STATE OF CALIFORNIA

C A L I F O R N I A L A W R E V I S I O N C O M M I S S I O N

R E C O M M E N D A T I O N

RELATING TO

S O V E R E I G N I M M U N I T Y

Number 8--Revisions of the Governmental Liability Act

January 1965

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

LETTER OF TRANSMITTAL

January 1965

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised. Pursuant to this directive, the Commission submitted a series of recommendations to the 1963 Legislature. The major portion of these recommendations became law.

The Commission has reviewed the legislation enacted in 1963 to determine whether any technical or clarifying changes should be made. As a result of this review, the Commission submits this recommendation.

At the request of the Commission, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles, prepared a research report containing suggested technical and clarifying changes that might be made in the 1963 legislation. His report was of substantial assistance in preparing this recommendation.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 8--Revisions of Governmental Liability Act

In 1963, the Legislature enacted a series of measures recommended by the Law Revision Commission that dealt with the liability of public entities and their employees. The legislation was designed to meet the most pressing problems that were created by the decision of the Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

The Commission reported in its recommendation relating to the 1963 legislation that additional work was needed and that the Commission would continue to study the subject of governmental liability. The Commission has reviewed the legislation enacted in 1963 and has concluded that a number of revisions should be made. The changes recommended here will not make any great substantive change in the 1963 legislation. They are technical changes designed to clarify the language of the 1963 legislation, to implement certain policies expressed in the 1963 legislation, and to facilitate use of the 1963 legislation.

The legislation recommended by the Commission is set forth below. Following each section of the legislation is a comment explaining the purpose of the proposed revision.

An act to amend Sections 815.2, 820, 821, 825, 825.2, 825.6, 830.4, 830.8, 831, 831.2, 831.8, 835, 835.4, 844, 844.6, 845.4, 845.6, 846, 850.4, 850.6, 850.8, 854.2, 854.4, 854.8, 855, 855.2, 856, 856.2, 860, 860.2, 860.4, 895.2, 905.2, 910.4, 910.6, 911.4, 912.4, 930, 930.2, 935, 943, 945.4, 945.6, 945.8, 947, 950.2, 950.4, 950.6, 951, 955.4, 965, 995, 995.2, 996.4, 40813, 41006, 53050, and 53051 of the Government Code, Section 846 of the Civil Code, Section 1095 of the Code of Civil Procedure, and Sections 17000, 17001, and 17004 of the Vehicle Code, to repeal Sections 945.5 and 960.2 of the Government Code and Section 17002 of the Vehicle Code, and to add Sections 800, 825.8, 850.5, 854.6, 912.1, 930.4, 930.6, 945.5, 960.2, and 960.3 to the Government Code and Section 17002 to the Vehicle Code, relating to the liability of public entities and public officers, servants, and employees.

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

SECTION 1. The heading of Part 1 of Division 3.6 of Title 1 of the Government Code is amended to read:

PART 1. SHORT TITLE AND DEFINITIONS

Comment. The heading of Part 1 is revised to reflect the addition of Section 800 to Part 1. See Section 2 of this 1965 Act (adding Section 800).

SEC. 2. Section 800 is added to Part 1 of Division 3.6 of Title 1 of the Government Code, to read:

800. This division shall be known and may be cited as the Governmental Liability Act.

Comment. This short title will provide a convenient means of referring to the governmental liability statute--Division 3.6 of Title 1 of the Government Code.

SEC. 3. Section 815.2 of the Government Code is amended to read:

815.2(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) ~~Except as otherwise provided by statute,~~ A public entity is not liable under this section for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Comment. Subdivision (b) is revised to make clear its original purpose and meaning: The public entity is not liable under subdivision (a) if the employee is immune from liability by virtue of the special statutory immunities given public employees by the Governmental Liability Act and other statutes. The revision also makes clear the original intent of the section which is that under certain circumstances the public entity may be liable even where the employee is immune. For example, Chapter 2 (commencing with Section 830) provides that a public entity may be liable for a dangerous condition of public property even though no employee is personally liable. See also Section 815.6. However, if liability does not exist under Section 815.2, a public entity is not liable unless a statute is found that imposes such liability on the entity even though no employee is liable. See Section 815.

SEC. 4. Section 820 of the Government Code is amended to read:

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. Section 820.8 provides that a public employee is not liable for an injury caused by the act or omission of another person. A difficult problem of interpretation arises from the fact that both Section 820 and Section 820.8 begin with the phrase "except as otherwise provided by statute." Obviously, each section cannot be an exception to the other. The amendment will make it clear that Section 820.8 is an exception to the rule declared in Section 820. In this respect, the amendment probably states what would be held to be the existing law. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 517 (Cal. Cont. Ed. Bar 1964).

The amendment solves the problem of the interrelationship of Sections 820 and 820.8 in the same way the same problem with respect to Sections 820 and 820.2 was solved in the basic statute enacted in 1963.

The inclusion of a reference to Section 820.8 in Section 820 does not affect the liability of an employee for his own negligence, i.e., his failure to exercise due care in appointing or in failing to remove or discipline another employee. In this respect, the amended section reflects the legislative intent in enacting the 1963 statute. See Report of Senate Committee on Judiciary on Senate Bill No. 42 (Comment to deleted Section 815.8), reprinted in 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 229 (1963). See also Section 820.8.

SEC. 5. Section 821 of the Government Code is amended to read:

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 Section 821 to the language of Section 818.2. The words, "any law", as found in Section 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.

SEC. 6. Section 825 of the Government Code is amended to read:

825. (a) Subject to subdivisions (b) and (c), if an employee or former employee of a public entity requests the public entity to defend him against any claim or action ~~against-him-for-an-injury-arising out-of-an-act-or-omission-occurring-within-the-scope-of-his employment-as-an-employee-of-the-public-entity~~ and such request is ~~made~~ presented in writing to the public entity substantially in the manner provided in Sections 915 and 915.2 not ~~less~~ more than 10 days ~~before-the-day-of-trial~~ after service upon him of the complaint, counterclaim, cross-complaint or other pleading based on such claim , the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed if the fact that the injury arose out of an act or omission occurring in 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 to the satisfaction of the board (as defined in Section 940.2); or

(3) Is established in an action or proceeding against the public entity .

(b) Except as provided in subdivision (c), if the public entity ~~conducts~~ provides for the defense of an employee or former employee against any claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed ~~;~~ . ~~but;~~

(c) Where the public entity ~~conducted such~~ provides for the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if ~~it is established~~ the fact that the injury arose out of an act or omission occurring in 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 to the satisfaction of the board (as defined in Section 940.2); or

(3) Is established in an action or proceeding against the public entity .

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

(e) 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. Section 825 has been revised to correspond more closely to Sections 995-996.6 (defense of public employees) and to clarify the procedures for invoking its provisions.

Subdivision (a) contains three significant revisions. First, a reference to cross-action pleadings has been included to correspond to Section 995. Second, 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 that 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. Third, the methods by which the fact that the act or omission of the employee was within the scope of his public employment may be established have been spelled out in detail. Under the section as originally enacted, an entity was under a duty to pay a judgment, compromise, or settlement against an employee only if (1) it actually conducted the employee's defense (without a reservation of rights) or (2) it was requested to defend and the claim against the employee was "for an injury arising out of an act or omission occurring within the scope of [the employee's] employment." But, because the section did not mention the means by which the essential fact of scope of employment might be established, one writer assumed that the fact did not have to be established at all if the entity chose not to defend the employee. See VAN ALSTYNE, CALIFORNIA GOVERNMENT

TORT LIABILITY §§ 10.24, 10.26 (Cal. Cont. Ed. Bar 1964). To eliminate such misunderstandings, subdivision (a) has been revised to indicate clearly that scope of employment must be established and to specify the procedures by which such fact may be established. The specified means for establishing that the employee was within the scope of his employment are probably declarative of the existing law. See Gorzeman v. Artz, 13 Cal. App.2d 660, 662, 57 P.2d 550, 551 (1936)("It is a well-settled general rule that when 'a master defends an action against his servant, or has an opportunity to assume the defense, and is under an obligation to do so, because the acts complained of were done under his orders, he is bound by the judgment.'"). Cf. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 10.25 (Cal. Cont. Ed. Bar 1964).

Subdivisions (b) and (c) have also been revised to indicate clearly how the fact that the employee was within the scope of his employment may be established when the public entity provides for the employee's defense pursuant to an agreement reserving its rights. See the discussion of subdivision (a), above.

Subdivision (d) has been added to eliminate the 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 was requested to defend or defended the action for the employee, or agreed to a compromise or settlement of the claim, it already had adequate notice to satisfy the policy of the claim procedure. Cf. GOVT. CODE § 950.2 (claim as prerequisite to suit against public employee). Thus, the presentation of a further claim would serve no useful purpose, and is here expressly eliminated.

SEC. 7. Section 825.2 of the Government Code is amended to read:

825.2. (a) Subject to subdivisions (b), (c), and (d), 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) Subject to subdivision (d), if an employee or former employee of a public entity requested the public entity to provide for his defense against the action or claim and ~~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 the 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) 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 and ~~the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice~~.

(c) Subject to subdivision (d), 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.

(d) The employee or former employee may recover under subdivision (b) or (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.

(e) 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 no defense, a defense under a reservation of rights, or an unconditional defense. In addition, the revision makes it clear that the duty of indemnification need not be the subject of an action against the entity if 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 (e).

SEC. 8. Section 825.6 of the Government Code is amended to read:

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 either in the action against him or in an action 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 Section 825.6 to the amended versions of Sections 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 Section 825(c)(3)--it should also collaterally estop the entity. This amendment clarifies Section 825.6, but it probably does not change existing law. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 10.25 (Cal. Cont. Ed. Bar 1964).

SEC. 9. Section 825.8 is added to Article 4 of Chapter 1 of Part 2 of Division 3.6 of Title 1 of the Government Code, to read:

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) or in any other statute hereafter enacted which expressly denies, limits or conditions the liabilities or duties provided in this article.

Comment. The indemnification provisions of Sections 825-825.6 originally 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., GOVT. CODE § 850.8 (employee liable for wilful misconduct in transporting injured person from scene of fire, 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 have been mandatory.

To avoid any misunderstanding, Section 825.8 makes this intention explicit. By limiting its effect to the two named sections and to future

explicit statutory modifications, it clearly precludes giving any effect to Vehicle Code Section 17002 even if it is not repealed. In this respect, amended Section 825.8 restates what appears to be existing law. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 10.21 (Cal. Cont. Ed. Bar 1964).

SEC. 10. Section 830.4 of the Government Code is amended to read:

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. The amendment to this section is intended to clarify the relationship between this section and Section 830.8. 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 Section 830.8. The original intent that these two sections refer to different signs, signals and markings is, however, quite clear. See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 851 (1963).

The wording of amended Section 830.4 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 Section 830.8, will eliminate any ambiguity.

SEC. 11. Section 830.8 of the Government Code is amended to read:

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 amendment is intended to clarify the relationship between this section and Section 830.4. See the Comment under the amended Section 830.4. The phrase "to warn or guide traffic" is adapted from Vehicle Code Sections 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 Section 830.4, of course) are:

detour signs (VEH. CODE § 21363); equestrian crossing signs (VEH. CODE § 21805); livestock crossing signs (VEH. CODE § 21364); open livestock range warning signs (VEH. CODE § 21365); pedestrian crossing prohibition signs (VEH. CODE § 21361); railroad warning approach signs (VEH. CODE §§ 21362, 21404); road work warning signs (VEH. CODE § 21406); school crosswalk warning signals and signs (VEH. CODE §§ 21367, 21368); and school warning signs (VEH. CODE § 22352(b)).

SEC. 12. Section 831 of the Government Code is amended to read:

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. CODE §§ 360 (defining "highway"), 590 (defining "street"), and 555 (defining "sidewalk"). But the Vehicle Code definitions are not directly applicable to Section 831. Thus, although it is probable that the present section would be construed to include sidewalks and alleys (see Bertollozzi v. Progressive Concrete Co., 95 Cal. App.2d 332, 212 P.2d 910 (1949)), a court conceivably could find an intent to limit the section to weather conditions that affect vehicular traffic. The proposed amendment is thus designed to forestall any such misunderstanding.

SEC. 13. Section 831.2 of the Government Code is amended to read:

831.2 (a) Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, ~~including but not limited to any natural condition of any lake, stream, bay, river or beach~~.

(b) 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 made or are being constructed.

(c) For the purposes of this section, property shall be deemed to be in its natural condition despite the fact that changes for the limited purpose of conservation of natural resources, such as the planting of trees in a burned-over area or the thinning of underbrush to promote growth and the like, have been made.

Comment. The revision of Section 831.2 is intended to provide a standard for determining the meaning of "natural condition" and "unimproved public property."

Subdivision (b) 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.

Subdivision (c) is intended to make it clear that changes such as the planting of trees in a burned-over area to prevent runoff and erosion and similar conservation measures are not "improvements"; the property is

deemed to remain in its natural condition. Although a fire trail or fire access road running through a forest would be an improvement, under subdivision (b) only the area of the trail or road would be improved; and under Section 831.4 an immunity is provided for injuries caused by the condition of any unpaved road which provides access to fishing, hunting or primitive camping, recreational or scenic areas and for any hiking, riding, fishing or hunting trail.

Subdivision (b) makes unnecessary the language which has been deleted from Section 831.2.

SEC. 14. Section 831.8 of the Government Code is amended to read:

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 it to be used.

(c) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if:

(1) The injured person was not guilty of a criminal offense under Article 1 (commencing with Section 552) of Chapter 12 of Title 13 of Part 1 of the Penal Code in entering on or using the property;

(2) The condition created a substantial and unreasonable risk of death or serious bodily harm when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used;

(3) The dangerous character of the condition was not reasonably

apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care; and

(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

(d) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if:

(1) The person injured was less than 12 years of age;

(2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used;

(3) The person injured, because of his immaturity, did not discover the condition or did not appreciate its dangerous character; and

(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

Comment. These proposed amendments are intended to clarify Section 831.8. Reference to Division 11 of the Water Code makes it clear that the term "irrigation district" refers only to districts organized under

the Irrigation District Law.

The word, "distribution", in the present text, seems to suggest that only water conduits carrying water to users are within the scope of Section 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.

SEC. 15. Section 835 of the Government Code is amended to read:

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. CODE § 810.8, defining "injury". But the official comment under Section 835 intimates that foreseeability was intended to refer to the way the injury happened rather than the kind of interest which was adversely affected. The amendment clarifies the original intent underlying the section.

SEC. 16. Section 835.4 of the Government Code is amended to read:

835.4. (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Comment. This amendment merely inserts the word "dangerous" in subdivision (a) to make it consistent with subdivision (b).

SEC. 17. Section 844 of the Government Code is amended to read:

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 a 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 Sections 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. CODE § 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 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. CODE § 503) and the juvenile hall is not a penal institution (WELF. & INST. CODE § 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.

SEC. 18. Section 844.6 of the Government Code is amended to read:

844.6. (a) Nothwithstanding 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 employement, 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 subdivision (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 Sections 4900-4906 (liability up to $5000 for erroneous conviction). Moreover, as a specific provision, it might even be construed to prevail over the general language of Government Code Sections 814 and 814.2, which preserve nonpecuniary liability and liability based on contract 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 Sections 814 and 814.2. The exception for subdivisions (b), (c) and (d) has been deleted as unnecessary.

The amendment to 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. CODE §§ 1626(c)(professors of dentistry), 2137.1 (temporary medical staff in state institution), 2147 (medical students), 2147.5 (uncertificated interns and residents).

SEC. 19. Section 845.4 of the Government Code is amended to read:

845.4. 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 Section 844.6 does not completely wipe out the liability of a public entity under Section 845.4; 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 personnaly liable. An interference with a prisoner's right to obtain judicial review may, of course, cause "injury" (as broadly defined in Section 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 Section 845.4 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.

SEC. 20. Section 845.6 of the Government Code is amended to read:

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 Section 844.6 clarifies this section's relationship to Section 844.6. See the similar 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 and Professions Code. This amendment corresponds with the amendment to Section 844.6(d).

SEC. 21. Section 846 of the Government Code is amended to read:

846. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody. Nothing in this section affects liability pursuant to any applicable statute for escape or rescue of a person arrested in a civil action.

Comment. As originally recommended by the Law Revision Commission in 1963, Section 846 only granted immunity for failure to make an arrest. The additional immunity for "failure to retain an arrested person in custody" was added by the Senate in the course of enactment of the 1963 legislative program. In context, and in light of the officially approved "comments" to this section and its companion provision, Section 845.8 (granting immunity for parole and release decisions, and for injuries "caused by an escaping or escaped prisoner"), it is clear that the immunity here conferred was being considered with reference to persons arrested or taken into custody under criminal process or on criminal charges. The application of the statutory language to instances of civil arrest (as authorized by CODE CIV. PROC. §§ 478-504) appears not to have been considered. Indeed, the entire concern of the Commission and Legislature seems to have been directed to the problem of liability for torts committed by the person who escapes from official custody, or who is not arrested.

The civil arrest statutes, on the other hand, establish a policy of personal liability of public officers (e.g., sheriff, marshal or constable) who fail to retain in custody a person arrested under civil arrest proceedings. This liability is not dependent on the commission of a tort by the person who escapes, but is a liability of the officer to the party who invoked civil arrest as a provisional remedy and whose rights have thus been frustrated by the escape. See GOVT. CODE §§ 26681, 26682; CODE CIV. PROC. §§ 501, 502. Hence, civil arrest cases are excepted from Section 846 by this amendment.

SEC. 22. Section 850.4 of the Government Code is amended to read:

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 amendment makes it clear that the immunity extends only to injuries that are caused by acts or omissions while actually fighting a fire.

SEC. 23. Section 850.5 is added to Chapter 4 of Part 2 of Division 3.6 of Title 1 of the Government Code, to read:

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 Sections 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 misinterpretations of these immunities.

For example, as enacted, Section 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., 213 Cal. App.2d 96, 28 Cal. Rptr. 560 (1963). As an immunity provision, Section 850.4 would prevail over the dangerous condition liability in this

case if the fire station was deemed to be a "fire protection . . . facility" within the meaning of Section 850.4 But such a result would be out of harmony with the purpose of the section.

Again, the State may conceivably fail to comply with a mandatory duty, imposed by the State Fire Marshal under Health and Safety Code Section 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 Section 850, or a failure to provide "sufficient fire protection facilities" under Section 850.2, and thus a dereliction for which the entity is immune from liability. Yet, in the absence of Sections 850 and 850.2, liability for resulting death or injury might well be imposed under the mandatory duty provisions of Section 815.6 or the dangerous condition provisions of Sections 830-840.6. The maintenance of a State hospital is not principally for fire protection purposes, and the immunity provisions of Sections 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. CODE §§ 4105, 4167 (and note that reference in these sections to "person" includes public entities, PUB. RES. CODE § 4017). Noncompliance would ordinarily be a possible basis of liability under both Section 815.6 and the dangerous condition sections; but present Sections 850.2 and 850.4 might be construed to grant immunity, for spark arresters might be deemed to be "fire protection facilities".

Section 850.5 thus clarifies the scope of Sections 850-850.4.

SEC. 24. Section 850.6 of the Government Code is amended to read:

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 fire-fighting 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 provide 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 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. CODE § 17001) even though the act causing the damage (loss of bridge; injury to bystander as bridge collapsed) was the act of an employee of the responding entity.

SEC. 25. Section 850.8 of the Government Code is amended to read:

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 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 Government Code Section 1957, and its wording was not conformed to the terminology and definitional sections of the Governmental Liability Act. The proposed amendments are intended to so conform it and thereby to clarify its meaning.

Subdivision (a) is worded so that it applies to every public employee, including 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 crashes 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 Section 810.8.

SEC. 26. Section 854.2 of the Government Code is amended to read:

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 Section 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.

SEC. 27. Section 854.4 of the Government Code is amended to read:

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. CODE § 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 recognized by California law but which was not explicitly mentioned in the original definition. See WELF. & INST. CODE §§ 7050 et seq.

SEC. 28. Section 854.6 is added to Chapter 5 of Part 2 of Division 3.6 of Title 1 of the Government Code, to read:

854.6. As used in this chapter, "mental patient" means a person who is in a mental institution for purposes of observation, diagnosis, care or treatment for mental illness or addiction, or is on parole or leave of absence from a mental institution.

Comment. This is a new section designed to clarify the scope of the immunities created by Section 854.8. Section 854.8 provides 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. CODE §§ 704, 5512) or "held" (WELF. & INST. CODE § 705) or temporarily "detained" (see WELF. & INST. CODE §§ 5050, 5400) pending commitment proceedings. Moreover, the requirement in Section 854.8 that the person be committed or admitted to a mental institution raises doubts as to its applicability to mental patients on parole or leave of absence, as authorized by law. see WELF. & INST. CODE §§ 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 addition of Section 854.6 and by the use of the phrase "mental patient" in Section 854.8.

SEC. 29. Section 854.8 of the Government Code is amended to read:

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~~ a mental patient.

(2) An injury to ~~any person committed or admitted to a mental institution~~ a 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 "mental patient" for the original language in subdivisions (a) and (c) merely utilizes the new definition of "mental patient" in Section 854.6.

The other changes in this section are supported by the reasoning advanced for the similar amendments made to Section 844.6.

SEC. 30. Section 855 of the Government Code is amended to read:

855. (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) 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 any 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 Section 854.8.

SEC. 31. Section 855.2 of the Government Code is amended to read:

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, 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 amendments are similar to those made to Section 845.4, and are made for similar reasons.

SEC. 32. Section 856 of the Government Code is amended to read:

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) As used in this section, "confine" includes admit, commit,

place, detain, and hold in custody.

Comment. Reference to "leave of absence" is recommended, since the Welfare and Institutions Code appears to consider such leaves equivalent to paroles. See WELF. & INST. CODE § 6725.5. Subdivision (d) has been added to clarify application of this section to all cases within its rationale.

SEC. 33. Section 856.2 of the Government Code is amended to read:

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. This amendment 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 custodial 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, 179 Misc 781, 40 NYS2d 109 (Ct Cl 1943), aff'd 266 App. Div. 1054, 46 NYS2d 104 (1943) (frostbite sustained by escaped mental patient); White v. United States, 317 F2d 13 (4th Cir 1963) (escaped mental patient killed by train). It is not certain whether the immunity provided by Section 854.8 for injuries to mental patients would apply 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 Section 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. CODE §§ 6602, 6605.1), persons held in emergency detention prior to commitment (WELF. & INST.

CODE §§ 5050, 5050.3), and juveniles placed in medical facilities for observation and diagnosis (WELF. & INST. CODE §§ 703, 705). The rationale of the immunity seems to cover all of these cases, and its application is therefore made explicit.

SEC. 34. Section 860 of the Government Code is amended to read:

860. As used in this chapter, "tax" includes a tax, or assessment, and 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 Cakland, 167 Cal. App.2d Supp. 835, 344 P.2d 1069 (1959), 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 amendment, however, clearly covers such exactions as delinquency penalties and redemption fees which are incidental to tax administration, and were thus probably within the original intent.

SEC. 35. Section 860.2 of the Government Code is amended to read:

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 in the interpretation ~~or application~~ of any law relating to a tax.

(c) Any act or omission resulting from an exercise of discretion in the application, imposition, enforcement or collection of any tax.

Comment. As amended, this section appears to more faithfully reflect the original legislative intent. As stated by the Senate Judiciary Committee, that intent was to set forth an explicit application of the discretionary immunity granted by Section 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 Section 820.2, to conform to legislative intent. And, even the liability created by Section 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 indication of legislative intent to do so appears.

SEC. 36. Section 860.4 of the Government Code is amended to read:

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

Comment. The expression, "providing for", is preferable to "relating to" because 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 Section 811, and the rather vague meaning of "relating to", one might argue that the general provisions of the Governmental Liability Act itself, and judicial decisions interpreting them, "relate to" tax administration and thus still apply, notwithstanding Sections 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 Section 815.6; and this would make Section 815.6 a law that "relates to" exemption of taxes. This line of reasoning would, of course, frustrate the legislative intent. To avoid possible litigation on the point, the amendment here makes clear that only those laws that provide for tax matters are within the scope of the disclaimer provision.

SEC. 37. Section 895.2 of the Government Code is amended to read:

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 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 the performance of such agreement.

Nothwithstanding any other law, if a judgment is recovered against a public entity for injury cause by an act or omission occurring in 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. The words, "by an act or omission occurring," have been added to the second paragraph in order to conform its language to that of the first paragraph.

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".

SEC. 38. Section 905.2 of the Government Code is amended to read:

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 1 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) of Section 905.2 followed the wording of former Government Code Section 641 (enacted in 1959), which was merely a reenactment of previous Government Code Section 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 (Cal. Stats. 1893, Ch. 45, § 1, p. 57) was repealed and replaced by Political Code Section 688. The 1893 act authorized suits in all types of contract situations. See Chapman v. State, 104 Cal. 690, 38 Pac. 457 (1894). But, when Political Code Section 688 was adopted in 1929 (Cal. Stats 1929, Ch. 516, § 3, p. 891), the adjective "express" was inserted before "contract." In 1931, the very next regular session of the legislature, Section 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, 214 Cal. 369, 6 P.2d 78 (1931). But in 1933, by still another amendment to Section 688, the adjective, "express", was again placed in the statute before "contract." Cal. Stats. 1933, Ch. 886, p. 2299.

The significance of this history is that Section 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, 20 Cal.2d 652, 662, 120 P.2d 537 (1942); Pacific Gas & Elec. Co. v. State of California, supra.

However, Section 945 of the Government Code, part of the 1963 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 Section 950.2 as a result of such failure. This result, however, would frustrate the intent underlying Section 950.2.

SEC. 39. Section 910.4 of the Government Code is amended to read:

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 shall be deemed to be in conformity with Sections 910 and 910.2 if the claim complies substantially with the requirements of the form or with the requirements of Sections 910 and 910.2.

Comment. The claim form prescribed by the State Board of Control (2 CAL. ADMIN. CODE §§ 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. Prior to the enactment of the 1963 legislation, lack of verification ordinarily was regarded as a fatal defect that could not be cured by the doctrine of substantial compliance. See, e.g., Peck v. City of Modesto, 181 Cal. App 2d 465, 5 Cal. Rptr. 482 (1960). Omission of other required data sometimes also was beyond cure by substantial compliance. Taken literally, this section thus might result in a trap where the claimant failed to comply with the form supplied, even though he fully complied with the requirements of Sections 910 and 910.2. 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).

SEC. 40. Section 910.6 of the Government Code is amended to read:

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 gave 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 subject to (1) the substantial compliance doctrine of Section 910.6(b), (2) the notice of insufficiency procedure of Section 910.8, and (3) the waiver rule of Section 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 there is a possibility that the phrase "claim as presented" in Sections 910.6(b), 910.8 and 911 will not 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. CODE § 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.

SEC. 41. Section 911.4 of the Government Code is amended to read:

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 division of this section into two subdivisions is solely for the purpose of ease of cross-reference in Section 930.4 (a new section recommended for adoption infra) and in Section 935 (for which an amendment is recommended infra), where the late claim procedure is incorporated by reference.

SEC. 42. Section 912.1 is added to Article 1 of Chapter 2 of Part 3 of Division 3.6 of Title 1 of the Government Code, to read:

912.1. If an application for leave to present a claim is granted by the court pursuant to Section 912, and the court finds that the denial of the application by the board was without substantial justification, the court may require the public entity to pay to the applicant the amount of the reasonable expenses incurred in obtaining the order, including a reasonable attorney's fee. If the application is denied by the court, and the court finds that it was made without substantial justification by the applicant, the court may require the applicant to pay to the public entity the amount of the reasonable expenses incurred in opposing the application, including a reasonable attorney's fee.

Comment. This section is new. Section 912, which immediately precedes this section, authorizes the superior court to grant late claim applications after they have been denied by the public entity, provided specified circumstances are shown to exist. Section 912.1 is designed to reduce the volume of applications to the courts by discouraging denials by the governing boards of late claims applications and by making applications to the court after denial more risky. It is based on Code of Civil Procedure Section 2034(a)(relating to motions to compel discovery).

SEC. 43. Section 912.4 of the Government Code is amended to read:

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 (a) before ~~or after~~ the expiration of such period or (b) after the expiration of such period if an action based on the claim 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 Section 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.

SEC. 44. Section 930 of the Government Code is amended to read:

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.

Comment. See the Comment to Section 930.2.

SEC. 45. Section 930.2 of the Government Code is amended to read:

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-an-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. The amendments to Sections 930 and 930.2 are necessary to conform these sections to the proposed language of new Section 930.4, infra, which states in more detail exactly how the "late claim" procedure of Sections 911.4 to 912.2 applies to claims governed by contractual procedures here authorized.

SEC. 46. Section 930.4 is added to Chapter 5 of Part 3 of Division 3.6 of Title 1 of the Government Code, to read:

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 935.2 or 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. Subdivision (b) of Section 911.4 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 911.6 and 912.

Comment. Section 930.4 is 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 Section 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 Section 911.2). On the other hand, some of the claims that may be the subject of contractual procedures under Section 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, the 100 day period of Section 911.2 is declared a minimum even for contractual procedures. Thus, the claimant will know that he always has at least 100 days in which to present his claim, whether it is governed by the statutory rule of Section 911.2, or by the contractual procedure of his agreement with the entity under Section 930 or 930.2, or by a local ordinance or charter provision pursuant to Section 935.

Subdivision (b) is based on Section 935 without substantive change. This subdivision makes all claims 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 Section 935.4 ($5,000 limit for local entity in absence of charter authority to go higher) where applicable or Section 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 Section 911.2. Subdivision (d) clears up these difficulties.

SEC. 47. Section 930.6 is added to Chapter 5 of Part 3 of Division 3.6 of Title 1 of the Government Code, to read:

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. Section 930.6 is new. It is based in part on Section 935. 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. Under existing law, it appears that prior rejection could be demanded as part of a contractual claims procedure. But the six month period of limitations does not apply (since Section 945.6 is limited in terms to claims governed by the statute), nor do the limitations on scope set out in Section 946 (which are likewise restricted to claims covered by the statute). The ordinary statute of limitations thus is applicable. See Section 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 will accomplish both purposes and make the procedure more nearly uniform for all claims.

SEC. 48. Section 935 of the Government Code is amended to read:

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 (1) the limitations of time for commencement of an action provided in Section 945.6, and (2) 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 Sections 911.4 to 912.2, inclusive, are applicable to all claims governed thereby~~.

(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. Subdivision (b) of 911.4 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 amendments to Sections 930 and 930.2, and new Sections 930.4 and 930.6, supra.

The adoption of this amendment and the provisions referred to above will both clarify and make more uniform the claims law, 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) If prior presentation and rejection is required as a prerequisite to suit, all claims will be subject to the uniform 6 month period of limitation.

(4) When the time for presentation is less than one year, all claims will be subject to the liberal "late claim" procedures.

SEC. 49. Section 943 of the Government Code is amended to read:

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 declares 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, Section 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 Sections 995-996.6.)

As the present section now stands, it creates uncertainty whether the

provisions of Sections 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. The revised section precludes that assumption and makes it clear that Sections 950.6 and 951 do not apply to University employees.

SEC. 50. Section 945.4 of the Government Code is amended to read:

945.4. Except as provided in Section 945.5, no suit for money or damages may be 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 until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

Comment. This amendment directs attention to the exception to Section 945.4 that is stated in Section 945.5.

SEC. 51. Section 945.5 of the Government Code is repealed.

~~945.5. Where provision is made by law or otherwise that no suit may be brought against any public agency as defined in Section 5350 unless and until a claim is presented to such agency, or an employee thereof, and such agency has failed to file with the Secretary of State and with the county clerk of each county in which there is located any portion of the territory of such public agency the information required to be filed under Section 53051, then and in such event the presentation of any such claim shall not be required.~~

Comment. Section 945.5 is replaced by a new Section 945.5. See the Comment to new Section 945.5.

SEC. 52. Section 945.5 is added to the Government Code, to read:

945.5. (a) Where provision is made by or pursuant to law that no suit may be brought against a public agency as defined in Section 53050 unless and until a claim is presented to the agency, the failure to present a claim or an application for leave to present a late claim does not constitute a bar or defense to the maintenance of a suit against such public agency if, during the 90 days immediately following the accrual of the cause of action:

(1) No statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of Secretary of State and of the county clerk of each county in which the public entity then maintains an office, as required by Section 53051; or

(2) A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but the information contained therein is inaccurate or incomplete or does not substantially conform to the requirements of Section 53051.

(b) On any question of fact arising within the scope of paragraphs (1) and (2) of subdivision (a), the burden of proof is upon the public agency.

(c) A suit brought pursuant to this section, without prior presentation of a claim, must be commenced within one year after the accrual of the cause of action.

Comment. This section replaces present Section 945.5. As originally enacted in 1963 as a part of a State Bar legislative program, Section 945.5

contained a number of ambiguities which the new section seeks to resolve. The operative language of the original section provided that when a public agency "has failed to file [with the designated officials] the information required to be filed under Section 53051, then and in such event the presentation of any such claim shall not be required." Problems created by this language, and the solutions provided by the new section, include:

1. The original version did not make it clear when the public agency's failure to file was to be operative (i.e., when the cause of action accrued, when the action was commenced, or when an effort to present a claim was undertaken?). And what if the entity, although in default when the cause of action accrued, later complied with Section 53051 before the plaintiff attempted to present his claim? Or what if the agency was in compliance when the time for presenting a claim expired, but thereafter failed to keep its statement for the Roster up to date, as required by Section 53051, and it was thus not in compliance when the plaintiff commenced his action?

Questions of this sort are resolved by the new section by making the operative period of time the 90-day period after the accrual of the claim. If, during this period, the public agency is not in compliance with the Roster procedure, presentation of a claim is excused. The entity, however, may comply at any time during the period; but, if it does, the injured person may then present his claim. The rule thus proposed, it will be noted, applies to both "100-day" and "1-year" claims in the interest of certainty and encouragement of diligence. By checking the Rosters at the end of 90 days, the plaintiff can always determine whether he must present a claim or not within the remaining 10 day or 275 day period (depending on

the kind of claim asserted) available for that purpose. Moreover, he he need have no concern that the public agency may thereafter file the required statements--perhaps on the last day for presentation of the claim or of an application for leave to present a late claim--and then contend that nonpresentation bars suit. Since the purpose of the Roster appears to be to give official notice of where and to whom the claim may be presented, 90 days is a reasonable basis for estopping the public agency from relying on the claims procedure; while compliance with the Roster procedure within the 90 days would fulfill its purpose, thereby curing any default as of the time the cause of action accrued without prejudice to the claimant.

2. The original version of Section 945.5 did not make clear what deficiencies would constitute a "failure to file . . . the information required," other than the total absence of a statement. The problem was particularly acute in that Section 53051 expressly required the public agency to present an amended statement within 10 days after any change in the relevant facts. What if the Roster statement was up-to-date when the cause of action accrued, but due to a change of facts had become out-of-date by the time the claimant attempted to present a claim? Or, conversely, what if it was accurate when the time to present a claim expired but prior thereto was defective or incomplete?

The new section resolves these kinds of problems by relating the sufficiency of the Roster statement to the 90-day period, and excusing compliance with the claim presentation requirement only if the defect (which must be a "substantial" one) existed throughout the entire 90 days. This tends to carry out the purpose of the Roster requirement to give fair notice but does not adversely affect the rights of claimants in any meaningful sense.

3. Unlike the original version, which was silent on these points, the new section expressly places the burden of proof of compliance with the Roster procedure on the public agency (which has the evidence readily at hand), and declares a special one year statute of limitations in order to promote the policy of early disposition which undergirds the claims procedure.

SEC. 53. Section 945.6 of the Government Code is amended to read:

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 the board, or is deemed to have been rejected 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 such 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 PENAL CODE § 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. As amended, the section requires 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 PENAL CODE §§ 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

deleted because they are redundant and because they tend to invite a contention that the prisoner's claim must be presented within the 100 day or one 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.

SEC. 54. Section 945.8 of the Government Code is amended to read:

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 Section 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). Amended Sections 930.6 and 935 both so provide. They should thus be expressly indicated in the present section as exceptions to the rule provided in Section 945.8, making the ordinary statute of limitations applicable.

SEC. 55. Section 947 Of the Government Code is amended to read:

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 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 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 Section 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, 34 Cal.2d 112, 207 P.2d 1057 (1949). 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. CODE CIV. PROC. § 1032(c).

SEC. 56. Section 950.2 of the Government Code is amended to read:

950.2. (a) 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 public entity for such injury is barred:

(1) Under Section 946; or ~~is barred~~

(2) 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 ~~(b)~~

(3) Because of the failure to commence the action within the time specified in Section 945.5 or 945.6, as the case may be.

(b) Immunity of the public entity from liability does not excuse the plaintiff from satisfying the conditions provided in this section.

Comment. The addition to subdivision (a)(2) of the amended section 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 the section 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 Sections 930 et seq.) and local ordinance or charter claims procedure (see Section 935).

The revision of subdivision (a)(3) conforms Section 950.2 to Section 945.5. The result of this revision is that an action against a public employee of a public agency that has failed to comply with the Roster of Public Agencies procedure must be commenced within the one-year period allowed by Section 945.5(c), just as an action against an employee of a complying agency would have to be commenced within the six-month period allowed by Section 945.6.

Subdivision (b) of the amended section clarifies the application of this section 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. CIVIL CODE § 3532.

SEC. 57. Section 950.4 of the Government Code is amended to read:

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 Section 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.

SEC. 58. Section 950.6 of the Government Code is amended to read:

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 such 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 Section 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.

SEC. 59. Section 951 of the Government Code is amended to read:

951. (a) At any time after the filing of ~~the~~ a complaint, counter-claim 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~~ costs and necessary disbursements 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 Section 947, and are supported by similar reasons. See the Comment to Section 947.

SEC. 60.. Section 955.4 of the Government Code is amended to read:

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 deleted because they are unnecessary and may cause uncertainty. They were contained in former Government Code Section 649 and its predecessor, Government Code Section 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." 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1017 (1963). 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.

SEC. 61. Section 960.2 of the Government Code is repealed.

~~960.2. In any suit against a public agency, if the governing body of any public agency fails to comply with Section 53051, notwithstanding any provision of law to the contrary, or if the governing body cannot with due diligence be found at the last known official mailing address of the governing body of the public agency, and it is shown by affidavit to the satisfaction of the court or judge that personal service of process against a public agency cannot be made with the exercise of due diligence, the court or judge may make an order that the service be made upon the public agency by delivery by hand to the Secretary of State or to any person employed in his office in the capacity of an assistant or deputy, employed in his office in the capacity of an assistant or deputy, of two copies of the process for each defendant to be served, together with two copies of the order authorizing such service. Service in this manner constitutes personal service upon the public agency.~~

~~A fee of five dollars ($5) shall be paid by the plaintiff to the Secretary of State for each public agency on which service is made in this manner.~~

Comment. Section 960.2 is replaced by two new sections: Sections 960.2 and 960.3. See the Comments to those sections.

SEC. 62. Section 960.2 is added to the Government Code, to read:

960.2. Notwithstanding any provision of law to the contrary, service of process in an action or proceeding against a public agency may be made in the manner provided in Section 960.3 if, during the ten days immediately following the commencement of the action or proceeding:

(a) No statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of Secretary of State and of the county clerk of each county in which the public agency then maintains an office, as required by Section 53051; or

(b) A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but the information contained therein is inaccurate or incomplete or does not substantially conform to the requirements of Section 53051; or

(c) A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but neither the governing body nor any officer or agent of the public agency upon whom personal service of process constitutes service upon the public agency can thereafter, with due diligence, be found and served at the address or addresses set forth in the statement.

Comment. In the interest of clarification, Section 960.2 has been recast as two new sections: Sections 960.2 and 960.3. New Section 960.2 defines the circumstances in which substituted service on the Secretary of State is permitted. As originally enacted, Section 960.2 authorized this form of service in two situations: (1) when the public agency "fails to comply with Section 53051," and (2) if the governing body cannot be found, and service of process cannot be made, in the exercise of due diligence. These occasions for substituted service have been retained, but made more precise in the new section.

Failure to comply with Section 53051 is defined in the new section as either the absence of a statement in the Roster of Public Agencies, or the presence in the Roster of a statement that is not in substantial compliance with the requirements of Section 53051 or is incomplete or inaccurate. A failure to present an up-to-date amended statement within the 10 days allowed by Section 53051, following a change of circumstances, would, for example, mean that the statement on file is "inaccurate" and not substantially in conformity with that section. The period of 10 days after the commencement of the action was chosen as the base period for determining compliance because this would permit the agency to file an original or amended statement and thus insist on service in the normal fashion within the same period of time, after commencement of the action, which is allowed by Section 53051 for filing amended statements in the usual course.

As originally enacted, Section 960.2 authorized substituted service if the governing board could not be found at the last known "official mailing address" of the entity, and if service could not be affected with due diligence. This basis for substituted service has been omitted in the

new section, except as reflected in subdivision (c). Under both the original and the new section, no showing of diligence was or is required if no statement is in the Roster; while if there is a statement on file, all that would appear to be necessary to establish diligence is a good faith effort to accomplish service at the addresses set forth in the statement. In any event, a court order must be obtained under new Section 960.3.

SEC. 63. Section 960.3 is added to the Government Code, to read:

960.3. If it is shown by affidavit to the satisfaction of the court or judge that the circumstances required by Section 960.2 exist, the court or judge may make an order that service of process be made upon the public agency by delivery by hand to the Secretary of State or to any person employed in his office in the capacity of an assistant or deputy, of two copies of the process for each public agency defendant to be served, together with two copies of the order authorizing such service. Service in this manner constitutes personal service upon the public agency.

A fee of five dollars ($5) shall be paid by the plaintiff to the Secretary of State for each public agency on which service is made in this manner.

Comment. This section is new. It is an adaption of part of former Section 960.2, which has been recast as two separate sections in the present proposal. See new Section 960.2, and the Comment thereto. No changes of substance have been introduced in the present section.

SEC. 64. Section 965 of the Government Code is amended to read:

965. 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 claims 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 Section 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 prescribed 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. The State Board of Control should have the same flexible authority in this connection as local entities.

SEC. 65. Section 995 of the Government Code is amended to read:

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 any strict time limitation upon the employee in making the request. Under Section 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 amendments to Sections 995.2 and 996.4, infra.

SEC. 66. Section 995.2 of the Government Code is amended to read:

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 Section 996.4, 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.

SEC. 67. Section 996.4 of the Government Code is amended to read:

996.4. 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.

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

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 Section 995.2, above.

SEC. 68. Section 40813 of the Government Code is amended to read:

40813. The city clerk may appoint deputies ~~;-for-whose-acts he-and-his-bondsmen-are-responsible.--The-deputies~~ who shall hold office at the pleasure of the city clerk and receive such compensation as is provided by the legislative body.

Comment. See the Comment to Government Code Section 41006.

SEC. 69. Section 41006 of the Government Code is amended to read:

41006. The city treasurer may appoint deputies ~~for whose acts he and his bondsmen are responsible.~~

Comment. The amendments to Sections 40813 and 41006 conform these sections to the basic policy reflected in Section 820.8 of the Government Code: "Except as otherwise provided by statute, a public employee is not liable for an injury caused by an act or omission of another person." No good reason has been discovered for treating city clerks differently from other public officers and making them liable for the torts of their deputies, absent personal negligence or tortious conduct on the part of the clerk. The necessity for the amendments arises from the exception at the commencement of Section 820.8, for as now written the unamended language of Sections 40813 and 41006 might be construed as constituting an exception to the basic rule of Section 820.8.

SEC. 70. Section 53050 of the Government Code is amended to read:

53050. The term "public agency," as used in this article, means any political subdivision of the State, district ~~of any kind or class~~, public authority ~~of any kind or class~~, public agency, and any public corporation in the State, other than a county, city and county, or city ~~, or town~~ .

Comment. The amendment of Section 53050 makes the section conform substantially to the language of Section 811.2 (which defines "public entity").

SEC. 71. Section 53051 of the Government Code is amended to read:

53051. (a) Within ninety (90) days after ~~the effective date of this article or after~~ the date of commencement of its legal existence, ~~whichever is later,~~ the governing body of each public agency shall cause to be filed with the Secretary of State and also with the county clerk of each county in which ~~there is located any portion of the territory of~~ the public agency maintains an office, a statement of the following facts:

1. The full, legal name of the public agency.

2. The official mailing address of the governing body of the public agency.

3. The names and residence or business addresses of each member of the governing body of the public agency.

4. The name, title, and ~~if different from the information required in paragraph 3, the~~ residence or business address of the chairman, president, or other presiding officer, and clerk ~~and~~ or secretary of the governing body of such public agency.

(b) Within 10 days after any change in the facts required to be stated pursuant to subdivision (a), ~~a~~ an amended statement ~~of~~ containing the information required by subdivision (a) shall be filed as provided therein.

(c) It shall be the duty of the Secretary of State and of the county clerk of each county to establish and maintain an indexed "Roster of Public Agencies", to be so designated, which shall contain all information filed as required in subdivisions (a) and (b), which roster is hereby declared to be a public record.

Comment. These amendments incorporate the proposals of the State Bar Committee on Administration of Justice as reported in 39 State Bar J. 513-514 (i.e., "maintains an office"), and makes other minor changes of wording in the interest of clarity, consistent with new Sections 945.5 and 960.2.

SEC. 72. Section 846 of the Civil Code is amended to read:

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 give 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 granted 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 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 Governmental Liability 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, 57 Cal.2d 499 (1962)(wrongful death statute held applicable to State, although statute only refers to liability of "person" causing the death). Section 846, however, should not be construed as a limitation on the Governmental Liability Act in view of the gross inconsistency between Section 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 (Cal. Cont. Ed. Bar 1964). To avoid any doubt, Section 846 is here amended to make clear that it does not affect statutory liabilities of public entities or public employees.

SEC. 73. Section 1095 of the Code of Civil Procedure is amended to read:

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 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 Governmental Liability 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 exclude actions for "specific or preventive relief" from the liability and immunity provisions of the Governmental Liability Act.

To be consistent with this policy, Code of Civil Procedure Section 1095 is here amended to indicate clearly that the immunities in the Governmental Liability 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. CODE § 820.2), because mandamus is not available to compel official discretion to be exercised in a particular manner. See, e.g., Jenkins v. Knight, 46 Cal.2d 220 (1956). On the contrary, it will further the policy underlying Government Code Section 815.6 (liability for breach of mandatory duty) when a tort action based thereon cannot be maintained. Cf. GOVT. CODE § 815.2(b).

Section 1095 is also amended to indicate that the claims presentation procedures do not apply. It is probable that this result would obtain under the Governmental Liability 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 Government Code Section 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 the 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 through these alternative channels.

SEC. 74. Section 17000 of the Vehicle Code is amended to read:

17000. As used in this chapter:

~~,-"public-agency"-means-the-State,-any-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 incorporates and makes applicable to automobile accident cases the same definitions that apply to other tort actions against public entities. See GOVT. CODE §§ 810.2, 810.4, 811.2. Vehicle Code Section 17001 in its present form makes public entities liable for negligence of "agents" of the public entity operating motor vehicles in the scope of their agency; but the definition of "employee" in Section 17000, together with revised Section 17001, has the effect of limiting the liability of a public entity for the negligence of an "agent" in operating a motor vehicle to the limited secondary liability provided by new Section 17002.

SEC. 75. Section 17001 of the Vehicle Code is amended to read:

~~17001. Any public agency owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of the motor vehicle by an officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent, or employee when acting within the scope of his office, agency, or employment. The injured person may sue the public agency in any court of competent jurisdiction in this State in the manner directed by law.~~

A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

Comment. This section is identical to that recommended by the Law Revision Commission to the 1963 Session of the Legislature. See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation relating to Sovereign Immunity (Number 5 - Liability of Public Entities for Ownership and Operation of Motor Vehicles) 1401, 1407 (1963).

The amended section makes a public entity liable for both negligent and intentional torts of public employees in operating motor vehicles. The existing section is limited to negligent torts; but, under Government Code Section 815.2, the public entity probably is liable for an intentional tort committed with a motor vehicle by a public employee where the employee is personally liable.

The amended section, like the present section, imposes liability directly upon the public entity; liability is not based on the personal liability of the public employee. Hence, an employee's personal immunity from liability--such as that provided in Vehicle Code Section 17004--does not protect the public entity from liability under Section 17001.

SEC. 76. Section 17002 of the Vehicle Code is repealed.

17002. ~~If there is recovery under this chapter against a public agency, it shall be subrogated to all the rights of the person injured against the officer, agent, or employee and may recover from the officer, agent, or employee the total amount of any judgment and costs recovered against the public agency, together with costs therein.~~

Comment. Section 17002 is inconsistent with the provisions of Government Code Sections 825-825.6 and was probably superseded by the enactment of those sections. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 7.69 (Calif. Cont. Ed. Bar 1964).

SEC. 77. Section 17002 is added to the Vehicle Code, to read:

17002. (a) A public entity is liable for death or injury to person or property to the same extent as a private person under the provisions of Article 2 (commencing with Section 17150) of this chapter.

(b) Nothing in this section makes Article 3 (commencing with Section 825) of Chapter 1 of Part 2 of Division 3.6 of Title 1 of the Government Code inapplicable in any case where that article is otherwise applicable.

Comment. Section 17002 makes public entities liable for death or injury caused by publicly owned vehicles to the same extent that private vehicle owners are liable for death or injury caused by privately owned vehicles under the provisions of Vehicle Code Sections 17150-17159. Section 17002 probably states existing law. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 7.65 (1964).

The liability to which public entities are subjected by Section 17002 is both a limited liability and a secondary liability. Section 17151 limits the liability to $10,000 for injury or death to any one person, to $20,000 for injury or death to more than one person, and to $5,000 for property damage; and Section 17152 requires that the operator be resorted to for satisfaction of judgment before recourse to the vehicle owner.

Where the damages sought are within the statutory limits contained in Vehicle Code Section 17151, a plaintiff may proceed against a public entity under Vehicle Code Section 17002 even though the public employee operating the vehicle may have been acting within the scope of his employment. By proceeding under Vehicle Code Section 17002, the plaintiff avoids the necessity for proving the employee's scope of employment. Subdivision (b) makes it clear

that the indemnification and subrogation provisions of Government Code Sections 825-825.6 apply in such a situation. (Sections 825-825.6 provide general, comprehensive rules governing indemnification of public employees for judgments resulting from acts or omissions in the scope of their employment and rules giving public entities a right of subrogation in appropriate circumstances.)

SEC. 78. Section 17004 of the Vehicle Code is amended to read:

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~~ 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 Vehicle Code Section 17004 to all public employees seems appropriate in light of the expansive definition of "authorized emergency vehicle" contained in Vehicle Code Section 165. 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 the former version of Section 17004; yet no apparent basis for limiting the immunity to less than all such emergency situations has been discerned.