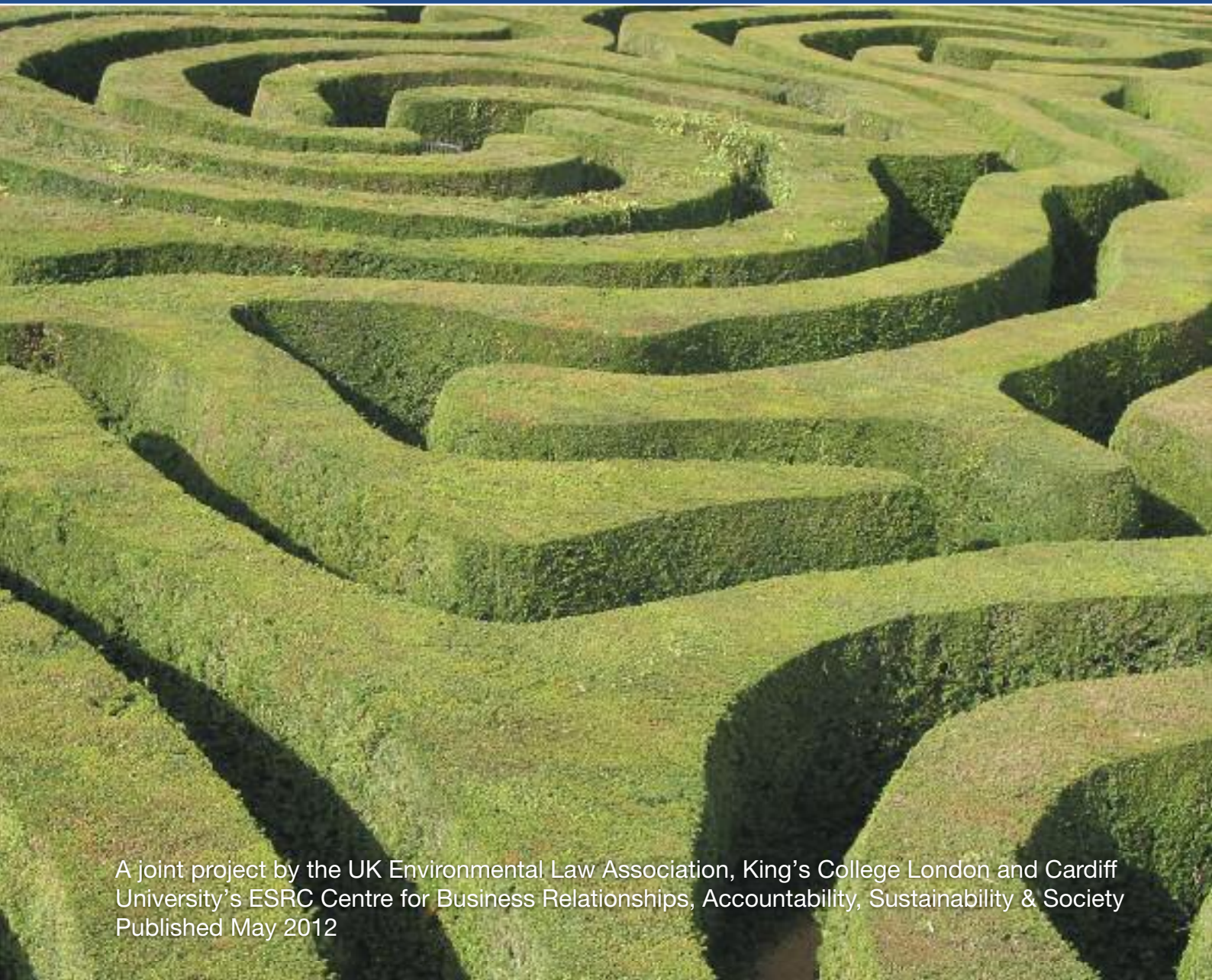


The State of UK Environmental Law in 2011-2012

Is there a case for legislative reform?



Thank you

This major project into the State of UK Environmental Law has been funded by the King's College London Futures Fund, BRASS (the ESRC funded centre for Business Relationships, Accountability, Sustainability and Society at Cardiff University), Matrix Chambers and by the UK Environmental Law Association's reserves. UKELA is grateful to those who have provided financial support, and to the consultants from Scotland, Wales and Northern Ireland who carried out research. Particular thanks go to all those who have provided support as volunteers - as tireless supervisors, interviewees, workshop attendees, advisors, imaginative thinkers, researchers, writers and editors, and in providing administrative and logistical help, including meeting rooms and cups of tea. Without you this project would not have been possible.

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Introductory remarks by UKELA’s President, Lord Carnwath JSC

I am delighted to welcome the Final Report following this ambitious project, and I congratulate the authors and researchers on a highly impressive achievement. All those involved in environmental law, whether as judges, professionals, or academics, are familiar with the problem of complexity. Although not of course unique to this area of the law (as I know only too well from my own experiences at the Law Commission), the problem is compounded by the intermingling of different streams of law from so many legislative sources, domestic and European, and the technical nature of much of the subject-matter. I have myself commented on the problems both judicially and extra-judicially. In one paper I spoke of “the contrast between the relative simplicity of the basic objectives, and the complexity of the machinery by which we try to give them effect”.¹ Relatively few cases find their way to the upper courts, so that the opportunities for judicial clarification are limited. I have no doubt that the UKELA work will both stimulate and fuel a much-needed debate on these issues.

Robert Carnwath

¹ “Environmental Litigation – A Way through the Maze?” [1999] JEL Vol 11 No1 p 1

Foreword

The UK Environmental Law Association embarked on this research programme in response to members' frustrations about the operation of environmental legislation in the UK. The project has aimed to investigate the nature and cause of the perceived problems and explore avenues for potential reform. These include possible improvements to legislative scrutiny mechanisms and a greater role for environmental principles in UK environmental law. More generally, UKELA has aimed to stimulate a broad debate about the state of UK environmental legislation – a debate already emerging in the devolved administrations.

The research has highlighted a range of problems for practitioners, from difficulties with specific statutory provisions to more general issues of legislative quality. Many of these are not unique to environmental legislation and there are other factors at play. These include a lack of integration and coherence at EU level, the technically complex nature of some regulatory areas, and fast moving policies that require legislation under tight deadlines. Ensuring legislative coherence, integration and transparency can be a difficult, resource-intensive business, which is always at risk of being a lower political priority than driving through policy changes.

However, whilst these problems may arise for a range of reasons, they are not necessarily inevitable or insurmountable. The recommendations in the report contain practical suggestions for how to improve the quality of environmental legislation. These include learning from best practice across the UK. The report also highlights areas where further research would help to develop a better understanding of the problems and possible solutions. The increasing fragmentation of environmental law across the devolved administrations is one such area. This adds a further layer of legislative complexity in UK environmental law, but it is also an important legal development. There is no longer a unitary body of UK environmental law, and work needs to be done to appreciate how the legislative picture across devolved administrations is evolving in unique, differing and also overlapping ways.

The research has brought out compelling reasons why problems of coherence, integration and transparency deserve prioritising. The strong message from legal professionals and industry respondents is that legislative quality matters. Incoherent, poorly integrated or opaque laws can cause uncertainty, wasted time and increased costs, impede understanding and awareness of the requirements, and undermine access to justice and the rule of law. For the law to work for a better environment, it is crucial that governments and regulators address these issues.

The project seeks to further UKELA's core mission to make the law work for a better environment. It also complements environmental law research being carried out at King's College London (on the legal roles of environmental principles),² and at The Centre for Business Relationships, Accountability, Sustainability and Society at Cardiff University (on the impact of regulation on industry).³ Drawing on these research links, the project has involved a collaborative effort between UKELA, King's and BRASS. This is a first for UKELA, demonstrating both UKELA's commitment to the project, and also the importance of building its links to UK research institutions.

UKELA hopes that this work will form the basis for collaborative discussion about law reform in each of the UK administrations. As we consider the possibility of reform of environmental law, good legislative quality – in terms of promoting coherence, integration and transparency – should be prioritised and embedded in all reform agendas and practices.

The Project Team

² Dr Eloise Scotford's research on principles in environmental law was the basis of a King's Futures Fund grant that supported the first research phase of the project.

³ Professor Robert Lee's support from the Economic and Social Research Council, which founded the BRASS Centre to conduct research into issues of sustainability and regulation for business, funded the final research phase of the project.

1. Research project scope and methodology

- 1.1 This research project has considered the effectiveness of UK environmental legislation assessed in terms of whether there are problems of lack of coherence, integration and transparency. Coherence is a reflection of legislative clarity and comprehensibility; integration captures how different laws and regimes overlap and interact; and transparency is a measure of legislative accessibility.⁴ The research examined four areas of environmental law, namely: waste law, environmental permitting, environmental and habitats assessment (and its interaction with planning law), and the regulation of water quality and resources.
- 1.2 Whilst the main focus has been on the legislation itself, the research has also considered guidance and other documents directly associated with the legislative regimes examined. These documents form an important part of the legislative picture and how it is accessed and used, particularly by industry. The research has not directly examined environmental governance issues such as compliance costs, policy outcomes or institutional matters.
- 1.3 The research project was undertaken in three stages.
- 1.4 The **Interim Report** sets out findings and conclusions from the initial research and data gathering stage, which ran from November 2010 to April 2011.⁵ The aim of this stage was to develop a method for the project; to establish whether there were in fact problems with the quality of UK environmental legislation worthy of investigation; and to explore some ways of improving matters. Research interns supervised by environmental law professionals interviewed key figures in UK environmental law from a range of perspectives, from legal practitioners and judges to government and academic lawyers, as well as industry representatives. The interviews addressed issues and problems of legislative quality, the potential legal roles of environmental principles, models of scrutiny and drafting methods. The interns also undertook desk-based research on principles, scrutiny and drafting. Consultants in each of the devolved administrations were commissioned to prepare reports that complemented that research, including providing salient examples from their jurisdictions. The Welsh and Northern Irish consultants conducted interviews with environmental law experts across a range of professional perspectives.⁶ This first research stage was largely funded by a grant from the King's Futures Fund.
- 1.5 Resource constraints limited the depth, scale and rigour of this research. In particular: the number of interviews was insufficient for this to be a fully researched study; the interviews were conducted on a sectoral basis so respondents were not asked to reflect on the state of environmental legislation overall; and many interview responses were impressionistic rather than fully researched.⁷ Despite these limits, the Interim Report contains a significant amount of research and concluded with thirty-five core findings. The findings set out a range of problems with the quality of UK environmental legislation and various reasons for this, suggest some modest and also more radical ideas for institutional and drafting reform, and identify areas for further research.
- 1.6 The **Member Consultation Report** presents the results of the second stage of the project's research.⁸ This involved consulting UKELA's working parties and members, again from a range of professional perspectives, to test the validity of the Interim Report findings and conclusions. Members were invited to complete an on-line survey, and working parties were asked to consider a set of more focused questions. Sixty-three of UKELA's 1500 members answered the survey questions about the report, and four of its ten specialist working parties responded. Comments were also received online through LinkedIn.

⁴ These concepts are explained more fully at pages 19-20 of the Interim Report.

⁵ Note that footnote references in this report are to the April 2012 version of the Interim Report that includes minor revisions.

⁶ Appendix B to the Interim Report gives more detail on the methodology of this first research phase.

⁷ Appendices A and B to the Interim Report explain further the methodological limitations.

⁸ *Report on the Member Consultation, August-October 2011.*

- 1.7 The results of this consultation indicate strong support for many of the findings in the Interim Report. A key concern throughout was that the legislative picture is too complex. There were more mixed views in relation to transparency, the potential reforming role of principles in legislation, and suggestions for radical reform. Few respondents commented on the findings on legislative drafting and legislative scrutiny.
- 1.8 The **Business Perceptions Report** presents the results of the final research stage.⁹ The empirical work for this research was carried out by the Centre for Business Relationships, Accountability, Sustainability and Society (BRASS) at Cardiff University, which is funded by the Economic and Social Research Council. This work sought to capture business views of environmental legislation. Quantitative data was gathered through an on-line survey, open between December 2011 and February 2012. Follow up telephone interviews from late January to early February 2012 gathered related qualitative data. The number of respondents was fairly small. Whilst over a thousand business users were invited to complete the on-line survey, thirty-eight responded, demonstrating the difficulty of gathering data amongst those preoccupied with work commitments. However, the methodology of the online survey was rigorous, producing detailed and comprehensive results and providing a model for similar exercises in the future. Thirteen business users took part in the follow-up telephone interviews. The survey tended to attract highly experienced professionals. The respondents represented a broad range of industries (with an emphasis on construction) and a mix of large organisations and small and medium sized enterprises (SMEs).
- 1.9 An overriding aim of the research project has been to try to capture perspectives from all devolved administrations, as well as from the range of different groups that make and work with environmental law. The methodology at each research stage has been designed to gather more representative views across these aspects of, and approaches to, UK environmental law. It has also enabled a catalogue of legislative examples to be built, and an overall case for reform to be made. But the limitations in survey size and scope of the various research exercises involved mean that the conclusions do not purport to represent a comprehensive picture as to how environmental legislation is understood or applied across the UK.

⁹ 'Business Perceptions of Environmental Legislation: A Response to UKELA's Interim Report on the Quality of UK Environmental Legislation'. Report by BRASS, with joint contribution from UKELA and King's.

2. The case for change

- 2.1 The research has brought out many reasons why legislative quality matters. It indicates that there are real benefits to be gained from dealing with the kinds of problems of legislative quality that have been identified.
- 2.2 UKELA has a particular interest in environmental legislation being readily understandable and well communicated. This flows from the charity's objectives: to improve understanding and awareness of environmental law; and to make the law work for a better environment. The two objectives are closely linked. For environmental legislation to work and bring about environmental improvements, the individuals, businesses and organisations that use it and are affected by it must be aware of and understand it.
- 2.3 The Business Perceptions Report suggests that most of those responsible for implementing environmental policies and laws in business have not had any legal training,¹⁰ and few business users consult lawyers (in-house or external) or use law subscription services to make sense of legal obligations. If the law is to work for a better environment, it must be capable of being accessed and understood by these unsupported business users. Worryingly, the Business Perceptions Report findings indicate a low level of awareness among business users on certain key matters. Respondents indicated a pattern of small and medium size enterprises (SMEs) relying on large operators to pass on information about relevant legal requirements; and a significant minority of all SME respondents did not know which regulator is responsible for which kind of environmental enforcement.¹¹
- 2.4 Legislative quality problems can also add to businesses burdens and affect profitability. Respondents to the Business Perceptions survey indicated that a lack of clarity in the legislation leads to uncertainty, wasted time and financial downsides.¹²

It's the uncertainty [associated with unclear environmental regulatory requirements and] not being able to move forward and possibly not being able to agree what the required solutions are. And it takes us a lot of time, in discussion and negotiation, which could be better spent in actually delivering things.

(Very experienced professional in water industry)¹³

Responses to the UKELA member consultation supported this view.

¹⁰ See Business Perceptions Report, paragraphs 3.10 and 3.12.

¹¹ Business Perceptions Report, paragraphs 4.13 and 6.3.

¹² Business Perceptions Report, paragraph 5.8.

¹³ Business Perceptions Report, paragraph 5.12.

- 2.5 Ninety-five per cent of respondents to the UKELA member consultation were of the view that lack of coherence and integration in UK environmental law matters. Reasons given as to why *coherence* is important include that a lack of clarity or certainty:
- can inhibit investment, innovation or reuse of materials because there is too much regulatory risk involved;
 - adds costs to businesses in seeking expert or legal advice, and in litigating points for resolution by court;
 - causes confusion, and makes it difficult for regulators, businesses, public and practitioners to understand and interpret the legislation;
 - can result in non-compliance if law is hard to explain and enforce, or inconsistent enforcement.
- 2.6 Put positively, *coherent* legislation allows simple commercial advice to be delivered more simply and with greater confidence to the business community and enhances companies' interest and ability to comply. Reasons given as to why respondents considered *integration* important include a recognition that the interconnectedness of issues and problems affecting the environment requires joined up policies and enforcement.¹⁴
- 2.7 Problems of legislative coherence, integration and transparency not only impede the effectiveness of environmental legislation; they may also undermine the rule of law. Thus, the late Lord Bingham characterised as the first 'sub-rule' of the rule of law: 'the law must be accessible and so far as possible intelligible, clear and predictable'. He went on to highlight British 'legislative hyperactivity' and the problems this causes in rule of law terms. He indicated that this is 'compounded by the British tradition of parliamentary draftsmanship which, for all its technical virtuosity, depends so heavily on cross-reference and incorporation as on occasion to baffle.'¹⁵
- 2.8 An absence of a clear, accessible expression of legal requirements might also constitute a barrier to access to justice. Article 5 of the Aarhus Convention (which has been ratified by the UK) requires that environmental legislation and guidance (being kinds of environmental information) are effectively accessible, including through increased provision of easily accessible electronic databases, and made available in a way that is transparent.
- 2.9 Finally, the case for changing UK environmental legislation is bolstered by current government initiatives to reform regulation, such as the Coalition Government's Red Tape Challenge and Defra's recent proposals in relation to this.¹⁶ Whilst such initiatives tend to focus on the direct costs of regulatory burdens, this research project aims to raise the profile of the hidden, indirect costs of incoherent or poorly integrated legislation. Addressing these issues is both good for business and – by making the law more effective – the environment.

14 Member Consultation Report, section III, comments on coherence and integration.

15 Lord Bingham, 'The Rule of Law', (2007) 66(1) *Camb LJ* 67, 70.

16 *Red Tape Challenge – Environment Theme proposal*, Defra, March 2012.

3. Key problems

- 3.1 The project's research has highlighted a number of specific problem areas and practices that adversely affect the coherence, integration and transparency of environmental legislation in the UK. It also highlighted problems with legislative scrutiny processes. The Interim Report, Member Consultation Report and Business Perceptions Report give full details. This section summarises the problems raised most commonly by respondents or that appear otherwise to be the most significant.
- 3.2 Further work needs to be done to understand whether these problems point to more significant and systemic problems with the design, creation and also implementation of UK environmental law, and what the solution to such wider problems would be.

Coherence and transparency

- 3.3 The Interim Report made seven findings on problems of legislative coherence and two on related issues of transparency. The most significant of these are set out below, with examples. The transparency findings partly reflect coherence problems in that they capture how legislation that lacks coherence is hard to follow and access. The Member Consultation Report indicates strong support for the coherence findings among UKELA members (from a range of perspectives) and working parties. The Business Perceptions Report concluded that problems of coherence and complexity are the primary concern of business users in relation to environmental legislation.
- 3.4 Overall, a key concern expressed repeatedly by environmental professionals was that the legislative picture is too complex and lacks clarity.¹⁷ These concerns were shared by the business users surveyed, a majority of whom thought environmental legislation lacks clarity.¹⁸ Some respondents were highly critical.

I think environmental regulation is dire, I think it's really badly put together [...] lots of it is archaic, it's in little pieces that don't always match each other.
(Very experienced professional from a large business in the engineering (football) sector)¹⁹

Waste legislation is incredibly incoherent and "all over the place"
(Solicitor, Scotland)²⁰

- 3.5 Business respondents described how their ideal piece of legislation would have to be 'clear'. The clarity would stem from plain and concise language, and possibility for 'digesting' it fairly quickly (a particular consideration for smaller organisations). Many respondents who read legislation saw the need for including clear definitions and objectives at the beginning.²¹
- 3.6 The research has brought out a number of practices that make it hard to gain a clear picture of the legislative requirements that apply in a given field or jurisdiction.²² These practices can create serious problems of coherence and comprehensibility of environmental legislation, as well as other transparency issues.

17 Member Consultation Report, section III.

18 Business Perceptions Report, paragraph 5.7.

19 Business Perceptions Report, paragraph 6.8.

20 Appendix to the Member Consultation Report, paragraph 3.10.

21 Business Perceptions Report, paragraph 5.12. See further, recommendation on principles, below.

22 Interim Report, findings 3, 5, 6, 7, 14 and 15.

Practices that adversely affect the coherence of the legislation

3.7 These include, in particular:

- frequent and/or complex amendments and modifications to legislation, without consolidation.²³ This can be the result, amongst other things, of:
 - fragmented and idiosyncratic implementation of EU obligations across a range of UK legislation: for example implementation of the Waste Framework Directive;²⁴ and the fragmented picture of water legislation in England;²⁵
 - amendments that fracture the legislative picture across the devolved administrations: for example the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011*;²⁶
- use of ministerial directions to implement Directives, without making them readily accessible: for example the directions under section 40 of the *Environment Act 1995* implementing many European obligations including parts of the Shellfish Waters Directive and the Waste Incineration Directive.²⁷
- applying UK legislation to Wales using a complex patchwork of secondary legislation and devolution powers: for example, the legislation implementing the *Marine and Coastal Access Act 2009* in Wales.²⁸

Practices that adversely affect legislative transparency and accessibility

3.8 Practices that affect legislative coherence (noted above) can also affect transparency as they make for an unclear legislative picture. Other practices that impede transparency and accessibility include:

- use of referential drafting to transpose European Directives (where the domestic legislation cross refers to obligations in 'Article X of Directive Y'). This presents difficulties in understanding the domestic legislation as it does not set out the relevant substantive obligations on its face. Not all respondents found this a problem: some (an academic and a regulatory lawyer) expressly preferred this approach to transposing.²⁹
- intricate drafting, involving complex inter-relationships between provisions and Schedules. This can make legislation hard to navigate and understand.³⁰

3.9 *The Environmental Permitting Regulations 2010* were cited as an example of both practices, whilst being generally applauded for addressing integration problems overall. This suggests there is a limit to how much improvement of legislative quality can be achieved through intricate and connecting drafting alone. Considerations of coherence and transparency, and thus workability, must be balanced with those of administrative integration.

Problems with how environmental legislation is communicated to users

3.10 The research brought out the importance of government and regulator websites and guidance as means of making environmental legislation more accessible and comprehensible.³¹ Done well, these tools can help mitigate the legislative coherence problems mentioned above.

23 Interim Report, findings 3 and 14.

24 The EU Waste Framework Directive 2008/98/EC is implemented in English law through at least the following legislative instruments: *Environmental Permitting (England and Wales) Regulations 2010*; *Waste (England and Wales) Regulations 2011*; *Finance Act 1996 and Landfill Tax Regulations 1996*; *Waste and Emissions Trading Act 2003* (likely to be soon repealed); *Household Waste Recycling Act 2003*. Interim Report, finding 3 and page 33. See also Interim Report, finding 6 (problems of coherence and comprehensibility of waste legislation in Northern Ireland); and finding 7 (problems of coherence of waste legislation in Scotland).

25 Interim Report, pages 33 and 44-45.

26 Interim Report, page 33.

27 Interim Report, finding 14.

28 Interim Report, finding 5.

29 Interim Report, pages 30 and 122.

30 Interim Report, page 32.

31 Interim Report, findings 4 and 14; Business Perceptions Report, section 4.

(i) Guidance

3.11 Different kinds of government and regulator guidance can usefully complement environmental legislation to make it more comprehensible for users. The Business Perceptions Report indicates a high level of use by businesses of government and regulator guidance; significantly higher than their use of the legislation itself.³² However, many business respondents felt that legislation is not complemented with adequate guidance.³³ Environmental law professionals and business users also highlighted a number of problems that can arise which restrict how helpful the guidance is, or even result in the guidance making legislative coherence worse.

- Some legislative regimes rely too heavily on guidance from several different sources, which is not necessarily consistent in its form or approach whilst also being very lengthy.³⁴ This creates problems of workability and unpredictability in applying and advising on environmental legislation. Over-reliance on guidance can also present problems of accountability, as Parliamentary scrutiny is avoided (see further below).
- Defra guidance on waste legislation. This was said often not to be helpful enough in making sense of complex waste legislation.³⁵ It was considered hard to locate and to know whether the version available is the up-to-date version.
- Guidance that is not well written, or drafted in a style that is not suitable for particular kinds of user. The Business Perceptions Report highlights business concerns that some guidance uses overly technical or legalistic language.³⁶

(ii) Government and regulator websites

3.12 Government websites, in particular legislation.gov.uk, are an important means of making the text of the legislation available to users free of charge. Whilst a number of subscription services provide access to up-to-date legislation, they are costly and not widely used by industry.³⁷ At present, government and regulator websites do not make legislation available in a way that addresses the coherence problems identified above because:

- they do not provide consolidated versions of the legislation, that incorporate amendments and explain modifications. This is considered a real limitation of legislation.gov.uk.³⁸ This means it can be hard for users to obtain an up-to-date picture of the law, even when they are actively seeking it out.
- they do not generally group together the legislation that might apply to a particular kind of environmental problem or activity, or explain how it interrelates. This makes it hard to know whether a given piece of legislation has been amended, revoked or modified, or whether it needs to be read in conjunction with other statutory instruments.³⁹

3.13 The websites of UK governments and statutory bodies can also play an important role in explaining the legislation, making guidance available and communicating changes. The research revealed positive perceptions about sites such as the former NetRegs and Business Link.⁴⁰ Some business respondents, however, reported difficulties searching and navigating the websites of SEPA and the Environment Agency.⁴¹

32 Business Perceptions Report, paragraphs 4.2 and 4.10, and figure 2.

33 Business Perceptions Report, paragraph 5.4.

34 Interim Report, page 35; Business Perceptions Report, figure 6 (concerns about 'bulky' Environment Agency guidance).

35 Interim Report, page 35 and finding 4; Member Consultation Report, comments on findings 4 and 14-15.

36 Business Perceptions Report: general concerns at paragraph 5.11; instances of guidance regarded as helpful and unhelpful at figure 6.

37 Business Perceptions Report, paragraph 4.7.

38 Member Consultation Report, comments on findings 14-15.

39 See for example, interviewee comments at paragraph 6.8 of the Business Perceptions Report.

40 See for example, Interim Report, page 72 (NetRegs and Business Link).

41 Business Perceptions Report, paragraphs 4.8 and 7.5; figure 6.

(iii) Communicating change

- 3.14 The research indicates problems with mechanisms for alerting users to changes to environmental legislation. Over half of the business respondents surveyed reported that they do not know why or when the legislation is altered.⁴² This lack of certainty can add to business risks, and ultimately undermine the rule of law. Lawyers, too, may fail to notice significant changes to the legislation. For example, the change to section 85 *Water Resources Act 1991* water pollution offence (superseded by the *Environmental Permitting Regulations* offences) was hard to follow, little publicised or explained, and slow to be appreciated by environmental lawyers.

Coherence problems affecting the workability of regimes for implementing EU Directives⁴³

- 3.15 The research identified two key problems that seriously impede the effectiveness of legislation that implements EU Directives:
- a lack of understanding in practice about key legislative concepts in the Directives and/or domestic implementing legislation. These include:
 - the definition of waste.⁴⁴ Related to this general problem, the research highlighted cross-border compliance problems that arise due to the different views taken by the Environment Agency and SEPA.⁴⁵ It also found that business users can develop very legalistic but confusing techniques to demonstrate compliance with waste regulation.⁴⁶
 - the duty to conduct an appropriate assessment under the Habitats Regulations;⁴⁷
 - various key terms that allow exceptions to water quality objectives under the Water Framework Directive, including 'technical feasibility' and 'disproportionate costs';⁴⁸
 - what constitute 'equivalent' amounts of electronic waste under the WEEE regulations.⁴⁹
 - a failure in the drafting, design and implementation of the EU WEEE producer responsibility regime.⁵⁰

Integration

- 3.16 The Interim Report made six findings on legislative integration. There was strong support for these findings among respondents to the member consultation. UKELA members gave further examples of integration problems, as did business respondents.⁵¹

Substantive integration problems

- 3.17 Substantive integration captures the interaction of overlapping environmental obligations and substantive provisions of different pieces of environmental legislation. The research indicates significant problems with (amongst other examples):
- legislation that sits uncomfortably with later and overlapping legislation: for example section 33(1) *Environmental Protection Act 1990* and regulations 12 and 38 *Environmental Permitting Regulations 2010*;⁵²
 - the uncertain legal interaction of the planning and habitats assessment regimes;⁵³
 - more generally, the overlap of Environmental Impact Assessment and Habitats assessment obligations with planning law, which is further complicated (in England and Wales) by pollution controls under the environmental permitting regime;⁵⁴

42 Business Perceptions Report, paragraph 7.3.

43 Interim Report, findings 1 and 7.

44 Interim Report, finding 1. Business Perceptions Report, paragraph 5.9.

45 Interim Report, finding 7.

46 Business Perceptions Report, para 5.9.

47 Interim Report, finding 1. Member Consultation Report section IV, comment on finding 1.

48 Business Perceptions, para 5.10.

49 Interim Report, finding 1. Member Consultation Report section IV, comment on finding 1.

50 Interim Report, finding 1.

51 Member Consultation Report section IV, comments on findings 8-13; Business Perceptions Report, figure 9. Note that the findings in section 6 of the Business Perceptions Report (Integration of Environmental Legislation) mostly relate to rather different matters including legislative coherence, and application of the legislation by regulators.

52 Interim Report, page 44 and finding 8.

53 Interim Report, pages 46-47 and finding 8.

54 Interim Report, findings 8, 9 and 11 (concerning Northern Ireland).

- Scottish legislation on waste, and the integration of water resources with other regimes in Scotland.⁵⁵

3.18 The Business Perceptions Report findings reinforce that substantive integration problems can cause real difficulties for businesses in complying with environmental law. The majority of respondents had found themselves in a situation where multiple or overlapping pieces of legislation applied, giving rise to different and/or conflicting sets of obligations, and a need to deal with different administrative agencies.⁵⁶ Coupled with the finding above that SMEs, in particular, are not always aware of which is the relevant agency involved, this paints a confusing picture for business users. Examples given by industry respondents of problematic overlapping legislation included:

- certain activities with both waste and IPPC requirements;
- compliance with *Site Waste Management Plan Regulations 2008* and the duty of care in section 34 *Environmental Protection Act 1990* for operators of construction sites;
- overlapping requirements under waste pollution control regulation, waste planning requirements and the Part IIA *Environmental Protection Act* contaminated land regime.

Administrative integration problems

3.19 Administrative integration is concerned with how environmental legislation and its obligations are administered, particularly as directed by relevant legislation. Key problems to emerge from the research include:

- practical problems due to the overlap and uncertain legal integration of regimes for environmental permitting and planning (a substantive integration problem noted above): for example, timing problems dealing with large complex projects requiring multiple permissions.⁵⁷
- myriad or overlapping enforcement powers and appeals mechanisms: for example in relation to waste regulation in England and Wales.⁵⁸
- problems of ensuring sufficient and consistent enforcement and regulation when responsibilities are split between authorities: for example, fly-tipping and marine habitat protection in Northern Ireland, and mining waste in Scotland.⁵⁹
- cross-border integration problems where authorities across borders have to work together, under markedly different substantive legislative requirements: for example, cross border water regulation in England and Scotland, and in Northern Ireland and the Republic of Ireland.⁶⁰
- the varied administration of different producer responsibility regimes throughout the UK.⁶¹

3.20 Environmental permitting was generally regarded as a significant success in this respect, by integrating the administration of a number of regulatory regimes in England and Wales. There were mixed views as to whether and how a similar unified permitting system might be introduced in Northern Ireland; or whether producer responsibility regimes should be streamlined along similar lines.⁶²

Coherence, integration and transparency problems outside the scope of this research

3.21 The Member Consultation Report and Business Perceptions Report give examples of perceived coherence and integration problems with environmental legislation that falls outside the direct scope of the project's research. These include:

- wildlife and countryside legislation in England, Wales and Scotland, which was noted for coherence problems due to its complexity.⁶³
- carbon legislation (in particular on the CRC energy efficiency scheme), which business users cited

55 Interim Report, finding 12.56 Business Perceptions Report, paragraph 6.6 and figure 9.

57 Interim Report, page 49 and finding 9.

58 Interim Report, pages 49-51 and finding 9.

59 Interim Report, page 59 and finding 11 (Northern Ireland); page 62 and finding 12 (Scotland).

60 Interim Report, findings 11 and 13.

61 Interim Report, page 59.

62 Interim Report, pages 52.

63 Member Consultation Report, section IV, comments on findings 3 and 7.

as unclear and hard to understand.⁶⁴

- legislation concerning remediation of contaminated land and water pollution. A number of environmental law professionals cited integration problems due to the overlap between these regimes.⁶⁵
- the range of legal controls and regimes that apply to noise, which gives rise to substantive and administrative integration problems.⁶⁶

Legislative scrutiny

Key perceived problems concerning legislative scrutiny processes

3.22 The research has highlighted a number of perceived problems with the processes for scrutinising legislation. These are not unique to environmental law. However, as environmental law is often implemented and amended using secondary legislation, it is particularly vulnerable to the perceived general weaknesses in processes for the oversight of secondary legislation.

- Piecemeal scrutiny of English/UK legislation, carried out at various levels by bodies with varying expertise and interests.⁶⁷
- Poor quality Parliamentary scrutiny because of inexperienced Parliamentarians; strategic, politically motivated and superficial Parliamentary debate; patchy or narrow Committee scrutiny; and minimal or no post-legislative scrutiny.⁶⁸
- Inadequate Parliamentary scrutiny in Westminster because of over-reliance on secondary legislation which is subject to more limited scrutiny.
- Use of guidance to introduce policies and obligations that some felt should be in the legislation itself, avoiding rigorous scrutiny.⁶⁹ For example, some of the *Environmental Permitting Regulations* guidance documents serve as important measures to give effect to Directives. They set out the approach to implementing EU provisions that the Regulations simply cross-refer to, yet they are subject to no formal Parliamentary scrutiny or ministerial approval process.
- Similar problems in relation to scrutiny of devolved legislation;⁷⁰ however certain legislative scrutiny practices in Scotland stood out as examples of good practice.
- A lack of scrutiny of UK bill provisions affecting Wales.⁷¹

3.23 These problems lead to lack of careful oversight for environmental legislation, which only exacerbates the coherence and integration problems identified above.

Key perceived problems concerning scrutiny of proposed policies and laws through public consultation

3.24 Environmental law professionals interviewed in the main study were generally positive about the effectiveness of consultation as a form and significant stage of legislative scrutiny.⁷² The research has, however, revealed some significant negative perceptions about consultation processes:

- Academic interviewees suggested that key stakeholder consultation processes, such as ongoing negotiations, should be more transparent.⁷³
- Industry respondents were concerned that there are too many consultations.
- There was also a perception among industry respondents and one academic interviewee that consultations are merely 'going through the motions': responses have little impact on development of the policies and legislation. One example given was the Carbon Reduction Commitment consultation on allocation of revenues.⁷⁴

64 Business Perceptions Report, paragraphs 5.9, 7.4.

65 Member Consultation Report, section IV, comments on finding 8. See also Interim Report, pages 63-64 and finding 12 (Scotland).

66 Member Consultation Report, section IV, comments on findings 8 and 9.

67 Interim Report, findings 17 and 18.

68 Interim Report, finding 18.

69 Interim Report, finding 18; Member Consultation Report, section IV, comments on finding 18.

70 Interim Report, findings 19-21.

71 Interim Report, finding 19.

72 Interim Report, page 85.

73 Interim Report, page 114.

74 Business Perceptions Report, paragraphs 9.7-9.11; Interim Report, page 86.

4. UKELA's recommendations

- 4.1 The recommendations that follow are grouped under two headings. Those in the 'solutions to specific problem areas' section are proposed as ways of improving the quality of environmental legislation in the short and medium term.
- 4.2 As stated in paragraph 3.2, the research to date does not provide a sufficient basis for making findings as to whether the specific problems identified are symptomatic of more significant and systemic problems with UK environmental legislation. If they are, more fundamental or radical reforms may be needed. The second set of recommendations addresses this issue and aims to provide for longer-term solutions.

Solutions to specific problem areas

- 4.3 This section makes general recommendations for tackling coherence, integration, transparency and scrutiny problems that affect environmental legislation throughout the UK. It does not deal with each particular instance where problems have been identified. The Interim Report, Member Consultation Report and Business Perceptions Report refer to specific problems with a range of legislative instruments and regimes. UKELA commends these reports to those responsible for policy and legislation on the subject areas studied. More detailed work is required to be done to develop solutions to each particular problem.

Governments should consolidate legislation more routinely

- 4.4 UKELA regards legislative consolidation as an important means of addressing problems of coherence, integration and transparency.⁷⁵ In particular, UKELA recommends that governments:
- avoid multiple amendments, and consolidate amended legislation more regularly.⁷⁶
 - consolidate and simplify multiple or overlapping pieces of legislation in particular problem areas. This research has highlighted a number of areas perceived as ripe for this kind of consolidation, which is a form of legislative integration. These include waste legislation in England and Wales,⁷⁷ Northern Ireland and Scotland⁷⁸, and the planning and pollution control regimes as they overlap for individual developments.⁷⁹ UKELA welcomes Defra's recent proposal to streamline the planning and permitting regimes where parallel applications are involved.⁸⁰
 - pay particular attention to whether primary or secondary legislation is more appropriately adopted in such consolidation exercises. Key obligations should be transparent on the face of the legislation and adequately scrutinised through parliamentary procedures.
- 4.5 The *Environmental Permitting Regulations* are a good example of consolidation of multiple and overlapping pieces of legislation. However, the research project suggests they are also a cautionary tale that including too much substantive and disparate regulation within a single legislative regime can create transparency and accessibility problems, particularly where referential drafting is used.

75 Interim Report, finding 26.

76 Business Perceptions Report, paragraph 6.3; Member Consultation Report, consultee views on transparency findings.

77 Member Consultation Report, section IV, comments on findings 3 and 14.

78 Interim Report, findings 6 and 7.

79 Interim Report, finding 9.

80 *Red Tape Challenge – Environment Theme proposals*, Defra, March 2012, page 5.

Governments should ensure that points of intersection between different legislative regimes do not generate unintended legal complexity

- 4.6 UKELA has identified various areas where a lack of integration between intersecting legislative regimes has led to legal confusion and thus cost. A good example is the interaction of the strict requirements for appropriate assessments under *The Conservation of Habitats and Species Regulations 2010* with general mechanisms in the planning regime.⁸¹ The relevant statutory regimes (legislation, guidance and policy documents) should be adapted to ensure they interact more harmoniously.
- 4.7 UKELA recognises that consolidating, streamlining and integrating legislation can be a difficult, resource-intensive exercise. But it considers that the benefits to be gained from addressing the coherence, integration and transparency problems caused by fragmented, overlapping legislation warrant governments prioritising consolidation and developing ongoing programmes for this. UKELA is encouraged by the Welsh Government's proposals to refresh its environmental protection regimes, and possibly re-write the legislation that implements EU obligations,⁸² and Defra's recent proposals for rationalising environmental legislation.⁸³ It recommends that this work should prioritise the quality of environmental legislation – in terms of its coherence, integration and transparency – over cutting direct costs.

Further consideration should be given to improving and rationalising environmental appeals mechanisms

- 4.8 This includes considering whether more appeals can be consolidated in the new First Tier Tribunal (Environment) in England and Wales. UKELA considers Professor Macrory's work and recommendations on this issue deserve special attention.⁸⁴ UKELA would also suggest that consideration be given to providing a more effective appeal route in Scotland and Northern Ireland where there is, as yet, no equivalent to the First Tier Tribunal (Environment).

Further work should be carried out to investigate the scope for streamlining enforcement powers

- 4.9 This includes enforcement powers relating to waste in England and Wales.⁸⁵

Further consideration should be given to integrating the administration of producer responsibility legislation

- 4.10 The research suggests this may assist implementation by regulators, but may bring less significant advantages to businesses that only deal with one of these regimes.⁸⁶ Consideration should be given to how to avoid the legislative transparency problems associated with the *Environmental Permitting Regulations*, identified above.

81 Interim Report, pages 46-48.

82 *Sustaining a Living Wales: A Green Paper on a new approach to natural resource management in Wales*, Welsh Government Consultation Document, 30 January 2012.

83 *Red Tape Challenge – Environment Theme proposals*, Defra, March 2012, page 5.

84 Macrory, *Consistency and Effectiveness – Strengthening the New Environmental Tribunal*, Centre for Law and the Environment, UCL, 2011.

85 Interim Report, findings 8 and 9.

86 Interim Report, page 52. Member Consultation Report, section IV comments on finding 9 (integration of these regimes supported by UKELA's water and waste working parties).

The UK should continue to seek to influence the drafting of EU legislation with a view to minimising its ambiguity of terms and maximising the integration of substantive and administrative obligations

- 4.11 On waste in particular, UKELA recommends that the UK seeks and contributes to the adoption of measures under Articles 5(2) and 6(2) Waste Framework Directive 2008 through EU comitology processes, to give further and more detailed legal guidance on the definition of waste and end-of-waste criteria for particular waste streams.
- 4.12 UKELA also encourages the UK Government to promote integration within and across European legislation concerning different environmental media. For example, UKELA recommends exploring reforms to integrate better the requirements of the Habitats and Environmental Impact Assessment Directives. The UK Government should try to influence the 7th Environmental Action Programme so that this type of integration exercise takes place over the next 10 years.

Governments and regulators should ensure that their guidance is up-to-date, avoids setting out matters that would more appropriately be addressed in legislation (and scrutinised accordingly), and that its legal status is clear. They should also ensure that guidance is consistent and comprehensive.

- 4.13 This includes making clear which parts of the guidance are advisory and which reflect mandatory legislative provisions.⁸⁷ It is clear from the Business Perceptions Report that businesses make much more use of guidance than the legislation itself. Multiple, overlapping or inconsistent guidance from different bodies can cause confusion and legislative incoherence. It is therefore important that the guidance is comprehensive, clear and consistent with other guidance documents (whether issued by the same body or another department, administration or regulator).
- 4.14 There is a need for more consistent government and regulator guidance on waste within and across the UK administrations. It is important that the various guidance documents signpost any differences across the UK administrations.

Governments and regulators should ensure their guidance is drafted in a way that is appropriate to its function and audience

- 4.15 Detailed and technical legal guidance has its place, especially for practitioners, as does guidance giving more simple explanations of environmental obligations that apply to particular problems for the public, and targeted industry guidance. But whilst there is no one ideal type of guidance, for particular audiences guidance styles and accessibility should be as uniform and comprehensive as possible.

Regulators should structure their websites better to ensure important information is accessible

- 4.16 The SEPA and Environment Agency websites were singled out as in need of improvements. These include making their search engines more effective, ensuring up-to-date guidance is available and easy to locate, and weeding out old guidance.⁸⁸

Governments should provide consolidated/updated versions of legislation

- 4.17 As a start, UKELA recommends providing these through legislation.gov.uk.

⁸⁷ Interim Report finding 4. Member Consultation Report, section IV, comments on findings 4 and 18.

⁸⁸ Business Perceptions Report, paragraph 4.8 and figure 6; Member Consultation Report, section IV: waste working party comments on findings 14-15.

Governments should provide an on-line single port of call for information about all relevant environmental legislation and associated guidance on a particular topic

- 4.18 This would give access to all relevant consolidated/updated primary and secondary legislation, directions, notices or other instruments, associated guidance and European legislation. Lessons could be learned from UKELA's Law and Your Environment website (www.environmentlaw.org.uk) which aims to explain and bring together information about environmental law. The site is much more limited in scope than the 'single port of call' proposed here, due partly to resource constraints and to the fact that it is aimed at individuals rather than businesses.
- 4.19 UKELA understands that Defra is working on a web-based portal 'Defra-Lex', which will compile the regulations, guidance and published impact assessments on all its policy areas, at least for England. The site is due to be made publicly available from early 2013. UKELA welcomes this development, and hopes that in due course this facility will also offer updated/consolidated versions of the legislation. Until then, it would assist understanding of legislation that has been amended or modified if the site were to provide a short explanation for users of how different statutory instruments interrelate.

Governments and regulators should be more proactive in alerting users to changes to legislation and associated guidance

- 4.20 They should ensure they highlight changes on their websites, and target the media and channels of communication most relied on by different user groups. The Business Perceptions Report findings on how business respondents work with environmental legislation are instructive. They reveal an important role played by trade associations, newsletters, databases and larger firms, in disseminating information on applicable environmental regulation.⁸⁹

Governments and legislatures should take note of examples of best practice in legislative scrutiny from across the UK

- 4.21 These include the Scottish Rural Affairs and Environment Committee's scrutiny of the recent Wildlife and Natural Environment (Scotland) Bill, which involved substantial evidence gathering, including three fact-finding visits.⁹⁰ Business respondents welcomed the Welsh Assembly Government's approach to consultations. One business respondent praised WAG for making it easier to get involved in consultations, and for being more personal and approachable. This led to the perception that consultation responses were genuinely listened to and made a difference.⁹¹ A recent official review of law making in the Welsh Assembly Government indicated a number of ways in which its consultation (and other legislative) processes might be further improved.

Governments and regulators should do more to communicate and explain to stakeholders the basis for decisions taken following consultations

- 4.22 Criterion 6 of the UK Government's Code of Practice on consultation sets out standards for explaining and notifying stakeholders about how the consultation exercise has influenced policy development.⁹³ The Business Perceptions Report, however, indicates that the practice can fall short of these standards. Business respondents were dissatisfied with the degree of influence they could exert on decision-makers, and complained of not being given justification for why decisions went against their views.⁹⁴

89 Business Perceptions Report, section 4.

90 Interim Report, finding 20, page 94.

91 Business Perceptions Report, paragraphs 6.12 and 9.10.

92 Interim Report, pages 118-119.

93 HM Government, *Code of Practice on Consultation*, July 2008, page 12.

94 Business Perceptions Report, paragraph 9.9.

Addressing the possibility of a more significant and systemic problem with UK environmental legislation: further research and longer term or more radical reforms

Further work should be done to understand whether the specific problems identified in this project point to more significant and systemic problems with UK environmental legislation

- 4.23 Overall, this requires a comprehensive mapping of environmental legislation (and supporting guidance documents) across all the UK administrations to isolate problems of legislative quality, with supporting empirical analysis to examine the experiences of different user groups. The current project has provided a framework for conceptualising such problems, and has also demonstrated methods for gathering data from a range of users. To be manageable, such a broader project would need to be broken down by administration in the first instance, and then connected together.

Further work should be done to consider the potential role that environmental principles might play in UK environmental law to address problems of legislative coherence, integration and transparency

- 4.24 Environmental principles include the precautionary principle, polluter pays principle, principle of integration and the principle of intergenerational equity. The project found there is an appetite for, and interest in, including such principles in environmental legislation amongst many users of environmental law in order to improve legislative quality (and also its environmental impact). However, there is also scepticism about the resulting legal effects, since these might be compromised and manipulated in light of the general and ambiguous terms of such principles.⁹⁵ This research has suggested that the simple inclusion of environmental principles in key environmental legislative instruments, without more legislative detail, would not solve legislative quality problems directly. However, such inclusion would have some legal effects – as already occurs through EU legislation that includes or is adopted on the basis of such principles – and these effects might become more precise and predictable over time.
- 4.25 Further research is thus required to monitor, map and predict the legal effects of environmental principles to see how they might influence ongoing UK legal developments, particularly in the implementation and interpretation of regulatory obligations. Such research could also investigate the varying effects that might result from incorporating environmental principles in different ways: as legislative objects in different environmental statutes; as core considerations binding all public (or private) decision-makers; or as guiding concepts in policy documents. The Welsh Assembly Government's planned Sustainable Development Bill might be particularly instructive in such further work, as might the evolving jurisdiction of the First Tier Tribunal (Environment), since the creative interpretation of principles by courts and tribunals has been central to their legal influence in other jurisdictions.
- 4.26 An alternative but related law reform option for further investigation is the inclusion of objects clauses in key environmental statutes. These need not contain common (ambiguous) environmental principles. Rather they might contain general and overarching objectives relevant to a particular statute, which might guide the interpretation of terms within it, thus minimising coherence problems.⁹⁶

⁹⁵ See, for example: Interim Report, finding 30; Member Consultation Report, section III, comments on Principles; Business Perceptions Report, figure 12.

⁹⁶ Business Perceptions Report, paragraph 5.12.

Further work should be done, both within and between UK governments and by external organisations (including universities), to research, analyse and explain the emerging picture of fragmented environmental law across the UK administrations⁹⁷

4.27 Given the fast pace of legislative and policy change across and within UK governments, it is important to understand the evolving legislative picture in order:

- to signpost effectively to businesses operating across borders the differences in legal obligations;⁹⁸
- to share lessons learned and best practice (including from other EU devolved administrations) on drafting, designing and scrutinising environmental legislation.

4.28 This report makes a start, but there is more work to be done. One issue that deserves particular attention is the approach in Wales and Northern Ireland of frequently copying English legislation, partly due to resource constraints. This can compromise the quality of environmental legislation, particularly where it prevents consideration of local circumstances that might warrant a distinctive policy approach.⁹⁹

Further work needs to be done to investigate possible improvements and changes to scrutiny procedures in order to address legislative quality problems

4.29 The findings of problems with both legislative quality and scrutiny mechanisms indicate that existing scrutiny mechanisms need to work better than in the past. Possible improvements include more active engagement with environmental legislation by the Law Commission and relevant Select Committees. However, there are limits to what those bodies can achieve. They have limited resources and (in the case of Committees) sitting time, and generally scrutinise legislation retrospectively rather than at the formation stage.

4.30 More radical or imaginative reforms should also be explored, including standing commissions, a bespoke Environmental Law Commission (or one for each UK administration), and more active use of the House of Lords as a specialist chamber.¹⁰⁰ Such work should examine scrutiny models in other jurisdictions. These kinds of alternative approaches have the potential to provide scrutiny that is more consistent and holistic than the current piecemeal approach, and which prioritises optimal legislative quality. UKELA recommends that governments give special consideration to the good and innovative practice of the New Zealand Legislative Design Committee.¹⁰¹

97 Interim Report, page 157.

98 For example, different requirements on waste carriers & for hazardous waste in England and Scotland: Interim Report, pages 62 and 65.

99 Interim Report, pages 107-109.

100 Interim Report, page 147.

101 Interim Report, page 16.

Project Team

The final phase of the project has been led by a group from King's College London, BRASS at Cardiff University, and UKELA's Council, which includes members of regulatory bodies, private practice lawyers, environmental consultants and academics. During the course of the project advice has been sought from UKELA's patrons, working parties, the wider membership and from businesses. Consultation has taken place with practitioners, government lawyers, industry representatives, academics and judges.

The research was carried out by volunteers, interns and consultants, co-ordinated by Vicki Elcoate, the Executive Director of UKELA, Begonia Filgueira of UKELA's Council and Dr Eloise Scottford of King's College London. Rosie Oliver, of UKELA's staff, had a particularly key role in writing up the final stages of the report.

We are immensely grateful to all those who have helped.

Biographies

Srijanee Bhattacharyya

Srijanee was a research intern on the project. She studied Environmental Law during her degree at Oxford University and is currently a trainee at Slaughter and May.

Alison Boyd

UKELA's Member Support Officer since 2005. Prior to that, Alison was a manager at the Department of Trade and Industry. She is also a qualified adviser for the Citizens Advice Bureau. Alison is the project administrator.

Jemma Braid

Jemma was the intern co-ordinating the consultation phase of the project. Following on from a Graduate Diploma in Law, she has just completed the part-time BVC at The College of Law (London). Jemma is working with Cambridgeshire County Council for the Infrastructure Management and Operations Department. She also volunteers for the Citizen's Advice Bureau on the Cambridge County Court Housing Advice Desk.

James Corbet Burcher

James was a research intern on the project. He has an LLM specialising in Environmental Law from University College London. He is a pupil at Landmark Chambers.

Vicki Elcoate

The Executive Director of UKELA since 2003, previously Director of the Campaign for National Parks. Vicki has a background as a journalist (with Independent Television News) and has a postgraduate diploma in advanced environmental practice. Vicki is one of the project co-ordinators.

Angus Evers

Angus is a Partner and Head of the Environment Group at international law firm SJ Berwin LLP. He advises on the environmental aspects of major infrastructure projects and corporate, real estate and finance transactions. Angus is co-convenor of UKELA's Waste Working Party and has a LLM in Environmental Law from De Montfort University, Leicester. Angus is one of the project supervisors.

Begonia Filgueira

Begonia is one of the project co-ordinators. She is co-director of the Environmental Regulation and Information Centre (Eric) Ltd a legal consultancy that advises international institutions, governments and industry on environmental regulation, policy and governance. Begonia is a solicitor of the Supreme Court of England and Wales, a Spanish abogada and has been an environmental lawyer since 1997. She is an Executive Council member of UKELA and a Senior Lecturer at City University. Her research interests include environmental regulation, the effectiveness of governance systems and environmental philosophy.

Rebecca Findlay

Rebecca was a research intern on the project. She studied Environmental Law during her degree at Oxford University and is a trainee at Dechert LLP.

Lorraine Frater

Lori is a Research Manager/Senior Research Associate at the BRASS Centre, Cardiff University. She conducts research on various environmental issues including sustainable waste management, the role of regulation in behaviour change and the regulation of new technology. She is one of the project supervisors.

Dr Richard Kimblin

Richard is a project supervisor, a member of UKELA Council and convenes its Environmental Litigation Working Party. Richard is a barrister. He practices at No5 Chambers and has a varied and broad practice in planning, environmental and public law.

Professor Robert Lee

Robert is Professor of Law, Cardiff Law School, Co-Director of the ESRC Research Centre for Business Relationships, Accountability, Sustainability and Society (BRASS). He holds a higher doctorate (LLD) for his work on Socio-legal Studies of Regulation.

Vikki Leitch

Vikki was a research intern on the project. She has an LLB in Law from Warwick University and an LLM in Environmental Law and Policy from Newcastle University. Currently teaching at Newcastle University Law School on a variety of subjects including a postgraduate class on Environmental Impact Assessment.

Bridget Marshall

Bridget is currently Head Solicitor at the Scottish Environmental Protection Agency (SEPA). She has been with SEPA since 2002. She previously worked as a senior solicitor in the Environment Agency specialising in radioactive and waste law. She is one of three authors of "Pollution Prevention and Control-The New Regime" (Butterworths 2003). She is a Council member of UKELA and has been helping supervise the project.

Rosie Oliver

Rosie is a lawyer and writer who has worked in the environmental law field since 2001. She works for UKELA supporting the specialist working parties.

Dr Eloise Scotford

Eloise is one of the project co-ordinators. She is Lecturer in Law at King's College, London. Eloise teaches Environmental, EU, Administrative and Tort law. Eloise's research concerns Environmental Law, in UK law, EU law, and Australian law. In particular, she writes on the comparative legal treatment of environmental principles, waste law, air quality and climate change regulation.

Radoslaw Stech

Radoslaw is an Evidence Analyst in the Sustainable Development Branch of the Welsh Government, working on the forthcoming Sustainable Development Bill. He taught European Law and Environmental Law at Cardiff University and teaches EU Banking Law at City University. He has recently finished writing a PhD on Costs Barriers to Environmental Judicial Review. Radoslaw is author of the BRASS industry report.

James Taylor

James is the project reviewer. He is a senior associate in the Environment and Climate Change Group at Simmons & Simmons. He advises clients on environmental and health and safety law, major energy, waste and infrastructure projects, and regulatory and contentious issues. James regularly talks and writes on environmental issues. He is a UKELA Council member.

Jamie Whittle

Jamie is a Partner at R & R Urquhart LLP Solicitors based in their Inverness office. He advises clients on a broad range of environmental, planning and rural law issues. He holds an MSc with distinction in human ecology, and is a part time lecturer in environmental law at the University of Edinburgh. Jamie is a Council member of UKELA and has been helping supervise the project.

Is UK environmental legislation easy to understand, apply and access? Is it well integrated in its application to environmental problems, and across UK administration borders?

Further, who is scrutinising the work of officials to make sure that our environmental legislation is coherent, accessible and well-informed?

Should our environmental law be based on a set of environmental principles?

Based on interviews with those dealing with environmental law from business, law, and academia this report goes some way to addressing these challenging questions.

This report will be of interest to all those interested in making the law work for a better environment.

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UK Environmental Law Association, King's College London and Cardiff University

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283

Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath CVO

