

8/7/70

Memorandum 70-98

Subject: Study 52 - Sovereign Immunity

Senate Bill 94 was introduced to effectuate the Commission's recommendations concerning various aspects of sovereign immunity. It appears that the bill will pass after three significant changes have been made:

- (1) Nuisance immunity provision deleted.
- (2) Exceptions to plan or design immunity deleted.
- (3) Ultrahazardous activity liability deleted.

For a time, it appeared that the three provisions listed above would meet legislative approval. However, Jerrold A. Fadem, a Los Angeles attorney, wrote a letter to the Assembly Judiciary Committee objecting to the provision eliminating nuisance liability. To make a long story short, the Committee had enough misgivings about the nuisance provision of the bill that the Chairman stated that the bill would be held in committee. It was possible to obtain Committee approval of the bill only if it did not contain any of the three provisions listed above. As a result, the California law on whether a public entity is liable on a common law nuisance theory remains unclear, the plan or design immunity remains in the law without any exception (the Ways and Means Committee defeated the proposal considered by the Commission at its July meeting), and no liability exists for ultrahazardous activities.

The policy question for Commission consideration is whether any further effort will be made to obtain enactment of the three provisions referred to above. It is apparent that the three must be combined as a package, for nuisance immunity would not be approved as a separate item and neither the

exceptions to the plan or design immunity nor the ultrahazardous activity liability provisions would be approved as separate items. If the Commission desires to present another recommendation on these items, no significant amount of Commission time will be required, but considerable staff time will be required in Sacramento if the proposal is to have any chance of legislative approval. Moreover, the support of such groups as the State Bar, the California Trial Lawyers Association, and various public entities will be required. We had the support (or at least eliminated the objections) of all groups other than the Department of Water Resources and Mr. Fadem. Also, the Senate Judiciary Committee devoted about an hour to a consideration of the nuisance immunity provision before that provision was finally approved by that Committee.

If the Commission determines to submit another recommendation on this subject, the staff suggests that a new tentative recommendation be prepared and sent out for comments. We suggest that it contain the following provisions:

(1) The nuisance immunity provision with a minor technical change to refer to a pertinent section of the Code of Civil Procedure.

(2) The plan or design immunity provision in the form in which it was contained in the latest amended version of Senate Bill 94 (with an exception for streets and highways).

(3) The ultrahazardous activity liability provision with an additional sentence indicating that police and correctional activities, riot control, and fire fighting activities are not ultrahazardous activities.

An additional matter that might be considered is whether the right should be given to a private person to bring an action to enjoin or abate a public nuisance. Legislation that would have given a private person this right was

defeated at the 1970 session. Such a provision would be consistent with our prior recommendation that damage liability for common law nuisance be eliminated but other remedies not be affected. If a private person is to be given such an action, it is suggested that a person bringing such an action be required to post an undertaking for \$1,000 or such greater sum as the court fixes to cover the costs of defense (including attorney's fees) of the public entity if the plaintiff fails to prevail in his action. If such a right of action is given, we need some provision to discourage the nuisance suits.

If the Commission decides to work only on the provisions contained in Senate Bill 94 and not to deal with remedies other than damages, the staff suggests that a tentative recommendation be prepared and distributed as soon as possible after the September meeting for comment. We need the views of the State Bar Committee and the California Trial Lawyers Association as well as the views of the various public entities. Such a rapid distribution would be necessary if we are to submit a new recommendation on this matter to the 1971 Legislature.

Respectfully submitted,

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Executive Secretary