

Keith Vincent
The Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ

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By E-Mail: administrativeredress@lawcommission.gsi.gov.uk

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Our ref: AL/LAWCOM/ADMIN

Administrative Redress: Public Bodies and the Citizens

Please find below our comments on the above consultation.

Background

Who we are

The Legal Services Commission (LSC) commissions £2 billion of legal aid in England and Wales. Through around 5,000 legal aid providers, we help over two million people in England and Wales every year.

The LSC enables people to safeguard their rights and address their problems. Our work is essential to the fair, effective and efficient operation of the civil and criminal justice systems. It is also critical in helping to provide access to justice and fair trials for all. We commission the services people need from solicitors, barristers and advice agencies. The skills and commitment of legal aid service providers are essential to helping people resolve their problems. We deliver legal services through two schemes: the Community Legal Service and the Criminal Defence Service.

How we work with the government

We are a non-departmental public body sponsored by the Ministry of Justice (MoJ). We play a big part in helping the MoJ achieve its aims of:

- promoting justice
- protecting the public
- increasing confidence in justice
- providing access to justice for all
- upholding rights
- safeguarding and modernising our constitution.

The Lord Chancellor and Secretary of State for Justice is accountable to Parliament for our activities and performance. The MoJ agrees its overarching Public Service Agreement targets with the Treasury. We in turn set our objectives in discussion with the MoJ.

Consultation Response

In summary, the LSC welcomes any reform of the current law, which seeks to balance the obligation to provide fair and reasonable redress for individuals who have been subject to substandard administrative action, while limiting the liability of public bodies, in view of the wider obligations they owe to society as distributors and administrators of publicly funded services.

The LSC has limited its response to specific points of concern to it, in its dual role as a public body which faces claims for compensation and as a funder of legal services which relate to such claims. For ease of reference, we have adopted the same numbering and headings used by the Law Commission (Commission) in its paper.

Part 4 – Liability in Public and Private Law

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

The idea that any party found to be responsible for the loss sustained by a claimant is liable for all of that loss, irrespective of the magnitude of its role in the claimant's loss, leaves public bodies with the prospect of paying out compensation beyond their actual culpability for causing any losses. This, as the Commission suggests, would seem to have the potential to create an impetus to bring actions against public bodies, and the LSC welcomes the Commission's provisional proposal that the operation of joint and several liability should be altered, so that courts can assess the relevant culpability of public bodies and apportion any awards appropriately.

1.92 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)

Anecdotally, the Commission's conclusions about the limited use of this tort in practice would seem to be supported by the limited number of such actions brought against the Commission and the limited number of such cases funded by the Commission.

1.93 Should the torts of misfeasance in public office and breach of statutory duty be abolished? (paragraph 4.106)

The need to show "malice" in the activity of an individual for which a public body can be held liable sets a very high liability threshold. In particular, a public body's concern about being labeled "malicious", has the potential to lead to an overly defensive strategy in relation to the settlement of claims, and the LSC agrees there may well be merit in reforming the operation of, or indeed abolishing, the tort of misfeasance in public office altogether.

Part 5 – Relationship between Ombudsman and court-based options

1.102 Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum?

The LSC would welcome a specific power to stay proceedings where a Court thinks that a case, or a specific issue within a case, would be more appropriately dealt with by an ombudsman's investigation. The LSC's understanding is that the effect of this would be to require an individual to bring suitable claims to an ombudsman before approaching a court/proceeding with legal action, whilst allowing the claimant the liberty to revive court proceedings if there remained any point of law that still required adjudication.

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

The LSC notes that such a proposal would significantly alter the current position on permission - there being no such provision for any class of applicant in judicial review at present. Retaining a permission requirement would allow the Administrative Court to keep control of its own caseload and, in particular, its jurisdiction to determine those cases which properly fall to be considered by it. On balance, the retention of the permission requirement, would be the LSC's preferred option.

1.105 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?

The LSC welcomes the suggestion 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. The LSC supports the provisional view that the ombudsman should be able to conduct an investigation where, in all the circumstances of the case, it is in the interests of justice to investigate the claim.

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

Whilst the LSC has no specific objections to the removal of the filter, on the face of it, it would appear that the alternative position suggested by the Commission, namely the adoption of a dual approach, allowing direct access, but also allowing MPs to refer claims arising out of their constituency business to the Ombudsman, would be preferable, retaining as it does, the 'short stop' function (albeit more loosely) of the filter.

In conclusion, the LSC is pleased to note that the Commission, at this formative stage, recognises that public bodies, potentially affected by any changes, will have legitimate concerns about their effect and that it acknowledges that it should work with them to address such concerns.

If you have any queries about the contents of this response please do not hesitate to contact Anthony Lawrence, Legal Adviser, at 020-77837271.

Yours sincerely

Carolyn Regan
Chief Executive
Legal Services Commission

cc. Anthony Lawrence, Corporate Legal Team, LSC