The Law Commission and Law Reform

The Law Commission is currently engaged in a consultation process about its thirteenth programme of law reform.[[1]](#footnote-1) The consultation closes on 31 October 2016 and the Commission has suggested a number of broad areas that it might look at. These are, at present, non-exhaustive talking points generated by the Commission’s fifty years’ experience as an independent law reform body.[[2]](#footnote-2)

However, before we all rush off and bombard the Law Commission with our pet projects – mine would be allowing vehicles to turn left on a red stop light – the Commission’s statutory[[3]](#footnote-3) Protocol with Government[[4]](#footnote-4) identifies a number of factors which bear on what might be incorporated in the final programme. Among others, these include the extent to which the law is unsatisfactory, the potential benefits of reform and, perfectly property, the extent to which proposed reform is suitable for the independent, non-political Commission. The Commission itself note that they are particularly interested in areas of law which cause substantial unfairness, are widely discriminatory or disproportionately costly, or where the law is unnecessarily complex, hard to understand or has fallen out of step with modern standards.[[5]](#footnote-5)

Among the areas identified by the Commission is the broad topic of leasehold law. This is a matter close to the heart of successive Editors of this Journal and there is little that has not been said about the wholly unsatisfactory state of landlord and tenant law in this jurisdiction.[[6]](#footnote-6) The Commission rightly notes that this corpus of law – “yards of it” to adopt the language of my predecessor – “impacts the lives of millions of people, whether they are landlords or tenants of homes, farms or businesses”[[7]](#footnote-7), yet they are few who would argue that it is fit for purpose, any purpose. On the large scale, how does anyone comprehend the overlapping and often inconsistent residential housing regimes – always assuming you have a desk big enough to take the many computer screens or weighty volumes necessary to be able to read the piecemeal legislation that makes up this unappetising smorgasbord? On the small scale, why was the Landlord and Tenant (Covenants) Act 1995 enacted with, apparently, so little regard to the practical reality of how assignments work in the world of commercial landlord and tenant and what is the point of Part II of the Landlord and Tenant Act 1954 given the simple op out procedure? Further, if there is a real desire to protect the possession and financial well-being of long leaseholders, why is Commonhold so complex, and so rare.[[8]](#footnote-8) And, of course, why do so many of our short term residential tenants live in squalor, with only the relatively weak (but well intentioned) s.11 covenant to protect them?[[9]](#footnote-9)

As noted above, the Commission does not have unfettered power to examine anything or everything it chooses. The not so well disguised preference for law reform that has a positive economic impact means that existing law which might impede commerce and the free movement of capital (like the 1954 Act) is much more likely to be included in the next programme for law reform. Proposals which might create more obligations, and possibly more cost (like stronger fitness for habitation rules or easier access to justice for disadvantaged tenants) have much less chance of being included, despite being areas where many would argue there is “substantial unfairness” and widespread discrimination. Even codification and consolidation of existing law on say, public sector tenancies, might well be beyond the near horizon, even though it would do much to remove unnecessarily complex law and make this crucial area more accessible to the millions it governs.

Under its Protocol with Government, the Law Commission also has to consider whether there is a “serious intention” by the relevant Government Minister to take forward law reform. That is a fair point – there are too many Law Commission Reports gathering dust because of an absence of a commitment on the part of those responsible for legislation. But, here is the crux of it: reform of landlord and tenant law will not win votes; it will not ignite the imagination of the 24-hour digital audience; it is not even, for the most part, very interesting. It just happens to touch the lives of everyone. And it is a mess.

MJD

1. The final agreed programme must be approved by the Lord Chancellor, s.3(1)(b) Law Commissions Act 1965. [↑](#footnote-ref-1)
2. http://www.lawcom.gov.uk/13th-programme-potential-projects [↑](#footnote-ref-2)
3. See s. 3B(4) Law Commissions Act 1965 as amended by s.2 Law Commission Act 2009. [↑](#footnote-ref-3)
4. Law Commission No.321 (2010), *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission*. The Protocol does not apply to the Commission’s proposals for consolidation and statute law revision. [↑](#footnote-ref-4)
5. http://www.lawcom.gov.uk/project/13th-programme-of-law-reform-call-for-ideas [↑](#footnote-ref-5)
6. [1991] Conv. 70 (HWW); [1994] Conv. 177 (HWW); [1998] Conv. 243 (PHK); [1999] Conv. 74 (PHK); [2004] Conv 163 (PHK and MB); [2014] Conv. 1 (MJD); [2015] Conv. 187 (MJD). [↑](#footnote-ref-6)
7. http://www.lawcom.gov.uk/leasehold-law/ [↑](#footnote-ref-7)
8. In May 2016, there were 16 registered commonholds, encompassing a total of 161 units. Of these, two schemes were non-residential, including the biggest (30 units, a caravan park). The last was registered in 2012. I am grateful to Giacomo Mastantuono, of Queens’ College, for this information, which he obtained from the Land Registry during his research for an M.Phil. thesis on commonhold. [↑](#footnote-ref-8)
9. Section 11, Landlord and Tenant Act 1985. Although not involving a charlatan landlord, the recent *Edwards v Kumarasamy* [2016] UKSC 40 illustrates the continuing difficulty in applying section 11 to blocks of flats [↑](#footnote-ref-9)