

Access to Justice and Limitation of Actions against Public Officers and the State

Introductory Note

1. Last year, the Commission, as part of its Public Law Reform Project, released a Discussion Paper on "Access to Justice and limitation of Actions against Public Officers and the State". We made provisional recommendations concerning reforms to be brought to the Public Officers' Protection Act and the State Proceedings Act.
2. We intimated in the Discussion Paper that we would report and make final recommendations on the issues raised, after consultation with stakeholders and interested parties and after comparative legal research on the evolution of similar provisions in other Commonwealth countries, as well as further reflection on the constitutional principles at stake.
3. Press notices were issued in August 2007 inviting any member of the public,¹ in particular any interested party, to make submissions on the issues raised in our Discussion Paper. The Secretary to Cabinet and Head of the Civil Service was also invited to react to our proposals. The general response we have received is that the current rules need to be amended as they are causing injustice to litigants.

¹ Le Mauricien 22 August 2007, L'Express 22 August 2007, Le Matinal 22 August 2007, and L'Express Dimanche 26 August 2007.

4. We have since reviewed the evolution of such provisions in Mauritius and in other Commonwealth jurisdictions. We have also reflected further on the constitutional issues at stake. In the light of our findings, we now make final recommendations for reform of the law. We are attaching a draft Public Officers' Protection (Amendment) Bill, which gives effect to our reform proposals, as Annex 1 to this Report. For ease of reference, we are also attaching our Discussion Paper as Annex 2 to this Report.

Further Consideration of the Issues from a historical and comparative perspective

Evolution in Mauritius

5. The special limitation period was introduced in our law as far back as 1898, through an amendment to the then Interpretation and Common Form Ordinance requiring that actions against public officers be instituted within a delay of three months.² Subsequent amendments were effected to the Ordinance bringing, inter alia, the time limit within which to institute proceedings to six calendar months.³

² Hansard, Debates of 21st June 1898. During the debates the view was expressed by the then Procureur General that "with regard to public servants it is admitted in law that they are entitled to a certain protection; that is a principle already existing in our law". Mr. Newton [later Sir William Newton, QC] was concerned "why with regard to criminal actions a difference should be made between a public officer and an ordinary individual".

³ Vide Cap. 162, Interpretation and Common Form Ordinance (1945).

6. In 1957, the Public Officers' Protection Ordinance was enacted.⁴ Criticisms have time and again been expressed against that legislation.⁵ As a result, the legislature in 1992⁶ extended the time limit within which actions may be brought to two years.⁷

The then Attorney General, Hon. A. Ganoo, had this to say during the debates:

"I refer to the provision contained in the Public Officers' Protection Act and in the Local Government Act 1989, whereby an action in damages against a public officer, a local authority or a member thereof will fail unless it is lodged within six months of the occurrence. It is easy to imagine that this may cause undue hardship and prevent a deserving victim from recovering what is lawfully due to him. It is accordingly proposed to extend the time limit within which such actions may be brought to two years." [Debates on 07.07.92]

⁴ During the debates on the Public Officers' Protection Ordinance (Bill No. XLIX of 1957) on 20th December 1957, the Procureur General stated to the Council that "for purely technical, legal reasons the provisions in the Interpretation Ordinance have been abstracted there from and reproduced in this Bill".

⁵ In *Jeekahrajee v Registrar of Cooperatives & anor* (1978) MR 215, Justice Glover (as he then was) expressed the view that the then section 4 of the Public Officers' Protection Ordinance of 1957 is a law framed in such a way that it is unreasonable and may have manifestly unjust consequences, as there would be a number of situations where a person would be absolutely unable to present his action before the expiry of the time limit (being incapacitated by an accident, or having to wait the result of certain preliminary investigations, for example by the police). One Chief Justice, Sir Maurice Rault, is reported - by Hon. A. Ganoo on 20th July 1990 during debates in the National Assembly on the Judicial Provisions Bill No. XVII of 1990 - as having said at a law conference:

"La troisième catégorie d'exception aux droits communs concerne la prescription. En général, à Maurice, les actions pour les délits ne prescrivent que par 20 ans, mais les actions contre un fonctionnaire pour tout acte ou omission dans l'exécution de ses fonctions doivent être intentées dans un délai de six mois. Il est permis de penser que cette prescription est indûment courte. Nous l'avons emprunté au Droit Anglais, mais en Angleterre, dès 1939, il fut jugé nécessaire de l'étendre de 6 mois à un an ; et depuis 1954, les actions contre les fonctionnaires se prescrivent par les mêmes délais que les actions contre les particuliers. »

⁶ Judicial and Legal Provisions Act No. 29 of 1992.

⁷ During the debates, Mr. I. Collendavelloo, SC, pointed out that "everyone will welcome this great step that has been bridged today by the extension of the time limit of six months to two years. Great hardship was being caused to people who were victims of road accidents, for example, by Government vehicles, and after a delay of six months, at the time they were still in hospital, they had to put their case in Court, they were met with an objection that they were outside the delay. That time-limit of two years is welcomed with a sigh of relief from all quarters."

Evolution in other Commonwealth jurisdictions

(a) England

7. Between 1893 and 1954, actions against public authorities were subject to shorter limitation periods than actions against other defendants. Under the *Public Authorities Protection Act 1893*⁸, actions against public authorities had to be brought within six months.⁹

8. The question of limitation periods against public authorities was considered by the Law Revision Committee in 1936.¹⁰ The Committee in its Report commented:

"We have carefully considered how far it is advisable to interfere with the policy of the Public Authorities Protection Act. That policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts, and that serious consequences might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrong doer is paid from public funds".¹¹

⁸ Public Authorities Protection Act 1893 (UK) s 1.

⁹ Under the terms of section 1 of the Public Authorities Protection Act 1893: Where any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act duty or authority ... the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in the case of a continuance or injury or damage, within six months next after the ceasing thereof.

This protection was not complete - although the statute applied to criminal prosecutions and most actions for civil wrongs it did not, for example, apply to actions for breach of contract [*Sharpington v Fulham Guardians* (1904) 2 Ch 449; *Lyles v Southern Corporation* (1905) 2 KB 1]. In addition, the Act did not apply to cases under the Workmen's Compensation Act 1897 [*Fry v Cheltenham Corporation* (1911) 81 LJKB 4] and its successors which provided compensation for industrial injuries before the advent of the National Insurance (Industrial Injuries) Act 1946, and it appears that it did not apply to actions under the Fatal Accidents Act 1846 (and its successors) [*British Electric Company, Ltd v Gentile* (1914) AC 1034 and *Venn v Tedesco* (1926) 2 KB 227.]

¹⁰ In the *Fifth Interim Report "Statutes of Limitation"* 1936, Cmd 5334.

¹¹ *Ibid.* at para 26.

9. The Committee did not recommend the abolition of these special rules, but suggested mitigating the problems they caused by extending the limitation period to one year, and making it run from the date of accrual of the cause of action rather than the date of the act, neglect or default in question. The *Public Authorities Protection Act* was amended along these lines by the *Limitation Act 1939*.¹²
10. Continuing dissatisfaction with the existence of special rules for public authorities led to further consideration being given to the matter in the Report of the Committee on the Limitation of Actions in 1949.¹³ The Committee approached the problem from the point of view that the special rules fixed for the benefit of public authorities by the 1893 Act were a curtailment of the rights of the individual and could only be justified if it was clearly established that there was a real likelihood of injustice on a considerable scale resulting from its repeal. It said that it was clear that the Act often caused injustice to plaintiffs where a genuine claim was barred through inadvertence or for other reasons. It pointed to the fine distinctions as to the conduct which came within the Act, the conflicting cases, and the complications resulting from having to ascertain whether a public body qualified for protection and whether it had caused an injury in the course of carrying out its public duty. It came to the conclusion that most cases would continue to be brought promptly even if the special limitation period were removed, and that there was no evidence that the difficulties which ensued from claims not being brought promptly (such as the problem of keeping records) were peculiar to public authorities. Large corporations were in the same position, and in any case public authorities engaged in commercial activity to an increasing extent. The Committee recommended that the *Public Authorities Protection Act* should be repealed. This recommendation was implemented by the *Law Reform (Limitation of Actions etc) Act*

¹² Section 21.

¹³ Chaired by Lord Justice Tucker, Cmd 7740, at paras 6-25.

1954. Since then, the position in England has been that the limitation periods applicable in actions against public authorities are exactly the same as those applying to any other defendant. As said by Lord Bridge of Harwich:

“The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency”.¹⁴

11. More recently the Law Commission of England has reasserted its position that “as under the present law, no special protection in limitations law should be given to public authorities. Where the core regime would apply to any other defendant, it should therefore apply in the same way to actions against public authorities.”¹⁵

(b) Australia & New Zealand

12. Four Australian States adopted the reform recommended by the Tucker Committee. In three of them the reform followed hard on the heels of the English Act. Tasmania abolished special limitation and notice requirements in 1954¹⁶ and Queensland followed in 1956.¹⁷ In Victoria, when the special limitation periods were abolished in 1955,¹⁸ the notice requirements were retained, on the recommendation of the Statute Law Revision

¹⁴ *Arnold v CEGB* (1988) AC 228 at 269.

¹⁵ Law Commission Report (2001) No. 270, para. 4.203. Vide also Consultation Paper No 151 (1998), para 13.153.

¹⁶ *Limitation of Actions Act 1954* (Tas) s 3 and 2nd Sch, inserting s 6A in the *Public Officers Protection Act 1934* (Tas).

¹⁷ *Law Reform Limitation of Actions Act 1956* (Qld) s 4 (limited to personal injuries). The Queensland Law Reform Commission *Report on a Bill to Amend and Consolidate the Law Relating to Limitation of Actions* (QLRC 14 1972) 6 proposed the abolition of all remaining notice requirements, which was effected by the *Limitation of Actions Act 1974* (Qld) s 4 and Sch.

¹⁸ *Limitation of Actions Act 1955* (Vic) s 34, re-enacted in *Limitation of Actions Act 1958* (Vic) s 34.

Committee,¹⁹ but in 1966 they were repealed,²⁰ bringing actions against public authorities fully into line with all other actions. In New South Wales, the special rules were abolished by the *Notice of Action and Other Privileges Abolition Act 1977*.²¹ The reform was delayed because the New South Wales Law Reform Commission did not report on public authorities in its first report on limitation of actions in 1967. However, its third report in 1975 gave full consideration to this matter, and its recommendation to abolish special limitation and notice rules was implemented by the 1977 Act.

13. The third report of the New South Wales Law Reform Commission contains the fullest Australian discussion of the arguments against special limitation and notice provisions. As regards notice requirements,²² it said that there was really only one substantial ground for giving public authorities special treatment, namely the need for prompt notice to marshal evidence, particularly the testimony of employees of the authority whose period of employment might be of only limited duration. This, however, was no different from the position of large private corporations. The notice rules were an anachronism. The greatest objection to the continuation of notice requirements was that they were discriminatory and unfair. The report endorsed the words of a leading article in the *Australian Law Journal*:

"The most obscure country shire is to receive notice of claim before any action may be taken against it or its servants. The largest private retail store in which thousands of people pass daily is not to receive such notice. There is discrimination in favour of public bodies as against private persons."²³

¹⁹ Victorian Statute Law Revision Committee *Report on the Limitation of Actions Bill* (1949) para 5.

²⁰ *Limitation of Actions (Notice of Action) Act 1966* (Vic) s 2.

²¹ S 4 and Sch.

²² NSW Report (1975) paras 13-39.

²³ J A Redmond "Notices before Action" (1964) 37 *ALJ* 316 at 317.

The report examined developments in other jurisdictions in detail and said that it would be a mistake for New South Wales to close its eyes to such developments and retain a system that had been generally abandoned because it had been found unsatisfactory. It concluded that policy considerations were against the continuance of notice requirements. The Commission noted that the law was hard to find, and that such requirements caused an increase in costs and were a source of injustice.

14. The special limitation provisions applicable in actions against public authorities came in for similar criticism.²⁴ After a detailed examination of the trend in other jurisdictions in favour of abolition of such requirements, it concluded that they should also be abolished in New South Wales. It drew attention to a number of grounds on which authorities had submitted that special limitation periods should be retained -

- (1) public authorities would have difficulty in preparing their budgets if limitation periods were extended;
- (2) authorities would be severely handicapped by having to retain records for longer periods – the Commission noted that similar difficulties were faced by large commercial and industrial organizations which do not benefit from the protection accorded to public authorities;
- (3) there would be problems arising from loss of evidence, due to the substantial staff turnover of public authorities;
- (4) the protection of special limitation periods was necessary because of the element of risk to which public authorities were subject in running their affairs.

²⁴ NSW Report (1975) paras 40-133.

The authorities also raised the traditional arguments always advanced against any extension of liability - that there would be an increase in litigation, and that it would encourage false and fraudulent claims. The New South Wales Law Reform Commission refuted each of these arguments in detail, pointing out that as regards each of the four points listed above public authorities were not in a position different from that of private corporations, and that it was unfair to disadvantage individuals to help the budgets of public authorities; the Commission pointed to the existence of alternative means of financing claims, such as insurance. The views of the Tucker Committee were expressly endorsed.

15. The Law Reform Commission of Western Australia has also recommended the repeal of similar provisions for public authorities and the Crown.²⁵
16. In New Zealand the one year limitation period and accompanying notice requirements formerly contained in section 23 of the *Limitation Act 1950* were abolished in 1962²⁶ as the result of recommendations made in a report by the Department of Justice.²⁷

²⁵ Law Reform Commission of Western Australia, *Report on Notice and Limitation of Actions*, Project 36 Part II (1997), paras 10.12, 23.7).

It was considered these rules (1) are anachronistic; (2) are unfair and discriminatory; (3) cannot be rationally justified, since private corporations are in exactly the same position as public authorities, especially those which conduct commercial enterprises; (4) are productive of fine distinctions as to whether something is done "in pursuance or execution or intended execution of any Act, or of any public duty or authority"; (5) are a trap for the unwary; (6) operate harshly on the plaintiff; (7) often force the commencement of an action, because there is insufficient time to pursue other alternatives; (8) make litigation unnecessarily complex; (9) increase costs; and (10) frustrate just claims.

²⁶By the *Limitation Amendment Act 1962* (NZ) s 3.

²⁷ *Limitation Act 1950*, Report by Department of Justice LR 175, 5-6. See also G P Barton "Limitation Periods for the Protection of Public Authorities" (1960-62) 3 VUWLR 133.

(c) Canada

17. In Canada equivalent rules have been abolished²⁸ or their abolition recommended.²⁹
18. The 1969 Report of the Ontario Law Reform Commission contained a detailed discussion of the case against special limitation and notice provisions similar to those found in the reports of the Tucker Committee and the New South Wales Law Reform Commission already discussed. The Commission noted that no adverse effects had been experienced as a result of the repeal of such provisions in England, New York and elsewhere. The Report refuted all the arguments presented by municipalities for the retention of such rules, and recommended the repeal of all special limitation periods. In the words of the Ontario Commission:

"The most significant element in settling upon the time for making a claim must be the nature of the injury: it cannot be the nature of the person who is liable. Whether a personal injury occurs on the operating table, on the highway, or on faulty stairs in a private residence, the same factors are relevant. The injured person must have a reasonable time to discover the extent of his injuries, to find out his legal position and to attempt to reach a settlement without bringing an action. Furthermore, an injured person should be entitled to some time for recovery from his injuries. He should not, in an ordinary case of hospitalization, have to be worried about issuing a writ from his hospital bed."³⁰

²⁸ Equivalent rules have been abolished in Alberta, British Columbia and Manitoba: SA 1966 c 49 s 4 (see Alberta Report for Discussion (1986) para 3.100); SBC 1975 c 37 s 16, now re-enacted in *Limitation Act 1979* (BC) s 15; SM 1967 c 32 s 3C, now re-enacted in *Limitation of Actions Act 1987* (Man) s 4.

²⁹ Abolition has been recommended in Ontario, Newfoundland and Saskatchewan: See Ontario Report (1969) 74-90; Newfoundland Working Paper (1985) 253-263 and Newfoundland Report (1986); Saskatchewan Report (1989) 54-57.

³⁰ Ontario Report (1969) 78.

(d) India

19. In its 100th Report on "Litigation by and Against the Government: Some Recommendations for Reform" (May 1984), the Law Commission of India recommended that section 80 of the 1908 Code of Civil Procedure, which requires prior notice of intention to sue the Government or a public officer for an act done by the latter in his official capacity, should be repealed.³¹ The Law Commission was of opinion that the only object of this section is to give to the Government an intimation of intended litigation, so that Government may consider its position and, if so advised, redress the wrong. This object is however almost never achieved since the notice does not receive prompt attention, the administration being unresponsive to such notice.

20. The Commission further recommended that no special treatment should be afforded to the Government in the matter of period of limitation and the special treatment afforded to Government should be abolished. The distinction made with regard to suits by the Government and suits by other persons and entities should be removed in the law.³²

21. In 1984, the Law Commission of India also reviewed the Judicial Officers' Protection Act of 1850, which confers protection on persons performing judicial functions and is also designed to protect persons executing decrees and orders passed by the judiciary in exercise of its functions. In Its Report, the Commission recommended that no Judge (nor any other judicial officer) should incur any civil or criminal liability for acts done by him

³¹ At para. 2.15.

³² At para. 4.4.

when acting judicially, in the exercise of any power which is given to him by law, or which in good faith he believes to be given to him by law.³³

22. The Commission also recommended that nothing which is done in pursuance of, or which is warranted by, the judgment or order of a court of justice, if done whilst such judgment or order remains in force, shall render a person liable to be sued in any civil court, notwithstanding that the court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.³⁴

Further Consideration of the Issues from a Constitutional and Human Rights Perspective

23. An underlying principle of our Constitution is the rule of law.³⁵ The rule of law requires that the Government should not enjoy unnecessary privileges or exemptions from the ordinary law. The short period of limitation available to protect public officers as distinct from other persons against whom litigation can be taken puts the State and other authorities served by such officers in a privileged position in comparison with other litigants. And there is, in our opinion, no pressing social need which would justify this privileged position. We consider that, save in exceptional circumstances, an individual in his dealings with the State should stand on the same footing as that on which he stands in dealings with his neighbour. These are the requirements of the rule of law, an entrenched constitutional principle to which other norms and any governmental action must conform with.

³³ 104th Report on 'Judicial Officers' Protection Act, 1850' (October 1984), at para. 10.1.

³⁴ *Loc. Cit.*

³⁵ *Mahboob v Government of Mauritius* (1982) MR 135; *Noordally v Attorney-General & ors* (1986) MR 204; *Ahnee & ors v Director of Public Prosecutions* (1999) [Privy Council Appeal No. 28 of 1998].

24. Another underlying principle in our Constitution is the principle of equality.³⁶ Our Constitution provides for equality before the Courts, equal protection of the law and the non-discriminatory character of laws on specified grounds.³⁷ Intrinsically linked with the right to equal access before the Courts is the right to an effective remedy for violation of rights, notwithstanding that the violation has been committed by persons acting in an official capacity.
25. Equal access to courts is a fundamental right of any individual in an open and democratic society based on human dignity, equality and freedom, which outweighs any governmental interest concerned.³⁸

³⁶ *Matadeen v. Pointu and ors. and Minister of Education and Science and anor* (1998) [Privy Council Appeal No. 14 of 1997].

³⁷ Vide *Union of Campement Sites Owners & Lessees & ors. v. Government of Mauritius & ors.* (1984) MR 100, where it was observed:

“It would appear that, on the question of equality before the law and the equal treatment of the law, our Constitution has adopted both facets of what really is the same principle, that is to say, provisions giving effect to positive equality and provisions giving effect to non- discrimination. Those giving effect to positive equality are entrenched in words like “No person shall” (e.g. sections 4, 5, 6, 7 and others) or “any person who” or “every person who”. There are also substantive provisions which guarantee equality of treatment before the Courts but not necessarily identity of treatment (section 10). Thus a person convicted of an offence before one jurisdiction and visited with a sentence higher than another person convicted of a similar offence under similar circumstances in another jurisdiction, or perhaps the same jurisdiction, could not justifiably complain of unconstitutional treatment if the trial was regular. There are also those provisions which, on the other hand, give effect to non-discrimination such as section 3 which applies to the rights contained in Chapter 2 and section 16 which applies to any law regulating any other right.”

³⁸ South African Constitutional Court cases of *Mohlomi v Minister of Defence* (1996) and *Moise v Transitional Local Council of Greater Germiston* (2001).

Our Final Recommendations for Reform

26. Section 3 of the Public Officers' Act has to be drafted differently³⁹. It includes in the definition of the offence an aggravating circumstance. It should be drafted as follows:

3. Molesting public officers

(1) *Any person who resists, opposes, molests, hinders, or obstructs a –*
(a) *public officer in the performance of his duty;*

(b) *person lawfully engaged, authorised or employed in the performance of a public duty; or*

(c) *person lawfully acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),*

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 3,000 rupees.

(2) *Where the offence is committed with force or violence, the penalty shall be a fine not exceeding 10,000 rupees and in the case of a second or subsequent offence, the penalty shall be a fine of 10,000 rupees and imprisonment for a term not exceeding three months.*

27. The definition given in section 2 of the Act of a "public officer", for the purpose of affording protection, as meaning any Government servant and any officer of a municipal council is too narrow. The words "officer of a municipal council" should be repealed and replaced with the words "officer of a local authority".

³⁹ Section 3 presently reads as follows:

“(1) Any person who by force or violence resists, opposes, molests, hinders, or obstructs a –

(a) public officer in the performance of his duty;

(b) person lawfully engaged, authorised or employed in the performance of a public duty; or

(c) person lawfully acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 10,000 rupees and to imprisonment for a term not exceeding 3 months.

(2) In the absence of force or violence, the penalty shall be a fine not exceeding 3000 rupees and in the case of a second or subsequent offence, the penalty shall be as provided in subsection (1).”

28. No special protection should be given to public officers or public authorities, by way of a shorter limitation period for actions brought against them as such provisions would be inimical to our democratic state constitutionally based on the rule of law. Section 4 of the public officers' Protection Act should therefore be repealed so that actions fall to be governed within the time limit prescribed by the *droit commun* of the Civil Code. There is no need for a provision requiring written notice of suit before commencing litigation, nor is there any justification for derogating from the principle of "réparation intégrale du prejudice".
29. We do not consider the current limitation period for different types of action, as laid down in provisions such as Articles 2273 seq. of the Civil Code, needs for the time being to be reviewed.
30. We consider that specific provisions in our law, which confer protection from liability to persons performing public functions for any acts done, or not done, in good faith in the performance or purported performance of their duties, as laid down by law, are necessary in a democratic state based on the rule of law.⁴⁰ Such provisions do not undermine, but rather strengthen the rule of law. We therefore recommend that such protection be afforded to public officers and other persons performing public functions. A new section 4, entitled 'Protection from civil liability', is therefore recommended in the draft Bill. The new section 4 would read as follows:

4. Protection from civil liability

No action or other proceedings for damages shall lie against a –

(a) public officer in the execution of his duty;

(b) person engaged or employed in the performance of any public duty; or

⁴⁰ Vide, for instance, section 16 of the Law Reform Commission Act 2005; section 23 of the Central Electricity Board Act; section 40 of the Central Water Authority Act.

*(c) person acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),
in relation to anything done, or not done, by him in good faith in the performance or purported performance, or in aid or assistance for the performance, of public duties.*

31. We have formed the opinion that Judges and other judicial officers should be afforded special protection in respect of the exercise of their judicial functions. We also consider that some protection must be afforded to public officers executing orders of a court of law.⁴¹ We recommend the repeal of the existing provisions in sections 5 and 6 and propose new provisions as follows:

5. *Judicial Protection*

No civil or criminal action shall lie against a Judge or a Magistrate or any other person performing judicial function for anything which is done or not done by him when acting judicially, in the exercise of any power which is given to him by law, or which in good faith he believes to be given to him by law.

6. *Protection for execution of court orders*

No civil or criminal action shall lie against a person for any act done or not done by him in pursuance of, or which is warranted by, the judgment or order of a court of law, if done whilst such judgment or order remains in force, notwithstanding that the court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.

⁴¹ We approve of the provisions contained in section 11 of the Police Act, entitled 'Protection of police officers', to the effect that "no liability shall attach to a police officer in respect of an act done in compliance with an order or warrant of a Court".

32. Subsections (1) to (5) of section 43 of the Local Government Act of 1989 provides for time limits and notices in respect of actions.⁴² We therefore recommend as a consequential amendment that such provisions be repealed.

⁴² Section 43 of the Local Government Act 1989, entitled 'limitation of actions', reads as follows:

- (1) *Every civil or criminal action, suit or proceeding by any person for any fact, act or omission, against a local authority acting in execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act shall, under pain of nullity be instituted within 2 years of the date of the event which has given rise to such action, suit or other proceeding.*
- (2) *No such civil action, suit or proceeding, shall be instituted unless one month's prior written notice of it, and of the subject-matter of the complaint, has been given to the defendant, and where such notice is given no evidence shall be produced at the trial except of the cause of action contained in the notice and in default of proof at the trial that such notice was given, the defendant shall be entitled to judgment with costs.*
- (3) *Where prior to the institution of any such civil action, suit or proceeding, the defendant has offered to the complainant an indemnity which is determined to be sufficient by the Court before which the case is brought or where after any such civil action, suit or proceeding has been commenced, the defendant deposited with the registrar of the Court a sum of money which the Court determines to be sufficient as damages or indemnity to the complainant, the case shall be dismissed, subject to such order as to costs as the Court may think fit.*
- (4) *Where in any such civil action, suit or proceeding the Court certifies on the record that the defendant acted upon reasonable or probable cause, the plaintiff shall not be entitled to more than nominal damages, or to any costs.*
- (5) (a) *No action, prosecution or proceeding shall lie against any member acting in execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act unless –*
 - (i) *there is against such member direct proof of corruption or malice;*
 - (ii) *the action is commenced within 2 years after the cause of action or complaint has accrued;*
and
 - (iii) *notice of the action is served on the member 30 days before the action is brought.**(b) Where judgment is in his favour, the defendant shall be entitled to twice the amount of his taxed costs.*
- (6) *Without prejudice to any other powers, the local authority, where the defendant in any action, prosecution or proceeding under this section is one of its members or officers, agents or servants, may if it thinks fit, pay out of the funds of the authority the whole or any part of any sums payable by the defendant in or in consequence of the action, prosecution or proceeding whether in respect of costs, charges, expenses, damages, fines or otherwise.*
- (7) *Where the subject-matter of the action relates to any question which is covered by the certificate of the Director of Audit, no action at law shall be brought under this section.*

33. We are of the opinion that section 2(5) of the State Proceedings Act should also be repealed⁴³. The imperatives of the rule of law dictate that the State should not exonerate itself for any wrongful act done by a person whilst exercising judicial function or in connection with the execution of judicial process.
34. We recommend, in respect of cases already lodged before the Courts, a transitional provision for the application of the new provisions.

Concluding Remarks

35. We are confident our recommendations go some way towards strengthening the rule of law, as enshrined in our democratic Constitution, and guaranteeing equal access to courts.

Full force should be given to the provisions contained in Article 2227 of our Civil Code, which is in our statute book as far back as 1805, to the effect that "la nation, les établissements publics et les communes sont soumis aux mêmes prescriptions que les particuliers et peuvent également les opposer".

⁴³Section 2(5) of the State Proceedings Act reads as follows:

"(5) No proceedings shall lie against the State by virtue of this section in respect of anything done, or omitted to be done, by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him, or responsibilities which he has in connection with the execution of judicial process."

ANNEX 1

THE PUBLIC OFFICERS' PROTECTION (AMENDMENT) BILL

(No..... of 2008)

Explanatory Memorandum

The object of this Bill is to amend the Public Officers' Protection Act to provide for –

- (a) actions against public officers to be entered within the same time limits as those actions entered against any other persons for same cause of action, without the need to serve a prior notice in writing;
- (b) protection from civil liability to public officers and other persons performing, or assisting in the performance of, public functions for acts done in good faith in the performance of these functions;
- (c) special protection from liability to judicial officers when acting judicially in the performance of their judicial functions;
- (d) protection from liability to public officers executing in good faith judgments or orders of courts of law; and
- (e) other related matters.

Jayarama VALAYDEN

Attorney-General

Minister of Justice and Human Rights

... 2008

THE PUBLIC OFFICERS' PROTECTION (AMENDMENT) BILL

(No. of 2008)

ARRANGEMENT OF CLAUSES

Clause

1. Short title
2. Interpretation
3. Section 2 of principal Act amended
4. Sections 3 to 6 of the principal Act repealed and replaced
5. Consequential amendments
6. Transitional provisions

A BILL

To amend the Public Officers' Protection Act to provide for better protection from liability for actions taken in good faith by public officers in the performance of public functions, whilst abolishing the shorter limitation period and notice requirement for bringing actions against them, compared with other persons, for wrongful acts.

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Public Officers' Protection (Amendment) Act 2008.

2. Interpretation

In this Act –

“principal Act” means the Public Officers' Protection Act.

3. Section 2 of principal Act amended

Section 2 of the principal Act is amended by deleting the words “officer of a municipal council” and replacing them with the words “officer of a local authority”.

4. Sections 3 to 6 of the principal Act repealed and replaced

Sections 3 to 6 of the principal Act are repealed and replaced with the following new sections –

3. Molesting public officers

- (1) Any person who resists, opposes, molests, hinders, or obstructs a –
- (a) public officer in the performance of his duty;
 - (b) person lawfully engaged, authorised or employed in the performance of a public duty; or
 - (c) person lawfully acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b), shall commit an offence and shall, on conviction, be liable to a fine not exceeding 3,000 rupees.
- (2) Where the offence is committed with force or violence, the penalty shall be a fine not exceeding 10,000 rupees and in the case of a second or subsequent offence, the penalty shall be a fine of 10,000 rupees and imprisonment for a term not exceeding three months.

4. Protection from civil liability

No action or other proceedings for damages shall lie against a –

- (a) public officer in the execution of his duty;
- (b) person engaged or employed in the performance of any public duty; or
- (c) person acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),

in relation to anything done, or not done, by him in good faith in the performance or purported performance, or in aid or assistance for the performance, of public duties.

5. Judicial Protection

No civil or criminal action shall lie against a Judge or a Magistrate or any other person performing judicial function for anything which is done or not done by him when acting judicially, in the exercise of any power which is given to him by law, or which in good faith he believes to be given to him by law.

6. Protection for execution of court orders

No civil or criminal action shall lie against a person for any act done or not done by him in pursuance of, or which is warranted by, the judgment or order of a court of law, if done whilst such judgment or order remains in force, notwithstanding that the court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.

5. Consequential amendments

- (1) Subsection (5) of section 2 of the State Proceedings Act is repealed.
- (2) Section 43 of the Local Government Act 1989 is repealed.

6. Transitional provisions

- (1) The provisions in this Act shall apply to any case already lodged before a court.
- (2) In respect of a case before a court, not yet disposed of, against a –
 - (a) public officer or a local government officer in the execution of his duty;
 - (b) person engaged or employed in the performance of any public duty; or
 - (c) person acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),the action, suit, or proceeding shall be deemed to have been validly instituted if instituted within 5 years from the date of the fact, act, or omission which had given rise to the action, suit, or other proceeding.

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ANNEX 2

Discussion Paper

"Access to Justice and Limitation of Actions against Public Officers and the State"

[June 2007]