

Item 11 Appendix 1

Draft Somerset Board submission to the Law Commission's online consultation form for its 14th Programme of Law Reform

Suggested SRA answers are in bold, or highlighted in yellow. For ease of reading, Consultation Question numbers and an initial header are also picked out in bold.

Answers are written for submission by the SRA Chair.

Your idea for reform

Please use this questionnaire to tell us where you think there is a significant problem with the law. We want to know what you think is wrong and what practical problems arise. Please give us as much information as you can, even if you cannot answer all the questions.

Please note: At the end of this questionnaire you will be asked if you would like to submit another idea for reform. If you would like to submit another idea, select "yes" and you will be taken to a new form. You may submit up to five ideas for reform. Please contact us at programme@lawcommission.gov.uk if you would like to submit more than five ideas.

Consultation Question 1

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

Please share your views below:

Widespread confusion and frustration about riparian responsibilities, that is the obligations for maintenance that come with owning watercourses, culverts, and structures likely to affect flood risks.

The problem is exacerbated because there are a range of different organisations and people with overlapping responsibilities for addressing flood risks. Widespread misunderstanding exists about what duties public sector organisations have in relation to the management and maintenance of watercourses. Often riparian owners are surprised that no public sector organisation has a statutory duty to maintain watercourses (unless the organisation is also the riparian owner). Often the permissive power to intervene if there is a flood risk is mistaken for a legal duty to maintain a watercourse.

From a public sector perspective, the problem manifests in a lack of maintenance by riparian owners which leads to larger problems that the public sector, using public funds, is then expected to rectify.

Reform could lead to much greater clarity and understanding, and more effective actions being taken to reduce flood risks, which would benefit people, properties, businesses, infrastructure and the environment.

I am responding to this consultation as the Chair of Somerset Rivers Authority (SRA) on behalf of the Board of the SRA.

You may find some background detail useful. Somerset Rivers Authority is a partnership comprising Somerset County Council, Mendip District Council, Sedgemoor District Council, Somerset West and Taunton Council, South Somerset District Council, the Parrett and Axe Brue Internal Drainage Boards, the Environment Agency, Natural England and the Wessex Regional Flood & Coastal Committee.

The SRA was launched in January 2015, following damaging floods in 2012 and 2013-14, and the production in 2014 of a 20 Year Flood Action Plan for Somerset. This Plan addressed many areas of concern, including a strong feeling in Somerset that recent floods would not have been so bad if more people had been aware of – and acted properly upon – their riparian responsibilities, particularly as regards maintenance. In seeking to improve matters, the SRA and its partners have consistently come up against difficulties with regards to people’s understanding of the law and (un)willingness to act. There are, of course, innumerable different reasons for people’s behaviour but one common factor does seem to be the frustrating state of the law itself. This view is supported by the findings of the *Report of a review of the arrangements for determining responsibility for surface water and drainage assets*, produced for the Department for Environment, Food and Rural Affairs (Defra) by David Jenkins and published in August 2020. Mr Jenkins sits on the SRA Board as the Chair of the Wessex Regional Flood & Coastal Committee. His Report noted “that riparian owners’ responsibilities with regard to flood risk management and maintenance are ill defined and poorly understood”. Mr Jenkins’ report can be found at <https://www.gov.uk/government/publications/surface-water-and-drainage-review-of-responsibilities>

Consultation Question 2

Can you give us 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.

Please share your views below:

Somerset Rivers Authority is regularly contacted about riparian responsibilities, and is regularly involved in discussions and activities about the subject. In terms of how problems affect people, common factors are confusion, frustration, anger and fear, particularly about

money and the possible consequences of different courses of action. Recent cases feature an elderly couple who may be forced to sell their home; people whose homes and gardens are being flooded during periods of heavy rain; concerns about a crumbling weir and its repair or removal and the implications thereof for nearby properties; as well as a disagreement with a property company about a charge being made for flood alleviation works, which a caller to the SRA felt should not be levied because of “ancient farmers’ rights”.

Many people believe that when it comes to water a public sector organisation ‘is responsible’ and that therefore such a body is bound to intervene.

Experience further suggests that when people are in quandaries about their own riparian responsibilities their feelings as communicated to the SRA tend to be a varying mix of hope, indignation and desperation.

In Somerset more people do seem to be approaching the SRA. It is the case that the SRA was set up to provide an additional level of flood protection and resilience for Somerset residents, in line with the objectives of the 20 Year Flood Action Plan that I referred to in my answer to Question 1. But the SRA’s remit of ‘doing extra’ does not mean that it can or should be used to fix problems that are legally the responsibility of riparian owners, especially in situations where the SRA judges that very limited community benefits would arise from spending public money. When the SRA is approached to intervene in matters that it was not set up to resolve, this can take time and resources away from other SRA projects and rejecting requests can generate ill feeling.

In short, people tend to have adverse experiences relating to the state of the law concerning riparian responsibilities. This is backed up by David Jenkins’ report, which notes frequent instances of stress and exasperation.

It would certainly be beneficial if clarity could be gained about triggers for enforcement. Put another way: what makes something bad enough to warrant spending public money on enforcement?

Consultation Question 3

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

Please tick one or more boxes.

Administrative or public law

Property or land law

Trusts and wills

Consumer law

Planning and environment

Medical or health law
Criminal law
Family law
Commercial or contract law
Regulatory law
Don't know
Other

If other, please state: Common Law (a very grey legal area)

Consultation Question 4

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

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

Please share your views below:

This area is well covered in two sections of David Jenkins' report. Firstly, 'Legislative background', pages 17-22. Secondly, 'Riparian and land owners' responsibilities', pages 50-56. For example, on page 51 Mr Jenkins covers the use of enforcement powers under section 25 of the Land Drainage Act of 1991, and the use by Internal Drainage Boards of their enforcement powers.

He goes on to note that the Association of Drainage Authorities urges "That a greater onus should be placed on riparian owners to take an interest in flood risk issues on their land, the consequential impact on others, and know how to deal with them. In parallel, property title deeds should take greater legal account of riparian ownership responsibilities and perhaps some additions to the requirements of property conveyancing would be helpful in this respect... The role of riparian owners should not be overlooked, to ensure that they are effectively maintaining channels and water management assets on their land." A particular problem that Mr Jenkins identified is that whilst the law places a responsibility to maintain a watercourse on a riparian owner there is no defined standard that the watercourse must be maintained to which makes it difficult, if not impossible, to require pro-active maintenance to avoid problems, on the principle of (to adapt an old proverb) 'a ditch in time saves nine'.

Mr Jenkins adds that "the Chief Executive of the National Flood Forum reports that in their surveys, riparian management responsibility is one of three issues that consistently top the lists of issues that people are concerned about. He says that people's awareness of them, their lack of enforcement and the role of maintenance in managing flood risk is a regular feature of discussions in flooded communities".

Consultation Question 5

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

You might have some information about how overseas legislatures have responded or how the court or tribunals approach the problem.

Please share your views below:

N/A

Consultation Question 6

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

Please share your views below:

N/A

Consultation Question 7

What do you think needs to be done to resolve the problem?

Please share your views below:

Relevant laws relating to the responsibilities of riparian owners need to be clarified, reformed and formalised.

Consultation Question 8

What is the scale of the problem?

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

Please share your views below:

There is almost universal confusion and frustration about riparian responsibilities, among those exposed to the subject. As Mr Jenkins notes on page 54 of his report: "this is a significant issue that the public interest calls to be addressed".

Interest in the subject tends to peak following severe summer storms.

Consultation Question 9

What would be the positive impacts of reform? Benefits derived from law reform can include:

modernisation, for example, supporting and facilitating technological and digital development;
economic, for example, reducing costs or generating funds;
fairness, for example, supporting individual and social justice;
improving the efficiency and/or simplicity of the law, for example, ensuring the law is clearly drafted and coherent to those who need to use it;
supporting the rule of law, for example, ensuring that the law is transparent;
improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost.

By way of example, when considering economic benefit, 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.

When seeking to address wider societal benefit, we are interested to hear your assessment of non-economic benefits. For example, will individuals have greater access to justice, will the reputation of legal services be enhanced, or will reform offer greater protection to victims of crime?

Please share your views below:

Reform would improve the efficiency of the law and support the rule of law. Greater clarity and understanding would bring economic benefits, because less time, money and effort would be wasted. The main societal benefit would be reduced flood risks.

Consultation Question 10

If this area of the law is reformed, can you identify what the costs or other negative impacts of reform might be?

The costs of reform might include, for example, increased administrative burden falling on business as a result of new regulatory requirements, or the costs and maintenance of creating a new oversight body. Non-economic costs might include reducing access to justice or unnecessarily increasing the regulatory burden on business.

Please share your views below:

N/A

Consultation Question 11

Does the problem adversely impact equality, diversity and inclusion by affecting 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 criminal justice, existing problems might be more likely to have a disproportionate impact on BAME communities. Or, if the law relates to agricultural land, it might affect farmers and their families more than the general population.

Please share your views below:

N/A

Consultation Question 12

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

Please share your views below:

The Law Commission would be the appropriate body to undertake this work because of the subject's difficulty and complexity and its roots in common law as well as statute law. The SRA agrees with the ultimate conclusion drawn by David Jenkins, when he notes on page 56 of his report: "I have not however found it possible to perceive or establish a consensus among respondents as to the way forward, or to form a clear recommendation, other than to identify that the issue calls for wider examination and consultation."

Riparian responsibilities is a subject that affects everybody in the UK, directly or indirectly, in so far as everybody may be affected at some time by flood risks. In the SRA's view, the expertise that needs to be applied, over an extended period of time, to riparian responsibilities makes it ideal for the Law Commission.

Consultation Question 13

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

Please share your views below:

In his report, Mr Jenkins recommended to Defra:

“That in accordance with the commitment set out in the Surface Water Action Plan, the Environment Agency, in consultation with others as appropriate, review their guidance to landowners on *Owning a watercourse*, in particular to ensure that this is as clear and comprehensive as possible on riparian owners’ responsibilities for maintenance of watercourses and related features, and that this guidance be promoted widely to those affected by it.

“That Defra consider what further steps the public interest requires to be taken, to ensure the maintenance of privately owned watercourses and related features, including culverted watercourses.”

After Defra accepted these recommendations, I wrote to Defra as Chair of Somerset Rivers Authority, on behalf of the SRA Board, to request that this work should be expedited.

Rebecca Pow MP, Defra’s Parliamentary Under Secretary of State with responsibility for flooding, replied to say:

“With regards to riparian landowners and their responsibilities, we committed, in our policy statement on flood and coastal erosion risk management, to ensure that they are clear on their responsibilities and better engaged in the protection of their communities. This is part of our overall ambition to create a nation more resilient to future flood and coastal erosion risk and will reduce the risk of harm to people, the environment and the economy.

“We will be looking to all our stakeholders to help raise awareness and understanding about riparian responsibilities. This could include raising the profile of the Environment Agency’s guidance on owning a watercourse (<https://www.gov.uk/guidance/owning-a-watercourse>). I would welcome the Authority’s support in using and promoting this guidance locally.

“As you note we have published David Jenkins’ review into surface water and drainage responsibilities and immediately accepted 12 of the review’s recommendations, including both on riparian landowners’ responsibilities. We are currently carefully considering the other recommendations from the review, as well as how the commitments and actions from the policy statement, surface water management action plan and review combine and complement each other.”

The Somerset Rivers Authority Joint Scrutiny Panel has also discussed on several occasions the need for greater clarity and action on matters concerning riparian responsibilities. The Panel consists of representatives from Somerset County Council, Mendip District Council, Sedgemoor District Council, Somerset West and Taunton Council, South Somerset District Council, and the Parrett and Axe Brue Internal Drainage Boards,

Consultation Question 14

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

Please share your views below:

For Defra’s involvement, please see the response to Question 13.

The Lincolnshire Riparian Working Group has also been considering this problem recently, its rationale being:

“The understanding and undertaking or lack thereof of riparian responsibilities, although not sine qua non, plays a contributory factor in creating and augmenting an areas flood risk profile. Indeed, during the extended period of flooding incidents from June to November 2019 numerous properties, highways, public and private assets were inundated due to overcharged private riparian systems.”

For more information see: <https://www.shiregroup-idbs.gov.uk/wp-content/uploads/2021/05/Riparian-Project-RMA-Study-Results-Final-Report.pdf>

The Law Commission should also look into the problem because doing so must be considered likely to produce wide-ranging and beneficial results. It would have a positive impact on people’s lives.

Consultation Question 15

Would you like to submit another idea for reform?

You may submit up to five ideas for reform.

(Required)

Yes

No

TEXT ENDS