



## Redefining the regime for public sector claims?

Law Commission Consultation Paper 187  
*'Administrative Redress:  
Public Bodies And The Citizen'*

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## 1. Introduction

According to the Law Commission, the central question when a citizen asserts rights against a public body may be framed quite simply: when and how should the individual be able to obtain redress against a public body that has acted wrongfully? The Commission first framed this general question in a scoping study published in October 2006, which has now been followed by a full formal consultation paper.

The Law Commission published its consultation paper 187 *'Administrative Redress: Public Bodies And The Citizen'* in early July 2008. Formal consultation closes on 7 November 2008. The paper sets the scene for a radical re-examination by the Commission of the remedies available to a citizen pursuing a public body. In a striking passage, the consultation paper notes that:

*'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.'*

The Commission's detailed proposals could, if implemented, lead to fundamental changes in the substantive and procedural law affecting such claims.

The analysis in this paper has several purposes: first to raise awareness of LCCP 187, second to analyse the proposals it makes and third to provide those with an interest with material to assist in any responding to the Commission.

## 2. The consultation paper

LCCP 187 runs to over 180 pages in total and examines non-litigated and litigated routes for securing redress against public bodies. The former are said by the Commission to include internal mechanisms (such as complaints procedures), external mechanisms (enquiries and tribunals) and finally relevant ombudsman schemes. The latter – the litigated routes – concern substantive legal remedies in public and private law, which would conventionally be thought more suited to detailed study by the Commission.

The main legal remedies examined in public law are actions for judicial review and for breaches of the Human Rights Act 1998 (it is probably coincidental that the paper was published a decade after the Act was implemented). European case law is also examined.

As regards public law, the Commission is critical of the anomaly whereby damages are not generally available in domestic judicial review proceedings, but they may be available in situations covered by the HRA or by EU law. It notes that the review or quashing of a decision may not, of itself, provide adequate redress to a claimant who has suffered loss as a consequence of such a decision. It quotes the hypothetical example of an unfounded refusal by a local authority to grant an applicant a taxi licence.

In respect of private law torts, the Commission is critical of the piecemeal evolution of the law of negligence in particular, with all the associated uncertainties that lead to fairly frequent appeals to the House of Lords on matters of principle. In fact, the Commission notes that *'the current situation is unsustainable'* and, in a well-phrased understatement, concludes that *'it does not seem desirable to leave the system in present state'*.

The Commission is also critical of current law applying to the other torts – breach of statutory duty and misfeasance in public office. The requirement that a claimant should show that Parliament specifically intended to confer a right to compensation in cases of breach of statutory duty is said to have defeated almost all claims. The requirement to show malice by an official in the case of misfeasance in public office is regarded as setting a very high test for claimants, and as potentially contributing to defensive settlement strategies among authorities anxious to avoid the tag ‘malicious’.

### 3. The proposals - redefining the regime?

Mainly for the reasons above, the Commission concludes that *‘there is a lack of any underlying principle or foundational structure that could lead to a simpler and more predictable system’* and hence suggests a new specific regime for both private and public law claims. This will be examined below.

#### 3.1 Non-litigated redress

In addition to its proposals on legal routes to redress, the Commission also recommends reforms to the non-litigated forms of redress, as noted at section 1 above. For cost-effectiveness and speed of resolution, it clearly favours an hierarchical approach to resolving disputes between the citizen and public bodies.

The hierarchy would begin with the internal complaints process, which should be capable of resolving the majority of cases. If however, there was a fundamental disagreement or the matter needed resolving in public, it could be referred to a tribunal or enquiry. The final non-litigated option would be to refer to matter to the relevant ombudsman. The Commission makes three further recommendations to broaden access to an ombudsman. First, it recommends removing the so-called ‘statutory bar’ and ‘MP filter’ which may operate to keep cases away from an ombudsman. Second, it recommends that the court should be able to stay proceedings where the matter would be more suitable for resolution by an ombudsman. Third, it proposes that an ombudsman should have the power to refer question of law to the court (this is modelled on EU law, in which a national court may make a reference to the European Court of Justice on a point of EU law).

#### 3.2 Litigated cases – public & private law

As has been alluded to above, the Commission outlines a new regime for claims against public bodies by citizens, whether in public or private law. The proposals are provisional and subject to the consultation process, and as such are not fully formed in either draft legislation or draft procedural rules.

**It is important to note that the Commission is not however proposing merging public law judicial review with private law actions against public bodies.** It states specifically that claims 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. It is difficult to disagree with the Commission’s assertion that it should be clear in most cases if the object of the claim is either to obtain an administrative remedy or to obtain compensation.

In essence, the Commission’s new regime draws on principles of corrective justice, and is designed to reflect the special status of public bodies and to protect them from unmeritorious claims – thus echoing not only the case law following *Tomlinson v Congleton*, but also the

compensation culture debate and the '*desirable activity*' provision of section 1 of the Compensation Act 2006.

Under the Commission's proposals, the private law torts of breach of statutory duty and misfeasance in public office could be abolished. The overall regime in public and private law would then be based around individual constituent elements of the action, at the heart of which would be the requirement to show 'serious fault' on the part of the public body. The individual elements suggested by the Commission also include a proposed relaxation of joint and several liability in favour of the public body defendant and may be summarised as follows:

- Is the claim justiciable?
- Was the public body engaging in a 'truly public' activity? (if yes, then the 'serious fault' test below would apply, if not ordinary rules of negligence would apply)
- Does the legal regime under which the public body was operating confer a benefit on the claimant?
- Does the claim show 'serious fault' on the part of the public body?
- Are the normal rules on causation satisfied?
- Should the normal rules on joint and several liability be modified in respect of the claim?
- How should the general rules on damages be applied in respect of the claim?
- Does the public body have a specific statutory immunity from claims?

In public law (judicial review) cases, the Commission proposes to allow the recovery of damages if the claimant can show the key elements (above) of benefit, 'serious fault' and causation. This is said to be a natural development of the law and to reflect case law under the HRA and EU law. By way of a control mechanism, the Commission recommends that damages in judicial review cases should be a discretionary remedy, with any such claim subject to judicial examination at the permission stage.

It is worth examining the three main elements proposed by the Commission – truly public activity, conferral of benefit and serious fault - in more detail.

'*Truly public activity*' is the test proposed to assess whether a claim should be made in negligence or under the Commission's new private law regime. Essentially, the Commission is seeking a test to isolate activity carried out by the public body in furtherance of statutory duties and powers which do not apply to private individuals or organisations. Such activity would be '*truly public*' and, as a consequence, private law claims arising from it would be subject to a '*serious fault*' test. In contrast, claims arising from day to day activities carried out by a public body which are no different to that carried out by a private individual or company would be subject to the normal law of negligence. Occupying office premises or ordering office furniture are possible examples.

In proposing its '*conferral of benefit*' test, the Commission draws from the conferral of rights test adopted in EU law by the ECJ. The test proposed is two stage: first to ask if the legal measure under which the public body acted (or failed to act) was intended to confer a benefit on individuals (in the sense of promoting or protecting rights and interests), and second to ask whether the harm complained of was of the same type as that benefit. '*Conferral of benefit*' therefore focuses on the objective intention of the legal measure. As the Commission points out, this contrasts with the current test in breach of statutory duty claims – which is whether the legislature subjectively intended a right to compensation for breach of the measure in question.

The '*serious fault*' test is designed as a control mechanism on claims, and is a higher test than mere negligence. This reflects the Commission's thinking on corrective justice and on the special status of public bodies, which has already been noted. The test is essentially one of aggravated fault, one of conduct which falls far below the standard expected in the circumstances. The Commission recommends that established factors regarding the degree of fault could be taken into account, and it lists the following:

1. the risk or likelihood of harm involved in the conduct of the public body
2. the seriousness of the harm
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, including factors such as preventing an undue administrative burden on the public body
6. the extent and duration of departures from well-established good practice, and
7. the extent to which senior administrators had made possible or facilitated the failure or failures in question.

At first sight, the phrase '*social utility*' at (5) would appear to be very close to the '*desirable activity*' test set out in section 1 of the Compensation Act 2006.

### 3.3 Questions for consultation

Having set out its proposals, the Commission frames the key questions for consultees in the following terms.

- *Should the torts of misfeasance in public office and breach of statutory duty be abolished?*
- *We invite comments on our formulation of the 'truly public' activity test and whether it would act as a suitable 'gatekeeper' to our private law scheme.*
- *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.*
- *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.*
- *We invite comments on the possible operation of a 'serious fault' regime in the context of the scheme outlined in the Consultation Paper.*

## 4. Next steps

As with any Law Commission consultation, the timetable for achieving reform is very much in the medium to long term. In the short term however, the principal task for those with an interest in claims against public bodies is to respond to the proposals above within before the deadline of 7 November.

We set out a possible timetable for medium or long term activity below. At this stage, any assessment of timing is purely indicative and will be subject to change as matters develop.

Date	Action
summer 2008	LCCP 187 published on 3 July
autumn 2008	consultation closes on 7 November
autumn 2009*	responses to consultation published, accompanied by draft legislation
summer 2010*	Government accepts Law Commission proposals
autumn 2010*	Draft Bill included in Queen's Speech
spring 2011*	supporting regulations and procedural rules considered in draft
summer 2011*	Bill receives Royal Assent
autumn 2011*	Commencement of new regime for claims against public bodies

\* estimated

Based on experience, the timetable set out above is most probably on the optimistic side, and would represent both a quick turn around by the Law Commission following consultation and a fairly rapid adoption by Government of the final post consultation proposals.

When considering responding to the paper, it is worth noting that the Commission is not limiting its consultation to technical or qualitative comment on its proposals. In its research, it found that evidence of the impact on public bodies in the UK of changes in liability was extremely limited and hence it makes an open call for assistance with this aspect.

*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.*

This clear invitation represents an excellent opportunity for relevant facts and/or case studies on the impact of liability and claims burdens to be drawn to the Commission's attention at an early stage in its thinking.

## 5. Comment and wider issues

The general matter of liability to individuals of public authorities carrying out statutory duties and services is both topical and complex.

A key recent issue is the extent to which protection under the Human Rights Act 1998 attaches to services delivered to citizens by private sector companies operating under contract with the public authority which itself is subject to the duty to provide the service in question. The matter reached the House of Lords in June 2007, in the case of *YL v Birmingham City Council*.

In *YL*, the service in question was the provision of care and accommodation under the National Assistance Act. The House of Lords held by a majority of 3:2 that the private sector provider did not fall within the definition of a public authority under the HRA. Hence HRA protection would not attach - as against the private service provider. The Government acted quickly to alter this interpretation of the Act, so that HRA protection would apply to all residents placed in care by public authorities. By virtue of section 145 of the Health and Social Care Act 2008, providers of care and accommodation in the factual circumstances of *YL* are now to be taken to be exercising functions of a public nature for the purposes of section 6 of the HRA.

The broader question of HRA protection and contracted out services generally has not been addressed by the 2008 Act. However, during the debates in Parliament, Ministers indicated that a wide consultation on this topic and section 6 of the HRA was likely to be undertaken within the consultation on a British Bill of Rights. This has yet to begin.

More recently, the House of Lords again considered HRA issues and the liability of public bodies in the case of *Van Colle v Chief Constable of Hertfordshire* in July 2008. In *Van Colle*, the claimant had been a witness to serious crime. He received death threats from the perpetrator of that crime and told the defendant police force that he needed protection. Such protection was not provided and the claimant was subsequently murdered by the perpetrator. The Lords refused to allow claims against the force - neither under the HRA (right to life) nor in negligence - largely for public policy reasons. The Lord Chief Justice, Lord Phillips, made the following comment:

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

*'Administrative Redress: Public Bodies and the Citizen' that directly addresses the issues raised by this appeal.*

The recent examples of *YL* and *Van Colle* strongly reinforce the Law Commission's finding that the law applying to redress against public bodies is uncertain and developing in a less than satisfactory manner that requires frequent and costly referrals to the House of Lords.

For public bodies, the legal uncertainty makes it difficult to predict future liabilities, which in turn must impede the efficient allocation of limited (taxpayer funded) resources as between providing services or servicing claims. For claimants, the complexities of the current system may well mean individuals are unable to obtain redress where they have been subject to administrative behaviour that falls far below that expected of a public body.

The Law Commission's proposals for a new regime for redress against public bodies represent a brave attempt to simplify the system for all concerned. The proposals recognise the important role of non-legal mechanisms in providing a first point of redress for aggrieved citizens and also seek to bring a new principles-based approach to legal routes to redress, whether in public law or private law.

The consultation process should demonstrate whether the Commission has struck the right balance in setting out its new regime. The political and legislative process that may follow should demonstrate whether central Government – of any party political complexion - is prepared to implement the measures that will follow this consultation.

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