

5/17/62

Memorandum No. 21(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Defense of
Actions Brought Against Public
Officers and Employees)

Attached (blue pages) are two copies of a draft of a tentative recommendation relating to defense of actions brought against public officers and employees. We are hopeful that the Commission will be able to approve this tentative recommendation for distribution for comments after the May meeting. Accordingly, we suggest that you mark your revisions on one copy of the attached tentative recommendation so that you can turn it in to the staff at the May meeting. We suggest, however, that you bring to the attention of the Commission at the May meeting any revisions that involve policy or which you believe that the Commission should consider.

For your convenience we have attached as Exhibit I (yellow pages) the text of a number of statutes that relate to the defense of public officers and employees. Some, but not all, of these statutes are amended or repealed in the tentative recommendation (blue sheets).

Exhibit II (green sheets) is the text of the Attorney General's opinion relating to Government Code Section 2001. Several references to this opinion are contained in the tentative recommendation.

Exhibit III (pink sheets) contains material concerning the interpretation of Government Code Section 2001 prior to the 1961 amendment of

that section. The tentative recommendation refers to the Tracy case which is discussed in Exhibit III.

The following matters are suggested for Commission consideration in connection with the attached draft of the tentative recommendation (blue sheets).

1. The Commission may wish to consider whether it is desirable to prevent the public entity from defending actions or proceedings to remove an officer or employee from his office or employment. See Section 991.1(a) (top of page 10 - blue sheets).

Section 3060 of the Government Code provides:

An accusation in writing against any officer of a district, county, or city, including any member of the governing board of a school district, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. An accusation may not be presented without the concurrence of at least 12 grand jurors.

Consideration should be given to permitting the public entity to defend a proceeding to remove a public officer instituted under Government Code Section 3060. The policy considerations involved are stated in the following quotation from the Tracy case (page 1 of Exhibit III, pink sheets):

. . . public interest is involved in any proceeding brought to remove a public officer from office; that faithful public officers should be protected from unfounded accusations based on honest action taken by them in good faith and without malice; that if such public officer be wrongfully charged he should be defended in the public interest, because otherwise a public official improperly charged, could be hounded out of office by unfounded charges brought against him requiring him to expend enormous funds for counsel fees and court costs in defending himself . . . ; that any decrease in the potential liability of an official will increase the willingness of competent people to assume the risk of office and an expenditure to that end is for a public purpose.

Note that the court responded to this contention by the public officer in the Tracy case as follows:

It does not appear to us that this change [an amendment to Government Code Section 2001] clearly indicated a legislative intent to so radically enlarge and change the purposes and scope of the Act as to include the costs of defense of a criminal action or of a grand jury accusation, which is criminal in nature, instituted by a body politic in the name of the People of the State of California which, in effect, would call upon the district attorney to prosecute the action and the county counsel to defend the action at the county's expense.

Our tentative decision on defense of criminal actions by public entities would seem to justify permitting a defense where an officer is sought to be removed from office under Government Code Sections 3060 to 3073, inclusive. Whether defense of the removal proceedings should be discretionary with the public entity (as in criminal actions) or should be a matter of right is a question of policy. If defense were a matter of right and the public entity refused to defend because it determined that the officer was guilty of bad faith, corruption or actual malice, the public officer could retain his own attorney and could recover the expenses of his defense if he established he was in the scope of his employment and the public entity failed to establish that he acted or failed to act because of bad faith, corruption or actual malice.

A possible solution to the problem might be to delete the limitation from Section 991.1 (a) and insert "a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code" in either Section 991.2 or 991.4 -- depending on whether the Commission believes that the defense should be required or discretionary.

Note that proceedings to remove public employees would be still excluded if the above change were made under Section 991.1(a)(2)(page

10 of blue sheets) which excludes defense of actions brought by a public entity against its own employee as an individual and not in his official capacity.

2. The Commission may wish to consider whether it is desirable to exclude defense of actions or proceedings brought by a public entity against its own employee as an individual and not in his official capacity. See Section 991.1(a)(2)(page 10 of blue sheets).

Consider the argument made above for defense of a removal proceeding against a public officer. Does it apply to a removal proceeding by a public agency of its own employee? Probably a civil service removal proceeding would not be considered an "action or proceeding". If defense of such employee removal proceedings were required, the public entity would normally refuse to defend and the employee could recover the cost of his defense from the public entity if the proceeding was based on an act or omission in the scope of his employment and the public entity failed to establish that he acted or failed to act because of bad faith, corruption or actual malice.

Should a defense be provided at public expense in civil actions and proceedings brought by the public entity against its own officer or employee? For example, should the employee be entitled to a defense at public expense where the public entity brings an action against him for his negligent act which causes an injury to the employing public entity? If, for example, he had injured the property of another public entity he would be entitled to a defense at public expense. Do different considerations apply here?

A consideration that might be pertinent to take into account is the

practice of private employers. Would a corporation provide a defense to an action to remove a corporate officer from office? Would a private employer provide his employee with a defense if the employer brought a civil action against his employee? In the other cases covered by the tentative recommendation, it would seem that the practice we would require of public entities is generally in accord with the practice one would expect would be followed by most private employers.

3. Note the standard set out in Section 991.4 (pages 10-11 of blue sheets) relating to defense of criminal actions and proceedings. This is basically the same standard now found in Education Code Section 13007.1 (page 12 of Exhibit I -- yellow sheets) and seems to be an appropriate standard for use here.

4. Section 991.3 (page 10 of blue sheets) provides that the public entity need not defend an action or proceeding if the entity makes certain determinations. What if the public entity refuses to defend and makes a determination under Section 991.3 that is obviously made in bad faith? Would a writ of mandate be issued to compel the performance of the duty to defend under Section 991.2? The statute does not specifically deal with this problem. Note that the tentative recommendation implies that a writ of mandate might issue to compel performance of the duty under Section 991.2 in rare cases even though the entity had made a determination under 991.3. See item 2, page 6 of the tentative recommendation (blue sheets).

5. Note the burden of proof requirements under Section 991.6 (pages 11-12 of blue sheets). The public employee can recover the cost of his defense if he proves he was in the scope of his employment at the

time of the act or omission unless the public entity proves that he acted or failed to act because of bad faith, corruption or actual malice. The staff is not certain exactly what the Commission decided at the April meeting with reference to this matter. It does seem that the public employee should be required to prove he was in the scope of employment, however, since the injured person would have to prove scope of employment in order to recover had he brought an action against the public entity rather than the public employee.

6. Some of the amendments contained in the draft statute will become unnecessary when the Commission prepares a tentative recommendation relating to indemnification of public officers and employees. Should the amendments made to the following sections be included in the statute set out in the tentative recommendation: Section 61632 of the Government Code (pages 15-16 of blue sheets); Section 31088 of the Water Code (pages 17-18 of blue sheets); the amendments contained in Section 11 of the Draft Statute (page 18 of blue sheet). The provisions amended in these three sections were not repealed because they indicate that the public entity involved has the authority to retain its own counsel to defend actions brought against it or its officers, agents and employees, rather than relying upon the district attorney or county counsel to defend such actions. The amendments are intended to make clear that the power to retain counsel to defend actions against public officers, agents and employees is subject to the provisions of the new general statute.

7. The text of the tentative recommendation should be studied carefully to insure that it accurately reflects the decisions of the Commission and the reasons for those decisions.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Government Code Section 2000 provides:

2000. Whenever suit for damages resulting from

(a) injuries caused by or due to the inefficiency or incompetency of any appointee or employee of any board or any member thereof, or

(b) negligence in failing or neglecting to remedy the dangerous or defective condition of any public property or to take such action as is reasonably necessary to protect the public against the condition is brought against any member of a board, the cost of defending the suit, including attorney fees actually expended in defending the suit, is a charge against the county, city or school district of which the member was an officer if the member had neither knowledge nor notice of

(1) the inefficiency or incompetency of the appointee or employee at the time of the injury, or

(2) the dangerous or defective condition.

[This section applies only to cities, counties and school districts]

Government Code Section 2001 provides:

2001. (1) As used in this section:

(a) "Action or proceeding" does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

(b) "Employee" includes an officer, agent or employee.

(c) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

(2) Unless provision has been made by the public entity for the employment of other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

(a) The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

(b) The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

(c) Any damages caused by any act or failure to act by such employee occurring during the course of his service or employment.

(3) The attorney's fees, costs and expenses of defending

the action or proceeding pursuant to this section are a lawful charge against the public entity. The public entity may recover from the public employee any attorney's fees or the reasonable value of legal services rendered, costs or expenses paid or incurred by it under the provisions of this section if the action or proceeding is one described in subdivision (2) (c) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.

(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee.

Government Code Section 2002.5 provides:

2002.5. Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions Code, for malpractice alleged to have arisen out of the performance of his duties as a state employee, a copy of the complaint shall also be served upon the Attorney General and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee. If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.

Government Code Section 26524

Upon request of any judge of the superior, municipal or justice court or constable , the district attorney shall appear for and represent the court or judge or constable if the court or judge or constable in his official capacity is a party defendant in any action.

Government Code Section 26529

In counties which have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523 and 26524. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party. He shall defend all suits for damages instituted against officers or employees or former officers and employees for acts performed by them in furtherance of their duties while in the employ of the county or or any district in the county, the legal services of which are required by law to be performed by him.

Government Code Section 26540

A district attorney shall not during his incumbency defend or assist in the defense of, or act as counsel for, any person accused of any crime in any county.

Government Code Section 27645

The county counsel shall represent and advise the officers and employees of special districts organized within the county and shall have exclusive charge and control of all civil actions and proceedings in which special districts, their officers or employees are concerned or are parties when:

(a) The governing board of the special district requests the county counsel to so act

(b) The governing board of the special district is composed in whole or in part of persons who are also members of the county board of supervisors, and

(c) No specific provision is made in the law under which the special district is organized for the district to obtain legal services.

Government Code Section 53054

When a damage suit is brought against a local agency for injuries to person or property allegedly received as a result of the dangerous of defective condition of public property, the attorney for the local agency shall be defense counsel unless other counsel is provided for. The fees and expenses of defending the suit are lawful charges against the local agency.

[This section is part of the statute relating to dangerous or defective conditions of public property.]

Government Code Section 61632

The district may employ counsel to defend any action brought against it or any of its officers, agents, or employees on account of any injury, taking, damage, or destruction, and the fees and expenses, including the cost of any bonds and undertakings, involved therein shall be a lawful charge against the district.

[This section is part of the Community Services District
Law.]

Education Code Section 1043

If suit is brought against any member of the governing board of any school district as an individual, for any act, or omission, in the line of his official duty as member of the board, or if suit is brought against any employee of any school district for any act performed in the course of his employment, the district attorney of the county shall defend the member of the board or the individual employee upon request of the governing board of the school district, without fee or other charge.

Education Code Section 13007.1 provides:

13007.1. As used in this section the term "action or proceeding" does not include an action or proceeding to remove an officer or employee from his employment or a criminal action or proceeding brought against an officer or employee. The term includes all other civil actions or proceedings brought against a school district officer or employee for an act committed during his assigned hours of duty and within the apparent course and scope of his employment.

The attorney for a school district, upon the request of the officer or employee, shall act as counsel in the defense of any action or proceeding brought against an officer or employee of the school district in his official or individual capacity, or both, on account of any alleged tortious or criminal conduct arising out of the performance of any official duty, upon, and following, the determination of the governing board of said school district that the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district.

The fees, costs and expenses of defending the action or proceeding pursuant to this section are a lawful charge against the funds of the school district. The school district may recover from the officer or employee any fees, costs or expenses paid or incurred by it under the provisions of this section if it is established that the officer or employee acted or failed to act because of bad faith or malice.

Water Code Section 5901 Art. IX(A) 6

6. No member, officer or employee of the commission shall be liable for injury or damage resulting from (a) action taken by such member, officer or employee in good faith and without malice under the apparent authority of this compact, even though such action is later judicially determined to be unauthorized, or (b) the negligent or wrongful act or omission of any other person, employed by the commission and serving under such officer, member or employee, unless such member, officer or employee either failed to exercise due care in this selection, appointment or supervision of such other person, or failed to take all available action to suspend or discharge such other person after knowledge or notice that such other person was inefficient or incompetent to perform the work for which he was employed. No suit may be instituted against a member, officer or employee of the commission for damages alleged to have resulted from the negligent or wrongful act or omission of such member, officer or employee or a subordinate thereof occurring during the performance of his official duties unless, within 90 days after occurrence of the incident, a verified claim for damages is presented in writing and filed with such member, officer or employee and with the commission. In the event of a suit for damages against any member, officer or employee of the commission on account of any act of omission in the performance of his or his subordinates' official duties, the commission shall arrange for the defense of such suit and may pay all expenses therefor on behalf of such member, officer or employee. The commission may at its expense insure its members,

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officers and employees against liability resulting from their acts or omissions in the performance of their official duties. Nothing in this paragraph shall be construed as imposing any liability upon any member, officer or employee of the commission that he would otherwise not have.

[This provision is contained in the Klamath River Basin Compact (Water Code §§ 5900 and 5901).]

Water Code Section 31088

The district may employ counsel to defend any action brought against it or any of its officers, agents, or employees on account of any injury, taking, damage, or destruction, and the fees and expenses involved therein shall be a lawful charge against the district.

[This section is found in the County Water District Law.]

Water Code Section 60201

The district may employ counsel to defend any litigation brought against any director or other officer, agent or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.

[This section is found in the Water Replenishment District Act.]

Water- Uncodified Acts- Act 4025 Section 15

Claims for money or damages against the district are governed by the provisions of Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of the Government Code, except as provided therein. Claims not governed thereby or by other statutes or by ordinances or regulations authorized by law and expressly applicable to such claims shall be prepared and presented to the governing body, and all claims shall be audited and paid, in the same manner and with the same effect as are similar claims against the county. The district may employ counsel to defend any action brought against it or any of its directors, officers, agents or employees on account of any taking, injury, damage or destruction to any property or injury or damage to any person, and the fees and expenses involved therein shall be a lawful charge against the district.

[This section is found in the Kings River Conservation
District Act.]

Water- Uncodified Acts - Act No. 5243 Section 21

No director or other officer, agent, or employee of any district shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

The district may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.

If any director or other officer, agent, or employee of the district is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the district, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

[This section is found in the Municipal Water District Act.]

Water- Uncodified Acts- Act 9095 Section 76

No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

[This section is found in the Mojave Water Agency Act.]

Water- Uncodified Acts- Act 9097 Section 24

No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.

[This section is found in the Desert Water Agency Law.]

Water- Uncodified Acts - Act No. 9099 Section 24

No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.

[This section is found in the San Geronio Pass Agency Law.]

Opinion No. 61-246--February 5, 1962

SUBJECT: PEACE OFFICER--Obligation of Public entity to provide legal counsel to defend against false arrest charge, regardless of provisions in insurance policy procured by officer concerning legal representative, and remedies of peace officer in case of failure to provide defense discussed.

Requested by: DISTRICT ATTORNEY, SACRAMENTO COUNTY

Opinion by: STANLEY MOSK, Attorney General
V. Barlow Goff, Deputy

The Honorable John M. Price, District Attorney of the County of Sacramento, has requested the opinion of this office on the following questions:

1. If a false arrest insurance policy procured by the insured police officer at his own expense provides for the reimbursement of the insured for legal expenses incurred in defense of a claim, but reserves to the insurer the right to take over the conduct of the legal defense, although not requiring the insured to contest legal proceedings unless a mutually agreed upon counsel so advises and the insured consents thereto, the consent not to be unreasonably withheld, is the employing public entity under a duty to provide a legal defense for such peace officers against an action arising out of acts performed within the course of their employment and covered within the risk insured against?

2. If a public entity does not employ counsel, part time or at all, is it relieved from the responsibility of providing a legal defense for peace officers sued under the circumstances set forth in question 1 above?

3. If a public entity is legally obligated but refuses to provide a legal defense for peace officers sued as stated in question 1 above, what legal remedies are then available to the employee?

The conclusions are as follows:

1. If requested by the peace officer employee, the public entity is under a duty pursuant to section 2001 of the Government Code to provide a legal defense for such employees against actions arising out of acts, or the failure to act, performed within the course of their employment, notwithstanding the provision of the employee's insurance policy relative to counsel.

2. The public entity is not relieved of its responsibility to provide a legal defense by reason of the fact that it does not employ counsel.

3. If the public entity refuses to provide a legal defense upon the employee's request, the employee may mandate the public officials to compel the performance of the statutory duty of providing legal representation at public cost. However, should it become necessary to immediately obtain defense counsel by reason of limitations upon the time within which to appear and answer the complaint in the aforementioned actions, the employee may retain counsel upon the refusal of the public entity to provide a legal defense, and thereafter present a claim in the manner provided by law for the reasonable amount of attorney's fees and costs incurred.

ANALYSIS

The questions presented involve the application and construction of section 2001 of the Government Code which was amended by Statutes of 1961, chapter 1692 and now provides as follows:

"(1) As used in this section:

"(a) 'Action or proceeding' does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

"(b) 'Employee' includes an officer, agent, or employee.

"(c) 'Public entity' includes the State, a county, city, district or other public agency or public corporation.

"(2) Unless provision has been made by the public entity for the employment or other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

"(a) The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

"(b) The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

"(c) Any damages caused by any act or failure to act by such employee occurring during the course of his service or employment.

"(3) The attorney's fees, costs and expenses of defending the action or proceeding pursuant to this section

are a lawful charge against the public entity. The public entity may recover from the public employee any attorney's fees or the reasonable value of legal services rendered, costs or expenses paid or incurred by it under the provisions of this section if the action or proceeding is one described in subdivision (2)(c) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.

"(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee."

(All statutory references in this opinion are to the Government Code unless otherwise noted.)

Although prior to this amendment section 2001 and the now repealed section 2002 indicated a legislative intent to provide a legal defense for public employees at public cost, the sections contained serious ambiguities including when and by whom the issue of good faith of the employee was to be determined in order to ascertain whether or not he was entitled to a legal defense at public cost, and the circumstances under which other counsel would be provided (see Tracy v. County of Fresno, 125 Cal. App.2d 52; 35 Ops. Cal. Atty. Gen. 103). Since under subsection (3) of the existing provisions the determination of the employees' good faith arises only in connection with the recovery of attorney's fees or the reasonable value of legal services rendered, the duty to defend by implication is not contingent upon a preliminary finding of good faith. Also, subsection (2) clearly indicates that if the employee desires legal representation at public cost, it is the responsibility of the public entity and not the employee to make provision for the employment of counsel other than the attorney for the public entity, a situation which might occur, for example, when the official attorney was properly disqualified or incapacitated, or when an insurance contract procured under section 1956 imposed the duty and right to conduct the defense upon the insurer, or where the local public entity did not have an attorney.

The broad definition of "public entity," which does not draw a distinction upon whether or not the public entity has regular, part time or any counsel, when considered with the mandatory language of section 2 (shall impose a mandatory duty where public policy favors such a meaning and where addressed to a public officer, People v. Municipal Court, 145 Cal. App.2d 767, 778) and the further provision that attorney's fees and other costs are a lawful charge against the public entity, not only imposes a duty upon the attorney for the public entity,

but also upon the public entity itself to provide a defense at public costs for its employees who request such legal representation in an action against them in either their official or individual capacities and based upon acts or the failure to act occurring during the course of their employment. This conclusion is consistent with the policy of such statutes to provide public employees with a measure of protection from the harrassment of vexatious lawsuits (see Huffaker v. Decker, 77 Cal. App.2d 383, 388 construing former sections).

Of course, section 2001 does not require the public entity to indemnify its employees for judgments arising out of such action (cf. section 1956 authorizing the public entity to insure against such risks at public cost) and, therefore, many peace officers have acquired false arrest insurance to protect themselves against such risks. The policy, in addition to indemnifying the insured peace officer, frequently provides for reimbursement for legal expenses incurred, but reserves to the insurer the right to take over the legal defense, although not requiring the insured to contest legal proceedings unless a mutually agreed upon counsel so advises and the insured consents thereto, such consent not to be unreasonably withheld. However, the duty of the public entity to provide a legal defense is not dependent upon the contractual rights of the employee with third parties, but upon the employee's request for representation, assuming the action to be within section 2001. The conventional view is that a contract incorporates rather than modifies existing statutes, (see Wing v. Forest Lawn Cemetery Assn., 15 Cal.2d 472). To permit the public entity to avoid a statutory duty by relying upon the contractual duty owed by a third party would be akin to the creation of a novation without the necessary consent or agreement of the obligee to release the original obligor (see Alexander v. Angel, 37 Cal.2d 856, 860). It is concluded, therefore, that the terms of the insurance contract relative to the insurer's duty to defend have no bearing upon the statutory duty of the public entity which upon request of the employee is responsible for providing a legal defense at public expense against action for false arrest and imprisonment or assault and battery arising out of acts performed during the course of his duties.

As previously noted and in answer to the second question, section 2001 does not distinguish between public entities which do have counsel and those which do not and, further, by recognizing that provisions may be made for other counsel, the fees of which are a legal charge against the entity, the lack of regular or part time counsel does not relieve the public entity from the responsibility of providing a legal defense for peace officer employees who have been sued in the above-mentioned actions.

Since it is concluded that the public entity is under a duty to provide a legal defense for its employees who have requested legal representation in actions based upon acts or the failure to act occurring in the course of their employment, the question of the employee's remedy in the event of the refusal of the public entity to make provision for counsel is then raised. After the request for legal representation has been denied, the employee may mandate the public officials to compel the performance of their statutory duty of providing legal representation at public cost (Code of Civil Procedure, secs. 1085-1086; Parker v. Bowron, 40 Cal.2d 344; Palmer v. Fox, 118 Cal. App.2 45.3).

However, should it become necessary to immediately obtain defense counsel by reason of limitations upon the time within which to appear and answer the complaint in the aforementioned actions, the employee may retain counsel upon the refusal of the public entity to provide a legal defense, and thereafter present a claim in the manner provided by law for the reasonable amount of attorney's fees and costs incurred. Although section 2001 does not expressly authorize this latter remedy, neither is the public entity authorized to refuse to provide for the legal defense of such actions upon the employee's request and, accordingly, it is concluded that due to the exigency of the situation, this remedy exists (see Tracy v. County of Fresno, supra, impliedly recognizing the existence of such a procedure; 35 Ops. Cal. Atty Gen. 103, 108.

EXHIBIT III

CONSTRUCTION OF GOVERNMENT CODE SECTION 2001
PRIOR TO 1961 AMENDMENT

1. In Tracy v. Fresno County, 125 C.A.2d 52, 270 P.2d 57 (1954), the court held that the employment of private counsel was not authorized by the mere claimed refusal by county counsel to defend a sheriff charged with misconduct by the grand jury, together with county counsel's advice to sheriff to obtain private counsel, at any price agreed on without previous authorization of the board of supervisors or the proper county officer. The court stated (125 C.A.2d at 54-56) with reference to Section 2001 of the Government Code:

Counsel for plaintiff argues that . . . public interest is involved in any proceeding brought to remove a public officer from office; that faithful public officers should be protected from unfounded accusations based on honest action taken by them in good faith and without malice; that if such public officer be wrongfully charged he should be defended in the public interest, because otherwise a public official, improperly charged, could be hounded out of office by unfounded charges brought against him requiring him to expend enormous funds for counsel fees and court costs in defending himself, and that for this reason Section 2001 supra, was amended to so provide; that any decrease in the potential liability of an official will increase the willingness of competent people to assume the risk of office and an expenditure to that end is for a public purpose, and that similar statutes so providing have been held constitutional, citing People v. Standard Acc. Ins. Co., 42 Cal. App.2d 409, 413

The legislative history of that section shows that it was based on the Statutes of 1919, chapter 360, as amended by Statutes 1931, chapter 1168, and Statutes 1933, chapter 807. It then applied only to suits for damages on account of injury to persons or property resulting from the dangerous or defective condition of any public property on account of any action or work done by him in his official capacity. Under these circumstances it was the duty of the attorney for the county to act as counsel in defense of such suit "unless lawful provision had been made for the employment of other counsel in connection therewith." Under such circumstances the "fees and expenses involved . . . are a lawful charge" against the county. In all of these statutes, that portion relating to the duties of counsel now found in subdivision (b)(2) of the section was not segregated from and was obviously applicable to the entire section. Upon codification of the Act in 1943, it was divided into sections and subdivisions, substantially as it is now found. In 1951 [Stats. 1951, chap. 1087, § 1] Section 2001 was amended to read as above quoted, to eliminate the words "suit for damages" and substitute the words "any action or proceeding, including a taxpayer's suit."

It does not appear to us that this change clearly indicated a legislative intent to so radically enlarge and change the purpose of scope of the Act as to include the costs of defense of a criminal action or of a grand jury accusation, which is criminal in nature, instituted by a body politic in the name of the People of the State of California which, in effect, would call upon the district attorney to prosecute the action and the county counsel to defend the action at the county's expense.

2. Under the language of Section 2001 prior to the 1961 amendment, the right of the public officer or employee to a defense was not clear because of the ambiguous language of the section. As the court said in the Tracy case (125 C.A.2d at 56-57):

In the present section it is clearly shown that before the county official would be entitled to be represented by the attorney for the county to defend a suit against such official for "any action taken or work done" by him, it would become immediately necessary for such official to show to someone or to some body (the manner in which and degree to which it must be shown is not indicated, and the section does not indicate the person or body) that he was free from bad faith and malice. Upon such showing it then becomes the duty of the attorney for the county to act in defense of such suit unless provision has been made (by someone - the section does not indicate) for the employment of other counsel.

The crucial question then arises as to who is to determine the question of good faith and lack of malice, and upon what standard it is to be determined. Is it the board of supervisors, the county attorney, or is it to be ultimately determined in a subsequent court action and must the county official's good faith and lack of malice be established by a preponderance of the evidence or beyond a reasonable doubt? It does not appear from the instant pleadings that the question of the sheriff's good faith and lack of malice was ever considered by any of the parties above mentioned. It is apparent that the question was not presented to the board of supervisors. If it was considered by the county counsel it appears that the determination was against the sheriff on this issue because the county counsel allegedly refused to act and the reason may have been that he was not satisfied that the sheriff acted in good faith and without malice. Plaintiff's contention that the jury's finding that the allegations of the accusation were in favor of the sheriff and were accordingly res judicata on this issue is not supported by the pleadings or the law. The accusation did not plead either that the sheriff acted in good faith or bad faith and/or with or without malice. . . . Under Section 2001, supra, before the public official would be entitled to be represented by the county counsel or the district attorney, as the case may be, or to make provision for other counsel at the expense of the county, it would be necessary for the county official to first show, to someone or some authority, that the actions taken by him were in "good faith and without malice." Just what measure of proof is required is not indicated by the section, but it does seem reasonable that it

would take no more than the greater weight of the evidence, and this would be a discretionary matter to be determined by the authority authorized to determine that issue

The section contemplates that the determination must be made by someone or some authority, other than the county official involved. The implication is that the refusal of the county counsel to act may have been predicated upon the belief that the sheriff had not established that he acted in good faith and without malice. . . . We do not believe that it was intended that the county official involved would be the one to determine whether he acted in good faith and without malice or that he was the one authorized by this section to make provision "for the employment of other counsel" in any unlimited amount and for his own personal defense in such action, without the sanction or direction of some other authority.

The court then referred to Section 2002 of the Government Code (repealed in 1961) and stated:

This section clearly contemplates first, an authorization by the board of supervisors, and second, a determination by the attorney that the county officer acted in good faith and without malice, before he would be entitled to be represented by county counsel and at public expense. It appears more reasonable that this was the intention of the Legislature in casting the Section here involved [Section 2001] and that unless the board of supervisors, which body was authorized to audit and pay the claim in the final analysis, had previously by contract or otherwise, made provision for the employment of other counsel, the fees, costs, and expenses involved would not be a lawful charge against the county.

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Defense of Actions Brought Against Public Officers and Employees

A number of California statutes either authorize or require public entities to defend actions and proceedings brought against their officers and employees. The two principal statutes are Section 2001 of the Government Code and Section 13007.1 of the Education Code.

Government Code Section 2001 requires that, upon request, a public entity defend a civil action or proceeding brought against its officer, agent or employee on account of any act or failure to act occurring during the course of his service or employment.¹ The section covers all public entities and includes all torts, whether negligent or intentional. Unless provision is made by the public entity for the employment of other counsel, the attorney for the public entity is required to act as defense counsel. The Attorney General has ruled that the lack of a regular or part-time counsel, or the disqualification or incapacity of regular counsel, does not relieve the public entity from the duty of defending the action or proceeding.²

1. Under Section 2001, the officer, agent or employee is not entitled to be defended at public expense if the action or proceeding is brought to remove him from his office, agency or employment or is brought by a public entity against him as an individual and not in his official capacity.

2. 39 Ops. Cal. Atty. Gen. 103 (1962).

Section 2001 was substantially amended in 1961. Prior to the 1961 amendment, the section apparently required a preliminary determination that the defendant had acted in good faith and without malice before he was entitled to be defended at public expense.³ The amended section, however, requires the public entity to defend the action or proceeding--even though the public entity believes that the defendant may have acted or failed to act because of bad faith or malice--and permits the public entity to recover the cost of the defense from the defendant if it is later established that he acted or failed to act because of bad faith or malice.

Section 2001 does not spell out the remedies available to the defendant in case the entity refuses to defend him upon request. The traditional remedy would be to petition for a writ of mandate to compel the appropriate public officials to act.⁴ In cases where this remedy would not be adequate, the defendant apparently may retain his own counsel upon the refusal of the public entity to do so, and the public entity must reimburse him for the reasonable amount of attorney's fees and costs incurred.⁵

3. The section did not indicate by whom this determination was to be made. See *Tracy v. Fresno County*, 125 C.A.2d 52, 56-57, 270 P.2d 57(1954).

4. 39 Ops. Cal. Atty. Gen. 103 (1962).

5. Although Section 2001 does not expressly authorize this remedy, this is the interpretation given the section by the Attorney General. See 39 Ops. Cal. Atty. Gen. 103 (1962). Presumably the officer, agent or employee would have to establish that he was in the course of his service or employment and that he did not act or fail to act because of bad faith or malice.

Section 2001 overlaps and conflicts with other California statutes.⁶ For example, Government Code Section 2000, which applies only to cities, counties and school districts, apparently permits a public officer included within its terms to retain his own attorney without first requesting that the public entity defend the action and gives the officer the right to recover the cost of defending the action from the public entity. Government Code Section 2002.5, which applies only to an officer or employee of the State licensed in one of the healing arts, requires that the Attorney General defend the officer or employee upon request; but it is not clear whether the State can recover the expenses of such defense from the officer or employee if it is later established that he acted or failed to act because of bad faith or malice.

Although Section 2001 purports to apply to all public officers, agents and employees, school district officers and employees are also covered by a special statute (Education Code Section 13007.1) enacted in 1961. Section 13007.1 adopts the basic scheme that was rejected when Section 2001 was amended in 1961. Thus, Section 13007.1 provides that a school district officer or employee is entitled to a defense at public expense only after a determination by the governing board of the school district that "the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and

6. Cal. Govt. Code §§ 2000, 2002.5, 26524, 26529, 61632; Cal. Ed. Code §§ 1043, 13007.1; Cal. Water Code §§ 31088, 60201; Kings River Conservation District Act (Chapter 1728, Statutes of 1959) § 15; Municipal Water District Act of 1911 (Chapter 62, Statutes of 1951) § 21; Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) § 76; Desert Water Agency Law (Chapter 1069, Statutes of 1961) § 24; San Geronio Pass Water Agency Law (Chapter 1435, Statutes of 1961) § 24. Cf. Cal. Water Code § 5901, Art. IX(A) 6 (Klamath River Basin Compact).

that such defense would otherwise be in the best interests of the school district."⁷

The Law Revision Commission has concluded that the present overlapping and inconsistent statutes should be replaced by a general statute providing for the defense of public personnel at public expense. Neither Section 13007.1 nor Section 2001 provides a satisfactory scheme for the new general statute. Section 13007.1 does not adequately protect a deserving public officer, agent or employee, for this section apparently leaves the decision as to whether he will be defended at public expense entirely to the discretion of the public entity.

Section 2001 is also unsatisfactory, primarily because it requires the public entity to defend an action or proceeding even if the defendant actually acted or failed to act because of bad faith or malice. It seems contrary to sound public policy to expend public funds to defend a civil action or proceeding against such a defendant. Yet this can be the result under Section 2001 because the right to recover the cost of the defense will be effective only to the extent of the defendant's financial resources. Moreover, Section 2001 does not adequately protect the deserving public officer, agent or employee in cases where a conflict of interest may arise under its provisions. For example, the interest of the public entity may best be served if it is established in the action against the officer, agent or employee that he acted or failed to act because of bad faith, corruption or actual malice, for the public entity can then under Section 2001 recover from him the cost of his defense.⁸

7. See also, Cal. Ed. Code § 1043, relating to defense of school district officers and employees.

8. See note 12, infra.

To eliminate this possible conflict of interest and at the same time to assure that deserving public officers, agents and employees will have an absolute right to be defended at public expense, the Commission makes the following recommendations:

1. Upon request by a public officer, agent or employee, a public entity should be required to defend a civil action or proceeding brought against him on account of any alleged negligent or wrongful act or omission⁹ in the scope of his service, agency or employment¹⁰ unless the public entity determines (a) that he was not within the scope of his service, agency or employment at the time of the act or omission or (b) that he acted or failed to act because of bad faith, corruption or actual malice.

If the public entity defends the action or proceeding, it should have no right to recover the costs of the defense from the person defended. This will eliminate the possible conflict of interest pointed out above,¹¹ for the public entity need not defend the action or proceeding if it determines that the defendant acted or failed to act because of bad

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9. The phrase "negligent or wrongful act or omission" embraces any act or failure to act, whether negligent, intentionally tortious or criminal. The fact that the act done is a serious crime is, of course, a factor indicating that it is not in the scope of employment.
10. The phrase "scope of his office, agency or employment" is intended to make applicable the general agency principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the principal for the torts of the agent.
11. See text at note 8 supra.

faith, corruption or malice and, if the public entity undertakes the defense, it will have no conflict of interest because it will not be permitted to recover the cost of the defense from the defendant.¹²

2. The public officer, agent or employee should have two remedies if the public entity fails or refuses to provide him with a defense at public expense. First, he should be permitted to petition for a writ of mandate to compel the public entity to perform its statutory duty. This remedy would, however, rarely be effective where the public entity refuses to defend because it has determined that the defendant was not within the scope of his service, agency or employment at the time of the act or omission or that he was guilty of bad faith, corruption or actual malice. Nor would a petition for a writ of mandate be a satisfactory remedy if it becomes necessary for the public officer, agent or employee to obtain counsel immediately by reason of limitations upon the time within which to appear and answer the complaint in the action against him. A second remedy should, therefore, be available to the defendant when the public entity fails or refuses to defend him: He should be permitted to retain his own attorney and be given a cause of action against the public entity to recover the expenses he incurs in defending the action or proceeding if the act or omission occurred in the scope of his service, agency or employment and he

12. A more serious conflict of interest problem could arise in cases where the public entity is required to pay the judgment secured against the public officer, agent or employee. E.g., Cal. Govt. Code § 2002.5; Municipal Water District Act of 1911 (Chapter 62, Statutes of 1951) § 21; Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) § 76; Desert Water Agency Law (Chapter 1069, Statutes of 1961) § 24; San Geronio Pass Water Agency Law (Chapter 1435, Statutes of 1961) § 24. This problem will be dealt with in a subsequent recommendation.

was not guilty of bad faith, corruption or actual malice. The Attorney General has ruled that both of these remedies are available under appropriate circumstances under the existing law.¹³

3. A public entity should be authorized to defend a criminal action or proceeding brought against an officer, agent or employee on account of an alleged wrongful act or omission occurring in the performance of his service, agency or employment if the public entity determines that he acted in good faith and without actual malice in the apparent interests of the public entity and that such defense would be in the best interests of the public entity. Public entities do not now have this authority.¹⁴ The Commission has been advised, however, that cases occasionally arise where a criminal proceeding is brought against a public employee who was simply carrying out his orders. For example, one case brought to the attention of the Commission involved a school district employee charged with criminal assault for ejecting a bully from a school playground. Because the school district was not authorized to provide him with counsel, this employee was required to secure his own attorney to make an appropriate motion to dismiss the criminal proceedings brought against him. The Commission has concluded, therefore, that it would be sound public policy to give public entities a limited discretionary authority to defend criminal actions and proceedings brought against their officers, agents, and employees. The public officer, agent or employee should not have any recourse against the

13. 39 Ops. Cal. Atty. Gen. 103(1962).

14. But see Cal. Govt. Code § 61632; Cal. Water Code §§ 31088, 60201; Kings River Conservation District Act (Chapter 1728, Statutes of 1959).

entity should it decline to furnish him with counsel in a criminal action or proceeding.

4. A public officer, agent or employee should not be entitled to be defended at public expense against an action or proceeding to remove him from his office, agency or employment or against an action or proceeding brought by the public entity against him as an individual and not in his official capacity. Similar limitations on the right to be defended at public expense are found in Government Code Section 2001.

5. The recommended legislation should be in addition to and not in lieu of any rights the public officer, agent or employee may have under any contract¹⁵ or under any other law, charter, ordinance or regulation providing for his defense. Government Code Section 2001 contains a similar provision.

15. See 39 Ops. Cal. Atty. Gen. 103 (1962).

5/15/62

The Commission's tentative recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 6 (commencing with Section 991.1) to Division 3.5 of Title 1 of the Government Code, and to repeal Sections 2000 and 2001 of, and to amend Sections 2002.5, 26529 and 61632 of, the Government Code, and to repeal Sections 1043 and 13007.1 of the Education Code, and to repeal Section 60201 of, and to amend Section 31088 of, the Water Code, and to amend Section 15 of the Kings River Conservation District Act (Chapter 1728, Statutes of 1959), Section 21 of the Municipal Water District Act of 1911 (Chapter 62, Statutes of 1951), Section 76 of the Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959), Section 24 of the Desert Water Agency Law (Chapter 1069, Statutes of 1961) and Section 24 of the San Geronimo Pass Water Agency Law (Chapter 1435, Statutes of 1961), relating to defense of actions and proceedings brought against public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Chapter 6 (commencing with Section 991.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 6. DEFENSE OF PUBLIC OFFICERS, AGENTS AND EMPLOYEES

991.1. As used in this chapter:

(a) "Action or proceeding" does not include (1) an action or proceeding to remove an employee from his service, agency or employment or (2) an action or proceeding brought by a public entity against its own employee as an individual and not in his official capacity.

(b) "Employee" includes an officer, agent or employee.

(c) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

991.2. Except as otherwise provided in Section 991.3, upon request of an employee or former employee, the public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of any alleged negligent or wrongful act or omission in the scope of his service, agency or employment as an officer, agent or employee of the public entity.

991.3. The public entity may refuse to defend an action or proceeding against an employee or former employee if the public entity determines that:

(a) He was not within the scope of his office, agency or employment at the time of the alleged negligent or wrongful act or omission; or

(b) He acted or failed to act because of bad faith, corruption or actual malice.

991.4. A public entity may, in its discretion, provide for the defense of a criminal action or proceeding brought against an

employee or former employee on account of an alleged wrongful act or omission occurring in the performance of his service, agency or employment as an officer, agent or employee of the public entity if the public entity determines that he acted in good faith and without actual malice in the apparent interests of the public entity and that such defense would be in the best interests of the public entity.

991.5. The public entity may provide for the defense of an action or proceeding under this chapter by its own attorney or may employ other counsel for this purpose. The fees, costs and expenses of defending an action or proceeding under this chapter are a lawful charge against the public entity. The public entity has no right to recover such fees, costs and expenses from the employee defended.

991.6. If after request a public entity fails or refuses to provide an employee with a defense as required by Section 991.2, the employee may retain his own counsel to defend the action or proceeding and is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if it arose out of an alleged negligent or wrongful act or omission in the scope of his service, agency or employment as an officer, agent or employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes that he acted or failed to act because of bad faith, corruption or actual malice.

Nothing in this section shall be construed to deprive an employee of the right to petition for a writ of mandate to compel the public entity or the governing body or an officer thereof to perform the duties imposed by this chapter.

991.7. The rights of a public employee under this chapter are in addition to and not in lieu of any rights he may have under any contract or under any other law, charter, ordinance or regulation providing for his defense.

SEC. 2. Section 2000 of the Government Code is repealed.

~~[2000.--Whenever suit for damages resulting from
(a)--injuries caused by or due to the inefficiency or
incompetency of any appointee or employee of any board or any
member thereof, or~~

~~(b)--negligence in failing or neglecting to remedy the
dangerous or defective condition of any public property or to
take such action as is reasonably necessary to protect the public
against the condition is brought against any member of a board,
the cost of defending the suit, including attorney fees actually
expended in defending the suit, is a charge against the county,
city or school district of which the member was an officer
if the member had neither knowledge nor notice of~~

~~(1)--the inefficiency or incompetency of the appointee or
employee at the time of the injury, or~~

~~(2)--the dangerous or defective condition.]~~

SEC. 3. Section 2001 of the Government Code is repealed.

[2001, --(1)--As used in this section:

(a) -- "Action or proceeding" does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

(b) -- "Employee" includes an officer, agent or employee.

(c) -- "Public entity" includes the State, a county, city, district or other public agency or public corporation.

(2) -- Unless provision has been made by the public entity for the employment of other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

(a) -- The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

(b) -- The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

(c) -- Any damages caused by any act or failure to act by such employee occurring during the course of his service or employment.

(3) -- The attorney's fees, costs and expenses of defending

~~the action or proceeding pursuant to this section are a lawful charge against the public entity. The public entity may recover from the public employee any attorney's fees or the reasonable value of legal services rendered, costs or expenses paid or incurred by it under the provisions of this section if the action or proceeding is one described in subdivision (2) (e) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.~~

~~(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee.]~~

SEC. 4. Section 2002.5 of the Government Code is amended to read:

2002.5. Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions Code, for malpractice alleged to have arisen out of the performance of his duties as a state employee, a copy of the complaint shall also be served upon the Attorney General [~~and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee~~].

If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such

officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.

SEC. 5. Section 26529 of the Government Code is amended to read:

26529. In counties which have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523 and 26524. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his official capacity. [~~He shall defend all suits for damages instituted against officers or employees or former officers and employees for acts performed by them in furtherance of their duties while in the employ~~] Except where the county or district provides other counsel, the county counsel shall defend any action or proceeding brought against an officer, agent or employee of the county or of any district in the county, the legal services of which are required by law to be performed by [him] the county counsel, if the county or district is required to furnish or determines to furnish such officer, agent or employee with a defense under Chapter 6 (commencing with Section 991.1) of Division 3.5 of Title 1 of the Government Code.

SEC. 6. Section 61632 of the Government Code is amended to read:

61632. The district may employ counsel to defend any action or proceeding brought against it [~~or any of its officers, agents,~~

~~er-employees~~] on account of any injury, taking, damage[,] or destruction, or to defend as provided in Chapter 6 (commencing with Section 991.1) of Division 3.5 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents, or employees, and the fees and expenses, including the cost of any bonds and undertakings, involved therein [~~shall be~~] are a lawful charge against the district.

SEC. 7. Section 1043 of the Education Code is repealed.

[1043.--If suit is brought against any member of the governing board of any school district as an individual, for any act, or omission, in the line of his official duty as member of the board, or if suit is brought against any employee of any school district for any act performed in the course of his employment, the district attorney of the county shall defend the member of the board or the individual employee upon request of the governing board of the school district, without fee or other charge.]

SEC. 8. Section 13007.1 of the Education Code is repealed.

[13007.1.--As used in this section the term "action or proceeding" does not include an action or proceeding to remove an officer or employee from his employment or a criminal action or proceeding brought against an officer or employee.--The term includes all other civil actions or proceedings brought against a school district officer or employee for an act committed during his assigned hours of duty and within the apparent course and scope of his employment.]

~~The attorney for a school district, upon the request of the officer or employee, shall act as counsel in the defense of any action or proceeding brought against an officer or employee of the school district in his official or individual capacity, or both, on account of any alleged tortious or criminal conduct arising out of the performance of any official duty, upon, and following, the determination of the governing board of said school district that the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district.~~

~~The fees, costs and expenses of defending the action or proceeding pursuant to this section are a lawful charge against the funds of the school district. The school district may recover from the officer or employee any fees, costs or expenses paid or incurred by it under the provisions of this section if it is established that the officer or employee acted or failed to act because of bad faith or malice.]~~

SEC. 9. Section 60201 of the Water Code is repealed.

~~[60201. The district may employ counsel to defend any litigation brought against any director or other officer, agent or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.]~~

SEC. 10. Section 31088 of the Water Code is amended to read:

31088. The district may employ counsel to defend any action

or proceeding brought against it [~~ex-any-of-its-officers,-agents,-~~
~~ex-employees~~] on account of any injury, taking, damage [y] or
destruction, or to defend as provided in Chapter 6 (commencing with
Section 991.1) of Division 3.5 of Title 1 of the Government Code an
action or proceeding brought against any of its officers, agents or
employees, and the fees and expenses involved therein [~~shall-be~~]
are a lawful charge against the district.

SEC. 11. Section 15 of the Kings River Conservation District
Act (Chapter 1728, Statutes of 1959) is amended to read:

15. Claims for money or damages against the district are
governed by the provisions of Chapter 2 (commencing with Section 700)
of Division 3.5 of Title 1 of the Government Code, except as
provided therein. Claims not governed thereby or by other statutes
or by ordinances or regulations authorized by law and expressly
applicable to such claims shall be prepared and presented to the
governing body, and all claims shall be audited and paid, in the
same manner and with the same effect as are similar claims against
the county. The district may employ counsel to defend any action or
proceeding brought against it [~~ex-any-of-its-directors,-officers,-~~
~~agents-ex-employees~~] on account of any taking, injury, damage or
destruction to any property or injury or damage to any person, or
to defend as provided in Chapter 6 (commencing with Section 991.1)
of Division 3.5 of Title 1 of the Government Code an action brought
against any of its officers, agents or employees, and the fees and
expenses involved therein [~~shall-be~~] are a lawful charge against
the district.

SEC. 12. Section 21 of the Municipal Water District Act of 1911 (Chapter 62, Statutes of 1951) is amended to read:

21. No director or other officer, agent, or employee of any district shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~[The district may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.]~~

If any director or other officer, agent, or employee of the district is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the district, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

SEC. 13. Section 76 of the Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) is amended to read:

76. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient

or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~[The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.]~~

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

SEC. 14. Section 24 of the Desert Water Agency Law (Chapter 1069, Statutes of 1961) is amended to read:

24. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~[The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.]~~

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.

SEC. 15. Section 24 of the San Geronio Pass Water Agency Law (Chapter 1435, Statutes of 1961) is amended to read:

24. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~[The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.]~~

If any director or other officer, agent, or employee of the agency is liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.