60 These schemes are distinct from the various mechanisms considered as the first and second pillars. They have broad ranging jurisdictions, to which they apply a distinctive approach both in terms of the basis of adjudication, and their methodology.
- 3.61 The role of the public sector ombudsmen is primarily to investigate complaints of “maladministration” on the part of public bodies and make recommendations for redress where the claimant has suffered “injustice” as a result.<sup>89</sup> It is not within their jurisdiction to determine the legality of administrative action or adjudicate on points of law – this remains the preserve of courts and tribunals.
- 3.62 In dealing with complaints of maladministration, the ombudsmen play a vital role in promoting good governance. In addition to resolving the individual complaint at hand, an ombudsman’s report may illuminate systemic failings that caused the incidence of maladministration. In this way the ombudsman can provide valuable diagnostic and feedback functions which can lead to an improvement in service delivery. Furthermore, the ombudsmen can carry out subject-specific reviews of particular areas of administration – commonly referred to as special reports –

<sup>87</sup> *Inquiries Act 2005, Explanatory Notes*, para 3. See also *Inquiries Act 2005*, s 1.

<sup>88</sup> The Parliamentary and Health Service Ombudsman comprises the Parliamentary Commissioner for Administration and the Health Service Commissioner. We are concerned with the former.

<sup>89</sup> The Parliamentary Commissioner Act 1967, s 5(2)(b); Local Government Act 1974, s 26(1).

highlighting and suggesting ways of dealing with, or pre-empting, administrative failure.

- 3.63 The Parliamentary Ombudsman and Local Government Ombudsman also promote institutional development by producing good practice guides for central and local government respectively.<sup>90</sup> Both have published principles of good administration with the stated aim of helping public bodies avoid maladministration.<sup>91</sup> If maladministration does occur, the Parliamentary Ombudsman's recently published "*Principles for Remedy*" seeks to guide public bodies on how they should provide remedies for any injustice or hardship caused.<sup>92</sup>

### **Maladministration**

- 3.64 The concept of maladministration, which was deliberately left undefined,<sup>93</sup> has been interpreted broadly by the ombudsmen. It is understood to encompass a broad range of administrative failure, including "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude [and] arbitrariness".<sup>94</sup>
- 3.65 It has been noted that the notion of maladministration reflects "an understanding of the wider principles of procedural fairness and contemporary expectations as to what constitutes good administrative practice".<sup>95</sup> Through the notion of maladministration, the ombudsmen are able to conduct a broad-brush assessment of the overall manner in which a public body has conducted itself, including instances of institutional failure. In this respect it is a more holistic inquiry than judicial scrutiny, which tends to focus on isolated acts or omissions as being negligent or unlawful.
- 3.66 A good example relates to wartime detainees. Here the Parliamentary Ombudsman found that the way in which the Ministry of Defence devised and announced the ex gratia scheme for wartime detainees amounted to maladministration. In so doing, the ombudsman relied on general principles of

<sup>90</sup> The Local Government Ombudsman, *Guidance on Good Practice*, <http://www.lgo.org.uk/guidance.htm> (last visited 16 June 2008). The Parliamentary Ombudsman also has a 'Best Practice' page on its website: [http://www.ombudsman.org.uk/improving\\_services/best\\_practice/index.html](http://www.ombudsman.org.uk/improving_services/best_practice/index.html) (last visited 16 June 2008).

<sup>91</sup> See Parliamentary and Health Service Ombudsman, *Principles of Good Administration* (2007); the Local Government Ombudsman, *Good Administrative Practice: Guidance on Good Practice 2*, [http://www.lgo.org.uk/pdf/good\\_practice\\_2.pdf](http://www.lgo.org.uk/pdf/good_practice_2.pdf) (last visited 16 March 2008).

<sup>92</sup> Parliamentary and Health Service Ombudsman, *Principles for Remedy* (2007).

<sup>93</sup> See JUSTICE, *Our Fettered Ombudsman* (1977) and the Parliamentary and Health Service Ombudsman, *Annual Report* (1993-94) para 7.

<sup>94</sup> Richard Crossman (the Minister in charge of introducing the Parliamentary Commissioner Bill), cited with approval by Lord Denning in *R v Commissioner for Local Administration ex parte Bradford City Council* [1979] 1 QB 287.

<sup>95</sup> R Kirkham, "When is it Appropriate to Use the Ombudsman?" [2004] *Journal of Social Welfare and Family Law* 181.

good administration, namely that public bodies are required to communicate clearly and effectively with those affected by their decisions.<sup>96</sup>

3.67 It is clear that the concept of maladministration is separate from, and broader than, the legal notions of illegality and negligence. Ombudsmen are therefore able to give complainants redress in circumstances where it is unavailable in courts. For example, while there has been a general reluctance to accept delay as a ground for judicial review, it is a recognised component of maladministration.<sup>97</sup> A public body may be guilty of maladministration even though it has acted legally.

3.68 In a 2007 asylum appeal, Lord Justice Carnwath drew a sharp distinction between illegality and maladministration. Whereas the conduct of the Home Office in handling an asylum application may have amounted to maladministration (which was an issue for the ombudsman), this was irrelevant to the court's inquiry into the legality of the actual decisions of the Home Office:

The court's proper sphere is illegality, not maladministration. If the... decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention, and provides the basis for the remedy.<sup>98</sup>

3.69 A similar point may be made in relation to maladministration and the concept of negligence. In *Reeman*, the Department of Transport had wrongfully certified a defective vessel as seaworthy, causing eventual purchasers to pay a price above its actual market value. The purchasers' claim for damages in negligence failed, as there was no duty of care owed to them to protect their financial interests.<sup>99</sup> However, a subsequent investigation of the complaint by the Parliamentary Ombudsman resulted in a finding of maladministration, with a recommendation for a substantial amount of compensation.<sup>100</sup> In general, ombudsmen have been more willing than courts to find in favour of applicants who complain about decisions by regulators, licensing authorities, certification and planning authorities.<sup>101</sup>

3.70 There is clearly overlap between the jurisdictions of the courts and ombudsmen. A particular set of facts may give rise to both a claim in law and a complaint of maladministration, capable of being pursued either through the courts or by the

<sup>96</sup> See R Kirkham, "Challenging the Authority of the Ombudsman: The Parliamentary Ombudsman's Special Report on Wartime Detainees" (2006) 69 *Modern Law Review* 792.

<sup>97</sup> See S McMurtrie, "The Waiting Game – the Parliamentary Commissioner's Response to Delay in Administrative Procedures" [1997] *Public Law* 159.

<sup>98</sup> *Secretary of State for the Home Department v R (S)* [2007] EWCA Civ 546, [2007] All ER 193 at [41].

<sup>99</sup> *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648.

<sup>100</sup> Case No C557/98 First Report of the Parliamentary Ombudsman (1999-00) HC 20.

<sup>101</sup> See respectively: Report 93/195 *Blaeneau Gwent Borough Council* [1995] JPL 1055; Report 91/B/3837 *Torbay Borough Council* [1997] JPL 81; Case No C557/98 First Report of the Parliamentary Ombudsman (1999-00) HC 20; Second Report of the Parliamentary Ombudsman (1989-90) *The Barlow Clowes Affair* (1989-90) HC 76.

ombudsmen. Demarcation of their respective jurisdictions has caused considerable difficulty and is considered further in Part 5.

### **Process and procedure**

- 3.71 In investigating allegations of maladministration, ombudsmen are said to provide a more accessible, user-friendly alternative to courts.<sup>102</sup> Investigation by the ombudsmen is free for both parties, and the process is less formal and stressful than an adversarial trial. It is almost entirely paper-based, avoiding the need for court appearances by public officials.
- 3.72 A key difference between the courts and ombudsmen is that the ombudsmen's approach to fact-finding and dispute resolution is more proactive and inquisitorial than the courts' approach. Ombudsmen employ teams of expert investigators to define and investigate independently the nature of the dispute, instructing experts where necessary.<sup>103</sup> The Parliamentary Ombudsman, in particular, enjoys a wide discretion to adopt such procedures as are considered appropriate in each case and has the power to compel the disclosure of evidence which would ordinarily be considered privileged in a court of law, such as minutes of any "closed-door" meetings.<sup>104</sup> Commentators have noted the advantages of the ombudsmen's vigorous approach to information gathering:

[I]n the course of the resolution of a dispute, the ombudsman is able to come into possession of vastly superior knowledge to the courts and that knowledge is also more reliable as it will have been established on the basis of its own investigations rather than having to rely upon the input of the two parties to the dispute.<sup>105</sup>

- 3.73 The particular style of investigation has enabled the ombudsmen, particularly the Parliamentary Ombudsman, to undertake penetrating investigations into matters of considerable importance and complexity. Notable examples include investigations into cases of regulatory failure. In *Barlow Clowes*, the ombudsman investigated claims against the Department of Trade and Industry in relation to its conduct over a fourteen year period. This resulted in the government offering compensation of £156 million to claimant investors.<sup>106</sup> Most recently, the ombudsman investigated information regarding occupational pension schemes

<sup>102</sup> See generally M Harris, "The Ombudsman and Administrative Justice" in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999) 133, p 136.

<sup>103</sup> Above.

<sup>104</sup> The Parliamentary Commissioner Act 1967, ss 7(2) and 8(3). Cf the Local Government Act 1974, ss 28 and 29.

<sup>105</sup> R Kirkham, "The efficacy of the Ombudsman vs Judicial Review as the best remedy to produce lasting changes in the behaviour of local authorities: The case for the superiority of the Ombudsman" (Paper delivered at the Public Law Project Conference: Judicial Review – Trends and Forecasts, 12 October 2006).

<sup>106</sup> See Parliamentary and Health Service Ombudsman, *Annual Report* (1989-90) HC 353, para 64. See also G Gregory and R Drewry, "Barlow Clowes and the Ombudsman: Part 1" [1991] *Public Law* 192 and G Gregory and R Drewry, "Barlow Clowes and the Ombudsman: Part 2" [1991] *Public Law* 408.

given by the Department of Work and Pensions and found that it was “inaccurate, incomplete, unclear and inconsistent”.<sup>107</sup>

### Remedies available

- 3.74 For the ombudsmen to recommend a remedy, the complainant must have suffered “injustice” as a result of maladministration. This has been construed flexibly to include pure economic loss, distress, lost opportunity and even “the time and trouble” spent in pursuing a complaint. It is therefore broader than the recognised heads of loss in tort.
- 3.75 Following a finding of injustice, the ombudsmen tend to use a broader range of remedies than courts.<sup>108</sup> As well as financial compensation, they can recommend that the public body apologise to the complainant, provide an explanation and acknowledgement of what went wrong or reconsider a decision. In addition they can recommend specific action or reparation in kind such as provision of specialist equipment or tuition to a wrongly assessed child.<sup>109</sup>
- 3.76 Where the ombudsmen choose to recommend financial compensation, money can be earmarked for particular purposes, such as a child’s education. However, the amounts recommended by ombudsmen do tend to be comparatively modest. This has led one commentator to argue that “tort actions are undoubtedly more appropriate for obtaining larger sums, and are generally the only way to gain substantial reparation for future loss, such as future loss of earnings”.<sup>110</sup> Moreover, certain courses of action remain unavailable to the ombudsmen. They do not, for example, have the power to grant interim relief pending investigation of a complaint, whereas this may be available in proceedings for judicial review.
- 3.77 The diversity of the remedies available to the ombudsmen allows them to respond flexibly to the complaint at hand and to the particular needs and wants of the claimant. However, they can also go beyond individual complaints and facilitate systemic change. They can recommend reviews of procedure, policy and practice or suggest that the public body consider the situation of other people in the claimant’s situation. Special reports can also be useful for these purposes.<sup>111</sup> In this way, individual complaints can result in a review of the whole system, which has the potential to improve things for many other people. This is one of the key strengths of ombudsmen schemes.

<sup>107</sup> Parliamentary Ombudsman, *Trusting in the Pensions Promise: Government Bodies and the Security of Final Salary Occupational Pensions*, Special Report of the Parliamentary Ombudsman (2005-06) HC 984.

<sup>108</sup> In recommending a remedy, the ombudsmen seek to put the complainant in the position he or she would have been in but for the maladministration. See the Local Government Ombudsman, *Remedies: Guidance on good practice 6*, <http://www.lgo.org.uk/pdf/remedies.pdf> (last visited 16 June 2008); Parliamentary and Health Service Ombudsman, *Principles for Remedy* (2007), [http://www.ombudsman.org.uk/pdfs/principles\\_remedy.pdf](http://www.ombudsman.org.uk/pdfs/principles_remedy.pdf) (last visited 16 June 2008). The remedy must be appropriate and proportionate to the injustice.

<sup>109</sup> See for example, the Local Government Ombudsman, *Remedies: Guidance on Good Practice 6*, <http://www.lgo.org.uk/pdf/remedies.pdf> (last visited 16 June 2008).

<sup>110</sup> D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) p 247.

<sup>111</sup> For an extended discussion see R Kirkham, “Auditing by stealth? Special Reports and the Ombudsman” [2005] *Public Law* 740.

### **Non-enforceability of recommendations**

- 3.78 Another significant difference between the courts and ombudsmen is that the latter have no power to enforce their recommendations. This means that, in principle, a public body can refuse to accept and implement the ombudsman's recommendations.<sup>112</sup> There are, however, additional mechanisms the ombudsmen can utilise to help secure redress in the event of non-compliance.
- 3.79 The Local Government Ombudsman can publish a further report recommending what action the body should take,<sup>113</sup> and if still dissatisfied, it may require the body to publish a statement in the local newspaper.<sup>114</sup> This forces the public body to state publicly their reasons for not complying with the ombudsman's recommendations.
- 3.80 The Parliamentary Ombudsman is supported by Parliamentary arrangements. In the event of non-compliance, it has the power to make a special report to Parliament.<sup>115</sup> This is reviewed by the Public Administration Select Committee, which can call Ministers or Civil Servants before it to justify their refusal to implement the ombudsman's recommendations. It has been noted that "the Select Committee brings to the process a degree of moral and political clout that would otherwise be absent".<sup>116</sup>
- 3.81 On the whole these arrangements, when invoked, have been effective in placing pressure on departments to comply with ombudsmen's recommendations. For instance, it was only after the publication of a special report<sup>117</sup> and intervention by the Public Administration Select Committee<sup>118</sup> that the Government complied with all of the ombudsman's recommendations concerning the ex gratia scheme for Japanese prisoners of war.<sup>119</sup> A notable exception is the occupational pensions

<sup>112</sup> Public authorities remain bound by findings of injustice and maladministration, subject to judicial review. See *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1998] 1 QB 855 at 867 and *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), [2008] All ER 98.

<sup>113</sup> The Local Government Act, s 32.

<sup>114</sup> These statements set out the ombudsman's recommendations, why he or she considers the authority's response unsatisfactory and often also the authority's reasons for non-compliance.

<sup>115</sup> The Parliamentary Commissioner Act 1967, s 10(3).

<sup>116</sup> R Kirkham, "Challenging the Authority of the Ombudsman's Special Report on Wartime Detainees" (2006) 69 *Modern Law Review* 792, 815.

<sup>117</sup> Parliamentary Ombudsman, "A Debt of Honour": the ex gratia scheme for British Groups interned by the Japanese during the Second World War, Fourth Report (2004-05) HC 324.

<sup>118</sup> Public Administration Select Committee, Second Report: A Debt of Honour (2005-2006) HC 735.

<sup>119</sup> Kirkham suggests that pressure had also mounted as a result of the Administrative Court's ruling that the MOD had operated unlawfully in applying the ex gratia scheme: *Elias v Secretary of State for Defence* [2005] EWHC 1435 (Admin), [2005] All ER 94: R Kirkham, "Challenging the Authority of the Ombudsman: The Parliamentary Ombudsman's Special Report on Wartime Detainees", (2006) 69 *Modern Law Review* 792, 796.

case where the Government has continued to reject the ombudsman's finding of maladministration despite the publication of a special report.<sup>120</sup>

- 3.82 While the lack of enforcement powers has attracted controversy, calls for ombudsmen's recommendations to be enforceable in courts have generally been resisted on a number of grounds.<sup>121</sup> First, the ombudsmen's recommendations are said to carry moral authority, which leads to compliance in practice. This was a point emphasised by the Local Government Ombudsman in their response to the Law Commission's Housing Disputes Paper:

Our recommendations have moral force because we act independently and impartially and they have practical force because of the reputational risk to the bodies we investigate resulting from non-compliance.<sup>122</sup>

- 3.83 The ombudsmen's recommendations are complied with in the vast majority of cases. In 2006-07 there was 100% compliance with both the Parliamentary Ombudsman's<sup>123</sup> and Local Government Ombudsman's recommendations,<sup>124</sup> suggesting that non-compliance is not a serious issue in practice. Even where the public body initially resists, the additional mechanisms that can be invoked are usually effective in placing pressure on the body to comply.

- 3.84 Secondly, it is argued that non-enforceability facilitates dialogue and co-operation between ombudsmen and public bodies which ombudsmen rely on in carrying out their investigations and obtaining redress for complainants. This co-operative approach is considered a strength of ombudsmen schemes:

<sup>120</sup> The Court of Appeal in *R (Bradley) v Department of Work and Pensions* [2008] EWCA Civ 36, [2008] All ER 98 held that the Minister had acted unlawfully in rejecting the ombudsman's recommendations.

<sup>121</sup> This is an issue on which we consulted in our Housing Disputes Paper: Housing: Proportionate Dispute Resolution, An Issues Paper (2006) para 6.27, [http://www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf). The ombudsmen respondents (namely, the Local Government Ombudsman, Housing Ombudsman, and Public Services Ombudsman for Wales) unanimously agreed that ombudsmen recommendations should not be made enforceable. See Housing: Proportionate Dispute Resolution, An Issues Paper: Analysis of Responses para 3.32, [http://www.lawcom.gov.uk/docs/disputes\\_responses\\_analysis.pdf](http://www.lawcom.gov.uk/docs/disputes_responses_analysis.pdf). A similar approach has been adopted by the Parliamentary Ombudsman. See Parliamentary and Health Service Ombudsman, *The Ombudsman, the Constitution and Public Services: A crisis or an opportunity?* (December 2006), [http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/speeches/ombudsman\\_constitution\\_publicservices.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/speeches/ombudsman_constitution_publicservices.html) (last visited 16 June 2006).

<sup>122</sup> See Housing: Proportionate Dispute Resolution, An Issues Paper (2006) para 6.26, [http://www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf).

<sup>123</sup> A Abraham, "The Ombudsman and 'Paths to Justice': A Just Alternative or Just an Alternative?", paper delivered at the Institute of Advanced Legal Studies, 27 June 2007.

<sup>124</sup> In 2005-06, there was 99% compliance with the Parliamentary Ombudsman's recommendations and 100% compliance with the Local Government Ombudsman's recommendations. Note that the latter does not take into account those cases where the authority has yet to respond to the ombudsman's recommendations.



The ombudsman is often able to work with the public body concerned in a positive process of dialogue to find a positive way forward... this is a lot harder to do, if not impossible with the courts. Thus... the ombudsman can encourage the body concerned to take ownership of the issue and the solution... the improvement of public services is often better achieved through consultation and encouraging the public body concerned to believe in the idea and take it on board as their own idea, rather than having it foisted on them through some adversarial process.<sup>125</sup>

- 3.85 An empirical study comparing the coercive style of the Dutch administrative courts with the co-operative style of the Dutch ombudsmen concluded that the ombudsmen's co-operative approach produces less policy tension and fewer defensive reactions.<sup>126</sup>

Because ombudsmen decisions are not legally enforceable, officials will probably feel less threatened. Agencies also are allowed to implement his recommendations in the ways they prefer. If, however, defensive reactions do occur, the ombudsman has several ways to address them in his frequent communications with government agencies. During many interviews, my research established that, in response ombudsman's recommendations, officials may try to prevent implementation by debating the legal competence of the ombudsman or by simply ignoring a (non-binding) report. However, when officials mentioned these and other techniques to sidestep an ombudsman's recommendation, they almost immediately added that these devices were rarely put into practice.<sup>127</sup>

- 3.86 There is concern that making recommendations enforceable might result in a more adversarial and confrontational approach. It might lead to defensive practices and make the process more formal, costly and lengthy.<sup>128</sup> This is especially so if, as a result of enforceability of their recommendations, ombudsmen investigations were considered a determination of civil rights for the purposes of Article 6 of the European Convention on Human Rights.<sup>129</sup>

<sup>125</sup> R Kirkham, "The efficacy of the Ombudsman vs Judicial Review as the best remedy to produce lasting changes in the behaviour of local authorities: The case for the superiority of the Ombudsman" (Paper delivered at the Public Law Project Conference: Judicial Review – Trends and Forecasts, 12 October 2006).

<sup>126</sup> M Hertogh, "Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands" (2001) 23 *Law and Policy* 47.

<sup>127</sup> Above, p 63.

<sup>128</sup> These concerns were raised by the Public Services Ombudsman for Wales: Housing: Proportionate Dispute Resolution, An Issues Paper: Analysis of Responses, para 3.32(5), [http://www.lawcom.gov.uk/docs/disputes\\_responses\\_analysis.pdf](http://www.lawcom.gov.uk/docs/disputes_responses_analysis.pdf).

<sup>129</sup> On this point, see Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th report (2006-07) HC 421.

### **Access to the Ombudsmen**

- 3.87 There are currently two rules which restrict access to the ombudsmen: the “MP filter” and the “statutory bar”.

#### ***The MP filter***

- 3.88 All complaints to the Parliamentary Ombudsman must be channelled through a Member of Parliament; the Ombudsman cannot accept a complaint directly from a member of the public. This filter mechanism does not exist for other ombudsmen in the UK, including the Local Government Ombudsman.<sup>130</sup>
- 3.89 Part 5 sets out the concerns about this filter, and puts forward some options for reform. It suffices to note here that the MP filter was intended to be a mechanism by which only suitable complaints would be passed on to the ombudsman, that is, where there was a strong prima facie case and where the ombudsman had jurisdiction. It can be seen as a product of its time, and the criticisms of it see it as no longer relevant to a mature ombudsman’s service.

#### ***The statutory bar***

- 3.90 The second rule that restricts access to the ombudsmen is that an investigation cannot be conducted where the complainant has or had recourse to a legal remedy before a court or tribunal. This is known as the statutory bar. The bar was intended to prevent the ombudsman from trespassing on the jurisdiction of the courts and tribunals. However, the “gaps” in the system have narrowed with the development of administrative law, and many complaints of maladministration are now also amenable to legal action. This has made the operation of the statutory bar more difficult and contentious. The problems associated with the bar are discussed further in Part 5.

### **RESIDUAL CASES**

- 3.91 The discussion above illustrates the range of non-court avenues which claimants can use to seek redress for substandard administrative action. From internal complaints systems to ombudsman schemes, these avenues can provide a flexible, informal and efficient means of resolving disputes between public bodies and individuals claimants.
- 3.92 Whilst these avenues are likely to provide redress for a large proportion of complaints, it is inevitable that there will continue to be a number of residual cases that will require the intervention of the courts, either by way of judicial review or through a private law action. Broadly speaking, these cases will be dealt with by the courts for one of three reasons:
- (1) Only the courts can provide the remedy desired by the claimant, such as an injunction, mandatory order or damages;
  - (2) At least one party does not want to engage with non-court processes; or

<sup>130</sup> Elsewhere only the French ombudsman operates a similar filter. Other jurisdictions that had a filter have now removed it, notably Sri Lanka and Hong Kong.

- (3) The claimant is not offered, or is not aware of, non-court alternatives to provide redress.
- 3.93 Even if the second and third reasons are addressed by strengthening the role of non-court avenues and by raising public bodies' and individuals' awareness of the benefits of such routes, there will still be a number of residual cases for the first reason mentioned above. Only the Administrative Court can declare an administrative decision unlawful, quash an order, or issue a mandatory injunction requiring the decision-maker to take some kind of positive action. For making findings of negligence and awarding complex and structured damages, civil courts are normally appropriate. If these are the types of remedies required by claimants, then access to the court is necessary and it is vital from the point of view of both the claimant and the respondent to ensure that the system of redress is clear, certain and principled.
- 3.94 The following sections, therefore, consider the ability of claimants to seek redress for unlawful administrative action and for tortious liability in the court system. This section also examines the ability to seek redress under the Human Rights Act 1998 and in EU law.

### **JUDICIAL REVIEW**

- 3.95 Judicial review is the procedure by which a person may challenge the lawfulness of a decision, action or failure to act in relation to the exercise of a public function.<sup>131</sup> The Administrative Court has an inherent supervisory jurisdiction to ensure that public bodies operate within the limits of their powers and in accordance with general principles of law.<sup>132</sup> To this end, the Court has a power to strike down a decision that is unlawful on the grounds of illegality, irrationality and procedural impropriety.<sup>133</sup>
- 3.96 There are limits to the Administrative Court's role. The constitutional principle of the separation of powers requires the Court to respect Parliament's judgment in entrusting decision-making powers to executive government. Government bodies must be afforded a degree of latitude when deciding how best to exercise their discretion. It would be inappropriate for the Court to second-guess government policies, or to substitute its own views in their place.
- 3.97 The tension between judicial scrutiny and judicial restraint is a delicate one, and the Administrative Court has developed various techniques for accommodating it. First, in exceptional cases, the Court will refuse to entertain a claim for judicial review where the decision challenged is "non-justiciable". In practice, however, the Court gives a very narrow meaning to "non-justiciable" and is wary not to abdicate its particular constitutional responsibilities.
- 3.98 Secondly, the Administrative Court's preferred method for striking the balance between judicial scrutiny and judicial restraint is to adapt the *standard or intensity*

<sup>131</sup> Civil Procedure Rules, r 54.1(2). A broad range of administrative decision-making is amenable to judicial review.

<sup>132</sup> See *R v Ministry of Defence ex parte Smith* [1996] QB 517 at 556 (Bingham MR).

<sup>133</sup> See generally *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 to 411.

of review. It has been observed that the courts now adopt a “soft” standard of review in relation to certain questions (such as the exercise by a public body of discretionary judgment in political, social or economic matters), and a more stringent standard of scrutiny for “hard-edged” questions (such as the interpretation by a public body of statute, questions of precedent fact and issues of procedural fairness).<sup>134</sup> Discretionary decisions calling for political judgment on controversial issues remain amenable to judicial review in principle, albeit that the Court will be more reluctant to find them unlawful. Adjusting the standard of review on a case-sensitive basis is made possible by the flexibility inherent in the grounds for review. In relation to review on grounds of irrationality, for example, it has been said that it “constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake”.<sup>135</sup>

### **Procedure for seeking judicial review**

- 3.99 In order to challenge a decision by way of judicial review, applicants must comply with certain procedural requirements. They must seek permission to bring proceedings and this must be done promptly and certainly within a strict three-month time limit after the grounds for the claim arise;<sup>136</sup> they must show that they are sufficiently interested in the matter to have standing;<sup>137</sup> and there is a prior duty to exhaust alternative remedies (such as rights of appeal). More generally, parties are expected to resolve disputes “in a manner which both meets the needs of the parties and the public and saves time, expense and stress”.<sup>138</sup> These safeguards are designed to protect public bodies from speculative or vexatious litigation and to enable decision-makers to rely with greater certainty on the legal validity of their actions.

### **Remedies available**

- 3.100 Where an administrative decision is found to be unlawful, various remedies are available, albeit on a discretionary basis only. The Administrative Court may order the decision-maker to act in a specified manner (mandatory order); or to abstain from acting in a particular manner (prohibitory order); or the Court may quash a decision (quashing order) and may remit the matter back to the decision-maker for further consideration in light of its judgment or substitute the original decision with its own decision.<sup>139</sup> Alternatively, the court may make a declaration (say, that an administrative decision is unlawful), or grant an injunction preventing or compelling action by the public body.<sup>140</sup>

<sup>134</sup> M Fordham, *Judicial Review Handbook* (4th ed 2004) pp 277 to 295.

<sup>135</sup> *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130 (Laws LJ). See also *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 556 (Bingham MR).

<sup>136</sup> Civil Procedure Rules, r 54.5(1).

<sup>137</sup> Supreme Court Act 1981, s 31(3). The requirement that the applicant show sufficient interest to bring the claim is construed liberally: M Fordham, *Judicial Review Handbook* (4th ed 2004) pp 727 to 744.

<sup>138</sup> *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, (2002) 1 WLR 803 at [1].

<sup>139</sup> Supreme Court Act 1981, s 31(5).

<sup>140</sup> Supreme Court Act 1981, s 31(1) and (2).

### ***The limited availability of compensation in judicial review***

- 3.101 Traditionally, the function served by judicial review has *not* been to award compensation. The power of the Administrative Court to order monetary compensation is subject to tight restrictions. First, compensation must be claimed in conjunction with an existing judicial review remedy. Secondly, and crucially, the claimant must show that damages would ordinarily have been awarded in private law.<sup>141</sup> This situation is increasingly seen as unsatisfactory, particularly given that breaches of community law can result in damages awards. The problems with these restrictions on the recovery of damages in judicial review are discussed further in Part 4.

### **TORT LAW**

- 3.102 The limited availability of damages in judicial review has meant that claimants seeking compensation, out of necessity rather than choice, have resorted to the law of torts. It follows from the English conception of the rule of law that essentially the same rules of tort law apply to all defendants, irrespective of whether they are individuals, private corporations or public bodies.<sup>142</sup>
- 3.103 There is no generalised principle of governmental liability, but only a series of specific (or “nominate”) torts, each governed by its own particular conditions. In order to qualify for a right to compensation, claimants must be able to characterise their claims in such a manner that they fit within the structure of an existing tort.
- 3.104 Public bodies may clearly be liable for intentional torts. This remains a significant area where claimants may obtain damages for unlawful action. For example, a police officer who uses unlawful force when attempting to restrain a suspect may be liable for battery. Other intentional torts such as false imprisonment and malicious prosecution are clearly applicable to public bodies.<sup>143</sup> A public body could also in principle be liable for nuisance if it uses its land in an unreasonable way, causing damage to nearby property owned by the claimant.<sup>144</sup>
- 3.105 As many of the common law torts have historically been fashioned by the courts with a view to regulating relationships between private parties, their use to regulate citizen/state disputes has not been without difficulty. As the following sections will show, private law concepts and rationales are not necessarily apt for the adjudication of claims against public bodies.<sup>145</sup>

<sup>141</sup> Supreme Court Act 1981, s 31(4); Civil Procedure Rules, r 54.3.

<sup>142</sup> A V Dicey, *Introduction to the Law of the Constitution* (10th ed 1959).

<sup>143</sup> See respectively *R v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19 and *Gregory v Portsmouth City Council* [2000] 1 AC 419. For other examples of intentional tort claims made against public authorities, see M Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” [2003] *Judicial Review* 104, 104 to 105.

<sup>144</sup> See C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) paras 16.05 to 16.06 for examples.

<sup>145</sup> On the argument that this leads to a distortion of tort law, see C Harlow, *State Liability – Tort Law and Beyond* (2004) pp 10 to 41; and Monetary Remedies in Public Law, Law Commission Discussion Paper (2004) para 8.10.

3.106 Two torts, the tort of misfeasance in public office and the tort of breach of statutory duty, stand out as being of particular relevance in relation to public body respondents. However, it is the tort of negligence, which has developed as the primary mechanism for citizens attempting to obtain redress from public bodies owing to the restrictive nature of misfeasance and breach of statutory duty. All three are considered in turn below.

### **The tort of misfeasance in public office**

3.107 Misfeasance in public office is an intentional tort, available only against public bodies. It provides a remedy to claimants who have been harmed by public officers acting unlawfully and in bad faith.

3.108 In order to establish the tort of misfeasance in public office, the claimant must prove either targeted or untargeted malice. Targeted malice means conduct specifically intended to injure the claimant. Untargeted malice is where the respondent knew or acted with reckless indifference with respect to the lawfulness of their conduct and its effect on the claimant.<sup>146</sup> Proximity, namely a special relationship between the claimant and the respondent, does not have to be established.<sup>147</sup> However, the claimant must prove material damage caused by the public officer in order to succeed.<sup>148</sup>

3.109 Establishing the mental element of the tort of misfeasance in public office has proved very difficult in practice, with the result that while the tort may be “well established”,<sup>149</sup> it is rarely made out. These difficulties are discussed further in Part 4.

### **The tort of breach of statutory duty**

3.110 Where a public body breaches a statutory duty, it may be liable to pay compensation to those harmed by the breach. Breach of statutory duty is a distinct private law tort that has been developed by the courts at common law. To establish the tort, a claimant must prove that:

- (1) the statute in question intends that a breach of the relevant duty gives rise to a private law action for damages;
- (2) the duty was, in the circumstances, breached by the defendant; and
- (3) the breach caused him or her to suffer loss and that this loss was of a kind contemplated by the statute.

<sup>146</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2000] UKHL 33, [2003] 2 AC 1.

<sup>147</sup> Above at 193 and 253.

<sup>148</sup> *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395.

<sup>149</sup> *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172 (Lord Diplock).

3.111 Whether or not a particular course of conduct amounts to a “breach” under the second requirement will depend upon the interpretation of the statute.<sup>150</sup> The third requirement is by and large a fairly routine question of causation. By contrast, it is the first condition that has attracted the most debate and litigation and which, in practice, has proved to be the most difficult for claimants to satisfy.

***The condition that a statutory duty be actionable in private law***

3.112 Claimants must establish that a particular statutory duty is actionable in private law. The central question is whether “from the provisions and structure of the statute an intention can be gathered to create a private law remedy”.<sup>151</sup> This is essentially an exercise in statutory construction: “the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted”.<sup>152</sup> However, most legislation does not state expressly whether or not Parliament intended for it to be actionable in private law. As such, courts have had to develop various techniques as aids to interpretation.

3.113 There is a general default presumption that, where a statute creates a duty and provides for a specific enforcement mechanism to ensure it is performed (for example, by making a breach of the duty a criminal offence, and prosecuting those who commit the breach), then that duty cannot be enforced in any other manner.<sup>153</sup> Alternatively, where no such mechanism exists, it may in fact be necessary to allow a private law right to sue for damages in order to enforce the statutory duty effectively.<sup>154</sup>

3.114 There are further relevant factors. One indicator in favour of actionability is if a particular statutory duty has been imposed with a view to conferring protection on only a limited class or sub-section of society to which the claimant belongs.<sup>155</sup> For example, courts frequently hold that health and safety legislation is passed for the particular benefit of employees and so breach of such legislation is actionable by them.<sup>156</sup> By contrast, broad duties to promote public welfare in general will not normally be actionable. A related consideration is the level of specificity, or generality, with which a statutory duty is cast or formulated. The more generic the obligation, the less likely it is that Parliament intended it to be actionable. It may also be relevant to have regard to the particular injury suffered by the claimant.

3.115 Statutory interpretation is not an exact science. The above factors are not so much strict tests as loose indicators. They frequently overlap and may often point

<sup>150</sup> Some statutes require the public authority only to take reasonable care, whereas others are capable of being breached without fault (in which case liability is “strict”). Some legislation may leave open specific statutory defences. See generally A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) paras 9.53 to 9.54.

<sup>151</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [3] (Lord Steyn).

<sup>152</sup> *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407 (Lord Simonds).

<sup>153</sup> *Doe d. Murray v Bridges* (1831) 1 B&Ad 847 at 859; cited with approval in *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 185.

<sup>154</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731.

<sup>155</sup> *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 185.

<sup>156</sup> See generally A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) para 9.16.

in opposite directions, meaning that the arguments for and against the actionability of a particular statute are finely balanced in practice. This approach has led to a perception of uncertainty and unpredictability about how the court will assess the parliamentary intention behind a particular statute. There also appears to be a general reluctance by the courts to imply an individual right to sue in private law where the statutory duty breached simply forms part of an overall regulatory system or a scheme of social welfare for the benefit of the public at large.<sup>157</sup> The difficulties are discussed further in Part 4.

### **Tort of negligence**

- 3.116 As there are tight restrictions on bringing claims for compensation on the basis of misfeasance in public office and breach of statutory duty, it has become an increasingly popular strategy for claimants to sue public bodies in the tort of negligence. Claimants will commonly seek to argue that a public body was negligent in the manner in which it exercised or refused to exercise its public law powers, or that it lacked diligence when discharging its public law duties. There is some overlap between the torts of negligence and breach of statutory duty, but they remain independent. A public body which breaches a statutory duty is not necessarily liable in negligence; conversely, a body may still be liable in negligence, even though it did not breach a statutory duty actionable in private law.<sup>158</sup>
- 3.117 In order to make out a claim in negligence, a claimant must show that:
- (1) the matter is justiciable;
  - (2) the defendant owed the claimant a duty of care;
  - (3) the defendant breached that duty of care; and
  - (4) the breach caused the claimant to suffer loss.
- 3.118 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. As a matter of basic principle, courts consider that this standard model applies equally whether the defendant is an individual or private organisation, or a public body.<sup>159</sup>
- 3.119 At the same time, however, courts have come to accept that claims against public bodies frequently raise particular difficulties of their own. Where the defendant is a public body, the traditional goal of ensuring compensation must be weighed against competing public interest factors, which may for one reason or another militate *against* liability.<sup>160</sup> Of particular concern has been the potential for state liability to expand uncontrollably. This is acutely apparent in cases where the claimant has been injured as an *indirect* result of a public body's conduct and where the injury has consisted of *pure economic loss*. An example where this

<sup>157</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731 to 732.

<sup>158</sup> *Bux v Slough Metals Ltd* [1973] 1 WLR 1358.

<sup>159</sup> *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93.

<sup>160</sup> These are discussed in the following sections.



could have occurred was the BCCI litigation, where, if the claimants had been successful, then the Bank of England could have been faced with liability approaching £1 billion.<sup>161</sup>

- 3.120 The balance between claimants' private interests in receiving compensation and the countervailing public interest can be difficult to strike and outcomes in this area of the law are often controversial. The focus in the following sections is on the ways in which the courts' consideration of public interest concerns can and has distorted the conventional analysis of a claim in negligence. It also considers the ways in which the law has become unclear and uncertain to the extent that outcomes are difficult to predict.

### **1. Doctrine of Justiciability**

- 3.121 A striking feature of the case law is that courts will sometimes refuse to entertain a claim in negligence against a public body on the ground that it raises issues that are "non-justiciable". Justiciability has been described as "the constitutional concept which recognises [that] the capabilities of the courts are limited".<sup>162</sup> It is noticeably absent from private defendant litigation. Justiciability operates as an extremely potent control mechanism for limiting claims against public bodies, because it requires the court to strike out a claim without even proceeding to ask whether or not a duty of care should be owed.
- 3.122 Courts have evolved and experimented with various techniques for identifying "non-justiciable" issues, but none have proven entirely satisfactory. In its earlier decisions, the House of Lords set out two tests for determining justiciability, albeit these have since attracted considerable comment and criticism.
- 3.123 An early test, which was laid down in case of *Dorset Yacht Club Co Ltd v Home Office*,<sup>163</sup> was that a public body's decision would be justiciable only if it had involved the body transgressing the scope of its powers (*ultra vires*).<sup>164</sup> That is, anything done by a body *within* the limits of its mandate was considered non-justiciable and so beyond court scrutiny.
- 3.124 The rationale behind this rule was that it was assumed that Parliament had intended to confer immunity on public bodies insofar as they acted within the ambit of their discretion. Nonetheless, the test based on *ultra vires* was controversial. For instance, it was considered inappropriate and confusing to introduce public law concepts of *vires* into the private law tort of negligence.<sup>165</sup> A

<sup>161</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2000] UKHL 33, [2003] 2 AC 1.

<sup>162</sup> B Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 *Cambridge Law Journal* 631.

<sup>163</sup> [1970] AC 1004. The tests, which are set out below, were originally intended to be cumulative.

<sup>164</sup> [1970] AC 1004 at 1031. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 736 the reference was to the judicial review notion of irrationality or *Wednesbury* unreasonableness. "Irrational" decisions are those that are so arbitrary that they defy logic and reason.

<sup>165</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 736; discussed in D Fairgrieve, "Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom" [2002] *Public Law* 288, 298.

more substantive point, meanwhile, was that it would seriously restrict the reach of negligence liability if courts were to confine themselves to scrutinising only those decisions which were so “grossly delinquent”<sup>166</sup> as to be illegal. Perhaps in response to such criticisms, the House of Lords now appears to disfavour the *ultra vires* test.<sup>167</sup>

- 3.125 According to another test, the House of Lords held that a claim in negligence would be justiciable only if brought against a public body’s “operational” decisions. “Policy” decisions, on the other hand, would be entirely immune from judicial scrutiny.<sup>168</sup> It was said that “policy” decisions were those which “involve discretionary decisions on the allocation of scarce resources or the distribution of risk”.<sup>169</sup> Operational decisions, on the other hand, were those which simply involved the practical execution of some higher policy.
- 3.126 The premise of this formulation of justiciability was that courts ought not to interfere with policy decisions because they involve “a series of interlocking considerations, affecting a wide range of interests” and are likely “to reflect the outcome of democratic processes”.<sup>170</sup> On the other hand, nothing should preclude courts from scrutinising operational decisions: they are simply practical implementation steps and do not in themselves involve the formulation of discretionary government policy. However, this policy/operation distinction has proven difficult to apply in practice.
- 3.127 Courts have struggled to articulate workable criteria for determining what should and should not be justiciable. The most that can be said under the current state of law is that certain matters are deemed “unsuitable for judicial determination” and that these are revealed on a rather unpredictable, case-by-case basis. Having adopted and then rejected various “tests”, courts now appear to be moving towards a broader and more purposive approach to determining justiciability, whereby the court asks whether a case involved issues the courts are “ill-equipped and ill-suited to assess” or in relation to which “the court... has no role to play”.<sup>171</sup>

<sup>166</sup> The expression is that of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 761. See generally C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) para 2.49.

<sup>167</sup> *Barrett v Enfield London Borough Council* [2001] 2 AC 550; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

<sup>168</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 737; see also the earlier decision in *Anns v Merton London Borough Council* [1978] AC 728.

<sup>169</sup> *Rowling v Takaro Properties Ltd* [1988] AC 473 at 501B.

<sup>170</sup> C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) paras 2.32 to 2.33.

<sup>171</sup> *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 580 and 571 (Lord Hutton and Lord Slynn respectively).

## **2. Duty of care**

- 3.128 Assuming that a claimant is able to satisfy the court that the claim does not raise matters which should be considered non-justiciable, then he or she must proceed to establish the routine elements of an action in negligence, starting with the duty of care requirement.
- 3.129 The requirement of duty of care has its historical origins in the notion of neighbourhood.<sup>172</sup> In *Caparo v Dickman*,<sup>173</sup> the House of Lords laid down three conditions for determining when a duty of care is owed. These are:
- (1) The defendant must have been able to foresee that his or her carelessness would have caused the claimant to suffer injury of the kind complained of;
  - (2) There must have been a relationship of “proximity” between the defendant and the claimant; and
  - (3) It must be “fair, just and reasonable” for the law to impose a duty of care on the defendant in respect of the claimant.
- 3.130 This tri-partite test constitutes the backbone of the law on duty of care. It forms part of general negligence theory and applies equally in cases implicating public and private defendants alike. While the *Caparo* test has provoked considerable debate in its own right, its application in relation to public body defendants has proven particularly problematic. We shall now focus on these particular problems.

### FORESEEABILITY

- 3.131 A defendant will be held to owe a duty of care to a claimant only insofar as the defendant could be reasonably expected to have foreseen that a failure to take care would cause the claimant damage. It is not necessary for the defendant to have foreseen the precise manner in which the loss would have occurred, but he or she must have been able to contemplate the broad nature or kind of injury suffered by the claimant.

### PROXIMITY

- 3.132 The notion of “proximity” refers to the closeness of connection between defendant and claimant. To this extent, it depends largely upon an analysis of the relationship of the parties to one another.

#### *Proximate relationships*

- 3.133 It is readily accepted that “proximity” is established in certain kinds of relationship, such as employer/employee, doctor/patient, and teacher/pupil.<sup>174</sup> More generally, proximity will also be established where a defendant has assumed special responsibility towards the claimant. The assumption of responsibility may be

<sup>172</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>173</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605. The case concerned liability for economic loss, but the conditions have subsequently been treated as being of general application.

<sup>174</sup> C Baker, *Local Government Liability Law* (2007) para 2.52.

express, such as between a police authority and its informants,<sup>175</sup> or implied from the defendant's conduct, for example, attending to a collapsed person but not calling for medical assistance.

- 3.134 In cases of assumed responsibility, a duty of care may arise depending upon the application of the *Caparo* test.<sup>176</sup> These cases often involve contractual relationships or relationships close to contract. In such relationships, it is easy to see that one party has assumed a special responsibility to take reasonable care not to harm the other party.
- 3.135 In private law, courts have employed the notion of proximity as a control mechanism for limiting a defendant's exposure to liability where the relationship is not considered contractual or near contractual. It is thought that it would be undesirable if an individual could be held to owe a duty of care to a potentially very large class of persons and in respect of loss which is widely dispersed and indeterminate. In such cases, the liability to compensate may be well out of proportion to the degree of the defendant's fault, and it might be considered more equitable to leave the loss distributed among many than to shift it, potentially ruinously, to a single individual.
- 3.136 By contrast, it is not immediately apparent that these reasons apply with the same force where the defendant is a public body. By their very nature, public bodies come into contact with the general population on a daily basis. They frequently enjoy extensive legal powers in respect of large sections of society, who entrust them to discharge their public functions competently. State intervention, whether in providing public welfare or in regulating private enterprise, is pervasive and it can affect the most intimate aspects of citizens' lives. Moreover, the fact that public bodies typically act in the public interest is a ground for distinguishing them from private individuals, who may generally (within limits) pursue their own self-interest in relation to other citizens with whom they do not have any voluntary relationship. For these reasons, it may be that the notion of "proximity", in so far as it requires a contractual or near contractual relationship, is inapt, or simply superfluous, as a criterion for determining liability in the citizen/state context.
- 3.137 Case law demonstrates that reliance on "proximity" as a formal pre-condition to establishing a duty of care leads to results which are inconsistent and unpredictable and in some cases unjust. For example, the Home Office may negligently release a dangerous offender into society who then commits a crime. It has been held that there is not sufficient "proximity" between the victim and the Home Office to establish a duty of care.<sup>177</sup> A similar problem may arise where police officers persistently neglect valid requests for special protection by a prosecution witness and that witness is subsequently murdered.<sup>178</sup>

<sup>175</sup> *Swinney v Chief Constable of Northumbria* [1997] QB 464.

<sup>176</sup> *Carty v London Borough of Croydon* [2005] EWCA Civ 19, [2005] 1 WLR 2312.

<sup>177</sup> *K v Secretary of State for the Home Department* [2002] EWCA Civ 775, (2002) 152 NLJ 917.

<sup>178</sup> See *Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325 (Admin), [2007] 1 WLR 1821 at [9].

3.138 By contrast, other cases have seen the concept of “proximity” being strained in order to impose a duty of care. For example, it has been held that the National Dock Labour Board, whose broad statutory remit included catering for the “training and welfare” of dock workers, did enjoy a sufficiently proximate relationship vis-à-vis the workers even whilst they were employed by registered private employers.<sup>179</sup>

“FAIR, JUST AND REASONABLE”

3.139 Particular difficulties arise when considering whether it is “fair, just and reasonable” to impose a duty of care on a public body. The starting point is that “the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy”.<sup>180</sup> The “counter considerations” which public body defendants have traditionally invoked were enunciated by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*.<sup>181</sup> The question in that case was whether or not it would be “fair, just and reasonable” to impose a duty of care on a local authority in respect of its failure to intervene and admit children into care who had suffered neglect and abuse at home. It was considered that a number of factors militated against a duty of care and these have subsequently been discussed in a variety of contexts.

*The multi-disciplinary and delicate nature of administrative decision-making*

3.140 Several of the reasons given in the *Bedfordshire* case for denying a duty of care related to the nature of the public body’s decision. For instance, emphasis was placed on the idea that dealing with vulnerable children was an “extraordinarily delicate” task and, moreover, one which provided a “fertile ground in which to breed ill feeling and litigation”.<sup>182</sup> It was also highlighted that the decision whether or not to remove a child was a multi-disciplinary one, involving co-operation between social services, but also the police, education bodies and doctors. Therefore, if a duty of care were to be imposed, this would lead to difficulties when it came to disentangling the respective liabilities of each participant body. Arguments of this kind are potentially applicable to other scenarios as well, such as the assessment of special educational needs.

3.141 In subsequent decisions, however, the courts have come to accept that these types of argument are only of limited weight in relation to the question of duty of care.<sup>183</sup>

<sup>179</sup> *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289, [2007] ICR 1469.

<sup>180</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 749.

<sup>181</sup> Above at 749 to 751. These were summarised by May LJ in *S v Gloucestershire County Council* [2001] Fam 313 at 329 to 330.

<sup>182</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 750.

<sup>183</sup> For example, see *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 674 (Lord Clyde).

*The compatibility of a duty of care with statutory schemes*

- 3.142 A further reason given in *Bedfordshire* for denying a duty of care was that it “would cut across the whole statutory system set up for children at risk”.<sup>184</sup> This raises a broader point that has featured strongly in subsequent cases: to what extent is a duty of care at common law consistent with a statutory scheme? Two particular kinds of tensions are liable to arise.
- 3.143 First of all, public bodies sometimes seek to argue that no duty of care should be imposed upon them at common law because this would conflict with their “primary” obligations under statute. For example, it is reasoned that police officers do not owe a duty of care to victims of crime, because that would risk distracting them from their primary function of crime prevention.<sup>185</sup> For the same reasons, neither do they owe a duty of care not to cause psychiatric injury to witnesses or suspects, because they should be entitled to interrogate them robustly in the course of criminal investigation.<sup>186</sup> To take a different example, courts consider that fire services do not owe a duty of care to individual members of the public who report a fire, because that would compromise their principal duty “owed to the public at large to prevent the spread of fire”.<sup>187</sup> As a final example, courts reason that social workers do not owe a duty of care to parents whom they wrongly suspect of child abuse. The courts have consistently held that to impose such a duty of care would conflict with a public body’s statutory duty to treat the child’s best interests as paramount.<sup>188</sup>
- 3.144 The second type of tension between statute and a duty of care arises where the statute already provides for some kind of redress mechanism, such as a right of appeal or a limited right to compensation. The issue here is whether the statutory remedy should be taken as ousting a duty of care at common law, or whether there is in fact scope for the two to co-exist.
- 3.145 Whilst not conclusive, the existence of an express statutory remedy has tended to result in the courts denying a common law duty of care. For example, decisions relating to social security, planning permission, and health and safety inspection are regulated by specific statutory frameworks and, therefore, cannot be challenged by way of an action framed in negligence.<sup>189</sup> In a similar vein, it was not considered fair, just and reasonable to impose a duty of care on the Secretary of State in the discharge of his statutory functions under the Child Support Act 1991, on the grounds that the statutory scheme provided substantial

<sup>184</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 750.

<sup>185</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53, confirmed in *Brooks (FC) v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 at [30].

<sup>186</sup> *Brooks (FC) v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 at [30].

<sup>187</sup> *Capital and Counties plc v Hampshire County Council* [1997] QB 1004.

<sup>188</sup> See *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373; *D v Bury Metropolitan Borough Council* [2006] EWCA Civ 1, [2006] 1 WLR 917; *Lawrence v Pembrokeshire County Council* [2007] EWCA Civ 446, [2007] 2 FCR 329.

<sup>189</sup> See respectively, *Jones v Department of Employment* [1989] QB 1; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281 at 283; EWCA Civ 1848, [2004] 1 WLR 1881; *Harris v Evans* [1998] 1 WLR 1285 at 1297 to 1298; see also *Martin Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2007] EWCA Civ 1041, [2007] STC 1802.

protection against incompetence.<sup>190</sup> Not only was there a statutory mechanism for the determination of appeals relating to the assessment of child support maintenance, the Act also made provision for interest to be paid on arrears thereby providing some measure of “compensation” for delayed receipt of maintenance.

- 3.146 One explanation for this approach is that where Parliament has already put in place a statutory remedy there is no longer any need for the courts to create an additional duty to compensate at common law.<sup>191</sup> A further justification relates to courts’ duty to respect Parliament’s intention. Statutory systems of redress have been put in place for sound reasons of policy and complaints must be channelled through these established routes, which were intended to be exclusive. For example, the statutory regime governing adoption has been carefully crafted with a view to promoting the finality and certainty of adoption orders. Permitting a broad claim in negligence to undercut this would therefore be unacceptable.<sup>192</sup>
- 3.147 A potentially countervailing consideration is the adequacy or effectiveness of the alternative remedy. In the *Barrett* and *Phelps* cases,<sup>193</sup> the House of Lords took the view that the availability of alternative remedies, including statutory procedures, did not militate against a duty of care as these would not be as “efficacious” as an action in negligence. It was only through a claim for damages at common law that the claimant was able to obtain compensation for past as well as future losses.<sup>194</sup> Generally, however, it is not the adequacy of the remedy per se, but rather Parliamentary intent which is taken to be decisive.<sup>195</sup> This means that the claimant will be expected to pursue the statutory remedy rather than a common law claim even where the former is less attractive than suing in negligence.<sup>196</sup>
- 3.148 The decisions on this point are difficult to reconcile and it is apparent that courts have not yet settled on a firm position as to relationship between statutory remedies and common law causes of action, and in particular the interplay between Parliamentary intent and adequacy of the statutory remedy. The need for clarification is pressing if claimants (and their legal advisers) are to know where and by what means they are expected to seek redress.

<sup>190</sup> *Rowley v Secretary of State for Department of Work and Pensions* [2007] EWCA Civ 598, (2007) 151 SJLB 856.

<sup>191</sup> C Baker, *Local Government Liability Law* (2007) para 2.101.

<sup>192</sup> *A v Essex County Council* [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [42] to [43].

<sup>193</sup> *Barrett v Enfield County Council* [2001] 2 AC 550 at 568; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

<sup>194</sup> *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 672.

<sup>195</sup> See for example, *Jones v Department of Employment* [1989] QB 1; *Ryeford Homes Ltd v Sevenoaks District Council* [1989] 2 EGLR 281 at 283; EWCA Civ 1848, [2004] 1 WLR 1881; *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42.

<sup>196</sup> The Court of Appeal has recently endorsed this as the correct approach. See *Rowley v Secretary of State for Department of Work and Pensions* [2007] EWCA Civ 598, (2007) 151 SJLB 856.

### *The risk of defensive administration*

- 3.149 Another argument raised against imposing a duty of care is that it may cause public officials to respond in an unduly risk averse or “defensive” manner. This concern has been expressed in a variety of contexts. In the *Bedfordshire* case, it was said that if social workers were made liable for wrong decisions in respect of removing children at risk, then they might hesitate when it came to making such decisions in the future. The delay would prejudice the child who was actually being abused, as well as other children who would suffer as a result of slower decision-making by individuals.<sup>197</sup> To take a different example, it has been suggested that highway authorities should not be held liable for failing to improve road safety, lest they over-do it and thereby “debase the currency” of road safety signs.<sup>198</sup> Finally, it has been speculated that if local authorities were to owe a duty of care in their supervision of building construction, then building inspectors might be over-cautious in their enforcement of regulations and insist upon higher standards than are actually required under the regulations. This would come at a considerable cost to those constructing buildings.<sup>199</sup>
- 3.150 Arguments based on notions of over-kill or “defensive administration” have been criticised by academic commentators on the basis that they are unsupported by empirical evidence.<sup>200</sup> Moreover, it has been argued that in foreign jurisdictions, including US states, France and Germany, the presence of a legal duty to compensate has not induced a risk averse culture.<sup>201</sup> Meanwhile, approaching the problem from a different angle, it has been argued that, even assuming that a duty of care would lead to more cautious decision-making, this should be welcomed as beneficial because it would encourage an improvement to standards in public service.<sup>202</sup> This area is explored further in Appendix B.

### *Floodgates*

- 3.151 A further argument is that imposing a duty of care on a public body would open the floodgates to a vast number of similar claims, many of them frivolous or vexatious.<sup>203</sup> The time and money expended in defending litigation would be a waste of public resources.<sup>204</sup> For example, if courts were to impose a duty of care

<sup>197</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 750.

<sup>198</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [103]; see also *Stovin v Wise* [1996] AC 923 at 958.

<sup>199</sup> See the comments by Lord Keith in *Rowling v Takaro Properties Ltd* [1988] AC 473 at 502, with regards to the decision in *Anns v Merton London Borough Council* [1978] AC 728.

<sup>200</sup> D Fairgrieve, *State Liability in Tort* (2003) pp 130 to 131; B Markesinis, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) pp 81 to 82.

<sup>201</sup> See D Levinson, “Making government pay: Markets, Politics and the Allocation of Constitutional Costs” (2000) 67 *University of Chicago Law Review* 345; B Markesinis et al, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English cases* (1999) pp 81 to 82.

<sup>202</sup> For example, see recently *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 at [33] (Lord Bingham).

<sup>203</sup> Following the decision in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, the headline in *The Times* of 14 May 2002 was “Schools face explosion of litigation”.

<sup>204</sup> For example, see recently *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 at [137].



on a financial regulator, then there is a danger that it would face many thousands of complaints. Similarly, a duty of care imposed upon police authorities would result in “a significant diversion of... manpower”<sup>205</sup> away from crime fighting and towards reopening and re-traversing closed investigations.

- 3.152 There is currently little empirical evidence to support or contradict these arguments and it possible that other limiting devices would be sufficient to rein in liability. Each claimant must still prove, on the balance of probabilities, that the defendant breached its duty of care, that this caused him or her loss, and that this loss is not too remote.<sup>206</sup>
- 3.153 In summary, the weight given by courts to the above factors in assessing whether imposing a duty of care would be “fair, just and reasonable” has varied, often unpredictably and without adequate explanation. The rather turbulent manner in which the case law has developed is illustrated in Part 4 with reference to certain sectors of government action.

### **3. Breach of a duty of care**

- 3.154 Provided that a claimant is able to show that his or her claim is justiciable and that the public body owed him or her a duty of care, the next step will be to demonstrate that the body breached that duty. A defendant will be considered to be in “breach” of its duty of care if it failed to meet the standard of care that could reasonably be expected of it.<sup>207</sup>
- 3.155 Determining what should be the appropriate standard of care is a question of law and it has become customary for courts to have regard to a wide range of factors. These include the probability that the defendant’s activity would have injured the claimant; the severity of the loss which the claimant would suffer should the risk posed by the defendant materialise; and the cost to the defendant of eliminating the risk. Two further considerations are of particular relevance in relation to public body defendants and so merit special attention.
- 3.156 First of all, when setting the standard of care, it will be relevant to take into account whether and the extent to which the defendant’s activity is undertaken in the public interest.<sup>208</sup> Courts are wary of imposing a standard of care which is excessively high. For instance, it has been said that although running trains at no more than five miles per hour may entail a lesser risk to health and safety, “our national life would be intolerably slowed down as a result. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk”.<sup>209</sup> In a similar vein, section 1 of the Compensation Act 2006 now formally provides that, where a defendant undertakes a “socially useful” activity, the court is entitled to take account of this by adjusting the standard of care as it sees fit.

<sup>205</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53, at 63 (Lord Keith of Kinkel).

<sup>206</sup> *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 667 (Lord Clyde); B Markesinis, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) pp 81 to 82.

<sup>207</sup> *Bolam v Friern Hospital Committee* [1957] 1 WLR 582 at 585.

<sup>208</sup> *Bolton v Stone* [1951] AC 850.

<sup>209</sup> *Daborn v Bath Tramways Motor Co* [1946] 2 All ER 333 at 336.

3.157 Secondly, courts have traditionally applied a carefully modulated standard of review when scrutinising the actions of defendants who are accused of professional negligence. In such cases, the relevant question is simply whether the defendant “failed to act in accordance with a practice accepted at the time as proper by a responsible body of persons of the same profession or skill”.<sup>210</sup> This approach has been justified on the basis that courts do not possess the technical expertise necessary to scrutinise to a fine degree the defendant’s professional judgment.<sup>211</sup> It is important to acknowledge that most claims for damages brought against public bodies for careless exercise, or non-exercise, of a statutory power, will involve allegations of professional negligence<sup>212</sup> and will, as such, be subject to the more appropriate standard of review.

#### **4. Causation**

3.158 The third element a claimant must establish to prove negligence is that the breach of the duty caused the claimant loss or damage. In particular, the claimant must be able to establish that:

- (1) the defendant’s conduct did in fact result in the damage of which he complains; and
- (2) the damage is not in law too remote a consequence of the defendant’s wrongdoing.<sup>213</sup>

3.159 The courts have often resorted to using the “but for” test to assess causation. That is, the court asks whether the loss would have been suffered by the claimant but for the defendant’s negligence. It has been suggested that this test cannot be mechanically applied to every instance, and is therefore limited by the concept of foreseeability.<sup>214</sup>

<sup>210</sup> *Carty v London Borough of Croydon* [2005] EWCA Civ 19, [2005] 1 WLR 2312 at [26], applying *Bolam v Friern Hospital Committee* [1957] 1 WLR 582.

<sup>211</sup> D Nolan, “The Reach of Breach: Breach of Duty as a Control Mechanism in Negligence” (forthcoming), 13. A further reason is that professionals will also be held to account by their own disciplinary or regulatory bodies. The *Bolam* test requires the claimant to show that a professional defendant fell below the standard of the ordinary skilled man exercising and professing to have that special skill and failed to act in accordance with an accepted body of opinion.

<sup>212</sup> Whether by social workers, educational psychologists, police officers, regulatory bodies or civil servants.

<sup>213</sup> A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) para 2.01.

<sup>214</sup> *Overseas Tankship (UK) v Morts Dock and Engineering Co (“The Wagon Mound”)* [1961] AC 388.

### **Liability for omissions**

- 3.160 It is a general rule of the tort of negligence that defendants cannot be held liable for a mere failure to act, also known as a “pure omission”.<sup>215</sup> By way of exception, a defendant may be held liable where it has entered into a special relationship or undertaken responsibilities giving rise to a positive duty to act.<sup>216</sup> The principle of no liability for omissions has traditionally been defended on political, moral and economic grounds:

In political terms it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the ‘why pick on me?’ argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity to bear its own costs. If it benefits from being able to impose some of its costs on other people ... the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else.<sup>217</sup>

- 3.161 As was the case with the notion of proximity generally, the omissions rule does not appear to be particularly well suited to the context of state wrongdoing. First and foremost, the rationales for a general principle of no-liability do not necessarily apply with the same force in citizen/state relationships as they do in relations between private individuals. The argument that a duty to act would curtail a defendant’s autonomy disregards the fact that, where the defendant is a public body, its freedom of action is already restricted by the limits of the mandate conferred upon it by democratic processes. Similarly, the economic justification for the omissions principle seems inapt. Public bodies and officials are paid to perform certain services and it may even be economically more efficient for them to act than for society to support the claimant’s injury. In simple terms, it is one thing to impose upon a stranger on the beach a duty to take care to save a drowning child; it is altogether different to impose such a duty upon a lifeguard employed by the local authority.<sup>218</sup> Likewise, the moral argument seems misplaced in the context of state omissions. Often, the public body will be the only body with the necessary legal powers to take action to prevent the claimant from suffering harm.<sup>219</sup> Indeed, there is a growing trend under human rights law

<sup>215</sup> For a critique of the omissions rule generally, see P Atiyah, *Atiyah’s Accidents: Compensation and the Law* (6th ed 1999) p 60.

<sup>216</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [38] (Lord Hoffman).

<sup>217</sup> *Stovin v Wise* [1996] AC 923 at 943 to 944 (Lord Hoffman).

<sup>218</sup> See *Indian Towing Company v US* (1955) 350 US 61.

<sup>219</sup> This is, for example, the case in relation to highway authorities who alone have power to remove certain obstacles to improve visibility: *Stovin v Wise* [1996] AC 923 at 943 to 946.

to impose positive duties on the state to take steps to prevent human rights violations and to investigate such violations where they do occur.<sup>220</sup>

- 3.162 It could be that a more convincing justification for the omissions principle is possible in the state liability context: in that it prevents courts from pre-empting public officials on important questions of social policy:

The concern is that, without a distinction between acts and omissions, the state can be held responsible for any failure to improve society. How such improvement can best be achieved, or even what is regarded as an improvement at all, are questions we ordinarily think of as being best left to the political process. Precluding liability for omission in relation to claims brought against public authorities helps ensure that it is not the courts that are determining the benefits to which members of the public are entitled.<sup>221</sup>

- 3.163 However, a further criticism of the omissions rule is that it is capable of producing particularly unfair results. Courts have become extremely reluctant to impose a duty of care, so much so that one senior law lord has said that it is now “difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has a power (or a public law duty) to provide”.<sup>222</sup> Assuming this view reflects accurately the current state of the law, it would appear to imply an absolute immunity from liability for failure to exercise a legal power. It seems harsh to apply such a blanket rule, regardless of how flagrant or ill-advised the omission by the public body and irrespective of the severity of the claimant’s injury. Drawing on the facts of *Dytham*,<sup>223</sup> it would be harsh not to impose a duty of care where a police officer watched a person being assaulted and took no steps to intervene.

### ***The role of damages in tort law***

- 3.164 If a claimant is successful in establishing negligence, then he or she will be entitled to compensation for past and future loss in full. The overriding purpose of awarding damages in tort law is to restore the claimant fully to the position he or she was in prior to the commission of the tort. In practice, however, problems do arise. Generally, losses resulting from property damage and physical injury are recoverable, although the rules on causation and remoteness may pose difficulties. However, recovery for certain kinds of “loss”, such as mental suffering and what is known as “pure economic loss”, are subject to special restrictions.

<sup>220</sup> For example, see *Osman v United Kingdom* (1998) 29 EHRR 245. See generally, A R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

<sup>221</sup> C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) para 3.108.

<sup>222</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [32] (Lord Hoffman).

<sup>223</sup> *Dytham* [1979] QB 722.

## COMPENSATION FOR PHYSICAL INJURY AND PECUNIARY LOSS

- 3.165 In principle, there is no problem in awarding damages for physical injury or property damage which a claimant suffers as a result of the defendant's negligence. The general principles governing the calculation of damages do not differ where the defendant is a public body. For various reasons, however, the quantification of loss is not an exact science, and is frequently an imprecise exercise in practice.
- 3.166 First, certain losses cannot by their very nature be quantified precisely in monetary terms (for example, pain, suffering and loss of amenity). The guiding principle is to award a sum that is "fair, reasonable and just" rather than to seek to achieve perfect restitution. Some degree of consistency is maintained through the use of tariffs and guideline bands for particular types of injury published by the Judicial Studies Board.<sup>224</sup>
- 3.167 Secondly, future losses (for example, loss of earnings) are likely to be subject to many variables. The multiplicand/multiplier method and the Ogden Tables attempt to provide a scientific approach to calculating damages, but the resulting figure will not necessarily be precise.<sup>225</sup> Certain losses are inherently speculative: for example, it is extremely difficult to predict what would be the likely effects of a negligent assessment of a claimant's educational needs on his or her prospects of employment or potential earning capacity.<sup>226</sup> It has even been queried, as a matter of principle, whether it is "fair, just or reasonable, or in accordance with the rational principles of distributive justice" to award compensation for loss which is so uncertain.<sup>227</sup> As a result, courts are likely to adopt a cautious approach to quantification and the level of damages will be modest.<sup>228</sup>

## RESTRICTIONS ON COMPENSATION FOR PURE ECONOMIC LOSS

- 3.168 There is a general rule that pure economic loss, that is, losses of a financial nature that are not consequent on either physical injury or damage to property, cannot be recovered. Examples of pure economic loss could be:
- (1) when an individual buys a company for a price which is greater than the actual value of a company as a result of a negligent audit; or
  - (2) the loss of income caused when a regulator negligently assesses whether a business complies with Health and Safety standards and prevents it from operating.

<sup>224</sup> Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (8th ed 2006).

<sup>225</sup> The sixth edition of the Ogden Tables is available at: [http://www.gad.gov.uk/Documents/Ogden\\_Tables\\_6th\\_edition.pdf](http://www.gad.gov.uk/Documents/Ogden_Tables_6th_edition.pdf) (last visited 16 June 2008).

<sup>226</sup> For the approach of the courts in calculating damages, see also C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) para 9.99.

<sup>227</sup> *DN v London Borough of Greenwich* [2004] EWCA Civ 1659, [2005] 1 FCR 112 at [77].

<sup>228</sup> For example, *Phelps v Hillingdon* [1997] 3 FCR 621 (Garland J); *Liennard v Slough Borough Council* [2002] EWHC 398 (QB), [2002] ELR 527 at [167] to [172] (Henriques J); *DN v London Borough of Greenwich* [2004] EWCA Civ 1659, [2005] 1 FCR 112 at [77].

- 3.169 Categorising a loss as “purely economic” can, by itself, be quite problematic. Take the frequently used example of a local authority surveyor who negligently approves plans for a house with insufficiently substantial foundations.<sup>229</sup> When this comes to light and providing the defect does not cause personal injury or damage to another property, the loss is not regarded as property damage. Rather, it is considered as a purely financial loss representing the cost of rectifying the mistake and the diminution in value of the property after the defect became apparent.<sup>230</sup>
- 3.170 As stated above, the general “exclusionary rule” for the tort of negligence is that pure economic loss is not recoverable.<sup>231</sup> This restrictive approach to pure economic loss is the result of the change in judicial attitude marked by the overturning of *Anns v Merton*<sup>232</sup> by the House of Lords in *Murphy v Brentwood*.<sup>233</sup>
- 3.171 In light of recent case law from the House of Lords, there seem to be three exceptions to the general rule of non-recovery for pure economic loss.<sup>234</sup> The first exception follows the line of reasoning that began with the case of *Hedley Byrne v Heller*.<sup>235</sup> There, the House of Lords allowed for the possibility of recovery of pure economic loss against the defendant who negligently makes an incorrect statement on which it is reasonable for the claimant to rely. *Hedley Byrne* concerned the negligent valuation of a company by its bankers on which the claimant advertising agency had relied before entering into a business relationship with that company. On the company’s default, the claimants sought recovery from the defendant bankers; the House of Lords held that there would have been recovery but for the existence of a clear disclaimer on the statement.
- 3.172 Over the years the courts have applied the negligent misstatement principle in *Hedley Byrne* to such situations as a negligently constructed reference such that the individual concerned could not gain employment<sup>236</sup> or a promise by a firm of solicitors to carry out an action and their negligent failure to do so.<sup>237</sup> In doing this, the courts have developed a rationale for the recovery of pure economic loss based on the “assumption of responsibility” test, as outlined by Lord Goff in the case of *Henderson v Merrett*. That is, the defendant knew what they were doing in making the statement and had assumed responsibility for the reasonable reliance of the claimant on that statement. In particular, Lord Goff stated that this assumption of responsibility “provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person

<sup>229</sup> This formed the background to both *Anns v Merton London Borough Council* [1978] AC 728 and *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>230</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>231</sup> S Deakin, A Johnson and B Markesenis, *Markesenis and Deakin’s Tort Law* (6th ed 2008), p 158. See also *Murphy v Brentwood District Council* [1991] 1 AC 398; *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>232</sup> *Anns v Merton London Borough Council* [1978] AC 728.

<sup>233</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>234</sup> *Customs and Excise Commissioners v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181.

<sup>235</sup> *Hedley Byrne and Co v Heller and Partners* [1964] AC 465.

<sup>236</sup> *spring v Guardian Assurance PLC* [1995] 2 AC 296.

<sup>237</sup> *Midland Bank Trust Co Ltd v Stubbs and Kemp* [1995] 2 AC 145.

assumes responsibility to another in the respect of certain services, there is no reason why he should not be liable in damages in respect of economic loss which flows from the negligent performance of those services".<sup>238</sup>

- 3.173 The second possible exception occurs where a claimant is unable to prove an "assumption of responsibility" by the defendant on the basis of the principle that began with *Hedley Byrne v Heller*. Then, following *Caparo v Dickman*,<sup>239</sup> it is necessary to fulfil the general test for the expansion of tortious liability into a new area. This means that a claimant must show "proximity", "foreseeability" and that it is "fair, just and reasonable" to impose liability in that situation.
- 3.174 As a third and final alternative, if the claimant can show that there is a clear analogy to an existing situation that has already been recognised by the courts, then the court may allow recovery.<sup>240</sup>
- 3.175 In the recent case of *Customs and Excise Commissioners v Barclays Bank plc*, the House of Lords revisited these exceptions, and held that they form three separate ways in which claimants may prove that they can recover for pure economic loss. However, none of these ways gives a conclusive answer; they are merely indicative of where a duty may be found.<sup>241</sup> As a result of this, where the courts will find it possible to recover for pure economic loss is probably best described as "uncertain". What is clear is that there is no general test in the tort of negligence for pure economic loss but looking over the history of cases on the matter, it is clear that there has been an incremental expansion of liability for pure economic loss.

#### ***Joint and several liability***

- 3.176 English tort law incorporates a general principle of joint and several liability.<sup>242</sup> In short, this means that where two or more persons acting independently contribute to the same loss, the claimant can sue any of them for the entire loss irrespective of their actual "share" in the overall blame. The defendant who is in fact sued then has a right to seek contribution from the other wrongdoer(s) in respect of their pro rata share in the blame.
- 3.177 As discussed in Part 4, the rationale for maintaining a general principle of joint and several liability is essentially policy-based. However, given the harsh results that the principle of joint and several liability can produce, Part 4 considers whether the principle should be re-evaluated.

<sup>238</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181.

<sup>239</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>240</sup> *Customs and Excise Commissioners v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181.

<sup>241</sup> Above.

<sup>242</sup> The principle is well entrenched and may be traced back as far as *The Bernina* (1887) 12 PD 58 at 61 (Lord Esher MR).

## **DAMAGES UNDER THE HUMAN RIGHTS ACT 1998**

- 3.178 The Human Rights Act 1998 (HRA) came into force on 2 October 2000. Its introduction has had two notable effects on the availability of compensation against public bodies in English law. First, the HRA has influenced the development of the tort of negligence at common law. Section 3 places a duty on courts to interpret and develop domestic law in a manner compatible with the European Convention on Human Rights (ECHR). Where a claimant's ECHR rights are engaged, this has arguably bolstered his or her existing claim in negligence and has helped rebut some of the public interest arguments which may otherwise have weighed against liability.
- 3.179 The second effect of the HRA has been to offer claimants a new and distinct route to redress in certain circumstances. Section 8 creates a statutory cause of action. This gives claimants the *prospect* of obtaining monetary compensation against a public body where that body has, contrary to section 6, acted in a manner incompatible with their rights under the ECHR.<sup>243</sup> It is essential to note, however, that an action for damages under section 8 HRA differs in a number of important respects from a common law claim for damages in tort. The following discussion will focus on the scope of section 8.

### **The availability of damages under section 8 HRA**

- 3.180 Claimants who consider that their Convention rights have been infringed must bring proceedings against the public body in the appropriate court or tribunal generally within one year from the date on which the act complained of took place.<sup>244</sup> They may be granted such relief or remedy as is considered just and appropriate by the court.<sup>245</sup> Importantly, the overarching concern for a court when deciding upon a remedy should be to bring to an end the human rights violation.
- 3.181 An award of monetary compensation for a breach of Convention rights does not follow as of right as it does in a negligence action. On the contrary, damages are awarded only exceptionally rather than as a rule. The court should not award damages unless they are "necessary to afford just satisfaction", having regard to all the circumstances including any other relief or remedy given.<sup>246</sup> This test mirrors the approach adopted by the European Court of Human Rights<sup>247</sup> and English courts must take into account the principles in Strasbourg case law.<sup>248</sup>
- 3.182 The other point to note about the availability of damages under section 8 is that where a court does decide to award damages, it should *not* seek to imitate the approach to quantification adopted in negligence. Rather, the correct approach to calculating damages is that developed by the European Court of Human Rights

<sup>243</sup> Defined in section 1 of the Act, and includes articles 2 to 12 and 14 of the Convention, articles 1 to 3 of the First Protocol and articles 1 and 2 of the Sixth Protocol as read with articles 16 to 18 of the Convention.

<sup>244</sup> Human Rights Act 1998, s 7(1) and (5).

<sup>245</sup> Human Rights Act 1998, s 8(1).

<sup>246</sup> Human Rights Act 1998, s 8(3).

<sup>247</sup> European Convention on Human Rights, Art 41.

<sup>248</sup> Human Rights Act 1998, s 8(4).



over the past fifty years.<sup>249</sup> The applicable principles were considered by the Law Commission and the Scottish Law Commission in a detailed review<sup>250</sup> and, more recently, by the House of Lords and the Court of Appeal.<sup>251</sup>

- 3.183 In particular, applicants should, as far as possible, be returned to the same position as if their Convention rights had not been violated and some regard should be had to manner in which the violation took place.<sup>252</sup> The purpose of incorporating the ECHR into domestic law via the HRA “was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg”.<sup>253</sup> Whereas at common law damages are quantified by reference to general brackets or guidelines, under section 8 HRA the level of compensation remains discretionary – it should be no more than is “equitable” in the circumstances.<sup>254</sup> It is notable that compensation for non-pecuniary losses in particular remains modest and involves an explicit balancing exercise between the need to ensure respect for human rights and the need to recognise that public resources are limited.<sup>255</sup> There is little doubt that the courts’ awareness of public finances has had a tempering effect on the levels of compensation.

#### **The application of section 8 HRA**

- 3.184 Presenting a claim for damages under section 8 HRA presupposes that the claimant is able to demonstrate that there has been breach of his or her Convention rights. The HRA does not provide a domestic remedy where none would have been available in the European Court of Human Rights.<sup>256</sup> In practice, the Convention rights which are invoked most commonly are the right to life (article 2); the right not to be subjected to inhuman and degrading treatment (article 3); the right to liberty and security (article 5); the right to a fair trial (article 6); the right to private and family life (article 8); and the right to peaceful enjoyment of one’s property (Protocol 1, article 1).
- 3.185 In certain respects, section 8 HRA may be seen as going further than the common law. For example, it is well established that a police authority which fails

<sup>249</sup> Human Rights Act 1998, s 3 expressly requires English courts to have regard to Strasbourg principles, not domestic precedents.

<sup>250</sup> Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180, <http://www.lawcom.gov.uk/docs/lc266.pdf>.

<sup>251</sup> See respectively *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673; and *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] QB 1124.

<sup>252</sup> *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 QB 1124 at [67] to [70].

<sup>253</sup> *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 at [19].

<sup>254</sup> *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] QB 1124 at [60].

<sup>255</sup> Above at [75]: “Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care”.

<sup>256</sup> *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2005] UKHL 57, [2006] 1 AC 529.

to catch a killer owes no duty of care in negligence to the murderer's victim.<sup>257</sup> By contrast, a claim for compensation is possible under section 8 HRA, on the basis of violations of articles 2 and 8 ECHR. Damages are available in respect of losses suffered by the victim and the victim's parents.<sup>258</sup>

- 3.186 Similarly, a local authority which persistently fails to provide a disabled person with appropriate accommodation may be liable to pay him or her compensation under section 8 HRA, on the basis that it has breached that person's rights under article 8 ECHR.<sup>259</sup> By contrast, had that person brought a claim in the tort of negligence, it would probably have failed given the reluctance of courts to impose a duty of care in respect of a failure to confer a benefit.
- 3.187 It may thus be tempting to see in section 8 HRA a means of remedying some of the shortcomings in the coverage of judicial review and tort law. However, Section 8 was not intended to be a sweeping-up mechanism and, as such, it can at best provide only an imperfect remedy for deficiencies in the common law. Not only is compensation under the HRA discretionary, but section 8 also puts great pressure on claimants to tie their actions to one of the rights explicitly enumerated in the HRA.

#### **DAMAGES UNDER EU LAW**

- 3.188 A person may recover compensation from any organ of a member state where it has breached a rule of EU law. In its decision in *Francovich*,<sup>260</sup> the European Court of Justice identified three conditions which have to be satisfied before liability may be established:<sup>261</sup>
- (1) The rule of EU law breached must have been intended to confer rights upon the individuals;
  - (2) The breach must be "sufficiently serious"; and
  - (3) There must be a direct causal link between the breach and the damage sustained by the individuals.
- 3.189 In practice, the first and third conditions have caused little difficulty for claimants. It is the second requirement which has proven the most common ground for dismissing claims.

<sup>257</sup> See also *Hill v Chief Constable of West Yorkshire* [1989] AC 53, confirmed in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 at [30].

<sup>258</sup> *Van Colle v Chief Constable of the Hertfordshire Police* [2007] EWCA Civ 325, [2007] 1 WLR 1821.

<sup>259</sup> *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 (Admin), [2003] HRLR 4, approved in *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] QB 1124.

<sup>260</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I- 5357.

<sup>261</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I- 1029, [1996] QB 404, para 74.

- 3.190 The test for determining a sufficiently serious breach is whether the member state “manifestly and gravely disregarded the limits on its discretion”, rendering the breach “inexcusable”.<sup>262</sup> Particular regard is had to factors such as:

The clarity and precision of the rule infringed, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law.<sup>263</sup>

- 3.191 The discretion afforded to the defendant will be highly relevant. Where the Member State has little or no discretion in the implementation of an EU directive, mere infringement may qualify in itself as a sufficiently serious breach.
- 3.192 The use of the “sufficiently serious” breach test as a control mechanism has not escaped comment and parallels have been drawn with the inquiry in English law into whether or not a duty of care has been breached.<sup>264</sup> In practice, it has proven extremely difficult for claimants to overcome the “sufficiently serious” hurdle.
- 3.193 Where a claimant is able to establish liability, the amount of compensation awarded must be in accordance with national law on liability and must not be “impossible or excessively difficult to obtain”.<sup>265</sup> It must be commensurate with the loss or damage sustained and may include an award of exemplary damages.<sup>266</sup> Yet there remains a requirement that the claimant show that he or she had taken reasonable care to avoid the loss or damage or to mitigate it.<sup>267</sup> For example, if a Community provision had direct effect, the claimant would be expected to bring proceedings in the national court to have his rights vindicated: he could not simply remain inactive and then later claim damages for the state’s failure to comply with EU law. To that extent, the claim for damages might be described as “residuary”.<sup>268</sup>

<sup>262</sup> Above, para 55.

<sup>263</sup> Case 424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para 43. A persistent breach by the member state, despite a ruling to the contrary from the European Court of Justice, is likely to amount to a serious breach.

<sup>264</sup> See Craig, “Once More Unto the Breach: The Community, the State and Damages Liability” (1997) 113 *Law Quarterly Review* 67, 94; M Andenas and D Fairgrieve, “Sufficiently Serious?” in M Andenas (ed), *English Public Law and the Common Law of Europe* (1998); and Allison, “Transplantation and Cross-fertilisation in European Public Law” in J Beatson and T Tridimas (eds) *New Directions in European Public Law* (1998), 169.

<sup>265</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I-1029, [1996] QB 404.

<sup>266</sup> Above.

<sup>267</sup> Above, para 84.

<sup>268</sup> P Craig and G De Burca, *EU Law Text, Cases and Materials* (4th ed 2008) p 341.

# **PART 4**

## **LIABILITY IN PUBLIC AND PRIVATE LAW**

### **INTRODUCTION**

- 4.1 Building on the work of Part 3, Part 4 considers some of the limitations inherent in the current system and suggests options for reform. This is done whilst recognising the special nature of public bodies, particularly the multifaceted burdens placed on them as providers of public services.
- 4.2 Part 4 draws on our analysis of the “modified corrective justice” principle. This principle suggests that where an aggrieved citizen cannot obtain just redress for substandard administrative action through alternative, non-court based mechanisms, they should be able to access the courts to obtain redress, within certain parameters.
- 4.3 These parameters are expressed as a package that attempts to balance the interests of aggrieved claimants against the danger that liability might create an undue burden on resources. The consequence of this is to modify the availability of damages in judicial review and create more certainty and predictability in the tortious liability of public bodies.
- 4.4 In judicial review, it is suggested that damages should be available as a remedy alongside the prerogative remedies where the administrative decision involved “serious fault” and where the claimant suffers loss. This would essentially harmonise the system with that which already exists for a “sufficiently serious” breach of EU law.
- 4.5 In tort, a similar “serious fault” scheme would apply to the sphere of public action that can be described as “truly public”. Action undertaken by public bodies that is not “truly public” would be subject to the ordinary law of tort. It is not proposed that our suggested scheme would replace the current regime in areas such as medical negligence. Within the “truly public” sphere the tortious standard of negligence would be replaced by a higher standard of “serious fault”.
- 4.6 Within both of these schemes, potential liability would only be imposed where it could be demonstrated that the relevant legal regime “conferred” a benefit on the claimant. Furthermore, the package would entail modifying the blanket rule on joint and several liability in this area of public body liability.
- 4.7 Lastly, if any change is to simplify the area, then it may be necessary to abolish the action for misfeasance in public office and significantly limit the ambit of breach of statutory duty as it applies to public bodies.
- 4.8 This Consultation Paper puts forward these proposals in the context of encouraging a real debate on the issues. We invite responses on all aspects of our proposals as well as on the underlying factors to be considered in any proposed reform of this area.

## **UNDERLYING PRINCIPLES**

4.9 In Appendix A, we outline a principle of “modified corrective justice”. This is the principle on which to base the liability of public bodies in those residual cases that require the court’s attention. To summarise our conclusions in Appendix A:

- (1) In general, the principle of corrective justice underpins the relationship between the state and individual claimants;
- (2) However, in certain circumstances the normal principle of corrective justice needs to be modified. This is in order to take into account certain features of the relationship between the state and potential claimants;
- (3) In relation to monetary compensation, the relationship between the state and an individual claimant has a different moral complexion to the relationship between private individual claimants;
- (4) An individual’s relationship with and expectations of the state are such that they should look first to non-monetary remedies against the state;
- (5) However, where compensation is in issue, there is a moral case for limiting it to particularly serious conduct where the state is the respondent;
- (6) This modification only applies where the state is undertaking “truly public” activity. Therefore, it does not apply where the impugned activity could equally have been carried out by a private individual.

4.10 We draw on these principles of “modified corrective justice” throughout this Part, as they provide the backdrop to the development of the options for reform.

4.11 That said, there are many ways to justify changes to the system, especially in light of the current confusion and over-complication. We do not feel that our options for reform are solely defensible by reference to any particular theory of justice. What is clear is that, within the process of reform of public service delivery, there should be open debate on the system through which citizens can obtain redress for substandard administrative action.

## **OVERVIEW OF CURRENT PROBLEMS**

4.12 This section deals with some of the problems with the current court-based systems of redress. The focus on court-based solutions in this Part should not suggest that we are ignoring alternative avenues of redress, including the ombudsmen. Rather, building on the examination of those alternative redress mechanisms in Part 3, this Part proceeds on the basis that while those avenues will afford the possibility of redress to the vast majority of citizens, there will be a certain number of “residual cases” that require the court’s attention.

4.13 Currently, there are certain situations where the court-based system fails to meet the needs of both citizens and public bodies. Those deficiencies should be remedied where possible. We are not suggesting, however, a complete revision of the current system or a massive expansion in the damages liability of public bodies.

## **Public Law**

- 4.14 At present, damages are only available in an action for judicial review in exceptional circumstances.<sup>1</sup> The view has traditionally been that the Administrative Court is not the appropriate forum for an award of damages. Certain exceptions to this rule do exist, for instance under section 8 of the Human Rights Act 1998 or where there would have been a possible civil law damages claim at the time that the judicial review was launched.<sup>2</sup>
- 4.15 Damages can also be awarded where a Member State has caused a claimant's loss by infringing their rights through a sufficiently serious breach of EU law.<sup>3</sup>
- 4.16 A situation where damages are awarded for "serious fault" in EU law but not for "serious fault" in domestic law is clearly problematic. It means that claimants whose action is based solely in domestic law are in a worse position with regard to remedies than those who can found an action in EU law.
- 4.17 Even in these exceptional cases, an application for judicial review cannot be launched solely for a monetary remedy.<sup>4</sup> However, occasionally a finding of unlawfulness in judicial review may facilitate a civil action for damages.<sup>5</sup>

### ***Possible reasons for limitation on damages***

- 4.18 There are three principal reasons for such a limited use of damages in judicial review. These are worth considering in turn.
- 4.19 First, the Administrative Court's supervisory jurisdiction has grown out of the need to uphold the rule of law. As such, the emphasis has primarily been on guarding against the objective misuse of executive power rather than on an individual's claim for reparation. In seeking to achieve this primary aim, it has traditionally been thought that compensation is not a necessary part of the rule of law. This contrasts with other jurisdictions where compensation is seen as an integral part of ensuring the proper functioning of the rule of law. For instance, in EU law, one of the principal justifications for allowing individuals to recover

<sup>1</sup> *Three Rivers District Council v Bank of England (No 3)* [2003] AC 1 at 229. See further H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review* (6th ed 2007) ch 19, especially para 19-025 and following.

<sup>2</sup> Civil Procedure Rules r 54; Supreme Court Act 1981, s 31(4).

<sup>3</sup> The test is outlined in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for transport ex parte Factortame (No 3)* [1996] ECR I-1029. The original concept was developed by the ECJ in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5357. The action is still sometimes referred to as "*Francovich* damages".

<sup>4</sup> Civil Procedure Rules r 54.3(2).

<sup>5</sup> For example, in *Re McC (A Minor)* [1985] AC 528, a detention order which was quashed in judicial review proceedings paved the way for a claim for damages in a civil action based upon the tort of false imprisonment. See also *R v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19.

damages from a Member State which breaches EU law is to ensure the full effectiveness (*l'effet utile*) of EU norms.<sup>6</sup>

- 4.20 Secondly, the Administrative Court does not provide an obvious forum for the resolution of complex issues of fact. Most evidence is in the form of written statements and the cross-examination of witnesses remains rare.<sup>7</sup> Consequently, the court may find it difficult to determine issues of liability involving an examination of complex factual issues such as fault, causation and the assessment of damages. There are fears that such fact-finding exercises would place an undue burden on the already overwhelmed Administrative Court.
- 4.21 The Administrative Court does however have an array of powers at its disposal to deal with matters of a factual nature; it has just made limited use of them. The limited use of fact-finding procedures flows from the idea that judicial review is a review of legality rather than an appeal on the merits of a particular decision. That said, it is recognised that “the courts have always shown themselves adept in altering their procedures to accommodate new challenges”.<sup>8</sup> The determination of monetary claims would simply require the court to make appropriate orders to that end.
- 4.22 We are aware that there is a widespread perception that the Administrative Court is already seriously over-burdened. A number of measures are currently being considered to address these concerns.<sup>9</sup> A judicial working group, reporting in November 2007, has recommended that the Administrative Court sit in four regional centres outside London. Its recommendations have been met with considerable support.<sup>10</sup> Steps are also being taken to increase the number of judges sitting in the Administrative Court, and a further working group reviewing the handling of immigration and asylum work in the higher courts is due to report at the end of April 2008.
- 4.23 Finally, it could be argued that a change to the availability of damages for invalid administrative action could create an excessive burden on public bodies and inhibit them in the discharge of their public functions.<sup>11</sup> This is the traditional “floodgates” argument, and is dealt with more comprehensively in Appendix B.

<sup>6</sup> D F Warlbroeck, “Treaty violations of member states: the effect of the *Francovich* case Law” in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (1997) 311, pp 315 to 316.

<sup>7</sup> See eg *R v Institute of Chartered Accountants in England and Wales ex parte Andreou* (1996) 8 Admin LR 557 at 562 to 563; C Lewis, *Judicial Remedies in Public Law* (2nd ed 2000) para 9.112.

<sup>8</sup> *D v Home Office* [2005] EWCA Civ 38, [2005] All ER 253 at [130].

<sup>9</sup> See the Government’s response to concerns about the delays in the Administrative Court [http://www.publiclawproject.org.uk/documents/TsolLetter08-03-04\\_000.pdf](http://www.publiclawproject.org.uk/documents/TsolLetter08-03-04_000.pdf) (last visited 16 June 2008).

<sup>10</sup> Justice outside London: Report of judicial working group (November 2007), available at [http://www.judiciary.gov.uk/publications\\_media/judicial\\_views\\_responses/justice\\_outside\\_london/index.htm](http://www.judiciary.gov.uk/publications_media/judicial_views_responses/justice_outside_london/index.htm) (last visited 16 June 2008).

<sup>11</sup> P Craig, *Administrative Law* (5th ed 2003) p 938; C Harlow, *State Liability – Tort Law and Beyond* (2004) pp 88 to 123.

## CONFLICT WITH THE UNDERLYING PURPOSE OF JUDICIAL REVIEW?

- 4.24 Professor Cane has pointed out that, in judicial review, the supervising court does not substitute its decision for that of the public body; rather it leaves it to the body to make good its illegal behaviour by making a fresh decision which complies with the requirements of the law. To award damages would be in a sense to substitute a decision for that of the public body, and may therefore be incompatible with the theory of judicial review as it cannot be reconciled with the idea that the ultimate decision must usually be left to the public body.<sup>12</sup>
- 4.25 However, in practice, the court can often conclude that the decision taken was one not lawfully open to the decision-maker. If the court can so conclude, we do not see any reason why it cannot award compensation if the applicant has suffered resulting loss. In those circumstances, it would be for the public body to show that the decision was lawfully open to it.<sup>13</sup>
- 4.26 In this context, it is also worth considering recent developments in judicial review. The Tribunals, Courts and Enforcement Act 2007 extends the power of the High Court with regard to quashing orders. Section 141 allows the High Court to substitute its own decision for the decision of a court or tribunal where there has been an error of law, if it is satisfied that without the error there would have been only one decision that the court or tribunal could have reached.

### ***Criticisms of limited availability of damages***

- 4.27 Despite these possible justifications for a restrictive approach to damages in judicial review, there is an increasing tendency amongst judges<sup>14</sup> and commentators<sup>15</sup> to view the current situation as problematic. As Cane has put it: “the absence of a right of damages for losses sustained as a consequence of public law wrongs is widely recognised as one of the most serious of the remaining gaps in our remedial system. It is a gap that does not exist in more developed systems”.<sup>16</sup>
- 4.28 Examples drawn from decided cases illustrate the potential injustice that the current situation can cause. For instance, a local authority may wrongfully refuse a claimant a licence to operate as a taxi driver, thereby causing them considerable loss of income. Whilst the individual who was refused the licence would be able to challenge the refusal through judicial review, they would not be

<sup>12</sup> P Cane, *Administrative Law* (4th ed 2004) pp 95 to 97.

<sup>13</sup> For example *AK (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535.

<sup>14</sup> See *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 (Admin), [2003] ACD 96 at [44]. In their extra-judicial capacities, see: H Woolf, *Protection of the Public – A New Challenge* (Hamlyn Lectures, 1989) p 57; R Carnwath, “The Thornton Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] *Public Law* 407, 418 and 422.

<sup>15</sup> Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice: Some Necessary Reforms* (1988), p 364; M Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” (2003) 8 *Judicial Review* 104; P Cane, “Damages in Public Law” (1999) 9 *Otago Law Review* 489, 505.

<sup>16</sup> P Cane, “Remedies Available in Judicial Review Proceedings” in D Feldman (ed) *English Public Law* (2004) 915, p 949.



able to recover lost earnings.<sup>17</sup> Taking a different example, where the government issues an order restricting the movement of a farmer's cattle and this decision is subsequently discovered to be flawed, the farmer cannot recover compensation "even though [he has] suffered substantial financial loss".<sup>18</sup> A final example could be where an individual is erroneously placed on a child abuse register, with the result that they lose their employment. In such a case, a judicial review would be brought challenging the decision to place the individual on the register. However it would be difficult, through judicial review, to claim the lost earnings.<sup>19</sup>

- 4.29 Many of the criticisms of the current position in English law are long-standing. The Law Commission highlighted the issues in a number of reports in the late 1960s.<sup>20</sup> In 1988, the Justice-All Souls Review of Administrative Law recommended legislation to create a damages remedy against public bodies, which would provide the following:

Subject to such exceptions and immunities as may be specifically provided, compensation in accordance with the provisions of this Act shall be recovered by any person who sustains loss as a result of either

- (a) Any act, decision, determination, instrument or order of a public body which materially affects him and which is for any reason wrongful or contrary to law; or
- (b) Unreasonable or excessive delay on the part of any public body in taking any action, reaching any decision or determination, making any order or carrying out any duty.<sup>21</sup>

- 4.30 Sir Robert Carnwath has observed that this was a deliberately broad formulation, though one that could be limited by reference to the gravity of the breach and the seriousness of the consequences.<sup>22</sup> In the same article he goes on to highlight the injustice inherent in a complete lack of a court-based remedy and the inadequacy of alternative remedies, concluding that:

Where serious harm has been caused to individuals by illegal action by public authorities, or by failure to carry out legal duties or obligations imposed upon them for the benefit of individuals, justice

<sup>17</sup> *R v Knowsley Borough Council ex parte Maguire* [1992] COD 499.

<sup>18</sup> *R (Banks) v Secretary of State for Health* [2004] EWHC 416 (Admin), [2004] NPC 43 at [117].

<sup>19</sup> *R v Norfolk County Council Social Services Department ex parte M* [1989] QB 619. In this particular case the individual did not suffer loss as they were, in fact, suspended on full pay.

<sup>20</sup> See Exploratory Paper on Administrative Law (July 1967) Working Paper No 13, para 8; Administrative Law (1969) Law Com No 20, Cmnd 4059, para 9; Remedies in Administrative Law (October 1971) Working Paper No 40, paras 147 to 148; and Remedies in Administrative Law (1976) Law Com No 73, Cmnd 6407, para 9.

<sup>21</sup> Justice-All Souls Committee, *Administrative Justice – Some Necessary Reforms* (1988) para 11.83.

demands a suitable remedy for breach. For past failures the only effective remedy in most circumstances is monetary compensation. As the European Court of Justice has recognised, failure to afford such a remedy impairs the effectiveness of the law. The ombudsman can continue to provide remedies for inconvenience and distress caused by maladministration. Serious harm caused by illegality requires a remedy in the courts.<sup>23</sup>

### **Conclusions**

- 4.31 Our provisional view is that judicial review has developed in a way that is over restrictive in relation to the award of damages to an aggrieved citizen. This can lead to significant injustice to those citizens who are adversely affected by poor decision making. Simply quashing a decision may, without more, prove an inadequate remedy in judicial review, particularly where the claimant has suffered significant interim losses pending judgment.<sup>24</sup>
- 4.32 In considering reform of this area, it seems that the traditional arguments relating to lack of institutional capacity within the Administrative Court are not necessarily valid. Furthermore, it is plainly anomalous that a claimant can recover damages where a public body has breached a rule of EU law intended to confer rights on individuals but not where the breach is of a rule of purely domestic law.
- 4.33 For these reasons, we consider that there is a strong case for reform with regard to the availability of damages in public law. However, it is clear from the discussion above that there have to be mechanisms within any system of redress to control the extent of liability. Below we suggest ways in which liability for damages could be controlled in the public law context.

### **Private Law**

- 4.34 This section considers three important private law causes of action against public bodies: an action in the tort of negligence, for breach of statutory duty and for misfeasance in public office. This section aims to show that the current state of the law neither meets the requirements of aggrieved citizens or properly addresses the legitimate concerns of public bodies faced with seemingly ever-expanding liability.

<sup>22</sup> R Carnwath, "The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties" [1998] *Public Law* 407, 422.

<sup>23</sup> Above.

<sup>24</sup> For example, see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 (Admin), [2003] ACD 96, where ship owners alleged that the wrongful denial of a licence caused them to incur losses of £2 million. See also Remedies in Administrative Law (1971) Law Commission Working Paper No 40, paras 147 to 148: "no system of remedies can afford justice to the individual who has suffered loss as a result of administrative action adverse to him unless it makes provision for the recovery of damages".

## **Negligence**

- 4.35 Following on from Part 3, this section examines the complicated way in which the tort of negligence has developed, highlighting issues relating to the award of damages. It also demonstrates that over time there has been an increase in the liability of public bodies, and that this is set to continue.

### DEVELOPMENT OF THE DUTY OF CARE

- 4.36 Government officials have for many years been liable for various tortious actions. However, a significant milestone in standardising and expanding that liability came with the Crown Proceedings Act 1947. This formally recognised that the Crown could be sued like any other body.<sup>25</sup> That said, the real sea change in governmental liability came with the House of Lords' judgment in *Dorset Yacht v Home Office*.<sup>26</sup>
- 4.37 *Dorset Yacht* has been described as "setting the scene for a liability revolution as great as, if not greater than, that usually attributed to *Donoghue v Stevenson*".<sup>27</sup> In imposing liability on the Home Office for damage caused by absconding borstal boys, Lord Reid rejected public policy arguments relating to defensive practice with the comment that "Her Majesty's servants are made of sterner stuff".<sup>28</sup>
- 4.38 The true importance of *Dorset Yacht* relates to the underlying judicial policy and the expansion of Lord Atkin's neighbourhood principle, enunciated in *Donoghue v Stevenson*. Lord Reid stated that: "I think the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion".<sup>29</sup> This marked a move to a single formulation for negligence and formed the basis of the policy that led to Lord Wilberforce's formulation of the duty test in *Anns*.<sup>30</sup> Whilst this was a laudable attempt to simplify the law of negligence, the courts came to believe that the effect on public bodies was unduly harsh.<sup>31</sup> Eventually there was a wholesale retreat from *Anns* with the House of Lords formally overturning that decision in *Murphy*.<sup>32</sup> Modern times have seen the development of a more incremental approach, based in part on the test outlined in *Caparo*.<sup>33</sup>
- 4.39 These changes in approach show that the underlying rationale behind liability in negligence can change, with certain factors coming to the fore at different times. For instance, the courts have moved between expanding the scope for redress, and restricting it out of a concern not to put undue strain on public resources. As

<sup>25</sup> Crown Proceedings Act 1947, s 2(1)(a).

<sup>26</sup> *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

<sup>27</sup> C Harlow, *State Liability: Tort Law and Beyond* (2004) p 17.

<sup>28</sup> *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1033.

<sup>29</sup> Above at 1027.

<sup>30</sup> *Anns v Merton London Borough Council* [1978] AC 728.

<sup>31</sup> BS Markesenis and S Deakin, "The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*" (1992) 55 *Modern Law Review* 619-646.

<sup>32</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>33</sup> *Caparo Industries v Dickman* [1990] 2 AC 605.

a result, the history of the law of negligence is marked by somewhat inconsistent and complicated development, which makes it difficult to predict accurately what future developments are likely to occur.

- 4.40 In fact, and as will be shown below, there seem to be two major features of this history that do stand out. First, that liability has expanded over time and that there is no good reason to expect that this will not continue. Secondly, that the expansion has occurred in a piecemeal fashion, frequently involving recourse to the House of Lords, which has examined the negligence liability of public bodies “in more than a dozen cases over the past 20 years”.<sup>34</sup>
- 4.41 The complicated nature of this expansion is illustrated below in the treatment by the courts of particular sectors of governmental action, such as education, social services, planning, emergency services, highways and policing.

#### *Education*

- 4.42 The liability of public bodies in providing education services has been a consistently expanding field. Whilst it has long been the case that schools should take reasonable care of pupils under their charge to prevent physical injury,<sup>35</sup> recent years have seen the development of a new form of “educational negligence”. Several judgments of the House of Lords and the Court of Appeal have made it clear that there is a common law duty of care placed on schools to assess properly the special needs of their pupils and deliver a tailored educational programme that takes these into account.<sup>36</sup> Other areas of potential liability have developed where pupils are bullied<sup>37</sup> and even when a pupil is injured on school grounds out of regular hours.<sup>38</sup>

#### *Social Services*

- 4.43 The jurisprudence of the European Court of Human Rights has strongly influenced the development of liability in the area of social services. In *X v Bedfordshire*,<sup>39</sup> the House of Lords refused to impose a duty of care to children who suffered abuse by their parents, where a local authority had failed to fulfil its duties under the Children Act 1989. The House of Lords held that to impose a duty would undermine the proper function of the Act, which was to protect children. However, after two decisions of the Strasbourg Court,<sup>40</sup> the House of Lords was prepared to impose liability in negligence where a local authority failed

<sup>34</sup> D Squires, “The consequences of public authority negligence liability” (ALBA Paper 29 January 2008).

<sup>35</sup> *Williams v Eady* (1893) 10 TLR 41. The duty to take care in this situation is essentially a duty to act as any reasonable parent would. This is different to the duty placed on social services when considering whether to remove a child from its parents.

<sup>36</sup> See *X v Bedfordshire County Council* [1995] 2 AC 633, *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 and *Robinson v St Helen’s Metropolitan Borough Council* [2002] EWCA Civ 1099, [2002] ELR 681.

<sup>37</sup> *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7, [2002] ELR 139.

<sup>38</sup> *Kearn-Price v Kent County Council* [2002] EWCA Civ 1539, [2003] PIQR 11.

<sup>39</sup> *X v Bedfordshire County Council* [1995] 2 AC 633.

<sup>40</sup> See *Z v United Kingdom* (2002) 34 EHRR 3 and *TP v United Kingdom* (2002) 34 EHRR 2.

to protect children in its care.<sup>41</sup> Courts have also been prepared to impose liability when a child has been erroneously placed with abusive foster parents<sup>42</sup> and when a child has been harmed as a consequence of carelessness in investigating whether they were being abused by their parents.<sup>43</sup> The House of Lords has relatively recently gone so far as to hold a school vicariously liable where it employed a warden who sexually abused pupils because such activity was “inextricably interwoven” with his employment.<sup>44</sup>

### *Planning*

- 4.44 The negligence liability of public bodies in relation to planning issues has been an area of contention over the past thirty years. The decision in *Anns v Merton London Borough Council*<sup>45</sup> found a local authority liable for the purely economic losses flowing from a negligent failure to exercise its statutory power to inspect a building’s foundations. In relation to purely economic losses caused by negligent planning authorities, this decision was overturned by the House of Lords in *Murphy*.<sup>46</sup> Subsequently, public bodies have only been found liable in relation to planning decisions where the body itself directly created a danger of physical injury.<sup>47</sup>

### *Emergency Services*

- 4.45 Although the Court of Appeal has previously refused to impose a duty of care on fire brigades where they failed to extinguish a fire, there has recently been a movement towards expanding the liability of emergency services. For example, the courts have imposed liability where an ambulance failed to respond to a 999 call within a reasonable time due to carelessness.<sup>48</sup> It is well established, however, that emergency services will be liable where they directly inflict physical harm upon a claimant, such as when they are involved in a road accident, even if they are responding to an emergency at the time.<sup>49</sup>

### *Highways*

- 4.46 The major route to establishing liability in this area has been to show that a highway authority has failed to “maintain” a road contrary to its statutory duty under the Highways Act 1980. However, the courts have traditionally adopted a restrictive approach to what amounts to “maintaining” a road. The house of Lords

<sup>41</sup> *Barrett v Enfield Borough Council* [2001] 2 AC 550.

<sup>42</sup> *S v Gloucestershire County Council* [2001] 2 WLR 909.

<sup>43</sup> *D v East Berkshire NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558.

<sup>44</sup> *Lister v Hesley Hall* [2001] UKHL 22, [2002] AC 215.

<sup>45</sup> *Anns v Merton London Borough Council* [1978] AC 728. See also *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.

<sup>46</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>47</sup> *Kane v New Forest District Council* [2001] EWCA Civ 878, [2002] 1 WLR 312.

<sup>48</sup> *Kent v Griffiths* [2001] QB 36.

<sup>49</sup> *Ward v London County Council* [1938] 2 All ER 341 (in relation to the fire service); *Daborn v Bath Tramways Motor Co* [1946] 2 All ER 333 (in relation to the ambulance service); *Gaynor v Allen* [1959] 2 QB 403 (in relation to the police).

has held that this does not include providing adequate signage<sup>50</sup> or directing that adjacent landowners remove obstructions to visibility.<sup>51</sup> However, the latter decision in the case of *Stovin v Wise* was a 3:2 majority in the House of Lords and has been subject to significant academic criticism.<sup>52</sup> Consequently this decision can be seen as vulnerable in the long term.

- 4.47 Other than where it can be shown that a highway authority has failed in its duty to maintain a road, it would seem almost impossible to impose liability for an omission by a highway authority to remedy a problem relating to a road that it did not build.<sup>53</sup> However, where the authority has built the highway, then the courts have been prepared to establish a duty of care in a much wider range of situations, such as where an authority failed to properly construct a barrier between a motorway and a railway line.<sup>54</sup> Additionally, the courts have imposed liability where the authority has introduced a danger onto the road, even when the object was not a danger when introduced and the event that made it unsafe was an act of a third party.<sup>55</sup>

### *Policing*

- 4.48 The general principle in this area has been to restrict liability on a combination of proximity and policy grounds, so that in general there is no duty of care relating to general policing.<sup>56</sup> However, the courts have imposed liability where there is some form of “assumption of responsibility” or a special relationship. Consequently, a duty of care has been imposed where the claimant had been acting as an informant for the police,<sup>57</sup> or was allegedly sexually abused by a fellow officer.<sup>58</sup> This area is the subject of litigation in the House of Lords again at the time that this Consultation Paper is published.<sup>59</sup> Traditionally, it had been thought that the Chief Constable was only responsible for the actions of an officer when that officer had acted in a negligent manner relating to the performance of his functions.<sup>60</sup> However, a Chief Constable may now be liable for the actions of an officer even if the officer acted in an unauthorised or illegal way, so long as the action was sufficiently closely connected to their employment.<sup>61</sup> This area is also

<sup>50</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

<sup>51</sup> *Stovin v Wise* [1996] AC 923.

<sup>52</sup> For example J Convery, “Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords” (1997) 60 *Modern Law Review* 559.

<sup>53</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057.

<sup>54</sup> *Great North Eastern Railway Line Ltd v Hart* [2003] EWHC 2450 (QB), [2003] All ER 506.

<sup>55</sup> *Fisher v Ruislip-Northwood Urban District Council* [1945] KB 584.

<sup>56</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495.

<sup>57</sup> *Swinney v Chief Constable of Northumbria Police* [1997] QB 464.

<sup>58</sup> *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692.

<sup>59</sup> See para 4.52 below.

<sup>60</sup> *Makanjola v Metropolitan Police Commissioner* (1990) 2 Admin LR 214.

<sup>61</sup> *Lister v Hesley Hall* [2001] UKHL 22, [2002] AC 215.

subject to increasing pressure following the decision of the European Court of Human Rights in *Osman*.<sup>62</sup>

#### *The current position*

- 4.49 This is not to suggest that all the courts have done over the past decades has been to expand the liability of public bodies. Duties have been denied by the courts on grounds of public policy in claims against social services departments in respect of their child protection functions,<sup>63</sup> education authorities in respect of their specific statutory duties towards children with special educational needs,<sup>64</sup> a highway authority for failure to rectify poor visibility at a dangerous junction,<sup>65</sup> a housing authority in respect of a long running campaign of racial harassment by their tenants,<sup>66</sup> and against banking regulators,<sup>67</sup> the police<sup>68</sup> and the CPS.<sup>69</sup> It was also not considered “fair, just or reasonable” to impose a duty of care on a classification society for a negligent survey of a vessel which resulted in the loss of the vessel and cargo.<sup>70</sup>

#### *The role of the European Court of Human Rights*

- 4.50 Though in *Z*,<sup>71</sup> the European Court of Human Rights modified its own approach in *Osman*, it is clear that the underlying principle in *Osman* continues to influence much of the jurisprudence in this area. As such, remaining blanket bans on liability must be seen as standing, at least legally, on shaky foundations.
- 4.51 The other major pressure on the liability of public bodies comes from the development of what some commentators describe as “positive obligations” on the state to prevent harm.<sup>72</sup> In the light of human rights jurisprudence, the traditional reluctance to impose positive duties is breaking down, and human rights duties may require a public body to prevent harm being caused to individuals. Reacting to this case law, in *Limbuela* Lord Brown held that “time and again these [positive or negative distinctions] are shown as false dichotomies” and that liability should in fact depend on whether the state is “properly to be

<sup>62</sup> *Osman v United Kingdom* (2000) 29 EHRR 245. This claim arose out of a failure by the police to investigate threatening behaviour from a teacher towards one of his former pupils. The behaviour culminated in a series of attacks resulting in the child’s father being killed and the former pupil injured by the teacher.

<sup>63</sup> *X v Bedfordshire County Council* [1995] 2 AC 633.

<sup>64</sup> Above.

<sup>65</sup> *Stovin v Wise* [1996] AC 923.

<sup>66</sup> *Hussain v Lancaster City Council* [2000] QB 1.

<sup>67</sup> *Yuen Ken Yeu v Attorney General of Hong Kong* [1988] AC 176 and *Davis v Radcliffe* [1990] 1 WLR 821.

<sup>68</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Osman v Ferguson* [1993] 4 All ER 344.

<sup>69</sup> *Elguzouli-Daf v Commissioner of the Police of the Metropolis* [1995] QB 335.

<sup>70</sup> *Marc Rich and Co v Bishop Rock Marine Co* [1996] AC 211.

<sup>71</sup> *Z v United Kingdom* (2002) 34 EHRR 3.

<sup>72</sup> See further S Fredman, “Human Rights Transformed: Positive Duties and Positive Rights” [2006] *Public Law* 498; A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (2004).

regarded as responsible for the harm inflicted (or threatened) upon the victim".<sup>73</sup> The recent imposition of human rights liability on the police for failing to protect a potential witness reflects this case law.<sup>74</sup>

### *The future*

- 4.52 Whilst many cases have been unsuccessful, we believe that the long-term trend is likely to be a continuing expansion of liability. An illustrative recent example can be seen in the case of *Smith*.<sup>75</sup> The Court of Appeal refused to strike out an action against the police in negligence. In fact, one member of the court commented that:

The common law and the Convention ... approach the present type of situation in a different way. [The claimant's counsel] submitted that no case, at any rate at appellate level, has yet considered whether the positive obligation imposed by Article 2 on public authorities, including the police, have or should have a relevant impact on the development of the common law principles of negligence in this area. As it seems to me, it is arguable that they should, on the basis that where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it; if so, the common law may well require a re-visiting of the *Hill* policy considerations, at least in the context of cases raising considerations of the right to life. It appears to me odd that, in that particular context, our jurisprudence can apparently acknowledge two parallel, but potentially inconsistent, approaches to the same factual situation: (i) the common law position, which is said to excuse the police from any duty to do anything at all to assist someone such as Mr Smith, whose life they knew was being threatened by an identified third party, and (ii) the position under Article 2, under which they were arguably required to take positive, albeit proportionate, preventive measures to protect him.<sup>76</sup>

- 4.53 This decision is being appealed to the House of Lords, where it has been joined with *Van Colle*.<sup>77</sup> It is likely that the opinion of the House will be delivered during our consultation period. Whichever way the issue is decided this time, the very fact that it is once again before the UK's highest court illustrates the uncertain and unsettled nature of this area of law.

<sup>73</sup> *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396 at [92].

<sup>74</sup> *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, [2007] 1 WLR 1821.

<sup>75</sup> *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39, [2008] All ER 48. Here the claimant alleged that the police had been negligent in failing to arrest his former partner, despite having sufficient evidence of the former partner's aggressive behaviour. Whilst the police were conducting an investigation into the situation, the claimant was attacked and injured by his former partner.

<sup>76</sup> Above at [45] (Rimer LJ).

<sup>77</sup> Appeal from *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, [2007] 1 WLR 1821.



- 4.54 The potential consequences of this, as the tort of negligence reacts to the jurisprudence of the European Court of Human Rights, reach far beyond the police and the underlying pressures could affect the liability all public bodies.

#### CONCLUSIONS ON DUTY OF CARE

- 4.55 What is clear from the discussion above is that the area is uncertain to such an extent that it requires frequent appeal to the House of Lords. While underlying considerations such as liability creating an undue burden for public bodies can be determinative in some instances, they are not in others. What cannot be ignored is that the Human Rights Act 1998 and the jurisprudence of the European Court of Human Rights are starting to affect liability of public bodies in negligence to an ever increasing extent and exert a distinct pressure to expand liability.
- 4.56 In considering how to move forward and react to the competing demands of claimants and public bodies it is important to bear in mind the two salient issues that come out of the above analysis:
- (1) Recent history has seen an increase in governmental liability and there seems little to suggest that this increase will halt or that the extent of liability will decrease.
  - (2) The jurisprudence on the law of negligence, particularly relating to the liability of public bodies, is complicated and uncertain to such an extent that outcomes are difficult to predict.
- 4.57 It does not seem desirable to leave the system in present state. This would serve neither the interests of public bodies nor those of claimants.
- 4.58 **We would welcome comments on this analysis of the development of the duty of care in relation to public bodies.**

#### DAMAGES

- 4.59 There are two aspects to the assessment of damages in negligence which are worth further consideration. The first is the availability of damages for pure economic loss. The second is the apportionment of damages following the modification of the general rule on joint and several liability. These two issues are discussed in turn.

#### *Pure economic loss*

- 4.60 *Clerk and Lindsell on Torts* outline three underlying reasons for treating pure economic loss in a more restrictive fashion than personal injury or physical damage to property. First, pure economic loss is frequently the result of complex human relationships where the effects of any action can be particularly unpredictable. This contrasts with the frequently more predictable nature of physical injury or property damage. Second, that as the relationships are frequently freely entered into then there is greater scope for the participants to mitigate potential losses through contract. Third, purely economic losses are often seen as the natural consequence of the workings of a market.<sup>78</sup> As

<sup>78</sup> A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) para 8-83.

Hobhouse LJ put it: “in a competitive economic society the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of others and is justifiable by the actor having regards to his interests alone”.<sup>79</sup>

- 4.61 Many of the general concerns with the imposition of liability on public bodies arise irrespective of the type of damage being sought. They relate to the special nature of public bodies and their position within our society as the enforcers of the laws of a democratic nation and the deliverers of services funded for the most part by general and local taxation. However, it has traditionally been thought that concerns such as floodgates, the fettering of decision-making and the creation of heavy demands on public funds are particularly acute when it is recovery for pure economic loss that is in issue.<sup>80</sup>
- 4.62 Against this position, some of the traditional justifications for a restrictive approach to pure economic loss *per se* may not be applicable in the case of public bodies acting in certain situations. It is often hard to argue that an individual has freely entered into a relationship with a public body. Also, there may well be less opportunity to mitigate potential losses through contract or insurance. A relevant example is in licensing cases where the state has used its power, normally through legislation, to regulate an economic sector and demand that those using it require some form of licence.
- 4.63 For example, in *Maguire*,<sup>81</sup> the local authority unlawfully refused to issue a taxi licence, causing the claimant to lose potential earnings. This harm suffered was the direct result of unlawful administrative action. It is hard to see this as the inevitable consequence of the operation of a free market and it would not be a situation in which an individual could have successfully mitigated their loss through contract or insurance.

#### *Joint and several liability*

- 4.64 The principle of joint and several liability provides that where two or more persons acting independently contribute to the same loss, the claimant can sue any of them for the entire loss irrespective of their actual “share” in the overall liability. The caveat is that the defendant who is in fact sued has a right to seek contribution from others in respect of their *pro rata* share in the liability.
- 4.65 The rationale for maintaining the general principle of joint and several liability is essentially policy-based. It is thought that claimants should be fully compensated for their loss, irrespective of a particular defendant’s ability to pay, and that it is the defendants who must themselves bear the risk of each other’s insolvency. However, it would seem that the rule of joint and several liability is capable of producing particularly harsh results in the context of public bodies.
- 4.66 First, there is a risk that litigants will disproportionately target co-defendants who are public bodies. Public bodies can be seen as defendants with “deep pockets”.

<sup>79</sup> *Perrett v Collins* [1999] PNLR 77 at 84.

<sup>80</sup> See further C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) paras 3.89 and 4.07 to 4.85.

<sup>81</sup> *R v Knowsley Metropolitan Borough Council ex parte Maguire* (1992) 90 LGR 653.

This is particularly problematic where the private co-defendant is insolvent, as the public body will be unable to enforce its right to contribution and will end up bearing the entire loss.

- 4.67 Secondly, in certain cases the public body co-defendant may be less culpable than the private co-defendant. One example is where citizens suffer loss because of fraudulent conduct by third parties of which the public regulator was unaware. The regulator will be guilty of a failure in oversight, but is less culpable than those actually committing the fraud. This is clearly seen in *Three Rivers*,<sup>82</sup> where the claimants were seeking to recover from the Bank of England, alleging that their loss was the result of its regulatory failure relating to the failure of a bank, BCCI. The primary cause of the BCCI collapse was internal to BCCI itself, but there was little to be gained by suing BCCI, since it had just collapsed. This left the Bank of England as the “last man standing” and therefore the subject of the claimants’ action.
- 4.68 In this example, the inflexible application of the principle of joint and several liability prevents any effective division of responsibility between co-defendants, and does not reflect the fact that the public body was not principally to blame.
- 4.69 It is also important to consider how the principle of joint and several liability combines with the equally inflexible principle of subrogation. Under the principle of subrogation, an insurer who has paid the claimant for his loss as required by the insurance contract will be able to recover in full from the public body which may have no effective means of obtaining contribution from the party or parties who were the central agents of the damage. This is despite the fact that the insurer has already drawn a premium on the insurance policy.<sup>83</sup>
- 4.70 The principle of joint and several liability has been the subject of considerable debate.<sup>84</sup> Other jurisdictions, including Australia, Ireland, France and most American states, have historically maintained a principle of joint and several liability, but have in recent times modified it significantly, in some cases specifically in relation to public bodies.<sup>85</sup> This changing international climate, coupled with the harsh consequences of an inflexible application of the rule, may provide a strong case for saying that the orthodox position on joint and several liability in English law needs to be carefully reconsidered.

<sup>82</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2000] UKHL 33, [2003] 2 AC 1.

<sup>83</sup> This was the case in *Dorset Yacht*. See C Harlow, *State Liability: Tort Law and Beyond* (2004) pp 17 to 18.

<sup>84</sup> In 1996, the Law Commission undertook a study of the rule of joint and several liability in civil law as a whole, but recommended that it did not merit a full law reform project: Department of Trade and Industry Consultation Document, *Feasibility Investigation of Joint and Several Liability by the Common Law Team of the Law Commission* (HMSO 1996).

<sup>85</sup> For example, see Part 4 of the *Civil Liability Act 2002* in New South Wales (“Proportionate Liability”) and Part 3 of the *Civil Liability Act 1961* in Ireland (modification of joint and several liability in case of contributory negligence by defendant). French law maintains a general principle of joint and several liability, except where there is a mixture of public and private co-defendants: Deguerge in *Dalloz Droit Administratif*, Fascicule 830, para 83. Meanwhile, in the US more than three-quarters of the states have enacted some kind of reform.

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

### ***Breach of Statutory Duty***

- 4.72 In Part 3 we consider the law relating to breach of statutory duty. In this section, we consider two problematic consequences of the law's development. These are uncertainty and the restrictive nature of the tort.

#### UNCERTAINTY

- 4.73 In order to prove a breach of statutory duty, the claimant must establish that Parliament intended the breach to be actionable in private law. The process by which courts imply the Parliamentary intention of a particular statute lacks transparency. This problem has been described as follows:

Unfortunately, most legislation fails to give any express guidance as to whether an action for damages is available for its breach, and then the courts have to decide what Parliament intended. Determining Parliament's intention when it has pointedly declined to express one is something of a haphazard process. The courts look to the construction of the statute, relying upon a number of "presumptions" for guidance, but in practice there are so many conflicting presumptions, with variable weightings, that it can be extremely difficult to predict how the courts will respond to a particular statute.<sup>86</sup>

- 4.74 Case law has failed to enunciate a clear set of principles and to apply them consistently. The reasoning in terms of Parliamentary intent has been criticised as fictitious.<sup>87</sup> Proposals have been made to apply a general *default* rule in favour of liability, or against liability, which could be displaced by express statutory wording. The Law Commission proposed the former alternative in the 1969 report on *The Interpretation of Statutes*,<sup>88</sup> whereas others have suggested the latter solution.<sup>89</sup> Neither reform proposal has, however, been implemented and it is difficult to see how the tort of breach of statutory duty can develop coherently on its current basis.

<sup>86</sup> A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) para 9.02. See also the comment by Lord Denning MR in *Ex parte Island Records Ltd* [1978] Ch 122 at 134 to 135: "[Legislation] has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you may as well toss a coin to decide it".

<sup>87</sup> For example, see D Fairgrieve, *State Liability in Tort* (2003) p 40.

<sup>88</sup> *Interpretation of Statutes* (1969) Law Com No 21; Scot Law Com No 11 at para 38 and Appendix A.4. See also *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 411 (Lord du Parcq).

<sup>89</sup> For example, see S H Bailey, "Public Authority Liability in Negligence: The Continued Search for Coherence" (2006) 26 *Legal Studies* 155, 161.

#### RESTRICTIVE APPROACH

- 4.75 A further criticism is that, where the defendant is a public body, courts have in practice been extremely reluctant to hold that a statutory provision was actually intended to confer a private law right to compensation.<sup>90</sup> This is especially the case where the statutory duty breached simply forms part of an overall regulatory system or a scheme of social welfare for the benefit of the public at large.<sup>91</sup>
- 4.76 There are numerous examples in the case law. For example, sections 39(2) and 39(3) of the Road Traffic Act 1988 impose generic duties upon highway authorities to promote road safety. These have been analysed by the House of Lords as imposing broad “target duties” which were not intended by the legislator to be enforceable by way of a private law right to sue in tort. As such, failure to repaint a “slow” sign does not lead to liability for breach of statutory duty.<sup>92</sup>
- 4.77 The restrictive approach to liability was demonstrated by the House of Lords in *O’Rourke*,<sup>93</sup> where the House overturned an earlier decision by the Court of Appeal in *Thornton*.<sup>94</sup> In *O’Rourke*, the House of Lords held that a citizen could not claim damages under the Housing Act 1985 where the housing authority had failed in its clear duty to provide accommodation when a citizen is homeless. Specifically, the court held that housing for the homeless was provided in the “general public interest”; therefore the statute could not create a private right of action for damages.<sup>95</sup>
- 4.78 The general effect of the restrictive approach is to render breach of statutory duty close to obsolete in many areas of the law. During 2006 and 2007, there were 15 reported cases<sup>96</sup> in which there was a successful claim for breach of statutory

<sup>90</sup> The exception to this is in cases of breach of health and safety legislation.

<sup>91</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731 to 732.

<sup>92</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [72] (Lord Scott); at [89] to [94] (Lord Rodger); and at [103] (Lord Brown).

<sup>93</sup> *O’Rourke v Camden London Borough Council* [1998] AC 188.

<sup>94</sup> *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626.

<sup>95</sup> *O’Rourke v Camden London Borough Council* [1998] AC 188 at 193 (Lord Hoffmann).

<sup>96</sup> Cases reported in the High Court and above for England and Wales only. Criminal prosecutions for breach of statutory duty were not included. Westlaw UK search, 25 March 2008 (database used: cases; search field: subject/keyword; search term: “breach of statutory duty”; date: between 01/01/2006 and 01/01/2008). Supplemented by LexisNexis search, 25 March 2008 (database used: cases; search field: summary; search term “breach of statutory duty”; judgment date: between 01/01/2006 and 01/01/2008).

duty.<sup>97</sup> Most of these claims were brought by employees against their employers for breach of health and safety legislation. In five of the successful cases, the respondent was a public body. In two of those cases the respondent was a local authority, and the successful claims were in relation to highway maintenance<sup>98</sup> and an employment matter (health and safety).<sup>99</sup> In two cases, the relevant respondent was a central government department (in relation to an industrial disease claim<sup>100</sup> and a European law issue<sup>101</sup>). In the final case, it was an NHS Trust (in relation to an employment matter (harassment)).<sup>102</sup>

4.79 However, breach of statutory duty does provide a useful remedy in some areas, particularly in health and safety at work. This area can be distinguished, however, on the basis that the legislation is aimed at regulating the employment relationship, and in this area the public body should not be treated any differently to a private company.

4.80 Various reasons have been put forward to explain why the approach to breach of statutory duty is restrictive. Firstly, there is the limited rationale or basis on which courts have developed the tort. Liability is not based on considerations of justice:

The relevant question is not whether it would have been appropriate or reasonable for Parliament to have provided a private law remedy but whether, as a matter of construction, it actually intended to do so.<sup>103</sup>

4.81 This is coupled with the general principle of English law that the proper role of the courts is to ensure compliance by public bodies with their statutory duties. Consequently, courts can reason that judicial review is sufficient to ensure this,

<sup>97</sup> The successful cases are the following: *Gravatom Engineering Systems Ltd v Parr* [2007] EWCA Civ 967; *Mason v Satelcom Ltd* [2007] EWHC 2540 (QB), [2007] All ER 377; *Pennington v Surrey County Council* [2006] EWCA Civ 1493; *PRP Architects v Reid* [2006] EWCA Civ 1119; *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; *Kiani v Land Rover Ltd* [2006] EWCA Civ 880; *Smith v S Notaro Ltd* [2006] All ER 79; *Day v Suffolk County Council* [2007] EWCA Civ 1436, [2007] All ER 377; *Walker v Inter-Alliance Group plc* [2007] EWHC 1858 (Ch); *Eyres v Atkinsons Kitchens and Bedrooms Ltd* [2007] EWCA Civ 365; *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289; *Corr v IBC Vehicles Ltd* [2006] EWCA Civ 331; *Fifield v Denton Hall Legal Services* [2006] EWCA Civ 169; *Wells v Mutchmeats Ltd* [2006] EWCA Civ 963, [2006] All ER 401; *Byrne v Motor Insurers Bureau* [2007] EWHC 1268 (QB). Other notable cases are: *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372 (a preliminary limitation issue was resolved in favour of the claimant; the substantive claim was not discussed); *Sempre Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 (concerned with issues relating to damages and interest) and *Gray v Fire Alarm Fabrication Services Ltd* [2006] EWCA Civ 1496 (the first respondent admitted liability, but the second and third respondents were held to be not liable on appeal).

<sup>98</sup> *Day v Suffolk County Council* [2007] EWCA Civ 1436, [2007] All ER 377.

<sup>99</sup> *Pennington v Surrey County Council* [2006] EWCA Civ 1493.

<sup>100</sup> *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289.

<sup>101</sup> *Byrne v Motor Insurers Bureau* [2007] EWHC 1268 (QB).

<sup>102</sup> *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34.

<sup>103</sup> *Neil Martin Ltd v The Commissioners of Her Majesty's Revenue and Customs* [2006] EWHC 2425 (Ch), [2007] STC 823 at [71].

without it being necessary to imply that Parliament intended an action for damages.<sup>104</sup>

- 4.82 Secondly, it is arguable that a breach of statutory duty should not be actionable where a public body faces difficulties in performing its statutory duties and where the body is afforded a wide discretion.<sup>105</sup> Although this may justify a higher fault requirement on the part of the public body, it is not clear that it should exclude liability altogether.
- 4.83 Thirdly, courts may be reluctant to hold breaches of statutory duties actionable, as the tort of breach of statutory duty does not take into account the degree of fault of the public body. Provided that breach of a particular statutory provision is considered actionable in principle, then every breach of that provision leads to liability to compensate any resulting loss. Such a situation can rightly be regarded as excessive.
- 4.84 This leaves two important considerations. Allowing a right to compensation in respect of every breach of statute, no matter how trivial or faultless, may open the floodgates and impose an undue burden on public resources. However, the absence of a remedy for *any* breach, no matter how serious or culpable, is equally undesirable and can lead to manifest injustice.
- 4.85 A more balanced approach would be for the law to *distinguish* between those breaches where there is no fault or only a low level of fault and those where the fault is more serious.<sup>106</sup>
- 4.86 It is instructive to note that other systems of liability based upon breach of statute adopt a more flexible approach than English law. For example, there is under EU law a preliminary requirement that the rule breached was intended to confer a benefit upon the claimant. In most cases, however, the European Court of Justice considers that this condition is satisfied fairly easily and the main control mechanism is the “sufficiently serious” nature of the breach.
- 4.87 In German law, liability for breach of official duty under §839 of the Civil Code requires a claimant to show that he or she was owed an individual duty. In France, the administrative courts have construed the notion of fault broadly to include instances of breach of statute (*violation de la loi*).

<sup>104</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *O'Rourke v Camden London Borough Council* [1998] AC 188.

<sup>105</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 747.

<sup>106</sup> See *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763 at [21]. Lords Bingham and Steyn considered that liability for breach of statutory duty should in that case have been triggered by only a “serious breach”.

### **Misfeasance in public office**

- 4.88 As we show in Part 3, the changes to the law on misfeasance following *Three Rivers*<sup>107</sup> and *Watkins*<sup>108</sup> have potentially restricted the possibility of a claimant proving misfeasance in public office. That said, the judgment in *Three Rivers* did lead some commentators to conclude that misfeasance may have a wider role to play in controlling “abuse of discretion”.<sup>109</sup> What is clear is that the evidential requirement of proving malice or that an official knowingly acted in excess of his or her powers is a particularly high barrier to successful actions.
- 4.89 There is a further factor to be taken into account in the context of misfeasance, which is the political nature of the action. Public bodies are rightly concerned not to be labelled malicious, or to be accused of having knowingly acted outside their powers. This could lead to an overly defensive strategy on the part of public bodies relating to the settlement of claims.
- 4.90 It is interesting to note that since the case of *Three Rivers*,<sup>110</sup> there have only been nine reported cases in which there has been an arguable case of misfeasance in public office.<sup>111</sup> These cases either involve a successful appeal against an order to strike out a misfeasance claim or a successful appeal against summary judgment for the defendant to a misfeasance action.<sup>112</sup>
- 4.91 **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.**

<sup>107</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2000] UKHL 33, [2003] 2 AC 1.

<sup>108</sup> *Watkins v Home Office* [2006] UKHL 17, [2006] 2 WLR 807.

<sup>109</sup> S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law* (6th ed 2008) p 430.

<sup>110</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2000] UKHL 33, [2003] 2 AC 1.

<sup>111</sup> Westlaw UK search, 5 March 2008 (database used: case locator; search field: keyword; search term: “misfeasance in public office”). Supplemented by LexisNexis search, 11 March 2008 (database used: cases; search field: keyword; search term: “misfeasance in public office”).

<sup>112</sup> *Karagozlu v Commissioner of Police of the Metropolis* [2006] EWCA Civ 1691; *R Cruikshank Ltd v Chief Constable of Kent* [2002] EWCA Civ 1840; *Akenzua v Secretary of State for the Home Department* [2002] EWCA Civ 1470; *Cornelius v Hackney London Borough Council* [2002] EWCA Civ 1073; *L v Chief Constable of the Thames Valley Police* [2001] All ER 116; *Darker v Chief Constable of the West Midlands Police* [2000] All ER 1075; *Ashley v Chief Constable of Sussex* [2006] EWCA Civ 108. In *Lord Ashcroft v Attorney General* [2002] EWHC 1122 (QB), the particulars of the claim were allowed to be amended to include an allegation of “reckless indifference” to go to trial. In *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, which was a case on a damages issue, the police had admitted misfeasance in public office. In *O'Brien v Chief Constable of South Wales* [2005] UKHL 26, the admissibility of similar fact evidence in a claim for misfeasance in public office was established.



## **Conclusions**

- 4.92 It is clear that negligence has developed in an unpredictable manner, leaving the law so uncertain that the House of Lords has frequently been called upon to re-address key areas of liability. Our provisional view is that both breach of statutory duty and misfeasance in public office fail to meet the requirements of a just system that properly balances the interests of claimants against those of public bodies in a clear and predictable manner. In both public and private law, it provisionally appears to us, there is a lack of any underlying principle or foundational structure that could lead to a simpler and more predictable system. This serves neither the interests of claimants nor those of public bodies.

## **SUGGESTED OPTIONS FOR REFORM**

- 4.93 In light of these problems, we feel that there is a strong argument for the reform of both public and private law remedies against public bodies in accordance with the principles of modified corrective justice.
- 4.94 We suggest that whilst the concept of duty is appropriate when seeking to identify situations in which individuals can be liable to one another, it is inadequate when seeking to identify the situations where a public body should be liable.
- 4.95 We propose that in determining whether the state should be liable for careless conduct, it would be more appropriate to ask whether the legal regime governing public bodies' actions was intended to benefit the claimant. This "conferral of benefit" test is set out below. Furthermore, we suggest that it would be appropriate to introduce a test of "serious fault" in relation to certain actions of public bodies.<sup>113</sup> Whilst public bodies confer a benefit on individuals in a wide range of legal situations, we propose that liability should only be imposed when administrative action falls *far* below that which it would be reasonable to expect.

## **Action in public law**

- 4.96 We provisionally propose to allow the recovery of damages in judicial review if the claimant satisfies the elements of conferral of benefit, "serious fault" and causation, which are set out in detail below. In our provisional view, this is a natural development in the law, considering that damages for breach of EU law and under the Human Rights Act 1998 are currently available.<sup>114</sup> Furthermore, we do not believe that such a development would impose a substantial burden on public bodies.
- 4.97 Procedurally, it would be possible to require a claimant seeking damages on a judicial review application to plead in full the particulars of the "serious fault" at the permission stage. The judge would then have an early opportunity to deny an unsustainable claim for damages even if he or she allowed other judicial review remedies to be pursued.

<sup>113</sup> We propose that the "serious fault" regime would only apply to those actions that could properly be termed "truly public".

<sup>114</sup> Research by the Commission indicates that, of the 121 successful judicial review applications in 2007, damages would probably have been recoverable in 9 cases. In those cases, damages would generally have run to a maximum of a few thousand pounds.

4.98 Where permission is granted and a hearing is held, a finding of unlawfulness by the court would create the potential for damages to be awarded. It would still be for the applicant to prove that the unlawfulness found by the court was caused by “serious fault” on the part of the defendant public body. It is important to note that an award of damages would be an ancillary remedy in judicial review and could only be claimed alongside the prerogative remedies. The scheme outlined in this Consultation Paper would not alter the established grounds of judicial review.

#### **Action in private law**

4.99 Our suggested approach in private law is to place certain activities which are regarded as “truly public” in a specialised scheme where, in order to establish liability, the claimant would have to prove the same elements as in the public law scheme. The effect would be to restrict liability in some areas and widen the potential for liability in others. This reflects our attempts to strike a balance between the following competing demands:

- (1) Allowing citizens to obtain redress where they are adversely affected by the acts or omissions of a public body in a wider range of governmental activity than is currently the case in private law; and
- (2) Appreciating that public bodies are subject to a wide range of competing demands and are thus in a special position. This means that imposing general negligence liability may not be in the interests of justice as it could adversely affect the activities of the public body and therefore harm the general public.

4.100 Cases that do not satisfy the “truly public” test would fall to be determined by the ordinary rules of negligence.

#### **Overview of elements in the proposed scheme**

4.101 As the elements suggested for the public and private law schemes are essentially the same, they are discussed together in this Part. The effect of this is that liability would be no wider in private law than in public law and *vice versa*. However, we are not proposing a merging of judicial review with private law actions against public bodies. Cases would still be brought either as an application for judicial review in the Administrative Court or as a private law action in the civil courts. Prerogative remedies would be available only through judicial review.

4.102 A slight difference between the two schemes comes with the nature of the court awards in public and private law. It is intended that damages in the public law scheme be discretionary, so as to “fit” with the nature of other orders. However, in private law we envisage that, if the strict requirements of the scheme are fulfilled, then damages be awarded as of right.

4.103 Our suggested scheme for dealing with such cases is set out in detail below. By way of overview, the various elements of that scheme may be summarised as follows:

- (1) **Identifying “truly public” activities:** The proposed ambit of the scheme is when public bodies act in a manner which is “truly public”. In the public law scheme, this will be satisfied by virtue of the body being amenable to judicial review. As such, the test of “truly public” will only be applied in private law actions. In determining what constitutes “truly public”, we suggest a test based on whether the contested action was conducted in the exercise of a statutory power or the prerogative. If the action is not “truly public”, then it will be subject to the normal rules of negligence.
- (2) **Operation of justiciability rule:** Within our new scheme, we propose a tightening of the definition of justiciability in private law in order to eliminate the grey area of non-justiciability that currently exists and move away from the application of notions of *Wednesbury* unreasonableness in the private law context. To this end, we suggest an interpretation of justiciability akin to that used in judicial review.
- (3) **Conferral of a benefit test:** We suggest replacing the duty of care concept in private law with a test to determine whether the underlying legislative scheme confers rights or benefits on the individual claimant. This test would also apply in the public law context. We envisage that this test would be interpreted broadly, in line with the jurisprudence of the European Court of Justice, which has provided the inspiration for this test.
- (4) **Serious fault:** The next step in our proposed scheme is to make liability contingent upon the claimant proving “serious fault” on the part of the public body. The claimant would need to show that the conduct of the public body fell far below the standard expected in the circumstances.
- (5) **Causation:** A claimant will be required to show that the loss suffered was caused by an action, omission or decision of the public body.
- (6) **Joint and Several Liability:** The normal rule will be modified giving the courts a discretion to apportion liability when this would be equitable in a given situation.
- (7) **General rules on damages:** The normal rules on assessing compensatory damages would apply. This would include the rules relating to contributory negligence.
- (8) **Immunity:** In areas where Parliament considers it necessary, there would continue to be the opportunity to enact either a general or limited immunity clause, which could be modelled on those already in existence, such as the immunity of the Financial Services Authority provided by section 102 of the Financial Services and Markets Act 2000. The approach we adopt would endorse the legitimacy of government making the judgement that, in a particular policy context, immunity was the correct form of modification to the principles of corrective justice.

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

obtain redress. Respondents may take quite a different view of the problems and solutions, but even within our provisional proposals, there is no doubt room for movement in relation to the individual elements of the scheme, and we would welcome responses at that level as well.

### **The future of misfeasance in public office and breach of statutory duty**

- 4.105 Included in the options for reform of private law could be the abolition of the torts of misfeasance in public office and breach of statutory duty in most contexts. Whilst we appreciate that in certain contexts the tort of breach of a statutory duty should be preserved,<sup>115</sup> the generally restrictive approach adopted by the courts coupled with the inherent inflexibility of the tort in assessing the level of fault on the part of the public body lead us to conclude that our proposed system would provide a more just remedy.
- 4.106 **Should the torts of misfeasance in public office and breach of statutory duty be abolished?**

### **Threshold conditions**

- 4.107 As noted above, the requirements of justiciability and “truly public” activity are more important in the context of a private law claim than in public law action. This is because the proposed scheme sets the requirements for justiciability at the public law level and the aim of the “truly public” test is to render the private law scheme broadly similar to the public law scheme.

### ***Justiciability***

- 4.108 In both public and private law, the courts have recognised that some decisions of public bodies should not be justiciable. In Part 3, we explained the operation of the doctrine of justiciability in the context of negligence. The courts refer to the technical limits of their institutional competence as well as to constitutional limits based on separation of powers arguments to decline jurisdiction to consider certain matters. We accept that there should be some cases in which the courts should decline jurisdiction on the grounds of constitutional propriety. We would envisage that in our suggested scheme, such a category would be a very limited one. It would be more akin to the narrower concept of justiciability as it is currently understood in judicial review rather than as it is currently interpreted in negligence.
- 4.109 For example, matters that are inextricably bound up with the exercise of the Monarch’s personal prerogatives should be considered non-justiciable. These would include, for instance, a decision to grant Royal Assent to primary legislation or to dissolve Parliament.

<sup>115</sup> For instance, there are actions under Health and Safety legislation where it would be desirable to retain the action. Additionally, in relation to certain private individuals, it would be advantageous to retain the action.

### ***“Truly public” activity***

- 4.110 It is not intended that all activities of public bodies come within the public law and private law schemes. In fact many activities of public bodies concern mundane operational matters which we do not think should fall within our scheme. Examples would be the employment relationship between a Primary Care Trust and a nurse, or a local authority placing a stationery order. These activities, it seems to us, differ from such actions as setting a policy relating to hospital provision in a given area or powers of stop and search by the police. Consequently, there needs to be a filtering mechanism that isolates activities that are unique to public bodies – which we regard as “truly public” activities - from activities that can be undertaken by private individuals.
- 4.111 “Truly public” activity would be a critical test in the private law scheme since it would determine whether the case was subject to the ordinary rules of negligence or should be subject to a “serious fault” requirement before liability could be imposed. In approaching this issue, the test for “truly public” has to take into account the nature of the UK constitution and particularly the different roles played by statute and the prerogative.
- 4.112 Additionally, as it is intended that the public law and private law schemes should be broadly co-extensive, then the ambit of “truly public” should be similar to that of amenability in judicial review.
- 4.113 At the outset, there would seem to be two distinct approaches to formulating a test identifying the scope of “truly public” activity. The first is to focus on the body itself, and examine factors such as how and for what purpose it was established. The second is to focus on the particular actions of the public body.
- 4.114 Merely looking at the way in which a public body is constituted is likely to be unsatisfactory. As noted above, there will be situations where a public body is performing functions that are the same as those performed by private individuals. So, a police officer driving a car in the normal course of their duties should be in the same position as a delivery driver. Conversely, 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.
- 4.115 The preferable option, therefore, would appear to be to adopt an approach which focuses on the activities of the body. This would aim to exclude actions conducted by public bodies which are not unique to government, such as buying paper clips or a police officer driving along the road as a normal incident of their duties. In the latter case, the police officer should be treated as just another driver. However the situation is different where the police officer is driving under a “blue light”: the special nature of that activity would bring it within the ambit of a “truly public” activity.

### POWERS UNDER STATUTE

- 4.116 The first step to defining “truly public” is to capture those acts and omissions governed by statute. In so doing, it is useful to consider the related concept of amenability to judicial review, especially as the tortious and judicial review systems should be broadly coextensive. In *ex parte Datafin* the court held that “if

the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review”,<sup>116</sup> unless there was a “compelling reason” to the contrary.<sup>117</sup> This applies to public and general acts. If the power comes from a Private Act then the body in question must be performing a “public function”.<sup>118</sup>

- 4.117 The drawback of this formulation, for the purposes of identifying “truly public” activity, is that to adopt a broad test of exercising a statutory power would capture all of the activities of certain bodies, such as local authorities. The only way that a local authority can act is through the use of a statutory power; therefore this would capture both mundane operational matters and the sort of activity that we feel should be regarded as “truly public”.
- 4.118 A useful insight into developing a more focused test is provided by the concept of an “emanation of the state”<sup>119</sup> in EU law. This is made out where private law bodies have “special powers beyond those which result from the normal rules between individuals”.<sup>120</sup>
- 4.119 The “special powers” in the EU test is similar to the phraseology adopted in New South Wales in the wake of the Ipp Review. The legislature in the *Civil Liability Act 2002* (NSW) gave particular protection to a public body exercising a “special statutory power”, which was defined as a power that is conferred by or under a statute, and is of a kind that persons generally are not authorised to exercise without specific statutory authority.<sup>121</sup>
- 4.120 In our view, where a body acts using what we refer to as a “special statutory power”, that is, one that allows a public body to act in a way not open to private individuals, then it is necessarily acting in a “truly public” fashion. This would cover such activity as police stop and search powers under Part V of the Terrorism Act 2000. This would apply to special statutory powers found in both of the following contexts:
- (1) where the special statutory power is one that is created explicitly in an Act; or
  - (2) where a special statutory power is necessarily implied so that a public body can discharge a statutory duty placed on it by Parliament.
- 4.121 This would cover “truly public” acts of a public body; it would not, of itself, cover omissions. Traditionally, there has been a reticence to recognise liability for omissions.<sup>122</sup> However, this would seem to be overly restrictive where Parliament

<sup>116</sup> *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815 at 847.

<sup>117</sup> *Mohit v Director of Public Prosecutions for Mauritius* [2006] UKPC 20, [2006] WLR 3343 at [20].

<sup>118</sup> *R v University of Cambridge ex parte Evans (No 2)* [1999] ED CR 556; *R (West) v Lloyds of London* [2004] EWCA Civ 506, [2004] All ER 251.

<sup>119</sup> Case C-188/89 *Foster v British Gas* [1990] ECR I-3313 at p 840.

<sup>120</sup> Above at [20].

<sup>121</sup> *Civil Liability Act 2002* (Cth), s 43A.

<sup>122</sup> See further the analysis of negligence in Part 3.

has placed a statutory duty on a public body to act, especially when considering that “truly public” is a threshold condition. Therefore, it is suggested that “truly public” should cover both acts and failures to act where the body was, or should have been, exercising a “special statutory power”. Whether an omission could give rise to liability would then be a question of the seriousness of the fault involved.

- 4.122 Whilst the concept of “special statutory powers” helps define the issue in many cases, it does not capture all the activities that we consider to be “truly public” when undertaken by a public body. For instance, “special statutory powers” would not capture the building and organisation of hospitals, providing libraries or housing the homeless. Such activities can be, and frequently are, conducted by individuals, businesses or charities, without recourse to a special statutory power allowing them to engage in the activity. However, in these situations, the individual, business or charity has freely chosen to undertake the activity. This raises a critical difference between this situation and the provision of similar services by public bodies. That is, in many situations, Parliament places specific statutory duties on a public body to undertake the activity; it is not a matter of choosing to do so. For example, Part VII of the Housing Act 1996 places specific duties on local authorities in relation to the provision of advisory schemes and accommodation for the homeless. We suggest that a statutory duty to engage in a particular activity that is placed on a public body should be termed a “special statutory duty” and the activity should be considered “truly public”.
- 4.123 However, a final consideration is that some statutes place duties on the public at large, or on certain sections of the public – for instance company directors. These would not seem, on the face of it, to be “truly public”. In light of the above, it is suggested that a further limb of any test for “truly public” activity should be action undertaken in regard to a statutory duty placed on that public body that is not placed on private individuals.
- 4.124 **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.**

#### PREROGATIVE POWERS

- 4.125 Prerogative powers are defined as “those rights and capacities which the [Crown] enjoys alone, in contradistinction to others, and not to those which [it] enjoys in common with any of [its] subjects”.<sup>123</sup> This would not encompass those powers that public bodies possess merely as a consequence of having legal personality.<sup>124</sup> Consequently, the situation with prerogative powers may be simpler than in the case of statutory powers. The prerogative, as defined above, is by its very nature something that is only utilised by the Crown and therefore it is correct to think of it as “truly public”.
- 4.126 The wider powers conferred by common law, as a result of a public body having legal personality, would not seem to be “truly public”. However, they are subject

<sup>123</sup> *Blackstone's Commentaries* 1.239. This distinction was accepted by the Court of Appeal in *R v Secretary of State for Health ex parte C* [2000] 1 FLR 627.

<sup>124</sup> See further HWR Wade and CF Forsyth, *Administrative Law* (9th ed 2004) pp 215 to 217.

to review and a public body operating in these situations can be subject to greater restrictions than a private individual.<sup>125</sup>

- 4.127 With the expansion of statute to cover much of public activity, the prerogative has “ceased to be a significant source of administrative power against the citizen”.<sup>126</sup> This stems from the rule that where there is a conflict between a statutory power and the prerogative, the prerogative power is taken as having fallen into abeyance.<sup>127</sup>
- 4.128 However, there are certain important areas where the prerogative is of real relevance to the governance of the country, such as declaring war, issuing passports and certain powers relating to the preservation of the peace.<sup>128</sup> While on the face of it these acts may fall within “truly public”, they are likely to be excluded from our scheme on the basis of non-justiciability.
- 4.129 In the context of the diminishing role of the prerogative, it should be noted that, as part of the Government’s *Governance of Britain* programme, there is increasing pressure to codify many of the remaining instances of prerogative powers.
- 4.130 Consequently, we suggest that the exercise of the prerogative constitutes a “truly public” activity. For similar reasons as put forward in relation to statutory powers, failure to exercise a prerogative power should also be included in the test.

#### CONCLUSION

- 4.131 Having regard to all of the above, we provisionally propose the following as the test for “truly public”:

An act or omission of the public body is to be regarded as “truly public” if:

- (a) the body exercised, or failed to exercise, a special statutory power; or
- (b) the body breached a special statutory duty; or
- (c) the body exercised, or failed to exercise, a prerogative power.

A “special statutory power” is a power that allows the public body to act in a way not open to private individuals.

A “special statutory duty” is a statutory duty placed on the public body that is specific to it and is not placed on private individuals.

- 4.132 **We invite comments on this formulation and whether it would act as a suitable “gatekeeper” to the operation of the private law scheme.**

<sup>125</sup> See further *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Development* [2008] EWCA Civ 148, [2008] All ER 25.

<sup>126</sup> HWR Wade and CF Forsyth, *Administrative Law* (9th ed 2004) p 216.

<sup>127</sup> *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508.

<sup>128</sup> On the latter, see *R v Home Secretary ex parte Chief Constable of Northumbria Police* [1989] QB 26.



### Conferral of benefit

- 4.133 The conferral of benefit test operates to restrict the possible ambit of both judicial review and tortious damages claims. Briefly put, it asks whether the legal regime in which the public body acted, or omitted to act, intended to confer a benefit on individuals and whether the harm suffered by the individual was of a similar nature to the benefit that the regime conferred.
- 4.134 In seeking to outline the operation of this test, this section focuses on legal regimes created by statute, as we believe that this is where the bulk of claims could or would occur. Concerning the prerogative, it is felt that showing that the prerogative power clearly conferred a benefit on individuals would be more difficult to make out, though not necessarily impossible. Consequently, the following discussion builds on the discussion of breach of statutory duty considered earlier in this Part.
- 4.135 Currently, in the context of breach of statutory duty, the court must find a Parliamentary intention that a breach is actionable. The problems with that approach were considered earlier in this Part. The focus of “conferral of benefit” is not to consider whether the statute intended to confer a right to compensation but whether the legislative scheme objectively was intended to protect or promote the claimant’s interests.
- 4.136 In many ways, the “conferral of benefit” test follows the approach of the European Court of Justice to its “conferral of rights” test when deciding whether damages should be awarded for a breach of EU law.<sup>129</sup>
- 4.137 It is important to note that we do not intend to limit the public law remedy to a narrow class of “rights”. For example, it might be very difficult for a claimant to show that legislation conferred a “right” to a certain licence, or that legislation conferred a “right” not to be left homeless. It should be sufficient to show that the legal regime was intended to advance, or protect, the interests of a class of persons in the position of the claimant and that the action, or inaction, of the public body adversely affected those interests.
- 4.138 The conferral of benefits is not so wide, however, that it would not preclude some claims. In *Three Rivers District Council v Governor of the Bank of England*,<sup>130</sup> the House of Lords held that the First Council Banking Co-ordination Directive<sup>131</sup> did not confer enforceable rights of reparation on BCCI’s depositors. *Three Rivers* was applied by the High Court in *Poole v HM Treasury*.<sup>132</sup> In that case, the claim was founded on *Francovich* principles and the claimants sought to establish that an insurance directive granted them rights as insurers to a properly regulated insurance market. The High Court rejected as an abuse of language the notion of a grant of a right to be regulated and held that the purpose of the regulation was

<sup>129</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I-1029.

<sup>130</sup> [2001] UKHL 16, [2003] 2 AC 1.

<sup>131</sup> Council Directive 73/239/EEC, Official Journal L228 of 16.8.1973 p 3.

<sup>132</sup> [2006] EWHC 2731 (Comm), [2007] All ER (Comm) 255. The Court of Appeal recently affirmed the High Court’s decision: [2007] EWCA Civ 1021, [2007] All ER 379.

not to protect the regulated but those to whom they supplied their products and service. Thus no rights were conferred on the claimants as individuals. *Three Rivers* and *Poole* provide examples of where claimants would not be able to satisfy the conferral of a benefit test.

- 4.139 Similarly, a regulatory scheme whose objective purpose is plainly to safeguard interests of a particular kind should not be taken as protecting of interests of a different nature. For example, the relevant “benefit” conferred by schemes for the inspection/certification of residential buildings, aircraft or sea vessels is limited to the promotion of the health and safety of individuals.<sup>133</sup> A benefit is not conferred with respect to the protection of the claimant’s property<sup>134</sup> or his or her economic interests<sup>135</sup> that are not immediately consequential upon personal injury.
- 4.140 Conversely, where a statute places a duty on a housing authority to provide interim housing to a person pending a determination as to whether he or she is actually homeless and is in priority need, then it confers a benefit on those who the housing authority has reason to believe are homeless.<sup>136</sup> Similarly, legislation which provides for a compulsory licensing scheme, where the award of a licence is automatic if the claimant fulfils certain criteria, will confer a benefit upon all those who are entitled to a licence.<sup>137</sup> These are examples of areas where we would expect the “conferral of benefit” test to be made out.
- 4.141 Once the claimant has shown that the legislative scheme underlying the “truly public” actions performed by the public body conferred a right on the claimant, the next stage is to show that the right was infringed in such a serious manner as to justify the court ordering the public body to pay compensation.
- 4.142 **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.**

#### **Serious fault**

- 4.143 This section considers the central component of the scheme outlined in this Consultation Paper. This is the requirement that “serious fault” on the part of public body would need to be shown before liability could be established. In developing this test, we have been greatly influenced by the operation of the law in relation to breaches of EU law and tests used in other jurisdictions.
- 4.144 The tort of negligence is essentially fault-based. The nature of the fault requirement is a simple lack of reasonable care. It seems to us that the modified corrective justice principle underlying our proposals requires this fault

<sup>133</sup> *Perrett v Collins* [1998] 2 Lloyd’s Rep 255 (damages for personal injury suffered by aircraft passengers are recoverable).

<sup>134</sup> See also *Marc Rich and Co v Bishop Rock Marine Co* [1996] AC 211 (compensation for loss of cargo on sunken ship is not recoverable).

<sup>135</sup> *Reeman v Department of Transport* [1997] 2 Lloyd’s Rep 674 at 685 (Lord Bingham): “the purpose of the certificate was to safeguard the physical safety of the vessel and her crew; it was not directed in any way to the market value of the vessel”.

<sup>136</sup> *O’Rourke v Camden London Borough Council* [1988] AC 188.

requirement to be enhanced to require a higher level of fault when the activity undertaken can be characterised as “truly public”. This would properly balance the interests of claimants with the competing demands made on public bodies, a dynamic not present in actions between private individuals.<sup>138</sup>

4.145 It is suggested that this enhanced level of fault should be characterised as “serious fault”. Adapting the language used in other enhanced fault concepts in the law of England and Wales, conduct would involve “serious fault” if it fell *far* below the standard expected in the circumstances.

4.146 A court deciding whether the relevant conduct met the requirements of “serious fault” would consider certain established factors, but would look for a significantly aggravated level of fault. These factors would include:<sup>139</sup>

- (1) The risk or likelihood of harm involved in the conduct of the public body;
- (2) The seriousness of the harm caused;
- (3) The knowledge of the public body at the time that the harm occurred that its conduct could cause harm, and whether it knew or should have known about vulnerable potential victims;
- (4) The cost and practicability of avoiding the harm;
- (5) The social utility of the activity in which the public body was engaged when it caused the harm; this would include factors such as preventing an undue administrative burden on the public body;
- (6) The extent and duration of departures from well-established good practice;
- (7) The extent to which senior administrators had made possible or facilitated the failure or failures in question.

4.147 Mere fault on the part of a public body is established where it is clear that the public body, having regard to the above factors, should not have acted in the manner that caused harm to the claimant, or should have taken appropriate steps to prevent such harm occurring. However, “serious fault” would only be established where the behaviour goes beyond mere administrative failure and engages these factors in an aggravated manner. For example, where the potential harm to the citizen was particularly grave or the departure from the principles of good administrative practice clearly blameworthy. As such, “serious fault” would only be established where the breach of the factors meant that the administrative failure of the public body fell *far* below the standard expected of public bodies.

<sup>137</sup> *R v Knowsley Metropolitan Borough Council ex parte Maguire* (1992) 90 LGR 653. See para 4.63 above.

<sup>138</sup> For further analysis, see Appendix A.

<sup>139</sup> For an analysis, see A Dugdale and M Jones, *Clerk and Lindsell on Torts* (19th ed 2006) paras 8.131 to 8.144.

- 4.148 Further guidance on the operation of any “serious fault” test can be provided through reference to the “sufficiently serious breach” test already in operation in judicial review where the claimant alleges a breach of EU law.<sup>140</sup> Simplicity would be served by adopting the exact terminology used by the Court of Justice in the English language versions of its case law. However, in light of the developing jurisprudence of the Court of Justice and adopting the factors drawn from the law of negligence, the use of “serious fault” as the governing term seems to be more appropriate. In fact, when considering the Court of Justice’s analysis in *Dillenkofer*, *ex parte Hedley Lomas*, *ex parte BT* and *Brinkman Tabakfabriken*,<sup>141</sup> it would seem that the test for “sufficiently serious” is in fact a test of *fault* on the part of the Member State in question.
- 4.149 In *Dillenkofer*, a Member State’s complete failure to transpose a Directive constituted a “sufficiently serious breach”. Again, in *ex parte Hedley Lomas*, as there was no legitimate excuse for the UK’s breach of EU law – refusing export licences to export livestock for slaughter abroad – the actions of the UK constituted a “sufficiently serious breach”.
- 4.150 Conversely, in *ex parte British Telecommunications*, the Court of Justice accepted that the Directive in question was capable of the meaning that the UK had adopted. As there was no further guidance from the Community Institutions, the Court of Justice held that the UK’s actions did not constitute a “sufficiently serious” breach of EU law. The Court of Justice adopted a similar line of reasoning in *Brinkman Tabakfabriken*, holding that whilst the Member State’s interpretation of a tax Directive was in fact incorrect, the position adopted by the Member State was understandable and therefore did not constitute a “sufficiently serious” breach of EU law. This analysis would seem analogous to, or at least complementary to, a reading of “serious fault”.
- 4.151 Within the “sufficiently serious” test, the “serious” criterion can be broken down into two components. The breach should be “manifest” and “grave”. It is sometimes said that “manifest” relates to the manner in which the rule is breached; and “grave” to the consequences that flow from it.<sup>142</sup> Furthermore, the European Court of Justice has identified a number of factors which are relevant to the characterisation of a breach as “sufficiently serious”:<sup>143</sup>
- (1) the clarity and precision of the rule breached;
  - (2) the measure of discretion left by that rule to the national or Community authorities;

<sup>140</sup> See Joined Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for transport ex parte Factortame (No 3)* [1996] ECR I-1029.

<sup>141</sup> Case C-178/94 *Dillenkofer v Federal Republic of Germany* [1996] ECR I-1281; Case C-5/94 *R v Ministry for Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; Case C-392/93 *R v HM Treasury ex parte British Telecommunications Ltd* [1996] ECR I-1631; Case C-319/96 *Brinkman Tabakfabriken v Skattenministeriat* [1998] ECR I-5255.

<sup>142</sup> M Andenas and D Fairgrieve, “Sufficiently Serious?” in M Andenas (ed), *English Public Law and the Common Law of Europe* (1998) p 320.

<sup>143</sup> Joined Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany* and *R v Secretary of State for transport ex parte Factortame (No 3)* [1996] ECR I-1029 at para 56.

- (3) whether the infringement and the damage caused was intentional or involuntary;
- (4) whether any error of law was excusable or inexcusable;
- (5) the fact that the position taken by a Community institution may have contributed towards the omission;
- (6) the adoption or retention of national measures or practices contrary to Community law.

### ***Role of “serious fault”***

4.152 We see “serious fault” as the key to our proposals. Under the current law, the court’s decision on whether or not to impose a duty of care is the major limiting factor on liability. However, within our scheme, the way in which the public body acted, or failed to act would be the deciding factor, with liability only being imposed where the administrative behaviour of the public body fell far below that reasonably expected of that body.

4.153 The role of “serious fault”, and the way in which our proposed reforms would “fit” with existing legislation, can be illustrated by taking the example of a planning application that is initially refused but is ultimately successful on appeal. There are two main ways in which this refusal followed by approval could occur. The first is where the initial application was refused but an appeal to the Secretary of State under section 78 of the Town and Country Planning Act 1990 was successful. We feel that this should not be a problem for our scheme. First, most appeals are allowed not because the local authority took an “illegal” decision but simply because the inspector took a different view of the planning “merits”. We feel that it would be very hard to make out “serious fault” where the question is one of a public body’s judgement. Second, in our general approach to the issue of administrative redress we stress that claimants should exhaust statutory remedies before bringing any action – this is also the case in the context of a judicial review.

4.154 The second instance where a “called in” decision of the Secretary of State to refuse the planning application was challenged in a successful statutory review under section 288 of the Act. Again, the claimant would have to show “serious fault” by the Secretary of State. As in the first instance, to amount to “serious fault” there would have to be grave failings in the action of the Secretary of State. These would have to go far beyond mere procedural errors, of the sort which could lead to a successful judicial review.

### ***Assessing “serious fault”***

4.155 In order to furnish examples of where the action of a public body would or would not amount to “serious fault”, we have drawn on judgments of the Administrative Court in 2007. We analysed all applications for judicial review where there was a substantive hearing in a relevant matter.<sup>144</sup> This comprised a dataset of 310

<sup>144</sup> As such, applications to extend orders, appeals by way of cases stated in criminal matters were excluded. The complete list of cases can be found at: <http://www.bailii.org/ew/cases/EWHC/Admin/2007/> (last visited 16 June 2008).

cases.<sup>145</sup> Of these 310 actions, the application for judicial review was successful in 121 cases. Of these 121, 18 were found to meet the criteria so as to merit a finding of “serious fault” on the part of the public body. The detailed analysis of these 18 cases is contained in Appendix C.

- 4.156 Below we have set out two examples to illustrate how these factors may be applied in cases where we provisionally concluded that a finding of “serious fault” should be made. A further two cases are set out where it was felt that the requirements of “serious fault” were not fulfilled though an application for judicial review was successful.

#### SERIOUS FAULT: EXAMPLES

- 4.157 *Aweys*<sup>146</sup> concerned the failure of a local authority to provide suitable housing under the Housing Act 1986 to a large number of disadvantaged individuals. A number of factors in this case suggest a finding of “serious fault”.
- 4.158 First, the court found that the local authority had adopted a clearly illegal policy denying that persons housed in inadequate accommodation could be “homeless” and therefore in priority need. Consequently, the local authority failed to fulfil its duty under section 193 of the Housing Act 1996. The policy adopted by the Council was so clearly at odds with the aims of section 193 that it removed the protection that the section was designed to provide. Secondly, the magnitude of the harm caused to the already vulnerable claimants was a significant factor. In one case two adults and seven children of various ages had been housed in a two-bedroom flat; in another the claimants had to remain in housing that was clearly inappropriate for their severely disabled daughter.<sup>147</sup> Thirdly, the continuing nature of the failures outweighed the significant problems faced by the defendant public body in providing suitable social housing. These reasons evidenced administrative action that fell far below the standard expected of the local authority and should be considered as amounting to “serious fault”.
- 4.159 An example of the way in which a series of cumulative failures can lead to finding of “serious fault” is *S*.<sup>148</sup> This case concerned the failure of the Secretary of State to properly assess the claimant’s asylum application. The first failure taken into account by the Administrative Court, in the initial application for judicial review, was the excessive delay in dealing with S’s claim; this amounted to some four and a half years. Secondly, the Secretary of State had informed the claimant that he could apply for entry clearance on return to Afghanistan. However, the British Embassy in Afghanistan had no facilities for this, making such an application impossible. Finally, the Secretary of State had unlawfully certified that the claimant had no right to appeal the refusal of discretionary leave to remain.
- 4.160 Concerning the first of these factors, the delay had been the result of the Government’s prioritising certain claims in order to reduce a backlog of outstanding claims. The court held that had the claim been based solely on delay

<sup>145</sup> The analysis of all 310 cases will be available in table form at: <http://www.lawcom.gov.uk/>.

<sup>146</sup> *Aweys v Birmingham City Council* [2007] EWHC 52 (Admin), [2007] All ER 230.

<sup>147</sup> This is considered in greater detail in Appendix C.

<sup>148</sup> *R (S) v Secretary of State for the Home Department* [2007] EWHC 51 (Admin), [2007] All ER 218.

then it would have failed. However, the cumulative nature of the failures led the Court to find the action illegal. Informing the claimant of the possibility of entry clearance in Afghanistan was clearly wrong and, had the claimant relied on this advice, could have had led to a potentially catastrophic result. In relation to the unlawful certification, this effectively removed a vital statutory remedy designed specifically for the protection of those in the claimant's position.

- 4.161 The seriousness of these failures, coupled with the effect that these failures would have on the claimant, took the claim far beyond mere administrative failure and led to our assessment of "serious fault".

#### NOT "SERIOUS FAULT": EXAMPLES

- 4.162 "Serious fault" is intended to constitute a level of failure where the administrative action is at such a level that the payment of monetary compensation would be justified under the principles of "modified corrective justice". To highlight that "serious fault" is intended to go far beyond illegality or negligence, it is useful to consider the following examples, where we did not consider that the requirements of "serious fault" had been fulfilled.
- 4.163 *Barlas* concerned a family seeking to reunite itself in the UK.<sup>149</sup> Here the Administrative Court held that the appropriate Immigration Rules had been misapplied and that additional conditions had been imposed that could cause undue hardship for families. Additionally the importance of the issue to claimants and their families was an important consideration. Consequently, the Administrative Court quashed the decision not to assess the claim for exceptional leave to remain. Whilst the decision was unlawful, and concerned a matter of importance to the individuals involved, the public body's conduct did not involve the sort of cumulative failure that would lead to a finding of "serious fault" in cases such as *Aweys*.<sup>150</sup> *Barlas* is an example of the sort administrative failure that can occur in any sort of large organisation.
- 4.164 *Camden Lock*<sup>151</sup> concerned a failure to establish in the Camden London Borough Council's Unitary Development Plan ("UDP") that the land on which the applicant conducted its business was for "market use". When London Underground sought to redevelop its tube station, it also applied for permission to develop a mixed-use site above ground. This would have led to the destruction of the claimant's market business. The claimant sought to resist this and a planning inspector found that the proposed development would have a significant detrimental effect on the area. This was upheld by the Secretary of State. A subsequent inquiry suggested that the land be designated for "market use", but the local authority failed to incorporate this into its UDP. This was a serious issue for the applicant and the Administrative Court duly quashed the UDP. However, this is another example of basic administrative failure, and, whilst this may have amounted to negligence on the part of those tasked with drawing up the UDP, it lacks the sort of factors that move administrative failure into the realm of "serious fault".

<sup>149</sup> *R (Barlas) v Consul General, British Consulate, Amsterdam* [2007] EWHC 1709 (Admin), [2007] All ER 359.

<sup>150</sup> Considered above.

<sup>151</sup> *Camden Lock (London Ltd) v Camden London Borough Council* [2007] EWHC 495 (Admin), [2007] All ER 298.

#### INTERIM CONCLUSIONS ON “SERIOUS FAULT”

- 4.165 We conclude that there would be little difficulty in creating settled and secure jurisprudence regarding the “serious fault” requirement for the purposes of determining the private and public law liability of public bodies.
- 4.166 We suggest that the combination of the conferral of benefit test and the requirement for “serious fault” will provide a more suitable control mechanism for actions against public bodies than the traditional concept of establishing a duty of care. This would also provide more certainty as to when liability would be imposed than under the current law of negligence. This would be of benefit both to claimant citizens and defendant public bodies. Further consideration of the possible effects of our suggested options is contained in Part 6.
- 4.167 **We invite comments on the possible operation of a “serious fault” regime in the context of the scheme outlined in the Consultation Paper.**

#### **Causation**

- 4.168 With regard to causation, we consider that general tort principles can be applied in the context of our suggested scheme. Therefore, the claimant must be able to establish that:
- (1) the defendant’s conduct did in fact result in the damage complained of; and
  - (2) the damage is not in law too remote a consequence of the defendant’s wrongdoing.<sup>152</sup>
- 4.169 These principles are very well established and the courts are accustomed to their application. As we suggest that they will apply unmodified in the “truly public” context in the private law scheme, we do not consider that it is necessary to elaborate on them any further.
- 4.170 However, there are some issues relating to judicial review that are worth considering. These relate to awarding damages where a decision has been quashed and remitted back to the original decision-maker.

#### ***The role of causation in judicial review***

- 4.171 Causation has an important role to play in limiting the recovery of damages in judicial review, particularly in cases concerning procedural impropriety. An example is where a disciplinary body has suspended an individual from working and has done this in a manner that led to a successful judicial review claim on the basis of procedural impropriety. If the decision is quashed and then remitted back to the original decision-maker, loss could only be established if the decision-maker subsequently holds that the individual should not be suspended. If the decision-maker holds that the individual should still be suspended – this time in a procedurally correct way – the claimant has effectively suffered no loss.

<sup>152</sup> A Dugdale and M Jones (eds), *Clerk and Lindsell on Torts* (19th ed 2006) para 2.01.



4.172 By way of examples, the effect of this would be:

- (1) *Causation*: A claimant holds an existing licence and the public body removes it in a procedurally improper way. If, after judicial review, the public body approaches the decision in a procedurally proper way and decides in the claimant's favour, there should be damages payable for losses sustained between the invalid and valid decision.
- (2) *No causation*: A claimant holds an existing licence and the public body removes it in a procedurally improper way. If, after judicial review, the public body takes the same decision but this time in a procedurally valid way, damages are not payable for losses sustained between the invalid and valid decision.
- (3) *No causation*: A claimant applies for a licence for the first time. The public body makes the decision not to grant the licence in a procedurally improper way. If, after judicial review, the public body takes the same decision but this time in a procedurally valid way, damages would not be payable as there is no loss between the invalid and valid decision.

4.173 **Is this approach to causation satisfactory?**

**When are damages recoverable?**

4.174 It is suggested that in the public law scheme damages should be discretionary, as is the case with other remedies in judicial review. In private law the normal rules of damages would apply, such that damages are available as of right once the other elements have been satisfied.

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

**Types of damages recoverable**

4.176 Under the ordinary rules of negligence, when a claimant has shown a breach of duty and established causation, damages will follow. The purpose of awarding damages is to attempt to restore claimants to the position they would have been in had the breach of duty not taken place. Under our suggested scheme, we provisionally propose that damages should follow the same rules that govern ordinary negligence. However, there is one area which causes some difficulty, namely the rules governing the recovery of damages for pure economic loss.

***Pure economic loss***

4.177 As we discuss above, there is a general "exclusionary rule" that militates against recovery for pure economic loss in all but a few specified circumstances. Earlier in this Part, we consider the reasons why recovery for pure economic loss has generally been excluded and ask whether the traditional reasons for restricting liability are equally valid in relation to public bodies as they are in the purely private context.

4.178 We are keen to invite discussion on the possibility of recovery for pure economic loss within our proposed regimes outside the exceptional circumstances in which it is currently allowed. We do this on the basis of the principles of "modified

corrective justice”, which we endorse throughout this Consultation Paper. While we do not consider that our principle of modified corrective justice is capable of directly generating detailed rules of liability, on the face of it, it is difficult to see why there should be a distinction between the type of loss suffered.

- 4.179 We acknowledge that this is a difficult issue. However, the paradigm case of administrative illegality is the unlawful refusal of a licence causing financial loss. If there were no liability for financial loss as a result of seriously substandard administrative action, we feel that this would dramatically reduce the effectiveness of any reform and fail to meet the requirements of a principled system for administrative redress.
- 4.180 We stress that we invite discussion on pure economic loss in the context of the specific safeguards contained in our proposals, including:
- (1) the proposed “conferral of benefit” test;
  - (2) the requirement to prove “serious fault”;
  - (3) causation;
  - (4) modifying the general rule on joint and several liability; and
  - (5) general principles for apportioning tortious damages such as mitigation through contributory negligence.
- 4.181 In our provisional view, these safeguards are sufficient to provide a proper balance between the competing demands on public bodies. That is, they balance the obligation to provide redress for individuals harmed by substandard administrative action while limiting the liability of public bodies in a just manner, in view of the wider obligations they owe to society as the distributors of services funded through public taxation.
- 4.182 In our view, there are two characteristics of the “conferral of benefit” test which are likely to operate so as to limit the recovery for pure economic loss. First, the conferral of benefit test would be designed to act as a bar to applications by those whose protection was not envisaged by the statutory regime.
- 4.183 Secondly, the “conferral of benefit test” would only provide for recovery where the type of loss is one that the statutory regime had been designed to protect. Therefore a statutory regime created for the protection of lives and vessels at sea could not be interpreted as protecting a purely economic loss, even if it could be proved that the public body’s actions caused this loss or were a significant contributory factor.<sup>153</sup>
- 4.184 In the consideration of “serious fault” we have already outlined how the operation of this safeguard sets a much higher threshold than that which exists for simple illegality in public law, and that which currently exists for the tort of negligence.

<sup>153</sup> Consequently, the decision in *Reeman v Department of Transport* [1997] 2 Lloyd’s Reports 648, would survive.

- 4.185 The proposed modifications to joint and several liability discussed below would mark a fundamental change in the nature of public body liability. In modifying the current law, we envisage that the impetus behind much of the previous litigation would be removed. In many earlier cases, such as *Murphy v Brentwood District Council*<sup>154</sup> or *Reeman*,<sup>155</sup> the public body was effectively the “last man standing” and therefore the whole of the claim was directed towards it. By being able to appropriately apportion a claim so as to take into account the public body’s true involvement in any losses, the potential liability of any public body would be greatly reduced.
- 4.186 It is arguable that this approach to pure economic loss could be adopted in both the public and private law schemes.
- 4.187 We appreciate that in private law this would mean a significant change in the current position. At present the approach in negligence is for the law to develop in an incremental fashion. A duty of care will be found where the requirements set out in *Caparo v Dickman*<sup>156</sup> are met, such that it is “fair, just and reasonable” to impose liability, or where there is a situation analogous to the “assumption of responsibility” in *Hedley Byrne v Heller*.<sup>157</sup> However we still provisionally, believe that the application of the modified corrective justice principle suggests that there should be recovery for pure economic loss in the private law scheme, as in the proposed public law scheme.
- 4.188 A further consideration in deciding whether to apply the same approach in both schemes would be that creating a difference between the two schemes of this nature would require claimants seeking recompense for pure economic loss to bring their claims in the already over-burdened Administrative Court.
- 4.189 **On this basis, we would welcome comments on the recovery of pure economic loss:**
- (1) **In the public law scheme;**
  - (2) **In the private law scheme.**

#### **Joint and several liability**

- 4.190 Earlier in this Part we note that the principle of joint and several liability can operate harshly in the state liability context. Our provisional view is that there is a strong case for mitigating the blanket rule on joint and several liability in the state liability context.<sup>158</sup> We provisionally suggest that for cases falling within our

<sup>154</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398.

<sup>155</sup> *Reeman v Department of Transport* [1997] 2 Lloyd’s Reports 648.

<sup>156</sup> *Caparo Industries v Dickman* [1990] 2 AC 605.

<sup>157</sup> *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465.

<sup>158</sup> Under our provisional proposals, the principle of joint and several liability would continue to apply to private defendants. It is beyond the scope of this project to make a more wide-ranging assessment of the operation of the principle of joint and several liability. Where a public body bears some responsibility for the claimant’s loss but the claimant brings proceedings exclusively against the private defendant, the latter will be liable for the entire loss. It will, however, be open to the private defendant to join the authority as a party, or subsequently claim contribution.

proposed scheme, the courts should be able to abandon the principle of joint and several liability and instead determine liability proportionately, based on the extent of the public body's responsibility for the loss.<sup>159</sup>

4.191 In France, the principle of joint and several liability applies in private law but has been abandoned by the administrative courts in favour of proportionate liability.<sup>160</sup> This was in part because it was thought that the administration should not be seen as a kind of insurance for claimants.<sup>161</sup> This has had a significant impact in cases concerning regulatory and supervisory failure. In *Kechichian*,<sup>162</sup> for example, the state regulator was found to be negligent in its supervision of a bank but was held liable for only 10% of the claimants' total loss, the primary cause of loss being the fraudulent activities of the directors.<sup>163</sup>

4.192 In the USA, there has been particular concern about the operation of the joint and several liability rule in relation to local authorities. It has been noted that:

Local governments have cited [joint and several liability] as a reason for increasing taxes and eliminating public facilities and services. Because of their deep pockets, public entities, particularly municipalities, are often brought into suits for their passive roles in "causing accidents".<sup>164</sup>

4.193 Accordingly, municipalities have been exempted from joint and several liability in Michigan,<sup>165</sup> while in Hawaii the rule was abolished in respect of all government entities.<sup>166</sup> There has also been widespread reconsideration of the rule in US tort

<sup>159</sup> In the context of contribution proceedings, "responsibility" has been taken to refer both to the degree of the defendant's fault, and the extent to which it contributed to the damage. *Downs v Chappell* [1997] 1 WLR 426 at 445: "It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. A more serious fault having less causative impact on the plaintiff's damage may represent an equivalent responsibility to a less serious fault which had a greater causative impact".

<sup>160</sup> There are a few exceptions, notably, where more than one public body contributes to the same indivisible damage, they will be held jointly and severally liable.

<sup>161</sup> Deguerge in *Dalloz Droit Administratif*, Fascicule 830, para 83.

<sup>162</sup> CE 30 November 2001, *Kechichian*, AJDA 2002.136.

<sup>163</sup> While French administrative courts have been willing to examine claims against financial regulators (albeit that liability is generally subject to the gross fault standard), such claims are unlikely to succeed in English law: see *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 1 WLR 821 and Remedies Against Public Bodies (October 2006) Law Commission Scoping Report, [http://www.lawcom.gov.uk/docs/remedies\\_scoping\\_report.pdf](http://www.lawcom.gov.uk/docs/remedies_scoping_report.pdf), para 3.15. This reluctance to impose liability on financial regulators may stem, at least in part, from the fact that it would involve holding them liable for the whole loss. The amounts at stake can be substantial. For example, the claim against the Bank of England in the BCCI litigation was for £850 million.

<sup>164</sup> L Pressler and K Schieffer, "Joint and Several Liability: A Case for Reform" (1988) 64 *Denver University Law Review* 651, 654 (footnote omitted).

<sup>165</sup> Michigan Compiled Laws, ss 600.6304(4) and 600.6312.

<sup>166</sup> This has now been extended to all defendants. Hawaii Revised Statutes, s 663-10.9.

law generally – thirty-seven states have enacted some kind of legislative reform, experimenting with a broad range of techniques.<sup>167</sup>

4.194 The experience in foreign jurisdictions, especially US states, highlights that there are intermediate positions between proportionate liability and a strict application of the joint and several liability rule and therefore the question of reform need not entail a stark choice between the two. The following are possible options for mitigating the rule on joint and several liability in the “truly public” sphere:

- (1) A strict rule of full proportionate liability. Apportionment would follow automatically in cases that satisfy the “truly public” test.
- (2) Imposing a minimum threshold for a concurrent wrongdoer’s comparative fault. The public body respondent would benefit from proportionate liability only if its comparative fault fell below a certain percentage, for example 51 or 60%.<sup>168</sup>
- (3) Giving the courts discretion to abandon the joint and several liability rule in “truly public” cases.

4.195 Our provisional preference is for option 3, that is, a discretion allowing courts to apportion liability in cases that satisfy the “truly public” test. We accept that there may be cases in which apportioning liability may not be appropriate or necessary. It may be unnecessary for example, where all wrongdoers are solvent and/or before the court, enabling the court to apportion liability. It may be inappropriate where the public body is the primary wrongdoer. If a public body respondent is found 80% liable, it is unfair for the claimant, rather than the respondent, to bear the burden of a concurrent wrongdoer’s insolvency or impecuniosity. A strict rule of proportionate liability would not, in our view, give the courts sufficient flexibility to achieve the right balance in individual cases.

4.196 **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?**

<sup>167</sup> See the website of the National Association of Mutual Insurance Companies: <http://namic.org/reports/tortReform/JointAndSeveralLiability.asp> (last visited 16 June 2008).

<sup>168</sup> This mechanism is used by a number of states in the USA, with varying percentage thresholds: 15% in Minnesota, 51% in Iowa, Montana and South Dakota and 60% in New Jersey. See the table on the website of the National Association of Mutual Insurance Companies: <http://www.namic.org/PrintPage.asp?ArticleID=6446> (last visited 16 June 2008).

## MOVEMENT BETWEEN PUBLIC LAW AND PRIVATE LAW

4.197 While the discussion in the next Part is concerned with movement of cases between the courts and ombudsmen, it is also important to consider the movement of cases within the court system, and specifically, between the public and private law systems.

### The nature of the claim

4.198 The current law draws a distinction between claims that a public body has taken an illegal decision and claims that a public body has acted without due care. A claimant who alleges that an administrative decision is unlawful must almost invariably use the procedure for judicial review whilst claims of carelessness would found an action in negligence.

4.199 A basic premise of our scheme is that there is a real difference in nature (at least, in the vast majority of cases) between public law illegality, on the one hand, and negligence, on the other. We believe that it will be readily discernible whether the claim should proceed under the public law or private law scheme. A key advantage of our approach is that, by more closely approximating the remedies available in public and private law, it removes the incentive on a claimant to “forum shop”. In particular, it would no longer be necessary for a claimant who sought compensation to re-shape an allegation of illegality to fit a negligence mould because of the lack of compensation on judicial review.

4.200 It is illustrative to take an example adapted from the facts of *Smith (by her mother and next friend) v Secretary of State for Health*.<sup>169</sup> A child develops a serious long-term disorder after having been given a safe dose of aspirin by her parents. An expert committee of the Department of Health, at a time before the incident, knew that there was a connection between aspirin and the disorder in children. There was overwhelming evidence of the dangers. However, such a warning was not issued immediately after the evidence was made known. This is because the Secretary of State did not consider that there was sufficient evidence. However, after vigorous lobbying from the medical profession, the warning was subsequently issued. Nonetheless, it came too late for the child in question.

4.201 The parents wish to take legal action against the Secretary of State. In this situation, the current law would encourage them to attempt to proceed in negligence. The principal potential remedies available to them in public law, such as a quashing or a mandatory order, would no longer be relevant, because the warning had subsequently been given. The principal remedy they seek is compensation for the harm done to the child, not available on judicial review. However, in reality, what the claimants are doing is challenging the reasonableness, ultimately, the legality, of the Secretary of State’s decision-making. But the current distribution of available remedies forces the claimants to try to dress up an allegation of illegality as an allegation of negligence.

4.202 Let us assume an alternative scenario but based on the same facts. The Secretary of State accepts the evidence of the expert committee, and plans to issue a warning immediately. However, instead of being issued within a couple of weeks, the warning is not issued for two months, as a result of administrative

<sup>169</sup> [2002] EWHC 200 (QB), [2002] Lloyd’s Reports Med 333.

delay. Amongst other breakdowns in communication, the minutes and associated papers of a previous meeting of the committee responsible for the implementation of the warning were lost, and the committee had to be reconvened and re-take evidence from external experts.

- 4.203 Here, the policy decision to issue a warning was itself lawful. Judicial review, the core function of which is to control the legality of decision-making, would not be appropriate here. The purpose of the legal action that the parents might take against the Department of Health would be to challenge the careless way in which the policy decision was implemented. In this respect, the parents' claim is naturally one in negligence.
- 4.204 We acknowledge that there are some cases where the same sequence of facts displays aspects of illegality and of negligence. In these circumstances, parallel proceedings would be acceptable. Where the claimant can plausibly argue, for example, both that a policy is unlawful, and that it was carelessly implemented, it might be right to allow both sets of proceedings to continue. The court has a wide variety of case management powers under the Civil Procedure Rules to deal with concurrent claims or claims brought using the wrong procedure. For example, the court can stay a negligence action pending a ruling on legality.<sup>170</sup> The court also has the power to transfer where a claim has been brought inadvertently using the wrong procedure<sup>171</sup> and the power to deal with claims deliberately commenced using the wrong procedure.<sup>172</sup>
- 4.205 Through case law, the courts have developed practical guidance on which procedure to use, when to transfer claims and when proceedings in a particular forum constitute an abuse of process.<sup>173</sup> This guidance would continue to be of practical assistance under our proposed schemes.<sup>174</sup>

### **Limitation periods**

- 4.206 At present, an application for judicial review must be made promptly and in any event not later than three months after the grounds for the claim first arose.<sup>175</sup> Time may be extended, if good reasons exist. For actions in tort, the general rule is that actions must be brought within six years,<sup>176</sup> or three years if the claim involves personal injury.<sup>177</sup> We are not proposing any changes to these limitation periods. It is suggested that the action in public law would be subject to the same

<sup>170</sup> Civil Procedure Rules, r 3.1.

<sup>171</sup> Civil Procedure Rules, r 30.5 and r 54.20.

<sup>172</sup> Currently, a claim which should have been brought by way of judicial review can be dismissed as an abuse of process, if the intention was to flout the strict limitation period: Civil Procedure Rules, r 3.4.

<sup>173</sup> M Fordham, *Judicial Review Handbook* (4th ed 2004), pp 562 to 574.

<sup>174</sup> See, for example, *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840; *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988.

<sup>175</sup> Civil Procedure Rules, r 54.5(1).

<sup>176</sup> Limitation Act 1980, s 2. Note that an overriding time limit of fifteen years applies to claims in negligence which do not involve personal injury: s 14B.

<sup>177</sup> Above, s 11.

limitation period as other judicial review cases and that the action in private law be subject to a similar limitation period as similar tort actions.

#### **CLOSING COMMENTS**

- 4.207 In summary, the current law relating to the liability of public bodies is uncertain and over complicated. In some places it is too restrictive to claimants and in other areas, public bodies are faced with an ever-increasing burden on public resources.
- 4.208 In exploring the issues raised by our analysis of the current position, the aim of this Consultation Paper is not to change government policy promoting the use of internal complaints procedures or non-court mechanisms such as ombudsmen. Indeed, our approach underlines its importance. However, we recognise that, whatever forms of alternative dispute resolution that there may be, in some circumstances aggrieved parties will still go to court. When they do so, the system they encounter should be capable of delivering justice for claimants, while properly recognising the public benefit of the activities of public bodies.
- 4.209 The possible effects of these options for reform are considered in further detail in Part 6.



# **PART 5**

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

### **INTRODUCTION**

- 5.1 This Consultation Paper is concerned with providing fair and reasonable redress to claimants for substandard administrative action. This involves two main areas of reform. The first, as discussed in Part 4, is to reform the public and private law avenues of redress to create a system that both enhances the certainty of the law and recognises the special position of public bodies. The second is to strengthen and clarify the relationship between two of the central pillars of administrative redress – the courts and ombudsmen.
- 5.2 This Part focuses on this second area and considers the ways in which the relationship between the ombudsmen and the courts can be made more transparent and flexible. Both public bodies and claimants should have a clear understanding of which complaints should be brought before ombudsmen and which should be brought before the courts. This should be coupled with a suitable mechanism to facilitate movement between the courts and ombudsmen. Finally, we make suggestions to improve access to the ombudsmen.
- 5.3 In general, our suggestions apply equally to the Parliamentary Ombudsman, the Local Government Ombudsman and the Public Services Ombudsman for Wales. An exception concerns the suggestions relating to the MP Filter which affect only the Parliamentary Ombudsman.

### **FACTORS GOVERNING THE RELATIONSHIP BETWEEN COURTS AND OMBUDSMEN**

- 5.4 In this section, we consider the overlapping jurisdiction of the courts and ombudsmen.

#### **Overlapping jurisdictions of the courts and ombudsmen**

- 5.5 The jurisdiction of the ombudsmen concerns the investigation of maladministration. As it can often be difficult to draw a line between maladministration and unlawful administrative action, or between maladministration and negligent administrative action, there is a strong potential for overlap between the jurisdictions of the courts and ombudsmen. As such, there may be situations in which an individual starts proceedings in an inappropriate forum. A forum may be “inappropriate” for a number of reasons, for example:
- (1) The claimant starts proceedings in the courts but the essence of the case is one of maladministration rather than illegality, or vice versa.
  - (2) The claimant discovers that he or she cannot obtain the relief or remedy they want in the forum initially chosen.

- (3) The claimant starts court proceedings but it becomes apparent that because of the value of the claim it would be more appropriately dealt with by an ombudsman.<sup>1</sup>
  - (4) There are other practical benefits to pursuing a claim in the alternative forum.
- 5.6 It is consistent with the proper administration of justice that claims that are not started in the appropriate forum can be easily transferred. As the current Parliamentary Ombudsman has suggested:

The most important thing is that we should have a system of administrative justice that enables any individual dispute in the sphere to get to the place – ombudsman, court, tribunal – where it has the best chance of being resolved as quickly, and cost effectively, as possible.<sup>2</sup>

- 5.7 In addressing the need to create a more responsive regime, reference is made to factors that might be considered when deciding whether a case should be investigated by an ombudsman or heard in a court.

**Factors to be taken into account in determining the appropriate means of redress**

- 5.8 Our consideration of these principles has been informed in part by the principles used by the ombudsmen in this jurisdiction to determine the types of cases they consider are suitable for investigation. We have also considered the Australian system, in which the Administrative Appeals Tribunal and the Commonwealth Ombudsman operate a system of cross-referrals.
- 5.9 The factors outlined below are neither exhaustive nor mutually exclusive.

***Factor 1: The availability of statutory procedures***

- 5.10 Where a specialist statutory procedure exists for a particular grievance, cases should normally be pursued through this procedure.<sup>3</sup> There is a risk that claimants may otherwise resort to an ombudsman for purely tactical reasons rather than to pursue a genuine complaint.<sup>4</sup>
- 5.11 However, the existence of a statutory appeals procedure does not in all cases preclude an investigation by an ombudsman. For example, the Child Support Act

<sup>1</sup> For example, see *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124.

<sup>2</sup> Parliamentary and Health Service Ombudsman, *The Ombudsman, the Constitution and Public Services: A Crisis or an Opportunity?* (December 2006), [http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/speeches/ombudsman\\_constitution\\_publicservices.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/speeches/ombudsman_constitution_publicservices.html) (last visited 16 June 2008).

<sup>3</sup> The benefits of using the statutory route over the ombudsman are discussed in R Kirkham, “Challenging the Authority of the Ombudsman: The Parliamentary Ombudsman’s Special Report on Wartime Detainees” (2006) 69 *Modern Law Review* 792.

<sup>4</sup> For example, we are aware that there is a concern that claimants will use the possibility of recourse to the ombudsman to halt deportation proceedings in the asylum and immigration context. Given the volume of deportation proceedings this would have serious implications for the administrative justice system.

1991 establishes a statutory scheme to give claimants a right of appeal to a tribunal in respect of assessments made by the Child Support Agency. However, where an individual wishes to complain about the conduct of the Agency itself, they may have recourse to an ombudsman. This would be where the complaint concerns issues of maladministration rather than a challenge to the assessment result.<sup>5</sup>

- 5.12 Similarly in the community care context, while complainants will normally be expected to have completed the statutory social services complaints procedure, the Local Government Ombudsman has indicated that:

In fact we are not bound by any restriction here, and we will investigate a complaint before a statutory process has been exhausted. We do so especially where there has been a breakdown of trust between the complainant and the authority, or where both sides agree that there is no point in completing a process which is unlikely to satisfy the complainant.<sup>6</sup>

**Factor 2: The nature of the complaint**

- 5.13 The nature of the complaint can determine whether the court or an ombudsman is the more appropriate forum. For example, where a finding of maladministration hinges on a contested legal issue, the case should go before a court or tribunal.
- 5.14 In contrast, where a case concerns systemic failings, the ombudsmen may be the most appropriate method of redress. The Parliamentary Ombudsman “can issue a special report to highlight systemic shortcomings, identify remedies and propose longer-term change”.<sup>7</sup>

**Factor 3: Characteristics of the parties**

- 5.15 The complainant’s ability to initiate, prepare and conduct their own case may be relevant. For example, the Local Government Ombudsman considers the ability of the claimant to cope with the adversarial nature of court proceedings when deciding whether the court or an ombudsman is the more appropriate forum. Factors that may point to the vulnerability of claimants include their age, state of health and level of education.
- 5.16 Similarly, where claimants do not know the full facts and could not obtain them through court proceedings, the ombudsmen may be the more appropriate method for obtaining redress. As the Local Government Ombudsman notes, in court “the onus is on the parties to obtain evidence and to decide which information to

<sup>5</sup> *Rowley v Secretary of State of Work and Pensions* [2007] EWCA Civ 598, [2007] 1 WLR 2861 at [79]. It was noted that the White Paper preceding the 1991 Act had expressly made provision for the ombudsman to investigate complaints of maladministration: “it must, therefore, have been within the contemplation of Parliament when the 1991 Act was enacted that complaints about maladministration of the CSA could be referred to the Ombudsman”.

<sup>6</sup> J White, “Community Care and the Local Government Ombudsman for England” [2006] *Community Care Law Reports* 8.

<sup>7</sup> Cited in Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th report (2006-07) HC 421, p 2.

present” whereas “ombudsmen themselves go out to find the information and have more scope than court to ferret out the facts”.<sup>8</sup>

- 5.17 The complainant’s financial situation may also be relevant. The ombudsmen procedure does not require complainants to have legal representation and is free for both parties. Parties to a legal action will normally require representation and the unsuccessful party may be ordered to pay the costs of the other side.
- 5.18 If the complainant is in an ongoing relationship with the defendant then the less adversarial and more conciliatory forum of the ombudsmen may be more appropriate than the courts. As Lord Woolf stated, in support of the Independent Housing Ombudsman Scheme:

In many situations an ombudsman scheme is more likely to produce satisfactory results because the relationship between a tenant and his or her landlord is a continuing one and relations between tenants and their landlords need to be as good as possible. Litigation in the courts is adversarial and therefore almost inevitably damaging to that relationship.<sup>9</sup>

**Factor 4: The claimant’s objectives**

- 5.19 The remedy or outcome sought by the claimant will influence whether the courts or an ombudsman is the more appropriate forum.
- 5.20 Where claimants want an explanation or an apology, the ombudsmen may be more appropriate.<sup>10</sup> Ombudsmen reports provide claimants with an explanation of how and why things have gone wrong, although information prejudicial to the safety of the state or against the public interest is not disclosed.
- 5.21 The ombudsmen may also be more appropriate if claimants do not want their grievances made public. Ombudsmen investigations are conducted in private and parties may make a complaint without disclosing their identities.<sup>11</sup> By contrast, hearings in judicial review proceedings are generally in public,<sup>12</sup> as are hearings in private law matters.
- 5.22 Where the claimant is seeking a monetary remedy, the value of the remedy sought will influence the choice of forum. As the cost of court proceedings should not be disproportionate to the remedy, then the size of the award compared to

<sup>8</sup> See E Osmotherly, “The Local Government Ombudsman as an Alternative to Judicial Review” (2000), [http://www.lgo.org.uk/judicial\\_review.htm](http://www.lgo.org.uk/judicial_review.htm) (last visited 16 June 2008).

<sup>9</sup> Taken from a letter to the Housing Ombudsman at the inception of the Housing Ombudsman Scheme on 1 April 1997.

<sup>10</sup> Where ombudsmen make a finding of maladministration, their investigations often conclude with the person or public body asking the ombudsman to convey their apologies to the complainant.

<sup>11</sup> M Biles, “Alternative Therapy” (2003) 7 *Landlord and Tenant Review* 25 at p 27.

<sup>12</sup> The court may in certain circumstances order that a hearing be held in private: Civil Procedure Rules, r 39.2 and Contempt of Court Act 1981, s 11.

the cost of legal fees can be a key factor.<sup>13</sup> Additionally, whilst tort law adopts a comprehensive approach to damages, restoring claimants to their pre-injury position by awarding damages for both past and prospective losses, the ombudsmen do not necessarily follow the same approach and awards can be smaller. This can be more appropriate in some circumstances, when taking into account the interests of both of the parties.

- 5.23 Another relevant factor is the type of loss the claimant is seeking to recover. If the claimant has suffered a loss not recognised by law, such as distress, hardship or pure economic loss, they will currently not be able to recover this through the courts. However, they may be able to do so through the ombudsmen.<sup>14</sup>
- 5.24 Where the claimant is seeking a prerogative remedy, then judicial review is, of course, the appropriate option. Similarly, where urgent interim relief is required, judicial review will be appropriate, as ombudsmen cannot provide interim relief.

### **MOVEMENT BETWEEN OMBUDSMEN AND THE COURTS**

- 5.25 This Consultation Paper affirms the vital role played by ombudsmen in providing redress for claimants and in improving administrative practices as a whole. It is our view that ombudsmen should be understood as providing a “system of justice” in their own right.
- 5.26 In order to strengthen the role of ombudsmen and improve the efficiency of administrative justice more generally, we make three suggestions for reform:
- (1) Make the transfer of cases from the courts to ombudsmen clearer and easier by providing the courts with a power to stay proceedings specifically for the purpose of referring a matter to an ombudsman.
  - (2) Clarify and strengthen the respective roles of the courts and ombudsmen by providing ombudsmen with a power to refer matters of law to the courts for adjudication.
  - (3) Modify the statutory bar to facilitate the suggested power to stay proceedings and to clarify the ambit of the ombudsmen’s jurisdiction.

### **Power to stay proceedings**

- 5.27 As illustrated in the examples above, proceedings may be brought in the courts that would be better dealt with by an ombudsman investigation. Currently, the courts have a broad power to stay proceedings for the purposes of allowing the parties to consider alternative dispute resolution procedures.

<sup>13</sup> *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124. See also the Local Government Ombudsman’s guidance: E Osmotherly, “The Local Government Ombudsman as an Alternative to Judicial Review” (2000), [http://www.lgo.org.uk/judicial\\_review.htm](http://www.lgo.org.uk/judicial_review.htm) (last visited 16 June 2008); Local Government Ombudsman, “Can the Ombudsman Investigate this Complaint?” <http://www.lgo.org.uk/advisers-guide/advisers-guide.htm> (last visited 16 June 2008).

<sup>14</sup> *R v Commissioner for Local Administration ex parte Liverpool City Council* [2001] 1 All ER 462 at [28].

- 5.28 The Civil Procedure Rules make specific provision for the court to stay proceedings for the purposes of ADR for one month, or for such a period as it considers appropriate.<sup>15</sup> This may be at the request of the parties or at the court's own initiative where it considers that such a stay would be appropriate.<sup>16</sup> Although "ADR" is defined broadly in the Civil Procedure Rules (CPR), in practice it tends to be used synonymously with mediation.<sup>17</sup>
- 5.29 In judicial review, if the Administrative Court considers that there is an alternative remedy which ought to be exhausted, this may be considered a good reason to refuse permission or to refuse relief if the issue arises at the substantive hearing.<sup>18</sup> The court also has a general case management power to stay proceedings in appropriate circumstances.
- 5.30 However, these powers cannot always be used effectively because of the statutory bars on the ombudsmen's jurisdiction, which limit the power to investigate where court proceedings have already been commenced. Consequently, we suggest below that the statutory bar be modified to facilitate the stay process and the referral of cases to ombudsmen.

#### ***Suggested options for reform***

- 5.31 Our provisional view is that courts should have a specific power to stay proceedings where they think that a case, or a specific issue within a case, would be better dealt with by an ombudsman's investigation. The claimant would be at liberty to revive proceedings before the court if there remained any point of law that required adjudication.
- 5.32 This power would be valuable in a number of circumstances. For example, the court might conclude that the dominant feature of the claim was an allegation of maladministration, even if it also contained arguable elements of illegality. Alternatively, the court might conclude that a claim of illegality was arguable to justify permission to apply for judicial review, but as a practical reality was unlikely to succeed at hearing and the claimant's only realistic prospect of relief or remedy was with an ombudsman. Another example would be where the court believes that the case would benefit from the kind of thorough independent investigation which ombudsmen provide.
- 5.33 Our suggestion would build on the existing power in the CPR in relation to civil claims. Our suggestion gives both the civil courts and the Administrative Court an express power to stay proceedings for the purposes of investigation by an ombudsman.
- 5.34 The new stay we are proposing would require claimants to exhaust their complaint to an ombudsman before a claim could be continued before a court. An

<sup>15</sup> The court can extend the stay until such date, or for such a specified period as it thinks appropriate. Civil Procedure Rules, r 26.4(3).

<sup>16</sup> Civil Procedure Rules, r 26.4(2).

<sup>17</sup> M Supperstone, D Stiltz and C Sheldon, "ADR and Public Law" [2006] *Public Law* 299 to 300.

<sup>18</sup> M Fordham, *Judicial Review Handbook* (4th ed, 2004) para 36.3. See also K Olley, "Alternative Remedies and the Permission Stage" [2000] *Judicial Review* 240.

alternative would be to rely on combining the existing stay to consider ADR with cost sanctions where a complainant resisted making a complaint to an ombudsman.<sup>19</sup> However, this may not be very effective as a large proportion of claimants are publicly funded.

- 5.35 We believe that the level of compulsion the stay entails is appropriate and does not breach the requirement of access to the court implicit in Article 6 of the European Convention on Human Rights. The proposal would be a restriction on the right of access, imposing a pre-condition on it, rather than ousting it completely. It is clear from the jurisprudence of the European Court that the right of access to the court is not absolute and can be restricted in pursuit of a legitimate objective.<sup>20</sup>
- 5.36 We do however recognise that the level of compulsion could mean that in some circumstances an ombudsman would be investigating a complaint where the complainant was initially unwilling to utilise or engage with the process. However we do not think that this would necessarily undermine the investigation. Unlike mediation, the ombudsmen's methodology does not require a positive and ongoing commitment from the complainant. We would nevertheless be interested in views as to whether, contrary to our suggestion, an investigation would be inhibited in these circumstances.
- 5.37 In some instances the court might be reluctant to exercise a power to stay if there was some urgency to the claim and it was thought that the application for judicial review might be heard more expeditiously than a complaint to an ombudsman. This difficulty might be overcome if the ombudsman were prepared to adopt "fast track" procedures to handle complaints which the court had remitted and had indicated as deserving expeditious treatment.<sup>21</sup>
- 5.38 **Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum? What problems do consultees see with the operation of the stay as described?**

#### **Referral on a point of law**

- 5.39 Ombudsmen do not have jurisdiction to adjudicate on points of law – this remains the exclusive remit of courts and tribunals. In practice this means the ombudsman will decline to investigate a complaint if it concerns an unresolved or disputed point of law. The complainant will then be required to initiate and pursue legal proceedings even if there are broader issues of maladministration at stake.

<sup>19</sup> Under the CPR, where a party has unreasonably refused an offer of ADR the court has the discretion to impose a costs sanction (Civil Procedure Rules, r 44.3) For a costs sanction to apply, it will be for unsuccessful litigants to prove that their opponent's refusal to have recourse to ADR was "unreasonable" in all the circumstances. See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920. The rules could be expanded to make specific reference to costs penalties for refusal to have the case transferred to the ombudsman.

<sup>20</sup> See *Golder v United Kingdom* (1975) 1 EHRR 524; *Ashingdane v United Kingdom* (1985) EHRR 528 and the recent reiteration of the principle by the House of Lords in *Seal v Chief Constable of South Wales* [2007] UKHL 21, [2007] 1 WLR 1910.

<sup>21</sup> This could be a discretionary power which would not be used if, for example, it appeared to the court or the ombudsman that the claimant had started the action in the courts solely in order to take advantage of this fast track procedure.

5.40 This restriction on the ombudsmen's jurisdiction has been relatively uncontroversial. The public sector ombudsmen have generally not been receptive to suggestions that their jurisdiction should be expanded to allow them to determine points of law. There is concern that it could lead to adversarial practices and damage the flexibility of ombudsmen's working practices.<sup>22</sup> The Local Government Ombudsman has noted that "one strength of ombudsman schemes is that they are able to look beyond legality and examine the detail of administrative practices".<sup>23</sup>

5.41 However, there is considerable support for the ombudsmen to have a power to make referrals to the court for a determination of a point of law. The Local Government Ombudsman, responding to the Law Commission's Housing Disputes paper, considered that it might be "helpful [in] complaints involving a difficult and important point of law for us to have the power to apply to a court for a determination of the point".<sup>24</sup> Similarly, in his response to our Housing Disputes paper, the Public Services Ombudsman for Wales also found this "appealing".<sup>25</sup> Lord Woolf has been a consistent advocate for this type of reform. The interim report on Access to Justice argued that:

Ombudsmen are not expected to determine an important issue of legal principle but to leave complaints involving such issues to the courts. I would like to see the ombudsmen having a discretion to refer complainants to the courts except that, where a point of law is concerned, the ombudsman should be able to apply to the court for a ruling without requiring the complainant to start court proceedings.<sup>26</sup>

5.42 A recent report on the Parliamentary Ombudsman also suggested that "proceedings could possibly be speeded up were the ombudsmen able to refer the issue of law to courts".<sup>27</sup>

### ***Suggested options for reform***

5.43 We provisionally agree that the ombudsmen ought to have the discretion to refer points of law to the court for determination. A determination, once made, would be sent back to the ombudsman to apply to the complaint at hand. This would retain the separate constitutional function of the court as the interpreter of the law while increasing flexibility in the system.

<sup>22</sup> See the Law Commission publication, Housing: Proportionate Dispute Resolution, An Issues Paper, Analysis of Responses, para 3.32, [http://www.lawcom.gov.uk/docs/disputes\\_responses\\_analysis.pdf](http://www.lawcom.gov.uk/docs/disputes_responses_analysis.pdf).

<sup>23</sup> The Local Government Ombudsman in response to the Law Commission publication, Housing: Proportionate Dispute Resolution, An Issues Paper (2006), [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf).

<sup>24</sup> Above.

<sup>25</sup> The Public Services Ombudsman for Wales in response to the Law Commission publication, Housing: Proportionate Dispute Resolution, An Issues Paper (2006), [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf).

<sup>26</sup> Lord Woolf, *Access to Justice: Interim Report* (1995) ch 18, para 18.

<sup>27</sup> Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th Report (2006-07) HC 421.



5.44 We envisage the reference procedure only being invoked in exceptional circumstances. The Local Government Ombudsman, in his response to our Housing Disputes paper, noted:

From our experience, we would not estimate that we would use such a facility, if it was available, in more than a small number of cases that are essentially about maladministration but which cannot be progressed satisfactorily without prior resolution of a substantive legal issue.<sup>28</sup>

5.45 We think this is broadly the correct approach. In the vast majority of cases a finding of maladministration will not be dependent upon the determination of a contentious legal point, even where it arises in connection with the complaint.<sup>29</sup> We would, however, welcome views on this issue.

5.46 With this in mind we suggest that the following factors might be relevant when deciding whether to refer a legal question to the court:

- (1) The ombudsman must consider that the determination of the particular legal question is necessary for it to make a finding of maladministration.<sup>30</sup>
- (2) A legal question should only be referred if it is contentious or unresolved. If it has already been determined or is pending determination by the courts, a reference will be unnecessary.<sup>31</sup>
- (3) A reference should not be made where it is more appropriate for the whole dispute to be dealt with by a court. The reference procedure should be invoked only where the complaint is essentially about maladministration but cannot be progressed without prior resolution of a legal issue.<sup>32</sup>

5.47 **Do consultees think that the ombudsmen should have the power to make references to the court of points of law?**

5.48 If it is accepted that ombudsmen can make a reference, then there is the further question as to whether such a reference should bypass the permission (or equivalent) stage of legal proceedings.

<sup>28</sup> The Local Government Ombudsman in response to the Law Commission publication, *Housing: Proportionate Dispute Resolution, An Issues Paper (2006)*, [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf). See the Analysis of Responses, para 3.32, [http://www.lawcom.gov.uk/docs/disputes\\_responses\\_analysis.pdf](http://www.lawcom.gov.uk/docs/disputes_responses_analysis.pdf).

<sup>29</sup> See for example *R v Local Commissioner for Administration, ex parte Liverpool City Council* [2001] 1 All ER 462.

<sup>30</sup> For example, contrast *R v Local Commissioner for Administration ex parte Liverpool City Council* [2001] 1 All ER 462 and *R v North and East Devon Health Authority ex parte Coughlan* [2002] QB 213.

<sup>31</sup> If it is pending resolution, it might be appropriate for the ombudsman to halt the investigation until the outcome is known.

<sup>32</sup> The Local Government Ombudsman in response to the Law Commission publication, *Housing: Proportionate Dispute Resolution, An Issues Paper (2006)*, [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf). See the Analysis of Responses, para 3.32, [http://www.lawcom.gov.uk/docs/disputes\\_responses\\_analysis.pdf](http://www.lawcom.gov.uk/docs/disputes_responses_analysis.pdf).

- 5.49 We can see arguments on both sides. To allow the ombudsmen to bypass the permission stage could be seen as promoting comity between the ombudsmen and the courts, as distinct systems for obtaining redress.
- 5.50 On a practical level, if there were to be a requirement for permission, the situation may develop where permission is seemingly granted automatically when a reference is made from an ombudsman. If such a practice did develop, then the requirement for permission would simply add delay to a claim without serving any purpose.
- 5.51 Removing the permission stage would create a situation similar to that in place when applications are made for a forced marriage protection order, under section 63C of the Family Law Act 1996.<sup>33</sup> This draws a distinction between certain applicants with official status, who do not need leave, and members of the general public, who do need leave.
- 5.52 On the other hand, such a proposal would significantly alter the current position on permission. There is no such provision for any class of applicant in judicial review now. It could also be argued that retaining a permission requirement would allow the already heavily burdened Administrative Court to retain control over its own caseload.
- 5.53 **Do consultees think that references from the ombudsmen should bypass the permission stage before proceeding to the Administrative Court?**

#### **ACCESS TO THE OMBUDSMAN**

- 5.54 In Part 3 we note two rules that currently restrict access to ombudsmen: the statutory bar and the MP filter. In the sections that follow we flesh out some of the concerns with these rules and suggest a number of options for reform.

##### **The statutory bar**

- 5.55 In general, ombudsmen possess a wide discretion in determining whether to conduct an investigation. However one important limit on their discretion is that they cannot conduct an investigation where the complainant has or had recourse to a legal remedy before a court or tribunal. This is known as the “statutory bar”.
- 5.56 The relevant provision in the Parliamentary Commissioner Act 1967 states:

Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say—

- (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty’s prerogative;
- (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:

<sup>33</sup> As inserted by the Forced Marriage (Civil Protection) Act 2007, s 1.

Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it.<sup>34</sup>

- 5.57 This provision reflects the intention of the scheme, which was “established to deal with grievances where no remedy was available in court” in order to address gaps in the system of administrative justice that existed at the time.<sup>35</sup> The bar was intended to prevent the ombudsman from trespassing on the jurisdiction of the courts and tribunals.
- 5.58 However, the “gaps” in the system have narrowed with the development of administrative law; as a result many complaints of maladministration are now also amenable to legal action. This has made the operation of the statutory bar more difficult and contentious. In the sections that follow we consider how the bar is interpreted, and the problems which can arise.
- 5.59 A distinction is drawn in practice between those cases in which complainants have a potential remedy but have not yet availed themselves of it, and cases where complainants have already had recourse to a remedy before a court or tribunal.

***Where the complainant has a potential legal remedy***

- 5.60 Where the complainant has a potential legal remedy but has not yet taken steps to pursue it, ombudsmen cannot investigate the complaint unless they are satisfied that it was not reasonable to expect the complainant to resort or to have resorted to the remedy.<sup>36</sup> In practice, this provision gives ombudsmen considerable discretion about whether to investigate.<sup>37</sup>
- 5.61 Ombudsmen do not usually exercise their discretion in favour of the complainant where a specific statutory appeal mechanism exists for dealing with a complaint. In these circumstances the complainant will normally be expected to follow the statutory route established by Parliament.<sup>38</sup>
- 5.62 The issue will often be less clear cut where the alternative remedy is a legal action in court. Here the ombudsmen have tended to exercise their discretion in a pragmatic manner, paying particular regard to the practical benefits for individuals in having their complaint dealt with via the ombudsmen. For example, the Local Government Ombudsman has suggested a number of areas where a dispute may be better dealt with by an ombudsman investigation than via judicial review,

<sup>34</sup> Parliamentary Commissioner Act 1967, s 5(2). See also Local Government Act 1974, s 26(6).

<sup>35</sup> M Senevirante, *Ombudsmen: Public Services and Administrative Justice* (2002) p 55. See also pp 31 to 34.

<sup>36</sup> The Parliamentary Commissioner Act 1967, s 5(2).

<sup>37</sup> The exercise of this discretion is subject to judicial review: *R v Local Commissioner for Administration for the North East Area of England ex parte Bradford City Council* [1979] QB 287 and *R v Parliamentary Commissioner for Administration ex parte Dyer* [1994] All ER 375. In practice, courts will not readily interfere with the exercise of the ombudsman's discretion.

<sup>38</sup> However see para 5.11 above.

drawing on similar factors to those we have set out above.<sup>39</sup> The court/ombudsmen boundary nevertheless remains blurred and is liable to give rise to confusion.<sup>40</sup>

***Where a complainant has had recourse to a legal remedy***

- 5.63 If the complainant has already had recourse to a legal remedy, it is problematic arguing that it was not reasonable to have resorted to it. On a strict reading of the statutory bar the ombudsman could not then investigate a complaint based on the same facts. This particular aspect of the bar has proven particularly problematic, with different interpretations developing as to its scope.
- 5.64 The first interpretation, adopted by the Local Government Ombudsman, is that the mere commencement of legal proceedings by the complainant is sufficient to oust the ombudsman's jurisdiction.<sup>41</sup> This can put the claimant in a difficult position. For example, a claimant applying for judicial review may be denied permission on the basis that the ombudsman would be the more appropriate forum for the complaint.<sup>42</sup> Yet the fact that they have instituted proceedings will preclude the claimant from making their complaint to the ombudsman. In this way the present system relies on the claimant pursuing redress in the appropriate forum first time round.<sup>43</sup> Therefore, claimants who institute proceedings simply to protect their position or claim interim relief are prevented from subsequently pursuing a complaint before the ombudsman even if well-founded. Additionally, on this reading of the provision, the restriction would apply to claimants who are forced to withdraw from court proceedings because they have been unable to obtain funding.
- 5.65 The Local Government Ombudsman has acknowledged that this restriction can produce undesirable outcomes. In its response to our Housing Disputes Paper, the Ombudsman identified the bar as a rule that inhibited proportionate and appropriate dispute resolution, arguing that it has created "rigidity in the system", and expressed support for some relaxation of the restriction in the founding legislation.<sup>44</sup>
- 5.66 The second interpretation, now adopted by the Public Services Ombudsman of Wales, is that the bar operates to oust the ombudsman's jurisdiction only where, having instituted legal proceedings, the complainant actually obtains a remedy. It

<sup>39</sup> See E Osmotherly CB, "The Local Government Ombudsman as an Alternative to Judicial Review" (2000), [http://www.lgo.org.uk/judicial\\_review.htm](http://www.lgo.org.uk/judicial_review.htm) (last visited 16 June 2008).

<sup>40</sup> This is something that came through strongly in the responses to our Housing Disputes Paper, Housing: Proportionate Dispute Resolution, An Issues Paper (2006), [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf).

<sup>41</sup> Until recently, the Parliamentary Ombudsman also adopted this interpretation of the bar. See for example *A v Secretary of State for the Home Department* [2004] EWHC 1585 (Admin), [2004] All ER 91 at [11].

<sup>42</sup> Civil Procedure Rules, r 1.4(e). See also *Anufrieva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124 at 1162.

<sup>43</sup> See the Judicial Review Pre-Action Protocol, para 3.2. See also *R (Umo) v Commissioner for Local Administration in England* [2003] EWHC 3202 (Admin), [2004] ELR 265 at [17].

<sup>44</sup> The Local Government Ombudsman in response to the Law Commission publication Housing: Proportionate Dispute Resolution, An Issues Paper (2006), available at [www.lawcom.gov.uk/docs/issues\\_paper.pdf](http://www.lawcom.gov.uk/docs/issues_paper.pdf).

follows that the ombudsman has discretion to investigate where no remedy has been obtained. This approach allows claimants who have been unsuccessful in establishing a cause of action to have recourse to the ombudsmen.<sup>45</sup> This can be perceived as giving claimants “two bites at the cherry”, which we recognise may be considered unacceptable by public bodies. However in these circumstances, the ombudsman is free to exercise their discretion to refuse to investigate a complaint.

- 5.67 It can be argued that these two approaches are too simplistic, as there may be cases where the legal remedy does not redress the whole injustice suffered by the complainant, yet they are prevented from pursuing full redress through the ombudsman. The Parliamentary Ombudsman has interpreted its discretion broadly to address this type of situation, finding discretion to investigate cases where the complainant has suffered injustice that was not, and could not be, remedied by a court or tribunal. Therefore a claimant who successfully obtains an order in judicial review to quash an illegal decision but receives no compensation for past losses can seek monetary redress from the ombudsman.

### ***Suggested options for reform***

- 5.68 The statutory bar is increasingly seen as problematic. Two consecutive amendments to the Tribunal, Courts and Enforcement Bill were laid seeking to repeal section 5(2) of the Parliamentary Commissioner Act 1967 (and equivalent provisions) and lift the bar completely. The amendments had the backing of the ombudsmen, the head of the Administrative Court and the Senior President of the Tribunals service, amongst others, but were eventually withdrawn for lack of Government support. While the Government accepted that there was a case for reform,<sup>46</sup> Vera Baird, speaking on behalf of the Government, explained that there were “complex issues” that needed to be resolved prior to reform:

They arise particularly in judicial review cases; they need to be dealt with quickly, for the sake of both complainants and public authorities, so that they know what they need to do to continue administration. Judicial review has tight time limits, so we have to get the balance right between those who have a genuine grievance and those who are looking for a reason to prevent the legitimate outcome of the decision from being put into effect.<sup>47</sup>

- 5.69 We recognise these and other concerns that have been expressed about the removal of the bar in its entirety. However, for the reasons we outline above, we provisionally consider that the bar as it currently stands is unsatisfactory and unclear and requires reform. The bar also requires modification to facilitate the stay process and referral of cases to the ombudsman that is suggested above.
- 5.70 Consequently, our preliminary view is that the statutory bar, as expressed in section 5(2) of the Parliamentary Commissioner Act 1967 and equivalent

<sup>45</sup> *Reeman v Department of Transport* [1997] 2 Lloyd’s Rep 648 is a case in point.

<sup>46</sup> See for example the comments of Baroness Ashton in *Hansard* (HL) 31 January 2007, Vol 689, col 304.

<sup>47</sup> *Hansard* (HC) 27 March 2007, Tribunal, Courts and Enforcement Bill Committee, 7th sitting, col 246.

provisions, should be repealed and replaced with provisions which will serve to redefine the jurisdiction of the ombudsmen.

- 5.71 In particular, the current default rule that an ombudsman should not investigate a complaint where the aggrieved has or had a legal remedy should be changed. We suggest that the bar should be reformulated along the following lines: an ombudsman may conduct an investigation, notwithstanding that the person aggrieved has or had a legal remedy, if in all the circumstances it is in the interests of justice to investigate. In exercising this discretion, an ombudsmen ought to have regard to the factors set out above.<sup>48</sup>
- 5.72 This would reformulate the ombudsmen's discretion where an available legal remedy had not been pursued. Encouraging the ombudsmen to investigate cases that may otherwise go to the courts is consistent with the Government's emphasis on using alternative dispute resolution processes. Structuring ombudsmen's discretion and specifying a list of factors to which ombudsmen should have regard should lead to greater certainty and enhance transparency.
- 5.73 This modification would also allow ombudsmen to investigate a complaint where the claimant has had recourse to a legal remedy, including where the court had adjudicated upon matters relating to the complaint.
- 5.74 We acknowledge that this raises a difficult issue and may be subject to a wide range of views. On the one hand, the broader remit of the ombudsmen can provide a means to obtain redress for a least some of those who find that they have no remedy in judicial review or tort. On the other hand, we recognise that repeated consideration of the same issues in different legal contexts can result in duplication of effort and resources and cause delay. Furthermore, inconsistent results may seem perplexing to claimants and undesirable from the point of view of public bodies who invest public resources in defending litigation. After consideration, however, we have provisionally come to the conclusion that the requirement that the investigation must, in all the circumstances, be in the interests of justice strikes an appropriate balance between these positions.
- 5.75 **Do consultees agree that the statutory bar should be modified both in cases where legal proceedings have been commenced and where there is a potential remedy before the court? Do consultees agree that this should be done so that the default position is that ombudsmen have discretion to investigate regardless of the availability of a legal remedy?**

<sup>48</sup> See paras 5.8 to 5.24 above.

### The MP filter

- 5.76 As noted in Part 3, the Parliamentary Ombudsman cannot accept a complaint directly from a member of the public. All complaints must be channelled through a Member of Parliament.<sup>49</sup> The Public Services Ombudsman of Wales and the Local Government Ombudsman do not have an equivalent filter.
- 5.77 The MP filter was introduced in response to concerns raised about the office when it was established in 1967: first, that it would undermine the role of MPs acting on behalf of and looking after their constituents, thereby undermining the role of Parliament; second, that the new office would be overwhelmed by complaints. The office was consequently conceived of as an adjunct to Parliament, “rather than the citizens’ defender”<sup>50</sup> with the filter introduced to preserve MPs’ constitutional role.<sup>51</sup> In addition it was intended to be a mechanism by which only suitable complaints would be passed on to the ombudsman, that is, cases in which there was a strong prima facie case and over which the ombudsman had jurisdiction. The filter was “seen as experimental”<sup>52</sup> and it was recommended that consideration should be given to a right of direct access after a period of five years.<sup>53</sup> The review never materialised.
- 5.78 The filter has since attracted much criticism.<sup>54</sup> It has been considered an unnecessary barrier to access, particularly for certain groups such as ethnic minorities, younger people and those from deprived backgrounds who might find it more difficult and demanding to approach their MP.<sup>55</sup> Moreover, many see the filter’s underlying rationale as no longer applicable. The Colcutt review argued that the principle that MPs should represent constituents in seeking redress was no longer applicable in light of the modernisation of government and the new, more diverse methods by which citizens can obtain redress from public bodies.<sup>56</sup>
- 5.79 In contrast, other commentators take the view that MPs still have an important role to play in channelling complaints to the ombudsman.<sup>57</sup> It has been suggested that the filter keeps MPs in touch with the problems and concerns of their

<sup>49</sup> The MP is kept involved throughout the process: he or she will be kept up-to-date on the progress of the complaint and is informed of any decisions made.

<sup>50</sup> Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th report Session (2006-07) HC 421, p 5.

<sup>51</sup> P Colcutt and M Hourihan, *Review of the Public Sector Ombudsmen in England* (2000) Cabinet Office Report.

<sup>52</sup> G Drewry and C Harlow, “A ‘Cutting Edge’? The Parliamentary Commissioner and MPs” (1990) 62 *Modern Law Review* 745.

<sup>53</sup> Justice, *The Citizen and the Administration: the Redress of Grievances* (1961) p 75.

<sup>54</sup> It was recently referred to as “one of the most criticised aspects of the 1967 Act”: Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th report (2006-07) HC 421.

<sup>55</sup> *Hansard* (HL) 4 February 2005, vol 669, col 486.

<sup>56</sup> P Colcutt and M Hourihan, *Review of the Public Sector Ombudsmen in England* (2000) Cabinet Office Report, para 3.43.

<sup>57</sup> See, for example, the Government’s response to the Parliamentary Commissioner (Amendment) Bill 2005, discussed below: *Hansard* (HL) 4 February 2005, col 669, cols 493 to 495.

constituents and in turn this “informs MPs’ contributions to larger debates...on legislation and otherwise”.<sup>58</sup>

- 5.80 The MP filter has, it has been claimed, been “proved remarkably successful”<sup>59</sup> at preventing an onslaught of complaints to the ombudsman. But if this is true, it is not clear whether this means that the filter is an effective method of screening out unmeritorious claims, or an arbitrary bar to access to the ombudsman. Indeed, there is now concern that the Parliamentary Ombudsman is underused and that this is at least partly attributable to the lack of direct access. The experience of the Local Government Ombudsman and other ombudsmen suggest a strong correlation between the provision of direct access and increased recourse to ombudsmen. There was a 44% increase in complaints to the Local Government Ombudsman in the year following the removal of the “councillor filter”.<sup>60</sup>
- 5.81 There has been a concern that the Parliamentary Ombudsman would not be able to cope with the increased workload that direct access would bring, although the Ombudsman has indicated recently that that would not be the case.<sup>61</sup> It is true that the Local Government Ombudsman faced some difficulty in determining complaints speedily in the period following removal of the filter but it has since adjusted.<sup>62</sup> In addition, direct access to the Health Commissioner has been long established and complaints are dealt with relatively easily and speedily.<sup>63</sup>
- 5.82 The removal of the filter has considerable support. Direct access has been recommended by Justice, the Colclutt Review and the Public Administration Select Committee, amongst others.<sup>64</sup> The Parliamentary Ombudsman herself and the majority of Parliamentarians support abolition of the filter.<sup>65</sup> Others have advocated dual access. This was the approach taken in a recent Private Members Bill, which created a right of direct access but retained the option of making a complaint through an MP.<sup>66</sup> It was an attempt to improve access, while

<sup>58</sup> *Hansard* (HL) 4 February 2005, vol 669, col 484.

<sup>59</sup> M Seneviratne, *Ombudsmen, Public Services and Administrative Justice* (2002) p 121.

<sup>60</sup> That is, from 4, 914 complaints in 1987-88 to 7,055 complaints in 1988-89. The rate of increase subsequently slowed down: 25% in the second year (1989-90) and 5% in the third year (1990-91).

<sup>61</sup> Second report of Public Administration Select Committee, *Tax Credits: putting things right* (2005-06) HC 577, Ann Abraham, Oral Evidence Q 6. Referred to in Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th report (2006-07) HC 421.

<sup>62</sup> F Laws, “The Local Government Ombudsman: Contemporary Issues and Challenges”, in N Hawke (ed), *The Ombudsman – Twenty Five Years On* (1993) p 64.

<sup>63</sup> *Hansard* (HL) 4 February 2005, vol 669, col 486.

<sup>64</sup> Respectively, Justice, *Our Fettered Ombudsman* (1977); Justice, *Administrative Justice: Some Necessary Reforms* (1988); P Colclutt and M Hourihan, *Review of the Public Sector Ombudsmen in England* (2000) Cabinet Office Report; Public Administration Select Committee, Annual Report of Parliamentary Ombudsman, Fourth Report (1999-2000) HC 106.

<sup>65</sup> In a survey conducted by the Public Administration Select Committee in 2004, of the MPs who responded, 66% were in favour of removing the filter:  
[http://www.ombudsman.org.uk/about\\_us/FOI/whats\\_available/documents/surveys/mp\\_survey\\_04.html](http://www.ombudsman.org.uk/about_us/FOI/whats_available/documents/surveys/mp_survey_04.html) (last visited 16 June 2008)

<sup>66</sup> The Parliamentary Commissioner (Amendment) Bill 2005.



assuaging the concerns of those who wished to see the filter retained.<sup>67</sup> The Bill passed successfully through the Lords but was not taken up in the Commons.<sup>68</sup> The Government nevertheless recognised that it was an important issue.

### ***Suggested options for reform***

- 5.83 Given the concerns that the MP filter is limiting access to the Parliamentary Ombudsman – and in light of our view that the role of the ombudsmen should be strengthened – our preliminary view is that there is a strong case for abolition of the MP filter. There are four reasons in support of this view.
- 5.84 First, it no longer appears necessary to use the filter to control the flow of complaints to the ombudsman. The ombudsman is not obliged to accept every complaint received but has a broad discretion whether or not to investigate. The ombudsman is free to exercise this discretion to refuse those complaints that are vexatious, misconceived or more appropriately dealt with by other means. In our view, this “internal filter mechanism” is sufficient to exclude unsuitable cases. We feel it likely that the MP filter significantly reduces the volume of complaints not because MPs have exercised their judgment that the complaints should not be passed on to the ombudsman but rather because complainants fail to make the initial approach to an MP. If this is right, it is likely to be an inaccurate way of weeding out weak cases. The point has also been made that the need for the ombudsman to be protected by a filter mechanism has reduced over time:

The wider complaints system that now exists is more developed than the one in place when the 1967 Act was first introduced and the Parliamentary Ombudsman normally expects complaints to be put before second-tier complaint handlers before she considers them.<sup>69</sup>

- 5.85 Secondly, removing the MP filter will help facilitate the movement of cases between the courts and ombudsmen. Under our suggested options, a court would be unlikely to order a stay of proceedings to refer a matter to the ombudsman unless it considered the case was suitable for investigation by the ombudsman. The MP filter, as an additional mechanism to weed out unsuitable cases, would, in our provisional view, be superfluous and likely to create delay.
- 5.86 Thirdly, the argument that the filter allows MPs to keep in touch with constituents’ concerns can be addressed adequately by a notification requirement. Once the ombudsman has accepted jurisdiction, the constituent MP or any nominated MP could be notified of the complaint and given the option of having continued involvement with the progress of the claim. Furthermore, there may be merit in allowing a complainant to have the option of making a complaint through an MP in addition to direct access – the “dual access” approach recently put forward in

<sup>67</sup> *Hansard* (HL) 4 February 2005, vol 669, col 479.

<sup>68</sup> The provisions were reintroduced in the Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill in 2006. Again it passed through all the stages in the House of Lords.

<sup>69</sup> Parliamentary and Health Service Ombudsman, *The Parliamentary Ombudsman: Withstanding the Test of Time*, 4th Report (2006-07) HC 421.

the Parliamentary Commissioner (Amendment) Bill and operated by the European Ombudsman.<sup>70</sup>

5.87 Finally, the abolition of the filter would bring the Parliamentary Ombudsman in line with other public sector ombudsmen in the UK and ombudsmen in most other parliamentary democracies. Their experience shows that the institution is able to operate effectively without the filter.<sup>71</sup>

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

<sup>70</sup> Complainants have the option of referring complaints directly to the ombudsman or via an MEP.

<sup>71</sup> See discussion in *Hansard* (HL) 4 February 2005, vol 669, col 497.

# **PART 6**

## **EFFECT ON PUBLIC BODIES**

### **INTRODUCTION**

- 6.1 As we saw in Part 4, the effect of changes in the underlying legal regime has led to an expansion over time in the liability of public bodies and consequent pressure on limited resources. This Part builds on that analysis by examining the effect of the suggested private and public law schemes on public bodies.
- 6.2 In approaching this, we have been guided by two salient factors. First, we have been guided by the necessity, within our understanding of “modified corrective justice”, to provide a settled liability regime that meets the needs of aggrieved citizens who have been subject to substandard administrative action while also recognising the special nature of public bodies and their resources. Secondly, we wish to avoid the catastrophic effects of a continual expansion of liability, as seen in certain US states during the 1970s and 1980s, and more recently, in the Australian insurance crisis of the late 1990s and early 2000s. We give detailed consideration to the latter situation and the position adopted by the Commonwealth and States of Australia following the Ipp Review of the Law of Negligence in this Part.

### **OVERVIEW: GAINS AND LOSSES**

- 6.3 The package suggested in Part 4 would create certain benefits for public bodies and claimants alike. Some benefits are “win-win” – they are good for both claimants and public bodies. Reforming an area of law to make it clearer and more principled has a public benefit in itself. Within the suggested scheme there are also clear and identifiable benefits for claimants and public bodies.
- 6.4 In terms of substantive liability, if considered at any point in time, some aspects of our package of provisional proposals deliver benefits to public bodies (and corresponding losses to actual or potential claimants), and vice versa. On the benefit side for public bodies, certain areas of existing liability would be taken out of normal negligence and made subject to the higher threshold requirement of “serious fault”.
- 6.5 Examples of areas which would be moved from the ordinary negligence regime to the “serious fault” regime would be “tripping”<sup>1</sup> and certain highway authority cases. Also in this category would be actions against emergency services where they are driving with a “blue light”. In each case, there is of course a corresponding cost to claimants. On the other hand, there are also areas where there are possible benefits for claimants and corresponding losses for public bodies, such as the provision of certain policing or social services activities (albeit subject to the “serious fault” requirement).

<sup>1</sup> “Tripping” cases refers to those cases that arise where a local authority has breached its duty to reasonably maintain a pavement or where public bodies carrying out public works have failed to properly protect the individual citizens. See: *Haley v London Electricity Board* [1965] AC 778.

- 6.6 The immediate or short-term effect of our proposed scheme would be a gain for claimants in some areas and a gain for public bodies in others. However, the long-term effects would be a general benefit for public bodies as normal negligence would be prevented from expanding into the areas covered by the proposed scheme. Essentially this would protect public bodies from any massive expansion in liability were the House of Lords to revisit and overturn cases such as *Hill*<sup>2</sup> or *Murphy*.<sup>3</sup>
- 6.7 As we showed in Part 4, these cases are already under pressure in light of the line of reasoning that flows from the European Court of Human Rights' judgment in *Osman*.<sup>4</sup> In particular, the restrictive policy approach in *Hill* has recently been doubted in the Court of Appeal,<sup>5</sup> and is currently under appeal to the House of Lords. If the scheme suggested in Part 4 were adopted, areas covered by cases such as these, for example policing, would be removed from potential common law liability and placed within the "serious fault" regime. From the point of view of the Government, taking no action may be a high-risk strategy. It is always possible (and, given sufficient time, highly likely) that the House of Lords, or the new Supreme Court, will remove these common law restrictions on liability and continue the historic widening of the tort of negligence. This would lead to much greater potential liability in these new areas, based as it would be on the lower threshold of breach in ordinary negligence.

<sup>2</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

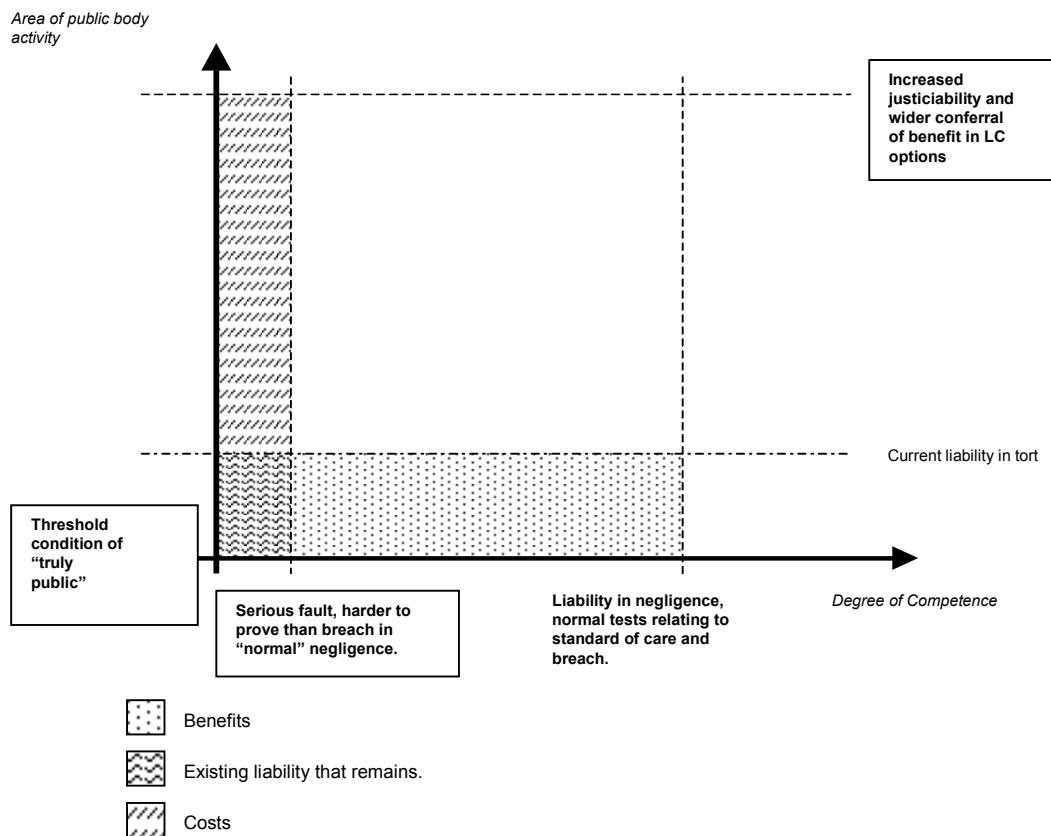
<sup>3</sup> *Murphy v Brentwood District Council* [1991] 1 AC 388.

<sup>4</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>5</sup> *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39, [2008] All ER 48 at [45] (Rimer LJ).

6.8 The way in which these options for reform would change the landscape of liability is expressed in the diagram below. The effect is to take certain matters out of the general negligence scheme and place them within the “serious fault” regime.

**Diagram 1: The effect of the Law Commission’s options for reform**



### ASSESSING THE EFFECTS

6.9 While it is possible to predict which areas of law would come out of the current or potential remit of negligence, it is harder to quantify the benefits and losses involved. This is partly a problem with economic tools in general, in that it is hard to put an economic value on principles or simplification. Partly, however, it is due to the lack of a reliable dataset covering current amounts of compensation and the circumstances in which cases against public bodies would be settled.

6.10 To give an idea of the current scale of liability, compensation figures derived from notes in departments’ annual accounts were helpfully provided by Her Majesty’s Treasury. This involved the review of the accounts for larger government departments and the analysis of liability.<sup>6</sup> The figures are broken down as “special payments” and “provisions”. “Special payments” cover, among other things, personal injury claims by employees, severance payments to employees and *ex gratia* payments. “Provisions” cover the future liability of government relating to identifiable liabilities, for instance where there is a high chance that a medical negligence case will have to be settled. These may not accrue in that

<sup>6</sup> The terminology and accounting methods are derived from the *Financial Reporting Manual* and *Managing Public Money*.

particular year but amount to a quantifiable draw on public funds at some point in the future. For the years 2005-2006 and 2006-2007, the accounts showed the following:

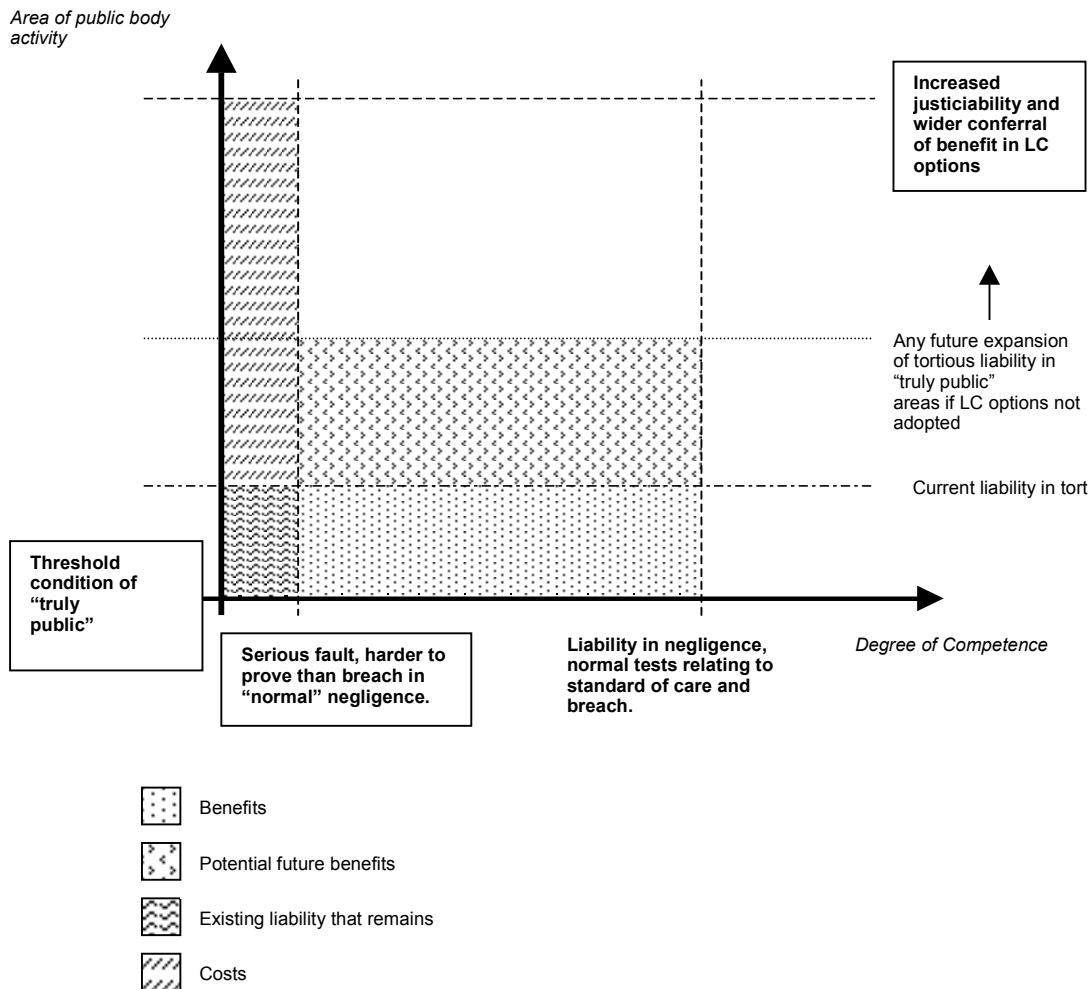
| <b>Type of liability</b> | <b>2005-2006</b> | <b>2006-2007</b> |
|--------------------------|------------------|------------------|
| "Special payments"       | £136,196,000     | £139,037,000     |
| "Provisions"             | £11,725,003,000  | £11,996,454,000  |

- 6.11 The largest components in "provisions" relate to medical negligence and future payments under the Coal Health scheme operated by the Department for Business, Enterprise and Regulatory Reform. For instance, at 31 March 2006, the provision for the relevant NHS budget for clinical negligence amounted to £6,788,608,000.
- 6.12 Excluded from these figures are "contingent liabilities". These are an assessment of potential liabilities which are difficult to quantify accurately, as they are contingent on certain events happening. Such potential liabilities would include negligence claims that a public body expects to defend successfully. Records of these are entered as a note on the accounts in case some of them do accrue. To give an idea of magnitude, in 2005-2006 these amounted to £5,480,822,000.
- 6.13 With this in mind, we have attempted to assess the effects in private and public law of our suggested options for reform.

## Private Law

- 6.14 In private law, the effect of the suggested scheme is to cushion those areas regarded as “truly public” against any changes in liability in negligence. As we note above, our current conception of “truly public” captures certain activities in pursuance of a “special statutory power” or where a public body acted under a “special statutory duty”. This cushioning effect is represented in the diagram below.

**Diagram 2: Future benefits for public bodies**



- 6.15 The effects of the scheme in expanding liability are difficult to accurately assess in the absence of detailed government figures on liability, which we have been unable to obtain. We are concerned to improve our ability to quantify the costs and benefits of our approach to both public bodies and claimants. But even in their absence, it would be wrong to take lack of quantification as an absolute bar to reform. Quite apart from the principled reasons for action, our analysis suggests that, from Government’s point of view, the status quo is a high-risk option in the medium to long-term. Problems with the quantification of the cost of reform (or, for that matter, the status quo) should not force us to abandon an assessment of the relative risks of reform and the maintenance of the status quo.

- 6.16 In addition to the savings to public bodies resulting from the placing of existing (or future extensions of) normal negligence liability into the new serious fault regime, our suggested approach to joint and several liability will assist public bodies. If the courts can equitably assess the actual responsibility of a public body on the given facts of a case, that would be particularly important for regulators such as the Competition Commission or the Food Standards Agency.
- 6.17 Lastly, where Parliament feels that a particular body requires special protection, then Parliament can enact specific protection for the body, as is the case with the Financial Services Authority under section 102 of the Financial Services and Markets Act 2000. An alternative parliamentary protection could come in the form of specific caps to liability. This may be of particular use where the Government was worried that a single action could lead to very large damages. This could occur in competition cases, where the regulator has taken action on the basis of seriously flawed market analysis. We see this as being clearly within the principled approach we advocate. There may be policy areas in which the appropriate modification to the corrective justice principle is immunity. We feel that it is for the democratically elected Parliament to make that judgement.
- 6.18 With regard to the general claim that any imposition of liability would lead to an overly defensive strategy on the part of public bodies, we stress that this position is not supported by general research. In Appendix B, we have analysed the research into the effects of liability on public bodies and this merely shows that liability is a factor in decision making but is not an overarching one.
- 6.19 **We would welcome any further information from consultees on the quantitative and qualitative effects of imposing liability on public bodies.**

#### **Public law**

- 6.20 As we explained earlier in Part 4, in order to assess the effect of our proposals in public law, we undertook an internal exercise in which our proposed scheme was applied to a selection of judicial review cases. In doing this, we applied the scheme to 310 cases where there was a substantive hearing in a relevant matter.<sup>7</sup> Of these cases, the application was allowed in 121 cases. In these 121 cases, our assessment was that “serious fault” could be made out in only 18 cases. Of those 18 cases, a mere nine satisfied the other elements of the proposed test, such that damages could be awarded by the court. These 18 cases are listed in Appendix C.
- 6.21 In short, the application of our proposed public law test would have resulted in the possibility of damages being awarded in less than 3% of the cases heard in the whole of 2007. This represents a very minor increase in the number of cases in which damages were awarded already and certainly does not suggest that public bodies would be exposed to a massive expansion in liability.

<sup>7</sup> These cases were drawn from the Administrative Court listings in 2007. We excluded cases concerning preliminary issues, such extensions of existing orders. We also excluded appeals by way of case stated in criminal matters, as these would not be “relevant cases” for the purposes of the scheme we have outlined.



6.22 As outlined in Part 4, the serious fault test would be modelled, in part, on the EC law test and would go far beyond that required to establish illegality or negligence. The intention is to provide suitable protection for public bodies whilst still facilitating the ability of citizens to obtain compensation for seriously substandard administrative action. However, we recognise the legitimate concerns of those potentially affected by any changes and agree that steps should be taken to address these concerns.

***Possible pilot programme***

6.23 Our research is open to the objection that it does not take account of possible changes in litigation behaviour by claimants if compensation were to become generally available in judicial review. One way to test this would be to establish a voluntary pilot programme within a small number of central government departments.

6.24 This scheme would be engaged following a successful judicial review application. If an application for judicial review against a participating department is successful in the Administrative Court then the applicant would be given the option of having their case referred to the pilot programme for an assessment as to whether damages would be payable under the Law Commission's suggested scheme. In making this assessment, the programme adjudicator would apply the suggested public law tests of conferral of benefit, serious fault and causation to the facts at hand. If the tests were satisfied by the applicant, then compensation could be payable by the department.

6.25 Additionally, the pilot programme could embrace applications in which the department concedes the point raised in the application and takes remedial action. In such cases, there would be no judgment from the Administrative Court but if our proposed scheme were implemented then it could become a factor in the settlement process.

6.26 This trial programme would provide empirical evidence as to how the suggested public law scheme would work in practice, and would provide some indication of the number of cases where the test is made out and the extent of damages payable.

6.27 In assessing the amount of any damages payable, it is suggested that the programme's adjudicator be guided by damages awarded by the relevant ombudsman.

6.28 In order to ensure meaningful results from the pilot programme, it would be vital to publicise widely the programme both within government and professional publications for lawyers. Additional outreach to potential claimants could be achieved through the websites of participating departments, the Ministry of Justice and the Courts Service.

6.29 Any publicity should highlight that the monetary remedy is available as an additional and separate remedy to those already available, in order to monitor whether this leads to an increase in claims. This possibility could be recorded by requiring a claimant who has been through the pilot programme to fill in a simple survey considering whether they would have brought their claim had the monetary remedy not been available.

- 6.30 Lastly, and as a practical point, Chapter 2 of *Managing Public Money* requires such schemes either to be very temporary or have a statutory footing. Considering the nature of the claims and the necessity to publicise any pilot scheme, it is unlikely that a very temporary scheme would provide useful data. Consequently, a statutory footing would be needed.
- 6.31 If this pilot programme were undertaken and if it were sufficiently well publicised then it should provide information on both the effect that the Law Commission's scheme would have on the level of liability and whether the creation of a monetary remedy would lead to an increase in judicial review cases.
- 6.32 **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.**

#### CONCERNS WITH THE APPLICATION OF THE TEST IN PRACTICE

- 6.33 There is a further concern relating to the application of any given test, which is that it could be applied in a way which was not intended. The particular concern is that the courts might extend the notion of "serious fault" to bring it closer than we intend to normal negligence.
- 6.34 We recognise the power of this objection. But we think that it can be exaggerated. First, the judges would have available to them our final report. In that report, we would both make clear, by example and explanation, what we saw as the proper calibration of "serious fault" as a criterion; and we would explain the principle behind it. Where a new test is enshrined in legislation *and* is based on a principled approach, we believe that it is more likely that the sort of extension feared would not come about.
- 6.35 Secondly, we could take steps in the legislation itself to make clear the seriousness of serious fault. We would consider with Parliamentary counsel whether it would be appropriate to include examples in the legislation, or to include a non-exhaustive list of features which may tend towards a finding of serious fault.
- 6.36 Thirdly, building on the approach taken by the then Lord Chancellor's Department and the Judicial Studies Board to the coming into force of the Human Rights Act 1998, it might be appropriate to engage on a specific training and education programme with the judiciary and others.

#### ***Avoiding administrative disruption***

- 6.37 There is a concern that any possible expansion in liability would lead to the disruption of administrative behaviour. This is a concern about the way in which changes to liability impact on the way in which administration is conducted. In our conversations with officials, we have become aware of issues that arose, particularly, in the implementation of the Freedom of Information Act 2000 and the Corporate Manslaughter and Corporate Homicide Act 2007. We should make it clear that this did not consider the desirability of those reforms, or undermine the Government position. Rather, it concerned possible consequential aspects of reform and their effects on the behaviour of officials.

- 6.38 By “administrative disruption” we mean a concept distinct from “defensive administration”. Administrative disruption occurs when there is an increase for whatever reason of the burdens placed on civil servants or other public officials in the conduct of their business. This is different from “defensive administration”, which describes the situation when, following a change in the liability regime, the performance of a public body is inhibited – for example, it backs away from certain policy goals or reduces service delivery – because it seeks to reduce its potential to be exposed to liability.
- 6.39 Whilst we accept that it is possible that changes made to the way public bodies act can cause “administrative disruption”, we argue that there is little or no evidence to suggest that changes to liability automatically lead to “defensive administration”.<sup>8</sup> Furthermore, whilst it is accepted that certain changes to the interface between the citizen and the state can cause administrative disruption, steps can be taken to reduce this to a minimum. We believe that activities such as appropriate training and the effective communication of the suggested changes to highlight the outcomes that the changes are intended to achieve would be particularly effective.

#### LESSONS FROM THE FREEDOM OF INFORMATION ACT 2000

- 6.40 As was noted in Part 1 and above, there is a perception that the Freedom of Information Act 2000 has created an unduly heavy burden on administrators. It is suggested that the Act has caused substantial “administrative disruption” and the operation of the Act reduces the quality of internal decision making.
- 6.41 Section 1(1) of the Freedom of Information Act 2000 creates a general right to information held by public bodies. This general right is subject to a series of both absolute and qualified exemptions, which are listed in Part II of the Act. In the case of qualified exemptions, section 2(b) provides that “in all the circumstances of the case”, “the public interest” in not communicating the information to an applicant must outweigh the “public interest” in disclosing the information to the applicant.
- 6.42 A key qualified exemption relating to policy formulation is contained in section 35(1)(a) of the Act. In essence, section 35 provides that information relating to “the formulation or development of government policy” is exempt if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 6.43 One possible reading of the operation of section 35(1)(a) would be that, once the section was engaged, assessing the public interest would allow for considerable weight to be given to traditional factors such as maintaining the smooth running of public bodies. This was the opinion of the First Division Association, the organisation that represents senior civil servants, prior to the Act coming into force.<sup>9</sup> This would accord with earlier Civil Service attitudes to the release of

<sup>8</sup> See further in this Part and in Appendix B on the impact of liability on public bodies.

<sup>9</sup> P Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (2001) p 468.

information in relation to the earlier Citizen's Charter or when withholding documentary evidence from a court under a Public Interest Immunity certificate.<sup>10</sup>

- 6.44 An alternate approach would be to give a strong preference to the release of information to the public, in which case there would have to be strong reasons provided for not releasing the information that go beyond preserving the smooth running of public bodies. This would accord with modern literature on "good governance" and the importance of "transparency" within government.<sup>11</sup> Of these two possible approaches, whilst the former might be preferable to civil servants, it is the latter approach that has been adopted by the Information Commissioner and the Information Tribunal.
- 6.45 An illuminating example of the potential for conflict between these two approaches is the decision of the Information Commissioner which held that the minutes of meetings of senior management at the Department for Education and Skills could be disclosed. The Department argued that if the Information Commissioner held the minutes to be discloseable, it would have a disturbing effect on candid discussion, causing officials to act "defensively".<sup>12</sup> According to this argument, there is a strong public interest in protecting good policymaking. However, the Information Commissioner held that such an approach would mean that the exemption in section 35 would essentially become "absolute", and decided that the public interest in "transparency and understanding policy decisions" prevailed.<sup>13</sup>
- 6.46 The Information Commissioner's interpretation can be justified on the basis of the underlying policy behind the Act, as well as the structure of the Act.<sup>14</sup> However, this does not remove the fact that there is clearly a legitimate disagreement concerning the "public interest" test in relation to the disclosure of information relating to policy formation. If the current interpretation was the approach intended by the drafters of the Freedom of Information Act 2000, then there has clearly been at the very least a breakdown in communication within the civil service.

<sup>10</sup> Citizen's Charter; *Code of Practice on Government Information* (1994). On PII certificates, see *Conway v Rimmer* [1968] AC 910; *Halsbury's Laws of England: Practice and Procedure* (Volume 37 Reissue) para 590.

<sup>11</sup> See further: C Hood and D Heald (eds), *Transparency: the Key to Better Governance?* (2006); C Harlow, "Freedom of Information and Transparency as Administrative and Constitutional Rights" (1999) 2 *Cambridge Yearbook of European Legal Studies* 285.

<sup>12</sup> Here the Department seems to use the term "defensively" in a broad sense, so as to cover all negative effects on government processes. This usage of the term "defensively" is different to the more precise concepts of "administrative disruption" and "defensive administration" put forward in this Consultation Paper. In the context of the case, the effects to which the Department was referring should properly be categorised as "administrative disruption".

<sup>13</sup> Decision Notice FS50074589, 4 January 2006, p 10. See also *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin), [2008] All ER 169.

<sup>14</sup> See further: White Paper, *Your Right to Know* Cm.3818 (1997). See also: Speech by Rt Hon Tony Blair, Campaign for Freedom of Information Annual Awards Ceremony, 25 March 1996, <http://www.cfoi.org.uk/blairawards.html> (last visited 16 June 2008); Speech by Lord Falconer to the Campaign for Freedom of Information, St Brides Institute, 1 March 2004, <http://www.dca.gov.uk/speeches/2004/lc010304.htm> (last visited 16 June 2008); Rt Hon Gordon Brown, Speech on Liberty, University of Westminster, 25 October 2007, <http://www.pm.gov.uk/output/Page13646.asp> (last visited 16 June 2008).

#### THE EFFECT OF THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

- 6.47 This Act entered into force on 6 April 2008.<sup>15</sup> Section 1 of the Act creates a criminal offence of corporate manslaughter in England and Wales, and Northern Ireland and an offence of corporate homicide in Scotland. By section 1(2)(b) this applies to “a department or other body listed in Schedule 1”, and by section 1(2)(c) “a police force”. Schedule 1 lists the current government departments and other public bodies to which the Act applies.<sup>16</sup>
- 6.48 The effect of this is to make central government departments liable for the new offence of corporate manslaughter. This represents a significant change in their legal position, as until the entry into force of this Act, departments as a corporate body had enjoyed immunity from criminal proceedings through the operation of Crown Immunity. Consequently, the effect of the Corporate Manslaughter and Corporate Homicide Act 2007 is to impose another potential type of liability to government. Though very few prosecutions are envisaged, it is now necessary for senior civil servants to plan for the possibility of police investigations and the consequent disruption that this could cause to the smooth running of a department. This would, on the face of it, go far beyond the sort of investigation from the Health and Safety Executive with which departments currently deal.
- 6.49 Consequently, the Corporate Manslaughter and Corporate Homicide Act 2007 can be seen in the same light as the Freedom of Information Act 2000. Both Acts are changing the culture within the civil service, and though they may lead to wider benefits, they still can entail considerable administrative disruption.

#### THE IMPLICATIONS OF THE CONCERN WITH ADMINISTRATIVE DISRUPTION

- 6.50 Our research on the impact of liability on public bodies has been concentrated on the issue of “defensive administration”. “Administrative disruption” seems to be a distinct phenomenon, and one which we should consider seriously. Its effects and underlying dynamics may be significantly different from those examined in our research on “defensive administration” (although we would also expect there to be similarities).
- 6.51 One point that seems already apparent is that the administrative disruption is driven by fears of political and policy costs, not monetary costs alone. Thus where civil servants avoid writing things down so there is no information to disclose under the Freedom of Information Act, they are motivated by the fear of the adverse effects of disclosure. Those adverse effects might be straightforward political embarrassment to the Government, or they might be the disruption of the smooth process of developing policy. It is important to recognise that there is nothing necessarily inappropriate about these fears, which reflect the proper duties of civil servants.

<sup>15</sup> Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No 1) Order 2008, SI 2008 No 401.

<sup>16</sup> With changes to the machinery of government, it is periodically necessary to update this list. See for example: Corporate Manslaughter and Corporate Homicide Act 2007 (Amendment of Schedule 1) Order 2008, SI 2008 No 396.

- 6.52 It is obvious that the notion of administrative disruption might have implications for our project. We might draw the conclusion, for instance, that the fear would be illusory on the public law side, because there we are proposing simply adding a new remedy where the public body has already been found to have acted unlawfully. It is unlikely that the payment of compensation will inflict *additional* political or policy costs to those already incurred by the finding of the court. On the other hand, the vulnerability of public bodies to liability for a greater range of conduct on the private law side might occasion such costs which would not otherwise have existed.
- 6.53 It seems to us that to assess properly the possible effects of our suggested scheme on administrative performance and to evaluate the concerns of civil servants, it would be beneficial to undertake a distinct piece of small-scale qualitative research. This could take the form of a semi-structured interview with civil servants about their reactions to the Freedom of Information Act 2000 and the Corporate Manslaughter and Corporate Homicide Act 2007. In particular, the research could address both the sorts of changes in practice that have occurred, and the motivation for those changes. We intend to discuss with Government the practicalities of undertaking such research.
- 6.54 We would then be in a position to assess the relevance of the concern with administrative disruption to our provisional proposals, and, where appropriate, to consider ways in which it could be mitigated or eliminated.
- 6.55 **We would be grateful for comments on the phenomenon of administrative disruption and its relevance to our provisional proposals.**

#### **COMMON LAW LIABILITY: A CAUTIONARY TALE**

- 6.56 The Australian insurance crisis of the late 1990s and early 2000s provides two salutary lessons. First, it provides a cautionary tale of what can happen if liability in negligence is left to expand uncontrolled. Secondly, it illustrates that law reform will always be most effective and enduring when it is conducted on a principled basis.

#### **The Australian insurance crisis**

- 6.57 During the Australian insurance crisis two major insurance companies collapsed and insurance premiums became exorbitantly expensive, and in some cases, cover was not available at all. While not-for-profit and adventure tourism organisations were said to be the hardest hit, it was also recognised that public agencies had “serious problems”.<sup>17</sup>
- 6.58 The crisis was seen to affect adversely the very fabric of community life:

Results have included the cancellation of community festivals, carnivals, art shows, agricultural shows, sporting events of all kinds, country fetes, music concerts, Christmas carols, street parades, theatre performances, community halls, and every manner of outdoor event. The Panel has been informed that some schools and

kindergartens are not able to offer the facilities they would wish and some have had to close.<sup>18</sup>

- 6.59 The government believed that one of the factors contributing to the crisis was “unpredictability in the interpretation of the law of negligence”, which the government saw as driving up premiums.<sup>19</sup> Within Australia, there was a widely held view that it had become too easy for plaintiffs to succeed in personal injury cases and that the damages awarded were too high.<sup>20</sup> The frequency and nature of claims against public bodies, particularly local councils and shires, was of particular concern. Some local government bodies faced average public liability premium increases of 30 to 50% in 2002, with “many examples of increase beyond this range – up to 100 percent in several cases and 700 in one case”.<sup>21</sup>

#### **Establishment of the Ipp Panel**

- 6.60 To address this situation, the Commonwealth, States and Territories jointly agreed to appoint an expert panel to examine the laws of negligence, chaired by Justice David Ipp of the New South Wales Court of Appeal (the Ipp Panel). The terms of reference given to the Panel were very specific about the assumptions that were to underpin the inquiry:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and the quantum of damages arising from personal injury and death.<sup>22</sup>

- 6.61 The Panel was charged with developing and evaluating “principled options” to limit liability and damages awards and were also required to “address the principles applied in negligence to limit the liability of public authorities”.<sup>23</sup>

<sup>17</sup> Towbridge Consulting Ltd, *Public Liability Insurance: Practical Proposals for Reform* (2002) p ii.

<sup>18</sup> Panel of Eminent Persons, *Final Report: Review of the Law of Negligence* (2002) para 1.34.

<sup>19</sup> Australian Government, The Treasury, Joint Communiqué: Ministerial Meeting on Public Liability, Melbourne, 30 May 2002.

<sup>20</sup> Panel of Eminent Persons, *Final Report: Review of the Law of Negligence* (2002) para 1.4.

<sup>21</sup> Australian Senate Economics Reference Committee, *Report on the impact of public liability and professional indemnity insurance cost increases* (22 October 2002) p 11.

<sup>22</sup> Panel of Eminent Persons, *Final Report: Review of the Law of Negligence* (2002) Terms of Reference.

<sup>23</sup> Above.

### **Findings of the Ipp Panel**

- 6.62 The Ipp Panel found that there was a strong community perception that the law of negligence as it applied in the courts was unclear and unpredictable.<sup>24</sup> The Panel made over 60 recommendations to reform the law of negligence, including limiting liability for dangerous recreational activities, imposing limits on claims for future economic loss, abolishing exemplary, punitive and aggravated damages and shortening the limitation period.
- 6.63 In relation to public bodies, the Panel noted that cases involving decisions about resource allocation and cases involving policy decisions were the two main areas of concern to public bodies.<sup>25</sup>
- 6.64 The Panel considered that it was undesirable that the issues raised by these cases be addressed in negligence actions for a number of reasons, including the fact that courts are not well qualified to adjudicate upon the reasonableness of decisions that are essentially political in nature. The panel recommended a policy defence, which provided that a policy decision by a public body should not be subject to challenge unless “the decision was so unreasonable that no reasonable authority in the defendant’s position could have made it”.<sup>26</sup>

### **Subsequent legislative reform**

- 6.65 The recommendations made in the Ipp Panel were adopted in a plethora of legislative reforms across Australia. Concerning the liability of public bodies, state legislatures tended to go much further than the recommendations of the Ipp Panel. For example, the *Civil Liability Act 2002* (NSW) uses the test of *Wednesbury* unreasonableness when it is alleged that a public body breached a statutory duty in exercising, or failing to exercise, one of its functions.<sup>27</sup>

### **Effect of reforms**

- 6.66 It is said that the reforms have “clearly succeeded in reducing the number of claims brought, and insurance premiums appear to have fallen as a consequence”.<sup>28</sup> The District Court of New South Wales, which has the busiest civil claims list in Australia, reported a drop from over 23,000 in 2001 to under 8,000 cases in 2005. It should be noted that these totals relate to all negligence actions, not just those against public bodies.
- 6.67 While the Ipp reforms appear to have achieved their primary aim, debate continues in legal and wider circles about whether some of the new legislation has gone too far. Various commentators have suggested that the charged political and economic context in which the reforms took place has resulted in the abandonment of rationality and sound principle in the development of public liability law in Australia.

<sup>24</sup> Panel of Eminent Persons, *Final Report: Review of the Law of Negligence* (2002) para 1.5.

<sup>25</sup> Above, paras 10.2 to 10.3.

<sup>26</sup> Above, Recommendation 39.

<sup>27</sup> *Civil Liability Act 2002* (Cth), s 43.

<sup>28</sup> Speech given by Justice David Ipp at the London School of Economics, 12 March 2008.



- 6.68 Justice Ipp himself has criticised extra-judicially the fact that some of the reforms exceed the Panel's recommendations, commenting that public bodies have been given "a host of new and powerful defences" and that "certain of the statutory barriers that plaintiffs now face are inordinately high".<sup>29</sup> He argues that the use of the *Wednesbury* test in determining public body liability is "in conflict with the democratic principle that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen".<sup>30</sup>
- 6.69 Professor Harold Luntz has expressed concern that "the recent waves of tort law reform in Australia will not only exacerbate many of [the pre-existing] problems, but they have also made the common law completely unprincipled".<sup>31</sup> Chief Justice James Spigelman of the New South Wales Supreme Court has echoed this scepticism, stating that the statutory intervention means that "in this area Australian law is now unlikely to develop in any principled way".<sup>32</sup> Prominent legal bodies such as the Law Council of Australia and the NSW Bar Association have also been openly critical of the actions of Australian governments, and public disquiet has been voiced about gains made by insurance companies following the reforms.
- 6.70 In the UK, a further criticism could be made of the use of the *Wednesbury* test for public body liability. It is likely that that inclusion of such a test in legislation would be subject to challenge on human rights grounds. The European Court of Human Rights has stated that it does not regard the *Wednesbury* test as suitable in all contexts.<sup>33</sup>
- 6.71 What the Australian experience does clearly illustrate is the danger of sacrificing balance and principle when implementing law reform in a crisis. We believe that better reform progresses on a well-prepared and well-reasoned basis, and not in a reactive and piecemeal way in order to assuage an unstable political and economic situation. The time is now ripe for such principled reform in England and Wales.

<sup>29</sup> Justice D Ipp, "Themes in the Law of Torts" (2007) 81 *Australian Law Journal* 609, 613.

<sup>30</sup> Above.

<sup>31</sup> H Luntz, "The Australian Picture" (2004) 35 *Victoria University of Wellington Law Review* 879, <http://www.austlii.edu.au/nz/journals/VUWLRev/2004/40.html> (last visited 16 June 2008).

<sup>32</sup> Justice J Spigelman, "Tort reform in Australia", Address to the London Market at Lloyds (6 July 2004): [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_spigelman](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman) (last visited 16 June 2008); also see "Negligence: Is Recovery for Personal Injury too Generous?", Speech given to the 14th Commonwealth Law Conference, London (14 September 2005): [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman140905](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman140905) (last visited 16 June 2008).

<sup>33</sup> *Smith and Grady v UK* (1999) 29 EHRR 493; *Hatton v UK* (2003) 37 EHRR 28.

# **PART 7**

## **SUMMARY OF SPECIFIC POINTS FOR CONSULTATION**

### **INTRODUCTION**

- 7.1 For convenience, this Part consolidates all of the specific points for consultation from Parts 4, 5 and 6 of this Consultation Paper. It does not contain any additional material or analysis.
- 7.2 We strongly encourage all interested parties to respond to us on the following consultation points. We would also welcome views on the “modified corrective justice” principle which we have adopted to guide our options for reform in this Consultation Paper.

### **PART 4 – LIABILITY IN PUBLIC AND PRIVATE LAW**

#### **Overview of Current Problems**

- 7.3 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)
- 7.4 We invite comments on the operation of joint and several liability in the context of litigation against public bodies. (paragraph 4.71)
- 7.5 We would welcome more data on the frequency of use of misfeasance in public office as a cause of action, and we would welcome views as to whether, and if so when, it remains a useful cause of action. (paragraph 4.91)

#### **Options for reform**

- 7.6 Should the torts of misfeasance in public office and breach of statutory duty be abolished? (paragraph 4.106)
- 7.7 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)
- 7.8 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)
- 7.9 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)
- 7.10 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)
- 7.11 Is the approach to causation outlined in paragraphs 4.168 to 4.172 satisfactory? (paragraph 4.173)
- 7.12 Should the discretionary nature of judicial review remedies be preserved for damages in the public law context? (paragraph 4.175)

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

(1) In the public law scheme;

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

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

## **PART 5 – RELATIONSHIP BETWEEN OMBUDSMAN AND COURT-BASED OPTIONS**

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

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

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

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

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

## **PART 6 – EFFECT ON PUBLIC BODIES**

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

7.21 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)

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

# APPENDIX A

## PRINCIPLES UNDERPINNING REFORM

### INTRODUCTION

- A.1 The aim of this part is to provide a workable theoretical basis for our suggested options for reform relating to the liability of public authorities in public and private law. We take our lead from theories of tort law because tort law is concerned with the situation where a claimant seeks redress against another party, which is also the situation when a citizen seeks redress against a public body in public and private law. Although we recognise that theoretical tort law scholarship is largely concerned with the legal relationships between private individuals, we wish to consider the extent to which it also applies to the legal relationships between individuals and the state. In this regard, we consider the two broad types of tort law theories – economic theories and corrective justice theories.<sup>1</sup>
- A.2 We conclude that corrective justice, appropriately modified to reflect the nature and function of the state, provides an adequate theoretical basis for our suggested options for reform. In what follows, we attempt to demonstrate that not only can corrective justice be applied to state liability but that it captures well the situation when a claimant individual seeks redress against the state. Although corrective justice imposes a duty on the state to put things right, the scope of monetary compensation as a remedy must be limited to reflect the special functions of the state and the special relationship it has with its citizens.

### THEORIES OF TORT LAW: A BRIEF SKETCH

#### Economic theories

- A.3 “Law and economics” has been a dominant strand in theoretical tort scholarship in the United States since the 1970s, although its roots go back further.<sup>2</sup> It attempts to explain or prescribe features of tort law using economic concepts and models. Economics theorists assume that, parties acting rationally will respond to the threat of liability by taking precautions against causing harm to individuals up to the point at which the costs of the precautions equal the costs of harm which would result if the precautions were not present. However, the aim is not to reduce the risk of the activity to zero but to ensure liability is set at its most economically efficient level. The goal of tort law is to ensure that costs from accidents are distributed in the most efficient fashion.
- A.4 This is best illustrated by considering the hypothetical question of who should be made liable for injuries to pedestrians in low-speed accidents. An economics theorist would wish tort law to impose liability on car manufacturers, if, by designing and installing “spongy” bumpers that would avoid or minimise injury, this was the cheapest way to avoid accidents and their costs. This would mean,

<sup>1</sup> Consideration of the normative and methodological debates about economic and corrective justice theories of tort law traditionally applied as between private individuals is beyond the scope of our limited discussion.

<sup>2</sup> Seminal articles include R Coase, “The Problem of Social Cost” (1960) 3 *Journal of Law and Economics* 1; and G Calabresi and A D Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 *Harvard Law Review* 1089.

of course, that liability would be placed on a party who had not “caused” the accident in the normal sense.<sup>3</sup>

### **Corrective justice theories**

- A.5 An alternative explanation and justification for tort law is found in corrective justice theories.<sup>4</sup> Originally articulated by Aristotle,<sup>5</sup> the core idea is that a person who injures another has a personal duty to put that person back in the position that they were in before the injury occurred. Modern corrective justice theories developed in reaction to the pre-eminence of economics theory, and is now its dominant challenger.
- A.6 Corrective justice theorists claim that they can explain aspects of tort law better than their economics counterparts. In particular, they say that only their theories can account for what is considered a central feature of tort: its *bipolar* structure, which can be explained in the following way. Tort law is based on the relationship between two parties, the claimant and the respondent; indeed tort law rules establish a legal relationship between the two. The relationship flows from the injury caused by the respondent to the claimant. It is for the claimant to seek compensation from the respondent, and the duty on the respondent to put the claimant back in the position that he or she was in before the injury involves the transfer of compensation from the respondent directly to the claimant.<sup>6</sup> Corrective justice theorists claim that economic theories cannot account for this bipolarity, since what matters to economic theories is who can avoid the cost of accidents most efficiently. This might mean that a party other than the respondent (that is, the party who caused the injury in the normal sense) would be made liable.
- A.7 It is important to note that even if corrective theories can explain and justify key features of tort law such as its bipolarity, they are unable in and of themselves to generate precise rules of substantive law. It is clear that corrective justice excludes certain rules which would be incompatible with the theory itself, such as those establishing a principle of strict liability; or conversely, a no-fault compensation scheme in a particular area. Beyond that, corrective justice theories are useful only as a guide.

### **THE THEORIES AND THE LIABILITY OF PUBLIC BODIES**

- A.8 How do these theoretical approaches work once we bring the state or a public body back into the picture as respondent? Until recently, there seems to have been comparatively little academic work in this area. In Britain, it could perhaps have been thought that the principle that state officials should be subject to the law on the same basis as the private citizen – a principle famously articulated by

<sup>3</sup> This is the example used by Guido Calabresi in “Does the Fault System Optimally Control Primary Accident Costs?” (1968) 33 *Law and Contemporary Problems* 429, 436 to 438, as well as in his book, *The Cost of Accidents* (1970).

<sup>4</sup> The leading scholars in the field include Ernest Weinrib and Jules Coleman. See for example E Weinrib, *The Idea of Private Law* (1995) and J Coleman, *The Practice of Principle* (2001).

<sup>5</sup> *Nicomachean Ethics*, Book V.

<sup>6</sup> W Lucy, *Philosophy of Private Law* (2007) p 270.

Dicey<sup>7</sup> – would be sufficient justification for tort law as it applied to relations between the state and individuals. However, particularly since an important article by Daryl Levinson in 2001,<sup>8</sup> the issue has helpfully been addressed by American academics.

- A.9 Levinson attacks the applicability of both economic and corrective justice theories where the state is the respondent in tort law. In this he has been apparently successful: a recent article considers that there is “an emerging consensus among legal scholars that government tort liability lacks a coherent justification”, and refers to similarly founded doubts expressed by the US Supreme Court.<sup>9</sup> Before considering Levinson’s position, it should be noted that tort law as it applies to public bodies is quite different in the US, and the American approach to tort law reflects these differences. However, the broad thrust of the arguments and counter-arguments are applicable in a UK context.

### **Economic accounts and state respondents**

- A.10 Levinson’s criticism of economic accounts challenges their assumption that public authorities respond to liability rules in a similar way to private individuals as rational maximisers. He forcefully argues that government actors respond to *political*, not economic, incentives.<sup>10</sup>
- A.11 In particular, unlike private enterprises operating in a market environment, government is not organised to maximise profits but to respond to the preferences of voters. Voters themselves are not uniquely interested in maximising collective or personal wealth: their preferences “may differ systematically from market preferences, reflecting not just immediate self-interest but altruism and individual and collective aspirations”.<sup>11</sup> Giving effect to these preferences may therefore “mean sacrificing some measure of wealth maximisation in order to realise other social goals”.<sup>12</sup> Levinson adds, however, that we should not expect government officials to be completely faithful to citizens’ preferences, since the control and selection mechanisms in politics are much weaker than in those in economic markets.<sup>13</sup>
- A.12 The upshot of all of this is that if the political cost of avoiding injuring others is sufficiently high, government will be unlikely to make an investment even when it is economically justified. Levinson gives the example of a policy of randomly stopping and searching young men in high crime areas. Although the policy could greatly increase tort liability, and so economically it is not acceptable, it could conceivably have significant political rewards.

<sup>7</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed 1959) p 193.

<sup>8</sup> D Levinson, “Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs” (2000) 67 *University of Chicago Law School Review* 345.

<sup>9</sup> L Rosenthal, “A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings” (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 797, 799.

<sup>10</sup> D Levinson, “Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs” (2000) 67 *University of Chicago Law School Review* 345.

<sup>11</sup> Above, 355.

<sup>12</sup> Above.

<sup>13</sup> Above, 355 to 356.

- A.13 Some scholars seek to model *political* behaviour in a similar way to that in which economists model economic behaviour. These scholars maintain that the purpose of tort law is to change the behaviour of the relevant actors in a socially useful way, but they wish to free their models from the flaws of economic models.<sup>14</sup> Levinson criticises this practice, and our review of empirical and theoretical work on decision-making in public bodies and the indirect evidence of judicial review discussed in Appendix B leads us to reject such attempts to produce generally predictive models of political behaviour. We conclude there that the reaction of public bodies to liability is context-specific and significantly determined by external factors.

### **Corrective justice and state respondents**

- A.14 Levinson also criticises the application of corrective justice theories where the respondent in tort law is a public body. His central and powerful point is that

compensation ultimately comes from the pockets of taxpayers [which] ... attenuates the connection between moral responsibility and the burden of rectification. Corrective justice theories ground the duty to rectify in the causation of moral harms. But taxpayers do not “cause” constitutional violations in any intuitive sense of causation, nor are they morally responsible for constitutional wrongdoing.<sup>15</sup>

- A.15 Levinson is essentially denying that the bipolarity which is at the heart of corrective justice applies in the state liability context. There are instead three distinct parties which are relevant – the claimant citizen, the respondent public body, and the taxpayer. We do not accept this criticism to the extent that it implies that the taxpayer materially affects the bipolar relationship between the citizen and the state (it is, of course, quite a different thing to say that the taxpayer “ultimately pays” when the state pays compensation). Corrective justice requires that the respondent use his or her resources to compensate the injured party. Just because government resources are raised in taxes does not mean they do not belong to the government; there is no legal sense in which taxpayers own the taxes they have had to pay. To assert otherwise is deny that the state has its own legal personality.

- A.16 Levinson, in a further attack on the application of corrective justice to state liability, questions the possibility of “a collective entity like government [qualifying as] a moral agent”.<sup>16</sup> However, we routinely evaluate government actions in moral terms, and this is generally true even of government actions which cannot be attributed to particular officials. The same is true of companies: in English law, they can commit crimes (provided the prescribed punishment can be imposed upon a company), and moral culpability and criminal liability go hand in hand.<sup>17</sup>

<sup>14</sup> For a good example of a “political” model, see L Rosenthal, “A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings” (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 797.

<sup>15</sup> D Levinson, “Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs” (2000) 67 *University of Chicago Law School Review* 345, 408.

<sup>16</sup> Above.

<sup>17</sup> At least, outside the ambit of purely regulatory offences.

- A.17 Recent changes to the law in England and Wales by the Corporate Manslaughter and Corporate Homicide Act 2007 are instructive here. The Act reflects an attempt to make the criminal responsibility of companies *less* dependent on the need to attach responsibility to an *individual* director. Rather than requiring a single human mind (which therefore has to be the “controlling mind” of the company) to satisfy the mental element of the offence, the Act provides for a more genuinely corporate view of the mental element of criminal responsibility. The Act expressly extends criminal responsibility for manslaughter to Government departments (albeit with certain exclusions). There is thus now official recognition that Government departments, just like companies, can be blamed for their activities (or inactivities), and be held liable for the harm they cause.
- A.18 We therefore reject Levinson’s criticisms in this context and accordingly consider that, as a general principle, corrective justice survives as a justification for state liability in tort.

### **THE DIFFERENCE THE STATE MAKES**

- A.19 However, the fact that the state’s resources derive from taxpayers and are to be used for public benefit is important when considering the nature or content of the state’s duty to put things right. It is clear that that diverting the state’s resources to compensation raises issues that are different from those raised by the diversion of resources from a private respondent to a private claimant.
- A.20 From an economic perspective, the state intervenes in markets to prevent market failure; such interventions are in the public interest. Markets fail when they do not deliver an optimal total welfare. For example, in nearly all advanced countries there is substantial state intervention in the supply of medical services because leaving it to the market would result in unacceptable social and individual consequences. On this view, the state is expending money for purposes which, by definition, could not be secured by private actors: if the state did not provide them, no-one would.<sup>18</sup> And, again by definition, if the state did not provide them, a negative effect on overall welfare would result. The social significance of money in the hands of the state is therefore different from that in the hands of private individuals.
- A.21 When money passes in compensation from a private claimant to a private respondent, the respondent loses the opportunity to spend it for their own benefit; instead the claimant is given the opportunity to spend it for his or her benefit. When money passes from a public respondent to a private claimant, however, money legitimately earmarked for expenditure in the public interest is diverted to the individual benefit of the claimant.
- A.22 In corrective justice theories, the paying of compensation from the respondent to the claimant constitutes a moral gain, since the end result is an improvement in the situation of the injured claimant. However, where the respondent is the state, there will also be a loss in general welfare provision resulting from the diversion to the injured individual of resources earmarked for correcting market failure.

<sup>18</sup> A qualification is necessary because private charity is capable of providing some of these goods and services, sometimes even on a universal basis (as, for instance, in the provision of lifeboat services in Britain).



## THE DUTY TO REPAIR AND STATE RESPONDENTS

- A.23 The above discussion illustrates that the duty to repair and the payment of compensation has a special moral dimension when a public body is the respondent. What should the impact be of this additional complexity on the theoretical approach to state liability? In what way should the moral feature of public resources modify the duty to repair which corrective justice imposes on the public body?
- A.24 Corrective justice accounts start with the notion that there is an equilibrium – a pre-existing state of things – which is upset by the respondent. Part of that state of things is the nature of the relationship between the parties. Therefore, it will be useful to consider the differences between the relationships between private citizens on the one hand, and the citizen and the state on the other. The nature of these pre-existing relationships could signal what differences in the form of repair might be appropriate.
- A.25 Individual citizens enter relationships with each other voluntarily. Beyond these voluntary relationships, individuals generally expect little more than that other people will leave them free from (wrongful) injurious interference. If an individual injuriously interferes with another individual, there is no obvious relationship between the individuals upon which one could hang some form of remedy other than monetary compensation. It simply diminishes the personal property of the respondent and enhances that of the claimant, typically at the same time, thus minimising the requirement for any continued non-voluntary relationship between the two individuals. Monetary compensation respects an individual's autonomy in their relations with others.
- A.26 Individuals' relationships with the state are very different. An individual stands in a life-long and generally non-voluntary relationship (or series of relationships) with the state. In a liberal democracy, individuals generally have higher expectations about how the state will behave than they do of their fellow citizens. The state will of course impose tax and regulate an individual's voluntary relations with other citizens. But it will also provide benefits, and in this regard it is fairness of treatment, not non-interference, that individuals expect. Cane argues that the state is different in another important respect:

Government may legitimately coerce citizens to act or refrain from acting in ways determined by the government in order to further community goals at their expense. This legal power of legitimate coercion is not possessed by any ordinary citizen, however great their de facto power over the lives of other citizens may be. Government is different from its citizens in having power which they do not have and, in having responsibilities to the community as a whole which they do not have...in order to control the exercise of the legitimate coercive powers of the government we may be justified in imposing certain liabilities on government which do not also rest on citizens and in order to enable it to fulfil its responsibilities to society as a whole, we may be justified in relieving government of certain liabilities to which its citizens are subject.<sup>19</sup>

<sup>19</sup> P Cane, "Damages in Public Law" (1999) 9 *Otago Law Review* 489.

- A.27 Since the state spends money raised in taxes in the public interest and is concerned to deliver benefits to individual members of the public, it is fair to expect the state to act in accordance with the rules of natural justice and an appropriate level of administrative competence. In principle, we can expect more from the state. However, it does not necessarily follow that court-based compensation is the appropriate remedy in all, or even many cases.
- A.28 As we showed in Part 3, citizens want a variety of remedies when they experience substandard administrative action. These include explanations, apologies and improvements in the future. Citizens' redress may be facilitated better through avenues other than the courts and the provision of compensation. Thus the first modification to the duty to repair where the respondent is a public body is to offer remedial mechanisms other than money.
- A.29 Where monetary compensation is sought, we believe it is appropriate to modify the duty to repair to limit the exposure of the state in ways that it would not be appropriate to limit the exposure of a private citizen. "Limiting exposure" may take the form of setting a higher threshold for when the duty to repair will arise or placing caps or limits on how much compensation will be paid when the duty to repair has arisen. As set out in Part 4, we have preferred the former approach in limiting the exposure of public bodies pursuant to the corrective justice principle.

#### **EQUALITY: A LIMIT TO THE MODIFICATION OF THE DUTY TO REPAIR**

- A.30 However, limiting the exposure of the state should only go so far. This should be balanced against the general principle of equality that "like cases should be treated alike".<sup>20</sup> This means that government should be treated in the same way and be subjected to the same rules as private persons to the extent that it really is "like" private persons.
- A.31 We consider that "like cases" as between public bodies and private persons should at least include those functions or activities carried out by the state that are also performed by the private sector and where the "public" or "private" quality makes little difference to its performance. This would include, for example, NHS doctors and consultants, and teachers employed in the public sector.<sup>21</sup> It would also include a police officer driving a car down a road in the normal course of his duties. By contrast, where a public body is exercising a statutory power or a prerogative power, this will move them into the sphere of "truly public" activity, where there is no private sector equivalent. For example, a police officer arresting a suspect or driving "under a blue light" is exercising a statutory power and thus should be subject to the modified duty to repair.
- A.32 In situations where there is a direct counterpart in the private sector to an activity carried out by a public body, it is inconsistent with the equality principle that the duty to repair be modified. The limit to exposure should only apply to those activities which are exclusively carried out by the state. Part 4 sets out our proposed test for delineating this sphere of "truly public" activity.

<sup>20</sup> T Cornford, in *Towards a Public Law of Tort* (forthcoming) ch 1, considers that equality is tied up with the notions of government under law and the rule of law.

<sup>21</sup> See C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) para 4.10.

## **OUR PROVISIONAL POSITION**

A.33 We now summarise the position we have reached in the course of this Appendix:

- (1) In general, the principle of corrective justice underpins the relationship between the state and individual claimants;
- (2) However, in certain circumstances the normal principle of corrective justice needs to be modified. This is in order to take into account certain features of the relationship between the state and potential claimants;
- (3) In relation to monetary compensation, the relationship between the state and an individual claimant has a different moral complexion to the relationship between private individual claimants;
- (4) An individual's relationship with and expectations of the state are such that they should look first to non-monetary remedies against the state;
- (5) However, where compensation is in issue, there is a moral case for limiting it to particularly serious conduct where the state is the respondent;
- (6) This modification only applies where the state is undertaking "truly public" activity. Therefore, it does not apply where the impugned activity could equally have been carried out by a private individual.

# **APPENDIX B**

## **THE IMPACT OF LIABILITY ON PUBLIC BODIES**

### **INTRODUCTION**

- B.1 Central to arguments about the extent of public body liability is the question of the effect of liability on the behaviour of public bodies. Broad assertions are often made about the potential impact of liability with little empirical backing. Therefore, in preparing this Consultation Paper, we searched a broad range of literature in an attempt to develop an understanding of the impact of any change to the underlying legal regime. This research encompassed the fields of law and economics, social psychology, socio-legal studies, and public management, policy and administration.
- B.2 Our research confirmed that direct empirical evidence regarding the impact of liability on public bodies in the UK is extremely limited. Therefore we have drawn on indirect evidence concerning the impact of other accountability mechanisms in the public sector, in particular judicial review.
- B.3 We are aware of two particularly important studies which are currently being conducted. First, Maurice Sunkin and colleagues at the University of Essex have been researching the effect of judicial review on the quality of local authority services. Secondly, Simon Halliday (Strathclyde University) and Colin Scott (University College Dublin) and colleagues are conducting a study of the effects of liability (largely tortious) on local authorities' performance of road and highway functions. This study will compare local authority behaviour in the Republic of Ireland and Scotland. Fortunately, we have had the advantage of some advance findings of both of these projects, but neither had been completed before the publication of paper. Both will add significantly to the body of empirical knowledge available on UK/Irish jurisdictions.

### **MONETARY REMEDIES AND POLICY CONCERNS**

- B.4 Courts frequently make broad assertions about the impact of imposing liability on a public body. Whilst it is acknowledged that their principal obligation is to provide a remedy for wrongs, courts have identified an array of countervailing policy considerations which have frequently been deployed to deny liability: imposing liability could impede the efficient use of public resources, encourage public body employees to act in a defensive manner, and could risk flooding the courts with litigation.
- B.5 Conversely, the courts have also on occasion acknowledged that liability may have beneficial consequences. In particular, it may encourage a higher standard of administrative performance by public bodies.<sup>1</sup>

<sup>1</sup> See *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 568; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 672.

### **Defensive or better administration**

- B.6 Two divergent perspectives on the impact of liability have therefore emerged. First, there is a concern that imposing liability will lead to “defensive administration” or otherwise inhibit effective performance by public bodies. Second, there is the view that placing a duty of care upon a public body will improve the standard of administrative performance.
- B.7 Both perspectives refer to behavioural changes of the same type. The difference is one of magnitude. They differ regarding whether the imposition of liability is seen as deterring carelessness to an appropriate degree, and results in effective administration, or whether the consequence of imposing liability is “over-deterrence” and a retreat into defensive practice.

### ***The assumption that impact will be discernible***

- B.8 Embedded in the debate over whether increased liability would encourage better administration or defensive practice is the assumption that changing the liability regime will have a discernible impact upon administrative behaviour. Another position is that changing the liability regime will have little or no impact upon the practice of public bodies. A final proposition is that liability is only likely to play a significant role in shaping administrative behaviour under certain conditions.

### ***The kind of wrong***

- B.9 The impact of liability on public bodies may depend on the kind of wrong that the imposition of liability seeks to deter. Illegality can take a number of forms,<sup>2</sup> and it should not be assumed that they are all equally responsive to a specific mode of deterrence.
- B.10 For some types of illegality it is plausible to hypothesise that monetary liability could act directly to improve administrative performance, but for others monetary remedies would act indirectly at best. The existence of a monetary penalty could in theory provide public bodies with the incentive to deal with negligence-based aspects of maladministration, such as delay or inattention, that could be addressed through improvements in organisational processes. In contrast, where the problem flows from a lack of resources, then monetary liability is likely to have little impact on the provision of services. However, even here, it may well be that the payment of damages highlights either an inappropriate distribution of resources within a public body or conflicts embedded in the underlying policy.<sup>3</sup>

<sup>2</sup> See P Schuck, *Suing Government* (1983) pp 4 to 13. Schuck identifies four sources of government illegality: comprehension-based illegality, capacity-based illegality, motivation-based illegality and negligence-based illegality.

<sup>3</sup> For a discussion of “the tendency for implementers to be left to try to cope with the dilemmas built into the policy itself” see G Fimister and M Hill, “Delegating implementation problems: social security, housing and community care in Britain”, in M Hill (ed), *New Agendas in the Study of the Policy Process* (1993) p 128.

### Opening the floodgates

- B.11 A further concern is that a change in liability would lead to a substantial increase in litigation.<sup>4</sup> This could occur as a result of at least three distinct processes. Firstly, a change in the liability regime might broaden the range of grounds upon which claims could be brought. Secondly, a change in the liability regime may lead to an increase in the propensity to claim with respect to a particular ground for complaint. Third, changing the liability regime may lead to an increase in vexatious and/or unmeritorious litigation.
- B.12 Again, there is limited empirical evidence available upon which to ground estimates of the likely impact of increased public liability. It is, however, well-known in the socio-legal literature that decisions to litigate are not just influenced by the absence or presence of a monetary remedy.<sup>5</sup> There may be an increase in litigation even when there has been no change in the liability regime.<sup>6</sup> The relationship between a liability regime and the propensity to litigate is by no means straightforward.
- B.13 Evidence from other jurisdictions may shed some light on the issue. In a recent paper Markesinis and Fedtke argue that evidence from Germany indicates that fears that extending liability will open the legal floodgates could well be unfounded. In Germany state liability is more extensive and, in general, the culture more litigious, yet state resources devoted to processing and defending negligence cases remain relatively modest.<sup>7</sup>

### Settlement

- B.14 More subtly, a change in the liability regime may alter the way in which parties engage with the process of litigation, and in particular the likelihood of settlement.
- B.15 One can analyse this issue from a law and economics perspective by considering the relative costs and benefits of going to court or settling the case before it reaches that stage.<sup>8</sup> If the claimant's assessment of the benefits of litigating (net

<sup>4</sup> The possibility of the floodgates being opened by increased liability was identified by (among others) Lord Browne-Wilkinson in *X v Bedfordshire County Council* [1995] AC 633, at 750 to 751. See also for example S Bailey, "Public Authority Liability in Negligence: The Continued Search for Coherence" (2006) 26 *Legal Studies* 155, 175. The floodgates argument has also been contested: for example by Stuart-Smith LJ in *Capital and Counties plc v Hampshire County Council* [1997] QB 1004 at 1043 to 1044.

<sup>5</sup> For example see H Genn, *Paths to Justice: What People Do and Think about Going to Law* (1999).

<sup>6</sup> For example, there was a significant rise in medical negligence claims in the 1980s and 1990s even though the liability regime did not change: P Cane "Consequences in Judicial Reasoning" in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 41, p 53.

<sup>7</sup> B Markesinis and J Fedtke, "Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective" (2007) 18 *European Business Law Review* 5. See alternatively B Markesinis and J Fedtke, "Damages for the Negligence of Statutory Bodies: The Empirical and Comparative Dimension to an Unending Debate" [2007] *Public Law* 299. See also Y S Lee, "Civil Liability of State and Local Government: Myth and Reality" (1987) 47 *Public Administration Review* 160 for an empirical study of the limited impact that three landmark cases had on the volume of litigation against US local government in the subsequent three years.

<sup>8</sup> See, for example, R Cooter and D Rubinfeld, "Economic Analysis of Legal Disputes and their Resolution" (1989) 27 *Journal of Economic Literature* 1067.

of costs) exceeds the settlement the defendant is willing to offer then it is likely that the parties will be unable to settle and the case will go to trial. The defendant's settlement offer will, in turn, be shaped by their perception of the costs they are likely to incur if the case proceeds to trial.

- B.16 It follows that attaching a monetary remedy to a public law action would tend to increase the claimant's incentive to seek a trial but would at the same time increase the amount of money a defendant is willing to offer in pre-trial settlement.<sup>9</sup> It is difficult to predict the net effect of these opposing forces in advance. It will depend on the parties' attitudes to risk, as well as institutional factors such as the extent of the defendant's discretion in offering settlements and whether the costs of settlement and litigation fall in the same place.
- B.17 There may also be other factors at play in a case that raises public law issues. A private party can easily concede private rights. To settle, a public body might have to admit unlawful conduct, and that could have implications for many other cases. A public body might choose to defend a claim knowing that there was a considerable prospect of failure. From a claimant's point of view, in most judicial reviews their principal object will be to secure the right decision from the defendant, in which case compensation would perhaps be unlikely to distort the process. On the other hand, it may be that the possibility of compensation would simply complicate any negotiations for a settlement, and thus render a successful settlement less likely.<sup>10</sup>
- B.18 Again empirical evidence sheds little light on this issue. In the US moves have been made in the opposite direction: imposing damage caps in tort cases. Evidence indicates that this can have effects such as increasing the probability of pre-trial settlement.<sup>11</sup> The US literature also explores the "shadow effect" of highly uncertain punitive damage awards in increasing the incentive for pre-trial settlement: this debate is very similar in structure to our current concern.<sup>12</sup>

<sup>9</sup> Under the present regime a proportion of cases are settled. Sunkin notes that "by the mid-1990s only approximately one-sixth of all judicial review claims in England and Wales reached a substantive hearing": M Sunkin, "Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 43, p 50. Not all claims that failed to reach a hearing should be taken to represent a settlement.

<sup>10</sup> It would of course always be open to the public body to exclude any compensation payment as part of the settlement, if it were prepared to concede, for instance, the re-taking of the decision.

<sup>11</sup> Evidence on the varied experiences across US states is briefly reviewed in L Babcock and G Pogarsky, "Damage Caps and Settlement: A Behavioural Approach" (1999) 28 *Journal of Legal Studies* 341. The US literature on the reform of tort law relating specifically to medical negligence (often focusing on the efficacy of damage caps in restraining the damages awarded by juries) is both extensive and heavily contested. For example, D A Hyman and C Silver, "Medical Malpractice Litigation and Tort Reform: It's the Incentives Stupid" (2006) 59 *Vanderbilt Law Review* 1085.

<sup>12</sup> T A Eaton, D B Mustard and S M Talarico, "The Effects of Seeking Punitive Damages on the Processing of Tort Claims" (2005) 34 *Journal of Legal Studies* 343.

## THE IMPACT OF LIABILITY ON PUBLIC BODIES – THE LAW AND ECONOMICS PERSPECTIVE

### Liability in the private sector

- B.19 The deterrence approach to tort law has its roots in the law and economics approach.<sup>13</sup> It is assumed that parties acting rationally will respond to the threat of liability by taking precautions against causing harm to others up to the point at which the costs of continuing to do so equal the costs of the harm that is expected to result if precautions are not taken.<sup>14</sup> It follows that increased liability deters negligent behaviour as parties seek to avoid the cost of tortious liability.
- B.20 The discussion of state liability typically starts by taking this as a reasonable account of the impact of the tort system on the private sector. It then proceeds to examine whether it has similar relevance to the response of public bodies to liability. This simple model is, however, at best a partial representation of how private bodies respond to tortious liability. In practice the picture is much richer.
- B.21 Research indicates that, in practice, liability may be effective in deterring some sorts of harmful behaviour in some contexts, but not in others.<sup>15</sup> Changing liability regimes can trigger responses other than increasing the care being taken: for example, firms may restructure production so that the activities most exposed to litigation are performed by smaller producers with less to lose should they be sued.<sup>16</sup>
- B.22 The simple model also assumes that the direct monetary outlay associated with litigation is producers' main concern. A broader conception of the impact of litigation might also acknowledge that bad publicity associated with being found liable in negligence may have far-reaching consequences for reputation and future demand for products or services. Organisations may rationally take greater account of a liability regime than the size and frequency of successful negligence actions might suggest.

### Liability in the public sector

#### *The retreat into defensive administration*

- B.23 Both sides of the debate over the impact of liability can be interpreted using a law and economics approach. Those who see liability as promoting effective administration are implicitly assuming that liability will give public bodies the

<sup>13</sup> For example, R Posner, "A Theory of Negligence" (1972) 1 *Journal of Legal Studies* 29. For an overview of this approach see L Kaplow and S Shavell, "Economic Analysis of Law" in A Auerbach and M Feldstein (eds) *Handbook of Public Economics* (1999) 1161, or S Shavell, *Economic Analysis of Accident Law* (2003) NBER Working Paper 9694.

<sup>14</sup> There is no assumption that it is rational to reduce the risk of harm to zero, only to the socially optimal level.

<sup>15</sup> See, generally, D Dewees, D Duff and M Trebilock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996). See also L Liang, F Sloan and E Stout, "Precaution, Compensation and Threats of Sanctions: The Case of Alcohol Servers" (2004) 24 *International Review of Law and Economics* 49.

<sup>16</sup> These issues are discussed in relation to the impact of regimes for dealing with environmental pollution based upon negligence and strict liability by A Alberini and D Austin, "Accidents Waiting to Happen: Liability Policy and Toxic Pollution Releases" (2002) 84 *Review of Economics and Statistics* 729.



incentive to invest sufficiently in the “harm-reducing” precautions of good administrative practice. In contrast, those who fear defensive administration see public bodies *over*-investing in such harm-reducing precautions.

- B.24 There is, however, a difficulty with the defensive administration argument. Why should rational actors invest in harm-reducing precautions to the extent that defensive administration results? The law typically requires no more than that a public body should achieve a reasonable standard of performance for it not to be held to be negligent. In the context of state liability, where the criteria for demonstrating that behaviour is unreasonable are demanding, such over-investment of resources would not seem rational.
- B.25 One possible explanation is that, since public bodies do not face the countervailing pressures of product market competition, there is little to prevent over-investment in harm-reducing precautions. If increased expenditure on defensive administration causes cuts in the level or quality of service, individuals cannot transfer their business to an alternative supplier.
- B.26 Yet some public bodies may be exposed to the risk of a negligence claim from more than one of the parties involved. In such cases, minimising the risk of a claim from one quarter may increase the risk from another. In this case, the absence of competition would not in itself significantly reduce a public body’s incentive to consider the issue of liability.
- B.27 Another possible reason for a retreat into defensive administration relates to lack of information. If the standard of reasonableness or, more generally, the limits of liability are uncertain then it will not be possible to identify with precision the appropriate level of investment in harm-reduction measures. This could lead those who are risk-averse to invest heavily in “good” administrative practice to maximise their chances of meeting whatever standard will be applied, to the extent that *de facto* defensive administration is the result.<sup>17</sup>
- B.28 Attitudes to risk are also relevant to the more fundamental question: precisely which practices constitute “defensive administration”? The term lacks any widely-accepted definition. A practice that would be considered “defensive” by a public official with a high tolerance for risk might be seen as entirely appropriate and prudent – and not “defensive” in a negative sense – by a second who is risk averse. In the field of medical negligence there is evidence to suggest that changing liability or increasing risk of litigation leads to changes in clinical practice that could be deemed to be “defensive”.<sup>18</sup> Yet, others argue that some of

<sup>17</sup> This point has been made in relation to “overkill” arguments in judicial reasoning, of which defensive administration is one example, by P Cane, “Consequences in Judicial Reasoning” in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 41, p 45, although it is not cast in quite the same terms.

<sup>18</sup> D Dewees, D Duff and M Trebilock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) p 417: “Empirical evidence suggests that the civil liability system has had a significant impact on medical practice, such as increased record keeping, increased discussion with patients about treatment risks, referrals to other health care professional, and increased diagnostic testing”. See also J Elmore et al, “Does Litigation Influence Medical Malpractice?” (2005) 236 *Radiology* 37.

these same practices are entirely appropriate and hence greater exposure to litigation has improved practice.<sup>19</sup>

- B.29 In this respect distinguishing risk-reducing from risk-avoiding strategies can be valuable. If exposure to liability encouraged risk-reducing strategies then that may well be socially desirable, whereas investment in risk-avoiding strategies which do not directly benefit the service users is largely redundant.
- B.30 An alternative approach would be to ask whether the core law and economics argument is applicable to the activities of public bodies. This issue has been directly addressed in US literature, which we consider in the section that follows.

### ***The responsiveness of public bodies to monetary remedies***

- B.31 As noted above, an underlying premise of much of the debate is that public bodies, by analogy with private bodies, are responsive to monetary remedies. This has been forcefully contested in the US literature on constitutional torts.
- B.32 Levinson<sup>20</sup> argues that the view that monetary remedies will have a significant impact upon public bodies is misconceived. Public bodies are more responsive to the political costs and benefits of administrative action than the financial costs, which can ultimately be passed on to others. Hence, changing the behaviour of public bodies requires regulatory mechanisms that affect their political, rather than financial, calculations. He considers that “without a sufficiently complex model, any predictions about the incentive effects of constitutional cost remedies on government behaviour are highly suspect”.<sup>21</sup>
- B.33 Rosenthal accepts that government responds primarily to political incentives, but argues that governmental liability reduces the resources available to politicians to pursue their favoured political agenda and this in turn affects their chances of re-election. Hence, monetary liability has a direct connection to political priorities, which gives politicians an incentive to minimise exposure to tort claims.<sup>22</sup>
- B.34 While the detail of this argument is shaped to some degree by the political structures of the US, the broad points it raises are important. Administrative decision-making is typically embedded in a political process, and that this can inject other priorities into the decision-making calculus.
- B.35 The opportunities to study the impact on public bodies of specific changes in the contours of liability in the UK are rare. Hartshorne and colleagues report on a

<sup>19</sup> See for example, A Symon, “Litigation and Changes in Professional Behaviour: a Qualitative Appraisal” (2000) 16 *Midwifery* 15.

<sup>20</sup> D Levinson, “Making Governments Pay: Markets, Politics and the Allocation of Constitutional Costs” (2000) 67 *University of Chicago Law Review* 345.

<sup>21</sup> Above, 386 to 387.

<sup>22</sup> L Rosenthal, “A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings” (2006) 9 *Journal of Constitutional Law* 1, 30. Rosenthal argues that the widespread implementation of immunity legislation in the US should be taken as an indicator that liability represents a constraint upon the discretion of public bodies. By implication, the costs of liability must be perceived by legislators to be greater than the political costs associated with passing immunity legislation.

study of the impact of *Capital and Counties plc v Hampshire County Council*<sup>23</sup> upon the Fire Service.<sup>24</sup> The research demonstrates that there are many variables that influence the impact of liability. The authors note that:

In *Hampshire* ... the discussion of whether the imposition of liability may lead to defensive fire fighting rested on the premise that fire fighters would be aware both of any legal decision imposing liability, and its full legal implications. The research demonstrates that instead, this information is taking time to filter through to all ranks, and in some instances is becoming distorted in the process. Moreover, there is a suggestion that in some cases information supplied to lower ranks may be, albeit for what are conceived as good reasons, to a certain extent diluted. The research even demonstrates that as regards the highest echelons of an organisation, the supply of legal information to it may be patchy, and the understanding of it variable.<sup>25</sup>

Very similar variables have been identified in relation to the impact of judicial review, discussed below.

- B.36 A small US study of the practices of a psychiatric hospital that had been subject to a lawsuit regarding the negligent release of a dangerous patient found clearer evidence of deterrence leading to more cautious release.<sup>26</sup> Some commonly theorised negative effects upon front-line workers – particularly stress and “litigaphobia” – were found to be present, alongside lower morale.
- B.37 A key point here is that over-caution on the part of decision-makers regarding the release of patients may have reduced the scope for negligent release lawsuits, but it impinged upon the freedom rights of non-released patients. This not only led to harm to these patients but also opened the possibility of legal challenges from a different quarter. This is a good illustration of the complexity associated with decision-making in public sector contexts.

#### **THE IMPACT OF LIABILITY ON PUBLIC BODIES – OTHER MODELS**

- B.38 Law and economics works with a very specific, and relatively simple, model of rationality. This in turn has inspired much of the thinking about the way in which monetary remedies – and tort law in particular – will impact upon bureaucratic behaviour. It is undoubtedly possible to detect elements of the law and

<sup>23</sup> [1997] QB 1004.

<sup>24</sup> J Hartshorne, N Smith and R Everton, “*Caparo Under Fire: A Study of the Effects upon the Fire Service of Liability in Negligence*” (2000) 63 *Modern Law Review* 502.

<sup>25</sup> Above, pp 518 to 519

<sup>26</sup> N Poythress and S Brodsky, “In the Wake of a Negligent Release Lawsuit: An Investigation of Professional Consequences and Institutional Impact on a State Psychiatric Hospital” (1992) 16 *Law and Human Behavior* 155.

economics type of cost-benefit thinking in the response of public bodies to the liability placed upon them.<sup>27</sup>

- B.39 This is, however, only one way that decision-making can be conceptualised. In this section we briefly examine four alternative strands in the academic literature on the decision-making process. Changing our understanding of decision-making processes can change our appreciation of the likely impact of imposing liability, and of the value of alternative regulatory mechanisms for delivering effective public administration.

### **Behavioural law and economics**

- B.40 The behavioural economics perspective argues that adopting alternative assumptions about rationality can deliver a richer understanding of legal phenomena.<sup>28</sup>
- B.41 Its central propositions are, first, that decision-makers often use rules of thumb (“heuristics”) rather than full cost-benefit calculation and, second, decision-making is subject to a range of biases, including egocentrism, over-confidence, over-optimism, confirmation bias, and the endowment effect.<sup>29</sup> Heuristics include the availability heuristic, which means, for example, that individuals rely upon recent experience of an event as the basis for assessing its likelihood. The consequence is over-estimation of the probability of easily recalled or recently experienced events.
- B.42 In terms of the impact of liability, behavioural law and economics could be used to consider the way in which the availability heuristic affects public bodies’ perceptions of the risks associated with particular courses of action. Over-confidence bias can, for example, lead to misapprehension of the robustness of procedures and success in judicial review.<sup>30</sup> These are analytical tools that have yet to be systematically applied in the field of administrative justice, at least in the UK.

<sup>27</sup> The way in which some German local authorities respond to changing requirements regarding highway maintenance would appear to be an example. Rather than incur the costs of additional maintenance it is cheaper to pay out the occasional claim for damages. See B Markesinis and J Fedtke, “Damages for the Negligence of Statutory Bodies: The Empirical and Comparative Dimension to an Unending Debate” [2007] *Public Law* 299.

<sup>28</sup> See, for example, C Jolls, C Sunstein and R Thaler, “A Behavioural Approach to Law and Economics” (1998) 50 *Stanford Law Review* 1471; L Babcock and G Pogarsky, “Damage Caps and Settlement: A Behavioural Approach” (1999) 28 *Journal of Legal Studies* 341. This alternative model of decision-making has itself been challenged on the basis that it overstates the prevalence of departures from rationality: G Mitchell, “Why Law and Economics’ Perfect Rationality Should Not be Traded for Behavioral Law and Economics’ Equal Incompetence” (2002) 19 *Georgetown Law Journal* 67.

<sup>29</sup> The endowment effect refers to a situation in which the price at which an individual is willing to sell something that they own exceeds the price at which they would be willing to buy an identical item from someone else.

<sup>30</sup> This would appear to be the case in the local authorities studied by Halliday. See S Halliday, “The Influence of Judicial Review on Bureaucratic Decision-Making” [2000] *Public Law* 110.

### Decision research

- B.43 Herbert Simon's concept of bounded rationality is a well-established alternative to rationality as understood by mainstream economics.<sup>31</sup> From this perspective decision-makers have aspirations with respect to the quality of an outcome: they are searching for a solution that is acceptable or "good enough". Decision-makers will therefore search for a solution that reaches their aspiration level and then stop.
- B.44 Unlike mainstream economics, there is no assumption that the solution chosen will be optimal. The key issues then become how aspiration levels are set and what constitutes a "good enough" decision. Public law requirements may provide guidance as to what is "good enough", although they may be too open textured to provide certainty.<sup>32</sup>
- B.45 A further level of complexity in understanding decision making arises when one considers that in many organisations' decisions are made by *groups* of people. A whole literature exists on the effects that group dynamics can have on decision-making, including the effects of conflict and of "groupthink" – the tendency of insular groups to come to a quick and unreflective consensus.<sup>33</sup> For our purposes, it is enough to note that this learning reinforces the message that decision-making in organisations is not well captured by the classic law and economics rationality assumptions.<sup>34</sup>

### Socio-legal approaches

- B.46 Halliday draws on research in local housing authorities to offer an analysis of the nature of administrative decision-making framed in more sociological terms.<sup>35</sup> He proposes that an important element in understanding the impact of judicial review upon administrative decision-making is the *nature of the decision-maker*. In particular, he highlights their level of legal knowledge; their legal conscientiousness; and their legal competence.
- B.47 Low levels of legal knowledge within an organisation will reduce the likelihood that administrative practice will accord with the law, or that changes in the law will be adequately reflected in changes in practice. If decision-makers are legally conscientious then they will seek to comply with the law, whereas low levels of

<sup>31</sup> H A Simon, *Models of Bounded Rationality* (1982).

<sup>32</sup> See K Pick and M Sunkin, "The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund" [2001] *Public Law* 754.

<sup>33</sup> I L Janis, *Victims of Groupthink* (1972). See also, among others, T Postmes, R Spears, and S Cihangir, "Quality of Decision-Making and Group Norms" (2001) 80 *Journal of Personality and Social Psychology* 918; V D Wall, G J Galanes and S B Love, "Small, Task-Oriented Groups: Conflict, Conflict Management, Satisfaction and Decision Quality" (1987) 18 *Small Group Research* 31; D J Devine, "Effects of Cognitive Ability, Task Knowledge, Information Sharing, and Conflict Decision-Making Effectiveness" (1999) 30 *Small Group Research* 608; S Schulz-Hardt et al, "Group Decision-Making in Hidden Profile Situations: Dissent as a Facilitator for Decision Quality" (2006) 91 *Journal of Personality and Social Psychology* 1080.

<sup>34</sup> See, for example, R Prentice, "Chicago Man, K-T Man, and the Future of Behavioral Law and Economics" (2003) 56 *Vanderbilt Law Review* 1664.

legal conscientiousness will result either in creative compliance or failure to comply. Finally, legal competence refers to the ability to appreciate the significance and implications of judicial pronouncements.

- B.48 An example of the effect of low levels of legal competence is provided by the work by Hartshorne and colleagues on the fire service referred to above. From their survey responses, it appears that in some areas the *Hampshire* judgment had been interpreted as being *about* sprinkler systems (and so requiring a change of policy in relation to them), reflecting the facts of the case, rather than having broader implications for the liability of fire authorities in negligence.<sup>36</sup>

### **Policy-oriented approaches**

- B.49 Underlying Halliday's framework, as with much socio-legal work in this field, is the concept of "street-level bureaucracy", which has had an equally significant impact upon the literature on the policy process.<sup>37</sup> Street-level bureaucrats are those "who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work".<sup>38</sup> Much of the literature has focused upon front-line police, social and welfare, and educational services.
- B.50 Street-level bureaucrats are seen as using their discretion to develop coping strategies to manage work overload that results from effectively unlimited demands upon limited resources. Strategies can take various forms, such as strict adherence to rules when the exercise of discretion would be expected in order to process cases quickly.<sup>39</sup> Some such coping strategies are precisely the type of procedural wrongs that administrative law is designed to address. If such strategies become embedded in the standard operating procedures of an organisation or engrained in an organisation's culture, the incentives needed to deter inappropriate practice may need to be correspondingly stronger.<sup>40</sup> The difficulties in effecting permanent changes to organisational practices should not be underestimated.<sup>41</sup>

<sup>35</sup> S Halliday, *Judicial Review and Compliance with Administrative Law* (2004). This account resonates with many of the insights derived from the approaches we have already considered, but grounds the analysis in issues of more direct concern to this project.

<sup>36</sup> J Hartshorne, N Smith and R Everton, "Caparo Under Fire: A Study of the Effects upon the Fire Service of Liability in Negligence" (2000) 63 *Modern Law Review* 502.

<sup>37</sup> M Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Service* (1980).

<sup>38</sup> Above, p 3.

<sup>39</sup> For illustrative examples, see I Loveland, "Housing Benefit: Administrative Law and Administrative Practice" (1988) 66 *Public Administration* 57.

<sup>40</sup> This point is also made in a slightly different context by B C Canon, "Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 76.

<sup>41</sup> See, for example, K M Sutcliffe and G McNamara, "Controlling Decision-Making Practice in Organisations" (2001) 12 *Organisation Science* 484.

- B.51 Although it may be possible to frame rules and procedures that reduce the scope for front-line workers to exercise their discretion,<sup>42</sup> it is not possible to eradicate discretion: Maynard-Moody and Musheno note that “like putty, discretion can be squeezed by oversight and rules but never eliminated; it will shift and re-emerge in some other form in some other place”. In this respect, street-level work can be seen as “rule saturated but not rule bound”.<sup>43</sup>
- B.52 Conceiving of service delivery in terms of the activities of street-level bureaucrats makes it possible that legal concerns and requirements could receive less weight than other imperatives. Under what conditions will a system offer significant scope for the exercise of front-line discretion and when will discretion be minimal? Equally importantly, under what conditions will legal concerns receive less weight than other imperatives? These are issues that we consider below.

### **Decision-making in public bodies – conclusion**

- B.53 In this section we have touched upon a broad spectrum of arguments. The aim is to highlight the fact that once one moves beyond the models of rationality associated with the law and economics approach it becomes clear that a wide range of factors, operating at the level of the individual and the organisation, act to make the picture much more complex. In addition, there are topics - such as the partial ways in which organisations gather information from their environment or the unavoidable imperfections in intra-organisational communication, - which we have not addressed but which would add further layers of complexity to the picture.
- B.54 Much regarding the nature of decision-making is still to be debated. In some instances competing accounts, rather than clear conclusions, emerge. This in itself means that simple assertions about the way decision-makers will account for the risk of legal challenge and monetary penalties in their deliberations should be treated with caution. The forces weighing against giving priority to the requirements of legal norms can be substantial. We return to this topic below.

### **JUDICIAL DECISIONS AND PUBLIC BODIES**

- B.55 There is a substantial body of research on the impact of judicial review on public bodies, which can provide indirect evidence in building our understanding of the likely impact of changing liability. We begin however by considering the largely American political science literature on the impact of judicial decisions more widely.<sup>44</sup>

<sup>42</sup> The experiences of the teachers and employment agency workers who participated in the small US qualitative study are compared in M Kelly, “Theories of Justice and Street-level Discretion” (1994) 4 *Journal of Public Administration Research and Theory* 119.

<sup>43</sup> S Maynard-Moody and M Musheno, “State Agent or Citizen Agent: Two Narratives of Discretion” (2000) 10 *Journal of Public Administration Research and Theory* 329, 334 and 339.

<sup>44</sup> The US literature on judicial impact is reviewed by B C Canon, “Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches” in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 76, drawing in part upon B C Canon and C A Johnson, *Judicial Policies: Implementation and Impact* (2nd ed 1999).

### **Impact of judicial rulings upon public bodies**

- B.56 O’Leary conducted a systematic study of the impact of judicial activities upon the US Environmental Protection Agency.<sup>45</sup> The research found that court rulings tended to dictate priorities within the Agency, sometimes at the expense of implementing statutory requirements, as the agency chose between competing priorities. As court rulings were made, work was reprogrammed and funds and personnel redeployed.
- B.57 Other impacts included greater difficulty in planning because discretion over programmes of work was undermined. Some judgments handed down were vague or broad ranging. The relative power of legal staff within the organisation increased, while the power of scientific staff was eroded. Some departments within the Agency perceived positive effects such as resources being devoted to favoured projects or through increasing staff motivation as they pulled together to meet the judicial agenda. O’Leary concluded that the impact of judicial rulings upon the Agency was neither entirely positive nor negative.
- B.58 Johnson examines five public bodies affected by five judicial rulings in Pennsylvania.<sup>46</sup> He starts from the position that agencies react to judicial decisions in a series of related stages that either use or risk resources. The interpretation of the judgment and the decision about how extensively to search for alternative responses are important in shaping an agency’s response. Two agencies made only a limited interpretation of the court rulings and, as a result, took the view that the ruling did not carry implications for their subsequent practice. Johnson then found that when taking decisions regarding how to respond, agencies tended to weigh up perceived risks of enforcement against the costs and possibilities of change. This suggests a relatively rational approach to determining agency response in the law and economics sense. Generally the agencies examined sought to minimise the extent of their response.
- B.59 A similar stages-based model for understanding agency responses to judicial rulings in the US is presented by Canon.<sup>47</sup> Canon argues that an agency’s “behavioural adjustment” needs to be understood in the light of an agency’s prior “acceptance decision”: the agency welcomes the judicial ruling as supporting its mission; treats it as being of little importance; or takes the view that the ruling will make it more difficult for the agency to fulfil its goals, that it conflicts with core agency values, or that it reflects what the agency considers to be the wrong policy. Hence, the acceptance decision can be positive, indifferent or negative.
- B.60 The extent to which an agency’s behaviour changes in the light of a judicial ruling will not correlate directly with the nature of its acceptance decision. For example, external pressures may mean that even though its acceptance decision is

<sup>45</sup> R O’Leary, “The Impact of Federal Court Decisions on the Policies and Administration of the US Environmental Protection Agency” (1989) 41 *Administrative Law Review* 549.

<sup>46</sup> C Johnson, “Judicial Decisions and Organisational Change: Some Theoretical and Empirical Notes on State Court Decisions and State Administrative Agencies” (1979) 14 *Law and Society Review* 27.



negative the agency nonetheless perceives it necessary to make a substantial behavioural adjustment. Yet behavioural adjustment is mediated by the acceptance decision: an indifferent or negative acceptance decision will tend to attenuate an agency's response to judicial rulings, other things being equal.

- B.61 Canon notes that the nature of agency responses to new legal requirements need not reflect a simple dichotomy of compliance or non-compliance. There is a continuum representing more or less compliant policy responses.<sup>48</sup>

### **The impact of judicial review**

- B.62 While judicial review has the potential to promote components of administrative justice such as the reasonableness of decisions and sufficient investigation of facts, it is not well suited to fostering good administration more broadly:

A wider concept of good administration might, for instance, include values such as effectiveness and efficiency in implementing public programmes and delivering public services. The grounds of judicial review do not promote these values as such and may, indeed, conflict with them. For instance, observing the requirements of procedural fairness and respect for human rights may reduce the ability of public functionaries to achieve their policy objectives quickly, cheaply and comprehensively.<sup>49</sup>

- B.63 Assessing the impact of judicial review is complex.<sup>50</sup> The mechanisms by which judicial review can impact upon administrative behaviour are several.<sup>51</sup>

- (1) The process of being subject to judicial review, including threats of litigation that proceed no further, may lead to alteration in the behaviour of the public body concerned.
- (2) The judgments emerging from judicial review can impact not only upon the public body being reviewed but other bodies engaged in similar activities or using similar organisational processes.

<sup>47</sup> B C Canon, "Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004). It draws upon Johnson's work. See also C A Johnson, "Judicial Decisions and Organisational Change" (1979) 11 *Administration and Society* 27.

<sup>48</sup> Similarly it has been argued that evaluating the impact of judicial decisions should not be limited to the question of compliance or the ultimate result of court decisions, but should involve an analysis of how officials respond to the decision and the process of implementation. See M Hertogh, "Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands" (2001) *Law and Policy* 47.

<sup>49</sup> P Cane, *Administrative Law* (4th ed 2004).

<sup>50</sup> See G Richardson, "Impact Studies in the United Kingdom" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 103.

<sup>51</sup> M Sunkin, "Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 43.

- (3) Judicial review can promote a particular set of legal norms, values and principles. If the thinking of public bodies is influenced by these values then judicial review may have a more indirect and diffuse impact upon administrative behaviour through shaping the broad culture.
- B.64 The first two mechanisms are broadly instrumental, working by means of deterrence, the third mechanism could be thought of as a non-instrumental means of shaping behaviour. It can be argued that a counterpart to each of these mechanisms exists in relation to monetary remedies.
- B.65 The third indirect mechanism indicates the complexity of the task of assessing the full range of potential impacts of judicial review. This is reinforced by reference to the question of who is influenced by the judicial process and how. Sossin argues that the principal means by which judicial requirements are communicated to front-line decision-makers is “soft law” such as non-legislative guidance or internal rules and administrative policies.<sup>52</sup> The behaviour of front-line decision-makers may therefore be strongly influenced by judicial review but this influence may be heavily obscured.
- B.66 Some conclusions can nevertheless be drawn. Perhaps the clearest is that judicial review appears to have limited ability to influence administrative behaviour. Evidence indicates that impact is limited in both administrative bureaucracies and adjudicatory bodies.<sup>53</sup> A study of the impact of judicial review on Mental Health Review Tribunals found it to be “patchy at best, even with regard to procedural fairness”.<sup>54</sup> In contrast, other empirical evidence suggests that judicial review can have a discernible impact upon bureaucratic outcomes to the benefit of the service-user rather more frequently.<sup>55</sup>
- B.67 A second conclusion is that the influence of judicial review can vary over time. Initial exposure to review can have a significant impact upon an organisation, but repeated exposure can lead to a less conscientious approach: the risk of judicial review comes to be seen as integral to the environment. Newly established organisations can be more inclined to alter their practice in response to an adverse judicial review decision. This inclination can lessen over time. Pick and

<sup>52</sup> L Sossin, “The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada” in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 129.

<sup>53</sup> See for example, S Halliday, *Judicial Review and Compliance with Administrative Law* (2004); G Richardson and D Machin, “Judicial Review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal” [2000] *Public Law* 494; T Buck “Judicial Review and the Discretionary Social Fund: The Impact on a Respondent Organisation” in T Buck (ed) *Judicial Review and Social Welfare* (1998) 115; K Pick and M Sunkin, “The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund” [2001] *Public Law* 736; I Loveland, *Housing Homeless Persons* (1995). This assessment can be contrasted with some of the views reported in A Barker, “The Impact of Judicial Review: Perspectives from Whitehall and the Courts” [1996] *Public Law* 612.

<sup>54</sup> G Richardson and D Machin, “Judicial Review and Tribunal Decision-Making: A Study of the Mental Health Review Tribunal” [2000] *Public Law* 494, 514.

<sup>55</sup> See R Creyke and J McMillan, “The Operation of Judicial Review in Australia” in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004). For a US case study see M R Mandlawitz, “The Impact of the Legal System on Educational Programming for Young Children with Autistic Spectrum Disorder” (2002) 32 *Journal of Autism and Developmental Disorders* 495.

Sunkin highlight the importance of senior management in shaping the “reverence” accorded to judicial review: a change of Social Fund Commissioner led to a substantial change in emphasis at senior management level and then throughout the organisation. This resulted in a shift from a focus on legal process and “judicial review proofing” decisions, to a focus on communication that is intelligible to consumers.<sup>56</sup>

B.68 Third, it has been suggested that public bodies can effectively use the existence of judicial review as an opportunity to delegate scrutiny of their processes. Rather than attend routinely to the question of whether their processes adhere to the requirements of administrative justice they rely upon the courts to highlight when they have fallen short.

B.69 Fourth, a level of defensive practice designed primarily to protect the organisation from legal challenge has certainly been detected.<sup>57</sup>

B.70 One of the strongest messages to emerge from this literature is that the impact of judicial review upon administrative decision-making needs to be set alongside a range of other influences. As Halliday argues, drawing on his three local authority case studies:

How judicial review “impacted” on the bureaucratic justice of ... decision-making processes depended ... upon the non-legal influences and priorities which co-existed with concerns of legality. In different ways, professional intuition, systemic suspicion, bureaucratic expediency, judgements about the moral desert of applicants, inter-officer relations, financial constraints and other values and pressures all played a part in how judicial review impacted upon decision-making.<sup>58</sup>

#### **What determines what impact judicial review will have?**

B.71 Halliday has offered the most comprehensive framework for contextualising the impact of judicial review.<sup>59</sup> We noted above that this framework identifies legal knowledge, legal conscientiousness and legal competence as key characteristics of the decision-maker that shape the impact of judicial review. These factors carry over to other types of regulatory mechanism. His recent study of the impact of internal reviews on decision-making within two Homeless Persons Units found that internal reviews had greater influence in the circumstances predicted by his qualitative model: administrative law would appear to play a more influential role when legal consciousness, legal conscientiousness and legal competence are higher. The research also noted that differences in the internal structure of the organisations could make a difference to the extent to which decision-making

<sup>56</sup> K Pick and M Sunkin, “The Changing Impact of Judicial Review: the Independent Review Service of the Social Fund” [2001] *Public Law* 736.

<sup>57</sup> On these points see S Halliday, *Judicial Review and Compliance with Administrative Law* (2004).

<sup>58</sup> S Halliday, “The Influence of Judicial Review on Bureaucratic Decision-Making” [2000] *Public Law* 110, 116. See also M Sunkin and K Pick, “The Changing Impact of Judicial Review” [2001] *Public Law* 736.

<sup>59</sup> S Halliday, *Judicial Review and Compliance with Administrative Law* (2004).

was informed by an up-to-date interpretation of the law. This was more apparent in the organisation with a dedicated review officer than in the other organisation.<sup>60</sup>

- B.72 In addition, Halliday argues that judicial review is likely to be more effective in regulating administrative behaviour when, first, the law is clear and consistent so there is little doubt regarding what it requires and, second, a public body operates in a context where law has a strong presence or it does not face a high level of competition from other normative frameworks.
- B.73 The following have been identified as the competing normative frameworks that can bear upon public administrations: bureaucratic, professional, legal, managerial, consumerist and market models.<sup>61</sup> The first three have been in competition as the dominant principle underpinning administration for many years. The latter three models – managerial, consumerist and market – have emerged as key concerns for the public sector since the reforms associated with the new public management agenda took hold in the 1980s.
- B.74 The normative orientation of a body will be the outcome of competition between normative positions which, in turn, will be championed by different interests, with different bargaining strength. It should be anticipated that:

These trade-offs vary between organisations and, within a given organisation, between the different policies delivered by that organisation and between the different stages of policy implementation. They also vary over time and between countries.<sup>62</sup>

- B.75 While not all of these six models are relevant to all public bodies, the legal model will exist unopposed in few fields.<sup>63</sup> When other models come to dominate, legal concerns may be sacrificed in order to satisfy other imperatives. The contemporary emphasis upon managerialism, for example, with the publication of targets and the naming and shaming of those who fail to reach an acceptable standard of performance means that public officials can be more concerned with delivering satisfactory performance, even at greater risk of legal challenge.<sup>64</sup>

<sup>60</sup> D Cowan, S Halliday and C Hunter, "Adjudicating the Implementation of Homelessness Law: The Promise of Socio-Legal Studies" (2006) 21 *Housing Studies* 381.

<sup>61</sup> Halliday draws on the framework proposed by Adler: M Adler, "A Socio-Legal Approach to Administrative Justice" (2003) 25 *Law and Policy* 323, who is in turn elaborating on the work of Mashaw: J Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983).

<sup>62</sup> M Adler, "A Socio-Legal Approach to Administrative Justice" (2003) 25 *Law and Policy* 323, 331.

<sup>63</sup> Richardson and Machin, for example, note the tensions between professional – in this case, medical – and legal norms in relation to tribunal decision-making. See G Richardson and D Machin, "Judicial Review and Tribunal Decision-making: A Study of the Mental Health Review Tribunal" [2000] *Public Law* 494.

<sup>64</sup> The distorting effects of targets have recently been explored in the context of the health service by G Bevand and C Hood, "What's Measured is What Matters: Targets and Gaming in the English Public Health Care System" (2006) 84 *Public Administration* 517. For a more general discussion see C Propper and D Wilson, "The Use and Usefulness of Performance Measures in the Public Sector" (2003) 19 *Oxford Review of Economic Policy* 250.

- B.76 Many public bodies operate in an increasingly crowded normative landscape. Emphasis upon managerialism, consumerism and the market, alongside traditional professional and bureaucratic concerns, could lead to the view that bureaucratic and professional discretion have largely been curtailed. This might suggest that as long as policies and procedures are robust the scope for infringing administrative law has been reduced. However, while front-line discretion may be more tightly constrained, to suggest that it has been removed entirely would be mistaken.<sup>65</sup>
- B.77 The framework proposed by Halliday offers a powerful tool for thinking about the role of law in public administration. If we unpack aspects of these models further, it is possible to highlight additional dimensions to the issue. For example, the pursuit of efficiency gains, under the managerial model, can lead to changes in the workforce's terms and conditions of employment. Employment conditions have been identified as a factor in the quality of decision-making: the greater the insecurity and casualisation, the poorer the quality of decision-making.<sup>66</sup>

### **THE RELEVANCE OF INDIRECT EVIDENCE**

- B.78 It is important to be conscious of the limits on the scope for learning from evidence relating to alternative mechanisms such as judicial review. The impact of judicial review, for example, may be moderated by the fact that in some cases the public body might lawfully be able to take the same decision again. Hence, a successful judicial review may not materially affect the public body's ability to achieve its desired administrative outcome. The effect of this should not be exaggerated, however. In practice it will often be the case that the nature of the judgment effectively determines the decision that the public body must take.
- B.79 Nevertheless, it may be that the award of damages will impinge upon budgets<sup>67</sup> and will send a more concrete message that there had been a wrong that needs remedying. In this respect it may elicit a stronger response from public bodies. Even here, however, the incentives can be attenuated as when, because of the division of labour within an organisation, budgets are the responsibility of a separate department.<sup>68</sup> Of course, very often the terms of the judgment will in practice constrain the public body to take a particular decision, or a decision within a much narrower range of possibilities than the public body thought were open to it before the judicial review. Nevertheless, the mechanisms through which judicial review, on the one hand, and monetary remedies, on the other, impact upon the behaviour of public bodies are different, and so may present public bodies with different incentives.
- B.80 Where judicial rulings either substitute the court's decision for that of the public body, as in appeals, or present the public body with what is taken to be a

<sup>65</sup> This argument is developed further by T Evans and J Harris, "Street-level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion" (2004) 34 *British Journal of Social Work* 871.

<sup>66</sup> Q Alam, M Robinson and J Pacher, "Public Sector Reform: Employment Security and Quality of Decision-Making in the Australian Taxation Office" (2006) 29 *International Journal of Public Administration* 743.

<sup>67</sup> Either directly or through increased premiums for liability insurance.

<sup>68</sup> See S Halliday, *Judicial Review and Compliance with Administrative Law* (2004).

mandate to act in a way other than it would have chosen, the contrary may be true – the response of the public body might be stronger than if the message arrived in monetary terms.

## OUR PROVISIONAL CONCLUSIONS

- B.81 As we observed at the outset, there are three possible ways in which a change in liability could impact on public bodies. Public bodies' behaviour might not change at all in reaction to changes in liability. Or their behaviour might change appropriately – the imposition of liability might deter negligent behaviour or decision-making, resulting in better public services. Or they might over-react, and inappropriately distort their behaviour to avoid liability, harming the service they provide to the public. Case law frequently contains broad assertions that one or other of these effects is likely.
- B.82 The broad conclusion we come to is that which of these outcomes comes about is heavily context-, indeed organisation specific. It is possible to offer hypotheses regarding the circumstances in which legal concerns will be relatively marginal – low levels of legal knowledge, legal competence and legal conscientiousness; an environment in which other (policy) priorities dominate; a field of law that is relatively vague in its prescriptions and implications – but empirical evidence does not as yet allow us to state with confidence how these circumstances are distributed within and between policy sectors.
- B.83 It is therefore 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. We think it can be reasonably concluded that the likelihood that changes to liability *will not* result in changes to behaviour is probably higher than has tended to be supposed. But beyond that, we would hold any general statement as open to doubt. Having said that, it would be reasonable to observe that, where a change in behaviour has been detected, it is probably more likely to be seen as promoting defensive rather than effective administration.
- B.84 To the extent that studies of judicial review can be relied on as an indication of the effect of liability, we find evidence of all three possible outcomes, depending on largely contingent factual differences between organisations and policy areas. Above all, one of the strongest messages from this now reasonably well studied area is that the impact of judicial review on administrative decision-making needs to be set in the context of a range of other influences. Much will depend on non-legal influences and the autonomous priorities and concerns of the organisation and those who staff it.<sup>69</sup> Academics have identified alternative normative frameworks which may compete with legal norms in determining the behaviour of public bodies (such as professional, bureaucratic or managerial models). On the face of it, these approaches seem to us to offer the possibility of understanding when and why law in general, and liability in particular, has an impact upon practice. They might provide a route to predicting, in any particular organisation

<sup>69</sup> Recent work on a broader range of contextual variables, such as the socio-demographic characteristics of local populations, has further advanced our understanding of when and where public law will impact upon public bodies: M Sunkin, K Calvo, L Platt and T Landman, "Mapping the use of judicial review to challenge local authorities in England and Wales" (2007) *Public Law* 545.

under study, how it might react to changes in liability. But again, they do not help with useful predictive generalisations.

- B.85 That is not the end of the matter, however. Some important work has suggested (albeit in the context of judicial review) that the legal equipment of an organisation can influence the appropriateness or otherwise of its reaction to legal change or challenge. Halliday's work identifies legal knowledge, legal conscientiousness and legal competence as necessary to ensure an organisation conforms to public law norms.

### **Public bodies as agents**

- B.86 The research, as appropriate, treats public bodies as passive. It often only hints at the processes by which legal concerns come to play a relatively minor role in the practice of many organisations. Yet, from a law reform perspective, we consider that it is appropriate to see public bodies as possessed of some powers of agency. It is important not to lose sight of the fact there is a degree of discretion, albeit in many cases heavily constrained, over the priority that organisations give to legal concerns.
- B.87 There are two particular consequences of this. In particular, if Halliday's work accurately reflects the variables that determine the quality of public bodies' responses to liability, then they have at least some power to determine the appropriateness of their response. If public bodies ensure that they have the right mechanisms to deliver legal knowledge, conscientiousness and competence, then they will be more likely to react appropriately to the messages sent by liability. This is a relevant factor in considering the extent to which the potential for adverse behaviour by public bodies should be a consideration in determining the design of the remedies which should be available to the wronged citizen. Ultimately, a claim by public bodies that they will indulge in inappropriate defensive administration if compensation becomes more readily available is to be treated with some caution, because it is within their power to order their affairs so as to ensure that such changes in their behaviour that take place are beneficial.
- B.88 Secondly, it is important to recognise that public bodies should be capable of calibrating their reaction to liability by consciously considering what changes in behaviour would be appropriate and what would not. As we observe above, there is no objective yardstick by which to measure whether certain practices should be seen as effective administration or defensive administration. It is, or should be, for the public bodies concerned to set their own administrative or service-delivery standards, so as to inform the appropriateness of their reaction to liability.

### **CONSULTATION**

- B.89 **We would particularly welcome specific information from public bodies on what they perceive to be either deleterious or beneficial effects of changes in exposure to compensation, whether legislative or as a result of case law. We accept that it is not likely that respondents will have formal studies at their disposal (although of course, if they did we would be very interested). But anecdotal accounts of what are perceived to be examples of impact would nonetheless be useful to us.**

## APPENDIX C JUDICIAL REVIEW CASE RESEARCH

| No <sup>1</sup> | Case name with neutral citation  | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation |
|-----------------|--|--|---|--|-----------|
| 1.              | <i>Aweys and Others v Birmingham City Council</i> [2007] EWHC 52 (Admin) | Background: Review of the local authority's approach to the allocation of housing for the homeless.<br><br>Grounds:<br>(1) The decisions of the local authority with respect to the claimants were unlawful; its policy was irrational;<br><br>(2) The decisions and policy breached Art 8 ECHR.<br><br>Result: Allowed. | Yes<br><br>(1) The Housing Act 1996 confers a benefit on individuals such as the claimants.<br><br>(2) The loss they would claim is of a similar nature to the benefit that the legislation confers (provision of accommodation). | Yes<br><br>- In each of the cases, the local authority had failed lawfully to deal with the claimants under Part VII of the Housing Act 1996.<br><br>- In particular, the local authority had breached its clear duty under section 193 by failing to provide the claimants as homeless persons with suitable accommodation. The local authority considered that the claimants' current accommodation would suffice temporarily until alternatives were found. This represented a serious misunderstanding of the statute and a frustration of its purpose, since the claimants were homeless under the Act <i>precisely because</i> their current accommodation was unsuitable.<br><br>- The local authority had in some cases also | Yes       |

<sup>1</sup> \* Denotes cases where the claimant could obtain damages under the present law.

<sup>2</sup> For example: Illegality, irrationality, procedural impropriety, claim under the Human Rights Act 1998, EU law.

<sup>3</sup> For example: quashing order, prohibiting order, mandatory order, injunctions, declaration, damages.

<sup>4</sup> Factors taken into account in assessing serious fault including: clarity of statutory regime; degree of discretion; complexity of task; whether there was an intentional breach.



| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>                            | Conferral of benefit                               | Serious fault <sup>4</sup>  | Causation  |
|-----------------|---|---|--|---|--|
|                 |   |   |  | <p>failed to process the claimant's applications according to the clear statutory provisions. This had the effect of denying that the claimants were homeless.</p> <ul style="list-style-type: none"> <li>- The local authority's allocation policy was unlawful because it failed to give priority to those to whom the full section 193 duty was owed (such as the claimants).</li> <li>- The consequences of these failures were particularly serious given the state of the claimants' current accommodation and the their difficult circumstances. Four claimants had large families (of six and seven children) and three were in overcrowded conditions (in one case two adults and seven children in a two bedroom flat). Another claimant's accommodation had a rat infestation and was damp. Another claimant had a severely disabled daughter.</li> <li>- Further, the local authority was in continuing breach of the section 193 duty. Most claimants had been awaiting accommodation for a considerable time (in one case for three years and typically for one or two years).</li> </ul> |  |
| 2.              | <i>Cook v General Commissioners of Income Tax and Another</i> [2007] EWHC 167 (Admin) | Background: Challenge of the Commissioners' decision to extend the time in which an appeal could be lodged. | Yes<br>(1) The Taxes Management Act 1970 confers a | Borderline<br>Yes<br>- The error of law was a serious one. The law  | No<br>The decision on whether to extend the time |

| No <sup>1</sup> | Case name with neutral citation | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>  | Causation   |
|-----------------|---------------------------------|--|--|---|---|
|                 |                                 | <p>Grounds:</p> <p>(1) The decision was unlawful;</p> <p>(2) Alternatively, the pursuit by Revenue of bankruptcy proceedings was in bad faith and/or breach of human rights.</p> <p>Remedies sought:</p> <p>(1) Quashing order and substitutionary remedy (that is, court ought to substitute its own finding for that of Commissioners) with respect to the decision;</p> <p>(2) Quashing order with respect to the bankruptcy proceedings.</p> <p>Result: Allowed. Quashing order granted in respect of the decision not to allow extension of time.</p> | <p>benefit on individuals such as the claimant.</p> <p>(2) The claimant's arguable financial loss in the period after the refusal to extend time (resulting from the bankruptcy proceedings) is of a similar nature to the benefit that the legislation confers.</p> | <p>was clear on the matter: there was a previous case on the point. The Commissioners in the instant case failed to take any relevant factors into consideration – it was not a question of whether the Commissioners correctly weighed relevant factors. The interpretation was based on the Revenue's submissions, as the claimant did not appear and was not represented.</p> <ul style="list-style-type: none"> <li>- The fact that their clerk misled them as to the legal position is irrelevant, since the Commissioners are accountable for their own decisions.</li> <li>- If the Commissioners had considered relevant factors, they would have realised that the lack of an appeal would primarily prejudice the claimant: justice requires that he be given an opportunity to put his case, especially given that his appeal is arguable.</li> <li>- The consequences are serious for the claimant, as there is a substantial sum at stake.</li> </ul> <p>No</p> <ul style="list-style-type: none"> <li>- The error of law was excusable, since there is nothing explicit in the statute in relation to the discretion of the Commissioners. The Commissioners decided the question that</li> </ul> | <p>limit for lodging an appeal was remitted to the Commissioners. Therefore it cannot be said at this stage whether their original refusal caused the claimant's arguable loss.</p> |

| No <sup>1</sup> | Case name with neutral citation  | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>   | Causation  |
|-----------------|--|--|--|--|------------|
| 3.              | <i>R (S) v Secretary of State for the Home Department</i> [2007] EWHC 51 (Admin) | <p>Background: Review of the decision to remove the claimant to Afghanistan. The adjudicator dismissed his appeal, and an application for discretionary leave to remain was refused.</p> <p>Grounds:</p> <p>(1) There was a breach of his legitimate expectation that his application would be dealt with within a</p> | <p>Yes</p> <p>(1) The Immigration Rules confer a benefit on individuals such as the claimant.</p> <p>(2) The loss he claims resulting from the failure of the Secretary of State to lawfully process his asylum claim, and</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- The Secretary of State's letter refusing the claimant's asylum claim stated that the claimant could gain entry clearance to the UK upon return to Afghanistan. This was incorrect, and could have resulted in serious consequences for the claimant if he had acted on that advice.</li> <li>- The Secretary of State was also wrong to certify that the claimant had no right to appeal a decision to refuse Discretionary Leave to Remain.</li> </ul>  | <p>Yes</p> |
|                 |  |  |  | <p>they were lawfully to decide. The fact that the claimant was not represented was not the fault of the Revenue.</p> <ul style="list-style-type: none"> <li>- The Commissioners were misled as to the legal position by their clerk, and they made the decision in good faith.</li> <li>- Even if the Commissioners had considered additional factors in exercising their discretion, they would also have had to consider that there would be prejudice to the Revenue if the appeal were allowed to proceed: given the passage of time and the loss of documentation, it would be difficult to assess the validity of the grounds of the appeal.</li> </ul> |            |

| No <sup>1</sup> | Case name with neutral citation                         | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>  | Causation  |
|-----------------|---|--|--|---|--|
|                 |   | <p>reasonable time. A long delay deprived him of his entitlement for Indefinite Leave to Remain: this was unfair and an abuse of process;</p> <p>(2) It was disproportionate and therefore unlawful to remove him because it would breach Art 8 ECHR;</p> <p>(3) The decision to certify that no right of appeal lay from the decision to refuse Discretionary Leave to Remain was clearly unlawful.</p> <p>Result: Allowed. The removal directions and certification were quashed. The claim was remitted back to Secretary of State for reconsideration.</p> | <p>his detention, is of a similar nature to the benefit that the legislation confers.</p>                | <ul style="list-style-type: none"> <li>- There was an excessive delay of 54 months in dealing with the claim, which resulted in unfairness and distress to the claimant. The claimant was a refugee when he arrived in the UK and was in "genuine need". He would have been granted Indefinite Leave to Remain if the claim had been dealt with earlier.</li> <li>- The two errors made by the Secretary of State and the delay have a cumulative effect.</li> <li>- Important interests of the claimant are at stake, since he stands to gain Indefinite Leave to Remain.</li> <li>- It is likely that there was only one lawful decision open to the Secretary of State in relation to the asylum claim.</li> </ul> |  |
| 4.              | <i>Donkin v The Law Society</i> [2007] EWHC 414 (Admin) | <p>Background: The claimant appealed against the decision of the Solicitor's Disciplinary Tribunal which found that he had acted dishonestly and ordered him to be struck off the Roll of Solicitors.</p>  | <p>Yes</p> <p>(1) The Solicitors Act 1974 confers a benefit on individuals such as the claimant (the</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- The Tribunal imputed an objective element into the subjective limb of the dishonesty test. This constituted a serious error of law. Counsel representing the claimant set out the test clearly, and the Tribunal apparently</li> </ul>  | <p>No</p> <p>There was no causation: the claimant cannot prove that but for the illegality</p> |

| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit  | Serious fault <sup>4</sup>  | Causation   |
|-----------------|---|---|---|---|---|
|                 |   | <p>Grounds:</p> <p>(1) Error of law (misapplication of the dishonesty test);</p> <p>(2) Failure by the Tribunal to take account of evidence of the claimant's good character (a relevant consideration).</p> <p>Remedy sought: Quashing order.</p> <p>Result: Allowed on both grounds. The case was remitted to the Tribunal for a rehearing.</p> | <p>claimant is subject to the disciplinary procedures provided in the Act).</p> <p>(2) Any alleged financial loss (caused by the Tribunal's decision) is of a similar nature to the benefit that the legislation confers.</p> | <p>understood that it was a two-stage test.</p> <ul style="list-style-type: none"> <li>- The Tribunal wrongly failed to consider evidence of the claimant's good character when setting out its findings of dishonesty. The court found this to be a "significant legal error". Had the evidence been considered, it might have effected the Tribunal's findings.</li> <li>- The consequences that flowed from Tribunal's decision were serious. The sanction imposed was penal. The claimant was struck off the register, which meant he could no longer practice and there was also the possibility of damage to his reputation.</li> </ul> | <p>he would have avoided the sanction. The Tribunal may lawfully reach the same decision following the rehearing.</p>   |
| 5.              | <p><i>Mahmood v General Medical Council</i> [2007] EWHC 474 (Admin)</p> | <p>Background: The claimant challenged the decision of the Fitness to Practise Panel to proceed with a hearing in the claimant's absence when he was ill. He was found guilty of serious professional misconduct and the Panel ordered his erasure from the register.</p> <p>Grounds: Procedural</p>  | <p>Yes</p> <p>(1) The Medical Act 1983 confers a benefit on individuals such as the claimant (the claimant is subject to the disciplinary procedures set out in the Act).</p>   | <p>Yes</p> <ul style="list-style-type: none"> <li>- Proceeding with the hearing in the claimant's absence was a "clear and serious procedural irregularity". The Panel was not completely up-front about its reasons for continuing with the hearing, and some of its conclusions were overstated. In exercising its discretion, the Panel also failed to apply the relevant test, clearly and uncontroversially set out by the House of Lords.</li> </ul>  | <p>No</p> <p>There was no causation: the claimant cannot prove that but for the illegality he would have avoided the sanction. The Panel may lawfully reach</p> |

| No <sup>1</sup> | Case name with neutral citation                                 | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation   |
|-----------------|---|--|---|--|---|
|                 |   | <p>impropriety.</p> <p>Remedy sought: Quashing order.</p> <p>Result: Allowed. Case remitted back to the Panel for a rehearing.</p>   | <p>(2) Any alleged financial loss resulting from the Panel's decision is of a similar nature to the benefit that the legislation confers.</p>   | <p>- The result was that the claimant was deprived of an opportunity to defend himself against a serious charge. The claimant's procedural rights were fundamental, especially given that his livelihood and reputation were at stake.</p>   | <p>the same decision following the rehearing.</p>   |
| 7.              | <p><i>Bryant v The Law Society</i> [2007] EWHC 3043 (Admin)</p> | <p>Background: Appeal against the decision of the Solicitor's Disciplinary Tribunal which found the claimants guilty of professional misconduct and dishonesty and ordered that they be struck off the Roll of Solicitors.</p> <p>Grounds:</p> <p>(1) Error of law (misapplication of the dishonesty test);</p> <p>(2) Failure by the Tribunal to take account of relevant considerations (evidence of the claimant's good character);</p> <p>(3) The allegations made</p> | <p>Yes</p> <p>(1) The Solicitors Act 1974 confers a benefit on individuals such as the claimants (the claimants are subject to the disciplinary procedures set out in the Act).</p> <p>(2) The alleged financial loss is of a similar nature to the benefit that the legislation confers.</p> | <p>Yes</p> <p>- The Tribunal failed to apply the subjective limb of the dishonesty test. In fact, at no point did it articulate with any clarity the test it was applying. It thereby committed a serious legal error.</p> <p>- The Tribunal wrongly refused to consider evidence of the claimant's good character when setting out its findings of dishonesty. This was also a serious error of law. See <i>Donkin v The Law Society</i> above.</p> | <p>No</p> <p>Although the penalty was reduced to suspension, the effect was that the claimants would still have been prevented from practising between the date of the Panel's decision and the court hearing. There was therefore no loss.</p> |

| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>  | Causation  |
|-----------------|---|--|---|---|--|
|                 |   | <p>against them had not been proved.</p> <p>Remedy sought: Quashing order.</p> <p>Result: Grounds (1) and (2) allowed. The court quashed the finding of dishonesty but thought it would be wrong to remit the matter back to the tribunal, as on the evidence it was clear that the dishonesty test, correctly applied, was not satisfied. Ground (3) was allowed in part. The claimants were guilty of misconduct but to a lesser extent than had been found by the Tribunal. It replaced the penalty imposed by the Tribunal with suspension for a defined period.</p> |   |   |  |
| 8.*             | <p><i>Actis SA v Secretary of State for Communities and Local Government</i> [2007] EWHC 2417 (Admin)</p> | <p>Background: Review of the Secretary of State's decision to publish an approved document which introduced changes relating to the measurement of the performance of thermal insulation products.</p>   | <p>Yes</p> <p>(1) The relevant statutory framework (the Building Act 1984 and the Building Regulations) confers</p> | <p>Yes</p> <p>- There was a complete failure to notify the Commission in accordance with the relevant Directive, which set out a clear procedure, and in circumstances where the changes introduced had "significant and far reaching effects" (including substantial damage to the</p> | <p>Yes</p> <p>There was damage to the claimant's commercial interests – they traded at lower</p> |

| No <sup>1</sup> | Case name with neutral citation  | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation   |
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|                 |  | <p>Grounds:</p> <p>(1) The failure to notify the European Commission of changes effected by the document was unlawful</p> <p>(2) Breach of a legitimate expectation and/or conspicuous unfairness for failure to consult.</p> <p>Result: Allowed on both grounds. The approved document was held to be inapplicable and unenforceable.</p> | <p>a benefit on individuals such as the claimant.</p> <p>(2) The financial loss suffered is of a similar nature to the benefit that the legislation confers.</p>                    | <p>commercial interests of a large part of the industry). This amounted to a manifest breach of EC law.</p> <p>- In relation to the second ground, the department had demonstrated high levels of incompetence. Only the competitors had had any input into the process leading to the change. Although a representation had been made about consultation, it was not performed and had caused serious detriment to the claimants. Even when the Department realised its mistake, it obfuscated rather than confronted its mistakes in a clear and straightforward manner. The court considered that the Department's conduct fell "a long way short of the standards that those dealing with a Government Department are entitled to expect".</p> | <p>levels of turnover and profitability than would have been the case if the changes had not been made.</p> |
| 9.*             | <p><i>Bashir v Secretary of State for the Home Department</i> [2007] EWHC 3017 (Admin)</p> | <p>Background: Claimant was an asylum seeker who had been detained following a conviction for robbery. He was detained for a further 32 months pending deportation. He refused to return to Iraq voluntarily.</p> <p>Grounds: Illegality.</p> <p>Result: Allowed. The court</p>  | <p>Yes</p> <p>(1) The Immigration Act 1971 confers a benefit on individuals such as the claimant.</p> <p>(2) The loss the claimant suffers as a result of the detention is of a</p> | <p>Yes</p> <p>- The claimant had been administratively detained for an unreasonably lengthy period of time with no immediate prospect of removal, and in circumstances where bail would have been appropriate.</p> <p>Note that the decision is being appealed.</p>  | <p>Yes</p>  |



| No <sup>1</sup> | Case name with neutral citation                                     | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>  | Causation  |
|-----------------|---|--|--|---|--|
| 10.             | <i>Gwynn v The General Medical Council</i> [2007] EWHC 3145 (Admin) | <p>made a declaration that the detention was unlawful and ordered that the claimant be released on bail subject to stringent conditions.</p> <p>Background: Review of the Panel's refusal to stay disciplinary proceedings against the claimant. The complaints that formed the basis of the proceedings had arisen from procedures carried out five years previously, with one of the complaints having already been considered and dismissed.</p> <p>Grounds:</p> <p>(1) Illegality;</p> <p>(2) Procedural irregularity.</p> <p>Remedy sought: Quashing order.</p> <p>Result: Allowed. The GMC had erred in refusing to allow the stay of proceedings. The decision was quashed.</p> | <p>similar nature to the benefit that the legislation confers.</p> <p>Yes</p> <p>(1) The Medical Act 1983 confers a benefit on individuals such as the claimant (who is subject to the disciplinary procedures set out in the Act).</p> <p>(2) Any alleged financial loss (for example if the claimant had been suspended pending the hearing) is of a similar nature to the benefit that the legislation confers.</p> | <p>Borderline</p> <p>- The allegations were allowed to proceed even though they were clearly out of time and the Registrar had not properly considered the test for allowing complaints to proceed out of time.</p> <p>- In addition, one of the complaints had been resubmitted three years after it had initially been considered, dismissed, and formally closed by the GMC. The claimant did not have notice of this complaint until four and half years after it was made. The GMC acted contrary to clear procedure for disposing of complaints set out in the relevant statute and a Manual issued by the Fitness to Practice Directorate. The claim was nevertheless allowed to proceed by the Panel.</p> | <p>No</p> <p>There does not appear to be any loss as the case against the claimant had not yet proceeded to a full hearing, nor had any sanction been imposed. However it is not clear whether the claimant had been suspended pending the hearing – if so, he may recover damages for loss of earnings.</p> |

| No <sup>1</sup> | Case name with neutral citation  | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>  | Causation  |
|-----------------|--|--|--|---|--|
| 11.             | <i>Hill v Bedfordshire County Council</i> [2007] EWHC 2435 (Admin)                     | <p>Background: Claimant sought a review of the Local Education Authority's (LEA) refusal to amend his statement of special educational needs when he changed schools, and so to continue to fund his education until the age of 19.</p> <p>Grounds: Illegality</p> <p>Remedy sought: Quashing order.</p> <p>Result: Allowed on both grounds. LEA's decision quashed.</p> | <p>Yes</p> <p>(1) The relevant statutes (the Education Act 1996 and the Local Government Act 2000) confer a benefit on individuals such as the claimant.</p> <p>(2) The financial loss resulting from the LEA's decision (the parents had to fund their child's schooling) is of a similar nature to the benefit that the legislation confers.</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- The authority consistently maintained that it did not have the power to fund the claimant's placement, despite the fact that statute clearly provided it with such a power. It eventually admitted its error but still refused to exercise its discretion in favour of the claimant. Crucially, this refusal was based on a serious error of fact – that the parents had made no attempt to make alternative arrangements for funding, when correspondence before the authority clearly demonstrated that the parents had approached the relevant body.</li> <li>- Further, the LEA did not notify the claimant of his right to appeal their refusal to maintain a statement of special needs.</li> <li>- There was much at stake (the education of a child with special needs).</li> </ul> | <p>Yes</p> <p>The claimant may recover the cost of schooling met by the parents.</p> |
| 12.             | <i>H and Others v London Borough of Wandsworth and Others</i> [2007] EWHC 1082 (Admin) | <p>Background: H, X and B, who were children in need, challenged the decision of the local authority to provide accommodation to them under section 17 rather than under section 20 of the Children Act 1989.</p>  | <p>H's case: Yes</p> <p>X's case: Yes</p> <p>B's case: Yes</p> <p>(1) The Children Act 1989 confers a benefit on</p>   | <p>H's case: Yes</p> <ul style="list-style-type: none"> <li>- The claimant clearly fell within section 20, but the local authority determined and specified that provision was being made under section 17. (It was in the local authority's interests to do so: it could avoid providing further and continuing support if provision was</li> </ul>  | <p>H's case: Yes</p> <p>X's case: Yes</p> <p>B's case: N/A</p>                       |

| No <sup>1</sup> | Case name with neutral citation | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>  | Causation |
|-----------------|---------------------------------|--|---|---|-----------|
|                 |                                 | <p>Grounds: The decisions and the national guidance on which the decisions were based were unlawful.</p> <p>Remedies sought:</p> <p>(1) Quashing orders and declarations in relation to the decisions where appropriate;</p> <p>(2) Declaration that the national guidance was erroneous.</p> <p>Result:</p> <p>H's case: Allowed. The decision by the local authority to accommodate H under section 17 was quashed. A declaration that the local authority was providing accommodation to H under section 20 was granted.</p> <p>X's case: Allowed. A declaration that accommodation was being provided to X under section 20 rather than section 17 was</p> | <p>individuals such as the claimants.</p> <p>(2) The loss they claim is of a similar nature to the benefit that the legislation confers (provision of accommodation).</p> | <p>considered to be made under section 17.)</p> <ul style="list-style-type: none"> <li>- The law was clear: there was case law which clarified the relationship between sections 17 and 20. Although the national guidance was misleading, it was neither wrong or unlawful. The court held that the local authority's approach was in fact not at all in accordance with the 1989 Act or the guidance.</li> <li>- The local authority insisted that C had made "an informed decision" to opt for section 17. They had essentially required a child who was "little educated" and whose English was poor to make a complex choice between section 17 and section 20 on the basis of a small-print document, assisted by interpreter whose language was not exactly his own: the court described this as "little short of bizarre".</li> <li>- The consequences for the claimant are significant. If the accommodation were treated as being provided under section 17, he would have been denied the support to which he would otherwise be entitled when he became 18.</li> </ul> <p>X's case: Borderline</p> <p>No</p> <ul style="list-style-type: none"> <li>- A proper assessment appears to have been</li> </ul> |           |

| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation  |
|-----------------|---|---|---|--|------------|
|                 |   | <p>granted.</p> <p>B's case: Dismissed.</p>   |   | <p>made; the claimant was not treated in an unfortunate way.</p> <p>Yes</p> <ul style="list-style-type: none"> <li>- The local authority's approach to the claimant in terms of the law was the same as in B's case. It insisted that the claimant was being provided with accommodation under section 17 though section 20 clearly applied even as a result of its own judgements.</li> <li>- The consequences of the decision were the same as in H's case, but in this case, the claimant was also moved to Coventry, interrupting his studies. This was in pursuance of a dispersal policy, which would not have been engaged had the services been deemed to be provided under section 20.</li> </ul> <p>B's case: No</p> |            |
| 13.             | <p><i>James v Secretary of State for Justice</i> [2007] EWHC 2027 (Admin)</p> | <p>Background: Review of Secretary of State's failure to provide treatment courses to the claimant, a prisoner serving indeterminate sentences for public protection.</p> <p>Grounds:</p> | <p>Yes</p> <p>(1) The relevant legislation (Criminal Justice Act 2003, Crime Sentences Act 1997, Powers of Criminal Courts (Sentencing) Act</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- The failure to provide treatment courses frustrated the purpose of the Act. The legislation presupposed that treatment courses would be provided for the purposes of reducing the danger that certain prisoners posed to the public. The claimant's tariff had expired, and he continued to be detained</li> </ul>   | <p>Yes</p> |

| No <sup>1</sup> | Case name with neutral citation                                | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation   |
|-----------------|--|--|---|--|---|
|                 |  | <p>(1) The Secretary of State acted unlawfully in failing to provide courses;</p> <p>(2) The claimant's continued imprisonment after expiry of tariff was unlawful;</p> <p>(3) This was also in breach of Art 5(4) ECHR.</p> <p>Remedies sought: Order to release the claimant.</p> <p>Outcome: Allowed. Order granted to release claimant but stayed pending appeal to Court of Appeal. (The Secretary of State's appeal was successful on ground (2) but failed on ground (1): [2007] EWCA Civ 30)</p> | <p>2000) confers a benefit on individuals such as the claimant.</p> <p>(2) The loss he claims resulting from his unlawful detention is of a similar nature to the benefit that the legislation confers.</p> | <p>only on the basis that he was still a danger to the public; there was no opportunity to improve this situation since there was a lack of treatment courses.</p> <ul style="list-style-type: none"> <li>- The claimant's liberty was at stake, since he would continue to be detained.</li> <li>- Although it was not argued, the court considered that there was force in the point that if the prisoner was prevented from making a meaningful submission to the Parole Board, which is then disabled from reaching a proper consideration, then that would breach the claimant's right under article 5(4) ECHR.</li> <li>- The failure to provide treatment courses could ultimately have potentially "disastrous" consequences for the public in cases such as these. A court would be bound to release an unlawfully detained person, even if he is still dangerous (it was for this reason that the order was stayed pending consideration of the Court of Appeal).</li> </ul> |   |
| 14.*            | <i>R (K) v Halton Borough Council</i> [2007] EWHC 2485 (Admin) | Background: Challenge to local authority's decision not to destroy a file containing personal information relating to the claimant, contrary to an earlier promise made to him.  | No<br>Decision not made under statute or the prerogative.   | Yes<br><br>- Breaking their promise to the claimant was unlawful in number of respects: it breached a legitimate expectation, interfered with the claimant's Article 8 rights, and was an  | There is no conferral of benefit, so no loss can be claimed. However, the |

| No <sup>1</sup> | Case name with neutral citation  | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit   | Serious fault <sup>4</sup>  | Causation  |
|-----------------|--|---|--|---|--|
|                 |  | <p>Grounds: Failure to destroy the file;</p> <p>(1) Breached his legitimate expectation;</p> <p>(2) Breached Art 8 ECHR.</p> <p>Remedies sought:</p> <p>(1) Order to destroy the file;</p> <p>(2) Alternatively, order that the local authority conduct a risk assessment to determine whether or not to destroy the file.</p> <p>Result: Allowed. Order to destroy the file granted.</p> |  | <p>infringement of data protection principles. This was true on any interpretation of the promise.</p> <ul style="list-style-type: none"> <li>- The consistent refusal to honour the promise meant that there was continuing unlawfulness.</li> <li>- The initial promise had been carefully considered and was particular to the claimant. This trumped even the normally definitive principle of child protection.</li> <li>- Further, there had been no consideration given to the decision not to destroy the file. If the local authority had considered the matter, it would have realised that there was no justification for retaining the file.</li> <li>- The promise-breaking had been compounded by an earlier disclosure of the file to OFSTED, a serious error which the Ombudsman had already investigated.</li> </ul> | <p>claimant would currently be able to obtain damages under the Human Rights Act 1998.</p> |
| 15.             | <p><i>O'Callaghan v Charity Commission for England and Wales and Others</i> [2007] EWHC 2491 (Admin)</p> | <p>Background: Review of an order made by the Commission authorising the trustees of Alexandra Park and Palace to grant a lease to developers.</p> <p>Grounds: The challenge was</p>  | <p>No</p> <p>The ministerial assurance of consultation went beyond the statutory requirements.</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- A specific assurance of consultation was made by a minister of the Crown in the course of a debate in Parliament. The promise was made in order to meet the concerns of opponents.</li> </ul>   | <p>No loss</p>   |

| No <sup>1</sup> | Case name with neutral citation | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit | Serious fault <sup>4</sup>  | Causation |
|-----------------|---------------------------------|---|----------------------|---|-----------|
|                 |                                 | <p>in essence to the adequacy of the consultation exercise which resulted from a ministerial assurance.</p> <p>Remedies sought:</p> <p>(1) Declaration that the Order which consented to the lease was unlawful;</p> <p>(2) Order quashing the consenting Order.</p> <p>Outcome: Allowed. Declaration made and Order quashed.</p> |                      | <ul style="list-style-type: none"> <li>- The court described the Commission's interpretation of the assurance as "simply unreasonable and wholly unrealistic", and the consultation process as "very seriously flawed". All that the Commission made public was a draft order which gave consent to the lease, and a question and answer document. The details of the lease were withheld. Since there was a "complete absence of any information as what it was that consent was proposed to be given to" the consultation was therefore meaningless.</li> <li>- This was not a case where some information was provided which was inadequate: there was a failure to give any essential information.</li> <li>- The Commission also failed to give further consideration to whether and the extent to which the details of the lease should be made public even after representations from a number of objectors, which were acknowledged in a report to the Commission, and by its own officials.</li> <li>- The consultation as a whole was unfair, since the trustees answered the concerns of some objectors with references to the terms of the lease, which had not been made available to them in the first instance.</li> </ul> |           |

| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>   | Causation |
|-----------------|---|--|--|--|-----------|
| 16.             | <i>FH Cummings v Weymouth and Portland Borough Council</i> [2007] EWHC 1601 (Admin) | Background: Claimants, who were property developers, wished to use their land for a residential development. A local plan review adopted by the local authority effectively prevented this. At the inquiry dealing with the claimant's objections to this, the inspector ruled that the claimant could not rely on expert evidence because it was not lodged in time.<br><br>Grounds: Procedural impropriety:<br><br>(1) Breach of natural justice and Art 6 ECHR (failure to give the claimant an adequate opportunity to put their case);<br><br>(2) The local authority failed to give adequate reasons for its designations in the | Yes<br><br>(1) The Town and Country Planning Act 1990 confers a benefit on individuals such as the claimant.<br><br>(2) There was no loss in this case, but any potential loss would arguably have been of a similar nature to the benefit that the legislation confers. | - There was a subsequent private assurance made by the Commission to the trustees that the lease would not be made public. The Commission had no power to make this, and it had "lost sight" of the need for consultation.<br><br>Yes<br><br>- The inspector refused to allow the claimant to adduce important expert evidence; he made this ruling without considering the report. He failed to review his decision after the hearing and an adjournment. In doing so he denied the claimants the opportunity to rely on evidence which was determinative of a crucial issue before the inspector.<br><br>- The consequences were serious. The claimants were effectively denied a fundamental right – the opportunity to adequately put their case, or respond to the authority's, so far as a vital issue was concerned, in a context where the local authority was both the proposer and judge. This substantially and unfairly prejudiced the claimants in the hearing. | No loss   |



| No <sup>1</sup> | Case name with neutral citation                                       | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>   | Conferral of benefit   | Serious fault <sup>4</sup>   | Causation   |
|-----------------|---|--|--|--|---|
|                 |   | <p>review.</p> <p>Remedy sought: Quashing order.</p> <p>Result: Allowed on the first ground. The court ordered certain designations in the review to be quashed.</p>   |  |  |   |
| 17.             | <p><i>R (A) v Liverpool City Council</i> [2007] EWHC 1477 (Admin)</p> | <p>Background: Claimant sought asylum on the basis that he was 14 years old. Following an examination by a dental surgeon the local authority determined that he was an adult, withdrew children's social services and removed him to adult accommodation. When the claimant sought review of this decision, the authority obtained further reports but still reached the same conclusion.</p> <p>Grounds:</p> <p>(1) Illegality (in treating the dental surgeon's opinion as determinative, the authority failed to take account of a wider range</p> | <p>Yes</p> <p>(1) The Children Act 1989 confers a benefit on individuals such as the claimant.</p> <p>(2) Any alleged loss resulting from the local authority's conduct is of a similar nature to the benefit the legislation confers.</p> | <p>Yes</p> <ul style="list-style-type: none"> <li>- The legal position was clear – the authority was obliged to have regard to a wide range of factors when determining the claimant's age; yet the authority considered only the dental assessment, ignoring all other relevant information both initially and when it made its final decision. In doing so it failed to apply a logical and common sense approach to the assertions made in the dental report.</li> <li>- The authority also failed to provide the claimant with an opportunity to see and respond to the dental report. This was despite an express request by the claimant's representatives that they see a copy of the dental report if the report was being used as an age assessment. The authority acted in blatant disregard of this request.</li> <li>- The consequences of a determination by the</li> </ul> | <p>No</p> <p>There was no causation. The authority may lawfully make the same decision again.</p> |

| No <sup>1</sup> | Case name with neutral citation   | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit  | Serious fault <sup>4</sup>  | Causation  |
|-----------------|---|---|---|---|------------|
|                 |   | <p>of determinative factors);</p> <p>(2) Procedural impropriety (breach of natural justice).</p> <p>Remedy sought: Declaration and quashing order.</p> <p>Result: Allowed on both grounds. The court made a declaration that the earlier decision had been made unfairly, and quashed the authority's ultimate decision relating to the claimant's probable age. The authority was also ordered to make a determination of the claimant's age by a specified date, and to give notification to the claimant's representatives of this decision.</p> |   | <p>authority were serious – the denial of social services to which the claimant was potentially entitled.</p>   |            |
| 18.*            | <p><i>S v Secretary of State for the Home Department</i> [2007] EWHC 1645 (Admin)</p> | <p>Background: Claimant was detained in an immigration centre pending determination of her asylum claim. Her claim was denied and it was decided that she would continue to be detained pending deportation (it was expected that the claimant would be deported</p>  | <p>Yes</p> <p>(1) The Immigration Rules confer a benefit on individuals such as the claimant.</p> <p>(2) The loss claimed</p> | <p>Yes</p> <p>- The claimant had been detained in the immigration centre for a lengthy period (which was found to be unreasonable), in circumstances where the detention of two young children was involved, and it was difficult to conclude on the evidence that there was a likelihood that the claimant</p> | <p>Yes</p> |

| No <sup>1</sup> | Case name with neutral citation | Grounds in judicial review, <sup>2</sup> remedies sought and result <sup>3</sup>  | Conferral of benefit  | Serious fault <sup>4</sup>   | Causation |
|-----------------|---------------------------------|---|---|--|-----------|
|                 |                                 | <p>within two months). The claimant challenged the legality of the detention.</p> <p>Grounds:</p> <p>(1) Illegality;</p> <p>(2) Breach of Arts 5 and 8 of the ECHR.</p> <p>Remedy sought: Declaration.</p> <p>Result: Allowed. The court made a declaration that the claimant's detention pending deportation was unlawful and in breach of the ECHR.</p> | <p>resulting from the detention is of a similar nature to the benefit that the legislation confers.</p> | <p>would abscond if released temporarily.</p> <p>- There had been no meaningful investigation of the children's health during the detention period with the result that the baby developed anaemia and rickets: the court found that this was both foreseeable and avoidable</p> |           |