2/18/63

Memorandum No. 63-16

Subject: Senate Bill No. 42

Attached is a copy of Senate Bill No. 42--the general governmental tort liability statute recommended by the Commission.

Senator Cobey and members of the Commission's staff met with the Governor. (The Chairman of the Commission planned to attend but was fogged in in L.A.) Representatives of various state agencies also were present. About all the Governor indicated was that he is concerned about the cost of governmental tort liability; but, at the same time, he is interested in seeing that a reasonable statute is enacted. He suggested to the representatives of the state agencies that they review their objections and that, at a later time, the Governor would further consider this matter and would determine the position of the administration on the proposed legislation.

At Senator Cobey's suggestion, I have met with representatives of the state agencies to determine what objections they have to Senate Bill No. 42. We hoped by these meetings to eliminate those objections that were based on misunderstanding, and to provide the Commission with an opportunity to consider the other objections prior to the Hearing on Senate Bill No. 42. Those suggestions of the state agencies that seem acceptable to the Commission can be incorporated into the bill prior to the hearing. The hearing time can then be devoted to a consideration of the unresolved areas of dispute.

In connection with these objections, it should be kept in mind that

if no legislation on this subject is enacted or if the Governor vetoes the proposed legislation, then Muskopf and Lipman will become the law in California. At the same time, Senator Cobey would like to eliminate as many areas of dispute as possible prior to the hearing.

I have requested that representatives of various state agencies be present at the Commission meeting to present the case in behalf of each of the suggestions and objections listed below.

Listed below is a section by section analysis of the various suggestions and objections made in reference to Senate Bill No. 42. Those that are considered to be of major importance by the state agencies are indicated.

SECTIONS 810.2 and 810.4 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The agencies suggest that the word "agent" be deleted from Section 810.2 and that the word "agency" be deleted from Section 810.4. Apparently, there would be no objection to indicating that a person could be an officer or employee even if he receives no compensation for his service. The objection to the use of the word "agent" is based on a concern as to which persons would be considered to be "agents." Note that the definition applies not only to the liability statute, but also to the defense and insurance statutes.

Because of the concern of insurance companies, the phrase, "does not include an independent contractor" was added to clarify the definition of employee. The Vehicle Code section which imposes liability for negligence includes an agent. The use of the word "agent" might result in liability in some cases where the negligent person might not be considered to be an officer or employee. For example, a prisoner working on a highway may create a dangerous condition. Or a dangerous condition may be created by an inmate of a state institution who has the duty of keeping a state building in a good condition.

It is clear that the present definition will result in a higher insurance rate because of the potential liability that it creates.

The staff considers whether agent is retained or not to be a question for determination by the Commission. (The school district negligence statute does not include the word agent.)

SECTION 810.8

The agencies suggest that the words "reputation, character, feelings or estate" be deleted from Section 810.8 in order to avoid liability for intentional torts.

This definition, as the Commission's report points out on page 835, does not impose liability for an injury. It merely defines injury and is intended to make clear that public entities and public employees may be held liable only for injuries to the kind of interests that have been protected by the courts in actions between private persons.

Deletion of the words "reputation, character, feelings or estate" might limit the immunity provisions of the bill. For example, Section 821.6 provides immunity for malicious prosecution. Changing the definition of injury might eliminate the immunity provided by Section 821.6 for injuries to reputation, character, feelings or estate. Section 821 provides immunity for injury caused by failure to enforce an enactment. Changing the definition of injury might limit this immunity. On the other hand, it is suggested by the state agencies that deleting the indicated words from the definition would not affect the immunities for the remaining language would be adequate.

The staff recommends that this definition not be changed. If it is desired to not have an entity liable for certain classes of intentional torts (or for all intentional torts), the immunity should be granted by an express provision in the bill, not by changing the definition of injury.

Section 814

The agencies suggest that the section be revised to provide that money damages shall be the only type of relief against a public entity for tort liability. The right to other types of relief against public officers and employees would not be affected.

The effect of the Commission's recommendations is that no money or damages can be recovered for a nuisance (unless it is a dangerous condition). The Commission took this action on the basis that an injured person could have a nuisance abated or could enjoin the continuance of a nuisance.

There are numerous cases where a state board was enjoined from a particular course of action. The proposed change might create problems for an injured person in attempting to identify the proper officer or employee when a state board as an entity is threatening a particular course of action. Moreover, in a nuisance case, the various officers and employees might each claim that they had no individual responsibility to take action. And an attempt to force the county board of supervisors to abate a nuisance might be resisted on the grounds that no individual member of the board could be compelled to act.

We have requested our research consultant to prepare a research study on specific and preventive relief against public entities and public employees. Until we receive the study, the staff suggests that we retain the existing law relating to this matter.

SECTION 815

Substitute "statute" for "enactment" to limit liability to that imposed by the Legislature.

The staff once made a similar suggestion, but the Commission retained the word "enactment." Note the definition of enactment in Section 810.6.

If a change is made here, conforming changes should be made in Section 815.2(b) and in Section 820.2.

SECTION 815.2 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The agencies suggest that paragraph (a) be deleted so that there would be no vicarious liability.

This provision is discussed on pages 814 and 815 of the Commission's report (Recommendation No. 1). The provision is essential to the statutory scheme recommended by the Commission. The Commission's recommended legislation will result in a reduction of liability of school districts and in little, if any, increase in the liability of cities and counties. It would seem that deleting Section 815.2 would so substantially reduce the existing liability of local public entities that such action could not be justified.

The agencies suggest that if paragraph (a) of Section 815.2 is retained, the liability under that paragraph should be restricted to negligence. It is pointed out that the Federal Tort Claims Act does not

provide for liability for certain intentional torts. It is recommended by the staff that liability not be restricted to negligence. For example, what if a doctor removes the wrong leg in an operation. This is assault and battery--an intentional tort. Yet, it seems that this is a case where liability is justified. Moreover, if a public employee uses excessive force (an assault and battery) or trespasses or is guilty of some other type of intentional tort in carrying out his duties, what reason exists for government not being liable where a private employer would be liable? For example, the public entity is liable for the act of the meter reader or bus driver who assaults a person in carrying out his duty. The proposal would eliminate this entity liability that exists under existing law.

Accordingly, the staff recommends that no change be made in Section 815.2(a). This paragraph is sound.

The Commission might wish to make an exception for two types of torts: negligent misrepresentation and interference with contractual rights. Perhaps, government has a greater exposure to liability for these two types of torts than private persons in view of the extensive regulatory duties of government.

Paragraph (b) of Section 815.2: The state agencies suggest that "statute" be substituted for "enactment." This paragraph should be consistent with Section 815; and, if a change is made in Section 815, a similar change should be made here.

SECTION 815.6

The state agencies suggest that "statute" be substituted for "enactment" in this section. The staff strongly urges that this change should not be made. When an agency is given authority to promulgate regulations (as regulations governing operation of swimming pools) and such regulations have the force of law, they should establish a standard of care. The public entity can avoid liability under the proposed statute merely by showing that it exercised reasonable diligence to discharge the duty. Providing the entity with this defense would seem to make it particularly undesirable to permit entities to ignore mandatory regulations having the force of law.

The state agencies also suggest that "to a person within the class of persons intended to be protected by the enactment" be inserted after the word "kind" in line 44 on page 3. The Commission once rejected this suggestion.

SECTION 815.8 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The agencies suggest that this section be deleted.

It is unlikely that liability will exist under this section in any significant number of cases. But the existence of the section may result in a substantial number of actions brought against public entities for "negligence in appointing" employees.

Note in Section 820.8 we retain liability where an employee is negligent in appointing or failing to discharge a subordinate employee.

SECTION 816 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The agencies suggest that this section should be deleted.

This section would create liability where immunity existed under the pre-Muskopf law. Public entities are concerned that proceedings to discharge employees will result in actions against public entities under Section 816.

SECTION 818.2

The agencies suggest that "law" be substituted for "enactment."

The terms "law" and "enactment" are defined. This seems to be a desirable change.

SECTION 818.4

The agencies suggest that ", approval, order" be inserted before "or similar authorization" in line 23. This change seems to be desirable.

SECTION 818.6.

The agencies suggest that "the public property of the public entity (as defined in Section 830)" be inserted in place of "property of the public entity" in lines 29 and 30. This change would tie Section 818.6 in with the dangerous conditions statute. The change seems to be desirable and carries out the intent of the Commission.

SECTION 820.2

The agencies suggest that "statute" be substituted for "enactment" in line 44. This section should be consistent with Section 815; and, if Section 815 is changed, a conforming change should be made here.

SECTION 820.4

The agencies suggest that "exercising due care" be deleted from this section. The staff recommends that this change not be made. Other immunities are provided for cases where due care is not required. This immunity is based on a similar immunity in the federal tort claims act and should not be broader. Under the proposed revision of this section, the employee would be immune from liability for negligence in enforcing a law. This is far too broad an immunity.

The agencies suggest that "or enforcement of any law" be inserted in place of "of any enactment" in line 50. This seems to be a desirable revision.

SECTION 820.6

The agencies suggest "exercising due care" be eliminated in line 1

on page 5 and that the words "except to" in line 4 and all of lines 5 and 6 be deleted.

This section substantially broadens the immunity provided by existing law, for it applies to invalid or inapplicable statutes and to ordinances and regulations (existing law limited to unconstitutional statutes). But the requirement of due care is not found in the existing statute. Although the requirement of due care can be justified, it might result in cases going to the jury to determine whether the officer or employee exercised due care in determining whether the statute was unconstitutional, invalid or inapplicable.

The last "except" clause is a restatement of existing law and should be retained.

SECTION 820.8

The agencies suggest that "statute" be substituted for "enactment" in line 7 on page 5. This section should be consistent with Section 815.

SECTION 821.2

The agencies suggest that ", approval, order" be inserted before "or similar authorization" in line 18 on page 5. This is a desirable change.

SECTION 821.6

The agencies suggest that "or" be substituted for "and" in line 31. This section seems to be drafted properly now, as both elements are required before malicious prosecution liability would exist. No cause of

action would exist if only one of the two elements listed were present.

RESTORE GOVERNMENT CODE SECTION 1953.5

The agencies suggest that Government Code Section 1953.5 be codified in the bill. This section relates to liability of a public employee for money that was in his custody. The agencies point out that various statutes require officers to account for money. Section 1953.5 makes clear that no liability exists except for negligence. It is suggested that a new section be added to the bill, to read as follows:

> 822. A public employee is not liable for moneys stolen from his official custody unless the loss was sustained as a result of his own negligent or wrongful act or omission.

SECTIONS 825 to 825.6

The agencies suggest that these sections be revised so that the entity is required to pay judgments based on negligence, but not if based on an intentional tort. These provisions should be consistent with the extent of vicarious liability.

SECTION 825

At the hearing on the defense bill, several members of the Senate Judiciary Committee expressed concern about the provisions of Section 825 of Senate Bill No. 42 relating to payment of judgments against employees. As a matter of fact, almost all of the hearing was devoted to this matter. Senator Grunsky is especially concerned with the waiver of the defense of "out of scope of employment" that the bill requires if the entity wishes to defend the action. Note that the plaintiff can

recover from the public entity if he obtains a judgment against an employee in an action defended by the public entity.

In cases where the defense is provided by the public entity (or, in the usual case, by its insurer), should not the insurance company be permitted to defend a case where it is fairly certain that the employee was not in the scope of his employment in the hope that the judgment will be for the defendant? In cases involving the defense of actions against private persons, the insurance company can protect its rights by obtaining an agreement reserving its rights to deny liability on the policy if a judgment is obtained against the defendant. This is not permitted under Senate Bill No. 42, for the bill provides that the public entity (or its insurer) cannot defend an action against an employee without undertaking to pay the judgment against the employee. This probably will result in higher insurance premiums for public entities because as a practical matter the insurance company is forced to defend the action on the merits rather than to risk a high judgment resulting from default judgment against the employee or from an inadequate defense by the employee.

If the proposed amendment set out in Exhibit I (pink page) were adopted, the plaintiff would have to show scope of employment in an action against the public entity to recover from the entity the amount of the judgment in a case where the case against the employee was defended by the entity with a reservation of rights. Under the bill as originally drafted, the entity would have to pay the judgment even

though it had a reservation of rights and would then be permitted to recover the amount paid from the employee if he could not establish that he was in the scope of his employment. It seems clear that the section as originally drafted does not protect the employee; it merely insures that the plaintiff will be paid in any case where the entity defends the action. The proposed amendment will place the employee in no worse position than the private person where the insurance company denies liability on the policy but undertakes the defense with a reservation of rights. In fact, the public employee may be in a better position under the proposed amendment since he will be provided with a defense in cases where it is doubtful that he was in the scope of employment. (The insurance company can defend such cases without assuming to pay the judgment.)

The amendment should not result in a conflict of interest since the issue of scope of employment is not an issue when the employee alone is the defendant in the action. In a case where the employee and the public entity are joined as defendants, there would be a conflict of interest if the entity wanted to defend on the grounds of "out of scope of employment." But the defense bill does not require a defense in such a case.

In view of the concern expressed by public entities as to the cost of Senate Bill No. 42, and in view of the views of Senator Grunsky and others, the staff recommends that the proposed amendment set out in Exhibit I be adopted. If this amendment is not approved, the Senate Committee will probably make the amendment as a committee

amendment anyway. We would like to avoid controversy concerning Senate Bill No. 42 to the extent we can without compromising policies the Commission considers important.

SECTION 830

The public agencies suggest that "it is designed or intended to be used" be substituted for "it is reasonably foreseeable that it will be used" in line 10 on page 7. This change should not be made. It would eliminate much of the attractive nuisance type of liability that public entities now have under existing law.

The public agencies suggest that "lawfully" be inserted after "is" in line 9 on page 7. The staff recommends that this change not be adopted as a general principle. On the other hand, the staff recommends that the Commission consider providing an immunity for cases where a highway, road or street (as distinguished from sidewalks and other property) is not lawfully used. This exemption would provide additional protection in the area where the major impact of the statute will fall (as far as the State is concerned). See report of research consultant. It would not, however, provide immunity in other areas where the attractive nuisance doctrine would be applicable if a

private person were the defendant, nor would it automatically eliminate liability for persons who are known to be using the public property but are technically trespassers. The requirement that the property be used with due care will eliminate most cases of liability where the plaintiff is not a small child. It seems that the Commission has already reduced substantially the existing liability for dangerous conditions of property by the definition contained in subdivision (a) and that further reduction is not warranted (except perhaps for highways, roads and streets). If it is desired to require that streets be lawfully used, the following section should be added to the bill:

> 831.8. Except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, neither a public entity nor a public employee is liable under this chapter for an injury caused by the unlawful operation of a vehicle on a street or highway. Nothing in this section exonerates a public entity or public employee from liability for an injury to a person who was not using the vehicle traveled portion of the street or highway.

The public agencies suggest that the word "or" be substituted for the word "and" in subdivision (b) of Section 830, line 13. There is no objection to this change.

SECTION 830.2

If any change is made in Section 830(a), a consistent change should

be made in this section.

SECTION 830.6

The agencies suggest that, in line 38, after "property", insert ", except for structural failures," and strike out all language after "approved" in lines 43 through 49. This change would make the question of whether the entity acted reasonably a jury question in case of a structural failure. It would grant complete immunity, even though no one could reasonably have acted as the entity acted, in all other cases of defective plan or design.

SECTION 831.2 and 831.4

The agencies suggest that the immunity under these sections should be absolute. Under these two sections, liability may be imposed (if it otherwise exists) for conditions actually known to the entity which constitute a trap. The effect of the sections is to eliminate any duty of inspection and to eliminate any duty to protect against conditions that do not constitute a trap. It should be noted that the existing law applicable to cities, counties and school districts does not contain any immunity similar to that provided in these sections.

ADDITIONAL IMMUNITIES FOR DANGEROUS CONDITIONS

The Attorney General will propose additional immunities to be provided for conditions of state beaches and parks and possibly forestry lands and for state mental institutions and correctional institutions.

The Commission should consider these changes when presented in draft form.

ADDITIONAL PROCEDURAL PROTECTIONS

The agencies suggest that certain additional procedural protections should be provided.

First, the happening of the accident should not be evidence of negligence. Second, evidence of subsequent repairs should not be admissible as evidence of negligence in a dangerous conditions case. Mr. Carlson of the Department of Public Works states that he receives numerous calls from persons in the field asking whether a repair should be made because an accident has indicated the desirability of providing protection against a condition. Also, photographs are introduced at trial that show the condition as repaired.

If it is desired to provide these additional procedural protections, the following section should be added to the bill:

> 830.5. (a) Except where the doctrine of res ipsa loquitur is applicable, the mere happening of an accident which results in injury is not evidence that public property was in a dangerous condition.
>
> (b) Evidence of any action taken after an injury has occurred to protect against a condition of public property is not admissible in an action to recover damages for such injury.

SECTION 835

The phrase found in this section "that the public entity did not take adequate measures to protect against the risk" continues to cause difficulty. The members of the Senate Fact Finding Committee were unable

to understand how a person could be injured if adequate measures were taken to protect against a dangerous condition. Either the condition is no longer dangerous (the measures were adequate) or the condition is still dangerous (the measures were not adequate). The public agencies suggest that the word "adequate" on page 9, line 22 be changed to "reasonable". Under the bill as drafted, the public entity is required to show that it acted reasonably in remedying a dangerous condition or in failing to protect against a dangerous condition. (Section 835.4.) The proposed amendment would create a conflict as to which party has the burden of proof on reasonableness. A good solution to this problem might be to delete the phrase "that the public entity did not take adequate measures to protect against the risk". If this change is made, a comparable change should be made in Section 840.2.

SECTION 835.2

The public agencies suggest that the word "reasonable" be substituted for "reasonably adequate" in line 48 on page 9. If this change is made, a comparable change should be made in Section 840.4 on page 11, line 35.

The public agencies suggest that "subdivision (b) of" be inserted before "Section 835" in lines 37 and 44 on page 9. There is no objection to this change.

At the hearing by the Senate Fact Finding Committee, the Committee was concerned as to which party has the burden of proof on constructive notice. The Committee believed that jury instructions would become extremely complex under proposed Section 835.2. In view of this concern, the staff presents the following revision (which would delete subdivision

(c) and revise subdivision (b) to read as indicated):

> (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:
>
> (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.
>
> (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

If the above revision is acceptable to the Commission, Section 840.4 (b) should be revised to delete "Subject to subdivision (c)" (line 15) and lines 30 through 40 should be deleted on page 11.

NEW SECTION 856.2

The public agencies suggest that there should be an absolute immunity for failing to admit a person to a public medical facility. The Commission excluded such a provision on the ground that where a mandatory duty existed, the person should be admitted; where no mandatory duty existed, the discretionary immunity would apply. The Commission may wish to include the following provision in the bill:

> 856.2. Except as provided in Section 815.6, neither a public entity nor a public employee acting in the scope of his employment is liable for an injury resulting from the failure to admit a person to a public medical facility.

SECTION 895 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The public agencies are concerned about the definition of "agreement" in Section 895. They suggest that, after the word "Code" in line 10, the remainder of the line and all of lines 11 through 15 be deleted. The State is concerned that it may be liable when it contracts with local government to provide state funds to be expended by local governmental units under specified conditions. The Department of Public Works is concerned about potential liability where it makes a contract with a city to sweep freeways in the city. A possible solution: insert "local" before "public entity" in lines 11 and 12 on page 16.

SECTION 895.8 (CONSIDERED TO BE OF MAJOR IMPORTANCE)

The State is concerned because this provision makes parties to a joint power agreement, for example, jointly and severally liable and limits contribution in the absence of an agreement to the contrary. Where one party is actively negligent, the other would ordinarily (under general rules of law) have a right to complete contribution if held liable. Making the statute retroactive in its application changes this rule which the parties may have considered in making their agreement prior to the effective date of the statute.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 63-16

EXHIBIT I

825. If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity ~~or if the public entity conducts the defense of an employee or former employee against any claim or action~~, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.