



7 November 2013

Our ref: ICAEW Rep 164/13

Twelfth Programme Project Officer
Law Commission
Steel House
11 Tothill Street
London SW1H 9LJ

By email: programme@lawcommission.gsi.gov.uk

Dear Sir/Madam

Twelfth Programme of Law Reform

ICAEW is pleased to respond to your request for comments on *Twelfth Programme of Law Reform*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

Felicity Banks

Head of Business Law

T +44 (0)20 7920 8413

E felicity.banks@icaew.com



ICAEW REPRESENTATION

TWELFTH PROGRAMME OF LAW REFORM

Memorandum of comment submitted in October 2013 by ICAEW, in response to The Law Commission consultation paper Twelfth Programme of Law Reform published in July 2013

Contents	Paragraph
Introduction	1
Who we are	2
Major points	5
Appendices	
1. Response to your project proposal: Corporate criminal liability	
2. Suggestion for project: The Regulation of Legal Services	
3. Suggestion for project: Legal Professional Privilege	
4. Suggestion for project: Joint and Several Liability	

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Twelfth Programme of Law Reform* published by The Law Commission on 2 July 2013, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

5. The reasons for our support for the idea of a project on Corporate Criminal Liability, and our ideas for other projects, are set out in the Appendices to this response. These concern the regulation of legal services, the reform of legal professional privilege and the reform of joint and several liability.
6. We recognise that the projects we have suggested concern very difficult subjects, but the fact that they are complex tends to lead to reform being deferred indefinitely, and makes them particularly suited to Law Commission consideration. In relation to the subject of Legal Professional Privilege, in particular, we believe that the careful analytical work typically done by the Commission would easily outweigh any perceptions of a lack of independence from the legal profession which might otherwise apply.

E felicity.banks@icaew.com

Copyright © ICAEW 2013
All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

icaew.com

APPENDIX 1

Q1. In general terms, what is the problem that requires reform?

1. Corporate Criminal Liability.

Q2. Can you give an example of what happens in practice?

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

2. Corporate criminal liability is currently confused and inconsistent. Recent statutes, such as the Bribery Act 2010 and the Corporate Manslaughter Act 2007, introduce specific corporate offences but law which is even slightly older, such as the Fraud Act 2006, do not. This makes it difficult to hold legal persons responsible for the actions carried out on their behalf or by their people, with consequent adverse motivational forces.
3. In addition, the inconsistency in the basic criminal law is compounded by divergences in conditions for leniency, and guidance given on the adequacy of corporate procedures for the avoidance of corporate liability.

Q3. 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?

4. This project should be given a high priority, in view of:
 - the current costs, difficulties and dysfunctionalities of the current state of the law
 - the fact that this project would be likely to be relatively cost effective, building as it does on two fairly recent Law Commission projects
 - the political advantages to the UK, in being seen to have a more effective system of corporate criminal liability.

Q4. 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.

5. An example of the problems caused lies in the outcry following the LIBOR fixing scandal, where initial press comment appeared doubtful as to whether there was any established criminal offence that had been committed, still less one that could hold Barclays itself to account.
6. An example of Government announcements of new proposed criminal offences regarding corporate misconduct is the recent announcement from Ed Davey, reported at <http://www.independent.co.uk/news/uk/politics/government-considers-jail-for-power-company-bosses-caught-fixing-energy-price-rises-8916372.html>.
7. It seems likely that 'rigging the energy market' would already be illegal under the Fraud Act, though it may be difficult to convict individual 'bosses' for personal liability under that Act. New criminal offences, if necessary, would be much easier to implement if they could be slotted into an existing system of corporate criminal liability. And it would surely be politically preferable to be able to announce that action is already being taken, rather than announcing future, and probably much delayed, action.
8. The Bribery Act 2010 provides a good model of criminal legislation, which encompasses criminality at a number of levels: individuals actually implementing the crime, corporates with inadequate systems to prevent the crime and directors or other senior managers who consent or connive at the crime or criminal environment. It also encompasses guidance to companies

on the nature of internal control procedures that would be considered adequate to provide a defence to the corporate offence or conditions for leniency. Our response to the Ministry of Justice consultation on statutory guidance on the Act is available from ([ICAEW Rep 122/10](#)).

9. The criminal cartel offence introduced under the Enterprise Act 2002 applies only to individuals who dishonestly agree that two or more undertakings will engage in prohibited cartel arrangements, not to the undertakings themselves or their consenting directors. Liabilities on the companies themselves are stringent, but enforced on a civil basis.

Q5. 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.

10. We are not aware of any jurisdiction, common law or civil law, which has a consistent and well-functioning system of corporate criminal liability though some (and in particular the USA) clearly have a much more organised, vigorous and apparently successful history of action taken against corporate offenders. This may therefore be an area where the UK could take political leadership on a global basis, building on David Cameron's recent announcements to the G20.

Q6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

11. All of the United Kingdom.

Q7. What do you think needs to be done to solve the problem?

12. Amend the criminal law, to introduce corporate liability for all legal persons, where any crimes have been committed upon their behalf, or as a result of their gross negligence.

Q8. 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.

13. Large, but difficult to measure.

Q9. 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.

14. The chief benefit of this reform would be the economic, societal, environmental and political benefits resulting from better corporate behaviour. Honourable companies would benefit from no longer having to compete with those breaking the law with near impunity, with consequent better outcomes overall.

15. Other benefits would include:

- Management and governance savings for companies, which would have fewer divergent legal and regulatory regimes to accommodate, and hence more consistent and easier to design and apply systems of internal control;

- Research and training savings for regulators, law enforcement authorities, the legal profession and the Courts, for the same reason;
- Easier and quicker criminal investigations, prosecutions and a higher chance of convictions for those corporate entities allowing or encouraging illegal behaviour on their behalf. More successful outcomes for the recently introduced Deferred Prosecutions Agreements, since corporates will be more willing to enter into them if there is a realistic chance of an actual successful prosecution.
- Saved costs in the drafting of new legislation, to deal with emerging areas of corporate misconduct.
- More consistent criminal liability, and the systems required to ensure that it is not incurred, may also make it easier and more likely for companies to introduce and enforce a higher ethical standard of conduct.

Q10. 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.

16. Over the medium term, the costs would be insignificant, compared with the benefits.

Q11. 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.

17. All of the UK and all groups in society are harmed by corporate misconduct of various types.

Q12. 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?

18. Government Departments tend to focus more on the task at hand, and may be less able to focus on an overall reform which could help cope with many current and future problems and issues.

19. This project would build on previous work done by the Law Commission, not only on its project on Criminal Liability in Regulatory Contexts, but also its project on Bribery. These provide a good grounding for this additional project.

Q13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

20. ICAEW has been drawing attention to the desirability of this reform in our responses to consultations in the areas of corporate misconduct from a number of Government Departments. We have not received a substantive response. For example, we suggested this reform in our response on the Ministry of Justice consultation on Deferred Prosecution Agreements.

Q14. 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.

21. We are not aware that any other body within Government are currently considering this matter, though comment from David Green, Director of the Serious Fraud Office, at the Cambridge Economic Crime Symposium, suggest that this project would have the SFO's active support.

APPENDIX 2

Q1. In general terms, what is the problem that requires reform?

1. The Regulation of Legal Services.

Q2. Can you give an example of what happens in practice?

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

2. The complexity of the statute law relating to the regulation of lawyers and legal services, and overlapping and duplicated regulatory requirements leads to unnecessary costs and restrictions on the provision of legal and professional services.

Q3. To which area(s) of the law does the problem relate (please tick one or more box)?

- ☐ Administrative or public law
- ☐ Property or land law
- ☐ Trusts and wills
- ☐ Consumer law
- ☐ Planning and environment
- ☐ Criminal law
- ☐ Family law
- ☐ Commercial or contract law
- ☒ Regulatory law
- ☐ Don't know

Other (please state):

Q4. 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.

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

3. The chief statute dealing with the regulation of legal services is the Legal Services Act 2007, but there are numerous other statutes and statutory instruments that have not been repealed and which affect the complexity of the situation.
4. Any comprehensive review of legal services regulation also needs to take account of the effects of regulation which is applied by the front line legal services regulators, which may itself be unnecessarily burdensome and restrictive to competition.

Q5. Can you give us information about how the problem is approached in other legal systems?

You might have some information about how overseas courts or tribunals approach the problem.

5. Legal services regulation is very jurisdictionally specific. Solutions which have been adopted abroad may not be suitable or easy to adopt in the UK.

Q6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

6. England, Wales and Northern Ireland.

Q7. What do you think needs to be done to solve the problem?

7. A fundamental review of the regulation of legal services, and other inconsistencies.

Q8. 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.

8. All citizens are consumers or potential consumers of legal services, though many are reluctant to consult a lawyer, due to perceived high costs or insufficient market access.

Q9. 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.

9. The economic benefits of improved legal services regulation would include:

- deeper and wider markets for consumers, with all the resulting benefits of consumer choice and active market economies, as barriers to entry and unnecessary restrictions to forms of practice were removed
- more efficient and less duplicated regulatory burdens would lessen the costs borne by those providing legal services and their clients, with no loss of protection for the latter.

Q10. 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.

10. The costs of implementation would vary widely, depending on the extent of the changes envisaged.

Q11. 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.

11. These reforms would be directed primarily at lawyers and other professionals and providers of legal services. Indirectly, the main beneficiaries should be the consumers of legal services - that is the entire population. In particular, access to justice for the most disadvantaged members of the community could be improved.

Q12. 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?

12. Government Departments tend to focus more on the task at hand, and may be less able to focus on an overall reform which could help cope with the immensely complex issue of legal services regulation, and its evolution from an inwardly facing model where lawyers operated in a restricted and closed professional environment to a far more open one, where new specialist providers have emerged for traditional legal services and there is more recognition of the fact that many professionals and other specialists routinely provide advice to clients which comes

within their professional competence and regulatory environment, but which also comes within the definition of 'legal advice'.

Q13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

13. The Ministry of Justice issued a Call for Evidence on Legal Services Regulation, a copy of which is available from <http://www.redtapechallenge.cabinetoffice.gov.uk/moj-review-of-legal-services-regulation/> A copy of our response is available ([ICAEW Rep 124/13](#)).

Q14. 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.

14. The Ministry of Justice are currently undertaking a review of legal services regulation. We think that it should at least be considered whether a review by the Commission may be able to take a more detailed, considered and all-encompassing review of the complex and diverse issues concerned.

APPENDIX 3

Q1. In general terms, what is the problem that requires reform?

1. Legal Professional Privilege, and in particular Legal Advice Privilege, is increasingly complex, potentially distorts the development of effective and efficient markets in professional services, is unpredictable in its effectiveness and can lead to unnecessary injustices.

Q2. Can you give an example of what happens in practice?

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

2. Tax advice is increasingly being advertised by lawyers on the basis that any tax advice provided by a lawyer is subject to LPP rather than on the basis solely of their competence, professionalism or knowledge. This creates a market distortion in the provision of tax advice in favour of lawyers which we believe is not justified. It leads to economic inefficiencies and contrary to Government policy of taxpayers being open and transparent in their dealings with the revenue authorities thereby leading to a threat to Government revenues.
3. Sharing privileged information with Boards of Directors of companies may result in their companies losing LPP, unless the information is given subject to strict conditions of confidentiality. Since Boards are the ultimate decision making bodies to which authority is delegated by shareholders, this could undermine the governance of companies, if Boards are, for this reason, denied the information to enable them to carry out their decision making obligations appropriately.
4. Auditors are denied access to privileged information which may be critical to their ability to draw a valid opinion on the financial statements. This may have adverse commercial effects.
5. The development of effective Multi-Disciplinary Practices, as intended by the Legal Services Act, may be prevented or delayed by uncertainties and lack of consistency of the availability of LPP, dependant on the status of the professional providing advice.
6. In recent years, there has been a greatly increased requirement for regulatory monitoring of various kinds. Monitoring personnel may encounter privileged material during the course of their work, in error, in the normal course of examination of specific case or client files or because they purposely seek it out in order to carry out their perceived functions more effectively. We are particularly aware that reporting accountants appointed under the Solicitor's Accounts Rules may on occasion form suspicions of money laundering from privileged information. There are no exemptions available for such accountants from reporting those suspicions under the anti-money laundering legislation in the usual way. We suggest that this issue is addressed, to prevent clients risking the loss of privilege through disclosure to third party regulatory monitors, but without this being apparent to either themselves or their legal adviser.

Q3. To which area(s) of the law does the problem relate (please tick one or more box)?

- ☒ Administrative or public law
- ☐ Property or land law
- ☐ Trusts and wills
- ☐ Consumer law
- ☐ Planning and environment
- ☐ Criminal law
- ☐ Family law
- ☒ Commercial or contract law
- ☐ Regulatory law
- ☒ Don't know

Other (please state):

Q4. 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.

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

7. The Legal Services Act 2007 addressed some aspects of LPP, but not all. For example, it specifically provided that practitioners could generate LPP for many of the reserved legal services, but not for other services such as general legal advice, where the position was left to be decided in the context of the existing common law.
8. The Supreme Court Ruling in the Prudential case is available from www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0215_Judgment and the press summary from www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0215_Presssummary
9. There are numerous other decided cases in the UK and abroad, on the application and availability of LPP.
10. An example of the changed commercial environment which has developed since the Prudential case, to the market advantage of lawyers over other professions (who may be just as well qualified to provide the services required) is available from <http://www.out-law.com/en/articles/2013/february/what-the-supreme-courts-prudential-ruling-means-for-insurers1/>.

Q5. Can you give us information about how the problem is approached in other legal systems?

You might have some information about how overseas courts or tribunals approach the problem.

11. Common law jurisdictions such as New Zealand have developed nuanced systems of confidentiality, specifically designed to help avoid the distortions in the market for tax advice caused by LAP.
12. Civil law jurisdictions tend to extend privilege to certain documents, for example where these provide legal advice, rather than to the status of the person generating those documents or the definition of the client receiving it. This problem is thereby avoided completely.

Q6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

13. The whole of the UK.

Q7. What do you think needs to be done to solve the problem?

14. A fundamental review of the law on LPP, to ensure that this basic right of citizens in the UK is set on a firm foundation, easily understood and not to be enjoyed only subject to what we believe are unjustified anomalies in the 21st century.

Q8. 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.

15. The legal cases relating to LPP are not only numerous, but can be very high profile, leading to appeals reaching the highest courts which are hence very costly to conduct.

Q9. 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.

16. A reform to the scope of LAP, so that it is available on the basis of the advice provided and its regulatory environment, rather than the exact professional status of the provider, as a member of the traditional legal professions, would lead to better and more efficient markets in professional services, with all the consequent economic benefits. Taxpayers should be expected to be open and honest in all dealings with HMRC.
17. A reform to the definition of 'client' for the purposes of LPP would enable corporate clients to operate their corporate governance in accordance with normal principles of company law, where Board of Directors are ultimately responsible for decisions on behalf of shareholders. Recent decided cases, where the 'client' is limited to a small group of executives who actually manage the relationship with lawyers, can lead to core information being withheld from the Board, in order to ensure that LPP is preserved.
18. A reform to the scope of LPP, so that statutory company auditors are included within its scope would benefit shareholders and financial markets, by improving the evidence available to auditors and hence the quality and reliability of annual financial statements.
19. Clarification of how LPP could be expected to operate in a Multi-Disciplinary Partnerships, where more than one type of equally well qualified professional may be responsible for advising clients on their rights and responsibilities under the law, could help prevent another extensive round of litigation in an effort to clarify these matters by court action.
20. Clarification of the law surrounding the access or use of privileged information in the course of regulatory monitoring would result in more consistent benefits to citizens of this right.
21. Societal benefits would include the relief of problems caused to citizens by their lack of understanding of the boundaries of LPP, including the dangers of inadvertent loss through disclosure.

Q10. 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. Any comprehensive reform of the law on Legal Professional Privilege would result in a need for considerable training of those generating privilege and their clients. However, it is difficult to say whether this would exceed the current costs of update training, in the current complex and developing field of law.

Q11. 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. This problem affects all groups in society, as the legal environment becomes more complex and it becomes less certain that either citizens or organisations will be able to reliably assess the circumstances in which they can depend on the availability of privileged advice.

Q12. 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. Government Departments tend to focus more on the task at hand, and may be less able to focus on an overall reform which could help cope with complex and increasing current and future problems and issues.

Q13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

25. We have drawn the attention of the Ministry of Justice to the problems, injustices and complexities of this issue in our response to their Call for Evidence on the regulation of legal services. A copy of our response is available ([ICAEW Rep 124/13](#)).
26. We have also been in discussion with the Legal Services Board over how Legal Professional Privilege might be expected to operate in a Multi-Disciplinary Practice involving both lawyers and accountants. These discussions were not conclusive.
27. We are planning to approach BIS, in relation to their 'Red Tape' initiatives, to suggest that the Companies Act is amended to maintain the right to privilege, where materials are supplied to auditors.

Q14. 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.

28. We are not aware of any other body currently considering this issue.

APPENDIX 4

Q1. In general terms, what is the problem that requires reform?

1. Joint and several liability for damage sustained by clients or third parties, especially in the context of professional services.

Q2. Can you give an example of what happens in practice?

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

2. Professionals, or professional firms, can be sued for the whole amount of losses, where their own culpability is tiny compared with the culpability of others. This tends to occur where the more culpable persons are no longer available to sue, or have no funds available for the payment of damages. This is very unfair in many cases. Examples include:
 - all trustees have joint and several liability for losses from the trusts they are responsible for. Negligence or a defalcation by one or more trustees may have to be made up by the remaining trustees, on a joint and several basis. We have anecdotal evidence that especially charities, but also family and other trusts, are beginning to find it difficult to recruit professional trustees as a result, with deleterious effects on the quality of their management, as well the availability of professional independence on their Boards of Trustees.
 - shareholders, creditors or insolvency practitioners sue the auditors of insolvent companies for the whole loss experienced, where a minor part of those losses may have been caused by the negligence of the auditors, in failing to ascertain the true financial position of the company at the date of the last audit. This may mean that auditors could be expected to cover the whole amount lost by shareholders, who are by their nature suppliers of risk capital to businesses, and creditors, who are at least partially responsible for their losses due to poor credit control procedures.
 - a single, very minor, instance of negligence can result in the loss of an otherwise sound and reputable professional firm. The consequence of this is reduced consumer choice and more expensive access to justice.
 - the costs of professional liability insurance are unnecessarily high, which is a cost borne by the business community as a whole, with a consequent drag on economic development.

Q3. To which area(s) of the law does the problem relate (please tick one or more box)?

- ☐ Administrative or public law
- ☐ Property or land law
- ☐ Trusts and wills
- ☐ Consumer law
- ☐ Planning and environment
- ☐ Criminal law
- ☐ Family law
- ☒ Commercial or contract law
- ☐ Regulatory law
- ☐ Don't know

Other (please state):

Q4. 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.

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

3. The common law behind these principles was developed for a 14th century agrarian society, and the absolute properties associated with it are inconsistent with a modern legal system that lays considerable store around proportionality. Accountants and lawyers are not the only professionals to suffer the effects of this unfair legal situation. For example, in 2004 the Association of Consulting Engineers issued a report *Professional Indemnity Insurance and Joint and Several Liability in the Construction Industry: the case for reform*.

Q5. Can you give us information about how the problem is approached in other legal systems?

You might have some information about how overseas courts or tribunals approach the problem.

4. No.

Q6. Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

5. The whole of the United Kingdom.

Q7. What do you think needs to be done to solve the problem?

6. Introduce proportionate liability, in place of joint and several liability, in relation to the law of negligence, and other relevant areas of the law. Claimants would still be entitled to damages based on the whole of their losses caused by the negligence or other fault of the professional or other provider involved, but not for that caused by others.

Q8. 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.

7. The scale of the problem can be gauged by the very high rates of professional indemnity insurance premia for auditors and other professionals, which is then passed on to consumers.

Q9. 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.

8. Economic benefits would include:

- a wider and richer market in professional services, as there would be fewer barriers to entry to professional firms and individuals, and fewer disorderly exits as firms are forced to close due to the impact of professional liability claims
- professional indemnity insurance costs would be substantially reduced, resulting in lower costs which have to be passed on to clients
- trusts, charities and individuals with limited means would be more likely to be able to obtain the professional or other services they need were the professionals involved able to assure themselves that they would not be liable in tort for the failings of others, even in engagements carried out with no remuneration.

9. Societal benefits would include a better reputation for the professions. We have good anecdotal evidence that auditors, for example, tend to be blamed for the insolvency of their clients where they have no culpability for the insolvency and only a minor amount of negligence for not discerning it at an early stage. Publicity around the issue tends to measure the culpability in terms of the damages levied, which with the application of joint and several liability, and the 'deep pockets' effect, can be very large.

Q10. 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.

10. We do not think that the costs of the implementation of the revised law would be major. Judicial training would be likely to be required, as additional judgements on the degree of culpability of a professional might be required. Additional costs might also be incurred by claimants and defendants, in order to reach a mediated settlement.
11. However, we do recognise that this would be a major change in the legal environment with many possible consequent effects.

Q11. 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.

12. This problem particularly affects:

- professionals and professional firms;
- their clients, including both corporate and individual citizens
- those seeking pro bono or voluntary services from them.

Q12. 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?

13. The Law Commission is more thorough in its consideration of legal issues than is typical of Government departments or other organisation, so more likely to reach an effective and comprehensive solution.

Q13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

14. We corresponded with BIS's predecessor departments extensively on the specific issue of auditor liability reform while they were comprehensively considering the reform of company law during the early years of the millennium. This resulted in the introduction of provisions which allow auditors to negotiate a limitation to their liability within Chapter 6 of Part 16 of the Companies Act 2006. This provides only a partial solution, and does not address the core injustice of the situation.

Q14. 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.

15. We are not aware of any other organisation currently considering this issue.