

20. Creating new, or relying on existing, civil remedies

A number of civil remedies (sometimes called “private law remedies”) exist in the common law and some cases are supplemented by legislation. Most forms of civil remedy concern private disputes between individuals, bodies corporate and, in some cases, the Government, over contracts, debt or wrongs such as negligence. In private civil actions the Government may sue and be sued as if it were a private individual, unless legislation has a specific provision to the contrary.

The primary purposes of civil actions are to repair the harm done by one party to another and to prevent the harm from happening again. Different mechanisms (referred to by the generic term “remedies”) are available to the parties. These include:

- the payment of damages from one party to another;
- court-ordered requirements to perform contractual or legal obligations;
- a variety of other orders that prevent or restrict the conduct of a party (or, in rare cases, a third party) to the proceedings.

In many cases these disputes are settled through the use of alternative dispute resolution (“ADR”) and it is unnecessary to involve the courts.

Civil remedies are determined in the courts, applying the rules of civil procedure. Matters are decided on the civil standard of proof—the “balance of probabilities”—meaning that it is more likely than not that a particular thing occurred or exists. The civil standard of proof is a less stringent test than the criminal standard of “beyond reasonable doubt”.

Guidelines

20.1. Should existing civil remedies be relied upon?

Existing civil remedies should be relied on where they are adequate and appropriate for the purposes of enforcement.

Existing civil remedies should be used where they can apply to the circumstances of the new legislation and are efficient and effective mechanisms for the purposes of enforcement. If there is uncertainty as to whether or not an existing civil remedy will apply, or if it is necessary to modify it in some way to better suit the purposes of the legislation (such as making a new or different kind of remedy available), this must be made explicit in the legislation. Legal advisers will be able to identify existing civil actions and whether they are adequate.

20.2. Should a new civil remedy be created?

New civil remedies should only be created where there is a clear need, where it is necessary to achieve the purpose of the legislation, and no existing civil remedy is appropriate.

New civil remedies should not generally be created unless there is a clear need. This need may arise due to a gap in the current range of remedies or where there are difficulties in

modifying existing remedies. In other cases a new process or institution might be a more effective and efficient way of addressing an issue.

Broad consultation should take place before creating a new civil action, in particular with agencies that administer similar legislation. The Ministry of Justice, the Crown Law Office, and the PCO should also be consulted.