#52(L) 11/2/64

Memorandum 64-102

Subject: Study No. 52(L) - Sovereign Immunity

The Commission retained Professor Van Alstyne to prepare a report indicating any necessary revisions in the 1963 Governmental Tort Liability Act. At its October meeting, the Commission reviewed a portion of his report and determined not to recommend amendment of certain sections and made suggestions for further research on other sections.

We have revised the material presented at the October meeting to reflect the suggestions made by the Commission. It was understood, however, that these were merely suggestions and that no final action was taken with respect to any matter other than the determination that certain sections are not to be included in the bill to be proposed in 1965.

Attached is the revised material which also includes an additional installment of Professor Van Alstyne's study. The study is now substantially complete, but a few additional revisions will be proposed as soon as Professor Van Alstyne has time to prepare the material.

Additional research is needed on some of the sections proposed in the attached material. However, it is unlikely that such research can be undertaken before the November meeting since the staff must prepare considerable material for the printer during the next three weeks.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Part 1. Short Title and Definitions

§ 809. This division shall be known and may be cited as the Governmental Tort Liability Act.

Comment: A short title will be very helpful in referring to the governmental tort liability statute.

§820. (a) Except as otherwise provided by statute (including Section 820.2 and Section 820.8), a public employee is liable for injury caused by his act or omission to the same extent as a private person.

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.

Comment: A difficult problem of interpretation arises from the fact that both §820 and §820.2 begin with the phrase, "Except as otherwise provided by statute". Obviously both sections cannot be exceptions to each other. This problem was solved as to §820.2 by making express reference thereto in §820, thus making clear that the liability declared in §820 is limited by the immunity in §820.2. The same interpretative difficulty relates to §820.8, which also commences with the phrase, "Except as otherwise provided by statute". This amendment is thus based on the same solution adopted as to §820.2, and will make it clear that §820.8 is an exception to §820.

821. A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce ~~an enactment~~ any law.

Comment: This amendment conforms §821 to the language of §818.2. The words, "any law", as found in §818.2 were inserted by the Senate (Sen. J., Feb. 26, 1963, p. 518) to broaden the entity's immunity to include failure to enforce decisional law. The employee's immunity should have like scope.

§825.(a) Except as provided in subdivision (b), a public entity shall pay any judgment, or any compromise or settlement to which the public entity has agreed, based on a claim against an employee or former employee of the public entity for an injury arising out of an act or omission allegedly occurring within the scope of his employment if (1) not more than 10 days after service upon him of the complaint, counterclaim, cross-complaint or other pleading based on the claim, the employee or former employee presented a written notice to the public entity, substantially in the manner provided in Sections 915 and 915.2, requesting the public entity to provide for the defense of the action or proceeding; or (2) the public entity provided for the defense of the action or proceeding.

(b) If the public entity provided for the defense of the action or proceeding 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 shall pay the judgment, compromise or settlement only if the fact that the injury arose out of an act or omission occurring in the scope of employment of the employee or former employee as an employee of the public entity (1) was established in the action or proceeding against the employee or former employee, or (2) is established by the claimant to the satisfaction of the board (as defined in Section 940.2), or (3) is established in an action or proceeding by the claimant against the public entity.

(c) The presentation of a claim pursuant to Part 3 (commencing with Section 900) of Division 3.6 of the Government Code is not a prerequisite to enforcement of the liability of a public entity under this section to pay a judgment, compromise or settlement.

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

Comment: This is a complete recasting of §825. It is designed to eliminate certain ambiguities, alter key language to correspond more closely to §§995 - 996.6 (defense of public employees), and make a few desirable substantive changes.

Subdivision (a) is based on the first paragraph of present §825, and the first clause of its second paragraph. The reference to cross-action pleadings corresponds to §995. The inclusion of procedural provisions for requesting a defense eliminates a hiatus in existing law. The time for presenting the request has been changed from not less than 10 days before the trial to not more than 10 days after service of the pleading which asserts the claim in question. If the entity is to be charged with the duty of paying the judgment, it should have an opportunity to draft the pleadings, undertake discovery proceedings, engage in negotiations for settlement at an early date, conduct the pretrial conference (if any), and make appropriate pretrial motions. To obtain the request only a few days before the trial date would often be too late for the entity, if it determines to defend, to protect its interests adequately.

Subdivision (b) is based on the second paragraph of existing §825. It attempts to eliminate the uncertainty which presently exists as to how the requisite fact of scope of employment is to be "established" when the defense is under a reservation of rights. Since the entity conducted the defense, it is believed appropriate to hold it bound by the determination of the issue if made in that action. (The issue of the employee's scope of employment may, of course, be relevant and material even though the action is solely against the employee. This will ordinarily be the case in dangerous condition actions. See Govt. C. §840. And in medical malpractice actions involving prisoners or mental inmates. See Govt. C. §§844.6, 854.8.) But if there was no

determination of the issue in that action, the claimant should have an opportunity to convince the governing board (or State Board of Control) that the requisite fact existed, without the necessity for instituting an action against the entity. This is the purpose of subdivision (b)(2). In extreme cases, of course, an action may become necessary. See (b)(3).

Subdivision (c) eliminates uncertainty under the existing law as to whether the entity's liability to pay a judgment, settlement or compromise under this section is conditioned on prior presentation of a claim. Since the entity either defended the action for the employee, or agreed to a compromise or settlement of the claim, it already had adeqiate notice to satisfy the policy of the claim procedure. Thus, the presentation of a further claim would serve no useful purpose, and is here expressly eliminated.

Subdivision (d) is based on the last paragraph of present §825.

§825.2. (a) Subject to subdivisions (b) and (c), if an employee or former employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under Section 825, he is entitled to recover the amount of such payment from the public entity.

(b) If the public entity did not ~~conduct~~ provide for his defense against the action or claim, ~~or if the public entity conducted such defense pursuant to an agreement with him reserving the rights of the public entity against him,~~ an employee or former employee of a public entity may recover from the public entity under subdivision (a) only if ~~he establishes~~ the fact that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity (1) is established by the employee or former employee to the satisfaction of the board (as defined in Section 940.2) and the board is further satisfied that he did not act or fail to act because of actual fraud, corruption or actual malice; or (2) is established by the employee or former employee in an action or proceeding against the public entity, and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice.

(c) If the public entity provided for his defense against the action or claim pursuant to an agreement with him reserving the rights of the public entity against him, an employee or former employee of a public entity may recover from the public entity under subdivision (a) only if the fact that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity (1) was established in the action or proceeding against the employee or former employee, or (2) is established by the employee or

former employee to the satisfaction of the board (as defined in Section 940.2), or (3) is established by the employee or former employee in an action or proceeding against the public entity; provided, however, that the employee or former employee may recover under this subdivision (c) only if the board is satisfied that he did not act or fail to act because of actual fraud, corruption or actual malice, or, if an action or proceeding is brought against the public entity, only if the public entity fails to establish therein that he acted or failed to act because of actual fraud, corruption or actual malice.

(d) The presentation of a claim pursuant to Part 3 (commencing with Section 900) of Division 3.6 of the Government Code is not a prerequisite to enforcement of the liability of a public entity under this section to pay a judgment, compromise or settlement.

Comment: Section 825.2 is here recast to conform to the changes recommended in Section 825. The purpose of the changes, as in the case of Section 825, is to separate into different subdivisions the somewhat different provisions relating to the entity's duty of indemnification where it has provided a defense under a reservation of rights, from the provisions that apply when there has been no defense provided or an unconditional defense. In addition, the suggested language has been so written as to make it clear that the duty of indemnification need not be the subject of an action against the entity, provided the board is satisfied that the factual requisites are present. Finally, as in Section 825, any contention that a claim must be presented in order to enforce the entity's duty of indemnification is eliminated by express provision in subdivision (d).

§825.6. (a) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of such payment if he acted or failed to act because of actual fraud, corruption or actual malice. Except as provided in subdivision (b), a public entity may not recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his defense against the action or claim.

(b) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his act or omission, and if the public entity conducted his defense against the claim or action pursuant to an agreement with him reserving the rights of the public entity against him, the public entity may recover the amount of such payment from him unless he establishes, or it was previously established in an action against him or against the public entity, that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice.

Comment: This amendment, which conforms §825.6 to the proposed amended versions of §§825 and 825.2, in effect makes the determination of scope of employment, if made in the action against the employee, conclusive upon the public entity. Since the entity provided the defense in that action, it should not have a second opportunity to litigate the issue. Similarly, if the determination was made in an action against the entity (such as an action by the claimant to enforce the entity's duty under §825(b)(3)), it should also collaterally estop the entity.

§825.8. The provisions of this article prevail over any immunity of a public entity or public employee, except as otherwise provided in Sections 844.6(d) and 854.8(d) of the Government Code or in any other statute hereafter enacted which expressly denies, limits or conditions the liabilities or duties provided in this article.

Comment: It seems reasonably clear, from the general pattern and framework of the Tort Claims Act of 1963, that the indemnification provisions of §§825 - 825.6 were intended to be applied without regard for specific immunities that might protect public entities and public employees from direct liability. In other words, the fact that the entity might be immune from direct liability would not preclude its duty to indemnify an employee who was held liable (e.g., employee held liable for wilful misconduct in transporting injured person from scene of fire, under Govt. C. §850.8, although public entity is totally immune from direct liability in such cases). Conversely, the fact that the employee might be immune from direct personal liability would not prevent the entity from enforcing his duty, where actual fraud, corruption or actual malice is shown, to reimburse the entity after it had been held liable and had satisfied the judgment (e.g., in a dangerous condition case, where employee liability is more restricted than entity liability). Sections 844.6(d) and 854.8(d), which make the duty of indemnification optional in cases of injuries to prisoners and mental patients, are consistent with this interpretation; for in the absence of these provisions, indemnification would (under the suggested interpretation) have been mandatory. Other indications that the Commission's intent was substantially as outlined above appear in its Recommendation,

pp. 819 and 847. (See, especially, the original Commission comment to proposed Govt. C. §825.6, which pointed out that the entity would have the right to recover from the employee, on a showing of actual fraud, corruption, or actual malice, amounts paid by the entity on a judgment based on that employee's conduct "even in those cases where the public employee would have been immune from liability had he been sued directly". Ibid. at 847.)

The only difficulty with the interpretation outlined above is that it is based on inference and argument from legislative history, and not on express language in the Act. To be sure, the general rule that the liability of a public entity is subject to "any immunity of the public entity provided by statute" is, itself, qualified by the introductory clause which limits its application when "otherwise provided by statute". Govt. C. §815(b). The general rule that a public entity has the benefit of immunities of employees (Govt. C. §815.2(b)) is likewise qualified by the words, "Except as otherwise provided by statute". But, is it entirely clear that the indemnification provisions are statutes that "otherwise provide" ? Could it not be argued that since the indemnification sections relate to rights and duties between public entities and their employees, while the other liability and immunity provisions are concerned with rights and duties between third persons and public entities or public personnel, there is no necessary inconsistency ? If so, the immunities could be given full effect as modifying the indemnification provisions, under the general rule that immunities prevail over liabilities.

To avoid any interpretation along these lines, the new section set out above is here proposed. By limiting its effect to the two named sections and to future explicit statutory modifications, it clearly precludes giving any effect to Veh. C. §17002 even if it is not repealed.

§830.4. A condition is not a dangerous condition within the meaning of this chapter ~~merely~~ solely because of the failure to provide ~~regulatory~~ official traffic control signals as described in Section 445 of the Vehicle Code, stop signs as described in Section 21400 of the Vehicle Code, yield right-of-way signs as described in Section 21402 of the Vehicle Code, ~~or~~ speed restriction signs, as described ~~by~~ in Section 21403 of the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

Comment: This section and §830.8, when read together, pose certain difficult problems of interpretation as originally drafted. For example, this section refers to "regulatory traffic control signals", while §830.8 refers to "traffic or warning signals". The Vehicle Code, however, does not employ precisely this terminology; in fact, an official traffic control device is defined therein as "any sign, signal, marking or device . . . for the purpose of regulating, warning or guiding traffic". Veh. C. §440. (Emphasis supplied.) Thus, under the present wording, it is difficult to identify exactly what signs or signals are meant, and to distinguish them clearly from the ones referred to in §830.8. The original intent that these two sections refer to different signs, signals and markings is, however, quite clear. See Commission's Recommendation, p. 851.

The wording of the proposed amendment uses the exact terminology of the Vehicle Code, and keys each descriptive phrase to the appropriate Vehicle Code section. These changes, together with conforming changes in §830.8, should eliminate any ambiguity.

§830.8. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide ~~traffic or warning~~ signals, signs, markings or other official traffic control devices (other than those referred to in Section 830.4) designed or intended to warn or guide traffic, as authorized by ~~described in~~ the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one ~~described~~ - referred to in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

Comment: This proposed amendment is intended to clarify the relationship between this section and §830.4. See the Comment under proposed amended §830.4. The phrase, "to warn or guide traffic", is adapted from Vehicle Code §§21350 and 21351, which authorize the placing and maintenance by the Division of Highways and local authorities, respectively, of "such appropriate signs, signals or other traffic control devices . . . to warn or guide traffic". The exclusion of the devices "referred to" (a term believed more accurate than "described in") in Section 830.4 is consistent with the original intent.

The principal types of traffic control devices within the purview of this section (excluding those mentioned in §830.4, of course) are: detour signs (Veh. C. §21363), equestrian crossing signs (Veh. C. §21805), livestock crossing signs (Veh. C. §21364), open livestock range warning signs (Veh. C. §21365), pedestrian crossing prohibition signs (Veh. C. §21361); railroad warning approach signs (Veh. C. §§21362, 21404); road work warning signs (Veh. C. §21406); school crosswalk warning signals and signs (Veh. C. §§21367, 21368); and school warning signs (Veh. C. §22352(b).

§831. Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets, ~~and~~ highways, alleys, sidewalks or other public ways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets, ~~and~~ highways, alleys, sidewalks or other public ways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets, ~~and~~ highways, alleys, sidewalks or other public ways resulting from weather conditions.

Comment: This is a clarifying amendment. The words, "streets" and "highways", as defined in the Vehicle Code, include alleys and sidewalks. See Veh. C. §§360 (defining "highway"), 590 (defining "street"), and 555 (defining "sidewalk"). But the Vehicle Code definitions are not directly applicable to §831. Thus, although it is probable that the present section would be construed to include sidewalks and alleys (see Bertollozzi v Progressive Concrete Co. (1949) 95 Cal. App.2d 332, 212 P.2d 910), the court might conceivably find an intent to limit the section to weather conditions that affect vehicular traffic. This intent might be derived from the fact that the Law Revision Commission's Recommendation, p. 824, appears to discuss this section only with respect to "drivers" and "motorists" on the highways, and makes no reference to pedestrians at all. Under the general rule of interpretation advanced in Muskopf (that where negligence exists, liability is the rule and immunity the exception), such a narrow interpretation is not impossible. The proposed amendment is thus designed to forestall unnecessary litigation.

§ 831.2. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property ~~y including but not limited to any natural condition of any lake, stream, bay, river or beach~~. For the purposes of this section, "unimproved public property" means an area of land or water, or both, in its natural condition, but does not include any portion of such an area upon which structural or other artificial improvements have been or are being constructed, except that changes for the limited purpose of conservation of natural resources do not alter the unimproved character of such property.

Comment: Section 831.2 provides immunity for conditions of "unimproved public property." The definition of "unimproved public property" makes it clear that a fire trail or fire access road running through a forest is not an "improvement"; it makes it clear that the planting of trees in a burned-over area, to prevent runoff and erosion, is not an "improvement"; it makes it clear that thinning of underbrush to promote growth in a redwood grove is not an "improvement." Nor is a communication line for the sole purpose of fire protection an "improvement." The definition also makes it clear that a large area in its natural condition is not "improved" merely because an improvement is constructed in a small portion of the area; only the portion of the area that is improved is taken out from under the protection provided by this section. On the other hand, when portions of such areas are "improved" for recreational purposes--by dredging, filling in with imported sand, anchoring of diving platforms, or constructing of piers for boats, or the like--only the area so improved is taken out from under the protection provided by this section.

The definition also makes unnecessary the language which has been deleted from Section 831.2.

§831.8. (a) Subject to subdivisions (c) and (d), neither a public entity nor a public employee is liable under this chapter for an injury caused by the condition of a reservoir if at the time of the injury the person injured was using the property for any purpose other than that for which the public entity intended or permitted the property to be used.

(b) Subject to subdivisions (c) and (d), neither an irrigation district organized pursuant to Division 11 (commencing with Section 20500) of the Water Code nor an employee thereof nor the State nor a state employee is liable under this chapter for an injury caused by the condition of a canals, conduits or drains used for the collection, distribution or discharge of water if at the time of the injury the person injured was using the property for any purpose other than that for which the district or State intended or permitted it to be used.

(c) [no change from present text] . . .

(d) [no change from present text] . . .

Comment: These proposed amendments are intended to clarify §831.8. The meaning of the term, "irrigation district", as it appears in the present text is not entirely clear, for some types of districts that engage in irrigation functions are organized under other statutes than the Irrigation District Law, and have other official names (e.g., California Water Districts; County Waterworks Districts; etc.). Reference to Division 11 of the Water Code eliminates any ambiguity on this point.

The word, "distribution", in the present text, seems to suggest that only water conduits carrying water to users are within the scope of §831.8(b); yet the term, "drains", appears to contemplate channels used to collect surplus or flood waters and convey them to points of discharge as well. This latter meaning is made clear by the added words.

The words, "or permitted", are inserted in (b) to conform to their use in (a). No rational reason is known for the difference now existing.

§835. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the ~~dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred~~ injury occurred in a way which was reasonably foreseeable as a consequence of the dangerous condition of the property, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Comment: The words of this section, as originally enacted, do not make entirely clear what is meant by "kind of injury". On their surface, these words appear to refer to the nature of the interest invaded - i.e., was it reasonably foreseeable that the condition would cause death, personal injury, property damage, or some other actionable invasion of an interest in "person, reputation, character, feelings or estate". See Govt. C. §810.8, defining "injury". But this view is not reflected in the official comment under §835, which intimates that a motorist might recover for injury caused by a chuckhole in a road while an airplane pilot might not, "for it is reasonably foreseeable that motorists will be injured by such a defect, but it is highly unlikely that airplanes will encounter the hazard." Sen. J., April 24, 1963, p. 1892. Thus, foreseeability was intended to refer to the way the injury happens rather than the kind of interest which was adversely affected.

§835.1. Sections 818.2, 820.2 and 821 of the Government Code do not limit or preclude liability pursuant to this article.

Comment: This section, which is entirely new, is intended to make clear the inapplicability of the discretionary immunity and the immunity for failure to enforce the law to public entity liability for dangerous property conditions. It is believed that this result is in accord with the original legislative intent, but that it should be made express rather than left to judicial interpretation.

Ordinarily, as the official comment under §815 pointed out (Sen. J., April 24, 1963, p. 1887), "the immunity provisions will . . . prevail over all sections imposing liability". But §815 so provides only "except as otherwise provided by statute". How does one know when a liability provision does "otherwise provide" ? The answer given by the official comment to §815 was: "Where the sections imposing liability or granting an immunity do not fall into this general pattern [i.e., immunity prevailing over liability], the sections themselves make this clear." Ibid.

Unfortunately, Section 835 does not make this clear, except by a process of liberal interpretation assisted by the legislative history. Section 835 begins with the words, "Except as provided by statute", and thus appears, when taken literally, to be directly subject to existing statutory immunities, including the discretionary immunity and the immunity for failure to enforce the law. But manifestly, to apply these two immunities in dangerous condition cases would eliminate most of the liability in those cases - for the basis of dangerous condition liability is ordinarily either a discretionary act or omission or a failure to enforce the law (i.e., building codes, safety orders, etc.). The nonapplicability of these two immunities should thus be made express to eliminate doubts.

Civil Code

§846. An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for taking of fish and game, camping, water sports, hiking or sightseeing, or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in this section.

An owner of any estate in real property who gives permission to another to take fish and game, camp, hike or sightsee upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been garnted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to take fish and game, camp, hike, or sightsee was granted for a consideration other than the consideration, if any, paid to the said landowner by the State; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner; or (d) for an injury for which a public entity or public employee is liable pursuant to statute, including Part 2 (commencing with Section 814) of Division 3.6 of the Government Code.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

Comment: Section 846 was added to the Civil Code by Chapter 1759 of the Statutes of 1963, and, being a later enacted statute than the Tort Claims Act (Chapter 1681) might be taken to limit the effect of the latter measure. General statutory provisions relating to tort liability have, in the absence of countervailing indications of legislative intent or public policy, been held applicable to public entities. See Flournoy v State of California (1962) 57 Cal.2d 499 (wrongful death statute held applicable to State, although statute only refers to liability of "person" causing the death). It is believed that persuasive arguments can be advanced that C.C. §846 should not be construed as a limitation on the Tort Claims Act, especially in view of the gross inconsistency between §846 and the dangerous condition provisions of the Act. One commentator on the Act has already taken this position. Van Alstyne, California Governmental Tort Liability §6.43 (1964). To avoid any doubt, §846 should be amended to make clear that it does not affect statutory liabilities of public entities or public employees.

Code of Civil Procedure

§1095. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay; provided, however, that in all cases where the respondent is an officer of a public entity, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the public entity represented by such public officer and not against such officer so appearing in said proceeding, and the same shall be a proper claim against the public entity for which such officer shall have appeared, and shall be paid as other claims against the public entity are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith. Recovery or award of damages pursuant to this section is not limited or precluded by the provisions of Part 2 (commencing with Section 814) of Division 3.6 of the Government Code, except that punitive or exemplary damages may not be recovered or awarded against the public entity. The presentation of a claim against the public entity pursuant to Part 3 (commencing with Section 900) of Division 3.6 of the Government Code is not a prerequisite to recovery or award of damages pursuant to this section. For the purpose of this section, "public entity" includes the State, a county, city, district or other public agency or public corporation. For the purpose of this section, "officer" includes officer, agent or employee.

Comment: Section 814 of the Government Code declares that the substantive liability and immunity provisions of the Tort Claims Act do not affect "the right to obtain relief other than money or damages against a public entity or public employee." The Senate Judiciary Committee Comment (Sen. J., April 24, 1963, p. 1886) indicates that this section was designed to preserve actions for "specific or preventative relief" and only preclude "tort actions for damages", where the Tort Claims Act provides an immunity.

In line with this policy, C.C.P. §1095 should be clarified to indicate that the immunities in the Tort Claims Act do not restrict the right to recover incidental damages in a mandamus proceeding. This will not frustrate the policy underlying the discretionary immunity rule (see Govt. C §820.2), because mandamus is not available to compel official discretion to be exercised in a particular manner. See, e.g., Jenkins v Knight (1956) 46 Cal.2d 220. But it will tend to carry out the policy of Govt. C. §815.6 (liability for breach of mandatory duty) when a tort action based on §815.6 cannot be maintained. Cf. Govt C §815.2(b)

Section 1095 should also be clarified to indicate that the claims presentation procedures do not apply. It is probable that this result would obtain under the Act as it now reads, for a mandate proceeding would probably not be regarded as a "suit for money or damages" within the meaning of Govt. C. §945.4, even though incidental monetary relief was sought. The point is, however, not entirely clear, and the necessity for litigation may be removed by appropriate amendment. The need for presentation of a claim in mandamus cases is, at best, minimal, for mandate ordinarily will not issue unless there has been a prior demand for performance, and refusal by the officer; hence, ample notice will usually have been secured by these alternative channels.

§844. As used in this chapter, "prisoner" includes an inmate of a prison, jail or penal or correctional facility, except that a person within the jurisdiction of the juvenile court is a "prisoner" only if he is an inmate pursuant to a previous adjudication, whether final or not, declaring him to be a ward of the juvenile court under Section 602 of the Welfare and Institutions Code, or finding under Section 707 of the Welfare and Institutions Code that he is not a fit and proper subject to be dealt with under the provisions of the juvenile court law.

Comment: In the light of the original official comment on the unamended definition in this section, a person adjudicated as a ward of the juvenile court, if an inmate, would be a "prisoner" subject to the immunity provisions of §§844 - 846. The Comment, for example, stated that a "ward of the juvenile court engaged in fire suppression would be considered a prisoner as defined in this section". Sen. J., April 24, 1963, p. 1893.

The juvenile court law, as revised in 1961, contemplates three classes of minors to be dealt with under that law: (1) dependent, neglected or abandoned children, who are termed "dependent children of the court" rather than "wards" (see Welf. & Inst. C. §600), (2)minors whose conduct is likely to result in delinquency, and who for that reason may be made wards of the court (ibid., §601), and (3) minors who have committed criminal acts or have violated orders of the juvenile court (ibid., §602). The rationale of the juvenile court law appears to regard the first two categories as designed principally for protective purposes and the third as primarily correctional or rehabilitative. The definition of "prisoner" should make it clear which of these classes of

minors are to be treated as "prisoners". The amendment here suggested has been formulated in the belief that the immunities which flow from classification as a "prisoner" are predicated chiefly on the rationale of non-interference with the peculiar needs of penal custody, discipline and control. That rationale would justify treating a suspect under arrest as a prisoner, if he is an adult, even before trial and conviction. But, in light of the fact that juvenile court proceedings are not criminal proceedings (Welf. & Inst. C. §503) and the juvenile hall is not a penal institution (Welf. & Inst. C. §851), it seems to follow that minors being held as inmates of a "prison, jail or penal or correctional facility" should not <u>always</u> be treated as "prisoners". Conversely, <u>some</u> minors guilty of criminal offenses, but being handled in juvenile court proceedings, probably should be regarded as "prisoners" under this rationale, as the Judiciary Committee Comment indicates was the initial intent. The amendment here proposed is intended to distinguish the former category from the latter.

Excluded from the definition of "prisoner" by the proposed amended definition would be: (1) minors held in temporary custody before a detention hearing is held (Welf. & Inst. C. §§625, 628, 663); (2) minors under observation in a county psychopathic hospital pending proceedings to determine whether they should be declared wards of the court (Welf. & Inst. C. §705); (3) minors declared wards of the court under Section 601 who are placed in a juvenile home, ranch, camp or forestry camp (Welf. & Inst. C. §730); (4) dependent children and wards of the court committed to care of a public agency (Welf. & Inst. C. §727); (5) wards and dependent children temporarily detained pending execution of a court order (Welf. & Inst. C. §737); (6) wards or dependent children under commitment to Department of Mental Hygiene for observation (Welf. & Inst. C. §703); and (7) wards and dependent children at Youth Authority diagnostic and treatment centers (§704).

§845.6. Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 844.6, 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is licensed, certificated or registered in one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state, or a public employee who, although not so licensed, certificated or registered, is engaged as a public employee in the lawful practice of one of the healing arts, from liability for injury proximately caused by malpractice or exonerates the public entity from liability for injury proximately caused by such malpractice.

Comment: The insertion of the cross-reference to §844.6 clarifies this section's relationship to §844.6, in conformity with the like amendment to Section 845.4.

The change in the last sentence expands the scope of the public employees who are referred to as potentially liable for medical malpractice to include all types of medical personnel, and not merely the limited classes who are "licensed" under the Business & Professions Code. This amendment is in conformity with the amendment to Section 844.6(d).

§844.6. (a) Notwithstanding any other provisions of ~~law~~ this part, except as provided in ~~subdivisions (b), (c), and (d) of~~ this section, a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee who is licensed, certificated or registered in one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state, or against a public employee who, although not so licensed, certificated or registered, is engaged as a public employee in the lawful practice of one of the healing arts, for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action based on such malpractice to which the public entity has agreed.

(e) Nothing in this section prevents or limits the application to this section of Article 1 (commencing with Section 814) of Chapter 1 of this part.

Comment: The amendment to (a) is designed to eliminate uncertainty. As originally enacted, this subdivision appears to preclude liability (except as provided in this section) elsewhere provided by any law. Taken literally, this would impliedly repeal, at least in some cases, Penal Code §§4900-4906 (liability up to $5000 for erroneous conviction), and Penal Code §4011 (liability of cities and counties for medical care of prisoners injured by public employees or fellow prisoners). Moreover, as a specific provision, it might even be construed to prevail over the general language of Govt. C. §§814 and 814.2, which preserve liability based on contract, non-pecuniary remedies, and workmen's compensation. Implied repeal of these liability provisions, however, does not appear to have been intended. The problem is solved in the proposed amendment by limiting the "notwithstanding" clause to "this part" and expressly excepting §§814 and 814.2. The exception for subdivisions (b), (c) and (d) has been deleted in the interest of clarity, and in any event is unnecessary.

The amendment proposed for subdivision (d) expands the mandatory indemnification requirement in malpractice cases to additional medical personnel to whom the same rationale appears to apply. The section as originally enacted was unduly restrictive, since it referred only to medical personnel who were "licensed" (thus excluding, under a possible narrow interpretation, physicians, surgeons, and psychologists who are "certificated" rather than licensed, as well as "registered" opticians, therapists, and pharmacists) under the Business and Professions Code (thus excluding other laws, such as the uncodified Osteopathic Act and Chiropractic Act). In addition, the insistence on licensing precluded application of subdivision (d) to medical personnel lawfully practicing without a California license. See Bus. & Prof. C. §§1626(c) (professors of dentistry), 2137.1 (temporary medical staff in state institution), 2147 (medical students), 2147.5 (uncertificated internes and residents),

§345.4. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement; but, except as provided in Section 844.6 of the Government Code, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury ~~may be commenced~~ shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment: The reference to Section 844.6 is intended to clarify the relationship of this section to that one. It should be noted that §844.6 does not completely wipe out the liability of a public entity under the present section; it only does so for "an injury to any prisoner", and even then, authorizes (but does not require) the public entity to indemnify its employee if he is held personally liable. An interference with a prisoner's right to obtain judicial review may, of course, cause "injury" (as broadly defined in §810.8) to persons other than the prisoner himself - for example, to his family or employer. Section 844.6 does not preclude entity liability to third parties. Hence, it should be inserted here as an exception, and the liability provided by the present section should be retained subject to that exception.

The second amendment, changing the section to refer to the date of accrual of the cause of action, clarifies the relationship of this section to the claim statute. As originally enacted, the 6 month period to sue after rejection of the claim might have expired before illegality of the imprisonment was determined so that an action could be commenced-

§846. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or, except as provided in Sections 26681 - 26684 of the Government Code, by the failure to retain an arrested person in custody.

Comment: It is not clear whether the liability of a sheriff for the escape or rescue of a person arrested in a civil action, as provided in Govt. C. §§26681 - 26684, was intended to be impliedly repealed by this section. The proposed amendment is based on the belief that no such repeal was intended. In the absence of this amendment, the general rule that immunities prevail over liabilities, as set out in §815, might be construed to effect such an implied repeal.

§850.4. Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused ~~in fighting fires~~ by an act or omission of a public employee while engaged in fighting a fire.

Comment: The language of this section, as enacted originally, is somewhat ambiguous. The words, "in fighting fires", might be construed to mean "in the course of fighting fires", and would then extend immunity to injuries not directly connected with the fire fighting operation. For example, if so construed, medical malpractice by a county hospital ambulance attendant in treating a victim of the fire at the scene might be within the immunity, for it occurred "in fighting fires". Or a fireman at the scene of a fire might commit an unprovoked assault upon a spectator for reasons wholly unrelated to the fire, and yet be immune. The proposed amendment makes it clear that the immunity extends only to injuries that are caused by acts or omissions while actually fighting a fire, which appears to have been the original intent.

§850.5. (a) Sections 850, 850.2 and 850.4 shall not be construed to limit or preclude the liability of a public entity or a public employee as provided in Chapter 2 (commencing with Section 830) of this part for an injury resulting from a dangerous condition of public property other than equipment or facilities maintained principally for use in preventing, protecting against, or suppressing fires.

(b) Sections 850, 850.2 and 850.4 shall not be construed to limit or preclude the liability of a public entity as provided in Section 815.6 of this code for an injury caused by its failure to exercise reasonable diligence to discharge a mandatory duty that relates principally to a function, responsibility or activity of the public entity other than fire protection, prevention or suppression.

Comment: This proposed section is new. It seeks to limit the application of §§850 (providing immunity for failure to provide a fire department or fire protection service), 850.2 (immunity for failure to provide sufficient fire protection personnel, equipment or facilities), and 850.4 (immunity for condition of fire protection and firefighting equipment and facilities, and for injuries caused in fighting fires) to avoid possible interpretations of these immunities in ways contrary to what appears to have been the legislative intent.

For example, as enacted, §850.4 might be construed to preclude liability for the dangerous condition of a fire station that caused injury to a voter entering it on election day to cast his ballot at the polling booth set up therein. See, e.g., Hook v Point Montara Fire Protection Dist. (1963) 213 Cal.App.2d 96, 28 Cal. Rptr. 560. As an immunity provision, §850.4 would prevail over the dangerous condition liability in this case if the fire station was deemed to be a "fire pro-

tection . . . facility" within the meaning of §850.4. It seems unlikely that this result is consistent with the legislative intent.

Again, the state may conceivably fail to comply with a mandatory duty, imposed by the State Fire Marshal under H. & S. C. §13108, to install a modern sprinkler system in a state hospital, as a fire safety precaution. This failure might be considered to be a "failure to provide fire protection service" under §850, or a failure to provide "sufficient fire protection facilities" under §850.2, and thus a delict for which the entity is immune from liability. Yet, in the absence of §§850 and 350.2, liability for resulting death or injury might well be imposed under the mandatory duty provisions of §815.6 or the dangerous condition provisions of §§830 - 840.6. The maintenance of a state hospital is not principally for fire protection purposes, and it is believed that the immunity provisions of §§850 and 850.2 were not intended to extend to such functions or activities but only to property, equipment and facilities whose principal function (like that of fire engines, pumpers, fire hydrants, ladder trucks, etc.) is the prevention or suppression of fire.

A third example might be an administration building in a county park in a mountainous area, or a bulldozer used by the county in constructing a county road in the mountains. The chimney on the building and the exhaust on the bulldozer are required to be covered with spark arrester screens. See Pub. Res. C. §§4105, 4167 (and note that reference in these sections to "person" includes public entities, Pub. Res. C. §4017). Noncompliance would ordinarily be a possible basis of liability under both §815.6 and the dangerous condition sections; but present §§850.2 and 850.4 might be construed to grant immunity, for spark arresters may be deemed to be "fire protection facilities".

The proposed section thus clarifies the scope of §§850 - 850.4.

§850.6. Whenever a public entity, pursuant to a call for assistance from another public entity, provides fire protection or firefighting service outside of the area regularly served and protected by the public entity providing such service, the public entity providing such service is liable for any injury for which liability is imposed by statute caused by its act or omission or the act or omission of its employee occurring in the performance of such fire protection or firefighting service. Notwithstanding any other law, the public entity calling for assistance is not liable for any act or omission of the public entity providing the assistance or for any act or omission of an employee of the public entity providing the assistance; but the public entity providing such service and the public entity calling for assistance may by agreement determine the extent, if any, to which the public entity calling for assistance will be required to indemnify the public entity providing the assistance. Except as provided by agreement, nothing in this section exonerates the public entity calling for assistance from liability for an act or omission of itself or of one of its employees.

Comment: This clarifying amendment ensures that the entity calling for assistance is held liable for its own negligent or wrongful acts, to the extent liability is imposed by statute, even though the entity providing firefighting assistance may be concurrently liable or the act or omission causing the injury may have been participated in by the employees of the latter entity. For example, if the calling entity's fire chief directed (negligently) that one of the calling entity's fire trucks should be driven by an employee of the responding entity over a bridge known to both individuals to be incapable of supporting the load, the calling entity should be liable (Veh. C. §17001) even though the the act causing the damage (loss of bridge; injury to bystander as bridge collapsed) was the act of an employee of the responding entity.

§850.8. (a) Any member of an organized fire department, ~~fire protection district,~~ or other firefighting unit of ~~either the State or any political subdivision,~~ a public entity, or any employee ~~of the Division of Forestry, or any other public employee~~ of a public entity when acting in the scope of his employment, may transport or arrange for the transportation of any person injured by a fire, or by a fire protection operation, to a physician and surgeon or hospital if the injured person does not object to such transportation.

(b) Except as provided in subdivision (c), ~~Neither~~ neither a public entity nor a public employee is liable for any injury sustained by the injured person as a result of ~~or in connection with such transportation~~ any act or omission under subdivision (a) or for any medical, ambulance or hospital bills incurred by or in behalf of the injured person ~~or for any other damages, but a~~ .

(c) A public employee is liable for injury proximately caused by his willful misconduct in transporting the injured person or arranging for such transportation.

Comment: As originally enacted, this section was substantially a reenactment (with a few changes) of former Govt. C. §1957. Its wording was not conformed to the terminology and definitional sections of the Tort Claims Act. The proposed amendments are intended to so conform it and thereby clarify its meaning.

Subdivision (a) is worded so that it applies to every public employee, but also to members of volunteer fire companies serving public entities. Subdivision (b) has been reworded to make it clear that the entity is not immune for torts committed by third persons in their employ, e.g., a negligent operator of a fire truck who crashed into the ambulance carrying the fire victim. The phrase, "any other damages" is omitted as unnecessary in light of the broad definition of "injury" in §810.8.

§854.2. As used in this chapter, "mental institution" means any medical facility, or identifiable part of any medical facility, used primarily for the care or treatment of persons committed for mental illness or addiction.

Comment: The insertion of the word, "medical", better correlates this section with the definition of "medical facility" in §854. It also seems desirable to make clear that the entire institution does not have to be devoted to care and treatment of the mentally ill in order to come within the definition, but that a ward or wing of a general hospital used for that purpose will also qualify.

§854.4. As used in this chapter, "mental illness or addiction" means mental illness, mental disorder bordering on mental illness, mental deficiency, epilepsy, habit forming drug addiction, narcotic drug addiction, dipsomania or inebriety, ~~sexual psychopathy~~ mental disease or defect or disorder which predisposes to the commission of sexual offenses to a degree dangerous to the health and safety of others, defective or psychopathic delinquency, or such mental abnormality as to evidence utter lack of power to control sexual impulses.

Comment: This amendment changes the definition of "mental illness or addiction" to reflect the abolition of the term "sexual psychopath" by the 1963 Legislature, and the substitution of the term "mentally disordered sex offender". See Welf. & Inst. C. §5500. The amendment paraphrases the statutory definition of the latter term as contained in the cited section. In addition, it includes reference to "defective or psychopathic delinquency", a form of mental irresponsibility which is still recognized by California law but which was not explicitly mentioned in the original definition. See Welf. & Inst. C. §§6664 - 6667.

§854.6. As used in this chapter, "mental patient" means a person who, for purposes of observation, diagnosis, care or treatment for mental illness or addiction, is confined or detained in a mental institution pursuant to admission, commitment or other placement proceedings authorized by law, or is on duly authorized parole or leave of absence from a mental institution.

Comment: This entirely new section seeks to clarify the scope of the immunities created by §854.8. In that section, it is declared that a public entity (except where otherwise provided in the section) is not liable for injuries by or to "any person committed or admitted to a mental institution". The quoted wording is not entirely clear. For example, it might not apply to persons who were neither committed nor admitted, but had been temporarily "placed" (see Welf. & Inst. C. §§704, 5512) or "held" (Welf. & Inst. C. §705) or temporarily "detained" (see Welf. & Inst. C. §§5050, 5400) pending commitment proceedings. Moreover, the requirement in §854.8 that the person be committed or admitted to a mental institution created doubts as to its applicability to mental patients on parole or leave of absence, as authorized by law. See Welf. & Inst. C. §§5355.7 (narcotics addicts), 5406 (inebriates), 6667 (defective or psychopathic delinquents), 6725.5 - 6726.6 (mentally ill persons). Yet, such paroled patients, or patients on leave, would seem to come within the rationale of the mental patient immunity, since the decision to parole or grant a leave should not be influenced by fear of possible liability for injuries by or to the patient. These ambiguities are cleared up by the proposed new section.

§854.8. (a) Notwithstanding any other provision of law this part, except as provided in ~~subdivisions (b), (c) and (d) of~~ this section, a public entity is not liable for:

(1) An injury proximately caused by any ~~person committed or admitted to a mental institution~~ mental patient.

(2) An injury to any ~~person committed or admitted to a mental institution~~ mental patient.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Nothing in this section prevents a person, other than a ~~person committed or admitted to a mental institution~~ mental patient, from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee who is licensed, certificated or registered in one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state, or against a public employee who, although not so licensed, certificated or registered, is engaged as a public employee in the lawful practice of one of the healing arts, for malpractice

arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action based on such malpractice to which the public entity has agreed.

(e) Nothing in this section prevents or limits the application to this section of Article 1 (commencing with Section 814) of Chapter 1 of this part.

Comment: The substitution of the phrase, "mental patient", for the original language in subdivisions (a) and (c) is consistent with the proposed new definition of "mental patient" in §854.6, recommended concurrently herewith.

The other changes in this section are in conformity with §844.6, and are supported by the reasoning advanced for the similar amendments proposed for that section.

§855. (a) A Except as provided in Section 854.8, a public entity that operates or maintains any medical facility that is subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation.

(b) A Except as provided in Section 854.8, a public entity that operates or maintains any medical facility that is not subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities substantially equivalent to those required by any statute or regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities applicable to a public medical facility of the same character and class, unless the public entity establishes that it exercised reasonable diligence to conform with such minimum standards.

(c) Nothing in this section confers authority upon, or augments the authority of, the State Department of Public Health or the State Department of Mental Hygiene to adopt, administer or enforce any regulation. Any regulation establishing minimum standards for equipment, personnel or facilities in any medical facility operated or maintained by a public entity, to be effective, must be within the scope of authority conferred by law.

Comment: The added cross-references, although not strictly necessary, clarify the relationship of this section to the immunities in §854.8.

§855.2. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of an inmate of a medical facility operated or maintained by a public entity to obtain a judicial determination or review of the legality of his confinement; but, except as provided in Section 854.8 of the Government Code, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury may be ~~commenced~~ shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment: These proposed amendments will conform this section to the amended version of §845.4, as proposed above, and for similar reasons. Although §854.8 grants immunity for injuries to mental patients, this section is not limited to this class of medical inmates and thus is only partially superseded by §854.8. It should be retained and, for sake of clarification, express mention should be made that §854.8 is an exception. The amendment in the last clause makes a more logical interrelationship with the claim presentation requirement.

§856. (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment:

(1) Whether to confine a person for mental illness or addiction.

(2) The terms and conditions of confinement for mental illness or addiction in a medical facility operated or maintained by a public entity.

(3) Whether to parole, grant a leave of absence to, or release a person ~~from confinement~~ confined for mental illness or addiction in a medical facility operated or maintained by a public entity.

(b) A public employee is not liable for carrying out with due care a determination described in subdivision (a).

(c) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out:

(1) A determination to confine or not to confine a person for mental illness or addiction.

(2) The terms or conditions of confinement of a person for mental illness or addiction in a medical facility operated or maintained by a public entity.

(3) A determination to parole, grant a leave of absence to, or release a person ~~from confinement~~ confined for mental illness or addiction in a medical facility operated or maintained by a public entity.

(d) "Confine", as used in this section includes admit, commit, place, detain, and hold in custody.

Comment: Reference to "leave of absence" is recommended, since the Welfare & Institutions Code appears to distinguish such leaves from paroles. See Welf. & Inst. C. §§6611, 6667, 6726. New (d) is added to clarify application of this section to all cases within its rationale.

§856.2. Neither a public entity nor a public employee is liable for an injury caused by or to an escaping or escaped ~~person who has been committed for mental illness or addiction~~ mental patient.

Comment: The amendment here proposed accomplishes two purposes:

First, by insertion of the words, "or to", it is clear that injuries sustained by escaping or escaped mental patients are not a basis of liability. Other jurisdictions have recognized that when a mental patient escapes as a result of negligent or wrongful acts or omissions of cutodial employees, injuries sustained by the escapee as a result of his inability due to mental deficiency or illness to cope with ordinary risks encountered may be a basis of state liability. See, e.g., Callahan v State of New York (Ct Cl 1943) 179 Misc 781, 40 NYS2d 109, aff'd (1943) 266 App Div 1054, 46 NYS2d 104 (frostbite sustained by escaped mental patient); White v United States (4th Cir 1953) 317 F2d 13 (escaped mental patient killed by train). It is not certain whether the immunity of §854.8 for injuries to mental patients would cover them after an escape or even during one. Hence, to clarify the rule, the immunity here should be expressly made to cover injuries to escapees.

Second, by using the term, "mental patient", the scope of the immunity is clarified consistently with its rationale. "Mental patient" is defined in proposed new §854.6. As so defined, it covers not only persons who were "committed" for mental illness or addiction, but also persons who after voluntary admission are forcibly detained in a mental institution (Welf. & Inst. C. §§6602(b), 6605.1), persons held in emergency detention prior to commitment (Welf. & Inst. C. §§5050, 5050.3), and juveniles placed in medical facilities for observation and diagnosis (Welf. & Inst. C. §§703, 704, 5512). The rationale of the immunity seems to cover all of these cases, and should thus be made explicit.

§860. As used in this chapter, "tax" includes a tax, assessment, or any fee or charge incidental or related to the imposition, enforcement or collection of a tax or assessment.

Comment: The words, "fee or charge", in this definition are somewhat uncertain in meaning. The term, "tax", has been generally regarded as synonymous for most purposes with "assessment", and has been held to include such analogous exactions as business license fees, sewer charges, and unemployment insurance contributions. See Cowles v City of Oakland (1959) 167 Cal. App.2d Supp. 835, 334 P.2d 1069, and cases there collected. Since the legislative purpose, as set out in the Senate Committee Comment was to confer immunity for "discretionary acts in the administration of tax laws" (Sen. J., April 24, 1963, p. 1895), it seems advisable to clarify the meaning of the words "fee or charge". Otherwise, the immunities here might be construed to extend well beyond the stated legislative purpose, and cover exactions that bear no resemblance to taxes, such as filing fees, charges for transportation, water or electricity, admission fees, rentals and concession fees, etc. The proposed amendment would, however, clearly cover such exactions as delinquency penalties and redemption fees which are incidental to tax administration, and were thus probably within the original intent.

§860.2. Neither a public entity nor a public employee is liable for an injury caused by:

(a) Instituting or prosecuting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

(b) An act or omission resulting from an exercise of discretion in the interpretation, ~~or~~ application, imposition, enforcement or collection of any ~~law relating to~~ a tax.

Comment: As here proposed to be amended, this section appears to more faithfully reflect the original legislative intent. As stated by the Senate Judiciary Committee, that purpose was to set forth an explicit application of the discretionary immunity granted by §820.2, thereby granting immunity for "discretionary acts in the administration of tax laws" and avoiding "the necessity for test cases to determine whether the discretionary immunity extends this far." Sen. J., April 24, 1963, p. 1895. But as originally drafted, this section was both too narrow and too broad to faithfully reflect this statement of intent.

It was too narrow in that it limited the immunity to "instituting" tax proceedings, but did not include their prosecution. It was too broad in that it granted immunity for any "act or omission in the . . . application of any law relating to a tax". Obviously, many acts in the application of tax laws are not discretionary; hence the amendment limits the immunity to discretionary acts, as in §820.2, to conform to legislative intent. In addition, it is hard to tell what is a law "relating to" a tax. And, even the liability created by §815.6 (for failure to discharge a mandatory duty) might be regarded as impliedly repealed by this section as to tax administration matters, although no no indication of legislative intent to do so appears.

§860.4. Nothing in this chapter affects any law ~~relating to~~ providing for refund, rebate, exemption, cancellation, amendment or adjustment of taxes.

Comment: The suggested expression, "providing for", is believed preferable to "relating to". The latter phrase is somewhat uncertain, and conceivably creates an inconsistency in the statute that constitutes an invitation to litigation. For example, in view of the broad definition of "law" in §811, and the rather vague meaning of "relating to", one might argue that the general provisions of the Tort Claims Act itself, and judicial decisions interpreting them, "relate to" tax administration and thus still apply, notwithstanding §§860 and 860.2. Thus, a statute might impose a mandatory duty on the county assessor to do a particular act relating to tax exemptions; his negligent failure to perform it would be actionable under §815.6; and this would make §815.6 a law that "relates to" exemption of taxes. This line of reasoning, although admittedly not likely to prevail, would, of course, frustrate the legislative intent. To avoid possible litigation on the point, the amendment here proposed is suggested, making clear that only those laws that provide for tax matters are within the scope of the present disclaimer provision.

§895.2. Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any ~~law~~ statute other than this chapter upon any one of the entities or upon any entity created by the agreement for injury ~~caused by a negligent or wrongful act or omission occurring in~~ arising out of the performance of such agreement.

Notwithstanding any other law, if a judgment is recovered against a public entity for injury ~~caused in~~ arising out of the performance of an agreement, the time within which a claim for such injury may be presented to, or in the event that a claim was previously presented to and acted on by the public entity the time within which ~~or~~ an action may be commenced against, any other public entity that is subject to the liability determined by the judgment under the provisions of this section begins to run when the judgment ~~is rendered~~ becomes final.

Comment: Substitution of "statute" for "law" in the first paragraph corrects what appears to be an inadvertent misusage.

The words, "or as a result of", are intended to preclude an unduly limited application of this section. If a bridge was safely built under an "agreement", but thereafter collapsed and caused injury, it might be argued that the injury had not occurred in the performance of the agreement, within the meaning of the second paragraph as originally worded. The first and second paragraphs have been amended to preclude this result. The term, "arising out of", is taken from §895.4.

As originally written, both the time for presenting a claim and for commencing an action on it began to run from the same date - an obvious inconsistency. This has now been cured. In addition, the indefinite expression, "judgment is rendered", has been changed to the technically more precise expression, "judgment becomes final".

§895.3. Unless the public entities that are parties to an agreement otherwise provide in the agreement, if a public entity is held liable upon any judgment for damages ~~caused by a negligent or wrongful act or omission occurring in~~ arising out of the performance of the agreement and pays in excess of its pro rata share in satisfaction of such judgment, such public entity is entitled to contribution from each of the other public entities that are parties to the agreement. The pro rata share of each public entity is determined by dividing the total amount of the judgment by the number of public entities that are parties to the agreement. The right of contribution is limited to the amount paid in satisfaction of the judgment in excess of the pro rata share of the public entity so paying. No public entity may be compelled to make contribution beyond its own pro rata share of the entire judgment.

Comment: These changes are intended to conform this section to the like changes made in §895.2, for reasons expressed in the Comment appended thereto.

VEHICLE CODE

§17000. As used in this chapter :

~~, "public agency" means the State, and county, municipal corporation, district and political subdivision of the State, or the State Compensation Insurance Fund.~~

(a) "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

(b) "Employment" includes office or employment.

(c) "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

Comment: This amendment merely incoroporates and makes applicable to automobile accident cases the same definitions that apply to other tort actions against public entities. See Govt. C. §§810.2, 810.4, 811.2.

§17002. A public entity which is the owner, or the bailee of an owner, of a motor vehicle is liable for death or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the public entity or otherwise, by any person using or operating it with the permission, express or implied, of the public entity. The negligence of that person shall be imputed to the public entity for all purposes of civil damages.

Comment: This new section incorporates the substance of present Veh. C. §§17150 and 17154 (second paragraph) into a single section, imposing liability upon public entities predicated upon ownership and bailment.

An effort has been made to make the ownership liability of public entities for motor vehicle torts correspond as closely as feasible with the liability now provided for private owners. In order to understand the impact of this section, therefore, consideration must be given to suggested new Vehicle Code §§17004 (governing joinder of defendants and satsifaction of judgment), 17005 (subrogation rights) and 17006 (bailee of public entity, if a private person, treated as an operator even though vehicle actually operated by third person).

§17003. The liability of a public entity under Section 17002, and not arising through the relationship of principal and agent or master and servant is limited to the amount of ten thousand dollars ($10,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of twenty thousand dollars ($20,000) for the death of or injury to more than one person in any one accident, and is limited to the amount of five thousand dollars ($5,000) for damage to property in any one accident.

Comment: This new section merely constitutes an adaptation of existing Veh. C. §17151.

§17004. (a) Except as provided in subdivision (b) of this section, in any action brought against a public entity under Section 17002 either as an owner or bailee, the operator of the vehicle whose negligence is imputed to the public entity shall be made a party defendant if personal service of process can be had upon the operator within this State. Upon recovery of judgment, satisfaction shall first be sought out of the property, funds or assets of the operator so served.

(b) If, at the time of the negligence on which the action is based, the operator was an employee of a public entity designated as a defendant in the action, the operator may but need not be made a party defendant. If the operator is made a defendant and is served with process, and if it is established in the action that at said time he was an employee of the public entity, the respective rights and duties of the public entity and the operator as to payment of, indemnification for, and subrogation rights under any judgment recovered by the plaintiff are governed by Article 4 (commencing with Section 825) of Chapter 1 of Part 2 of Division 3.6 of the Government Code and by Section 17006 of the Vehicle Code.

Comment: Subdivision (a) of this section is an adaptation of present Veh. C. §17152 to the context of public entity liability based on ownership. The requirement in §17152 that "recourse first be had against the property of the operator" has been recast as above in light of the treatment of entity-bailees as "operators" under proposed new §17005 (below) and the fact that judgments against public entities are not enforceable by execution against their "property".

Subdivision (b) is deemed advisable in order to prevent a dilution of the indemnification policy of Govt. C. §§825 - 825.6 in cases where the operator was an employee, but the plaintiff elected to sue under ownership liability theory rather than respondeat superior. Compare §17006.

§17005. (a) If a public entity which is the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then the public entity and the driver shall both be deemed operators of the vehicle of the owner within the meaning of Sections 17004 and 17006.

(b) If the bailee of a public entity with the permission, express or implied, of the public entity permits another to operate the motor vehicle of the public entity, then the bailee and the driver shall both be deemed operators of the vehicle within the meaning of Sections 17004 and 17006.

Comment: Subsection (a) is an adaptation of present Veh. C. §17154 (first paragraph). It applies to a situation in which the plaintiff sues the owner of a motor vehicle under bailment to a public entity, and requires (by reference to § 17004) that both the bailee-entity and the actual operator of the vehicle be joined as defendants, with the qualification that the plaintiff must seek satisfaction of his judgment first from the bailee-entity and the actual operator. It also provides (by reference to §17006) that the owner is subrogated to the plaintiff's rights against both the entity-bailee (liable under §17002) and the actual operator (liable for his personal negligence under general tort law). In both situations, however, if the actual operator was an employee of either the owner or the bailee-entity, the indemnification policy of Govt. C. §§825 - 825.6 is preserved and made applicable; hence, if in the scope of his employment, the actual operator is ordinarily entitled to indemnification from the entity that employs him.

Subsection (b) is a corollary provision to take care of the case of a plaintiff who sues an entity-owner of a vehicle under bailment to a private (i.e., non-public entity) bailee, applying the same policy as in (a).

§17006. If there is recovery under Section 17002 against a public entity, the public entity is subrogated to all the rights of the person who has been injured and may recover from the operator the total amount of any judgment and costs recovered against the public entity, except that if at the time of the negligence on which the judgment is based the operator was an employee of the public entity, this section is subject to the provisions of Article 4 (commencing with Section 825) of Chapter 1 of Part 2 of Division 3.6 of the Government Code.

Comment: This section is an adaptation of present Veh. C. §17153. A public entity which is a bailee, it should be noted, is an "operator" within the meaning of this section (see proposed new §17005(a), supra), so that the owner-defendant can assert subrogation rights against it as well as against the actual operator of the vehicle.

The section extends to public entity-owners/bailees the same subrogation rights which present law extends to private vehicle owners/bailees, with one exception. The exception is in the case of an operator who, at the time of the tort, was an employee of the entity held liable and was acting within the scope of his employment or was accorded a free defense by the public entity without a reservation of rights preserving the issue of scope of employment. (Because scope of employment is not essential to liability under §17002, plaintiffs may sometimes elect to sue under §17002 in view of the easier proof required even though, in fact, the employee was in the scope of his employment.) In these cases, the indemnification policy of the Tort Claims Act continues to apply. Of course, if the employee cannot qualify for the exceptional treatment thus allowed, the subrogation policy of the present section is applicable to him. Thus (except where an unconditional defense is provided by the entity) an employee not acting in the scope of employment, but with consent, is liable to indemnify the entity.

§17007. Subject to Sections 935.4, 935.6, 948 and 949 of the Government Code, a public entity which is the owner or bailee of the owner of a motor vehicle involved in an accident resulting in death or injury to two or more persons may settle and pay any bona fide claims for damages arising out of such death or personal injuries, whether reduced to judgment or not, and the payments shall diminish to the extent thereof the total liability of the public entity on account of the accident. If the liability exists solely by reason of imputed negligence pursuant to Section 17002, payments aggregating the full sum of twenty thousand dollars ($20,000) shall extinguish all liability of the public entity for death or personal injuries arising out of the accident.

Nothing in this section shall be construed to limit or affect the liability and duty of a public entity to indemnify its employees as provided in Article 4 (commencing with Section 825) of Chapter 1 of Part 2 of Division 3.6 of the Government Code.

Comment: This section is an adaptation of existing Veh. C. §17155. The cross-reference to Govt. C. §§935.4, 935.6, 948 and 949 in the first line is intended to make clear that authority to settle claims, delegated to public officers or claims boards under these sections, are applicable to settlements under the present section.

The second paragraph is deemed essential to prevent the undermining of the indemnification policy of Govt. C. §§825 - 825.6 when the public entity has fully exonerated itself by payment of a full $20,000 from further liability to the injured person (or to an owner-bailor). Thereafter the entity's employee may be adjudged liable to a greater amount, and the entity either provided him with a defense without a reservation of rights or it is established that the employee acted in the scope of his employment. In these cases the duty to indemnify the employee still exists under this section.

§17008. If a motor vehicle is sold by a public entity under a contract of conditional sale whereby the title to such motor vehicle remains in the public entity, the public entity or its assignee shall not be deemed the owner notwithstanding the terms of the contract, until the public entity or its assignee retakes possession of the motor vehicle.

Comment: This is a counterpart to section 17156 of the Vehicle Code, without substantive change. Although it is probable that very few public entities either buy or sell motor vehicles on conditional sale contracts, the problem may occasionally arise under local home rule procedures authorizing such transactions by purchasing agents or under special district enabling acts containing broad and unlimited power to buy and sell property for district purposes.

§17009. No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages on account of personal injury to or death of the guest during the ride against any public entity legally liable for the conduct of the driver as provided in Sections 17001 and 17002 or in any other statute, unless the plaintiff in such action establishes (1) that at the time of the event giving rise to the cause of action, the driver was acting as a public employee in the scope of his employment, and (2) that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

Comment: This section is an adaptation of the "guest statute", Veh. C. §17158. It is concerned only with liability of public entities, since the employee's liability will continue to be governed by the ordinary guest statute. The requirement of proof in subdivision (1) is based on the judicial rule of Weber v Penyan (1937) 9 C.2d 226, 70 P.2d 183, recently reaffirmed and applied in Benton v Sloss (1952) 38 C.2d 399, 240 P.2d 575, relieving an owner of imputed liability under the guest statute where intoxication or willful misconduct of the driver is shown, unless a basis for application of the respondeat superior doctrine was also established.

~~§17004. No member of any police or fire department maintained by a county, city, or district, and no member of the California Highway Patrol or employee of the Division of Forestry, is~~

§17010. A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

Comment: The extension of former Veh. C. §17004 (here renumbered as §17010) to all public employees seems appropriate in light of the expansive definition of "authorized emergency vehicle" contained in Veh. C. §165, as added in 1961). Under that definition, emergency calls in authorized emergency vehicles may take place under a variety of circumstances not clearly qualifying for the employee immunity under present §17004; yet no apparent basis for limiting the immunity to less than all such emergency situations has been discerned.

Note on Vehicle Code provisions:

Sections 17000 through 17010, which are proposed above, represent a complete scheme for enacting in concise form a body of law governing liability of public entities for motor vehicle accidents. Other conforming changes would also be required, of course, but would depend to some extent upon the policy determinations made by the Law Revision Commission on the preceding recommendations. For example:

1. Existing Veh. C. §§ 17000, 17001, 17002, 17004 should be repealed, if the foregoing recommendations are adopted. These sections relate to liability based on respondeat superior.

2. Existing Veh. C. §17004.5 should be renumbered and reenacted as Veh. C. §17011.

3. Consideration should be given to the appropriateness of adding another section (perhaps numbered §17012) to the Vehicle Code declaring that nothing in §§17001 - 17002 shall be construed to limit or restrict any liability elsewhere imposed by statute. For example, public entities may on occasion be held liable for maintaining a motor vehicle in a dangerous condition, whether driven by an employee in the scope of his employment, or by a permissive user.

§905.2. There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the State:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express or implied contract, (2) for an injury for which the State or an employee of the State is claimed to be liable or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

Comment: As enacted in 1963, subdivision (c)(1) followed the wording of former Govt. C. §641 (enacted in 1959), which was merely a reenactment of previous Govt. C. §16041 (enacted in 1945), and referred to claims for money or damages "on express contract". This limitation to express contract was first introduced into California law in 1929, when the original statute authorizing suits against the state (Stats 1893, ch. 45, §1, p. 57) was repealed and replaced by Pol. C. §688. The 1893 act authorized suits in all types of contract situations. See Chapman v State (1894) 104 Cal. 690, 38 Pac. 457. But, when Pol. C. §688 was adopted in 1929 (Stats 1929, ch. 515, §3, p. 891), the adjective "express" was inserted before "contract". In 1931, the very next regular session of the legislature, §688 was again amended, and "express" was deleted, apparently because of a legislative desire not to adversely affect certain pending litigation. See Pacific Gas & Elec. Co. v State of California (1931) 214 Cal. 369, 6 P.2d 78. But

in 1933, by still another amendment to §688, the adjective, "express", was again placed in the statute before "contract". Stats 1933, ch. 886, p.2299.

The significance of this history is that §688 not only related to the presentation of claims, but was the sole statutory authorization for suing the State on a rejected claim. Since claims were only permitted on "express contract", suit could not be brought against the State on implied contracts for want of consent by the State to be sued on such claims. See County of Los Angeles v Riley (1942) 20 Cal.2d 652, 662, 128 P.2d 537; Pacific Gas & Elec. Co. v. State of California, supra.

However, §945 of the Government Code, added by the 1963 Tort Claims Act, now authorizes the State to be sued generally, without limitation to particular types of actions. The State today thus may be sued on implied contract claims. To limit the claim presentation requirement to express contract claims thus creates one class of claims on which suits may be brought against the State that are excused from the claim requirement, without any apparent reason to make the exception. Of course, some implied contract claims (such as an assumpsit claim founded on a conversion of the plaintiff's goods) would probably be classified, for claim-presentation purposes, as claims for money based on an "injury", and thus within the claim requirement of subdivision (c)(2). But it is not clear that all such claims would be so regarded; and in any event, the logical way to eliminate the problem is to insert "or implied" into subdivision (c)(1) as above.

The amendment to subdivision (c)(2) is intended to eliminate any doubt that a claim must be presented, as a condition to suit against a State employee, when the State is clearly not liable (i.e., is immune by statute) although its employee may be liable. As originally enacted, it could be argued that a claim need not be presented in such cases, and that suit against the employee is thus not barred by §950.2 as a result of such failure. This result, however, would frustrate the intent underlying §950.2.

§910.4. The board may provide forms specifying the information to be contained in claims against the public entity. If the board provides forms pursuant to this section, the person presenting a claim need not use such form if he presents his claim in conformity with Sections 910 and 910.2. ~~If he uses the form provided pursuant to this section and complies substantially with its requirements, he shall be deemed to have complied with Sections 910 and 910.2.~~ A claim presented on a form provided pursuant to this section, which complies substantially with the requirements of the form or with the requirements of Sections 910 and 910.2, shall be deemed to be in conformity with Sections 910 and 910.2.

Comment: The claim form prescribed by the State Board of Control (2 Cal. Admin. C. §§631, 632.5) requires certain information that is not explicitly required by Section 910, and also requires that the claim be verified. As this section was originally enacted, it might be possible for a claimant to use the officially prescribed claim form but fail to verify it, or fail to include required information. Lack of verification is ordinarily regarded as a fatal defect that cannot be cured by the doctrine of substantial complaince. See, e.g., Peck v. City of Modesto (1960) 181 C.A.2d 465, 5 Cal. Rptr. 482. Omission of other required data sometimes also was beyond cure by substantial compliance. Taken literally, this section thus might result in a trap, where claimants failed to comply with the form supplied, even though they were fully in compliance with the statute requirements. The amendment makes it clear that a claim presented on an officially provided form - such as the State Board of Control form - is sufficient if the information given satisfies Sections 910 and 910.2, even though it may not fully meet the requirements of the form itself (e.g., may not be verified).

§910.6. (a) A claim may be amended at any time before the expiration of the period designated in Section 911.2 or before final action thereon is taken by the board, whichever is later, if the claim as amended relates to the same transaction or occurrence which gives rise to the original claim. ~~The amendment shall be considered a part of the original claim for all purposes.~~ For all purposes the claim as amended shall be considered the original claim as presented.

(b) A failure or refusal to amend a claim, whether or not notice of insufficiency is given under Section 910.8, shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Sections 910 and 910.2 or a form provided under Section 910.4.

Comment: This amendment is designed to make it entirely clear that an amended claim is (a) subject to the substantial compliance doctrine of §910.6(b), set out above, (b) subject to the notice of insufficiency procedure of §910.8, and (c) subject to the waiver rule of §911. Each of the cited provisions refers to the "claim as presented" as the object of the indicated procedural rules. It is believed that no change in legislative intent will result from the amendment; but it was not fully clear that the phrase, "claim as presented", in §§910.6(b), 910.8 and 911 would readily be understood by counsel to include an amended claim. But since the 45 day period for board action begins to run from the presentation of the amendment (Govt. C. §912.4), it seems evident that the notice of insufficiency, substantial compliance and waiver rules were intended to cover amended claims to the same extent as original claims as presented.

§911.4. (a) When a claim that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim.

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) of this chapter within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.

Comment: The insertion of subdivision indicators, "(a)" and "(b)", is solely for the purpose of ease of cross-reference in Section 930.4 (a new section recommended for adoption below) and in Section 935 (for which an amendment is recommended below), where the late claim procedure is incorporated by reference.

§912.4. The board shall act on a claim in the manner provided in Section 912.6 or 912.8 within 45 days after the claim has been presented. If a claim is amended, the board shall act on the amended claim within 45 days after the amended claim is presented. The claimant and the board may extend the period within which the board is required to act on the claim by written agreement made before ~~or after~~ the expiration of such period or after its expiration, if an action based thereon has not been commenced and is not yet barred by the period of limitations provided in Section 945.6. If the board fails or refuses to act on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement pursuant to this section, whether made before or after the expiration of such period, the last day of the period within which the board is required to act shall be the last day of the period specified in such agreement.

Comment: This amendment makes it clear that an agreement extending the board's time to act on a claim, if made after the end of the 45 days allowed by the Act, must be entered into before the action has commenced or is barred by limitations (the six month's period allowed after rejection by §945.6). It seems appropriate to conform this section, in this respect, to Section 913.2, which allows previously rejected claims to be reconsidered and settled before they are barred by limitations. In addition, if an action on the claim had been commenced, a reopening of the matter with a new period for board consideration would create anomalous problems for the court and litigants, perhaps resulting in dismissal of the action for prematurity, because the agreement for further consideration would nullify the previous rejection on which the action was predicated.

§930. The State Board of Control may, by rule, authorize any state agency to include in any written agreement to which the agency is a party, provisions governing (a) the presentation, by or on behalf of any party thereto, of any or all claims which are required to be presented to the board arising out of or related to the agreement and (b) the consideration and payment of such claims. ~~A claims procedure established by an agreement made pursuant to this section exclusively governs the claims to which it relates, except that Sections 911.4 to 912.2, inclusive, are applicable to all such claims.~~ As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

§930.2. The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body. ~~A claims procedure established by agreement pursuant to this section exclusively governs the claims to which it relates, except that Sections 911.4 to 912.2, inclusive, are applicable to all such claims.~~

Comment: These amendments are necessary to conform these sections to the proposed language of new §930.4, below, which states in more detail exactly how the "late claim" procedure of §§911.4 to 912.2 applies to claims governed by contractual procedures here authorized.

§930.4. A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates, except that:

(a) The procedure so prescribed may not require a shorter time for presentation of any claim than the 100th day after the accrual of the cause of action to which the claim relates.

(b) The procedure so prescribed may not provide a longer time for the board to take action upon any claim than the time provided in Section 912.4.

(c) The procedure so prescribed may not authorize the consideration, adjustment, settlement, allowance or payment of a claim by any claims board, employee or commission of a local public entity contrary to the provisions of Section 935.4 or by any state agency contrary to the provisions of Section 935.6.

(d) When a claim required by the procedure to be presented within a period of less than one year after the accrual of the cause of action is not presented within the required time, an application may be made to the public entity, and if denied by it, to the superior court, for leave to present such claim. Sections 911.4(b) and Sections 911.6 to 912.2, inclusive, are applicable to all such claims, and the time specified in the agreement shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.4 and 912.

Comment: This proposed section is entirely new. Its purpose is to spell out clearly the limitations on contractual claims procedures, and to clarify the application of "late claim" procedure to such claims.

Subdivision (a) is based on §935 (which authorizes local claims procedures to be set up for claims exempt from statutory procedures), with one modification. Section 935 forbids local claims procedures prescribed by

ordinance or charter to require presentation times less than the 100 days and one year times provided by Section 911.2. Where the procedures are set by contract, however, there seems to be no good reason why presentation times of less than one year should not be permitted for contract claims or for claims of injury to real property (the two types of claims chiefly under the one year requirement of §911.2). On the other hand, some of the claims that may be the subject of contractual procedures under §§930 and 930.2 will be tort claims - for these contractual procedures may apply to any claims "arising out of or related to the agreement". In the interest of uniformity of policy, and to prevent the setting of an excessively short presentation time by a "small print" clause in a contract form prepared by the public entity, it is thus suggested that the 100 day period of §911.2 be declared a minimum even for contractual procedures. Thus, if approved, the claimant would know that he always has at least 100 days in which to present his claim, whether it is governed by the statutory rule of §911.2, or by the contractual procedure of his agreement with the entity under §930 or §930.2, or by a local ordinance or charter provision pursuant to §935.

Subdivision (b) is based on §935 without substantive change. If adopted this would mean that all claims would be subject to a uniform rule governing the period of time for their consideration and disposition.

Subdivision (c) is designed to prevent the frustration, by a claims procedure established by agreement, of the limitations on administrative claims settlements provided in §§935.4 ($5,000 limit for local entity in absence of charter authority to go higher) and 935.6 ($1,000 for state agency).

Subdivision (d) makes more explicit how the "late claim" procedure applies to contractual claims proceedings. As originally enacted, the statement that "Sections 911.4 to 912.2, inclusive, are applicable" involved problems of interpretation, for those sections all were framed in terms of the time limits set by §911.2. The proposed amendment clears up these difficulties.

§930.6. A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon. If such requirement is included, any action brought against the public entity on the claim shall be subject to (a) the limitations of time for commencement of an action provided in Section 945.6, and (b) the limitations on scope of an action provided in Section 946.

Comment: This section is entirely new. It is based on Section 935, in part. Its purpose is to make clear the application of the 6 month statute of limitations, and the general rules limiting suit on a claim to the portion of the claim rejected by the board and not waived by the claimant. As originally enacted, it appears that prior rejection could be demanded as part of a contractual claims procedure. But the six month period of limitations did not apply (since §945.6 was limited in terms to claims governed by the statute), nor did the limitations on scope set out in §946 (which were likewise restricted to claims covered by the statute). The ordinary statute of limitations thus was applicable. See §945.8. But the normal period of limitations might extend the period for suit unduly long - since prior rejection would mark the commencement of the period for suit. The basic policy of limiting actions to those brought within 6 months after rejection seems applicable to contractual claims, however; and in the interest of uniformity, it seems appropriate to require adherence to the 6 month rule here. Similarly, when prior rejection is a required procedural prerequisite, it would seem best to require adherence to the same uniform rule limiting suit to the rejected portion of the claim. This section, if adopted, would accomplish both purposes and make the procedure more nearly uniform for all claims.

§935. (a) Claims against a local public entity for money or damages which are excepted by Section 905 from Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part, and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity.

(b) The procedure so prescribed may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon ~~, but~~ . If such requirement is included, any action brought against the public entity on the claim shall be subject to (a) the limitations of time for commencement of an action provided in Section 945.6, and (b) the limitations on scope of an action provided in Section 946.

(c) The procedure so prescribed may not require a shorter time for presentation of any claim than the time provided in Section 911.2 ~~nor~~ .

(d) The procedure so prescribed may not provide a longer time for the board to take action upon any claim than the time provided in Section 912.4~~, and~~ .

(e) When a claim required by the procedure to be presented within a period of less than one year after the accrual of the cause of action is not presented within the required time, an application may be made to the public entity, and if denied by it, to the superior court, for leave to present such claim. Section 911.4(b) and Sections 911.6 to 912.2, inclusive, are applicable to all such claims, and the time specified in the charter, ordinance or regulation shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 912.

Comment: This amendment is designed to make applicable to claims governed by local charter or ordinance provisions the same basic policies suggested to be

incorporated expressly into the act with respect to claims governed by contractual claims procedures. See the proposed amendments to §§930 and 930.2, and the proposed new sections 930.4 and 930.6, above.

If this proposal is adopted, and the proposals included in the cited provisions are also adopted, the claims law will be both clarified and more uniform, since it will be clear that (1) all claims, whether under statute, contract procedures, or local charter or ordinance procedures, are subject to not less than a 100 day presentation period; (2) all claims will likewise be subject to a maximum of 45 days during which the board may act, unless extended by agreement; (3) all claims will be subject to the uniform 6 month period of limitation, if prior presentation and rejection is required as a prerequisite to suit; and (4) all claims will be subject to the liberal "late claim" procedures, when the time for presentation is less than one year. These aspects of claims procedure are believed most likely to become traps for the unwary, if not fully understood, and it is submitted that at least these minimum aspects of uniformity should be insisted upon regardless of the source of the claims procedure (whether statute, contract, or local ordinance).

Section 935.2 of the Government Code is repealed.

Comment: Section 935.2 authorizes local public entities to establish a "claims board" to perform the functions of the governing body in passing on claims and late claim applications. It appears to be unnecessary, since §935.4 also authorizes local entities to establish claims "commissions" for exactly the same purpose, as well as to delegate these functions to a claims officer. Thus, since there seems to be only a semantic difference between a "claims board" and a claims "commission", these two sections as enacted appear to substantially overlap.

The overlap, however, causes interpretative difficulties. Section 935.4 expressly establishes a $5000 limitation on the delegable authority of settlement of claims, except where a higher figure is set by city or county charter approved by the voters. Since the $5000 limitation applies to "commissions" and to claims officers, it would be anomalous to permit a local entity to delegate authority to settle claims to a "claims board" under §935.2 without any limitation in terms of dollar amount. Repeal of §935.2 would make the legislative intent - indicated by the insertion in the Assembly of the word "commission" (see Ass. J., June 15, 1963, p. 5490) - effective as to any form of administrative board, commission or claims agent established by a local entity.

§943. This part does not apply to claims or actions against the Regents of the University of California or against an employee or former employee of the Regents.

Comment: "This part" includes the procedural provisions governing actions against public employees, as well as actions against public entities. Yet, as enacted, this section only declared the provisions in question inapplicable to claims or actions against the University, thereby leaving them applicable to claims and actions against University employees.

Specifically, it seems reasonably plausible that, as enacted, an employee of the University might rely on the application to him of: (1) Section 950.6, which provides a short six-month period for commencing an action on a claim following its rejection. It should be noted that although a claim is not required to be presented to the University as a condition to suit, a claimant might voluntarily present one or might present one in ignorance of the fact that the University is exempt from the claim presentation rule. Whatever the reason, once a claim has in fact been presented, §950.6 appears to provide a prior rejection requirement as a condition to suit, and the six months period of limitations. (2) Section 951, which requires the posting by the plaintiff of an undertaking for costs in an action against a public employee, whenever the employing entity provides a defense and demands the undertaking. The University is under the same duty to provide a defense as every other public entity. See §§995 - 996.6.

As the present section now stands, it creates uncertainty whether the provisions of §§950.6 and 951 apply to University employees, for those two sections were drafted on the assumption that comparable procedures did apply to the defendant employee's employer-entity. This section precludes that assumption. The Act should be clarified so that the application or non-application of §§950.6 and 951 to University employees is made explicit.

§945.6. (a) Except as provided in subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced within six months after the date the claim is acted upon by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, ~~such suit must be commenced within~~ the time limited for the commencement of said suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence ~~such~~ a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division ~~within the time prescribed therein~~.

Comment: Although receipt of a sentence to imprisonment in a state prison constitutes the operative fact making effective a loss of civil rights (see Pen. C. §2600), this section as enacted provided no standards for determining when failure to sue within the 6 month period could be said to be "because" of the sentence. It is here proposed to

require at least some effort on the part of the claimant to commence his action within the ordinary 6 month period of limitations as a condition to enjoyment of the extended period of limitations for claimants who have lost their civil rights. As originally enacted, this section gave the same extended period of limitations to the plaintiff who lost his civil rights towards the end of the six month period and to the claimant whose cause of action accrued after his civil rights had been lost (i.e., while he was awaiting the outcome of an appeal from the conviction, or was in prison, or was on parole). Yet, in each case, the extension was predicated on the statutory requirement that his inability to sue must be "because" he had been sentenced to prison. The amendment seeks to clarify this causal relationship, by defining it in terms of whether the claimant had made a reasonable effort to commence the action or obtain a restoration of his civil right to do so. Since the facts would ordinarily be a matter of public record, it seems fair to place the burden of proof on the public entity to establish the claimant's ineligibility for the extension of time.

The Penal Code contemplates that a prisoner may apply for a limited restoration of civil rights. See Pen. C. §§2600 (limited restoration by judge between time of sentencing and time convicted person actually commences to serve sentence), 2601 (limited restoration by Adult Authority during imprisonment), 3054 (limited restoration by Adult Authority to parolee).

The last sentence has been recast as a new subdivision, with appropriate rewording in the interest of clarity. The last five words are suggested for deletion on the ground of redundancy, and because they tend to invite a contention that the prisoner's claim must be presented within the 100 day or 1 year periods of "time prescribed" in 911.2, and that the late claim procedures do not apply. Although this contention probably would be rejected, it seems advisable to delete the basis for it.

§945.8. Except where a different statute of limitations is specifically applicable to the public entity, and except as provided in Sections 930.6 and 935, any action against a public entity upon a cause of action for which a claim is not required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced within the time prescribed by the statute of limitations that would be applicable if the action were brought against a defendant other than a public entity.

Comment: This amendment conforms §945.8 to the proposal, incorporated in the language of new Section 930.6 (applicable to claims procedures established by agreement) and amended Section 935 (applicable to claims procedures established by local charter or ordinance), that the maximum period of limitations for commencement of an action on a rejected claim should be uniformly set at 6 months (except for plaintiffs without civil rights). Sections 930.6 and 935 both so provide in the versions proposed above. They should thus be expressly indicated in the present section as exceptions to the rule here provided, making the ordinary statute of limitations applicable.

§947. (a) At any time after the filing of ~~the~~ a complaint, counterclaim or cross-complaint in any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of each plaintiff, counterclaimant or cross-complainant as security for the allowable costs which may be awarded against such plaintiff, counterclaimant or cross-complainant. The undertaking shall be in the sum of one hundred dollars ($100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff, counterclaimant or cross-complainant files such undertaking within 20 days after service of a demand therefor, his action, counterclaim or cross-complaint shall be dismissed.

(b) If judgment is rendered for the public entity in any action against it, whether on a complaint, counterclaim or cross-complaint, the costs and necessary disbursements ~~allowable costs~~ incurred by the public entity in the action, if allowed by the court, ~~but in no event less than fifty dollars ($50)~~ shall be awarded against each ~~plaintiff~~ adverse party, but in no event less than fifty ($50) dollars.

(c) This section does not apply to an action ~~commenced~~ in a small claims court.

Comment: This amended version of §947 is designed to accomplish two objectives: (1) It makes clear that an undertaking may be required when the action is brought against a public entity by way of counterclaim or cross-complaint. Unless this is made explicit, it is doubtful that the courts would apply this section to cross-demands. Cf. Shrader v Neville (1949) 34 Cal.2d 112, 207 P.2d 1057. Yet the policy of the rule seems to apply to cross-demands. (2) It makes it clear that the $50 minimum award only obtains when some costs are awarded, and that an award of costs is not mandatory but is governed by the same rule as in other cases. Cf. C.C.P. §1032(c).

§950.2. Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing entity for such injury is barred (a) under Section 946 or is barred (b) because of the failure (a) to present a timely or sufficient written claim to the public entity in conformity with Sections 910 to 912.2, inclusive, or such other claims procedure as may be applicable, or (c) because of the failure to commence the action within the time specified in Section 945.6. Immunity of the public entity from liability does not excuse the plaintiff from satisfying the conditions provided in this section.

Comment: The addition to clause (b) makes it clear that even when a claim is, in fact, presented to the entity, an action against the employee is not necessarily permitted by this section. The claim must, in addition, be timely and sufficient. As originally enacted, it might be contended that clause (b) barred suit against an employee only when no claim of any kind was presented to the entity. This contention appears to be contrary to the legislative intent, and presumably would be rejected by the courts. It seems advisable to avoid doubts by making the rule explicit: a claim insufficient or too late to support an action against the entity will not support one against the employee. Reference to "other claims procedure" makes the rule applicable to contractual claims procedures (see §§930 et seq.) and local ordinance or charter claims procedures (see §935).

The last sentence, which is new, clarifies the application of this section even when the employing entity is immune from liability. As enacted, it could be argued that presentation of a claim to a public entity that is clearly immune would be a useless act which is impliedly excused, since the law does not require idle acts. Civ. C. §3532.

The subdivisions have also been renumbered for convenience of reference.

§950.4. A cause of action against a public employee or former public employee is not barred by Section 950.2 if the plaintiff pleads and proves that he did not know or have reason to know, within the period ~~prescribed~~ for the presentation of a claim to the employing public entity as a condition to maintaining an action for such injury against the employing public entity, as that period is prescribed by Section 911.2 or by such other claims procedure as may be applicable, that the injury was caused by an act or omission of the public entity or an employee thereof.

Comment: As originally enacted, it was not clear from this section whether the plaintiff was required to prove lack of notice of the public employment status of the defendant during the 100 day claim presentation period or during the entire period, up to one year in duration, during which a "late claim" application could be submitted. Construed liberally, the period prescribed for the presentation of a claim could well be deemed to include the "late claim" period as well. Yet, such interpretation would tend to frustrate what appears to have been the legislative intent to make the presentation of a claim unnecessary if the plaintiff had no notice of the public employment status of the defendant during the 100 day period.

This section also, of course, relates to claims within the one year presentation period of §911.2. But as to them it presents no special problems, for the late claim procedure does not apply in such cases.

The reference to "such other claims procedures as may be applicable" is designed to take into account contractual procedures or procedures lawfully established by local ordinance or charter.

§950.6. When a written claim for money or damages for injury has been presented to the employing public entity:

(a) A cause of action for such injury may not be maintained against the public employee or former public employee whose act or omission caused such injury until the claim has been rejected, or has been deemed to have been rejected, in whole or in part by the public entity.

(b) A suit against the public employee or former public employee for such injury must be commenced within six months after the date the claim is acted upon by the board, or is deemed to have been rejected by the board, in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division ~~or, where~~ .

(c) When a person is unable to commence the suit within ~~such~~ the time prescribed in subdivision (b) because he has been sentenced to imprisonment in a state prison, ~~such suit must be commenced within~~ the time limited for the commencement of said suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public employee or former public employee establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (b).

Comment: This amendment conforms the present section to the amended version of §945.6, and likewise requires a showing of reasonable effort as a condition to obtaining the benefit of the extended period of limitations for commencement of an action when the plaintiff has lost his civil rights by imprisonment or sentence thereof.

§951. (a) At any time after the filing of ~~the~~ a complaint, counterclaim or cross-complaint in any action against a public employee or former public employee, if a public entity undertakes to provide for the defense of the ~~action~~ employee or former employee, the attorney for the public employee may file and serve a demand for a written undertaking on the part of each plaintiff, counterclaimant or cross-complainant as security for the allowable costs which may be awarded against such plaintiff, counterclaimant or cross-complainant. The undertaking shall be in the amount of one hundred dollars ($100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff, counterclaimant or cross-complainant files such undertaking within 20 days after service of the demand therefor, his action, counterclaim or cross-complaint shall be dismissed.

(b) If judgment is rendered for the public employee or former public employee in any action, whether on a complaint, counterclaim or cross-complaint, where a public entity is not a party ~~to the action~~ thereto but undertakes to provide for the defense of the ~~action~~ public employee or former employee, ~~the allowable~~ and necessary disbursements costs incurred in defending ~~the action~~ against the complaint, counterclaim or cross-complaint, if allowed by the court, ~~but in no event less than fifty dollars ($50)~~ shall be awarded against each ~~plaintiff~~ adverse party, but in no event less than fifty dollars ($50).

(c) This section does not apply to an action commenced in a small claims court.

Comment: These amendments conform this section to the amended version of §947, and are supported by similar reasons. See Comment, §947.

§915. Upon the allowance by the State Board of Control of all or part of a claim for which a sufficient appropriation exists, and the execution and presentation of such documents as the board may require ~~which discharge the State of all liability under the claim~~, the board shall designate the fund from which the claim is to be paid and the state agency concerned shall pay the claim from such fund. If the claim is allowed in whole or in part or is compromised, the board may require the claimant, if he accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim. Where no sufficient appropriation for such payment is available, the board shall report to the Legislature in accordance with Section 912.8.

Comment: This amendment conforms the practice of the State Board of Control to that which applies to governing boards of local public entities in passing on claims. Section 912.6(b) contains language substantially like the new second sentence added here, making it discretionary with the local board whether to require the claimant to accept a settlement in full satisfaction or not. The theory of §912.8, which governs the disposition of claims by the State Board of Control, was that the Board of Control would dispose of them in accordance with rules to be presribed by it. The present section, however, as originally enacted curtailed the broad discretion of the Board of Control and required an inflexible procedure under which no partial allowances of claims were permissible, where appropriations for settlement existed, unless the claimant waived his rights to the balance. It is submitted that the State Board of Control should have the same flexible authority in this connection as local entities.

§995. Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee made in writing a reasonable time prior to the date set for trial, a 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 an act or omission in the scope of his employment as an employee of the public entity.

For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.

Comment: It seems advisable to require the employee's request to be in writing for the purpose of making a record, and to conform this section to the requirement of a written request in Section 825.

However, it does not seem essential here to impose and strict time limitation upon the employee in making the request. Under §825, an early notice provides the entity with an opportunity to protect itself against financial liability on the merits through operation of the indemnification rules. Here the law is concerned only with providing a defense to the employee. Any adverse effect upon the entity, so far as the costs and expenses of providing a defense are concerned, can be taken care of in other ways, such as by denying the employee a right of recovery of his expenses of defending when the entity has declined to provide such a defense. See the suggested amended versions of §§995.2 and 995.4, below.

§995.2. A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

(a) The act or omission was not within the scope of his employment; or

(b) He acted or failed to act because of actual fraud, corruption or actual malice; or

(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee; ; or

(d) The ability of the public entity to provide an effective defense was substantially prejudiced by the failure of the employee or former employee to request a defense at a time earlier than that on which the request was in fact made.

Comment: This additional ground for declining to provide a defense is suggested as an incentive to the making of a prompt request by the employee. It is coupled with a provision suggested to be added to §995.4, denying entity liability for the expenses of a defense when the lateness of the request substantially impaired the entity's ability to provide an effective defense. As originally enacted, it appears that the public entity may be required to provide a defense (or at least pay for the employee's expenses in so doing) even though not given prompt notice of the action. It would seem only fair to require an exercise of diligence on the part of the employee as a condition to getting a free defense - although the degree of diligence appropriate for this purpose need not be as onerous as that which may be required as a condition to the benefit of the employee indemnification rules.

§955.4. Except as provided in Sections 955.6 and 955.8:

(a) Service of summons in all actions ~~on claims~~ against the State shall be made on the Attorney General.

(b) The Attorney General shall defend all actions ~~on claims~~ against the State.

Comment: The words "on claims" are suggested for deletion on the ground that they are unnecessary and may cause uncertainty. They were contained in former Govt. C. §649 and its predecessor, Govt. C. §16049; but they do not appear to have been intended to limit the effect of this section. Yet, in practice, they may constitute a limitation, for they might be construed to restrict this section to cases in which the action is based on a formal claim that has been rejected by the State Board of Control. The Law Revision Commission's recommendation to the Legislature, however, took the broader position that "Service of summons on the Attorney General should be proper in any action against the State." Recommendation, p. 1017. Many types of actions against the State do not have to be preceded by presentation of a formal claim, however. See §§905.2, 925.4. Thus, elimination of the words "on claims" will clarify the scope of the section and make the original intent effective.

§995.4. If after written request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as ~~are necessarily incurred by him in~~ of defending the action or proceeding as are necessarily incurred by him from and after the 10th day following delivery of the written request to the public entity, if he establishes or the public entity concedes that the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4, or (c) that its ability to provide an effective defense was substantially prejudiced by the failure of the employee or former employee to request a defense at a time earlier than that on which the request was in fact made, and that the entity's failure or refusal to provide a defense was based on that ground.

[No change proposed for second paragraph of this section.]

Comment: This amendment is designed to: (1) Limit the recoverable litigation expenses to those incurred after the request for a defense was refused by the entity. As here written, the computation of recoverable expenses commences on the 11th day after the request is made - thus giving the public entity 10 days to decide whether to provide a defense or not. The employee should not be able to hold the entity liable for expenses incurred before a request was made and rejected. (2) Provide the entity with a defense based on prejudice where a request for a defense was made unduly late, consistently with proposed amended version of §995.2, above.