



UKELA Brexit Task Force: Summary report on stage one (2017/2018)

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Year One Report
Published June 2018

Foreword

In September 2016 the Brexit Task Force was established by UKELA as a response to the Referendum result and to ensure that UKELA was at the forefront of the discussion on strategic issues affecting environmental law both before and after Brexit.

This paper sets out what we have done since then, and the progress that has been made in ensuring that UKELA has influenced debates upon the direction of environmental law at this crucial time. It is also indicative of the enormous effort and time that has been spent by the BTF team in ensuring the production of quality documents and personal engagement with significant stakeholders in the political process. We sincerely thank all those who have contributed their time and energies in this respect.

UKELA was neutral on the Referendum, and we decided that our most valuable role was to provide an authoritative and independent voice on the issues that need to be addressed. In doing so we have helped set the agenda. We know that our work has been welcomed by a broad range of interests including politicians, NGOs and Government, who have been very complimentary about the quality of what has been produced.

This report marks the completion of the first stage of UKELA's Brexit work, and as indicated in the introduction we feel the style and pace of UKELA's involvement will be changing in the light of developments in Brexit negotiations. It is therefore the right moment to hand over leadership of the BTF to others in the coming months to ensure that UKELA continues to provide a distinctive input. We would like to give special thanks to the UKELA Trustees for their wholehearted support over the last 18 months enabling us to place UKELA at the centre of the debate on Brexit and environmental law.

Richard Macrory
Andrew Bryce



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Introduction

As phase one of UKELA's Brexit work comes to an end, and the personnel on the Brexit Task Force change, we look back over what this small team has achieved after the last year. The period from February 2017 to February 2018 was marked by intense effort in profile raising and agenda setting.

UKELA launched its Brexit work with the aim of providing distinctive and authoritative legal expertise to the debate. UKELA's [Brexit Task Force](#) was established in September 2016, with 25 members representing UKELA's expertise across environmental law, co-chaired by Professor Richard Macrory and Andrew Bryce. They were supported by a small team comprising UKELA Policy Advisor, Rosie Oliver, and from February 2017 by Brexit Specialist, Joe Newbigin.

The Task Force's [reports](#) have been designed to help set the agenda, and our [Brexit blog](#) has endeavoured to make technical findings more accessible to the public. In doing so UKELA's profile and reputation in Brexit has now been established, and we have been effective in agenda setting. We have contributed to parliamentary select committees, spoken at numerous events, and maintained high level contact with key decision-makers.

The next stage of Brexit may involve a quite different rhythm and approach – one that will be more dependent on and responsive to government proposals and the developments in the Brexit negotiations. We expect that this will require a different type of contribution from UKELA. Therefore this paper therefore sets out the work we have done so far, the coverage it has received, and the projects that are still ongoing.

UKELA's *Brexit and Environmental Law Reports*

Exit from the Euratom Treaty and its Environmental Implications

While questions of security and safeguarding were being discussed in relation to Euratom, the question of safety, the protection of human health and the environment surprisingly were not. In response to this lacuna Paul Bowden and Stephen Tromans QC, two experts in the field, drafted UKELA's first report in the *Brexit and Environmental Law* series, [Exit from the Euratom Treaty and its Environmental Implications](#).

The report drew attention to legislative measures necessary to maintain the current regime of nuclear safety, particularly where the possible impact of 'Brexitom' (the constitutionally and legally separate process of withdrawing from Euratom) was not fully



appreciated. The report also raised the issues of key safety-related bodies, such as ENSREG (the European Nuclear Safety Regulators' Group) and ECURIE (European Community Urgent Radiological Information Exchange) which the UK may not be able to remain in, as well as the review of existing Nuclear Co-operation Agreements (NCAs) embracing Nuclear Safety with states outside Euratom.

Enforcement and Political Accountability Issues

Our second report in the series addressed the important topic of [*Enforcement and Political Accountability Issues*](#) after Brexit. The report highlighted the need for effective mechanisms to hold government and public authorities to account for their environmental law responsibilities after Brexit, emphasising both the range of governance roles which the European Commission fills, and why judicial review is ill-suited to replacing its supervisory role. Specific thanks should be given to the Environmental Litigation working party for their assistance in compiling the Appendices to this report, which elucidated the range of environmental courts, tribunals and ombudsman available throughout the world.

Enforcement has become a mainstay of the Brexit debate, and traction for UKELA's arguments about an impending governance gap are still raised with particular reference to the environment. The issue featured in the Environment Secretary's [*Unfrozen Moment speech*](#) in July, where he recognised the need to replace the enforcement functions currently undertaken by European institutions, and it frequently featured highly in the House of Commons debate on the second reading of the European Union (Withdrawal) Bill.

Brexit, Henry VIII Clauses and Environmental Law

Our third report was written in response to discussions about the scope of Henry VIII powers (provision enabling primary legislation to be amended or repealed by Ministers through subordinate legislation) proposed in the Withdrawal Bill, and a lack of any concrete information on where and to what extent they would be used. The Task Force wanted to determine the extent to which these powers were likely to be necessary in the field of environmental law. We combed through all major pieces of primary legislation relevant to the environment and identify any references which might require amendment or removal. We categorised each of so-called 'deficiencies' to determine if amendment was necessary, advisory, or unnecessary. This work resulted in the report [*Brexit, Henry VIII Clauses and Environmental Law*](#) and its accompanying Annex.



We found that the clause 7 power, which will give the Secretary of State power to make regulations to deal with ‘deficiencies’ in EU law that is rolled over after Brexit as retained EU law, would need to be used far less than many would have expected in the environmental field. Across twenty-nine Acts of Parliament we found six provisions which would require amendment, and a further thirty where change is advisable, although not necessary. Seventeen Acts of Parliament – the majority – would not require a single amendment. This report was well received and the Task Force is currently working on a follow-up paper looking at the scope of necessary amendments to secondary legislation, with a focus on waste and transboundary shipments.

The UK and International Environmental Law after Brexit

The Task Force’s fourth report was the longest so far in the *Brexit and Environmental Law*. This comprehensive mapping exercise analysed all the international environmental agreements that the UK is currently bound by and how each has been implemented through EU and domestic legislation. The Annex to [the UK and International Environmental Law after Brexit](#) sets out our findings in detail and is intended as a living reference document. Our analysis highlights issues with the continued applicability of international agreements, its implementation and the enforcement of it through international mechanisms.

The report highlighted that unless and until the UK ratifies international agreements which have been entered into by the EU alone, the UK will cease to be bound by these agreements and lose the backstop these provide in terms of standards and obligations. Similarly, the situation is unknown for mixed agreements (i.e. international agreements ratified jointly by both the EU and the UK), and there is ongoing disagreement about whether the UK will still be bound by them. The report recommended that the UK Government clarifies which of these agreements the UK will continue to be bound by. Some progress has been made since publication, but there is still a great deal of ambiguity.

UKELA staff have also developed the thinking in this report for an occasional paper on [Brexit and International Environmental Law](#) for the British Institute of International and Comparative Law’s *Brexit: The International Legal Implications* series.

Brexit and Nature Conservation Factsheet



Although not strictly part of the *Brexit and Environmental Law* series, this timely factsheet was key to the impact UKELA has made. Conscious that the Nature Directives have persistently received bad press in the UK, and that this has been accompanied by rumours that Habitats laws will not be 'rolled over' after Brexit, the Brexit Task force worked with the Nature Conservation Working Party to produce the [Brexit and Nature Conservation Factsheet](#). This factsheet aimed to provide a simple and accessible resource to debunk some common myths about this area of law, particularly in relation to the impact it has on infrastructure projects and placing the reviews done of this legislation at the UK and EU levels in context.

Wales, Brexit and Environmental Law

The Task Force's final report of 2017 was [Wales, Brexit and Environmental Law](#), written by Dr Victoria Jenkins of the Wales Working Party. The report elucidated the numerous challenges faced in developing environmental law in Wales after Brexit. It emphasised the importance of maintaining common frameworks for action on environmental protection across England, Wales, Scotland and Northern Ireland in a way that involves all four nations, and leaves room for Wales to tailor its approach to meeting or even exceeding common standards. Dr Jenkins drew attention to the complexity of applicable law in Wales, and to the relationship between devolved and non-devolved powers which must also be considered in the future development of environmental law. She also highlighted how recent innovative approaches, such as legal reforms for the well-being of future generations, can provide strategic direction and stability for the future development of Welsh environmental law.

The UK and European Cooperation Bodies

Our first report of 2018 was [the UK and European Cooperation Bodies](#). This paper systematically set out the detailed rules governing membership of 18 key environmental bodies and networks in which the UK (or UK-based bodies) currently participate. The analysis shows which bodies the UK can retain full membership post-Brexit under current rules, as well as highlighting opportunities for the UK to either seek amendment to these rules or apply for a lesser form of membership.

In order to inform the Government's decision, this report considers which environmental bodies it would be in the UK's interests to continue to participate in after Brexit. It sets out the functions performed by each of these bodies and its relationship with the delivery and enforcement of key sectors of environmental law, as well as exploring possible political barriers to continued engagement, such as budgetary



contributions, application of the relevant *acquis* or accepting limit jurisdiction of the European Court of Justice.

Environmental Standard Setting after Brexit

The Task Force followed this report up with an interlinked analysis of [Environmental Standard Setting after Brexit](#). This paper highlighted the considerable activity currently carried out at EU level to develop the standards that apply under EU-derived environmental. It considered the particular challenges that arise in three different scenarios:

- 1) if the UK is required to keep pace with EU standards under the terms of withdrawal or a trade agreement;
- 2) if the UK wishes to keep pace with evolving EU standards as a matter of domestic policy; and
- 3) if standards are to be developed domestically.

The report concludes that the third scenario – setting standards domestically – raises the biggest practical and legal challenges, as governments will need to decide how to repatriate the considerable work currently undertaken at EU level. The report deployed two contrasting case-studies: standard-setting for industrial processes; and water classification standards. It considered whether current arrangements might suggest starting points, or provide lessons, for developing standards domestically after Brexit. In both cases, the report recommended that governments consider ways of involving a range of stakeholders, including regulators, industry and environmental NGOs, in developing standards after Exit Day.

Ongoing projects

There are three further reports which the Task Force and UKELA members are working on.

First, a report on *Corrective Amendments to Secondary Environmental Legislation*. Following on from the earlier report on [Henry VIII Clauses and Environmental Law](#), the Task Force and a team of UKELA members from LexisNexis has been analysing the extent to which 'corrective' amendments which may necessary to secondary environmental legislation after Brexit. The report which this analysis has generated is a return to UKELA's earlier focus on sectoral analyses, using as its case study regulations governing waste and producer responsibility. The report will set out where UKELA



considers changes to secondary legislation in this field might be necessary, advisable or not needed.

Second, *Scotland and International Environmental law*. The Task Force commissioned follow up work to our report on [the UK and International Environmental Law after Brexit](#) which extends the detailed analysis of the implementation of each environmental convention to Scotland. This supplementary Annex identifies key implementing measures for each international agreement in legislation applicable to Scotland. Positive feedback has been received from lawyers working with Holyrood who have seen a draft copy. The Annex will be accompanied by a covering report written by Dr Annalisa Savaresi of the University of Sterling, which sketches out the unique complexities international environmental law poses for Scotland after Brexit.

Third, *Scotland, Brexit and Environmental Law*. Following the success of Victoria's paper on [Wales, Brexit and Environmental Law](#), the Task Force decided to write reports on the implications of Brexit for each of the other devolved administrations – starting with Scotland. This paper will look at the division between devolved and non-devolved powers, issues around common frameworks, and highlight complications to the question of enforcement and standard setting addressed in the other BTF reports.

External engagements

Over the past year the Task Force and UKELA staff have been building connections with other actors working in the fields of Brexit and environmental law. We have had considerable success engaging both with civil society and government through UKELA's own seminars and conferences, as well as attending events organised by others.

UKELA events

In June 2017 Task Force co-chairs Andrew Bryce and Professor Richard Macrory held a launch event to announce the launch of UKELA's *Brexit and Environmental Law* report series. The event, at climate change think tank E3G's London offices was chaired by UKELA patron and E3G chairman Tom Burke. Richard and Andrew outlined the full complexity of rolling-over environmental law after withdrawing from the European Union and gave a taster of the research UKELA would be publishing on Brexit and environmental law over the coming year.



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In May 2017 Andrew and UKELA Policy Advisor, Rosie Oliver, held a productive seminar at Cleaver Fulton Rankin's Belfast offices. The meeting brought together UKELA members from across Northern Ireland to discuss their priorities and concerns, and to ensure that UKELA's Brexit work reflected issues specific to Northern Ireland.

Later in the Summer UKELA, in partnership with the Law Society, the Environmental Law Foundation, and Wildlife and Countryside Link arranged an 'EU environmental legislation and Brexit workshop'. This session, which took place in July, was very well-attended by representatives from across Government and civil society. Breakout groups highlighted common concerns and divergence of opinions on topics including enforcement and compliance, possible gaps in legislative framework, practical regulation and UK-wide frameworks.

In September UKELA arranged a follow up seminar to the launch event at E3G's London offices. The particular focus of the event was on UKELA's work analysing the likely impact of Henry VIII clauses in the Withdrawal Bill on environmental law. The small group of select lawyers, business organisations and civil society also provided informative feedback on the usefulness of UKELA's reports to date.

Our Brexit Conference in October drew together the threads of the Task Force's research, and our connections with other organisations. The event was originally scheduled for earlier in the year, but had to be postponed after Theresa May's decision to call a snap general election, which delayed publication of the Withdrawal Bill. The conference sold out in record time. Speakers at the event included representatives from the Brexit Task Force, UKELA's Working Parties and Regional Groups, as well as President of UKELA, Lord Carnwath, UKELA Patron Tom Burke and Defra legal advisers

External organisations

As a result of UKELA's [Enforcement and Political Accountability Issues](#) report, the BTF met with the Institute for Government to discuss their project looking at the data on the UK's dealings with the EU institutions over the course of its membership. The Institute's team had seen trends emerging from data on how often the UK receives letters of formal notice compared to other member states, and why such a large preponderance of these cases involve the environment. Members of our BTF were able to provide context to these findings from a technical, legal perspective. The Institute's report, [Who's afraid of the ECJ?](#), was published in December 2017.

UKELA was also consulted by the Institute for Government about a project exploring the impact of Brexit on devolution and governance arrangements in the spheres of



agriculture, fisheries and environmental regulation. In a roundtable discussion, the Institute brought together practitioners, researchers and stakeholders from across the UK to consider options for common frameworks between national governments in the UK and how these frameworks might work. UKELA contributed to this discussion and followed up by engaging representatives from each of the Devolved Administration Working Parties to discuss in more detail: which policy areas might need UK-wide legislation and which could be devolved fully; whether there would need to be one UK-wide oversight body or whether each administration should establish their own; and the state of current inter-governmental systems and how they might be improved. The Institute for Government's final report is due later in 2018.

The BTF has fostered connections with the other main player working in their fields of environmental law and Brexit. The Task Force has been in regular dialogue with IEMA on numerous occasions to discuss interactions between our work, perspectives on the future of environmental governance after Brexit, and to share more information on the New Zealand model of enforcement. We have also been in contact with Greener UK and the NGOs that are members of the coalition, in particular ClientEarth and the Wildfowl & Wetlands Trust. We also maintain observer status with the Repeal Bill Alliance, contact with Environment Pillar in the Republic of Ireland.

We have also met senior lawyers dealing with BREXIT in DG Environment, European Commission both in Brussels and London to discuss UKELA's work. We were told they found our reports extremely valuable.

Political engagements

The Task Force's established reputation for neutrality and unquestioned focus on producing impartial and evidence-driven researching has allowed us to engage with political actors across the spectrum. We have found it useful to hear how helpful different parties have found our research, and if they have any suggestions about further avenues of inquiry.

Task Force members based in Scotland have had an ongoing dialogue with the Scottish Government and their legal advisors. Professor Colin Reid has represented (amongst other organisation) UKELA at Scottish Parliament inquiries, notably the recent Finance and Constitution Committee session on legislative consent memorandum for the European Union (Withdrawal) Bill (UK Parliament Legislation).

In Westminster we have enjoyed a productive relationship with UK Government lawyers. Defra's legal advisers, with whom we have met a number of times, have taken the time to sit with us on a number of occasions, as well as speaking at UKELA's Brexit



conference in October. We have also met with (what was then) DCLG's legal advisers, and with lawyers from DG Environment. We have been pleased to have had the opportunity to meet privately with ministers and a number of MPs from across the political spectrum.

Parliamentary Committees

UKELA has a long history of responding to both Government and Parliamentary consultation relating to withdrawal from the EU. For instance, in 2013 [UKELA responded](#) to the call for evidence on the environmental and climate change as part of the Government's review of balance of competences. This review – long before the referendum - considered the impact that the EU has had on the UK's laws and policies, and the pros and cons of keeping things the way that they are. UKELA has continued to actively engage with decision-making processes through both the working parties and the BTF. For example, Angus Evers, co-convenor of the Waste Working Party, gave oral evidence to the House of Commons Environmental Audit Committee's 2015 inquiry into 'EU and UK Environmental Policy', and UKELA's working parties made written submission to the House of Commons Energy and Climate Change Committee's 2016 inquiry on 'Leaving the EU: implications for energy policy' on the implications for both [climate policy](#) and [energy policy](#).

Since the formation of the BTF we were invited to give evidence to a number of Parliamentary Select Committees. Richard Macrory [appeared as a witness](#) before the House of Lords Select Committee on the Environment and Climate Change inquiry into Brexit: Environment and Climate Change in December 2016, and was cited in the [Committee's report](#). In October 2017 [Andrew gave evidence](#) to the House of Commons Committee on Exiting the European Union inquiry into the EU (Withdrawal) Bill. The Committee was [particularly interested](#) in how to ensure the law is properly enforced absent the European Commission. In November Hilary Stone of the Waste Working Party gave [evidence](#) to the House of Lords EU Energy and Environment Sub-committee inquiry into impact of Brexit on UK's trade in waste. And then in December Richard was invited to give [evidence](#) to the House of Commons Environmental Audit Committee's inquiry into 'UK progress on reducing F-Gas emissions' on the [implications of the UKELA's report on Brexit and International Environmental Law](#) in the context of the Kigali Amendment to the Montreal Protocol.

The BTF has developed a strong relationship with these committees, and will endeavour to continue providing expert evidence throughout the Brexit process.



Other speaking engagements

Task Force members and UKELA members have appeared at a range of other events representing the Brexit Task Force.

Task Force co-chair Professor Richard Macrory represented UKELA at conferences speaking on a range of issues including: 'Brexit and Environmental Law' at the *Environmental Law Fundamentals Conference* hosted by Dentons in London on 8 November 2017; 'Brexit and the Great Repeal Bill' at the *Annual Environmental Law Conference*, at 39 Essex Chambers in London on 1 November 2017; and, 'Environmental enforcement' at the ENDS Report Conference '*Environment After Brexit*' in Bournemouth on 11 April 2017.

Richard has briefed legal researchers in the House of Commons library on 'International Environmental Law and Brexit' at the House of Commons Library Briefing on June 1 2017, and again spoke on 'International Environmental Law Post Brexit' at the BIICL and Centre for International Governance Innovation '*Legal Challenges Post Brexit*' event at the British Institute in London on 31 January 2017. He also spoken on 'Brexit environmental update' at the *Castle Debate* in London on 20 Oct 2017; 'Brexit and environmental law' at the King's College London *Brexit Seminar* on 10 January 2017; and, 'UKELA and Brexit' at UCL on 7 February 2018.

Task Force co-chair Andrew Bryce represented UKELA at the Department for Business, Energy & Industrial Strategy's Euratom Exit Industry Forum in September 2017, to introduce the Nuclear Safeguards Bill and discuss other issues related to Euratom Exit.

UKELA chair Anne Johnston has attended a number of roundtable discussions, representing the Task Force, including a Strathclyde Centre for Environmental Law and Governance meeting on 'Brexit and the Environment – Visions for the Future of Environmental Law and Governance in Scotland post-Brexit' in May 2017 and a Scottish Government roundtable to discuss the implications of the UK's decision to leave the EU on Human Rights, Environmental and Social Protections in November 2017.

Mentions

The impact of UKELA's Brexit work can be measured both by the political influence we have achieved, and by the publicity our work has garnered.



The House of Commons Library, which has provided consistently good research on all aspects of Brexit, picked up UKELA's reports on a number of occasions. UKELA's Enforcement report was picked up by the House of Commons Library [Briefing Paper on the European Union \(Withdrawal Bill\)](#), which drew on our analysis in their discussion of complaints made to the European Commission. All of UKELA's reports were summarised and referenced in the Library's comprehensive [Brexit and the environment](#) report, published in November 2017 and summarising issues in the field, we were heartened to see UKELAs reports referred to extensively.

The Task Force's work, our reports and events have also attracted significant media coverage, including:

- EnvironmentAnalyst - UKELA evaluates environmental bodies and standard setting post-Brexit [6.2.18]
- ENDS - Warning of 'frozen' green laws after Brexit [5.2.18]
- ChemicalWatch - UK law body backs post-Brexit ECHA participation [5.2.18]
- BusinessGreen - Brexit risks leaving UK green standards 'frozen in time', lawyers warn [5.2.18]
- EnvironmentAnalyst - UKELA ranks environmental body membership post-Brexit [2.2.18]
- ENDS - EU body membership vital post-Brexit, say lawyers [31.1.18]
- Lexis - 'Open door' for continued UK membership of environmental bodies post-Brexit [29.1.18]
- EU Observer - Avoiding a Brexit chemical reaction [29.11.17]
- FT - New twists in compliance with environment laws [15.11.17]
- BBC - Scale of 'nitrate timebomb' revealed [10.11.17]
- Lexis PSL - Challenges of developing Welsh environmental law after Brexit highlight [18.10.17]
- Unearthed - Farm pollution at risk after Brexit, legal experts warn - Unearthed [17.10.17]
- ENDS - International environmental agreements could cease to apply after Brexit [13.9.17]
- Lexis PSL - Government urged to clarify environmental obligations in face of Brexit [11.9.17]
- Business Green - UK urged to deliver clarity on international environmental treaties post-Brexit, as Labour launches 'Green Brexit' push [11.9.17]
- PLC - UKELA report aims to clarify how Henry VIII powers in the Withdrawal Bill will be used to amend deficiencies in environmental laws after Brexit [5.9.17]
- ENDS - Environmental professionals warn of 'grave threat' from withdrawal bill [7.9.17]



- ENDS - Lawyers call for minimal changes to environmental law after Brexit [7.9.17]
- Business Green - Green groups keep up pressure on the government [7.9.17]
- UK Human Right Blog - Enforcement of environmental law: what is not in the Brexit Bill [20.7.17]
- Energy Live News – UK’s green laws ‘must be preserved post-Brexit’ [19.7.17]
- ENDS - Environment could ‘die in silence’ without post-Brexit supervision [18.7.17]
- PLC - UKELA publishes Brexit paper on enforcement and political accountability issues for environmental law [18.7.17]
- ENDS - Post-Euratom regime likely to rely on voluntary arrangements [17.7.17]
- Environment Analyst - Legal experts highlight Brexit environmental enforcement concerns [17.7.17]
- PLC - UKELA publishes paper on Brexit and Euratom [14.7.17]
- Environment Analyst - Slow progress in corporate sustainability advisory sphere [14.7.17]
- ENDS - Lawyers draw up plans to prevent weakening of EU environment rules [5.7.17]
- ComplianceWeek - Brexit poses many environmental law challenges [4.7.17]
- PLC - UKELA announces series of reports on Brexit’s impact on environmental law [3.7.17]
- The Guardian - Lawyers plan to stop UK dropping EU rules on environment after Brexit [3.7.17]
- Business Green - Gove signals support for green farming Brexit plan [3.7.16]

Moving forward

As this paper started off by saying we are now entering a different phase of Brexit which will require a different type of contribution from UKELA. That is not least because of personnel changes within the Task Force. Richard Macrory has stepped down as co-chair (although he remains on the Task Force) and is succeeded by Begonia Filgueira, and both Rosie Oliver and Joe Newbigin have left UKELA. Paul Stookes took over from Rosie Oliver in April 2018. Andrew Bryce is stepping down as co-chair in July, to be succeeded by Angus Evers.