



Bar Council response to the 13th programme of law reform consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's consultation paper entitled the 13th programme of law reform.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council is pleased to offer comments on the majority of areas of law proposed for reform by the Law Commission. It also proposes three additional areas of law reform for consideration by the Law Commission. In the area of immigration and public law it highlights the challenges of a regulatory regime without statutory framework and internet based policy. Additionally a new offence of corporate fraud is proposed.
5. The below contents page aims to aide navigation of the response.

¹ Law Commission [13th programme of law reform consultation 2016](#).

Contents

Comments on the Law Commission’s proposed areas of law reform	3
Arbitration.....	3
Banks’ duties to customers	7
Codification of the law in Wales	11
Confiscation	15
Inquiries.....	21
Leasehold Law first idea- Landlord and Tenant (Covenants) Act 1995.....	26
Leasehold law second idea- Part II of the Landlord and Tenant Act 1954	29
Legislative standards for Wales	33
Online communications	37
Reviewing children’s social care.....	38
Surrogacy	44
New ideas proposed by the Bar Council for consideration by the Law Commission	55
Corporate fraud.....	55
Immigration/public law- regulatory regime without statutory framework and internet based policy	58

Comments on the Law Commission's proposed areas of law reform

Arbitration

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

6. Arbitration law

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

7. The general consensus is that the Arbitration Act 1996 has improved the arbitration process in this jurisdiction. Nevertheless, we would favour the Law Commission giving further consideration to the following matters:

- a. We favour arbitrators having the power to strike out unmeritorious claims as such claims may prolong arbitrations unnecessarily. We would propose that arbitrators exercise this power according to the principles that guide judges when exercising such a power.
- b. We support making summary judgment more explicit as this would assist in making arbitrations more efficient and less costly.

8. It is important that both powers should be in the mandatory section of the Act so that institutional rules cannot remove or reduce such powers. This is because most institutional rules contain provisions allowing parties to have a full opportunity (or something equivalent) to present their case and that is frequently used as a basis for saying tribunals lack such powers.

9. Careful consideration would need to be given to how such awards would be considered under the New York convention when it came to enforcement.

10. We would favour the possibility of joining others to certain arbitrations where those persons were closely involved in the transactions at issue even if those persons were not parties to the arbitration clause. A particular example of this is in the context of insurance or reinsurance where insurance/reinsurance brokers have negotiated and placed insurance with insurers/reinsurers on behalf of the client insured/reinsured. When matters have gone wrong

in relation to such placements, it may well be that the brokers were negligent and it would be desirable to have the issue of brokers' negligence dealt with in an arbitration regarding the liability of insurers or reinsurers.

11. A further area for consideration would be the explicit ability to use the arbitration equivalent of a Part 36 offer (sealed offer). Although, theoretically available in English seated proceedings, there is very little use because there is not the legislative framework to ensure that it would have the same effect as a Part 36 offer. If it was clear that it was a device capable of use in English seated arbitrations, and the results of using it would be equivalent to a Part 36 Offer, it would encourage much more settlement of English arbitration proceedings. It may require the court to be willing to accept Part 36 Payments in English arbitration proceedings as, otherwise, there is no obvious recipient of such payments.

12. We are conscious of the fact that there is an ongoing debate about the extent to which arbitration decisions should remain private. We do not wish to enter into that debate, but we appreciate that there are strongly held views on either side, notably by senior members of the judiciary. We would, however, invite the Law Commission to consider recommending some further publication in the context of those arbitrations where the parties have not excluded s.69 of the Arbitration Act and are subject to its substantive appeal right and its associated procedural law. The point that the Law Commission may wish to consider is whether it would be desirable for judges to make public their reasons upon refusal of permission to appeal on a point of law of general public importance. It may well be useful for others, particularly lawyers, to know why certain appeals on points of law of this nature have been refused.

13. The Law Commission has raised the question of arbitration in the context of trusts. We can see the merit of allowing trust documents to contain a clause requiring disputes to go to arbitration. We are not aware, however, of the extent to which those involved in setting up trusts would wish to have such a reform, particularly as it is open to those involved in a later dispute about the trust to enter into a separate agreement to have matters dealt with by way of arbitration. If there is strong support for reform in this area, then we would favour the Law Commission consulting on this.

14. We have also read the suggestion that the Law Commission might take on the task of analysing different models of investor state dispute resolution clauses. We are doubtful whether the Law Commission should be spending its time and resources on such an analysis.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

15. We do not consider it appropriate for us to comment on this.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

16. We are aware that on 10 March 2016 there was a London Shipping Law Centre seminar on whether to make changes to the Arbitration Act. There is a report of this seminar on the LSLC's website.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

17. We are not in a position to comment.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

18. We are not in a position to comment other than in relation to England and Wales and have given our comments on the proposed project above.

Question 7- What do you think needs to be done to solve the problem?

19. We favour the Law Commission giving further consideration to the issues identified above but not spending time analysing different models of investor state dispute resolution clauses.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

20. We are not in a position to comment.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- economic benefits (costs of the problem that would be saved by reform); or
- other benefits, such as societal or environmental benefits?

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

21. We are not in a position to comment other than legal costs are likely to be reduced by appropriate use of striking out and summary judgment powers.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

22. We are not in a position to comment.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

23. We are not in a position to comment.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

24. The Law Commission is independent and has good resources.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

25. No to the first question, so the second question does not arise.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

26. We are not aware of any other organisation considering this problem.

Banks' duties to customers

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

27. Banks' duties to customers.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

28. This proposal picks up on a suggestion made by the Financial Services Consumer Panel, which has campaigned over the last couple of years for the inclusion of a statutory duty of care. The Panel proposed an amendment to the Financial Services and Markets Act 2000 ("the FSMA") to impose a duty on regulated firms to act with reasonable care towards the customer to ensure that the customer does not suffer unreasonable harm or loss (*Incorporating a Duty of Care in the Financial Services and Markets Act*, June 2015).

29. Part of the Panel's justification for the imposition of such a duty was the plethora of financial penalties imposed in recent times by the FCA for mis-selling scandals, including PPI and interest-rate hedging products ("IRHP") and foreign exchange and LIBOR rigging. We are aware of the existence of such claims – PPI mis-selling claims continue to be made, and there are a number of actions currently before the Courts addressing IRHP mis-selling.

30. However, the suggested reform is directed at improving the behaviour of financial institutions in the future. At present we are not aware of any particular issues which would be specifically addressed by the suggested reform. As we set out below, there are a number of existing provisions which operate in a similar fashion to the proposed duty of care (or which at least arguably have, or should have, a similar effect).

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

31. We do not view this as an issue which should be treated as a particular priority.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

32. There are a number of facets to this issue. All regulated firms are bound to comply with the FCA Principles for Business and the relevant provisions of the FCA Handbook. The Principles give no individual right of action, but the FCA can (and does) take enforcement action where there has been a breach of any of the Principles. The most important Principle for current purposes is Principle 6, which states 'A firm must pay due regard to the interests of its customers and treat them fairly'.

33. Consumers have a right of action under s.138D of the FSMA in respect of any loss caused to them by a breach of an FCA Rule. Specific areas of the Handbook apply to specific regulated sectors – for example the Consumer Credit Sourcebook ("CONC") for firms which carry out credit-related regulated activities. Relevant Rules within CONC include CONC 3.3.1R, which requires firms to communicate with customers in a manner which is clear, fair and not misleading.

34. Consumer credit customers (which can include individuals acting for business purposes and small partnerships but does not include corporations) have a further layer of protection provided by the "unfair relationship" provisions in s.140A-C of the Consumer Credit Act 1974. These provisions were considered in the context of PPI mis-selling by the Supreme Court in *Plevin v Paragon Personal Finance* [2014] UKSC 61. In summary, they allow a borrower to ask the Court to reopen a credit agreement if it is unfair, whether by reason of its terms or due to pre- or post-execution conduct by the lender or its agent.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

35. We do not have any experience of this issue in other legal systems. The UK system of regulation is generally thought to be relatively advanced.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

36. This is not an issue which is limited to any particular geographical area of the UK.

Question 7- What do you think needs to be done to solve the problem?

37. We are not convinced that there is a problem which needs solving. Customers of authorised firms already benefit from the protections which we outline above and we are not convinced that the suggested duty of care is an appropriate additional layer of protection. It is arguable that it would simply lead to further complication of an area which is already complex, both for financial institutions and their customers.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

38. Please see our response to question 7 above.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform);**
- **or other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

39. Please see our response to question 7 above.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

40. We are not in a position to comment on the likely costs of reform.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

41. This is an issue which potentially affects all customers of financial institutions.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

42. If this area is to be reformed our view would be that it is best undertaken by the FCA itself, which is in a position to consult on and implement changes in its Rules in a relatively streamlined and cost-effective manner.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

43. No.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

44. We are only aware of the involvement of the Financial Services Consumer Panel.

Codification of the law in Wales

Overview

45. The Bar Council supports the Law Commission's objectives in proposing reform by way of codification of the law in Wales. The proposed reforms would also seek to achieve in part one of the aims already identified by the Law Commission, namely to improve the accessibility of the law in Wales. Codification could also incorporate some of the legal principles established through case law but which are not currently set out in the current legislation. We agree that such an approach would make the legal system in Wales far more accessible to the public as well as to those more used to dealing with the legal system, would help avoid inconsistent decisions being made and would bring about greater fairness overall. However, it is worth pointing out that this problem, and the potential solution, is almost as equally applicable to the other nations of the United Kingdom.

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

46. Codification of the law in Wales

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

47. The law in Wales can be difficult to access due to the lack of a single source for legislative texts. Both primary and secondary legislation is found in both legislation promulgated by the United Kingdom Parliament in Westminster and in Acts, Measures and Regulations created by the National Assembly for Wales and the Welsh Ministers in Cardiff. The latter type of legislation often amends the former. The former often exists in a different form depending on whether it is applicable to England or to Wales. Legislative provision in any particular field may therefore exist in a particularly piecemeal fashion and be difficult for the legally qualified professional, let alone the layman, to access. This increases the cost of seeking legal advice on a given area of law.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

48. This issue was highlighted together with the issue of consolidation, among various others as being of considerable importance for reform in the Law Commission's report "*Form*

and Accessibility of the Law applicable in Wales” (Efurf a Hygyrchedd y Gyfraith sy’n gymwys yng Nghymru”) published in June 2016. It is undoubtedly the case that, together with the problem of legislative standards and bilingual drafting, this is one of the most pressing areas in Wales.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified. You may be able to tell us the name of the particular Act or a case that relates to the problem.

49. This issue covers the full extent of the areas of law for which the National Assembly for Wales and the Welsh Ministers have devolved responsibility, with the possible exception of legislation on the Welsh language itself, where Westminster legislation is far less comprehensive. The issue is well set out in Chapters 2, 3, 4, 5, 6 and 16 of *“Form and Accessibility of the Law applicable in Wales”*.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

50. This is understood to be a problem throughout the common law legal world. Civil Law countries, such as France, Belgium and Italy are known to have adopted Codes of law, particularly in the field of civil law, but they start from a different basis. The problem is also known to exist in Scotland and Northern Ireland (see below).

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

51. The issue certainly exists in the remainder of the United Kingdom. In England, at least, the problem is alleviated by the existence of comprehensive practitioner texts in the majority if not all of the relevant areas of law, including, of course, Halsbury’s Laws. Such texts, dealing solely with Welsh law, do not exist in Wales. The coverage of Welsh law in texts dealing with England and Wales is often variable in quality and comprehensiveness. This is a particular problem, given the increasing divergence between English and Welsh law. Long gone are the days when there was any truth in the reference “For Wales, see England”!

Question 7- What do you think needs to be done to solve the problem?

52. The recommendations found at paragraphs 16.1 – 16.18 set out a comprehensive proposed set of steps to resolve the problem. We note in particular, recommendation 3, that those areas in which the law is in most need to being brought together in Assembly legislation should be identified; recommendation 8, that codes should not be formally distinct from Acts of the Assembly which should be identified as a code by a section of the Act and its short title;

recommendation 9, that codes should be preserved by a rule that where there is a code in place, further legislation within the subject area should only take effect by way of amending the code; recommendation 12, that when secondary legislation is amended, the updated text of the statutory instrument should then be laid before the National Assembly, rather than an amending statutory instrument; and recommendation 14, that the Welsh Government should institute regular programmes of codification.

Question 8- What is the scale of the problem? This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

53. This is very difficult to quantify. Suffice it to say that the problem concerns virtually every single area of law devolved to the National Assembly for Wales and in which the Welsh Ministers either initiate legislation or implement policy steps. As a result, virtually every case coming before the courts or tribunals in Wales, which concern provisions of Welsh law, will encounter the problem. The most obvious areas of law are perhaps education, social care, waste and the environment, town and country planning and local government. It is understood that the Law Commission already has under way a planning law project which is designed to produce the first codification Bill, and which could ultimately lead to a Single Act of the National Assembly for Wales which would then stand as the only primary piece of legislation on the subject of planning law in Wales. It is hoped that others will soon follow.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform);**
- **or other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

54. Some detail of the present cost of inaccessibility is given at paragraphs 1.50 – 1.58 of *“Form and Accessibility of the Law applicable in Wales”*. Thus, if it is difficult to find out what the law is, it will take longer to carry out a piece of legal research. It may be nigh on impossible or at least disproportionately expensive for a citizen to find the law, which could deter the just resolution of legal disputes. IT has also been suggested that a lack of clarity as to what the law is can contribute to a tendency against bolder more imaginative decision making. Needless errors can occur. Clearly legal disputes would be unlikely to be lessened simply by virtue of the law in Wales being more readily accessible, but it would surely reduce the cost of litigating such disputes and would perhaps facilitate early settlement of disputes.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be? The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

55. See the response to Q 9 above

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas? As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

56. See the response to Q 8 above.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

57. Because of the extensive work already undertaken in consulting upon and then reporting in *“Form and Accessibility of the Law applicable in Wales”*.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

58. The National Assembly for Wales’ Constitutional and Legislative Affairs Committee held an Inquiry into the issue of *“Making Laws for Wales”* and published its report in October 2015.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

59. See the response to Q 12 and Q 13 above.

Confiscation

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

60. Confiscation

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

61. The question posed by the Law Commission is a broad one, for good reason. There are a number of aspects of the confiscation regime that would benefit from consideration. The principal areas of interest / concern are set out below:

a. The lack of discretion at the stage of making the confiscation order.

Two illustrations of potential unfairness will suffice, both concerning the way in which the court is required to determine a defendant's ability to meet a confiscation order. First, debts owed to unsecured creditors are not taken into account when valuing a defendant's assets. While a recent modification to s.6(5) of POCA, following the judgement of the Supreme Court in *R. v. Waya*, makes it plain that the court is required not to make orders that constitute a disproportionate interference with a defendant's rights under Article 1 of the First Protocol to the ECHR, this has not removed the prospect of injustice in many cases - defendants may owe significant sums to unsecured creditors and have some modest equity in the family home, but only the latter of these is taken into account when considering their ability to pay a confiscation order. Secondly, the "tainted gifts" provisions (s.9(1)(b), as defined by s.77) are also capable of generating unfairness by requiring a court to evaluate a defendant's ability to pay a confiscation order by including assets over which he has relinquished control and which in some cases no longer exist - in a recent case at first instance a court was required to count a gift that a defendant had made to charity as part of his assets.

b. The operation of the s.10 assumptions

The requirement (under s.10) that a court assume that a defendant identified as having a "criminal lifestyle" has obtained all property passing through his hands over a six year period, and met all expenditure over that period, from the proceeds of crime, subject to his discharging a reverse burden of proof or

the establishment of "a serious risk of injustice" arguably sets the bar too high against defendants who do not in any meaningful sense of the word have a criminal lifestyle.

c. The lack of discretion at the enforcement stage

The absence of discretion afforded to magistrates at the enforcement stage means that orders can go unfulfilled indefinitely, while constantly accruing interest. Once a defendant has served a sentence in default of payment of a confiscation order, and assuming there are no assets against which to attach any property-based orders, the court's enforcement powers are limited; equally, unlike fines, confiscation orders remain payable once the default term is served and cannot simply be remitted.

It is uncontroversial that the courts need the power to make robust financial orders against individuals who have benefited from their criminal conduct. However, the lack of ability to depart from the literal operation of the law in appropriate cases undermines the wider merits of the regime - not least because one of the consequences of this is a stark contrast between the sums ordered to be paid to the court and the sums in fact paid.

d. The position of third parties

There is also a separate, discrete issue that might merit consideration, arising out of the way in which third party interests in property are determined. While the Crown Court has recently been given power (under the new s.10A of POCA) to receive representations from third parties claiming interests in property held by the defendant, a criminal court is not perhaps the most natural forum for what may involve complicated disputes of property law. Indeed, the Explanatory Note to the Serious Crime Act 2015, which introduced s.10A, makes it plain that judges should consider carefully whether their expertise in property law is sufficiently developed to justify their embarking on a s.10A enquiry. Outside of s.10A, third parties are reliant upon either (i) the appointment of a receiver in the criminal enforcement proceedings (which is costly and comes very late on in the process); (ii) the making of a property adjustment order under the Matrimonial Causes Act 1973 (which will of course only apply to divorcing couples); or (iii) a determination of benefit under TLATA. Both of the latter routes would at present require the parties to visit a separate court, adding to the complexity and uncertainty in this area.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

62. In the context of criminal practice, the issues arising out of the present confiscation regime are wide-ranging and pervasive, and deserve serious attention.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

63. The governing statute is the Proceeds of Crime Act 2002, most recently (and substantially) amended by the Serious Crime Act 2015. Caselaw dealing with the various issues identified above includes:

- R. v. Waya [2013] 1 AC 294
- R v Johnson (Beverley) [2016] EWCA Crim 10

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

64. No comment.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

65. No comment.

Question 7- What do you think needs to be done to solve the problem?

66. Potential reforms could include the very simple mechanism of including a discretion or safety valve at both the stage of making a confiscation order and at the enforcement stage, or widening the test for the disapplication of the s.10 assumptions to require merely "some" risk of injustice.

67. At the enforcement stage, as well as the introduction of a discretion to remit the outstanding liability (modelled on that relating to fines) it might be worth questioning whether it is appropriate to continue to charge interest on unpaid sums after a term of imprisonment in default has been served - the outstanding sum can increase at a quicker rate than the rate of repayment, giving the misleading impression (when the figures are considered globally) that defendants are continuing to benefit from their criminal conduct when in fact they may have served time in prison in default of payment and be continuing to pay against the original order.

68. At the more radical end of the spectrum of possible reforms, more complicated cases relating to the interests of third parties could be diverted to a free-standing (and perhaps occasional) Confiscation Court with both civil and criminal powers. The allocation process could be akin to the exercise undertaken to determine which track civil cases run on.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

69. The scale of the problem is significant. As is noted in the Law Commission's proposal: "Figures published by the National Audit Office in December 2013 estimated the total annual cost of court hearings and appeals on confiscation orders to be £31.8 million, and the cost of enforcement of such orders to be £3.2 million."

70. Further, recent figures (from a report of the Home Affairs Committee dated July 2016 - <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/proceeds-of-crime/>) show that the extent of unpaid confiscation orders is significant. Despite a reduction in the number of confiscation orders being made, it found that the total debt figure outstanding from confiscation orders currently stands at £1.61 billion. Of this figure, it was estimated that only 10% can realistically be collected

Question 9- What would be the benefits of reform? In particular, can you identify any:

- economic benefits (costs of the problem that would be saved by reform); or
- other benefits, such as societal or environmental benefits?

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

71. There would be a clear economic benefit in reforming the law so as to better target the proceeds of crime and reduce the costs of enforcement. Similarly, there would be societal benefits, most notably public confidence in the ability of the government and law enforcement agencies to properly punish and de-incentivise financial and drug-related crime.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

72. That depends on the scope of any reforms. If a conservative approach is adopted, which merely amends some of the central provisions of POCA - for example by introducing an element of discretion into the process both of the making and enforcement of confiscation orders - then the most obvious direct cost will be re-training of judges and lawyers, which ought not to be particularly significant. However, if a more progressive approach is adopted - for example the establishment of a separate specialist Confiscation Court, combining the ability to make confiscation orders and to enforce them both against people and property, the costs will inevitably be greater. The advantages of a combined court, with the expertise and power to make orders relating to third party interests in property (for example under s.14 TLATA) may in time outweigh any costs of establishment, particularly if enforcement of orders against both individuals and property can be dealt with by the same court that makes the confiscation order

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

73. No.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

74. What is required is consideration of whether or not root-and-branch reform of the way in which the courts' confiscation powers operate is needed, or whether on the other hand a number of small but important tweaks would suffice to remedy the principal deficiencies. The Law Commission is best placed to obtain, collate and analyse input from a wide range of stakeholders, including judges, the legal professions (not only criminal practitioners but also those who practice in property and matrimonial law), and law enforcement agencies.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

75. No.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

76. Not that we are aware of. As noted above, POCA was recently amended by the SCA 2015 which included among other reforms the ability for courts to make binding determinations in relation to third party interests in property (under the new s.10A) and the ability to decline to make a confiscation order in circumstances where to do so would be a disproportionate interference with a defendant's property rights under A1P1 of the ECHR. However, while both of these reforms are welcome, the "proportionality" test falls some way short of a full discretion. And a number of issues with s.10A have already been identified by practitioners, notably an understandable refusal on the part of some Crown Court judges to become involved in what amounts to civil litigation, and the lack of public funding for third parties within the criminal confiscation regime.

Inquiries

Question1- Which of the Law Commission's project suggestions do you wish to comment on?

77. Inquiries

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

78. We will focus on inquiries held under the Inquiries Act 2005 (IA 2005) and Inquiry Rules 2006 (IR 2006), although problems facing statutory inquiries have also affected non-statutory or ad hoc inquiries.

79. The significance of inquiries is apparent from section 1, IA 2005 which empowers a Minister to institute an inquiry into matters of public concern. Inquiries are therefore held into some of the particularly important matters of the day and the public inquiry system is now arguably an important part of the fabric of the UK constitution. In such circumstances, it will be important that a considered report containing recommendations is produced by a demonstrably independent inquiry within a relatively short period of time. Where there are concerns about the independence of the inquiry panel or inquiry reports are delayed, there is a real danger that the public will lose faith in the individual inquiries concerned and ultimately with the public inquiry system.

80. We are assisted by the post-legislative scrutiny given to IA 2005 and IR 2006 (see details given in answer to Q4), which we suggest should be the starting point for Law Commission consideration of the inquiries project. The Bar Council would suggest that particular focus be given to two issues: [a] Maxwellisation, as already identified by the Law Commission; and [b] inquiry independence.

- a. Maxwellisation: The Law Commission has identified the main concern with the procedure mandated by Rule 13 of IR 2006, which requires an inquiry chair to send a warning letter where a report may include significant criticism about a person and to give that person reasonable opportunity to respond to it. Rules 14-15 contain further relevant provisions. There is now good evidence that the warning letter process adds considerably to the cost and duration of inquiries. By way of example, Sir Robert Francis QC has said that it had unnecessarily added six months to the work of his Mid Staffordshire NHS Foundation Trust Inquiry. Sir Brian Leveson and Robert Jay QC (subsequently appointed as a

High Court judge), Chair and Counsel to the Leveson Inquiry, have said that the complex process took an inordinate time to complete. Most recently, it has been suggested that the non-statutory Iraq Inquiry was substantially lengthened by the Maxwellisation process, with much public opprobrium as a result. There is also a strong argument that fairness does not require that a warning letter process take place. Once a fair hearing has been given to witnesses in a court of law, the rules of natural justice do not then require the judge to present a draft judgment on which the parties are entitled to comment before the judge hands down the final decision. Lord Pannick has observed that: "If that is right in a court of law, it is all the more so when we are talking about the report of an inquiry – which, however important, imposes no criminal or civil liability on anyone" (during discussion in the House of Lords in 2015, details of which are given in answer to Q4). As the Law Commission has already observed, the Select Committee on the IA 2005 recommended in 2014 that rules 13-15, IR 2006 should be revoked and replaced with a more flexible arrangement.

- b. Inquiry independence: The early focus of concern in relation to IA 2005 related to powers given to ministers, particularly those to restrict public attendance at an inquiry, to withhold material from it or to withhold material from a report (see primarily sections 19-20 and 25). The Select Committee on the IA 2005 acknowledged that the relevant provisions had not in fact resulted in the predicted collapse in public confidence in IA 2005 inquiries but nonetheless recommended that the Act should be amended to restrict the ministers' powers in this area. The government subsequently rejected most of these recommendations. The Bar Council suggests that this is an area that could now usefully be reconsidered and reviewed, particularly in light of the experience at inquiries such as the Litvinenko Inquiry and the ongoing Undercover Policing Inquiry, both involving the consideration of sensitive material.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

81. The significance of public inquiries is addressed above together with the potential impact of issues such as Maxwellisation. The Bar Council has not attempted to assess the respective priorities of the identified issues.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

- a. Inquiries Act 2005 and Inquiry Rules 2006.
- b. Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005, October 2010, Cm 7943
<https://www.justice.gov.uk/downloads/publications/moj/2010/Post-Legislative-Assessment-Inquiries-Act.pdf>
- c. The Inquiries Act 2005: post-legislative scrutiny, Select Committee on the Inquiries Act 2005, 11 March 2014, HL Paper 143
<http://www.publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/143.pdf>
- d. Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, June 2014, Cm 8903
https://www.parliament.uk/documents/lords-committees/InquiriesAct2005/Cm8903_Government%20response%20to%20HL%20Committee%20on%20the%20Inquiries%20Act%202005_260614_TSO_Print.pdf
- e. Inquiries Act 2005 (Select Committee Report) Motion to Take Note, Lords Hansard 19 March 2015
<http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150319-0001.htm>
- f. Public Inquiries: getting at the truth, Nicholas Griffin QC and Peter Watkin Jones, Law Society Gazette 22 June 2015
<http://www.lawgazette.co.uk/law/practice-points/public-inquiries-getting-at-the-truth/5049449.fullarticle>
- g. Review of Maxwellisation in public Inquiries, Treasury Committee, ongoing
<https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2015/maxwellisation-16-17/>
- h. Letter from Caroline Dinenage MP (Ministry of Justice) to Lord Sewel CBE, 21 July 2015 <https://www.parliament.uk/documents/lords-committees/liaison/Inquiries-Act-2005-Committee-follow-up.pdf>

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

82. The Bar Council has not conducted research into the approach in legal systems outside the UK.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

83. The problem occurs across the UK. Ministers in Scotland, England, Wales and Northern Ireland may set up inquiries under the Inquiries Act 2005.

Question 7- What do you think needs to be done to solve the problem?

84. Maxwellisation – review and replacement of rules 13-15, IR 2006 with a more flexible arrangement.

85. In other respects, the Bar Council suggests that the Law Commission should take note of and review the recommendations arising from the post-legislative scrutiny (see Q4).

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

86. Please see Q2

Question 9- What would be the benefits of reform? In particular, can you identify any:

- economic benefits (costs of the problem that would be saved by reform); or
- other benefits, such as societal or environmental benefits?

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

87. Please see Q2 and Q10.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

88. The amendment of the rules relating to warning letters / Maxwellisation may result in substantial savings in the costs of future inquiries.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

89. No. Inquiries have been called to address matters of public concern occurring throughout the UK and in relation to many and diverse events.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

90. Please see Q14

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

91. No.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

92. We refer to the references given at Q4.

93. Please note that the 2015 letter from Caroline Dinenage MP (see Q4) includes that: "In light of the strength of argument in the debate on 19 March we accept that the process of Maxwellisation and the related rules should be reconsidered to see whether greater clarity can be given to both chairmen and those who may be criticised in inquiry reports. Rules 13 to 15 will therefore be reviewed as we take forward work to amend the Inquiry Rules 2006 which Lord Shutt's Committee [Select Committee on the IA 2005] recommended. The changes to the Rules are in hand and other recommendations that require primary legislation will be made when a suitable legislative vehicle becomes available."

94. The Bar Council suggests there may be an advantage in an independent body such as the Law Commission reviewing these matters. However, it is suggested that in the first instance there should be liaison between the Law Commission and the Ministry of Justice as to the best way to proceed.

Leasehold law

95. We have two suggested areas for reform under this heading, the first of which deals with Landlord and Tenant (Covenants) Act 1995 and the second of which deals with Part II of the Landlord and Tenant Act 1954.

Leasehold Law first idea- Landlord and Tenant (Covenants) Act 1995

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

96. Leasehold, in particular the Landlord and Tenant (Covenants) Act 1995. The basic objective of the Act was to limit the liability of an assignor of a lease, and the liability of a guarantor of the assignor, for the lease liabilities after assignment. This has been achieved by abolishing the old rule that an original lessee would remain bound by the covenants in the lease after assignment and by preventing parties making agreements that provide for a lessee or guarantor to remain liable for the lease liabilities after assignment (save by means of an "authorised guarantee agreement" or "AGA"). This anti-avoidance rule, contained in Section 25 of the Act, causes difficulties where a lease is to be assigned within a group of companies or between partners in a firm: in such cases, where the lessee's obligations are guaranteed, Section 25 can prevent the assigned lease being guaranteed by the same guarantor as had guaranteed the assignor's obligations.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

97. One example is where, in a group of companies, the lease is held by a subsidiary and guaranteed by the parent. It may be desirable to assign a lease to another subsidiary as part of a group restructuring but for the lease to remain guaranteed by the parent. This is not possible at the moment. It may be that there is no company in the group other than the parent with the financial resources to provide a credible guarantee. In practice the restructuring may be prevented.

98. Another example is where a firm's leasehold property is held in the name of a number of partners, one of whom wishes to retire. A guarantor of their obligations could not also guarantee the obligations of the partners into whose name the lease is assigned. This could complicate the financial arrangements between retiring and continuing partners and create risk for the retiring partner who may have to remain a lessee and be left to rely on an indemnity from the firm for the lease liabilities.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

99. As our professional experience is more with litigation rather than transactional property work, we understand that this is a recurring problem arising out of the Act and can be a great inconvenience to those affected by it.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

100. *K/S Victoria Street v House of Fraser* [2011] EWCA Civ 904; *EMI Group Ltd v O&H Q1 Ltd* [2016] EWHC 529 (Ch)

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

101. No.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

102. Our experience only relates to England & Wales.

Question 7- What do you think needs to be done to solve the problem?

103. There should be an amendment to the Act in order to allow a guarantor to continue to guarantee post-assignment lease liabilities when the assignment is between group companies or partners in a firm.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

104. We understand that this is a recurring problem.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- economic benefits (costs of the problem that would be saved by reform);
- or other benefits, such as societal or environmental benefits?

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

105. There would be benefits for those interested in assignments within a business or group of businesses. They would have greater freedom to achieve their objectives, with no adverse effect on any other party. Such parties could then avoid the legal cost and uncertainty of attempting to find ways around the problem.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

106. The costs would be very small.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

107. It affects businesses, particularly groups of companies and partnerships.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

108. No

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

109. No comment

Leasehold law second idea- Part II of the Landlord and Tenant Act 1954

Question 1 - Which of the Law Commission's project suggestions do you wish to comment on?

110. Leasehold law, in particular Part II of the Landlord and Tenant Act 1954. This part of the Act provides security of tenure to tenants of business premises. Such tenants are given indefinite security, in the form of a right to apply to the court for a new tenancy on the expiry of the tenancy granted by their landlords, subject to the landlords' right to oppose renewal on certain specified grounds.

111. The security provided by the Act protects businesses from losing goodwill that they have built up around their business premises and protects them from the costs and disruption associated with regular changes of premises.

112. This security obviously comes at a cost to the landlords, whose freedom to use their premises as they like is restricted. The Act balances these competing interests. We believe that it does this well. One of the ways that the balance is achieved is by allowing landlords and tenants to agree that a tenancy will not attract the security of the Act. In different locations and sectors, and in different stages of the market cycle, such "contracted-out" tenancies may be the norm.

113. However, there is one circumstance in which this balance breaks down: when the tenant under a contracted-out tenancy unlawfully sublets the premises without contracting out of the Act (i.e. the subletting is in breach of a covenant not to sublet without consent; such covenants being one means by which the landlord can ensure that the subtenant does not get security under the Act). The effect is that the subtenant then enjoys security of tenure under the Act, even after the intermediate tenancy expires. The landlord who negotiated a contracted-out tenancy – perhaps at a lesser rent – is then stuck with a tenant that was not consented to and can remain indefinitely.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

114. The effect described above is unfair on the landlord. The landlord may have had no say in the selection of the tenant, and may have had plans for the premises that fall short of the statutory grounds for opposing a renewal. Having bargained for a contracted-out tenancy, the landlord is then left in a position that he or she did not want to be in because of the unlawful subletting of the tenant.

115. This will usually only be a problem when the landlord does not discover the subletting until the end of or close to the end of the contracted-out term. If the landlord discovers it sooner, he or she may choose to forfeit the intermediate lease in order to get possession from the subtenant.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

116. Because of the limited circumstances in which this issue arises as a practical problem, it need not be given the highest priority. But it is an important anomaly that rewards a breach of covenant to what may be the substantial detriment of the landlord.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

117. An example is *D'Silva v Lister House Developments Limited* [1971] Ch 17.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

118. No

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

119. We can only speak for England and Wales.

Question 7- What do you think needs to be done to solve the problem?

120. There should be an amendment to Section 23 of the Act to exclude from the protection of the Act any subletting carried out in breach of a covenant against or restricting subletting.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

121. Unknown, although as stated above, it will generally only be a practical problem if the subletting is only discovered at or towards the end of the term of the intermediate tenancy.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

122. The principal benefit would be to avoid the unfairness to the landlord arising out of the issue. At least some of the cases where this happens will generate litigation.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

123. It is expected that the costs would be very small.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

124. It is believed to affect smaller landlords more than the larger. The problem is unlikely to arise if the tenant has engaged lawyers to assist in the grant of the subtenancy, as is more likely to happen with high-end property: in that case the lease will be inspected and the intending subtenant is likely to insist on the tenant obtaining a licence to sublet in advance. Smaller landlords might be expected to be less well equipped to deal with the consequences than larger landlords.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

125. No comment.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

126. No

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

127. Not as far as we are aware.

Legislative standards for Wales

Overview

128. The Bar Council supports the Law Commission's objectives in proposing reform by way of improving legislative standards in Wales. The proposed reforms would also seek to achieve in part one of the aims already identified by the Law Commission, namely to improve the accessibility of the law in Wales. Improvement in legislative drafting, and in particular the issue of bilingual legislative drafting should make the legal system in Wales far more accessible to the public as well as to those more used to dealing with the legal system. This may help avoid inconsistent decisions being made and would bring about greater fairness overall. However, it is worth pointing out that, with the exception of the issue of bilingual drafting, this problem, and the potential solution, is almost as equally applicable to the other nations of the United Kingdom.

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

129. Legislative Standards in Wales

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

130. There is no widespread concern that the standard of legislation is any lower in Wales when compared to legislation emanating from other parts of the United Kingdom. However, that is not to say that a set of legislative standards directed at government departments and legislative draftsmen, setting standards of clarity and effectiveness which any piece of legislation should seek to achieve, is not good idea. In practice, the real difference in respect of legislation passed in and applying to Wales is that the legislation exists in bilingual forms, each having an equal status with the other. This is particularly important for legislative interpretation and requires a level of consistency between the two legislative texts, and simply does not apply to other monolingual legislatures.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

131. This issue was highlighted together with the issue of codification and consolidation, among various others as being of some importance for reform in the Law Commission's report "*Form and Accessibility of the Law applicable in Wales*" (*Ffurfa a Hygyrchedd y Gyfraith sy'n gymwys*

ying Nghymru") published in June 2016. It is undoubtedly the case that, together with the problem of bilingual drafting, this is one of the pressing areas in Wales.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified. You may be able to tell us the name of the particular Act or a case that relates to the problem.

132. This issue covers the full extent of the areas of law for which the National Assembly for Wales has devolved responsibility and in which it has legislated. The issue is well set out in Chapters 8, 9, 10, 11, 12 and 16 of *"Form and Accessibility of the Law applicable in Wales"*.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

133. The Belgian legal system at the Federal level which is also bilingual (in most of the country; trilingual in one part) provides for bilingual texts of its legislation in French and Flemish (Dutch), with both texts appearing on the same page in opposite columns. This is undoubtedly preferable to the printing of different language versions of legislative provisions in different texts or even printing different language versions on alternating or different pages in the same text.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

134. For perhaps obvious reasons, the problem of bilingual legislation does not exist elsewhere in the United Kingdom, though it is understood that the issue is relevant in the Republic of Ireland. As for the standard of legislation generally, the issue is of course relevant to the whole of the United Kingdom. It is perhaps to be inferred from the proposal of this issue that it is thought to be a particular problem in the "newly" devolved legislatures in Cardiff, Edinburgh and Belfast. A quick review of the Social Action, Responsibility and Heroism Act 2015, however, will show that the legislature in Westminster is not immune to encountering difficulties in legislative drafting standards.

Question 7- What do you think needs to be done to solve the problem?

135. The recommendations found at paragraphs 16.19 – 16.26 of *"Form and Accessibility of the Law applicable in Wales"* set out a comprehensive proposed set of steps to resolve the problem. One recommendation (No. 24) is of particular interest. This recommends that the Welsh Government should be formally recognised as being responsible for standardisation of Welsh language legal terminology and that an independent multidisciplinary panel should

be established to advise the Welsh Government on such Welsh language legal terminology. This is particularly important in a situation where, prior to 1999, there was virtually no legislation existing in the Welsh language and since when, a number of legal terms of art have had to be coined. This is essential in ensuring that the Welsh language version of legislation is truly equal in status to its English counterpart and not simply seen as a translation. Another recommendation of note (No. 25) is that the Welsh Government and the National Assembly for Wales should consider, and keep under review, the practical benefit of an Interpretation Act of the Assembly.

Question 8- What is the scale of the problem? This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

136. This is very difficult to quantify. Suffice it to say that the problem concerns virtually every single area of law devolved to the National Assembly for Wales and in which the Welsh Ministers implement policy steps through legislation. As a result, virtually every case coming before the courts or tribunal in Wales, which concern provisions of Welsh law will encounter the problems, such as they exist. The most obvious areas of law are perhaps education, social care, waste and the environment, town and country planning and local government.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

137. Some detail of the present cost of inaccessibility is given at paragraphs 1.50 – 1.58 of *“Form and Accessibility of the Law applicable in Wales”*. Clearly legal disputes would be unlikely to be lessened simply by virtue of the fact that legislation in Wales was better drafted (or that bilingual texts were better drafted), but it might reduce the cost of litigating such disputes and would perhaps facilitate early settlement of disputes.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be? The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

138. See the response to Q 9 above

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas? As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

139. See the response to Q 8 above.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

140. Because of the extensive work already undertaken in consulting upon and then reporting in *“Form and Accessibility of the Law applicable in Wales”*

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

141. The National Assembly for Wales’ Constitutional and Legislative Affairs Committee held an Inquiry into the issue of *“Making Laws for Wales”* and published its report in October 2015.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

142. See the response to Q 12 and Q 13 above.

Online communications

143. No comment

Reviewing children's social care

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

144. Review of children's social care law.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

145. The current law is out-dated – for example, the definition of a 'disabled' child in section 17(11) of the Children Act 1989 is different from the more modern approach to disability reflected in the Equality Act 2010. It is also complex, due to the number of statutes that impose statutory powers and duties (frequently amending the 1989 Act) and the mass of caselaw interpreting these powers and duties. There is confusion among statutory bodies about basic matters, such as whether the definition of a disabled child includes a child with mental health disorders such as ADHD and autism. In many areas, for example services to children 'in need', there are no national guidelines or eligibility criteria, resulting in a patchwork of local policies, and in some cases, no published policies or guidance at all. This makes it difficult for statutory bodies to provide a consistent service, and families to know what support they are entitled to request.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

146. This is an area that should be given priority, particularly in light of the recent introduction of the Care Act 2014 in respect of adult social care. The clarity and consistency provided by the Care Act 2014 in relation to care and support for disabled adults and their carers has thrown the absence of a similarly codified scheme for disabled children and their families into sharp relief. We agree with the suggestion in the consultation materials that the two decades which have passed since the enactment of Part 3 of the Children Act 1989 should result in a full review of the statutory scheme for children's social care.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

147. In *R (G) v Barnet LBC* [2003] UKHL 57, the House of Lords decided by a 3-2 majority that section 17 of the Children Act 1989 imposed a general rather than a specific duty in

relation to services for children 'in need'. In this case the House of Lords unanimously determined that there is a specific duty to assess every child 'in need'. However there is no express statutory duty in relation to such assessments, nor are any requirements as to the form or content of the assessment set out in regulations. Although statutory guidance (*Working Together to Safeguard Children*) has been issued, this may of course be departed from with good reason. There is therefore a distinct lack of clarity as to this fundamental issue within the statutory scheme

148. In relation to disabled children, the interplay between the general duty to children 'in need' in section 17 of the 1989 Act and the specific duty to meet needs where it is 'necessary' to do so in section 2(4) of the Chronically Sick and Disabled Persons Act 1970 is widely misunderstood and/or unknown in practice.² It is striking that the central duty to meet disabled children's social care needs is found within legislation that is 46 years old and was originally applied to disabled adults.

149. We also note that in *R (JL) v Islington LBC* [2009] EWHC 458 (Admin), Black J (as she then was) referred to a 'pressing need' for clear guidance on the use of eligibility criteria to restrict access to children's services, see [125]. Some seven years later no such guidance has been forthcoming, while at the same time there are new national eligibility regulations for adult social care.

150. A separate issue that arises which could also usefully form part of the review is the anomaly that results from having two different tests for mental capacity in operation in respect of children and young people – the common law test of *Gillick* competence up to the age of 16, and the statutory test under the Mental Capacity Act 2005 for young people aged 16 and over.

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

151. No comment.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

² See for example *R (JL) v Islington LBC* [2009] EWHC 458 (Admin), where Black J held at [126] that 'the use of the eligibility criteria in their present form is not compatible with the local authority's duty under section 2 CSDPA 1970'.

152. England. In particular, Wales has developed a distinct approach to children's social care such that Part 3 of the Children Act 1989 no longer applies in Wales.³

Question 7- What do you think needs to be done to solve the problem?

153. These issues are complex and require a detailed review by the Commission with input from all relevant stakeholders. It may be that some form of codifying Act is required and/or that a clearer statutory distinction needs to be drawn between child protection interventions and services and support for children 'in need' and their families, for example disabled children. The benefits or disadvantages of national minimum eligibility criteria for services and support to children and families also merits careful consideration.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

154. 391,000 children were identified as being 'in need' at 31 March 2015.⁴ This is however likely to significantly underestimate the true number of children 'in need', as this is only those children known to local authorities. For example, it is estimated that there are around 700,000 disabled children in England⁵, all of whom will be 'in need' for the purposes of section 17(10)(c) and (11) of the Children Act 1989.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

155. The benefits would be societal benefits to families of disabled children; economic benefits to the legal aid agency and Ministry of Justice by reducing the need for legal challenges by clarifying and simplifying the law; and benefits to local authorities in the

³ See section 16B of the 1989 Act, restricting the application of Part 3 to local authorities in England.

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469737/SFR41-2015_Text.pdf

⁵ Office for Disability Issues (2010/2011) Disability Facts and Figures, <http://odi.dwp.gov.uk/disability-statistics-and-research/disability-facts-and-figures.php>; Office for National Statistics (2012) Population Estimates, <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Population+Estimates>

medium- to long-term of having coherent national legislation to implement, rather than having to create local systems, each of which is potentially subject to legal challenge.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

156. The cost will primarily be to local authorities in the short term having to review and republish policies and guidance, and training social workers. However, ongoing training of social workers would be required in any event to keep them updated with caselaw developments in relation to the current law. These costs are increased by the lack of clarity in the current statutory scheme which results in the need for legal challenge.⁶

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

157. The lack of clarity and coherence in the current statutory scheme potentially affects all children and families in England. However there is a particular impact on certain groups of children 'in need', for example disabled children and their families.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

158. The Law Commission is best placed to develop new legislation including national eligibility criteria.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

159. No

⁶ See for example *R (J) v Worcestershire CC* [2014] EWCA Civ 1518 (on the question of whether local authorities have the power to provide services for children 'in need' outside their area) or *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin) (on the question of whether assessments of disabled children need to be carried out by social workers);

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

160. No comment.

Streamlining (how can the law be simplified)

161. No comment.

Surrogacy

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

162. Surrogacy.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

163. Irrespective of where a child is born, or where any surrogacy arrangement is entered into, the law in the UK is that:

- a. A surrogacy arrangement is an arrangement whereby if a woman to whom the arrangements relates were to carry a child in pursuance of it, she would be a surrogate mother (section 1(3) Surrogacy Arrangements Act 1985);
- b. Surrogacy agreements are unenforceable and it is illegal to negotiate such an agreement on a commercial basis;
- c. Payments made to a surrogate are not illegal per se, but may cause problems when the intended parents ('IPs') come to seek a parental order as they can be a basis for not granting a parental order;
- d. The surrogate is the only legally recognised mother of the child born irrespective of any agreement, names on the birth certificate or indeed the gametes used i.e. even if the child is conceived using the egg of a female IP (section 33 of the Human Fertilisation and Embryology Act 2008);
- e. If the surrogate is married or has a civil partner then her husband or civil partner is also automatically the legal parent of the child born irrespective of any agreement, names on the birth certificate or indeed the gametes used;
- f. If the surrogate is not married or in a civil partnership then, if the treatment is carried out at a licensed facility, the commissioning biological father is treated as the legal parent (section 36 Human Fertilisation and Embryology Act 2008) or the commissioning mother or non-biological commissioning father is to be treated as the second legal parent (section 43 of the same);
- g. IPs are required to regularise their relationship with a child born under a surrogacy arrangement by making an application for a parental order between

six weeks and six months from the birth of the child; the six-month time limit has caused enormous problems where, for good reason, it is not practicable to make the application within 6 months of the birth. This caused the President of the Family Division to 'read down' s.54 of the HFEA 2008 to permit an application for a parental order to succeed, despite it having been made 19 months after the birth. However artificial, this was done because of the significance of the parental order to the child's status and identity as a human being: *Re X (A Child) (Surrogacy Time Limit) [2014] EWHC 3135 (Fam)*)

- h. Parental orders will only be granted in prescribed circumstances (section 54 Human Fertilisation and Embryology Act 2008) and require an application to be made by two persons: single parents are not eligible;
- i. The welfare of the child is the paramount consideration when deciding whether to make a parental order;
- j. It is open to the IPs to apply to adopt the child instead; usual adoption law would apply to their application.

164. Thus, the type of problem which has arisen in recent times includes the following scenarios:

- a. A single parent seeking a parental order and being denied this (see Z referred to below) giving rise to incompatibility with article 8 of the European Convention on Human Rights and discrimination issues;
- b. The absence of a genetic connection to the child on the part of at least one IP precludes the making of a parental order i.e. where there has been double donation of both egg and sperm;
- c. Confusion arising from the names entered on the birth certificate and the potential impact on the same on the timing of an application for a parental order;
- d. Confusion arising from complex surrogacy arrangement e.g. the Kyle Casson case in which a mother acted as a surrogate for her son, using his sperm and a donor egg, but he was legally the child's brother and not its father at birth, which in turn caused complications in seeking to adopt the child;
- e. Recognition of legal parenthood in a foreign jurisdiction (e.g. a pre-birth order in the USA) which is invalid in the UK and associated difficulties in obtaining the consent of a surrogate who resides in another jurisdiction and may or may wish to sign a document relinquishing legal motherhood which she never intended to thought to have – the form used in England is called 'Agreement to the making of a parental order in respect of my child';

- f. Late application for parental orders (although the Court has been flexible where necessary in this regard e.g. *Re X (A Child) (Surrogacy Time Limit)* [2014] EWHC 3135 (Fam));
- g. The risk to the IPs of a surrogate changing her mind before any parental order has been obtained (e.g. *Re DM and LK* [2016] EWHC 270 (Fam) in which an order was ultimately made);
- h. The risk that payments made to the surrogate result in the making of no parental order unless they are retrospectively authorised (see sub-section 54(8) Human Fertilisation and Embryology Act 2008).

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

165. This area of reform should be given high priority not least because it has been subject to a declaration of incompatibility with the Human Rights Act 1998 ('HRA') in *Z (A Child) (no 2)* [2016] EWHC 1191 (Fam).

166. Questions of identity and the welfare of the child as well as of the family unit are undoubtedly matters of high priority to society and of great public interest in the wider sense.

167. Societal norms and attitudes have evolved a great deal since the primary legislation which concerns surrogacy was enacted i.e. the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Acts of 1990 and 2008. Indeed, when surrogacy was first regulated in the UK, the HRA had not been enacted and the legalisation of civil partnerships and same-sex marriage was in the distant future.

168. Legislation and regulation which assumes a particular type of family unit, e.g. a heterosexual married couple, is rapidly falling behind the times with the result that the court cannot legitimately bend and stretch its ordinary meaning any further to deal with lacunae or inequity arising from its application.

169. It would appear that the number of people availing themselves of fertility and surrogacy arrangements is increasing (and not only because of the older average age of those seeking to become parents through a biological route which is a matter well documented by the ONS, for example). The true extent of the use of surrogacy arrangements cannot, however, be gleaned from the number of applications made for parental orders as it is not a legal requirement that any such requirement be made and surrogacy agreements are not enforceable in any country within the UK.

170. Further, a number of surrogacy arrangements are entered into outside the UK within completely different legislative and other arrangements. India accounts for 56.3% of the UK's international surrogacy arrangements (according to a CAFCASS study on parental order applications in 2013/14), but has recently banned non-Indian nationals from availing themselves of surrogates in India except in the case on non-resident Indians. Thailand, another popular place for surrogacy arrangements to be made, banned surrogacy in 2014 following a high profile case in which an Australian couple refused to take one of the twins born under the surrogacy arrangement who had Down's Syndrome. The case caused an outcry. The lack of availability of surrogates to parents in this country seeking to start a family in this way may spell a return to the use of (limited) surrogates in the UK and it is an optimal time to revisit the law on surrogacy which has scarcely changed in thirty years.

171. Where surrogacy arrangements or contracts are not enforceable and payments to surrogates disadvantageous to the IPs, and where the system of regulating surrogacy is very limited in scope, this is also an opportunity for Parliament to bring this law up to date in a way which protects children, IPs and surrogates.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

172. Please see the Surrogacy Arrangements Act 1985, the Human Fertilisation and Embryology Acts 1990 and 2008 and the Human Fertilisation and Embryology (Parental Orders) Regulations 2010.

173. Please also refer to the following cases:

- *Z (A Child) (no 2) [2016] EWHC 1191 (Fam)*
- *Re X (A Child) (Surrogacy Time Limit) [2014] EWHC 3135 (Fam)*
- *Re DM and LK [2016] EWHC 270 (Fam)*
- *Re B v C [2015] EWFC 17*
- *Re X and Y (Foreign Surrogacy) [2008] EWHC 3030*

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

174. No comment.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

175. Yes, it occurs in all jurisdictions.

Question 7- What do you think needs to be done to solve the problem?

176. In headline terms, as a minimum, the law should be reformed to:

- a. Create a system whereby legal parenthood can be established pre-conception and birth and a child's status is not in limbo between 6 weeks and 6 months of age;
- b. Create a default system of IPs registering births which recognises the reality of surrogacy;
- c. Allowing single parents to become parents through surrogacy arrangements;
- d. Allow IPs who are not genetically linked to the child to become its legal parents under surrogacy arrangements;
- e. Remove the time limit for applying for a parental order (if that method of acquiring legal parenthood is to remain) on the basis that the otherwise stringent conditions apply; alternatively, provide for discretion to be exercised to extend the time limit where the welfare of the child requires this.
- f. Review the arrangements for the formal regulation of surrogacy in the UK to ensure protection for all parties to such an arrangement.

177. We would welcome the opportunity to comment further and in greater detail in the event that the Commission decides to reform this area of law. It is an area of law that would benefit from being reviewing in parallel with the law concerning legal parenthood / consent generally.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

178. It is hard to ascertain the precise scale of the problem, as data can be hard to come by with many arrangements remaining informal, but there can be no doubt that, as Theis J in the Family Division stated, this is a "ticking legal time-bomb" which may result in numerous children being born legally "parentless and stateless".

179. Whilst acknowledging that the number of applications for parental orders is illuminating rather than conclusive, CAFCASS reported that 241 such applications were made (in the context of surrogacy arrangements) in the period April 2014 to March 2015.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

180. The benefits are likely to include:

- a. Certainty of position for all parties to a surrogacy arrangement whether entered to in the UK or elsewhere;
- b. Promoting the welfare of the child by ensuring he or she is not left legally parentless or indeed stateless;
- c. Reduction in applications to the Family Court by reason of a settled system by which IPs can take on the legal mantle of parenthood for the family they have sought to have;
- d. Establishing compatibility with the HRA;
- e. Eliminating discriminatory practices at establishment-level;
- f. Creating a legal system that is in tune with modern society and can be applied simply and clearly when the Court does have to consider issues rather than placing judges between a rock and a hard place in ensuring the appropriate legal outcome.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

181. Likely costs will include:

- a. Training of the legal profession, judges, those involved in the fertility sector or registrations of births and those involved otherwise in advising or counselling affected persons, and;
- b. A dedicated information campaign targeted to stakeholders and affected persons.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

182. This affects anyone requiring the assistance of a surrogate, for whatever reason, to have or add to their family. It affects the children born and the surrogate mothers. There is a particular impact on single parents and same-sex parents or couples and those who require donated eggs and sperm in order to enter into such arrangements (e.g. for a medical reason such as infertility for whatever reason).

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

183. Yes. The Law Commission can draw on the expertise and views of a wide range of interested and affected persons, including the legal expertise of this respondent. A wide range of views is likely to bring balance to what can be an emotive topic because surrogacy has always been seen as something of an 'illegitimate' or 'lesser' route to parenthood.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

184. No. This is already on the government's radar.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

185. It would be remiss not to consider the views of CAFCASS, of the Family Law Bar Association and other specialist family law groups, the Human Fertilisation and Embryology Authority and Surrogacy UK.

Weddings

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

186. Weddings

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

187. The current regime, both as to preliminaries to a wedding and the registration of the marriage is antiquated, cumbersome, restrictive and unfair. There is particular difficulty with inter-faith marriages where there is little scope for a tailored ceremony which caters for the beliefs of each party.

Question 3- What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

188. This issue should be given reasonably high priority. The existing marriage law remains essentially that of the Marriage Act 1836 and was designed for a very different age. There is a pressing need for a modern law of marriage suitable for the 21st century.

189. Modernisation is needed order to provide a legal framework for marriage which is clear and straightforward, catering to current cultural norms and which provides adequate safeguards against forced marriage.

Question 4- Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

190. *R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 the Supreme Court considered whether a church of the Church of Scientology decided that the Church of Scientology could register its central London chapel as a place of meeting for public religious worship (under s.2 of the Places of Worship Registration Act 1855) and conduct religious weddings.

191. The Registrar General of Births, Deaths and Marriages stated that she was bound by the Court of Appeal's judgment in *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 to reject the appellant's application to record such a church to marry in, as the authority held

that Scientology did not involve “religious worship” since it did not involve “reverence or veneration of God or of a Supreme Being”, but rather instruction in a philosophy.

192. The appeal was unanimously allowed, the court holding that religion should not be confined to faiths involving a supreme deity, since to do so would exclude Buddhism, Jainism and others; and involve the Court in difficult theological territory. Religion could be described as a belief system going beyond sensory perception or scientific data, held by a group of adherents, which claims to explain mankind’s place in the universe, and to teach its adherents how they are to live their lives in conformity with the belief system. On this approach to religion, Scientology was clearly a religion. It followed that as the Church of Scientology held religious services its church is a “place of meeting for religious worship”.

193. There are a great many articles and points of view available on the internet on the subject of marriage reform. A couple of links are pasted below:

<http://www.lawandreligionuk.com/2014/03/11/exclusively-secular-marriage-for-england-and-wales-unlikely-but-the-law-needs-reform/>

<http://interfaithfoundation.org/event/touchstone-marriage-law-reform-in-england-wales/>

<https://humanism.org.uk/campaigns/human-rights-and-equality/marriage-laws/>

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

194. There are so many permutations that it is not considered helpful to comment.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

195. Yes, it occurs in all jurisdictions.

Question 7- What do you think needs to be done to solve the problem?

196. In headline terms, as a minimum, the law should be reformed to:

- a. Create a system whereby a marriage may take place in a broader range of locations (including, as in many jurisdictions) out of doors.

- b. Rationalise the notice and registration requirements and make them less restrictive.
- c. Clarify and simplify the formal requirements for a valid marriage. The aim should be that the requirements are the same for any marriage. This will involve considering what the ceremony needs to include and which sort of ceremonies should qualify as a valid ceremony of marriage.
- d. Redefine who may conduct a marriage ceremony and how such persons or groups should be regulated.
- e. Recognise, and create safeguards against, forced marriage.

197. In addition to the above, consideration might be given to whether and, if so, how far, one should try and achieve alignment between the rules for the solemnization of a marriage and those for formation of a civil partnership.

198. We would welcome the opportunity to comment further and in greater detail in the event that the Commission decides to reform this area of law.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

199. The question is more the anomalies which are created by the law as it stands. For example, in certain religions, a marriage ceremony may take place outside but such a ceremony would not be valid under English Law.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- economic benefits (costs of the problem that would be saved by reform); or
- other benefits, such as societal or environmental benefits?

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

200. There will be considerable benefits in terms of clarity and fairness. Society would benefit, for example, from a regime which recognised as valid interfaith marriages, taking place in a religious building of one faith.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute.

201. The costs are difficult to identify but are likely to be proportionate to the benefits.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

202. Interfaith marriages are particularly affected insofar as couples wish to have a religious ceremony.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

203. Yes. The Law Commission can draw on the expertise and views of a wide range of interested and affected persons, including the legal expertise of this respondent.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

204. No. The government is believed to be aware that reform is needed in this area.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

205. It would be appropriate to consider the views of religious bodies, Humanist organisations, Registrars of Births, Deaths and Marriages (through their professional organisation) the Family Law Bar Association and other specialist family law groups.

New ideas proposed by the Bar Council for consideration by the Law Commission

Corporate fraud

Question 1- In general terms, what is the problem that requires reform?

206. Problem: the absence of any criminal liability arising from the failure of corporations to prevent fraud committed by their employees. See the article⁷ written by Tom Cockcroft, member of the Bar Council's Law Reform Committee in the August 2014 Edition of Counsel Magazine for more information.

Question 2- Can you give an example of what happens in practice?

207. It's very hard to pin responsibility on directors through the existing law and in any event financial misconduct is usually met with fines, which aren't a sufficient deterrent and don't hurt the pockets of those to blame.

Question 3- To which area(s) of the law does the problem relate?

208. Criminal & regulatory law.

Question 4- We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation or journal articles that relate to this problem.

- Money Laundering Regulations 2007 (AML rules)
- Bribery Act 2010, s. 7 & the Standard Chartered Case (the first conviction under s. 7)
- Corporate Manslaughter and Corporate Homicide Act 2007, s. 8(3)
- *R v Innospec* (26 March 2010)
- *SFO v Standard Bank* (30 November 2015)

Question 5- Can you give us information about how the problem is approached in other legal systems?

209. Australian Criminal Code 2002 Pt. 2.5, s. 51

⁷ <https://www.counselmagazine.co.uk/articles/ghastly-mess>

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

210. All

Question 7- What do you think needs to be done to solve the problem?

211. Enact an offence of corporate failure to prevent fraud akin to the Bribery Act 2010, s. 7

Question 8- What is the scale of the problem?

212. For example, the economy sets aside £30-120bn p.a. to bail out banks if things go wrong. If regulations introduced to reduce risk aren't observed - and corporations are dishonest in failing to observe them - then it will be difficult to prevent further crises like 2008.

Question 9- What would be the benefits of reform? In particular, can you identify any: economic benefits (costs of the problem that would be saved by reform); or other benefits, such as societal or environmental benefits?

213. Economic benefit - reduced implicit subsidy and risk of future crises – see A to Q8.

214. Societal benefit – it is fair to bring corporate and individual liability into line.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

215. There would be: (i) higher costs of prosecution but these may be recovered in confiscation/compensation or mitigated by use of DPAs and (ii) increased costs to corporations in compliance.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

216. No.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

217. The Law Commission has a recent history of engaging with the issue of corporate criminal liability. David Cameron as PM proposed the introduction of such an offence earlier this year.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

218. No.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

219. HMRC launched several consultations into an offence of failure to prevent tax evasion (see annexed hereto). There's no reason why a similar consultation couldn't be launched in respect of a broader offence, as Cameron proposed earlier this year.

Immigration/public law- regulatory regime without statutory framework and internet based policy

Question 1- Which of the Law Commission's project suggestions do you wish to comment on?

220. The basic issues can best be described by reference to two Supreme Court cases in the field of immigration - R(Alvi) v Home Secretary (JCWI intervening) 2012 1 WLR 2208; and R (New London College v Home Secretary 2013 1 WLR 2358.

221. In the first, the Supreme Court held that details relevant to the points system of immigration control such as the list of skilled occupations had to be themselves contained in the Immigration Rules, with the consequence that they had to be laid before Parliament pursuant to the requirement in s 3 of the Immigration Act 1971.

222. In the second, the Supreme Court held that the details of system for licensing educational establishments under Tier 4 of the points based system did not have to be laid; they were not subject to s3 because they only affected the position of the educational establishments and were not part of the Rules governing an individual's application for leave to enter.

223. The result of the decision in New London College is that there is, in effect, a complex regulatory regime affecting educational establishments and sponsoring employers which lacks any statutory base and which derives its force solely from the ability of the Crown to contract with the sponsoring body.

224. In New London College (paragraph 1) Lord Sumption said "The Immigration Act 1971 is now more than 40 years old, and it has not aged well. It is widely acknowledged to be ill-adapted to the mounting scale and complexity of the problems associated with immigration control. The present appeals are a striking illustration of the difficulties."

225. There are two practical problems that arise as a result. The first is that the complex regulatory regime described by Lord Sumption in paragraph 1 of New London College does not operate within any sort of statutory framework; there are for example, no rights of appeal, though judicial review is available. This has turned out to be a blunt and crude instrument, and is fundamentally unsuited to dealing with factual issues that arise in what is, in effect, a complex regulatory scheme.

226. The second is an issue shared with other regulatory areas, a striking example being planning. There is now a drive across government for substantial and important areas of policy to be promulgated exclusively on the internet. From the perspective of the relevant

sponsoring department this is attractive precisely because it enables frequent and informal amendment of the policy; sometimes making major changes; sometimes adjusting fine detail. From the perspective of the "policy user", whether in immigration, or planning, or any other regulatory area where internet-based policies are in play, it can be very difficult indeed to ensure that one is dealing with the version of the policy that is relevant.

227. Accordingly, the proposal we put forward is that:

- (1) The Commission looks at the issue of whether a clear statutory basis governing the licensing of sponsoring educational establishments and employers should be provided- ie addresses the issue identified by Lord Sumption in paragraph 1 of New London College and/or
- (2) The Commission looks at the possibility of a statutory framework for internet based policy pronouncements. One possibility is that the sponsoring Department signs up to using the new statutory machinery, which could dictate how much notice had to be given of policy changes, provide a clear email address for searching for authoritative statements of policy and a machinery for producing an authoritative version of the policy at any given date.

228. Importantly (2) has a much larger reach than immigration, and could be carried forward even if the Commission were not interested in (1).

229. The form of delegated legislation has been governed by the Statutory Instruments Act or its predecessors for a substantial period of time. The migration of sizeable areas of policy onto the net could be seen as demanding a similar, modern, formal framework to promote transparency.

Question 2- Can you give an example of how the issue highlighted causes problems in practice?

For example, if you are a solicitor or barrister, you might describe how the issue affects your clients.

230. The problems created both by the absence of appeal rights in the immigration system; and the overall problem created by lack of transparency in net based policy pronouncements are described above.

Question 3- To which area(s) of law does this relate?

231. Administrative/public law, planning and environment, regulatory law.

Question 4- We will be looking into the existing law that related to the problem you have described. Please tell us about any court/tribunal cases, legislation or journal articles that relate to this problem.

You may be able to tell us the name of the particular Act or a case that relates to the problem.

232. See above for the leading Supreme Court cases in immigration.

233. The importance of planning policy has been considered in a large number of Court of Appeal cases - including, recently, Southwark Coastal District Council v Hopkings 2016 EWCA Civ 168. The Supreme Court gave permission to appeal in this case on 11th July 2016

Question 5- Can you give us information about how the issue is approached in other legal systems? You might have some information about how overseas courts or tribunals approach the problem.

234. We have no information about the regulation of e-based policy elsewhere.

Question 6- Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

235. It is UK wide.

Question 7- What do you think needs to be done to solve the problem?

236. See answer to question 1 above.

Question 8- What is the scale of the problem?

This might include information about the number of people affected this year or the number of cases which were heard in a court or tribunal over a particular period.

237. The problems potentially occur across the whole of the regulation of sponsoring employers and colleges in the immigration aspect; and the need for transparent policy is present in a very large number of planning applications.

Question 9- What would be the benefits of reform? In particular, can you identify any:

- **economic benefits (costs of the problem that would be saved by reform); or**
- **other benefits, such as societal or environmental benefits?**

For example, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one

which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.

238. The major gain would be an increase in transparency across a wide area of law. This would promote legal certainty and a probable saving of expense in litigation caused by uncertainty and difficult access to authoritative statements of policy.

Question 10- If this area of the law is reformed, can you identify what the costs of reform might be?

239. The costs of reform might include, for example, the cost of the legal profession and judiciary undertaking training to learn about a new statute. Another cost would be the training of sponsoring government departments to use the new machinery.

Question 11- Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As an example, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

240. In its immigration aspects, it potentially affects both employers and colleges on the one hand and individual immigrants on the other. In planning, planning policy affects range of applicants for planning permission as well as local planning authorities.

Question 12- In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

241. The fundamental suggestion of a need for the equivalent of a statutory instruments act for the digital age is one of classic law reform. It requires detailed drafting; cuts across government departments; and a sensitivity to legislative policy requirements.

Question 13- Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

242. No.

Question 14- Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

243. No.

Bar Council⁸
31 October 2016

For further information please contact
Sarah Richardson, Head of Policy, Regulatory Issues and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 0207 611 1316
Email: SRichardson@barcouncil.org.uk

⁸ Prepared for the Bar Council by the Law Reform Committee