Thirteenth Programme of Law Reform consultation response

Please answer as many of these questions as you can, as fully as you can. If necessary, continue on additional sheets. Please also indicate where you are not able to provide an answer.

Please tell us about yourself:

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(Please tick one or more box)

Member of the public	☐		
Third sector/voluntary sector	☒	Commercial sector/business	☐
Nature of third sector/business organisation: This proposal is being submitted collectively by members of the public health community following extensive consultation with academic, statutory, political, and non-governmental organisations.			
Practising lawyer Specialist area:	☐	Academic Specialist area:	☐
Member of the judiciary Court or tribunal:	☐	Government official Department:	☐
Local authority staff member	☐	Parliamentarian	☐
Other (please state): _____			

***Consultation Principles**: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at:*

https://www.gov.uk/government/publications/consultation-principles-guidance.

*We treat all responses as public documents in accordance with the **Freedom of Information Act** and we may include the names of respondents and attribute comments in any publication relating to this consultation. If you want your submission to remain confidential, you should contact us before sending your response. (Please note that we*

disregard automatic IT-generated confidentiality statements.)

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

Contemporary public health covers the biologic, physical, and mental well-being of all members of society. The practice of public health aims to provide conditions under which people can be healthy, improve their health and wellbeing, or prevent the deterioration of their health. The public health profession addresses health problems and the political, social, and economic factors affecting health at local, national and global levels.

Reporting on the ninth programme of law reform in 2005, the Law Commission made an additional and rare recommendation to urge the Government to undertake work on UK public health legislation, fearing that “a major outbreak of contagious disease could be significantly impaired by the defects in the law.” This followed exploratory work on the need for legal reform done previously by the Nuffield Trust in 2003 and then explored by the London School of Hygiene and Tropical Medicine in 2005.

Since then, the need for reform of public health legislation, including related social care legislation, has become more urgent - largely as a consequence of the following developments:

1. The introduction of the Health and Social Care Act 2012 ("the 2012 Act") laid new duties in England on:

i) the Secretary of State for Health, Public Health England, NHS England and Clinical Commissioning Groups, “to reduce inequalities between the people of England with respect to the benefits that they can obtain from the health service;" and

ii) local authorities to take such steps as they consider appropriate for improving the health of the people in their area.

2. The 2012 Act created Public Health England and transferred the public health function in England from the NHS to local authorities. Although the informal view of the Law Commission was that this allayed some of its concerns about weakness in the health protection function, the 2016 Health Select Committee review on public health post-2013 reported that the arrangements in some areas of England for coordinating a local response to a health protection issue appear to be dependent on goodwill and strong local relationships.

3. In 2009, the EU defined health inequalities as the "substantial differences in life expectancy at birth." For example, from 2012-2014, life expectancy for a baby boy born in an area of most deprivation in England was 7.6 years less than for a baby boy born in an area of least deprivation. Figures for 2013/14 show that over 20% of families with children fell at least 25% short of the minimum household income needed to avoid material deprivation. Social, economic, geographic and biologic factors all contribute to health inequalities, with responsibility for addressing many of these factors falling within the remit of local authorities. Work done in 2010 as part of the Marmot Review estimated the cost of treating illness and disability as a result of health inequalities at £5.5bn each year in England alone. Lost taxes and increased welfare payments were estimated to cost £28-£32bn.

4. There is a public policy drive towards devolving powers from the central government to local areas, with some areas in England negotiating the inclusion of health in extended devolution deals under the Cities and Local Government Act 2016. This is bringing the shortcomings in current legislation to much wider audiences as local, as well as national, administrators are discovering the limitations of action possible under existing laws.

5. Complex relationships between primary care, acute and tertiary care, social care and care in the community have come to the fore in all parts of the UK. These are greatly exacerbated both by a demographic trend that means people are living longer lives with increasingly complex and long-term care needs and by funding restrictions due to the state of the economy. This complexity has driven demand for public services' reform and greater integration of health and social care. However, existing legislation is not conducive to enabling the services concerned to adapt in the ways necessary or at the pace and scale needed to achieve effective change.

The public health community is concerned that legislation is currently failing to support the delivery of the duty to reduce health inequalities in England, reporting that it cannot utilise and implement existing laws effectively in all English local authorities. The public health community would like assurance that its legislative ability to support the Secretary of State for Health's new duties is not being compromised by laws that are out of date.

No comprehensive analysis of the piecemeal nature of present legislation or the ease with which the law can be utilised and implemented by public health professionals appears to have been undertaken in any of the UK's constituent countries.

An investigation into the extent to which legislation is able to be used to consider the population's health, particularly in England, is, therefore, now considered to be essential.

2. 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.

There are a number of areas which currently present public health professionals with difficulties in utilising legislation effectively to redress unfairness, especially in England.

1. Current legislation uses inconsistent and poorly defined terminology to describe "public health." Terms such as "Social wellbeing" (Localism Act 2011), "well-being" (Children and Families Act 2014), "human health," (Licensing Act 2003, Police Reform and Social Responsibility Act 2011), "public health" (Health and Social Care Act 2012, Licensing (Scotland) Act 2005), "welfare" (Housing and Planning Act 2016), "life chances" (Welfare Reform and Work Act 2016) and "health" (Housing Act 2004) all appear to be used in connection with protecting and improving the public's health.

Clarity of terminology over what constitutes the 'health service,' now that public health functions reside outside the NHS, is becoming increasingly important for areas negotiating the inclusion of health in any extended devolution deals under the Cities and Local Government Act 2016.

Such variation in wording creates confusion and demonstrates the need for greater understanding of how nuanced language can have an impact on the ability of the public health profession to access and use the law effectively.

2. The status of health impact assessments requires clarification. Currently these could range across strategic environmental assessments, regulatory impact assessments, health impact assessments and considerations around sustainable development. Health is not necessarily considered within some of these assessments. It would be very helpful to determine whether such impact assessments are mandatory and integral and therefore include health or if they are a separate process. Since strategic environmental assessments are a legal requirement under the EU Directive 2001/42/EC, the implications of this Directive when the UK leaves the European Union also need investigating.

3. Recent legislation has tended to give Directors of Public Health in England responsibililty within their local authorities without the levers they need to exercise required powers. This is resulting in a number of issues relating to the built environment. The built environment is a significant contributory factor in persistent health inequalities throughout the UK with poor quality environments more likely to be found in areas of socioeconomic disadvantage. There are three particular concerns:

i. licensing laws are being used with apparently widely varying degrees of success by public health teams to control the density of fast food takeaways, alcohol or gambling outlets. Unlike Scotland, public health is not a relevant factor in licensing decisions in England and Wales. The Police Reform and Social Responsibility Act 2011 amended the Licensing Act 2003 to establish a statutory duty for licensing authorities to consult health bodies over licensing policy as well as enabling Directors of Public Health in England / Local Health Boards in Wales to act as responsible authorities in licensing applications. However, additional guidance from the Home Office emphasises that the primary concern in licensing should be one of safety rather than one of public health. This has the contradictory effect of preventing Directors of Public Health from presenting their concerns in public health terms.

ii. planning guidance creates inconsistencies in the interpretation of 'sustainable development' because it is silent on issues of health and wellbeing and health inequalities. Several local public health teams in England report that interpretation of the Framework, both by the Planning Inspectorate and local council officers, appears to favour development rather than addressing health concerns. This is in spite of the fact that the Framework was amended in the light of a 2011 Select Committee report to broaden the definition of sustainable development to include a healthy society. The Planning Inspectorate was also reported anecdotally as making substantively different rulings when processing ostensibly similar Local Development Plans and Supplementary Development Plans which build in public health considerations because of divergent interpretation of planning laws.

iii. There is no consolidated body of legislation that addresses noise pollution. Currently the ability to deal with noise pollution is scattered across more than 20 separate Acts. Some of the legislation applies to England, Scotland and Wales and some to England and Wales only and some just to Scotland.

4. As a result of the Health and Social Care Act 2012, health protection responsibilities are now divided between local authorities, Clinical Commissioning Groups, and Public Health England, among others. As health protection responses should not depend on the strength of local relationships with individual post-holders, a clear delineation of responsibilities between organisations is required as a matter of urgency. Directors of Public Health have reported this issue is of particular concern in England's two-tier local authorities where environmental health and public health responsibilities are divided between district and county councils.

5. A further issue has arisen for the public health community as a result of the UK's decision to leave the EU. At present, the public's health is protected by many EU Directives and policy frameworks. As well as a lack of certainty over the future of such frameworks there is also growing concern at how health will be protected in any new trade negotiations. There is now a pressing need to look at the potential legislative gaps that may arise if the UK loses European mandates that currently protect and improve health and wellbeing

Exclusions: Legislation around housing and air pollution are also causing significant issues for public health. However, these areas have been excluded from this proposal because they are felt to require policy change and therefore would be outside the scope of the Law Commission.

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

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

Other (please state):

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.

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

The duty to reduce health inequalities was introduced in particular by the Health and Social Care Act 2012. As at December 2015, it is believed that no case law reports have been reported. The following references all describe aspects of the legal issues covered in this submission that are currently being experienced by the public health profession, particularly in England.

Cavill N, Rutter H. (2014) Obesity and the environment: regulating the growth of fast food outlets. London: Public Health England https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296248/Obesity_and_environment_March2014.pdf

Current noise legislation: a summary of the powers in England (2012). London: Chartered Institute of Environmental Health http://www.cieh.org/WorkArea/DownloadAsset.aspx?id=43548

Foster J (2016) The Licensing Act 2003: its uses and abuses 10 years on. London: Institute of Alcohol Studies http://www.ias.org.uk/uploads/pdf/IAS%20reports/rp22032016.pdf

Galbraith-Emami S. (2013) Public health law and non-communicable diseases. London: UK Health Forum. http://www.ukhealthforum.org.uk/prevention/pie/?EntryId43=28499

Gambling regulation: Councillor handbook. (2015) London: Local Government Association http://www.local.gov.uk/documents/10180/6869714/L15-230+Councillor+handbook+-+gambling+regulation+FINAL.pdf/3e8fafb9-493b-4027-a7c8-0feb89b8e209

Guidance for Commissioners on equality and health inequalities legal duties (2015) Leeds: NHS England Equality and Health Inequalities Unit https://www.england.nhs.uk/wp-content/uploads/2015/12/hlth-inqual-guid-comms-dec15.pdf

Health inequalities and population health. NICE advice LGB4. (2012) London: NICE https://www.nice.org.uk/advice/lgb4/chapter/what-can-local-authorities-achieve-by-tackling-health-inequalities

House of Commons Select Committee on Communities and Local Government (2011) The National Planning Policy Framework: eighth report of Session 2010–12. Volume I: report, together with formal minutes, oral and written evidence HC 1526 London: Stationery Office http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomloc/1526/1526.pdf

Jones R, Yates G (2013) The built environment and health: an evidence review. Concept briefing paper 11. Glasgow: Glasgow Centre for Population Health. http://www.gcph.co.uk/assets/0000/4174/BP_11_-_Built_environment_and_health_-_updated.pdf

Public health post-2013: second report of Session 2016-17 HC 140. (2016) London: House of Commons Health Committee http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/news-parliament-20151/public-health-report-published-16-17/

Martineau FP, Graff H, Mitchell C et al (2014) Responsibility without legal authority? Tackling alcohol-related health harms through licensing and planning policy in local government Journal of Public Health 36: 435-442 http://jpubhealth.oxfordjournals.org/content/36/3/435.full.pdf+html

Noise and nuisance law search (n.d.) UK Environmental Law Association http://www.environmentlaw.org.uk/rte.asp?id=308 as at 28/9/2016

Salay R, Lincoln P (2008) The European Union and health impact assessments: are they an unrecognised obligation? London: National Heart Forum http://www.ukhealthforum.org.uk/prevention/pie/?EntryId43=30789

Tipping the scales: case studies on the use of planning powers to limit hot food takeaways (2016) London: Local Government Association http://www.local.gov.uk/documents/10180/7632544/L15-427+Tipping+the+scales/6d16554e-072b-46cd-b6fd-8aaf31487c84

5. 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.

The need to review public health legislation to keep it in line with both current scientific knowledge and social and economic circumstances has been widely recognised internationally.

1. Since 2005, more than a dozen major pieces of legislation have been enacted around the world that focus specifically on public health. These include Australia, Canada, Finland, France, Greece, New Zealand, Norway and - most notably for the UK- in Wales with the Future Generations (Wales) Act 2015. Ten of these Acts set out overarching specific requirements either to reduce health inequalities or protect and improve the wellbeing of the population.

2. A report from the US Institute of Medicine in 2011 described a "sense of urgency" in the need to review public health legislation to take account of developments in the public health sciences, the economy, the functioning of the public health system, and the state of the population's health. In line with the situation in the UK, the IOM found that most legislation had been developed in response to epidemics and hygiene-related threats to health.

3. The weight of international research evidence suggests that legislation is an effective and powerful tool for governments to tackle the burden of non-communicable diseases.

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

It has become very apparent that the legislative contexts in Scotland and Wales are enabling public health professionals to deliver their functions with greater cohesion and clarity than in England. Concern is particularly strong among local authority public health teams in England at the mismatch between public health laws that now exists between the various UK jurisdictions.

Example 1: the Future Generations (Wales) Act 2015 places an obligation on public sector bodies to consider the impact of their policies on the wellbeing of the people in Wales. This is complemented by the Social Services and Wellbeing Act (2014) which requires local authorities, health boards and government ministers to promote and monitor wellbeing in both carers and those receiving care. Equivalent frameworks do not exist in England.

Example 2: the Active Travel Act (Wales) 2013 creates the legal requirement for local authorities to build and improve the infrastructure for walking and cycling each year as well as promote active travel as a mode of transport. There is no equivalent law in England.

Example 3: the Licensing (Scotland) Act 2005 includes an additional specific objective on "protecting and improving public health." Evaluation of the impact on licensing decisions has shown that Scotland is beginning to manage the overall availability of alcohol by refusing licenses, particularly on the grounds of overprovision. An equivalent public health objective does not exist in England, despite the fact that Directors of Public Health in England are now statutory consultees on licensing applications and can act as responsible authorities.

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

The public health community in England would like a review of legislation to cover one or more of the following:

1. Provide codification of legislation applicable to the practice of public health both UK-wide and in England, Scotland, Wales and Northern Ireland to ensure public health professionals are able to access the legislature more effectively, regardless of whether they are based in local authorities (as in England) or the NHS (as in Scotland and Wales).

2. Identify the adverse implications for the delivery of the public health function where laws differ between UK jurisdictions.

3. Provide clarification of legislation affecting the delivery of the public health function in England, particularly pertaining to the following issues: impact assessments, health protection, licensing, planning, and noise pollution, as well as addressing inconsistent use of terminology to describe public health.

4. Consolidate legislation where the ability to address an issue (such as noise pollution) is currently scattered across numerous individual Acts.

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.

The scale of the issues for public health in using legislation to manage the built environment is hard to quantify as local authority public health teams are not able to systematically collate the problems.

However, the extent of the issues with using the Licensing Act 2003 to manage gambling outlets can be illustrated by the Sustainable Communities proposal in 2014 led by Newham Borough Council on behalf of 93 local authorities in England to reduce the maximum stakes on fixed-odds betting terminals and to prevent the clustering of gambling outlets in deprived areas.

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.

   The benefits of reforming legislation to improve its use by the public health community would eventually be seen in economic terms through a reduction in the demand for health and social care services and improvements in the population's health status. Examples of potential cost-savings if legislation were to be more effective are:

   £1.09bn, representing the cost in 2013 of an additional 542 cases of acute myocardial infarction, 788 additional stroke cases and 1169 additional dementia cases in a single year arising from exposure to home environmental noise levels

   £3.5bn pa, representing the cost of alcohol-related harm to the health service.

   £11bn pa, representing the cost of alcohol-related crime to society.

   £7.3bn pa, representing the cost to the economy of lost productivity through alcohol-related ill-health.

   £47bn pa, representing the burden of obesity to the UK economy.

   The wider societal benefits would include improved health and wellbeing and reduced health inequalities - described by Sir Michael Marmot as a matter of "social justice" with individuals and communities more engaged in issues of health and wellbeing and community assets better used to support them.

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.

    The costs of reform are unknown at this point.

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.

    Marmot describes a social gradient of health, with clear evidence that poorer individuals and communities experience the poorest health and wellbeing and the greatest health inequalities when compared with areas of least deprivation.

Although it is recognised that public health laws are not scientifically or politically neutral, the impact of failing to use legislation effectively to protect the health of the population will be more noticeable in those areas of the country that are already classified as deprived. For example:

- the greatest number of fast food takeaways is in areas of highest deprivation with density rising by 43% since 1990.

- there are 40% more places to buy alcohol in areas of deprivation.

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?

The public health community believes that there is an increasingly urgent need for an independent review of legislation affecting the profession's ability to protect and improve the health and wellbeing of the population, especially in England. This review needs to be outside the political arena in order to provide the required level of impartiality and freedom from any political party policy influences or considerations. A review with substantive, cross-departmental recommendations is also more likely to be translated into law.

This review needs to be independent and conducted without prejudice or assumption about the current state of public health legislation. As such, the Law Commission is ideally placed to deliver such a review.

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

In a survey of public health professionals across both local and national governments for the UK Public Health Network, 79% of respondents felt that public health legislation, particularly in England, is "a mess of historical developments and fudges" and that a review is "long overdue." 54% of respondents reported a lack of confidence in using legislation to support the public health function. Only half of the respondents felt they had a sufficient understanding of relevant legislation that could be used to protect and improve the health of the public. Respondents in Scotland and Wales showed more confidence in understanding legislation relating to their countries. Overall, however, comments received indicated a high degree of concern that public health professionals have to climb a "legislative mountain."

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.

To the best of our knowledge, no other organisation is giving current consideration to this issue. There are related pieces of work in progress, most notably the House of Lords inquiry into the Licensing Act 2003 that began in June 2016 but this does not focus solely on legislative difficulties with the Act. The most recent examination of the state of UK public health legislation was in 2013 by the UK Health Forum who made an international comparison of legislative ability to respond to non-communicable diseases.

The general lack of legal expertise within the public health community would make it very difficult for any individual public health organisation to do this kind of review. There are also very few specialist schools of public health law in the UK, making capacity to conduct a timely review a significant issue.

Thank you for your response.

Please send, by **31 October 2016**, to: 13th Programme Project Officer
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We would like to know more about what our stakeholders think of the Law Commission and our work, and hear your thoughts on what we might change or improve. If you would be willing to take part in a short survey, please would you give us your email address: