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The challenge of public law law reform: reflections on a failed Law Commission project

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ABSTRACT

This article reviews the history of the Law Commission project on administrative law and citizen from 2003, a project which the Law Commission essentially substantively ended in 2010. The project provides lessons both about the initiation and design of law reform projects and on the prospect of law reform being institutionally capable of contributing to the development of core areas of public law.

KEYWORDS

Law reform; public law; remedies against public bodies; judicial review; tort liability of public bodies

Introduction

The aim of this article is to reflect on, and learn some lessons from, the most 'public law' project that the Law Commission has attempted during the life of what is now the Public and Welsh Law Team at the Commission. That project was known by various names. The report was titled 'Administrative Redress: Public Bodies and the Citizen', and I refer to it as 'the remedies project' below. Although it was the most public law project, it also involved substantial consideration of private law issues, in the context of the liability of public bodies. From this experience, I suggest the key lessons for future administrative justice law reform by the Law Commission are, first, that this project does not provide a guide to how to do it in the future, and indeed, it is highly unlikely that a similar project would be attempted now. Secondly, taking on any project in this area requires political thinking about how to frame a project that is capable of being undertaken using the Law Commission's independent and non-political methodology. And finally, in the light of the above, it is unlikely that a far reaching, 'pure public law' project could realistically be countenanced by the Law Commission, at least if anything like current political conditions persist.

The current writer was the civil service lawyer who was team manager of the relevant team from its inception at the end of 2000/beginning of 2001 to the end of 2014. What follows relies in part on my memory of some facts; and more importantly, on a general knowledge and a set of understandings arising out of my participation in the institutional and 'cultural' context of the work I was then undertaking.

In its small way, therefore, this article raises big issues about the academic use of personal recollection and experience. There is a considerable academic literature within anthropology and sociology/criminology on 'insider research' in ethnography (Hodgson 2005; Southgate and Shying 2014; Ferrell and Hamm 1998). That deals in part with questions of how, and whether,

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'insider status' is achievable in a world of shifting identities, and how and when the proximity of the purported insider is to be assessed. These sorts of questions do not arise (at least, not in anything like the same way) when one looks back, as a researcher, on one's own pre-research life. But the literature does, valuably, also point at the advantages of insider status, providing as it does some claim to access to particular experiences, to a rich knowledge of the environment, to an 'intimate cultural knowledge of the contexts' (Southgate and Shying 2014) involved. And this conception of insider status has been used in legal or socio-legal research (Abram and Blandy 2018).

But if there are advantages in insider status, they are not conclusive: as Wolcott puts it, "[t]here is no monolithic insider view … there are multiple insider views, multiple outsider views. Every view is a way of seeing, not the way of seeing." (Wolcott 1999, p. 137)

Another way of looking at how one puts personal experience to use is memoir. This article might be thought of as containing a (small) personal memoir. Memoir is considered a legitimate source for the historian: but not an unproblematic one (Janken 2016).1 A memoir is to be treated with care, and using it, another researcher must take full account of the biases, personal or normative, of the memoirist, and where possible seek corroboration. However, if an historian can footnote a memoir, which records the memoir-writer's personal acquaintance2 with a fact or experience, then the researcher writing in part from his or her own personal experience can, equally, forgo footnoting a fact or experience which relies on that researcher's personal acquaintance.

The fact that I rely in part on personal knowledge in this article should not be privileged, but neither should it be discounted.

The context

The development of the Public Law Team provides the immediate context. One might think that the existence of a team called the "Public Law Team", with a Commissioner with the same title, meant that the Law Commission had decided at some point in the abstract that it needed a resource to do public law law reform, and had created the bureaucratic apparatus to accomplish that. It was not like that. It was, rather, an outcome of the response of the Commission to particular contingencies during the relevant period.

Initially, the team was called the Administrative Justice Team, and then for some time the Housing and Administrative Justice Team. This reflected the fact that its main project from 2001 to 2006 was a major project on housing tenure reform (Law Commission 2006).[3] The original impetus for this project had come from the then Chairman of the Commission, Lord Carnwath, as he now is. The "administrative justice" element came from the fact that the Commission had effectively been handed a small project on a particular group of tribunals by the Leggatt Review of Tribunals (Law Commission 2003).

The Commissioner from 2001 until 2006 was Professor Martin Partington CBE QC, an academic who specialised in housing law and administrative justice. He happened to be a perfect fit to undertake these projects, rather than the team taking its character from his interests. Partington subsequently stayed on as a 'special consultant' to finish two further housing law projects after Kenneth Palmer QC became Commissioner in 2006 (Law Commission 2008a; 2008b). Palmer was the first of a sequence of practitioner-Commissioners for the team, the second of whom was Frances Pattison QC, who assumed office in January 2010. The administrative redress project spanned the terms of office of Partington, Palmer and Patterson. The reference to Welsh law was added after Nicholas Paine QC, another practitioner, became Commissioner in 2013, in recognition of the Team's role in reforming Welsh law (Percival 2019).

It can be seen that the Team, from its inception, was not conceived as a resource to undertake

what a university curriculum, or a practitioner, would think of as public law. The name change occurred in about 2006, and may have had more to do with the recruitment of the Commissioner than anything else. Rather, projects dealing with substantive areas of what one might call broad social welfare law have featured. If the first period of the team's existence was dominated by housing law, the second was dominated by another large and ambitious project on adult social care (from 2008 to 2011). Since then, the team has developed a series of portfolios of projects which involve the reform of large statutory regulatory structures, usually proposed and supported by departments other than the Ministry of Justice (the regulation of health care professionals, taxis and private hire vehicles, electoral law, planning law in Wales).

The project

In this section, I set out the history of the remedies project. The substance of the law reform proposals, and indeed of the criticism of them by academics and others, are only dealt with briefly, to the extent that that is necessary to give an account of the events. Anyone interested in these details may consult the referenced documents.

First stages

The original impetus for the remedies project was a paper presented by Michael Fordham at the Government Legal Service's annual administrative law conference in March 2003.[4] That paper argued that existing tort causes of action were inadequate to give proper financial reparation for administrative failures resulting in financial loss. Fordham emphasised the need for an independent, flexible, public-type financial remedy on judicial review, rather than a binary, winner-takes-all tort-type remedy.

The next step was a "Discussion Paper" issued by the Team (that is, not formally approved by the Commission). The Paper, at much greater length, pursued a broadly similar line, although without formally coming to conclusions. The Paper moved towards seeing the lack of a general discretionary power to award damages on judicial review as a lacuna, given the (at the time, new) power of the court to grant damages under the Human Rights Act, and the possibility of compensation in EU law cases.

The Paper was in part prepared for discussion at what was described as a high level seminar, which took place in November 2004, presided over by Lord Phillips, the then Master of the Rolls. The seminar was critical of the court-centric approach taken in the Paper, and called for a wider perspective, including consideration of ADR, ombuds, complaints procedures and so on.

This perspective clearly informed the approach formally adopted by the Commission when the first phase of the project was approved in the Ninth Programme of Law Reform (March 2005), which emphasised a wide approach to dispute resolution. The Ninth Programme announced a scoping project to delineate the subject matter of a full scale law reform project.

The Scoping report published as a result, however, moved back towards a more court- and money-centric approach. While insisting that it would still consider non-court means of redress, it centred what was described as a "bi-focal" approach, considering both monetary remedies on judicial review and private law claims against public bodies in tandem.

This change in approach was partly the result of the problem of defining a realistic project, and also more closely reflected the views of Kenneth Parker, who became Commissioner in January 2006.

The scoping report announced the terms on which the substantive project would proceed. It is more usual, certainly since that time, for the publication of a scoping report to constitute a review point in a project, that is, a point at which both Government and the Law Commission must decide whether to proceed.

Thus the Scoping Report in this project assumed that the Commission's *vires* to undertake the

substantive project relied on the Ninth Programme of Law Reform, which, in accordance with the procedure set down in Law Commissions Act 1965, section 3(1)(b) and (c), had been approved by the Lord Chancellor.

This had been controversial between the Department for Constitutional Affairs (as it then was) and the Law Commission. Officials in the Department, apparently now more alive to the possible nature of the project, had argued that the Programme only covered the scoping review, and that a new reference under section 3(1)(e) of the 1965 Act was necessary for the substantive project. The Commission countered that the wording of the relevant entry in the Programme was such that it covered the substantive project as well. Whatever the subjective intentions of the drafters of the Programme had been in 2005, the Department did not press the point.

The consultation paper

Work accordingly started on the Consultation Paper. The paper was published in July 2008 (Law Commission 2008c). The proposals were far reaching. The paper continued with the 'bi-focal' approach, considering in tandem the availability of monetary remedies in public law, and claims for damages against public bodies in tort. The core was a requirement to show "serious fault" before damages were available against a public body, whether on the public or private side (ie in addition to public law illegality, and negligence, respectively). This was expressly based on EU law principles.

In judicial review, there would be a further hurdle, in that the statutory regime within which the public body's decision fell would have to be, objectively, there to confer a benefit on the class of individual into which the claimant fell. Further, the award of damages in judicial review would remain discretionary, at least in a residual sense, as with the prerogative orders.

Consideration of the private law side in the consultation paper was dominated by negligence, with a suggestion that breach of statutory duty and misfeasance in public office should be abolished. Within negligence, the aim was to carve out a category of "truly public" acts of public bodies for a completely new scheme. Within this realm, the "serious fault" threshold would apply, thus, on the fault axis, narrowing the potential liability of public bodies. However, a wider range of claims would be justiciable by the courts. The same conferral of benefit test that was applied to damages in judicial review would stand in the stead of "duty of care" in negligence. And the courts would have a discretion to disapply the principle of joint and several liability within the 'truly public' sphere.

These proposals, it will be seen, were designed to be balanced. In some respects, public bodies' exposure to damages would be increased, becoming available on judicial review, and with the extension in the range of justiciable issues. However, in other respects, exposure would be reduced, by virtue of the 'serious fault' criterion and the possible disapplication of joint and several liability.

In addition to being presented as a balanced set of proposals, there were other attempts to reassure public bodies nervous about the effects of the proposals. First, much was made of the dangers of 'defensive administration' if liability to damages claims was extended, on an analogue with the phenomenon of 'defensive medicine'. To interrogate claims and counter-claims about 'defensive administration', a literature review was commissioned from Alex Marsh, professor of social policy at Bristol University, on the impact of changes to liability on the conduct of public bodies. The full report, which has never been separately published,[5] provides an exhaustive account of (largely) domestic and US literature on the question, and concludes that there is ultimately no generally applicable answer to the question: does increased liability encourage defensive administration or improve bureaucratic performance? It also indicated what features of public bodies affected how they might react (or not) (Law Commission 2008c, Appendix B).

Secondly, the Consultation Paper included an analysis of all judicial review applications

resulting in hearings in 2007 and concluded that, of 121 successful applications, 'serious fault' would have been found in 18 (*Ibid*., Appendix C). The aim of the analysis was to demonstrate that this criterion would mean that damages would only be available in a moderate proportion of successful applications for judicial review.

However, the Consultation Paper did not, and could not, provide a proper cost/benefit analysis. Such an analysis was necessary as the central part of the Government's requirement for an Impact Assessment of major policy changes, which the Law Commission generally undertook. It was, however, impossible to conduct such an analysis in this instance, there being no reliable base-line evidence of the existing exposure to damages claims of public bodies in general, or central Government departments in particular.

The public law proposals received a mixed reception on consultation. Put broadly, public law academics and practitioners supported the analysis that the lack of monetary remedies on judicial review was a flaw in the system. Some agreed with the proposals, although many had issues with one or more of the elements. Other consultees were much more likely to be critical. In part, this was a spill over from opposition to the private law proposals, the two sharing many characteristics, although there was certainly also principled opposition. There were also concerns on practical and procedural aspects.

The response on the private law side was described in the final report as 'almost universally negative'. Probably the most fundamental and widespread criticism, shared by many of the most prominent academics, was that the Commission's analysis of the failings of the current system was wrong; and there was no need for reform. Secondly, even if there was a case for reform, then the proposals were unworkable, unsuitable, and generally unpleasantly continental in flavour.

The Government View

But it was the Government's response that was most important to the outcome of the project. The first point is that the Government's formal response, received from what was by then the Ministry of Justice (MoJ), had gone through a full scale Cabinet committee write-round. Normally, in a Law Commission consultation, the Department with policy responsibility would providing the response, which would be subject to whatever level of policy clearance was thought necessary within the Department. In this case, however, the MoJ thought it necessary to seek Government-wide policy approval for the response, via the relevant Cabinet Committee. This was very unusual and reflected the level of concern felt within Government about the project.

It was also very late. The consultation period elapsed in November 2008. The Government response was received in May or early June 2009.[6] While it was common enough for a response, including a Government response, to be a few weeks' late, this level of delay was unprecedented.

This was not the first pause caused by Government concern. The original plan had been for the publication of a consultation paper before the end of 2007. The Commission had established a 'Government Contact Group', composed largely of Government lawyers, who were kept informed of the work as it developed. In late 2007, the Commission was asked to delay publication pending the provision of new information on the likely impact on liability of the proposals. Although the Commission stated that 'the delay did not to result in the production of any significant new information', the proposals were said to have been recast to avoid 'misunderstandings' (Law Commission 2008d, pp. 44-5). It does not appear that the proposals were significantly amended as a matter of substance at this point.

There had been, and would continue to be, meetings with Treasury officials in an attempt to access even base-line data about existing exposure to compensation of central Government (let alone other parts of the public sector), which in the end proved fruitless.

The Government's response was wholly and implacably negative in respect of both the public law proposals, and the new scheme for negligence, on both principled and practical grounds. It welcomed the proposals on joint and several liability, and (somewhat less warmly) those in respect of the ombuds.

Withdrawal and the report

It is normal for staff at the Law Commission to maintain continuous contact with officials in relevant Departments during the currency of a project. Standardly the point of contact is the official with primary policy responsibility for the area. Relations became more adversarial during the currency of the remedies project than is normally the case, and, rather than a policy official, the Departmental/Governmental side was represented by lawyers, including at a higher than normal level. It became apparent that there was interest in, and concern about, the project in a number of departments across Whitehall. Anecdotally, Commissioners and members of staff at the Commission working on wholly unrelated projects in other law reform teams were becoming aware of some level of hostility towards the Commission as a result of the project. On at least two occasions, there were meetings with the Treasury Solicitor, the head of the Government Legal Service, with permanent secretary status.

Over the summer of 2009, it became clear to the Team that there was no point in continuing with the project as it related to the central themes of monetary remedies on judicial review and public bodies liability in negligence. Before Parker left office in September, the agreement of Commissioners had been secured for abandoning the main part of the project.

The result was that when it was published in May 2010 (Law Commission 2010a), the Report announced that no further work would be done in respect of remedies on judicial review and the negligence scheme. The report gave two reasons for this. One was the firm opposition of the "key stakeholder", the Government. The second was the Commission's inability to undertake an analysis of the financial effect on the liability of public bodies of the proposals, in the absence of even basic data. This second reason was advanced as making it impossible to address the concerns expressed by Government.

The Report also contained the Commission's substantive response to the criticisms of the proposals made by consultees. In both cases (that is, the public and private sides) the defence was reasonably robust. But it was clear from the terms of the discussion that, while the Commission hoped that the question of monetary remedies on judicial review would continue to be discussed, it was accepted that the private law proposals were dead. It would be reasonable to assume that, if the approach of the Government had not been as it was, the Commission would have persisted with, while no doubt amending, the judicial review proposals, while discontinuing those relating to negligence.

The relatively modest proposals in respect of ombuds were broadly supported,[7] and the Report announced that work on this aspect would continue. There followed a further consultation paper in September 2010 and a final Report in 2011 (Law Commission 2011).

In addition, the Report made recommendations on financial reporting, with a view to facilitating the collection of the data to allow the assessments of liability that had proved impossible to be undertaken in the future.

What went wrong?

Machinery of Government

A key part of the Whitehall, and indeed, political, context is provided by the development of the old Lord Chancellor's Department into the Ministry of Justice.

The Lord Chancellor's Department was a relatively small department, although hardly tiny, with 12,000 staff and a budget of about £2.4 billion in 2001/2. Its principal executive role was

confined to administering the courts and legal aid. In addition, it had policy responsibility (as its successors have had) for the courts and the judiciary, and for the civil law – that is to say, any part of the civil law that did not specifically belong somewhere else in Whitehall. It was the sponsoring Department for the Law Commission, with responsibility for recruitment, budget and so forth. In addition to that role, the LCD's policy role in relation to civil law meant that it was the Department with policy responsibility for the subject matter of many Law Commission projects. This was the case with the remedies project.

In 2003, Lord Falconer was appointed Lord Chancellor, the Government tried, but ultimately failed, to abolish the post of Lord Chancellor, and the Department for Constitutional Affairs came into being. The DCA was more than a name change for the old LCD – it acquired policy responsibility for constitutional reform in general, for the Channel Islands and the Isle of Man from the Home Office, and became a sort of feudal overlord of the Scotland and Wales Offices. But it did not add significantly to the executive responsibilities of the department.

The change from DCA to Ministry of Justice in 2007 did, however. The new Department acquired policy responsibility for criminal law and penal affairs, and with it, executive responsibility for prisons and probation. In 2014/15, after some years of expenditure cuts, the MoJ's budget was £9.3 billion.

The old LCD was seen as a department which spoke for the judges, and therefore the law, within Whitehall. This was inextricably linked to the office of Lord Chancellor itself. The Lord Chancellor had always had a political and administrative dimension, but had also been the head of the judiciary. Until very recently, Lord Chancellors sat judicially (Lord Irvine being the last to do so). Since the late seventeenth century, Lord Chancellors had been members of the House of Lords (and indeed its speaker), and therefore, at least in recent times, not people with front-rank political ambition.

All this meant that when undertaking the policy role in relation to the civil law within its remit, the Department was, at least in part, doing so with a judicial/lawyer's perspective. Of course, legislation always requires Cabinet level approval, and Governments act politically. But at the critical earlier stages of policy formation, when the LCD came at a problem, it did so with some sense that the courts and the judges were its client, not a political secretary of state. It was through mechanisms controlled by the LCD that the revolution in judicial review triggered by the introduction of Rules of the Supreme Court, Rule 53 came about.

The fundamental change to the nature of the LCD which came about as a result of its conversion to the DCA, and in particular the attempt to abolish the office of Lord Chancellor, was recognised as creating a crisis for the judiciary. The result was a wholesale reform of judicial leadership and the formal position of the judiciary under the constitution. This was accomplished both by the Constitutional Reform Act 2005 and by new understandings, such as those set out in the 2004 'concordat' agreed between the Government and the judiciary.

But there was no corresponding 'rescue' for the old LCD's role in the rational development of the civil law, nor could there have been. In place of the LCD, we now have, in the MoJ, a mainstream political spending department, headed by non-lawyer career politicians in the House of Commons.[8] Within this very much larger department, much the same policy resources are devoted to the general, or residual, civil law as was the case under the LCD.

This transformation of the Whitehall structure for considering reform to civil law took place at much the same time as the remedies project was progressing through its stages at the Law Commission. The change does not mean, of course, that the permanent policy apparatus at the Ministry is no longer capable of assessing and acting on sensible law reform proposals relating to the broad civil law. But it does mean that in doing so it is no longer at least partly insulated from political pressure in the way it once was. This makes it much more difficult for the Ministry to stand up for proposals that might be objectively rational, but which may impact negatively on other Departments, or which may carry political dangers.

Decision-making within Government

The nature of the subject matter meant that a non-MoJ department considering the proposals looked (a) to its lawyers; and (b) to its *litigation* lawyers to advise it on the proposals. In doing so, the lawyers clearly advised that the proposed reforms held dangers, and had few upsides.

The Law Commission proposals, particularly those on the private law side, attempted to provide a balanced package, albeit based on guess work rather than data. In particular, the extension of liability in terms of a narrower test for non-justiciability was balanced against the higher fault element of 'truly public', and the discretion to disapply joint and several liability. However, although this could be argued to be balanced across the public sector as a whole, the loser was more likely to be central government departments, the winner public bodies delivering direct services, or arms-length regulators. And it was the former who were making the decisions. It does not matter how much local authorities might save in routine highways litigation, if the Home Office or the Department for Transport might see more high-level policy matters before the courts, the subject of a negligence claim.

It is also worth noting that the natural conservatism of the Government lawyer was reinforced by recent shocks to the system. In particular, both freedom of information and corporate manslaughter were quoted to Commission officials as examples of what were seen as own- goals by Government, the repetition of which was to be avoided.

Conclusions

The lessons that can be drawn from this history are relevant to the assessment of the practice of law reform in England and Wales in a general sense. But they are also lessons that might be helpful for anyone considering proposing a project to the Law Commission to keep in mind.

First, it is highly unlikely that this history could be repeated now. The reason for this, however, is not that such a project would now enjoy a better chance of success, but that it would be stifled at birth.

A number of reforms were made to the statutory scheme governing the Commission, and in particular to its relationship with Government, in the Law Commissions Act 2009. The reforms were designed to improve implementation of Law Commission reports by (in part) preventing too wide a gap developing between the intentions of Government and the development of proposals by the Commission. In particular, the Act provided for a Protocol to be agreed between the Lord Chancellor and the Commission.[9] The Protocol agreed in 2010 provides that, before commencing a project, the Minister with relevant policy responsibility must, with the support of the Permanent Secretary, 'give an undertaking that there is a serious intention to take forward law reform in this area', as well as to provide staff to liaise with the Commission (Law Commission 2010b, para.7). This requirement for both consideration and commitment at a reasonably high political and policy level would, probably, have resulted in the project failing for lack of support.

Even if an initial scoping stage were to be approved, as is at least possible, it is inconceivable that, today, it would not be expressly clear whether the scoping report constituted a break- point or not. The Protocol requires agreement on review points and on the overall timetable, and even before the Protocol was agreed, that had become clear practice (*ibid*, para.12).

Some have seen the Protocol as a threat to the independence of the Law Commission. This is not the place to argue that point (although I think it wrong). But whether it is desirable or not, this is the set up now, and it is therefore relevant for anyone proposing a project for inclusion in a Programme of Law Reform.

Secondly, it would have been very much better if the remedies project *had* been stifled at birth. It may have been a good idea. But law reform is about changing the law for the benefit

of people. It is not an abstract intellectual exercise. A significant amount of this jurisdiction's scarce law reform resources were spent, for – on and off – about seven years, on an endeavour that failed, and that, at least in retrospect, can be seen to have inevitably failed. Those law reform lawyers engaged on it, of whom I was one, could have been spending their time on something useful.

Thirdly, the Law Commission is heroically non-political in its conduct of projects. However, in securing support for a project, both the promoters of a project to the Commission, and the Commission itself, have to think, in a broad sense, politically. That includes analysing what both the political and the permanent Government will see as the down-sides to the proposal, and seeking to neutralise or evade them.

Thinking politically includes thinking financially. This is not the place to go into the many and varied failings of cost/benefit analysis as it is practised in UK policy-making as the central part of the Impact Assessment system. However, that system is with us, and will not go away. So if a law reform project proposal cannot be at least plausibly presented as saving money, or at the very least, being financially neutral, it will not proceed. This fact is best seen, perhaps, as a challenge to the ingenuity of the law reformer, not a reason for despair. Even if one considers that Impact Assessment is a fundamentally flawed process (as I do), it provides a set of rules that can frequently be persuaded to come to the desired outcome.

Finally, it remains at best an open question whether the Law Commission is likely to be able to take on *any* far reaching project on 'public law proper' under current conditions. The Government controls the Law Commission's agenda, a law reform project is conducted in collaboration with the Government, and, on the conclusion of a project, it is Government that implements it, or not. The Government cannot, and should not, be *neutral* about a law reform project. It should want the project to be carried out, because it agrees reform in this area is necessary. But in approving a project, the Government is also accepting that the Law Commission's very particular process is a good way to arrive at that reform. At the core of that method is that the Law Commission's policy making process is independent of Government. The remedies project throws into doubt whether the Government is capable of the forbearance necessary when the subject of reform is the terms on which the citizen may hold the Government itself to account.

The caveat 'under current conditions' is important. If, in the future, a Government sought a wide-scale constitutional remodelling, then no doubt the Law Commission could have a role to play. But that does not appear to be a plausible immediate prospect.

Disclosure Statement

The author was the civil service lawyer who was team manager of the Public Law team at the Law Commission from its inception at the end of 2000/beginning of 2001 to the end of 2014.

Notes

[1] For a striking account of one historian's struggle with two memoirs, see Janken (2016).

[2] Perhaps all social science footnotes, if tracked back far enough, originate in immediate personal sense perception: Russell (1910).

[3] The project was rejected in England. It has recently been legislated in Wales (The Renting Homes (Wales) Act 2016)

[4] Subsequently published as Fordham (2003).

[5] A paper based on the research was given by Professor Marsh at the SLSA conference in Manchester in March 2008 (and subject to comments from Professors Maurice Sunkin and Colin Scott).

[6] The Law Commission annual report 2008-8 was published on 7 July 2009, and stated that the Government

response was received just as the report was went to press.

[7] These were procedures to stay an application for judicial review for a matter to be referred to the ombuds, and for ombuds' to have a power to refer questions to the court, the abolition of the rule that a complaint cannot be investigated by ombuds if it could form a claim to a court, and the abolition of the rule that an MP must refer a complaint to the Parliamentary ombuds.

[8] It is true that Jack Straw (2007 to 2010) and Kenneth Clarke (2010 to 2012) had both been barristers, but both were really politicians who had once been lawyers, rather than the political-lawyer figures who had previously been Lord Chancellors. The four succeeding Secretaries of State for Justice and Lord Chancellors had had no legal training (although David Lidington's doctoral thesis was on the Elizabethan Court of Exchequer). David Gauke practiced as a solicitor in a corporate law firm for some years before election to the House of Commons.

[9] Law Commissions Act 1965, section 3B, inserted by Law Commission Act 2009.

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