



Submission to the Law Commission's 14th Law Reform Programme

Introduction

We are pleased to make this submission to the Law Commission concerning its 14th Law Reform programme. The Law Commission plays an essential function in keeping areas under review with the aim of ensuring that the law is as simple, accessible, fair, modern and cost-effective as possible. We note that the Commission is now grappling with some challenging legal topics, including the impact of AI and digitisation upon governmental and private law decision making; the need to enable legislation to meet environmental objectives, and the adaptations that society, business and the public sector have been having to make brought about by the exit of the UK from the EU and from the consequences of the COVID-19 pandemic.¹ The Law Commission is also operating in a context in which the traditional distinction between “public” and “private” law is beginning to look a little obsolete. The legal environment is now far more complex and multi-dimensional, including aspects of international law that may impact on retained EU law (such as regulatory standards and consumer rights) in domestic legislation. Our submission is limited to areas of law in which we have direct engagement.

About LawWorks

LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which provides a range of projects and brokerage services to bring together lawyers and law students who are prepared to give their time without charge, and individuals and community groups in need of legal advice and support. LawWorks is also a membership body for firms and other legal organisations that engage in legal pro bono work. Our work includes:

- Supporting a network of around 300 independent legal advice clinics hosted through law schools, advice agencies and other non-profit partnerships across England and Wales;
- Brokering pro bono legal advice for small not-for-profit organisations;
- Running ‘secondary specialisation’ bespoke pro bono casework and representation projects;
- Developing new online platforms for facilitating and delivering pro bono online such a new Pro bono Portal (with Justice Connect in Australia) and our Free Legal Answers website;
- Providing training and resources for individuals, firms and in-house legal teams undertaking pro bono, and celebrating excellence in pro bono through our annual awards;
- Collaborating with others in the legal support sector, for example: as partners with the Litigants in Person Support Strategy (LIPSS), engaging across the legal profession, and providing a “policy voice” for pro bono.

Whilst LawWorks is not a campaigning organisation, we hope that our policy work, learning, and core concerns around access to justice and the rule of law can make a contribution to the Law Commission's work. We therefore structure our response around:

- the outline themes that the Law Commission have set out;
- areas of policy work we have engaged in;
- areas of law in our training programme that have raised issues of complexity;
- broader conclusions on the Law Commission's priorities for law reform.



Thematic areas for law reform

The Law Commission has already identified the following five “common themes” to run across potential future law reform projectsⁱⁱ:

- *Emerging technology*: This reflects recognition of a growing need in the future for law which reflects developments such as AI and the use of algorithms in decision-making, considering not only the commercial and economic implications but also the need for proper consumer protection.
- *Leaving the EU/Brexit*: As this is the first ‘post-brexit’ programme there are likely to be important legal questions about retained European law, including which areas should be reformed, or reabsorbed unchanged into domestic legislation.
- *The environment*: There is widespread domestic and international interest in promoting reforms to safeguard our environment and this affects existing legal structures in a myriad of ways, including the need to address legal barriers which might be restricting the adoption of green initiatives.
- *Legal resilience*: Ensuring that the law is resilient enough to cater for exceptional circumstances should be an important aspect of the Law Commission’s future work.
- *Simplification*: Simplification of the law, including through codification or consolidation.

We are broadly supportive of the above themes. However, it raises a question of whether the Law Commission’s overall approach should be thematic or topic based, and how projects are prioritised. We understand the Law Commission applies criteria agreed with the Lord Chancellor around ‘impact’ and ‘suitability’. As far as possible we believe that it is important for the Commission to focus on “the law of everyday life,” for example legal issues concerning social welfare, consumer, housing and family law, and scoping reforms which will enable the law to provide greater clarity and certainty for citizens and consumers, including effective redress. Indicators of legal need, for example the Legal Services Board’s dashboard,ⁱⁱⁱ Citizens Advice datasets,^{iv} and bespoke legal needs studies^v are worth reviewing to identify common legal problems that might potentially have a law reform solution.

LawWorks policy and law reform priorities

Pro bono does not operate in a vacuum; pro bono clinics for example are hosted a range of different community organisations and advice agencies, as well as universities, so are impacted by policy issues in the wider external environment. LawWorks therefore undertakes policy work on issues that are directly pertinent to pro bono and engages with wider stakeholders in the access to justice sector including, for example, the Civil Justice Council. We also engage in policy work to address policies and practices which may impact on the need for legal advice. Whilst LawWorks does not have capacity to contribute to the full legal policy spectrum, or engage in all areas of law reform, below are some of the areas of work and policy discussion we have recently engaged in. These may not map directly onto the Law Commission’s priorities, but nevertheless they can provide a framework for considering how law reform programmes may interact with the pro bono sector.

Issues relating to access to justice and public legal education:

We are very clear that we do not see pro bono as a replacement or substitute for legal aid. Nevertheless, pro bono can add value in assisting access to justice, working in partnership with advice agencies and civil society. Having engaged with the Ministry of Justice in the review of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) and the development of the “Legal Support Action Plan,”^{vi} it is perhaps now better understood that the public’s legal support needs run on a spectrum from public legal education (PLE) and information to legal advice, and where necessary representation. Using alternative

terminology, this spectrum runs from prevention, to early intervention, then late or crisis intervention etc.

We acknowledge that the Law Commission cannot engage in questions of legal aid policy as this is a question of how funding is allocated. However, at the earlier part of the spectrum PLE is of relevance to the Law Commission as it concerns how the law can be best understood, accessed and communicated. Transparency is key to enable people to understand the role of law of their lives, and to build legal capability. LawWorks was instrumental in developing the Solicitor General's PLE goals – a long term vision for upscaling PLE.^{vii} So, as part of its 14th Law Reform programme, we would like to see the Law Commission commit to engaging in PLE activities, and build a PLE strand into its work, so that transparency and the capacity of those effected to understand the law should run through all law reform projects.

Later in this response we address further issues that the Law Commission may want to look at in respect of technology, online courts, and automated decision-making. As the civil justice system is changing fast with the online justice agenda it is important that the Commission should engage with the Civil Justice Council (CJC). The CJC's recent work include important reports on civil mediation^{viii} and small claims^{ix}. It would be consistent with the Commission's remit including its commitment on "improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost" to work with stakeholders like the CJC and the Administrative Justice Council (supported by the law reform organisation JUSTICE) to look at how civil redress pathways can be made easier for citizens to navigate, including consistent standards of information and support.

Employment rights and labour market regulation:

During the past year (2020 reporting period), clinics on the LawWorks network reported for the first time that they received the highest number of inquiries for employment law matters.^x LawWorks have also seen high demand through our unpaid wages "secondary specialisation" project which undertakes casework on typical 'wage theft' issues such as 'not being paid in full for work, being denied the minimum wage, or owed holiday, sickness or notice pay. We submitted responses to the Taylor review and to the subsequent 'Good work programme' consultations with the aim of strengthening enforcement mechanisms and protections for insecure workers.^{xi} We also submitted a response to the Law Commission's consultation on the powers of employment tribunals (ETs).^{xii} We understand that new employment rights legislation will be forthcoming in this Parliament, although this is likely to stop short of implementing all the recommendations from the Taylor review. Outstanding questions may remain, such as should employment rights be codified, and should freelancers and other types of self-employed workers have a more defined or protected legal status, especially following recent judgements such as the Uber case.^{xiii}

One of the challenges here, however, is how employment law interacts with contract law. The Law Commission has begun to address this interaction in its review of the respective jurisdictions of employment tribunals and civil courts in employment relationships. We suspect that there may be follow up work needed on this, especially given the shift to digital and remote working (issues which were outside the scope of the Commission's previous ETs consultation and report).

Family Law:

Jointly with our Litigant in Person Support Strategy (LIPSS) partners, last year we briefed on two important pieces of legislation (both of which achieved cross-party and widespread stakeholder support) during their parliamentary passage last year, namely the Divorce, Dissolution and Separation Act 2021, and the Domestic Abuse Act 2021. We note that other areas of family law remain in need of reform, for example on cohabitation where successive governments have failed to advance the Law Commission's clear recommendations for

reform in 2007,^{xiv} notwithstanding calls for change from leading members of the judiciary over many years. The Supreme Court, just last year, ruled that preventing a surviving cohabitee (a mother of 4 who had lived with her partner for 23 years) from claiming widowed parent's allowance was incompatible with the European Convention on Human Rights.^{xv} Whilst Government have said they are looking at this issue, proposals for reform were not forthcoming; a consultation is now underway on a remedial order but questions remain on whether it will be retrospective.^{xvi} Family law specialists have also argued that whilst many advances in family law have been made, such as the Children's Act, the family justice system itself still suffers from perceptions of lack of transparency due to outdated legislative frameworks – for example the operation of the Administration of Justice Act 1960.^{xvii}

Regulatory matters and legal services (including property matters)

Our work in supporting pro bono takes place within a regulated framework, the centrepiece of which is the Legal Services Act 2007 (LSA). We have engaged in a range of regulatory issues concerning pro bono and free legal advice provision, including the challenge of overlapping regulatory regimes (e.g., OISC, and FCA regulation of debt advice), questions of regulation in the non-profit sector, and specific issues concerning in-house lawyers undertaking pro bono. Some of these issues we have flagged to regulators in their most recent business plan consultations.^{xviii} Following the Competition and Market Authority (CMA) legal services market study,^{xix} and the Mayson review of legal services regulation^{xx}, both of which have raised questions about the efficacy and proportionality of current regulatory structures as well as the position of unregulated providers, it is possible that there will be consideration as to whether legislative reforms are needed in the legal services sector.

As well as the LSA there are other older provisions which effect the operation and regulation of legal services, including the Courts and Legal Services Act 1990, Administration of Justice Acts 1960 and 1985, the County Courts Act 1984, the Solicitors Act 1974. Regulation of conveyancing and property transactions is regulated by legislation that is becoming increasingly outdated (Conveyancing and Law of Property Act 1881, Law of Property Act 1925, Law of Property (Miscellaneous Provisions) Act 1989). Although it may be premature to think about consolidation, it is important to note that much of this legal framework predates the digital environment in which courts and legal services now operate. This is also the case for other areas of reserved legal activities (e.g., probate, documents relating to the conduct of litigation etc.) These issues are pertinent to access to justice as they effect for example the standing that pro bono/volunteer lawyers may have in different types of legal proceedings, processes and circumstances, and more broadly they effect the affordability and accessibility of legal services.

Procurement

The Government has been considering post-Brexit procurement issues, and recently issued a green paper,^{xxi} to which LawWorks responded.^{xxii} This a complex area of law affecting multiple sectors and, as the Green Paper makes clear, it will involve significant law reform in which the Law Commission may have an interest. Our response touched on only one aspect of public sector procurement, namely the Government's own use of legal services and whether the procurement system can be used to facilitate social value and best practice in Corporate Social Responsibility (CSR), including encouraging pro bono.

Human Rights and Judicial Review

LawWorks responded to the recent 'Independent' reviews carried out for the Ministry of Justice on administrative law (IRAL)^{xxiii}, and the operation of the Human Rights Act (IRHRA)^{xxiv}. These reviews have raised concerns amongst stakeholders about risks of potentially diluting legal accountability and redress for executive actions, and potentially

weakening some of the mechanisms of deterrence. The reviews also involve questions of constitutional law, some of which may be beyond the Law Commission's remit to engage with. However, we hope that the Law Commission would wish to factor-in public law redress and Human Rights Act compatibility in all of its law reform projects.

LawWorks training and legal complexity

Our training mostly consists of introductory family and social welfare law sessions ("social welfare law" is an umbrella term for common legal issues in welfare benefits, debt, consumer rights, housing, employment, discrimination, immigration, and community care – many of these areas are partially or fully outside the scope of legal aid). However, the programme has increasingly taken on more specialist and advanced legal topics to support pro bono clinics and volunteers where they may be required to advise on complex topics, both within and beyond the scope of family and social welfare law. The Law Commission may find some these areas to be of interest. Recent training topics involving particular issues of complexity have included:

- The complexities that can arise in relation to property interests in the context of co-habiting couples, especially the Trusts of Land and Appointment of Trustees Act 1996 (ToLATA);
- Child abduction and relocation issues;
- Disparate provisions which cover landlord repair obligation for residential tenants as well as tenant responsibilities, including the Defective Premises Act 1972, the Environmental Protection Act 1990 (law of 'nuisance'), the relationship between Homes (Fitness for Human Habitation) Act 2018, and the Landlord and Tenant Act 1985;
- We have also run sessions on tenancy disputes and issues, including repossessions and interrelating aspects of the Landlord and Tenant Acts 1985 and 1987, and the Housing Act 1988. We hope that some of the complex issues around tenant security may be addressed in the Government's expected Renters Reform Bill as many of these issues have remained unresolved since the Law Commission first produced its 'Renting Homes' report in 2006.^{xxv}

Broader conclusions on the Commission's priorities for law reform

In addition to the areas that we have already covered in this submission, we offer these further thoughts on priorities for the Law Commission's 14th programme.

Technology, access to justice, and automated decision-making

We believe there is scope for the Law Commission to engage in how different areas of law are impacted by the significant shift to remote working in the justice system, developments in online courts and dispute resolution, and in automated decision-making. Here the pandemic has had the effect of being a 'catalyst', and the judiciary have to consider whether remote hearings can provide a proper alternative to attended hearings in a range of circumstances. As well as rules covering disclosure and service of documents, most of the laws that affect access to court and tribunal information were drafted at a time when the media and legal landscapes looked very different to what they do today.

As automated decision-making begins to play a greater role in public sector processes it is important that the Law Commission is ahead of the curve, especially on legal frameworks of accountability. Taking social security law as an example: by making Universal Credit "digital by default," the UK has already started down a path which may see social security decision-making increasingly using 'big tech' solutions. A recent report from the law reform

organisation JUSTICE has concluded that “Clearer structures and rules are required for decision-making to ensure fairness and consistency, while also tailoring decisions to individuals’ circumstances.”^{xxvi}

When deployed appropriately and lawfully, the adoption of Automated Decision Making (“ADM”) and Assisted Decision Making (“ASDM”) systems and technologies can offer the potential to improve the speed and consistency of decision-making whilst generating savings for the taxpayer. However, recent experiences in immigration, policing, welfare and education have highlighted the risks and limitations associated with the use of ADM/ASDM systems. These risks, if unaddressed, have the potential to undermine rights, damage trust in public sector bodies and could generate costly litigation. To develop effective solutions, the Law Commission should examine and learn from international approaches to regulating public sector use of ADM/ASDM systems. It is important that positive regulatory and legislative solutions are in place to govern the use of these systems and provide swift and effective routes to redress.

Consumer and employment rights after Brexit

Partly through “retained EU Law”, UK consumers have continued to be covered by similar consumer rights as they did before Brexit. However, challenges are already evolving for example in enforcement and redress rights when buying goods, services, or digital content online from EU based traders and suppliers. Also, UK consumers have lost their rights to use EU-based ADR mechanisms and the EU’s Online Dispute Resolution (ODR) Platform, which links consumers with ADR providers in the EU. Two key directives that were in development on digital services and enforcement before Brexit will not be applicable to UK law, but the UK may opt to implement similar legislation. Issues of consumer redress and enforcement mechanisms will therefore be ongoing issues, especially concerning online commercial practices and online markets. The Government’s Consumer Green Paper outlines some of the future direction of travel.^{xxvii}

On employment rights, the terms of Brexit prevent any divergence taking place from EU-derived workers’ rights and labour market standards. Government confirmed earlier this year that it is not planning any post-Brexit review of existing employment rights and regulations. A key task for the Law Commission, however, might be to look at how retained EU law is best protected and codified in domestic legislation.

Law reform after the pandemic: Public Health

Finally, it would be surprising in the context of the pandemic if the Law Commission did not take the opportunity to examine some aspects of public health law in light of discussions about how ‘fit for purpose’ the legal framework has been for introducing public health regulations and the operation of emergency powers. There were several sets of regulations that the Government initially deployed to execute the lockdown and the associated package of policies, but most important were the Health Protection (Coronavirus Restrictions) (England) Regulations 2020/350, introduced in March 2020 as emergency secondary legislation under the Public Health (Control of Disease) Act 1984. This detailed consideration may however have to await the full process of the inquiry about the handling of the pandemic.

The pandemic may also be a catalyst for looking at the wider relationship between health and law. Work led by UCL, for example on “Law for Health”^{xxviii}, examines the broad relationship between law and health, including health justice partnerships, the legal responses to the pandemic, and evidence reviews to inform the prevention of non-communicable diseases caused by unhealthy products. UCL also has an ongoing programme of work looking at health care law, especially the balance of jurisdiction of the courts and parliamentary sovereignty over clinical freedom, and on matters of health care ethics which raise important issues of public morality in very personal contexts.

Endnotes

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- ⁱⁱⁱ https://legalservicesboard.org.uk/coronavirus_impact
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- ^{xvi} <https://www.gov.uk/government/publications/bereavement-benefits-proposal-for-implementation-of-the-mclaughlin-2018-and-jackson-2020-judgments>
- ^{xvii} *Proposal for the Law Commission's 14th Programme of Law Reform* James Munby, Clifford Bellamy, Lucy Reed, Julie Doughty, Louise Tickle, February 2021
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- ^{xix} <https://www.gov.uk/government/news/cma-publishes-review-of-progress-in-legal-services-sector>
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