

#52

1/7/65

Memorandum 65-2

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

We previously sent you a draft of a recommendation to make primarily clarifying and technical changes in the governmental liability legislation enacted in 1963 upon recommendation of the Law Revision Commission.

This recommendation must be approved for printing at the January meeting of the Commission. We plan to introduce the recommended legislation as soon as possible after the January meeting. We will have our report printed as soon as possible thereafter.

In most cases, the Comment to the particular section explains the need for the suggested revision and no further comment is needed in this memorandum. The recommendation is based on the report of Professor Van Alstyne. We have revised his recommended revisions of the statute and have revised the comments that explain the revisions. However, except as noted below, these revisions are for the purpose of improving the drafting of the statute or for the purpose of preparing the material in a form suitable for publication as a recommendation to the Legislature. Professor Van Alstyne plans to attend the January meeting and will present the case for any of his revisions that we have not included in the recommendation. For your convenience in comparing our revisions with Professor Van Alstyne's report, we also attach a copy of his report. You will note that in preparing our recommendation we have rearranged the order of the sections in his report.

Section 800

We have numbered the section as Section 800, instead of as Section 809 as suggested by Professor Van Alstyne. We have also omitted the word

"Tort" from the short title the Commission previously approved. The portion of the statute governing claims and actions and funding of judgments, for example, is not limited to tort actions or judgments.

#### Section 815.2

The revision of this section is not suggested by Professor Van Alstyne. However, the staff believes that this is a highly desirable revision and should be made. See the Comment to the amended section. This revision will eliminate much of the confusion that has resulted in the interpretation of the 1963 Act. The confusion arises out of the meaning of the phrase "except as otherwise provided by statute" in subdivision (b). Actually, subdivision (b) is not necessary, but we do not believe it would be desirable to delete it; its deletion might lead persons to believe that the deletion reflects an intention to change the meaning of Section 815.2.

#### Section 820

We have included Professor Van Alstyne's suggested revision of Section 820. However, we doubt that this is a necessary or desirable change. Section 820 deals with the liability of an employee for his act or omission. Section 820.8 provides the employee with an immunity for the act or omission of another person. See the second sentence of Section 820.8. In any event, if the Commission determines to include this amendment in the bill, we believe that the last paragraph of the proposed Comment is essential to indicate that an employee can be liable for his own negligence in appointing or failing to discharge or discipline another employee.

#### Section 825

The staff has included most of the changes suggested by Professor

Van Alstyne in this section. However, there is one significant difference between the section proposed by the staff and that proposed by Professor Van Alstyne. Professor Van Alstyne states in his book on California Government Tort Liability that the public entity is bound by the judgment if a request is made that the entity defend the judgment but the entity does not defend because it believes the employee was not in the scope of his employment. The Commission's intent was that the entity could decline to defend in such a case and that scope of employment would need to be established before the entity would be bound by the judgment. The revised section makes clear the Commission's original intent. The revised section provides a fair and reasonable protection to the public entity when it is requested to defend an action against an employee it believes was not in the scope of his employment in a case where the employee will not permit the entity to defend under a reservation of rights.

Note that Section 825 does not deal with the right of the employee to recover the costs of the defense; that matter is covered by other sections which provide a rule more liberal to the employee. Section 825 deals only with when the entity is required to pay the judgment against the employee.

#### Section 831.2

The staff has redrafted this section in light of the discussion of the section at a previous Commission meeting. Professor Van Alstyne recommended a somewhat different phrasing of the amendment.

#### Section 831.8

Professor Van Alstyne recommended that the words "or permitted" be inserted after "intended" in the last line of subdivision (b). We have not made this change. The difference between subdivisions (a) and (b) was intentional; the immunity provided by subdivision (b) was intended to be

broadier than that provided by subdivision (a).

Section 835.1

Professor Van Alstyne suggests the addition of a new Section--Section 835.1. (See page 18 of his report.) We have not included this section in the recommendation because we believe it is unnecessary and undesirable.

Sections 820.2 and 821 (which are referred to in the new section) relate to employee immunities. These immunities do not operate as a limitation on entity liability under Article 2 (commencing with Section 835). See amended Section 815.2. We believe that the amendment to Section 815.2 takes care of the problem. In the event that it might be held that the immunities provided by Sections 820.2 and 821 were limitations on employee liability for dangerous conditions, no harm would result because the employee liability for dangerous conditions is not a necessary part of the dangerous conditions statute. The entity liability is broader than the employee liability and exists in any case where an employee is liable as well as in many cases where the employee is immune.

Section 818.2 (which also is referred to in the new section) presents a more difficult problem. We do not believe that Section 818.2 applies where the plaintiff bases his cause of action on the dangerous condition liability and does not claim that the entity is liable because it enacted or failed to enact an ordinance or failed to enforce the law. This analysis is consistent with the recent case of Morgan v. County of Yuba, 223 ACA 1009 (Dec. 15, 1964). This was an action against a county for the wrongful death of a woman murdered by a prisoner who had threatened her life. Liability was based on the failure of a deputy sheriff to give a promised warning of the prisoner's release from custody. It was held that the

complaint stated a cause of action. Government Code Section 845.8 (neither a public entity nor its employee is liable for injury resulting from a determination whether to release a prisoner) was cited by the county to avoid liability. Court held that liability existed because plaintiffs did not urge that the officers negligently released a dangerous prisoner. The negligence charged was the failure to warn, as promised, that a dangerous prisoner was about to be, or had been released.

On the other hand, if the claim is that the property is in a dangerous condition because of the negligent failure to adopt or negligent adoption of an enactment or negligent failure to enforce a law, the immunity would and, we believe, should apply.

Moreover, we do not read the immunity provided by Section 818.2 as providing an immunity for failure to comply with the law. The immunity provided is for failure to enforce the law. Hence, Section 818.2 has no effect on liability for a dangerous condition based on the failure of the entity to comply with building codes, safety orders, etc. In fact, where compliance with such codes or orders is required by law, the failure of the entity to comply therewith would also be a basis for liability under Section 815.6 (mandatory duty imposed by enactment).

#### Section 835.4.

This amendment was not included in Professor Van Alstyne's report, but is made at the request of the Department of Public Works. The change is merely a conforming change; it has no substantive effect on the meaning of the section.

#### Section 844.6

We suggest that subdivision (e) be revised to delete the words "to this section".

Another revision of Section 844.6 is suggested below.

Sections 845.4 and 845.6

The recommendation contains the amendments proposed to these sections by Professor Van Alstyne. However, the staff suggests that the problem of the interrelationship of these sections and Section 844.6 be resolved in a different way. We suggest that a new subdivision be added to Section 844.6 to read:

Nothing in this section affects the liability of a public entity under Section 845.4 or 845.6.

The effect of this addition to Section 844.6 will be that the entity may be held liable under Section 845.4 or 845.6 in the narrow cases covered by the liability portions of those sections. We believe that this is a desirable method of resolving this problem. We would also delete the language proposed to be added to Sections 845.4 and 845.6 that refers to Section 844.6.

Section 850.8

The recommendation does not contain the revision of subdivision (a) of Section 850.8 in the language suggested by Professor Van Alstyne. (See his report at page 34.)

Professor Van Alstyne suggests that the words "or in connection with" be deleted from subdivision (b).

Section 854.8

We suggest that subdivision (e) be revised to delete the words "to this section".

Another revision of Section 854.8 is suggested below.

Section 855

In lieu of the proposed amendment to this section, Section 854.8 might be amended to add the following additional subdivisions:

Nothing in this section affects the liability of a public entity under Section 855.

The staff presents this for Commission consideration without recommendation.

#### Section 855.2

The recommendation contains the amendments to this section proposed by Professor Van Alstyne. However, the staff suggests (as in the case of Sections 845.4 and 845.6) that the problem of the interrelationship of Sections 855.2 and 854.8 be resolved in a different way. We suggest that a new subdivision be added to Section 854.8 to read:

Nothing in this section affects the liability of a public entity under Section 855.2.

We would also delete the phrase ", except as provided in Section 854.8," from Section 855.2.

#### Section 860.2

This amendment is generally the same as that suggested by Professor Van Alstyne. However, we have not included the requirement of "exercise of discretion" in subdivision (b). One of the major purposes of enacting this section was to provide an immunity for incorrect tax interpretations. In other words, no suit for damages can be brought if a public employee administering a tax law gives a taxpayer an incorrect interpretation of the tax laws.

#### Section 895.2

Professor Van Alstyne suggests an amendment of the first paragraph of Section 895.2. (See his report at page 63.) We have not included this amendment in the recommendation.

In addition, we prefer the phrase "injury caused by a negligent or wrongful act or omission occurring in the performance of the agreement" to

the phrase "injury arising out of the performance of the agreement." Hence, we have used the equivalent of our preferred phrase in the second paragraph of Section 895.2 instead of the phrase suggested by Professor Van Alstyne. The phrase is intended to refer to torts and we believe that the phrase we prefer is more precise for this purpose.

The word "cause" should be "caused" in the second line of the second paragraph.

#### Section 895.6

We did not include the amendment suggested by Professor Van Alstyne to this section in the recommendation. (See his report at page 48.) We prefer the phrase used in the statute as drafted.

#### Section 910

See Exhibit I (attached pink page) for an amendment of Section 910 that is necessary to make a technical correction.

#### Sections 935.2 and 935.4

Section 935.2 gives a local public entity unlimited authority to delegate settlement of claims to a claims board. Section 935.4 gives a local public entity authority to delegate to an employee or "commission" authority to settle claims, but such authority is limited to settlements of not more than \$5,000.

Professor Van Alstyne points out that there is a question whether Section 935.4 impliedly repeals the authority given in Section 935.2 to delegate authority to settle claims in excess of \$5,000. The amendments to Section 935.4 were not intended to limit the authority under Section 935.2, and the staff suggests that Section 935.4 be amended to make this clear.



Professor Van Alstyne suggested that Section 935.2 be repealed. We believe this would be undesirable, because we believe that a local public entity should have unlimited authority to delegate settlement of claims to a claims board if the entity so desires.

To effectuate the staff recommendation, we suggest that the amendment of Section 935.4 (set out in Exhibit II-green pages) be adopted.

Section 955.4

The amendment to this section is set out as recommended by Professor Van Alstyne. The amendment causes us some concern. Are actions against the Regents of the University of California to be defended by the Attorney General? Under Const. Art. 9, § 9, the Regents of the University of California is a public corporation and has the power to sue and be sued. Does the elimination of the words "on claims" create any problems with respect to the Regents?

See also Revenue and Taxation Code Section 26104 (service on franchise tax board in action for refund of bank or corporation taxes) and Revenue and Taxation Code Section 19087 (service on franchise tax board in income tax refund action).

In addition, Code of Civil Procedure Section 411 provides that "the summons must be served by delivering a copy thereof as follows:

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7. In an action or proceeding authorized by law against a state board or commission, to the president, chairman, or other head of or to the secretary of said board or commission."

In view of these various provisions, we believe that no amendment of Section 955.4 should be made without further study of the matter. The deletion of the words "on claims" would create an inconsistency with Code of Civil Procedure Section 411.

#### Vehicle Code Sections 17000-17004

Professor Van Alstyne suggests a comprehensive statute governing the liability of public entities for injuries arising out of the operation of motor vehicles. See his report at pages 49-60.

There was considerable misunderstanding at the 1963 session as to the effect of the Commission's recommendation that public entities be subject to ownership liability to the same extent as a private person. Our initial reaction to our experience at the 1963 session was that it would be necessary to spell out the extent of such ownership liability in the statute imposing such liability on the public entity. Professor Van Alstyne prepared his report in this form.

After giving the matter further consideration, the staff has concluded that it would not be desirable to duplicate the provisions dealing with ownership liability in a statute covering public entities. Instead, we have incorporated the statute imposing ownership liability on private owners by reference.

Section 17000 of the Vehicle Code as set out in the recommendation is the same as recommended by Professor Van Alstyne.

Section 17001 of the Vehicle Code as set out in the recommendation is the same as recommended by Professor Van Alstyne.

The repeal of existing Section 17002 is recommended by Professor Van Alstyne, and this section is repealed in the recommendation.

Section 17002 (added in the recommendation) is a substitute for Sections 17002-17009 recommended by Professor Van Alstyne. (See pages 51-58 of his report.) We believe that the Commission Comment to the new section will make it clear that the liability is both a limited liability and a secondary liability.

The amendment of Section 17004 as set out in the recommendation is the same as recommended by Professor Van Alstyne.

The staff believes that if the amendments to the Vehicle Code are deleted from the bill by legislative action, the entire bill should be killed. We make this recommendation because we would not want to effect the interpretation of the existing law. We believe that, under existing law, ownership liability now exists.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

EXHIBIT I

SEC. . Section 910 of the Government Code is amended to read:

910. A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

- (a) The name and post office address of the claimant;
- (b) The post office address to which the person presenting the claim desires notices to be sent;
- (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
- (d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; and
- (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known- ; and
- (f) The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

Comment. The amendment to Section 910 makes a technical correction.

## EXHIBIT II

SEC. . Section 935.4 of the Government Code is amended to read:

935.4. A charter provision, or a local public entity by ordinance or resolution, may authorize an employee or commission of the local public entity to perform such functions of the governing body of the public entity under this part as are prescribed by the local public entity, but may not authorize such employee or commission to allow, compromise or settle a claim against the local public entity if the amount to be paid pursuant to such allowance, compromise or settlement exceeds five thousand dollars (\$5,000), except that a charter provision may authorize a public employee or commission to allow, compromise or settle a claim, even where the amount to be paid exceeds five thousand dollars (\$5,000). Upon the written order of such employee or commission, the auditor or other fiscal officer of the local public entity shall cause a warrant to be issued upon the treasury of the local public entity in the amount for which a claim has been allowed, compromised or settled.

Nothing in this section limits the authority of a local public entity under Section 935.2.

Comment. Section 935.2 authorizes local public entities to establish a "claims board" to perform the functions of the governing body in passing on claims and late claim applications. Section 935.4 authorizes local public entities to establish claims "commissions" for exactly the same purpose, as well as to delegate these functions to a claims officer. Thus, the two sections appear to substantially overlap.

The overlap causes interpretative difficulties. Section 935.4 expressly establishes a \$5,000 limitation on the authority to delegate settlement of claims, except where a higher figure is set by city or county charter approved by the voters.

To make it clear that Section 935.4 does not in any way limit the authority of a public entity to delegate authority to settle claims to a "claims board" under Section 935.2 (without any limitation in terms of dollar amount), Section 935.4 is here amended to provide expressly that it does not limit the authority of a public entity under Section 935.2.