

Government Response to the

Part A of the Law Commission's report:

***The Crown in Court: A Review of the Crown Proceedings Act and
National Security Information in Proceedings***

Presented to the House of Representatives

In accordance with Standing Order 249

Introduction

The Government welcomes the Law Commission's (the Commission's) report on the *Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (the Report).

The Crown Proceedings Act 1950 (the Act) has not been comprehensively reviewed since it was passed and Government thanks the Commission for its work on this report.

This response only relates to Part A of the report relating the Review of the Crown Proceedings Act 1950. The Government will respond to Part B of the report separately. The Government has carefully considered the Commission's report and responds to Part A of the report in accordance with Standing Order 249.

Recommendations and Government Response

Recommendations

The Law Commission made 11 recommendations relating to the Act. These recommendations are divided into three packages: one relating to the direct liability of the Crown (recommendations 2, 4, 5, 6, 8 and 9); one relating to a new Act (recommendations 1, 3 and 7); and the third containing discrete miscellaneous recommendations (recommendations 10 and 11).

Recommendations relating to direct Crown liability

The Law Commission has proposed a package of recommendations relating to direct liability of the Crown. These recommendations are:

- the Crown should be able to be sued in tort as a private individual and be held directly liable (*recommendation 2*)
- courts should continue to develop the substantive law of torts, including the kind of torts for which the Crown is liable (*recommendation 4*)
- the retention of statutory immunity for Crown employees (*recommendation 5*)
- immunities for Crown employees should not prevent the Crown being held liable (*recommendation 6*)
- indemnity should be paid by the department responsible (*recommendation 8*)
- the court can grant any remedy in civil proceedings against the Crown (*recommendation 9*).

Recommendations relating to a new Act

The Law Commission has made three recommendations relating to the need for new legislation. These recommendations are that:

- the Crown Civil Proceedings Bill, which is attached to the report, should be considered for enactment (*recommendation 1*)
- the new Act should include a schedule which lists the existing immunity provisions that apply to Crown employees (*recommendation 3*)
- a statutory indemnity should be enacted for Ministers of the Crown to replace the current indemnity procedure in the Cabinet manual (*recommendation 7*).

Declaratory orders

The Law Commission has recommended that where the public interest requires, the court must make a declaratory order about the party's rights and entitlements (*recommendation 10*).

***In rem*¹ proceedings**

The Law Commission recommended that the exclusion against bringing *in rem* proceedings against the Crown should be retained. As a result, the Crown's ships or aircraft and related property cannot be arrested or made subject to the consequences of *in rem* proceedings (*recommendation 11*).

Response

Recommendations relating to direct Crown liability

While conscious of the Law Commission's reasons for its proposal, the Government considers the proposed extension of liability to raise significant constitutional and fiscal issues rather than being a procedural change.

The Government disagrees with the Law Commission's proposal and believes that:

- the proposal may lead to an extension of the scope of Crown liability at common law, particularly when coupled with other Law Commission recommendations (in particular, recommendation 4 - courts should continue to develop the substantive law of torts, including the kind of torts for which the Crown is liable);
- treating the Government differently from other litigants, especially corporations, can be justified, because the Crown serves the public as a whole as a matter of duty;
- the Crown owes international obligations that require it to act in ways that may be to the detriment of private citizens;
- individual department responsibility for indemnity could disrupt a department's work programme or business as usual functions; and
- the Crown is different to individuals and corporations in that it cannot be 'wound up'.

For these reasons the Government rejects the Law Commission's *recommendation 2* around direct liability in tort for the Crown, along with the other recommendations relating to direct Crown liability (recommendations 4, 5, 6, 8 and 9).

Recommendations relating to a new Act

The Government agrees with the Law Commission's general view that it would be desirable for the Act to be modernised and simplified.

In light of the Government's rejection of the recommendations relating to direct liability for the Crown, and the Government's other legislative priorities, however, the Government considers that a new Act is not warranted at this time.

The Government will consider which aspects of the Law Commission's report and recommendations could be implemented, alongside the modernisation of the Act, as and when appropriate legislative vehicles become available.

Declaratory orders

The Government considers that the Law Commission's *recommendation 10* relating to declaratory orders should be deferred to be considered in the context of the Law Commission's review of the Declaratory Judgments Act 1908. The Law Commission was asked to review this statute in November 2015.

¹ *In rem* is a legal term describing the power a court may exercise over property.

In rem proceedings

The Government agrees with the Law Commission's *recommendation 11* that the exclusion against bringing *in rem* proceedings against the Crown should be retained. As a result, the Crown's ships or aircraft and related property cannot be arrested or made subject to the consequences of *in rem* proceedings.

Conclusion

Regarding Part A of the *Crown in Court* report, the Government:

- **rejects** the recommendations that relate to direct liability for the Crown;
- **defers** at this time the recommendations relating to need for new legislation;
- **notes** that the Government will look at what aspects of the report can be legislatively implemented, alongside modernisation of the Act, as and when appropriate vehicles become available;
- **defers** consideration of the recommendation that where the public interest requires, the court must make a declaratory order about the party's rights and entitlements, for consideration in the context of the Commission's review of the Declaratory Judgments Act 1908; and
- **agrees** with the recommendation that the exclusion against bringing *in rem* proceedings against the Crown should be retained.