

RESPONSE TO THE LAW COMMISSION'S CONSULTATION PAPER 187 ADMINISTRATIVE REDRESS: PUBLIC BODIES AND THE CITIZEN

FROM THE ASSOCIATION OF CHILD ABUSE LAWYERS

ABOUT THE ASSOCIATION

The Association of Child Abuse Lawyers (ACAL) provides practical support for survivors and professionals working in the field of abuse. Formed over 10 years ago, ACAL maintains a telephone help line and web site presence to sign-post survivors of abuse to lawyers who have the expertise and experience to assist them in obtaining the redress to which they are entitled. ACAL also campaigns in this area (most recently on the issue of limitation in child abuse compensation claims), and provides training, access to data bases and an information exchange to members to assist them in their work. ACAL's membership is made up of solicitors, barristers, psychiatrists and social work experts who are all specialists in this field.

HOW WE HAVE APPROACHED OUR RESPONSE

Where the specific points for consultation listed at pages 132 and 133 are relevant to our work and our members, we answer these below. We adopt the Part 7 numbering to indicate which question for consultation we are answering. Firstly however we wish to provide some feedback on other issues raised in the paper which are not covered by the specific consultation points and we do this below. References in brackets are to paragraphs in the consultation paper.

PREAMBLE TO OUR RESPONSE

ACAL is very concerned at the proposals contained within this paper, particularly as they relate to compensation claims on behalf of victims of abuse. We would argue strongly that all personal injury claims (of which we represent a small part) should be exempted from these proposals, which the authors of the paper admit would seek to subvert the rule of law and the principle of equality before the law (see paragraph 3.102). In our view should these proposals become law, there is a strong argument that they would breach a citizen's human rights.

What appears to be missing from the paper is an analysis of what is socially desirable. It is we argue socially desirable for citizens who are injured by the state, and through no fault of their own, to be compensated by the state on the same basis as they would have been had they be injured by a private individual or a private body. The paper does not deal with the 'hidden costs' of not doing so - personal injury/ abuse victims who are injured as a result of the state's 'public only' functions and who are not compensated for their injury (because they are unable to meet the higher threshold in establishing fault) will nevertheless need to resort to welfare benefits, local authority care services, NHS treatment etc. and there will be an opportunity lost for the DWP to recoup their expenditure on benefits paid.

We would emphasise that our client group are particularly vulnerable. Dealing with the effects of abuse (both physical and psychological) which may have been long buried, they are among the most excluded, stigmatised and voiceless members of our society. They are already handicapped when it comes to embarking on litigation against the state by virtue of their vulnerability and relative poverty. The reforms provide immunity from suit in certain circumstances to the state - which is least deserving of it - whilst in contrast the reforms proposed will not in our view confer any proportionate benefit to the citizen in general nor our client group specifically.

FEEDBACK ON SPECIFIC ISSUES RAISED BY THE PAPER

PRIVATE LAW FOCUS

At paragraph 2.5, the private law focus appears to be concerned with the torts of misfeasance, breach of statutory duty, and negligence. Is trespass against the person (assault, battery and false imprisonment) being excluded from the debate? It is mentioned at 3.104 as "a significant area where claimants may obtain damages for unlawful action". But where does it feature otherwise? Would 'intentional torts' be outside the scheme? Misfeasance is an intentional/ reckless tort and it is of course suggested that this should be abolished.

DAMAGES

At paragraph 3.13 it is said that the civil law award of damages does not punish, or make a moral vindication of the claimant's rights. However in our submission this is certainly the case of damages awarded by the European Court of Human Rights, and domestically under the Human Rights Act. In cases of trespass and misfeasance certainly, aggravated and exemplary damages can be awarded.

ALTERNATIVE REMEDIES (paragraph 3.21)

It is said that ADR is important and failure to adopt it when public money is involved is indefensible. In our members' experience (and case studies can be provided) it is the claimant who often suggests such resolution and the defendant public body who often rejects it. Whilst we accept that this in itself perhaps supports the assertion later in the paper that economic cost is not a powerful tool for change in a public bodies' behaviour, it is however indicative of how public bodies respond to litigation and build up costs. The clear remit of the paper is to attempt to limit liability thereby saving public bodies' financial resources for apparently better use elsewhere. But where better can those resources go than in making restitution for a wrong committed by a public body on a citizen? It is our view that, from the way that public bodies and their lawyers conduct litigation, they only have themselves to blame for the legal costs they ultimately have to pay in the event of an unsuccessful defence.

EX GRATIA PAYMENTS (3.45)

The practice of providing ex gratia payments appears to be approved by the Commission but it does not add to the jurisprudence. Ex gratia payments are ad hoc, inconsistently awarded and therefore the citizen has no certainty on which to be advised.

ALTERNATIVES TO LITIGATION (3.58)

Whilst alternatives to litigation are welcomed in certain circumstances, there are time bars on an individual's rights to access to the courts for redress, and proceedings often must be issued in order to protect that right. In the real world, what law firm would enter into a 'no win no fee' agreement with a client who instructs a lawyer to protect his/her position in a civil claim but is likely to resolve a case through an ombudsman scheme on which the lawyer is not instructed (as costs are not awarded if successful). It is accepted that the ombudsman scheme is not appropriate where compensation for lost earnings or care packages needs to be structured as the awards are modest, the ombudsman's recommendations are not legally enforceable and he cannot intervene where the claimant has another remedy before the court. So we conclude that the discussion of the ombudsman scheme is largely irrelevant to personal injury and abuse victims. (See also paragraph 4.153 - we would comment similarly that the idea that claimants should exhaust statutory remedies before bringing any court action does not take account of the limitation position in personal injury claims).

LACK OF EMPIRICAL DATA

It is accepted at paragraph 6.9 and at B2 that "our research confirmed that direct empirical evidence regarding the impact of liability on public bodies in the UK is extremely limited". So where is the impetus and need for any change, let alone such radical change? We note that at paragraph 6.10 the largest 'provisions' for litigation costs and damages relate to medical negligence claims and the coal health scheme (compensation

to employees). But we also note that it is not proposed to include medical negligence claims in the scheme (4.5) nor compensation as a result of an employer/ employee relationship. We would add that on figures from the Compensation Recovery Unit the number of accident claims reported is on a downward trend and the latest Data Monitor report indicates that costs and damages are fairly static. We are concerned that the impetus for this report has largely come from public bodies themselves and a perception of a compensation culture which on the figures we do have available simply does not exist.

ANSWERS TO SOME OF THE SPECIFIC POINTS FOR CONSULTATION

7.3: DUTY OF CARE/ NEGLIGENCE

We do not agree with the authors' assertion at paragraph 2.7 that negligence is "uncertain and unprincipled... in relation to public bodies" and this has been "coupled with the unpredictable expansion of liability over recent years". We would argue that the law of negligence is in fact steps behind the increasing role that Parliament has legislated for public bodies' own involvement in people's lives, for example social care and child protection. The Human Rights Act means that citizens must now have a domestic source of redress open to them (see *AK & RK v United Kingdom (Application no. 38000(1)/05)*, 30th September 2008). Does the Commission's view on the law of negligence change now in the light of the House of Lords' decisions in *Van Colle* and *Smith v Chief Constable of East Sussex* [2008] UKHL 50?

Further to paragraph 4.56 of the paper, the increase in governmental liability comes - we would argue - with the increase in powers and regulatory function of public bodies. With this comes jurisprudence and test cases which is natural in the evolution of common law. We do not agree that for the vast majority of personal injury claims "outcomes are difficult to predict".

7.4: JOINT & SEVERAL LIABILITY

Whilst we appreciate that this is problematic where the private co-defendant is insolvent, the corollary of the proposals is that the claimant will not be able to enforce his right of compensation at all. Balancing outcomes, is it not better for the claimant to be compensated? What we say above in our preamble about the hidden costs of limiting access to redress for personal injury/ abuse victims has an impact here (4.191). We would submit that it is better for an even partially guilty party to pay than no one at all.

7.6: MISFEASANCE & BREACH OF STATUTORY DUTY

We have no reason to believe that the tort of misfeasance leads to an excessive burden on public authorities. To remove it altogether could cause injustice. Constitutional principles require safeguards and checks and balances on public power and these should mitigate against abolishing this tort in a civilised democracy. In any event, reliable statistics of the incidence of such claims need to be analysed before consideration can be given as to whether the tort should be abolished, something that the Commission does not currently have (hence the question at paragraph 4.91).

The argument that even a minor breach of statutory duty could lead to a compensation claim to compensate any resulting loss and is therefore excessive (4.83) does not factor in the concepts of proportionality and causation. We believe that it should be for Parliament to specifically exclude compensatory remedies for a breach of an imposed statutory duty as now. In any event it is a somewhat circular argument as often the common law tort of negligence is informed by a breach of statutory duty even where there may be no right (or only an arguable right) to compensation for a specific breach.

7.7 & 7.8: TRULY PUBLIC ACTIVITY

There is a real need here to define terms as to what is a 'truly public' activity in a private law action. We have to say that some of the reasoning in the paper appears confused (or

at least our understanding of what is proposed is confused). As we understand it, a 'truly public' activity is something which only a public body can carry out. Highway maintenance is described as a truly public activity in the paper and tripping claims would therefore be subject to the proposed higher liability regime (6.5). But private un-adopted roads are maintained by private individuals. Does therefore the 'truly public' activity only apply to specific duties of public bodies under the Highways Act? But compensation claims in tripping actions are also founded in nuisance and negligence which can be brought against private as well as public bodies. So is this truly a 'public law' function?

Of more direct relevance to our members and the clients we serve is the abuse of children. Is for example the abuse of a child in a local authority care home subject to the scheme? What about a child in foster care where a care order has been obtained by the local authority? Does it make a difference if the child in foster care is not covered by a care order, but where the child has been accommodated with the express consent of the parents? What about private care homes? Would a child abused in local authority care therefore have a higher test of liability to overcome than a child abused in a Barnardo's home? Presumably the scheme would capture those 'professional negligence' type actions where social services are sued for failing to take a child into care, or for negligently returning a child to the care of an abusive parent.

We note that it is stated at paragraph 4.114 "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". Why should this be? This will act as a windfall for the insurers of those private companies engaged in running prisons for the profit of their shareholders. Then at paragraph 4.122 it is stated that the fact that some activities are undertaken under statutory powers will not capture other functions such as the building of hospitals, the provision of libraries or housing the homeless. Other organisations do this but they have "freely chosen to undertake the activity". Is that the case in the example above with the Barnardo's home and/ or the private care home (or foster placement)? Is this not at odds with paragraph 4.114? And see A31 where 'truly public' activities are defined by the negative – they are not functions carried out by the state that are also performed by the private sector and where the 'public' or 'private' quality makes little difference to the performance. Examples given are NHS doctors and teachers employed in the public sector. By contrast 'truly public' activity is when the state is exercising a statutory power and there is no private sector equivalent, but this surely ignores the issue of private sector volunteering. And are banks now public authorities?!!

Whilst clearly clarification is needed, whatever the scheme, those caught by it will have less chance of compensation than if they were harmed by a private individual/ body. There will therefore be a two tier system of justice created overnight. It is worth bearing in mind that even under our present system claimants suing public bodies are on the wrong side of an unlevel playing field: Claimants generally have very limited resources themselves (and are often instructing their solicitors to fund the cases themselves on a no win, no fee basis or through very limited and increasingly unavailable public funding). They are pitched against a public body with it appears unlimited resources to defend actions if they wish. The proposed scheme will further and unreasonably tip the playing field in favour of the state.

7.9 CONFERRAL OF BENEFIT TEST

Again further clarification is required. As we understand it, under paragraph 4.113 the conferral of benefit test is to establish whether the activity complained of intended to confer a benefit on individuals and whether the harm suffered was of a similar nature to the benefit conferred. We do not see why the harm suffered should be proportionate to the apparent benefit. Does this test replace current issues of foreseeability and proximity? It appears to focus on legal regimes created by statute "as we believe that this is where the bulk of claims would or could occur". So is this not intended to apply to negligence claims?

7.10 SERIOUS FAULT TEST

This seems to be predicated on the actions of the public body rather than the seriousness of the harm done. (4.103 (4)). For the higher level of fault to apply ("far beyond that required to establish illegality or negligence" (6.22)), whilst the court would take into account the seriousness of the harm caused, it also must consider the cost and practicability of avoiding harm and the social utility of the activity in which the public body was engaged. It speaks of the 'aggravated' manner of the behaviour as opposed to mere administrative failure (4.147). In our view the whole scheme should exempt cases where it is alleged that physical or psychiatric harm has been caused by a public body's actions/ omissions - the very fact that this type of harm may be proved to have been caused by the public body would surely indicate that serious fault has occurred.

Further if it is right that section 1 of the Compensation Act "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" (3.156) then we would say that this offers sufficient protection for public bodies and to take the law further would be a grave mistake.

7.14: DISCRETION TO ABANDON JOINT & SEVERAL LIABILITY RULE

The idea to give courts the discretion to abandon the joint & several liability in 'truly public' cases will lead to uncertainty and this will lead to an increase in costs and court time.

7.15: STAY PROVISION FOR CIVIL CLAIMS TO GO TO THE OMBUDSMAN

We believe this is problematic where a civil claim could also be pursued and is dependant on obtaining and preserving evidence. Delays in so doing could prejudice the claimant's position. There is also the impact of the time limits for bringing a court action which has been dealt with above. On a general note, we would question whether the Government is likely to commit sufficient resources to the ombudsman scheme in order to deal with the huge influx of claims when the bar to the ombudsman dealing because the complainant has other remedies is removed.

7.20: EFFECTS OF IMPOSING LIABILITY ON PUBLIC BODIES

Paragraph 6.7 gives the clear reason behind these proposals: To stop a perceived expansion of negligent liability to public bodies. We would argue that to do so would give no impetus to reform, and we believe there is clear evidence that litigation does change attitudes and practices - for example in the field of child protection.

If the Law Commission really intends to change behaviour by these reforms, it should be looking at legislation to make the people at the top accountable. In public organisations (as well as private ones to an extent) people can hide behind the 'systems failure', which means everyone and no- one was responsible. We cite for example the Climbie enquiry. Legislation (such as corporate manslaughter, making directors personally liable for major health and safety breaches and so on) is the real way forward here.

We note that the availability of insurance is not dealt with in any great detail here, but public bodies are often insured and so it is often not the tax payer who is footing the bill. The scheme proposed by the Law Commission would operate as a windfall to insurers. We would argue that there may be budgetary considerations to injuring a person (or a class of persons) even for a government department or a local authority. The idea that when money passes from government to claimant, money earmarked for public expenditure is lost is no doubt true - more unjustly so we would suggest in a non fault system - but this ignores the social desirability that where an individual is harmed through no fault of their own, but by the fault of the state, they should be restored as far as possible to the situation they would have been in but for the accident or assault. It also

ignores the 'hidden state costs' of prohibiting someone from otherwise successfully claiming compensation, dealt with in our preamble above.

Association of Child Abuse Lawyers
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