



RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO LAW COMMISSION'S 14TH PROGRAMME OF LAW REFORM

INTRODUCTION

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response to the consultation has been prepared with the assistance of UKELA's specialist working parties and Governance and Development Group which aims to inform the debate on the development of environmental law and policy post-Brexit. This response does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members. We respond to the specific consultation questions within the consultation paper.

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

3. In the most general terms, the problem that requires reform is the failure of legal norms and the law in general to keep pace with (and be competent to address) the increasing environmental challenges faced by the United Kingdom in the 21st Century – from pollution, the loss of biodiversity and climate change.
4. UKELA, therefore welcomes the indication from the Law Commission that the environment will be a focus for law reform in coming years.

5. The problem is both (i) a lack of integration and (ii) the outdated (and sometimes overly complicated) legal toolkit in specific areas.
6. As far as integration is concerned, the government's proposals (see e.g. the 25 year plan and the Environment Bill in England) are ambitious but there is a need for environmental law to be more cohesive. A simple example would be ensuring that *all* government departments understand and draw the concept of sustainability into policy making and decision-taking. Environmental obligations in government should be overarching, not limited to specific sectors (energy, environment, rural affairs etc.).
7. Moreover, there is also a need to ensure that the frameworks for areas of law, not traditionally seen as 'environmental', are reviewed in light of the environmental challenges of today. UKELA strongly agrees with the Law Commission that considering property law is important in this regard – there is little legal incentive on landowners to take action, for example, to mitigate and/or adapt to climate change. However, other areas of law are also inadequate to the environmental and climate crises. In particular, there is a good case for reviewing also the frameworks for contract and company law (and the role and effectiveness of environmental and social governance).
8. More specifically, there is a good case for reviewing the adequacy of the legal framework on climate change. The Climate Change Act 2008 sets a framework, but few new powers or duties have been expressly created beyond it – and references to Net Zero outside of the 2008 Act are piecemeal. UKELA understands that a number of local authorities who have made declarations of climate emergency do not feel they have sufficient powers to do anything about it. Even in areas like housing, planning and transport, climate change obligations are unclear. This is an area where the Law Commission could make a very valuable contribution.
9. As far as the legal toolkit is concerned, there are two areas where there are particular problems that arise now. The first, as identified by the Law Commission, relates to flooding and drainage. The powers, duties and potential liabilities in this area are overlapping and confusing. That in turn inhibits early action to adapt to climate change and leads to legal uncertainty. UKELA strongly supports review in this area, although it considers that it should extend also to

coastal and fluvial flooding. The second is the circular economy (i.e. waste law). Departing from the EU means that the UK needs to develop its own clear and effective legal framework to ensure the reduction of waste – however, the duties that apply (including the statutory duty of care) are limited and too often ineffective.

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

10. With regard to integration, examples of government departments in other areas giving priority to sustainability and climate change considerations is limited. The draft policy statement on environmental principles prepared in conjunction with the Environment Bill refers to the principle of integration, but in extremely limited terms.
11. On climate change, taking action is too difficult for companies, individuals and local authorities, when it ought to be incentivised.
12. The problem of uncertainty for liability for flooding can prevent landowners/developers and local authorities working together on solutions.

Q3 To which area(s) of the law does the problem relate?

13. 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:

14. In truth, environmental concerns – particularly on sustainability and climate change – are systemic and cut across most (if not all) areas of government and

law.

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, books or journal articles that relate to this problem.

15. The Well-Being of Future Generations (Wales) Act 2015 (WFGWA 2015) is an interesting cross-cutting statute that goes some way to promoting integration, at least within Wales.
16. In *R (Finch) v Surrey County Council* [2020] EWHC 3566 (Admin) the High Court held that the climate impacts of the downstream use of fossil fuels from oil wells were irrelevant to the environmental impact assessment process. The case is to be heard on appeal later this year, but it demonstrates the need for clearer overarching climate change duties.
17. Case law on liability for flooding is piecemeal and unclear. A good example of the difficulties (conceptual and practical) caused by drains being owned in part by the local authority and in part by a private landowner is *Thorburn v Northumberland CC* (1999) 1 LGRL 819. The Flood and Water Management Act 2010 is to some extent unfinished business, both it and the recommendations on which it was partially based (the 2007 Pitt Review) are very relevant.

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

18. We would refer again to the WFGWA 2015.

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

19. Throughout the UK.

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

20. It is almost certain that new primary legislation is required for all of the issues identified in this response.

Q8 What is the scale of the problem

21. The scale of the current environmental crises is enormous. Ensuring that our legal regime is adequate to meet it, is therefore a significant challenge, but is also urgent.

Q9 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.**

22. The most pertinent of the listed benefits are as follows:

- a. Reducing future costs, by getting the legal framework for imminent environmental challenges right now;
- b. Increased fairness, by ensuring that duties are evenly spread and integrated in all areas of society; and

- c. Supporting the rule of law, by ensuring that environmental issues are addressed in a lawful and structured way, rather than chaotically as impacts are felt.

Q10 If this area of the law is reformed, can you identify what the costs or other negative impacts of reform might be?

- 23. UKELA recognises that there will be short term costs in some areas of society, but in the long term the areas of law reform identified should lead to savings.

Q11 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?

- 24. No. For the reasons above, securing law reform to pursue environmental goals, climate change and sustainability should improve equality, diversity and inclusion.

Q.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?

- 25. There have already been plenty of reports from NGOs and others on environmental issues, but not so much on the legal framework. Because this is an area with competing interests, the independent commitment and detailed analysis of the Law Commission is necessary in order to get it right.

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

26. UKELA has explained in recent consultation papers that the current approach to questions of sustainability and sustainable development are incomplete see e.g. paras 46-49 of the UKELA Response to the Planning White Paper (UKELA, 29.10.20 see e.g. www.ukela.org). The government's response is not known.

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 on this issue, and why you think the Law Commission should also look into the problem.

27. UKELA is not aware of any current project on integration specifically – the integration principle is wrongly often overlooked among the environmental principles. In limited terms, however, it is being promoted through the Environment Bill and draft policy statement on environmental principles.
28. There is understandably a lot of work on climate change at the moment, including consideration of the legal framework – but UKELA is not aware of any overarching and independent analysis.
29. UKELA is not aware of any project looking at law reform on flooding and drainage.
30. Some changes to waste law and producer responsibility are being proposed in Part 3 of the Environment Bill.

Q15 Would you like to submit another idea for reform?

31. As explained above UKELA has asked its members and specialist working parties for ideas for reform. UKELA would invite the Law Commission to consider:

- a) The consolidation of environmental legislation, that tends to be scattered across a number of different statutory provisions and other areas (including the common law).
- b) Clarifying and strengthening the legal framework for climate change mitigation and net zero, and adaptation.
- c) Considering how the law can more effectively support the circular economy.
- d) Reviewing flooding and water drainage law.
- e) Considering how environmental duties (including sustainability and climate concerns) can be integrated in different areas of law and governance.

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