



**Law
Commission**
Reforming the law

**Administrative Redress: Public Bodies
and the Citizen**
Press summary

June 2008

PRESS SUMMARY

- 1.1 This summary briefly outlines the contents of the Law Commission's Consultation Paper *Administrative Redress: Public Bodies and the Citizen*.
- 1.2 This Consultation Paper deals with issues of considerable importance to public bodies and the public at large. We are considering whether the current system for administrative redress in both public and private law should be reformed.
- 1.3 The Consultation Paper outlines the Law Commission's initial findings on the availability of administrative redress and asks a series of open questions about the desirability of any reforms. The Law Commission is actively seeking as wide a range of views as possible.
- 1.4 This project has been guided by two fundamental considerations. The first is that, in principle, claimants should be entitled to obtain redress for loss caused by seriously substandard administrative action. The second is that special regard should be given to the role played by public bodies when considering when and under what terms they should be liable for such losses. Our key concern is to balance these two fundamental considerations. The Law Commission believes that the legal rules on liability should not impede the activities of public bodies or impose unacceptable burdens on public funds.
- 1.5 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.
- 1.6 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.
- 1.7 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.
- 1.8 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.

- 1.9 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.
- 1.10 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. We are seeking views of interested parties on this approach.
- 1.11 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.
- 1.12 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.
- 1.13 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.
- 1.14 Cases that do not satisfy the “truly public” test would be determined by the ordinary rules of negligence.
- 1.15 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. When public bodies are

the respondents, 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.

- 1.16 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.
- 1.17 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.
- 1.18 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 affect 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.
- 1.19 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 before the courts, 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).
- 1.20 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 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.
- 1.21 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.
- 1.22 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 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.

1.23 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.