Welcome to the first edition of elaw for 2018.

This year, we celebrate 30 years of UKELA. Looking back at the January 1988 edition of the ENDS Report, it is encouraging to see that some of the key environmental issues grappled with at that time, such as the regulation of CFCs and reducing acid emissions, are now heralded as some of the most successful environmental laws in history. In addition to regulation, public pressure played an important role, with some aerosol companies beginning to label their products as ‘ozone friendly’ and ‘CFC free’ on a voluntary basis.

As part of the 30th Anniversary initiatives, we will incorporate a special series of 60 second interviews with some of our convenors, trustees and Patrons to share their thoughts on how environmental law has changed during their careers. We are honoured and delighted that our President, Lord Carnwath of Notting Hill, has kindly agreed to be our first interviewee. Read his thoughts on developments over his esteemed career, his favourite UKELA memory and what he sees as the main challenges to environmental law in future years.

The theme for this edition is the role of environmental courts and tribunals (ECTs). This topic has always been of interest to me, as I spent much of my first few years as an environmental lawyer appearing and instructing Counsel in the Land and Environment Court of New South Wales (LEC). The LEC was established in 1980 as a superior court of record and was the first specialist ECT in the world. I was fortunate to appear before specialised Registrars, Commissioners and Judges, and to experience many of the innovative features of the Court’s practice, including eCourt, Court-appointed experts, alternative dispute resolution and ‘hot-tubbing’ to name a few. Many of the cases I was involved with concerned complex hydrological, ecological and town planning issues. The ability of the Court to understand and digest these issues quickly led to significantly reduced hearings, and better quality judgments. The LEC also created a hub around which the community of environmental practitioners and experts grew and developed.

More than 350 specialised ECTs now exist throughout the world. In England and Wales, and more recently in Scotland, calls for specialised ECT with comprehensive and exclusive jurisdiction have so far been unsuccessful. I understand from Neil Parpworth and Katharine Thompson’s article ‘Establishing a Specialist Environmental Tribunal: The Implications for Magistrates’ (2003) 167 JPN 888, that in 1991, during his delivery of the Garner lecture on ‘Are the judiciary environmentally myopic?’ Sir Harry
Woolf referred to the growing body of environmental law, and queried whether the legal system was capable of adapting so as to provide an effective means of protecting the environment. His preference was to establish a specialised ECT. In 1999, the Grant Report 'Environmental Court Project Final Report' examined the prospect of a specialised ECT and identified five alternative models for an environmental Court in England and Wales. However, the government was not persuaded at that time for the 'need for an environmental court.'

The Grant Report was followed by the Royal Commission on Environmental Pollution’s 23rd Report, Environmental Planning, which recommended that an environmental tribunal be established to hear planning and environment appeals, with the main concern being the need for merits review. It was this recommendation which provided the starting point for the research which led to the ‘Macrory Report’ by Professor Richard Macrory and Michael Woods Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.

We are extremely fortunate that Professor Macrory has kindly written a piece for this edition of elaw which reminds us of the history of the case for an environmental tribunal in England and Wales, discusses the establishment of the First-Tier (Environment) Tribunal, albeit with limited jurisdiction, and considers the future potential of the Tribunal, please see: The Environmental Tribunal and its future potential.

We are also grateful to our Patron, Sir Crispin Agnew, for his interesting article on Does Wednesbury protect the environment? The need for an Environmental Court which recommends that a Scottish Land and Environmental Court should be established based on the Scottish Land Court.

William Rundle, Friends of the Earth, looks at costs rules for environmental cases, imagining that the environment tribunal has expanded its jurisdiction in his article: Too expensive to win? Costs neutrality in tribunals and I have set out some of the key features of the LEC in my article A brief look at the Land and Environment Court of New South Wales: 37 years of experience.

In our matters in practice section, we also have two topical articles, A new independent environmental body for England? Some reflections by Wyn Jones, and Evidence to the House of Lords Select Committee on the European Union: The impact of Brexit on the UK's trade in waste by Hilary Stone.

Finally, please don’t miss Anne Johnstone’s Words from the Chair as she makes some important announcements about changes in the organisation.

Best wishes,

Hayley Tam

Hayley Tam
UKELA Trustee & e-law Editor
Welcome to the first elaw edition of 2018. I hope it has been a good start to the year for everyone. As usual, elaw is packed with excellent content for which we are hugely grateful to our members, and we are especially grateful to Lord Carnwath for kindly agreeing to be our first 60 second interviewee in this special 30th anniversary edition. For my part, I have a number of changes within UKELA to inform you about.

After five years with UKELA, our Executive Director Linda Farrow is leaving us at the end of February. Linda is going to join the Ruskin Mill Land Trust, an educational charity that works with young people with a range of special needs. We are very sorry to see Linda go and wish her well in her new role. She is going to join as a member though, so it’s not really goodbye!

February also sees the departure of our Brexit Researcher, Joe Newbigin. Joe’s post was created as a result of Trustees’ decision to release money from UKELA’s reserves to support the work of the Brexit Task Force (BTF). The production of the Brexit and Environmental Law series of reports would not have been possible without this resource. Our congratulations to Joe on securing a position as a Defra lawyer in the planning and infrastructure team. We hope that he will also continue to be an active member of UKELA!

And finally, after nine years as UKELA’s Working Party Advisor we also have to say goodbye to Rosie Oliver. Many of you will have worked with Rosie, who has done an amazing job supporting the working parties over the years, ensuring high quality submissions on UKELA’s behalf on an impressive roll call of consultations. Rosie has also been providing staff support to the Brexit Task Force for the past year and the Brexit and Environmental Law reports would not have happened without her. Rosie is leaving to focus on her own businesses, Dotmaker Tours (alternative walking tours around London) and audio producing. And again although sad to be losing Rosie’s wise counsel, we are very excited for her and wish her continuing success with her ventures.

Linda, Rosie and Joe – thank you so much for all you have done for UKELA.

And now on to the good news! I am delighted to announce that the Board of Trustees has appointed Alison Boyd as UKELA’s Operations Director. All of you will have dealt with Alison at some point and many of you will know her personally. She is in many ways the heart and soul of UKELA. Alison will be very much focussed on the day-to-day running of the organisation, and over the next few months she will be contacting working party and regional committee convenors to discuss how UKELA can help them make their groups as vibrant as possible. Alison will be supported by Elly-Mae Gadsby, who is being promoted from Administrator to Senior Administrator, with particular responsibility for membership development and administration. We are also recruiting a replacement for Rosie. Please see the advertisement, and do get in touch if you are interested in this fantastic opportunity.

With regard to the BTF, Rosie and Joe’s departure marks the end of the first stage of UKELA Brexit activity, one that saw intense effort in profile raising and agenda setting. It is the view of the current BTF co-chairs that the next stage will 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. For example, we are anticipating the imminent launch of a consultation on a new enforcement body and an ad hoc working group is standing by to respond. We expect the proposals to be heavily influenced by our report on enforcement models.

UKELA’s profile and reputation in Brexit has now been established, and we have been effective in agenda setting. The next phase will require a different type of contribution. Future work will basically be about the shape of our national environmental law post-Brexit and the lead on this should be taken by the working parties, who will have the relevant expertise, or ad hoc working groups created and disbanded as required. Having fulfilled the principal purpose of the BTF, both Richard and Andrew will be standing down as co-chairs this year, Richard at the end of February and Andrew at the end of June. Both will continue to be active members of the BTF, which will continue to advise the Chair and Board of Trustees on Brexit matters. If you are interested in joining the BTF, please contact either me or Alison.

One final change I would like to highlight is the change of convenor of the Nature Conservation Working Party. Wyn Jones has stepped down as convenor but continues to be a very active member of the NCWP. He has been replaced by Pip Goodwin and Eunice Pinn. We would like to thank Wyn profusely for his leadership of the NCWP and also Pip and Eunice for taking up the mantle.

A rather long note from the Chair this month, but an important one. UKELA has been described to me recently as the “foremost authority” on environmental
issues relating to Brexit. Many doors are open to us, and we can continue to set the agenda, but only with the full engagement of our membership. Our voice will be crucial to the shape of our environmental law over the next decade and beyond. So please step up! Join a working party if you haven’t already, go to meetings if you can and contribute to their output. Encourage people to join us. Or let me know directly what kind of contribution you would like to make.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair
Farewell from our Executive Director

It is with a mix of sadness and excitement that I write these few words for e-law. Sadness because I am leaving my role as Executive Director of UKELA after close to five, thoroughly rewarding and enjoyable years in post; excitement because I sense that my environmental career and personal growth are in for a change of direction and an input of new ideas and new people.

I will be taking so many good memories with me – of annual conferences in Edinburgh, Liverpool, Brighton and Nottingham, of Wild Law weekends visiting the Isle of Arran, Northumberland and Ben Nevis and of influential and authoritative contributions both to policy and legislative developments and to our members’ continuing professional development – not least on the subject of Brexit.

It was with some trepidation that I took over from UKELA’s previous Executive Director, Vicki Elcoate, in 2013. Vicki had been the Association’s first and only Executive Director up to this point and had held the position for close on ten years. How would I be able to absorb the information she wanted to pass on to me from a decade of experience? How would I remember all the names and faces of people in UKELA’s working party, Devolved Administration and regional groups from our 1,400 strong, UK-wide membership? Well I needn’t have worried. While we are a charity with a small financial turnover, UKELA has good governance and effective systems and processes beneath its surface – the famous hidden, webbed feet of the swan that work so hard below while the rest of the bird glides smoothly above. And these systems and processes stand UKELA in good stead as individuals come into post, learn, contribute, grow and then move on, leaving space for the organisation to grow again, in new and different ways.

I am delighted to say that I am leaving UKELA in experienced hands. Trustees have made the very wise decision to create a new role of Operations Director and invite Alison Boyd to take it up. Alison knows UKELA inside out and has warm and long-standing working relationships with many of you. I wish Alison every success.

My new role – as Field Centre Manager for the Ruskin Mill Land Trust – will be to co-ordinate and develop the Trust’s research programme, making sure that its valuable work educating young people with special needs – undertaken in close connection to the natural world – draws on the best knowledge for the benefit of those in its care. In common with UKELA, I hope to help forge national and international links, as well as exploring the potential for collaboration with the UKELA Working Parties most closely linked to the Trust’s own work in the environment and health.

Last summer, I was lucky enough to see a large number of orca off the west coast of Canada – an unusual grouping of several migratory pods. Amongst our whale-watching group, there was an intense period of activity and focus, each one of us absolutely “in the moment.” Once the last of the orca went their way some half an hour later, I was left with a feeling of intense gratitude for the experience, tinged with sadness that it was over and allied with a firm belief that I would see them again. As UKELA celebrates its 30th anniversary, I leave you all with a similar mix of feelings. “Hitchhiker’s Guide to the Galaxy” fans will understand that when I say “so long and thanks for all the fish” – something that orca might well join their dolphin friends in saying – it is meant with good humour and much affection.

Linda Farrow
UKELA news

Membership subscriptions

Your membership subscription notice for 2018 renewals was sent to you at the beginning of December, followed by a reminder a couple of weeks ago. Many thanks to all who have paid – your continued support is very much appreciated. If you don’t think you have heard from us about renewing your membership, please drop us a line.

Direct debits

Have you considered paying your membership subscription by direct debit? It is really straightforward to set up and takes all the hassle out of renewal. It also helps UKELA to save admin costs and time, meaning we can put more effort into other areas to benefit members. If you would like to sign up for a direct debit, please contact Alison Boyd for a form.

Gift Aid

Do you pay your own subscription? If you are a UK taxpayer*, you can register to allow us to claim Gift Aid on your subscription. Thank you to those of you who already allow us to do this, as it makes a big difference to our budget. If you would like to find out more and complete a Gift Aid form, please get in touch. Every penny counts!

*you must be able to confirm that you are a UK taxpayer and that you understand that if you pay less Income Tax and/or Capital Gains Tax in the relevant tax year than the amount of Gift Aid claimed on all your donations, then it is your responsibility to pay the difference.
Membership news

Thirty Plus One

2018 is UKELA’s 30th anniversary. To celebrate this milestone, and to help the organisation become even stronger as it heads into the next 30 years, we are calling on all members to help us recruit! Can you add one more member to our ranks? Is there a friend or colleague you know who has been thinking about joining and not quite got around to it? Or do you know someone who used to be a member and has fallen by the wayside?

Recruit someone new or bring back an old friend and help UKELA grow! As an incentive, the first 30 members to recruit a new or returning member, will be given 2 free tickets (for them and the new member) to a UKELA event of their choice* – so, get recruiting! To let us know about the person you have recruited, please get in touch. Our membership application form is on our website.

Thank you!

*not including the Annual Conference, Scottish Annual Conference or the Wild Law weekend; events included currently are: Waste seminar on 7 March; Nature and Wellbeing seminar on 26 March; Changing Face of the Energy Mix on 9 May; Water & Marine Issues on 24 September. Other events will be added as they become available. All free tickets are subject to availability and offered at UKELA’s discretion. Free tickets will only be issued once the new member has completed registration. UKELA has the right to vary these terms at any time.
The Brexit Task Force

Introduction
This is the final update from Rosie and myself as researchers for the Brexit Task Force. After a year in this post, I am leaving UKELA to join the Government Legal Department in the planning and infrastructure team at MHCLG; and after nine years at UKELA, Rosie is leaving to focus on her work as a producer, and on running Dotmaker Tours surprising London walks.

It has been an eventful year for Brexit-watchers, and this change of personnel on the BTF coincides with a step-change in the Brexit process. The first stage has been marked by an intense effort in profile raising and agenda setting on the part of the BTF. The BTF’s reports positioned UKELA as a body with distinctive expertise to contribute to the debate, with coverage extending beyond the specialist press to the Financial Times and the BBC.

The next stage of Brexit will 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. The BTF will continue coordinating UKELA’s Brexit work, but the impact of this work on all facets of environmental law means that it will be increasingly led by the working parties, and by UKELA itself.

This update complements the summary we previously provided in e-law September/October 2017, Issue 102 and looks back at the work that the BTF has done to date, as well as the work the BTF will be continuing going forward.

Wales, Brexit and Environmental Law
The BTF’s final report of 2017 in the Brexit and Environmental Law series was Wales, Brexit and Environmental Law, written by Dr Victoria Jenkins. The report elucidates the numerous challenges faced in developing environmental law in Wales after Brexit. It emphasises the importance of maintaining common frameworks for action on environmental protection across England, Wales, Scotland and Northern Ireland. This should be done in a way that involves all four nations, and leaves room for Wales to tailor its approach to meeting or even exceeding common standards. Victoria draws 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.

The report also highlights 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 sets 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 of 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.

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
We have also just launched a report on Environmental Standard Setting after Brexit. This paper highlights the considerable activity currently carried out at EU level to develop the standards that apply under EU-derived environmental legislation. It considers 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 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 takes two contrasting case-studies: standard-setting for industrial processes; and water classification standards. It considers whether current arrangements might suggest starting points, or provide lessons, for developing standards domestically after Brexit. In both cases, the report recommends that governments consider ways of involving a range of stakeholders, including regulators, industry and environmental NGOs, in developing standards after Exit Day.

**Forthcoming reports**

First, a corrective amendments report. Following on from the BTF’s earlier report on *Henry VIII Clauses and Environmental Law*, the BTF has been working on a paper looking at ‘corrective’ amendments which may necessary to secondary environmental legislation. This report is a return to the earlier focus on sectoral analyses and uses as its case study regulations governing waste and producer responsibility. Given the sheer volume of detailed cross-references, this has required a huge amount of work, and we have been very lucky to have had the help of the LexisNexis team to do the heavy lifting on this. The report will adopt the same formula as the Henry VIII report and consider whether changes might be necessary, advisable or not needed.

Second, *Scotland and International Environmental law*. The BTF has 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. A supplementary Annex will accompany this, identifying key implementing measures in Scottish legislation. This will be accompanied by a covering report which analyses in more detail the interaction between the devolution settlement and international environmental law in Scotland.

We have elaborated on the original report in a paper on *Brexit and International Environmental Law* for the British Institute of International and Comparative Law’s *Brexit: The International Legal Implications* series.

Third, *Scotland, Brexit and Environmental Law*. Following the success of Victoria’s paper on *Wales, Brexit and Environmental Law*, the BTF intends to produce reports on the implications of Brexit for each of the 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.

**Networking and engagements with decision makers**

The BTF has been engaging widely among civil society groups and decision makers. The Brexit Conference in October was a great success, with positive feedback from the broad spectrum of UKELA members who attended. A wide range of views were represented and we were grateful in particular to Lord Carnwath and Defra lawyers for contributing, and to 39 Essex Chambers for hosting.

As a result of UKELA’s *Enforcement and Political Accountability Issues* report, the BTF was consulted informally by the Institute for Government for a 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 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 invited to contribute to an Institute for Government 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’s final report on this is due in February.

We have been maintaining contacts with other actors to share ideas and continue to engage and collaborate throughout the Brexit process. The BTF met IEMA to discuss perspectives on the future of environmental governance after Brexit, and to share more information on the New Zealand model of enforcement. We have also maintained productive dialogues with Greener UK, individual eNGOs and their Irish-equivalents at Environmental Pillar.

The BTF has enjoyed audiences with decision makers from across the spectrum. We sat down with representatives from the European Commission on a visit to London to discuss the content of our reports, and to get their perspective on other areas which might warrant further research. BTF members have also had the opportunity to meet with the Environment Secretary, the Scottish Governments and...
MPs from opposition parties. Throughout these meetings UKELA has maintained a strict political neutrality, engaging with all parties to explain our technical findings and provide expert input to inform the Brexit process. We have been heartened by the positive feedback our reports have received across the board, and we have welcomed suggestions of areas for further work.

The BTF has been invited to contribute to a number of Parliamentary Committees. In October, BTF co-chair Andrew Bryce gave evidence to the House of Commons Select Committee on Exiting the European Union session on the EU (Withdrawal) Bill, focusing on the implications of the Bill for environmental law and chemicals regulation. The Committee was particularly interested in UKELA’s Enforcement and Political Accountability Issues report, and in ensuring that environmental law is properly enforced absent the European Commission.

In November, Hilary Stone from the Waste Working Party gave evidence to the House of Lords EU Energy and Environment Sub-committee inquiry into the impact of Brexit on UK's trade in waste. See Hilary's article. And in December, BTF co-chair Richard Macrory provided evidence to the Environmental Audit Committee inquiry into UK progress on reducing F-Gas emissions. The Committee wished to explore the issues raised in UKELA’s report on the UK and International Environmental Law after Brexit in relation to the Montreal Protocol and the Kigali Amendment.
Working Party news

Brexit

Brexit – and how we should approach environmental regulation after Exit Day – continues to be a focus for all UKELA’s working parties, whose convenors sit on the BTF. The Waste Working Party will be holding an afternoon seminar on 7 March on ‘Waste Law and the Circular Economy after Brexit’.

Other consultations and influencing

With the publication of the UK Government’s 25 Year Environment Plan in January, UKELA’s working parties are gearing up to engage with the proposals in the Plan. Work is currently underway preparing a submission for the Environmental Audit Committee’s inquiry into the Plan.

The working parties have engaged with a number of important consultations from environmental regulators in England and Scotland, concerning permitting and enforcement.

In December, the Scottish Working Party responded to the Scottish Government and SEPA consultation on an Integrated Authorisation Framework: Supporting Guidance. In January, the Waste Working Party responded to the Environment Agency’s consultation on charging proposals to take effect in England in April 2018. The response welcomes the Environment Agency’s aim of more closely linking its charges to the cost of regulation combined with its commitment to provide a fair and transparent charging scheme. It includes detailed comments on the proposals. The Environmental Litigation Working Party responded to the Environment Agency’s consultation on revised Enforcement and Sanctions Policy documents. The response welcomes the initiative to streamline and simplify the guidance, whilst making detailed comments on the content.

Events

The Wales Working Party held a seminar on 25 January on Planning Law in Wales. Officials from the Planning Directorate of the Welsh Government provided an update on their key projects to be delivered during the fifth term of the National Assembly for Wales. This ambitious project will involve consolidating some 30 Acts of Parliament and replacing them with just two.

Our new Public Health and Environmental Law is planning an early evening seminar for soon after Easter on why environmental law practitioners need to consider public health.

Thank you, Wyn!

In February, Wyn Jones will be stepping down from his role as convenor of the Nature Conservation Working Party, to be replaced by Eunice Pinn and Pip Goodwin. UKELA is enormously grateful to Wyn for his huge contribution, enthusiasm, deep knowledge and hard work convening the group over many years. You can read Wyn’s reflections on the suitability of the joint nature conservation agencies – where he worked for some 30 years – to perform the role of environmental watchdog after Brexit.
UKELA Moot Competition 2018

The UKELA annual Moot competition finals will take place on Friday 23 February, once more kindly hosted by King’s College, London. Our Moot Master, Nina Pindham, has judged the skeleton arguments for both the Junior (Dame Frances Patterson) and Senior (Lord Slynn of Hadley) competitions and found them to be of an exceptionally high standard this year, making her job very tricky indeed!

We have four teams going forward for each competition, each hoping to win the prizes which include:

- a trophy for each winning team to take back and display at their institution;
- a prize of £150 from No5 Chambers for each winning team, as well as an offer of a one-month internship at No5 Chambers for the winners of the Senior Competition and an offer of a one-week mini-pupillage at No5 Chambers for the winners of the Junior Competition;
- free membership of UKELA for all finalists for one year;
- a free one-year subscription to the four winners to the leading journal, Environmental Law and Management, kindly provided by Lawtext Publishing

Good luck to all taking part, and well done to all who entered!

Student publication opportunity

Interested in authoring a hot topic article in collaboration with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members’ journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to our student advisors Rosie McLeod or Lewis Hadler. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is ‘Waste and the Circular Economy’, expected to be published in the week commencing 4 April.
A Guide to Getting Into Environmental Law

Written by Mark Davies

Thank you for taking an interest in studying environmental law and for contacting UKELA. Whether you are a school student, undergraduate, post-graduate or simply looking for a career change, we hope this guide will help you understand the various routes into environmental law.

This Guide does not presume to recommend any one route over another and should not be taken as definitive.

What should be recognised at the outset is that there are various different routes but what is common to almost all of them is that you will not have the opportunity to specialise in environmental law from the outset.

School Students

If you are currently studying for your A-levels, Scottish Highers or the International Baccalaureate there are several routes into law, which should eventually afford you the opportunity to study some environmental law.

The first is the standard law degree (usually denoted by the letters ‘LLB’). Many universities around the country offer law degrees and having one (or the Graduate Diploma in Law, the GDL/Common Professional Exam, the CPE see below) is the traditional route into a career in law. The entrance requirements for the different universities vary and competition for places at ‘Russel Group’ universities can be tough.

The LLB generally takes three years and covers the core ‘law-subjects’. Those core subjects do not include environmental law, but some universities may offer it as an optional module.

Wherever you undertake the LLB you should ensure that it is a qualifying law-degree, that is recognised by the Solicitors Regulation Authority (SRA).

A list of institutions accredited by the SRA may be found here: [https://www.sra.org.uk/students/courses/Qualifying-law-degree-providers.page](https://www.sra.org.uk/students/courses/Qualifying-law-degree-providers.page).

The second option is to undertake a ‘non-law’ undergraduate degree in a subject of your choice (for example in environmental science) and then complete the GDL after graduation. The GDL is a one-year full-time or two-year part-time course which covers only the core subjects of the LLB. It is not offered by as many institutions as the LLB and is not, ordinarily, covered by Government student loans.

Most providers of the GDL require their students to undertake a personal research project during the course; some providers mandate a list of questions students must choose from, whilst others afford students the choice. If you want to study any environmental law on the GDL you would need to do so as part of the personal research project.

A list of CPE/GDL providers may be found here: [https://www.sra.org.uk/students/conversion-courses/cpe-gdl-providers.page](https://www.sra.org.uk/students/conversion-courses/cpe-gdl-providers.page).

The third way into law post A-level/Baccalaureate/Scottish Highers is through a legal apprenticeship (for example offered by the Chartered Institute of Legal Executives, or CILEX). Legal apprenticeships are offered by employers and do not lead to qualification as a solicitor or barrister, however they do offer opportunities to work with qualified lawyers, learning from them. At present, there is no ‘environment’ legal apprenticeship so pursuing this as a route into environmental law may be inadvisable.

Further information about legal apprenticeships may be found here: [https://www.gov.uk/guidance/legal-services-apprenticeships](https://www.gov.uk/guidance/legal-services-apprenticeships).
Undergraduate Students

If you are completing a non-law degree, please see the section above on the GDL/CPE and then read the below.

Whether you are completing an LLB or the GDL/CPE, you will need to consider whether you wish to become a practising lawyer (either a solicitor or barrister) or an academic lawyer. This is a decision you should consider during your course.

If you wish to pursue a career as an academic lawyer in the field of environmental law you should consider taking a Masters level course in environmental law and even, eventually, undertaking a doctorate (or PhD) in your chosen specialism.

If you decide that you want to practise environmental law then you will need to decide whether you want to do so as a solicitor, and apply for training contracts, or as a barrister and apply for pupillage (this Guide will not consider the differences between the professions). Getting either a training contract or pupillage is extremely competitive.

In any event, you will need to undertake the Legal Practice Course (LPC) to become a solicitor or the Bar Professional Training Course (BPTC) to become a barrister.

If you secure a training contract your firm may pay your LPC fees and support you through the year.

A list of LPC providers may be found here: https://www.sra.org.uk/students/courses/lpc-course-providers.page.

If you decide to choose the barrister route you can apply to the Inns of Court for funding for the BPTC and/or if you secure pupillage some sets of Chambers (the name given to groups of self-employed barristers sharing overheads and providing pupillage) may allow you to ‘draw-down’, i.e. give you an advance, some of your pupillage award, which is the money you are given whilst training.

A list of BPTC providers may be found here: https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/bar-professional-training-course/bptc-providers.

To ensure you have the best chance of practising environmental law during your early years of practice you should consider tailoring your applications to firms/Chambers that have some specialism in environmental law.

Note that the CILEX route is available for those with a degree. You do not become a qualified solicitor or barrister, as with the legal apprenticeship route, but rather a Chartered Legal Executive. Further information about this option may be found here: https://www.cilex.org.uk.

Post-Graduate Students:

If you are a post-graduate student with a non-law degree please read the section above on the GDL/CPE under the ‘School Students’ heading.

If you are a post-graduate student with a law degree and non-environmental law masters then please read the section above for undergraduate students.

Career Change

If you are considering a complete career change then you will need to consider whether doing an LLB, the GDL/CPE or pursuing the CILEX route is the best option for you.

Frequently Asked Questions

Q: Do I need a Masters in environmental law to practise environmental law?
A: No, but it does not hurt to have one. The more specialist environmental law firms/Chambers may consider an application more favourably if an applicant has a Masters in environmental law as it clearly demonstrates an interest in the topic, but if you have studied it at undergraduate level or are simply able to show a genuine interest in the area you should be fine.

Q: Do employers prefer law or non-law degrees?
A: Quite simply it doesn't matter. The important thing is to do as well as possible in either, aim for a first class or upper second-class degree.

Q: Should I do work experience?
A: Absolutely! Get as much work experience, whether at a solicitors’ firm, in a set of Chambers (commonly called a mini-pupillage), or elsewhere, as possible. It is invaluable on your CV and shows that you are really committed.

Q: How do I become an environmental consultant?
A: Environmental consultancy requires a good working knowledge of environmental law, but does not require any legal training or qualifications. Instead it is technical and scientific and may be a good option for those who are more interested in the practical implementation of environmental law.

There are many routes into environmental consultancy, but typically you will have to have studied science subjects to A-level/Higher. Some universities offer environmental science undergraduate degrees, but probably the majority of environmental consultants will not have specialised at undergraduate level. Common degree subjects are geology, chemistry and physical geography, with specialism at Masters level. In some cases, this may be an environmental LLM; however this route does not qualify you to provide legal advice.

There is no clear route into environmental consultancy because there is such a wide range of careers. Most companies advertising graduate positions will be seeking candidates qualified to Masters level, but don’t let that put you off if you want to apply for a job after your undergraduate degree. Strong candidates with a first or upper 2:1, excellent report writing ability, strong interpersonal skills and a demonstrable interest in the sector are likely to perform well at interview.
UKELA events

Moot Competition Finals – 23 February
If you are interested in watching the finals of our Moot competition, please get in touch.


The post-Brexit world presents new challenges for the waste and resources industries. This is the first joint seminar UKELA has hosted with ESA and CIWM. We have an exceptional line up of speakers on this key subject. The seminar is aimed at anyone who deals with waste and resources in a legal, consultancy or technical capacity. The seminar will provide you with a detailed understanding of the potential impact of Brexit on the UK waste management and export industry. For booking details, please visit our website.

UKELA Annual Conference: Past Reflections and Future Horizons: Environmental law in a post-Brexit World – 22 to 24 June 2018
Please join us in Canterbury at Kent University’s beautiful campus from 22 to 24 June 2018. Our Conference theme this year is “Past Reflections and Future Horizons: Environmental law in a post-Brexit World”. This year, the conference will give us time and space to recharge as we approach Brexit – and UKELA’s 30th anniversary. Our programme starts earlier this year to give you even more CPD value. For booking details, please visit our website.

Non-UKELA Diary Dates

PIEL UK Annual Conference: Has the Green Revolution Reached the Courts? – 6 April 2018
UKELA is proud to be supporting the Public Interest in Environmental Law (PIEL) 12th Annual Conference. This year’s conference, which will be held at CASS Business School on 6 April, is organised around the theme of ‘Public Interest Environmental Litigation’.

In the current context, strategic litigation in environmental issues is seen as one of the most creative ways for lawyers and activists to bring environmental issues to the public’s attention. Around the globe there is a rise of creative interpretation by judiciary and expansion of the legal rules to allow more of these issues to be addressed through the courts. Public interest litigation is seen as a powerful tool to bring regulators’ attention to the current issues. This conference aims to discuss these implications and strategies used by lawyers and courts in addressing the complex subjects of environmental damage and climate change. The panel sessions address topics such as human rights and environmental rights, government accountability for emissions, and the liability of multinational corporations for environmental harm.

Book now to secure your place on the conference. There is a discount for students. For further details, visit our website or our event page on Facebook.

UKELA Diary Dates

26 March – Nature & Wellbeing
9 May – The Changing Face of the Energy Mix
25-28 May – Annual Wild Law weekend

For more details about these and our whole events programme, please visit our website.
The e-law 60 second interview
30th Anniversary edition

Rt. Hon Lord Carnwath of Notting Hill C.V.O. UKELA, President

In this, our 30th anniversary year, we have asked some of our convenors, trustees and Patrons to share their thoughts on a range of environmental law issues and UKELA activities. We are honoured and delighted that our President, Lord Carnwath of Notting Hill, has kindly agreed to be our first interviewee. Read his thoughts on environmental law developments over his esteemed career, his favourite UKELA memory (one of ours too!) and what he sees as the main challenges to environmental law in future years.

Lord Carnwath has been a Justice of the UK Supreme Court since April 2012. He was a Lord Justice of Appeal since September 2001, having been a Judge of the High Court, Chancery Division, from 1994. He was Chairman of the Law Commission for England and Wales from February 1999 until July 2002. In July 2004, he was nominated as “Shadow” Senior President of Tribunals, to provide judicial leadership in the reform of the UK Tribunal system. In November 2007, he was appointed as the first statutory Senior President of Tribunals under the Tribunals, Courts and Enforcement Act 2007. Internationally, in 2004 he was a founding member, and first Secretary-General, of the European Union Forum of Judges for the Environment (EUFJE). He has been joint chairman of the judicial advisory committee for the UNEP handbook on environmental law; and a member of the UNECE taskforce on the Aarhus Convention.

How did you get involved with environmental law?
My first chambers (now Landmark Chambers) specialised in planning. The head was Geoffrey Rippon QC who in 1970 had been the first ever Secretary of State for the Environment. Environmental law as such gained added prominence in my practice with the passing of the Environmental Protection Act 1990.

What are the greatest achievements in environmental law during your career?
It is difficult to choose. Notable examples would be: the development of a comprehensive and powerful body of European environmental law; globally, the Stockholm and Rio Declarations: the successful campaign in the 1980s and 90s against the depletion of the Ozone layer; the ground-breaking decisions of the Indian Supreme Court in the same period, putting environmental protection at the heart of the constitutional right to life; and more recently the Paris Climate Change agreement.

What barriers (if any) have you seen to achieving environmental justice in the UK?
The expense of legal proceedings, though much mitigated in recent years by the acceptance of Aarhus principles.

When did you get involved with UKELA?
Too long ago to remember!

How does UKELA contribute to the development of environmental law in the UK?
By bringing together interested professionals and students, not just lawyers, from a wide range of backgrounds in the public and private sectors, for expert, practical and politically neutral examination and discussion of the major issues of the day.

What is your favourite UKELA memory?
Being the victim (fortunately unharmed) of a Richard Macrory conjuring trick at a UKELA conference dinner.

What are the main benefits of UKELA membership?
Making friends and contacts in environmental law, and keeping abreast of the major developments.

What opportunities exist to advance environmental law in the UK?
We have a fairly well-developed legal and regulatory system, but the real challenge is to make it better known and better understood, and encourage people and organisations to use it effectively.

What changes to environmental law in the UK do you think we’ll see over the next decade?
In the UK, we are likely to be fully occupied in coping with the fall-out from Brexit, and ensuring that there is no derogation from principles of environmental protection, or in particular from our Climate Change commitments.

Theme question: What are the greatest benefits of a specialist environmental court or tribunal?
Flexibility, expertise, and cost-effectiveness.
Conference report
UKELA Scotland Annual Conference 2017

The Right to your Day in (an Environmental) Court

By Rachael Miller

This article was first published on the University of Glasgow Law School Blog on 10 October 2017.

On Thursday, I was afforded the opportunity to attend the UK Environmental Law Association Scotland Annual Conference held in Edinburgh, thanks to a sponsored place from Westwater Advocates. The theme of the conference was ‘Access to Environmental Justice.’ This is a highly topical area of law in Scotland given both the Scottish Government’s recent confirmation that it will not be creating an ‘Environmental Law Court’, despite calls for this from some members of the legal profession, and the announcement that the moratorium on extraction of unconventional oil and gas (‘fracking’) will be continued indefinitely. Throughout the day, I was lucky enough to hear from advocates, solicitors, academics and those working in various related government bodies on their perspectives of this important and growing area of law.

Several of the presentations were of particular interest to me. Firstly, a talk from Dr Ben Christman gave an insight into the struggles faced by some litigants who seek judicial review relating to environmental law issues. He explained that the obligations which the Scottish Government has to ensure access to environmental justice under the Aarhus Convention include, *inter alia*, that procedures are not ‘prohibitively expensive’. He went on to argue that this standard may not be met in Scotland. Legal aid is not available for judicial review and the framework for protective expenses orders (PEO) requires claimants to incur a great deal of legal costs preparing their case to justify that they deserve a PEO. When a PEO is granted, it is of limited scope and includes a reciprocal cost cap. The compelling take-home point was that it can be unreasonably expensive for individuals to seek judicial challenge of public authority decisions which have an environmental element. The result is a lack of access to justice for these individuals, which is especially worrying given that the environment has no voice and requires protection by individuals through legal challenge.

A second especially interesting presentation was the ‘case update’ given by Denis Garrity and James Findlay QC, both of Terra Firma Chambers, who ran through several cases which have been heard in Scottish courts in the last year and which have an environmental issue as their focus. What struck me about this discussion was the broad range of actions which have an environmental aspect – in addition to judicial reviews raised by both individuals and NGOs, there were criminal charges, and private law cases relating to delict, contract and property law which all centred around environmental disputes. This really emphasised the extent to which environmental issues permeate all areas of law and all aspects of the everyday life of individuals and communities. The frequency with which cases seem to have arisen in this last year alone underlines that as well as being an interesting area of law for study, environmental law is also highly relevant to many areas of legal practice.

A final point of interest from the conference was the discussion raised by Sir Crispin Agnew QC of Westwater Advocates, an eminent public and environmental law advocate, on the need, in his opinion, for a dedicated environmental law court or tribunal. He gave a thought-provoking talk on the perceived weakness of applying *Wednesbury* criteria to environmental judicial reviews, specifically criticising the courts’ tendency to defer to the ‘expertise’ of the public authorities. This is despite the very real possibility that the decision-makers involved were not experts in the environmental, scientific or legal implications of their decisions. He also mentioned the fragmented distribution of jurisdiction relating to environmental matters, with different areas being dealt with by the Court of Session, the Sheriff Courts, the Land Court and even the Scottish Ministers. His calls for an environmental court (which he suggested could be put into effect by the creation of a ‘Land and Environmental Court’) are particularly interesting given the recent decision, mentioned above, by the Scottish Government not to create an environmental court, mainly due to the uncertainty surrounding the environmental law framework in the context of Brexit.

Given the strength of the arguments put forward by Sir Crispin, and the positive response to the consultation on the possibility of an environmental court, it may be that this is a decision which should be reconsidered in the future.
As I took the train home from Edinburgh after the conference, I glanced out of the window and saw wind turbines, a now familiar sight in the Scottish countryside. I would ordinarily have thought nothing of this but after the discussion throughout the day of the impact of environmental issues, I couldn’t help but think of the conflicts which their construction must have raised: the balancing act for the Scottish Government between its various environmental obligations and targets, and budget restrictions; complaints from the community on many issues from concerns about the impact on land value and grazing farm animals to the effect on the view; and even disagreement from various environmental groups on the benefits of wind farms and the potential harm they may cause to wildlife. If a lack of access to environmental justice means that these different groups do not have the platform to express their interests and concerns before a court comprised of experts in the environmental and scientific elements of the case, then this may create a significant deficit in trust in the legal system as regards environmental issues, not to mention the possibility that potential harms to the environment go unchallenged.

Rachael Miller is a third year LLB student at the University of Glasgow. Her interests include environmental law, access to justice and the application of private law to public authorities more generally.
Environmental law headlines
December 2017 – January 2018

A selection of recent environmental law news and updates prepared by the teams at Lexis®PSL Environment and Practical Law Environment.

25 year environment plan unveiled
Lexis®PSL Environment

The 25-year Environment Plan was delivered by Theresa May on 11 January 2018 and sets out how the government will improve the environment over a generation by creating richer habitats for wildlife, improving air and water quality and curbing the scourge of plastic in the world’s oceans.

Drawing on the work of the Natural Capital Committee, the plan sets out how a natural capital approach will be used to help achieve additional benefits. Proposals are made in six key areas: using and managing land sustainably, recovering nature and enhancing the beauty of landscapes, connecting people with the environment to increase health and well-being, increasing resource efficiency and reducing pollution and waste, securing clean, healthy, productive and biologically diverse seas and oceans and protecting and improving our global environment.

The plan sets out the government’s long term ambitions relating to the environment and will be updated over time as matters evolve. The vision is for the UK to be a global leader in environmental protection and there are proposals for delivery of a green Brexit and higher environmental protections post-Brexit, with the introduction of a new environmental regulator to enforce environmental standards.

The plan includes a raft of proposals relating to plastic waste with avoidable plastic waste to be eliminated by the end of 2042 and the UK to demonstrate global leadership in this area. Proposals include:

- extension of the 5p carrier bag charge to all retailers in England;
- the government is to work with supermarkets to encourage introduction of plastic-free aisles where all food is loose;
- the government will look at how the tax system or charges could further reduce the amount of waste we create—a call for evidence on how to reduce the use of single-use plastics will begin in February 2018;
- new funding will be injected into plastics innovation through a bid into the government’s £7bn research and development pot.

Other measures include:

- creation of 500,000 hectares of new habitat for endangered species;
- support for farmers to turn fields into meadows and other habitats;
- depleted soils to be replenished;
- £5.7m funding for a new Northern Forest;
- a ‘net environmental gain’ principle so that development delivers environmental improvements locally and nationally, enabling housing development without increasing overall burdens on developers;
- a review of National Parks and Areas of Outstanding Natural Beauty is also proposed to see how they can be improved and to assess whether more may be needed;
- measures to help more children engage with the environment. This will be delivered through £10m of funding for school visits and a Nature Friendly Schools programme.

A consultation on the new independent environmental regulator and a set of environmental principles is to be launched in early 2018. A framework will be created to measure progress towards the plan’s goals and there will be an annual report on progress which is intended to ensure actions target the right area. Other steps to put the plan into practice include establishing a Green Business Council to provide advice on key areas.

For more information, see News Analysis: 25 year environment plan unveiled.

Provisional agreement reached on the Circular Economy package
Lexis®PSL Environment

On 18 December 2017, the European Council reached a provisional agreement with representatives from the European Parliament on all four legislative proposals of the circular economy package. Legislation to be amended includes:

- the Waste Framework Directive (considered the umbrella legislative act of the package);
- the Packaging Waste Directive;
- the Landfill Directive;
- the directives on electrical and electronic waste, end-of-life vehicles, and batteries and accumulators.
Key elements of the proposals include:

- clearer definitions of key waste concepts;
- new binding targets at EU level for waste reduction to be met by 2025, 2030 and 2035. These targets cover the share of municipal waste and packaging waste recycling, and also a target for municipal waste landfilled by 2035;
- stricter methods and rules to calculate the progress made towards those targets;
- stricter requirements for the separate collection of waste, reinforced implementation of the waste hierarchy through economic instruments and additional measures for Member States to prevent waste generation;
- minimum requirements for extended producer responsibility schemes. Producers under these schemes are responsible for the collection of used goods, sorting and treatment for their recycling. Producers will be required to pay a financial contribution for that purpose calculated on the basis of the treatment costs.

EU ambassadors will be debriefed on the outcome of the last trilogue on 20 December 2017. The final analysis of the text will take place under the incoming Bulgarian presidency with a view to confirm the agreement. After formal approval, the new legislation will be submitted to the EU Parliament for a vote at first reading and to the EU Council for final adoption.

For more information, see LNB News: Tougher EU waste legislation takes step forward.

Circular economy: European Strategy for Plastics and monitoring framework published

Practical Law Environment
In December 2015, the European Commission published a circular economy action plan for the EU, which sets out a range of policy measures and actions to move the EU towards a circular economy. A circular economy is one that aims to keep the added value in products for as long as possible, eliminate waste and achieve sustainable growth.

Plastic is one of the five priority areas addressed in the 2015 action plan and in April 2017, the Commission published a roadmap, which commits the Commission to preparing a strategy that addresses the challenges posed by plastics.

On 16 January 2018, the Commission published a European Strategy for Plastics, with a number of accompanying documents. The plastics strategy includes the following key commitments to:

- Make all plastic packaging on the EU market recyclable or reusable by 2030. This will be done by amending the Packaging Waste Directive 1994 (Directive 94/62/EC).
- Reduce consumption of single-use plastics (going beyond plastic bags). The Commission will present a legislative proposal on single-use plastics later in 2018.
- Restrict the intentional use of microplastics.
- Harmonise definitions and labelling for biodegradable and compostable plastics.

Also on 16 January 2018, the Commission published a monitoring framework for the circular economy, which follows on from the Commission roadmap on developing a monitoring framework for the circular economy that was published in April 2017.

The framework sets out of ten key indicators to capture the main elements of the circular economy. The indicators are grouped into four aspects of the circular economy, and reflect the structure of the 2015 action plan.

- Production and consumption. The indicators in this group are:
  - EU self-sufficiency for raw materials;
  - green public procurement;
  - waste generation; and
  - food waste.
- Waste management. The indicators in this group are:
  - overall recycling rates; and
  - recycling rates for specific waste streams.
- Secondary raw materials. The indicators in this group are:
  - contribution of recycled materials to raw materials demand; and
  - trade in recyclable raw materials.
- Competitiveness and innovation. The indicators in this group are:
  - private investments, jobs and gross value added; and
  - patents.

The Commission also provided a broad assessment of the EU’s performance against these indicators, to set a baseline for comparison with future performance. The indicators will be updated on an ongoing basis, and will be available on a website dedicated to the monitoring framework, which was also launched on 16 January 2018.

For more information, see Legal update, Circular Economy: European Commission publishes plastics strategy and Legal update, Circular Economy: European Commission publishes monitoring framework.
Microbeads ban comes into force
Lexis®PSL Environment

Microbeads, which are tiny pieces of plastic, are often added by manufacturers of rinse-off products, such as face scrubs, toothpastes and shower gels. The regulations ban manufacturing rinse-off personal care products with immediate effect and ban selling them from 19 June 2018. The beads are known for causing serious damage to marine life and the ban will help to prevent billions of the beads entering the ocean each year.

For more information, see News Analysis: Ban on microbeads comes into force.

Government launches consultation on amending MEES Regulations 2015 to remove “no cost to landlord” principle for domestic property
Practical Law Environment
On 19 December 2017, the Department for Business, Energy and Industrial Strategy (BEIS) published a consultation on amending the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962) (MEES Regulations 2015) in relation to the requirement on landlords to achieve minimum energy efficiency standards (MEES) for domestic properties, which partly comes into force in April 2018.

Under the MEES Regulations 2015, private landlords must ensure their properties meet a MEES of Energy Performance Certificate (EPC) Band E, or get as close to it as is possible using available third party funding with the “no cost to landlord” improvements financed through “pay-as-you-save” (Green Deal) funding, grant funding, or subsidy.

The “no cost to landlord” principle provides that where funding is not available to fully cover the cost of making a recommended improvement then the landlord will not be required to make that improvement to the property although the landlord will still need to register an exemption on the national private rented sector (PRS) Exemptions Register.

The government proposes removing the “no cost to the landlord” principle and replacing it with a capped landlord financial contribution element, which would take effect where a landlord is unable to obtain suitable third party funding. To protect landlords from excessive costs, the consultation proposes as a preferred option to introduce a cost cap on that contribution of £2,500 for each property. The government intends that amending regulations would take effect from 1 April 2019.

The consultation also proposes that regulators have new powers of entry in order to enforce this regime effectively, with associated powers to search and take samples.

The consultation closes on 13 March 2018.

For more information, see Legal update, Government launches consultation on amending MEES Regulations 2015 to remove “no cost to landlord” principle for domestic property.

Government consults on enforcement regime for EU Invasive Alien Species Regulation 2014 in England and Wales
Practical Law Environment
The EU Invasive Alien Species Regulation 2014 (EU Regulation 1143/2014) seeks to address the problem of invasive non-native species (INNS) in a comprehensive manner across the EU and requires member states to eradicate and manage certain key INNS. Article 30 requires that member states introduce penalties for breach of the regulation.

On 9 January 2018, the Department for Environment, Food and Rural Affairs (Defra) and the Welsh Government published a consultation on their proposals for enforcing the EU Invasive Alien Species Regulation 2014 for INNS in England and Wales.

The consultation proposals include using:

• a range of civil penalties including fixed and variable monetary penalties (FMP and VMPS), enforcement and third party undertakings and compliance, restoration and stop notices for less serious non-compliance;
• two existing criminal offences under the Wildlife and Countryside Act 1981 relating to the release of INNS into the environment and selling INNS, where an order has been made banning such sale, for more serious non-compliance.

The consultation specifically asks, without giving a view, whether it is proportionate and necessary to create new and additional criminal offences to cover the remaining restrictions in the EU Invasive Alien Species Regulation 2014 relating to keeping, breeding, transporting, using or exchanging or permitting to reproduce, grow or cultivate INNS.

The consultation closes on 3 April 2018.

For more information, see Legal update, Government consults on enforcement regime for EU Invasive Alien Species Regulation 2014 in England and Wales.
**Fracking Updates**

*Lexis®PSL Environment*

On 10 January 2018 shale mining company INEOS Shale announced that it is seeking a judicial review of the Scottish Government’s effective ban on onshore fracking. INEOS said there have been ‘very serious’ errors within the decision-making process, including a failure to adhere to proper statutory process and a misuse of ministerial power. The judicial review, if successful, could open the door to similar challenges in Wales and Northern Ireland. For more information, see LNB News: [INEOS Shale seeks judicial review of Scotland’s ban on onshore fracking](https://news.lexisnexis.com/lbn/ineos-shale-seeks-judicial-review-of-scotlands-ban-on-onshore-fracking).

On 12 January 2018 the Court of Appeal, in Preston New Road, dismissed two appeals from the April 2017 High Court decision, upholding planning permission for exploratory fracking works and related development at land to the north of Preston New Road in Lancashire. The judgment confirms the position taken by the High Court, providing guidance on the application to fracking projects of established legal principles, including in respect of the interpretation of planning policy, cumulative impacts required to be assessed as part of environmental impact assessment (EIA), and the operation of the precautionary principle. For more information, see News Analysis: [Court of Appeal upholds permission for fracking exploration in Lancashire (Preston New Road)](https://news.lexisnexis.com/lbn/court-of-appeal-upholds-permission-for-fracking-exploration-in-lancashire-preston-new-road).

**Climate Change Committee assessment of Clean Growth Strategy published**

*Lexis®PSL Environment*

On 17 January 2018 the Climate Change Committee issued a new report, ‘[An independent assessment of the UK’s Clean Growth Strategy: From ambition to action](https://news.lexisnexis.com/lbn/an-independent-assessment-of-the-uk-s-clean-growth-strategy-from-ambition-to-action)’. The report concludes that the government’s Clean Growth Strategy will fail to meet the fourth (2023–27) and fifth (2028–32) carbon budgets. The Committee said that, despite significant progress in reducing greenhouse gas emissions since the introduction of the Climate Change Act 2008 (CCA 2008), the existing policies, even if delivered in full, will miss the carbon budgets by around 10-65 MtCO₂e, which the Committee described as a ‘significant margin’.

In addition to the projections dictating that the government would fail to meet carbon budgets, the Committee also recommended a number of actions which could help to reduce emissions, such as:

- increase the energy efficiency of our homes by 2035;
- improve the energy efficiency standards of new buildings;
- phase out installation of the most polluting fossil fuel heating in homes and businesses off the gas grid;
- generate 85% of the UK’s electricity from low-carbon sources by 2032.
- developing and implementing policies to close the remaining ‘emissions gap’ to the fourth and fifth carbon budgets—domestic measures could include, among other things:
  - greater near-term improvements in the energy efficiency of UK buildings;
  - steps to ensure a larger proportion of heating from heat networks comes from low-carbon sources;
  - action to drive greater uptake of ultra-low emission vehicles and improve energy efficiency of conventional vehicles by 2030.
- addressing the risks of under-delivery—ensuring the timely completion of projects, such as, among others, the Hinkley Point C nuclear power station.

For more information, see LNB News: [Clean Growth Strategy will fail to meet carbon budgets by ‘significant margin’](https://news.lexisnexis.com/lbn/clean-growth-strategy-will-fail-to-meet-carbon-budgets-by-significant-margin).
The Environmental Tribunal and its future potential

Richard Macrory, Professor of Environmental Law at University College London

At a glance

- The First-Tier (Environment) Tribunal has been operating for eight years as Britain’s first specialist environmental court or tribunal. It still has a fairly limited jurisdiction but has already made a valuable contribution.
- With both legal and specialist members, and an emphasis of resolving cases at low cost and fairly and justly, both the Environment Tribunal and the Upper Tribunal have the potential to play a far more significant role in the future development of environmental law in this country.
- With the prospect of a new post-Brexit enforcement body holding government and other public bodies to account for their environmental responsibilities, the Environment Tribunal should provide the obvious legal forum for resolving disputes that may arise.

In 2010 the First-Tier (Environment) Tribunal was established in England and Wales. It was the UK’s first dedicated environmental court or tribunal, and exercises a fairly specialized function. Yet it has the potential of a significantly greater role in environmental law post Brexit.

The setting up of the Environmental Tribunal was carried out with little fanfare and almost came about by chance. This was despite over twenty years of debate concerning the possibility of a specialist environment court or tribunal, a debate that revealed fundamentally competing visions of what was needed and feasible. It was the current President of UKELA, Lord Carnwath, who appears to have first raised the subject in this country in his 1989 Report on the Enforcement of Planning Controls. He suggested there could be a case for combining the jurisdiction of various courts and tribunals dealing with environmental and planning matters. Three years later the then Lord Chief Justice, Lord Woolf, gave the Garner Lecture, organized by UKELA, under the provocative title ‘Are the Judiciary Environmentally Myopic?’ He too argued the case for a single environmental Tribunal, a ‘one-stop shop’ able to resolve all the legal issues, civil and criminal, involved in an environmental dispute. But his vision was for a body quite different from a conventional court and one that could provide different skills, both legal and scientific, and adopt innovative procedures.

The Government’s response was to commission Malcom Grant, then at Cambridge University, to carry out an extensive study of existing specialized courts in other jurisdictions, including Sweden, Australia and New Zealand. Grant was asked to suggest possible models for England and Wales, and he identified six possible solutions ranging from a new planning appeals tribunal to a full-blown two-tier environmental court. The Government listened politely but was not at the time persuaded of the need for change.

Following a recommendation in the 2002 report of the Royal Commission on Environmental Pollution, the Government commissioned the UCL Centre for Law and the Environment to study the various routes of statutory appeals under a range of environmental legislation. The UCL Report, Modernizing Environmental Justice (2003), revealed a haphazard and incoherent system with statutory environmental appeals going to magistrates’ courts, the planning inspectorate, the county court, the High Court and sometimes no right of appeal at all. The Report concluded that a new specialist tribunal handling all such appeals would bring greater legal authority and coherence, and improve confidence in environmental regulation for direct users, the regulatory authorities, and the general public.

The UCL proposal was clearly more modest than some of the earlier visions of an environmental court but it was one which seemed at the time politically feasible, and attracted considerable support from lawyers, regulatory and the judiciary. But Defra had also commissioned a report on environmental law issues from environmental NGO and lawyers which was published soon afterwards. Its focus was much more of emerging access to environmental justice issues, and the high costs of judicial review. It felt the UCL proposal had little to offer on this aspect and rejected the idea of an specialist environmental appeals tribunal as far too modest.

The Government was faced with competing visions from within the environmental law community and
did nothing. It seemed that the momentum for new environmental judicial institutions had stalled for the time being. A few years later, I was asked to lead the Cabinet Office Review on Regulatory Sanctions which recommended that regulators should have greater access to civil penalties as an alternative sanction to the criminal law which then predominated in the regulatory field in this country. There had to be an appeal system against the imposition of a civil sanction, and rather than go the ordinary courts, I recommended that appeals should go to the tribunal system which had recently been reorganised. Part III of the Regulatory Enforcement and Sanctions Act 2008 (RESA) reflected this recommendation with appeals going to the First-Tier Tribunal.

RESA did not impose civil sanctioning powers on all regulators but left it to regulators and their Departments to decide whether they wished to acquire them by secondary legislation. Any area of regulation could have been the first-mover but it so happened that Defra was the first off the block, giving civil sanctioning powers to the Environment Agency and Natural England in a limited range of environment regulation. Appeals went to the General Regulatory Chamber (GRC) within the First-Tier Tribunal. Perhaps because they thought they would be faced with a large amount of appeals, the GRC carried out an internal administrative re-organization and established the First-Tier (Environment) Tribunal in 2010, with both legal members and other specialists in various aspect of the environment.

Any other regulatory body might have taken the first initiative, and we might have had a different specialist tribunal. In the event, the Environment Tribunal initially had little work to do initially, because there were few formal civil sanctions imposed as the regulators found the use of enforcement undertakings as equally effective. Enforcement undertakings are agreed between the parties and there is therefore no appeal.

Since then, various environmental regulatory appeals have been transferred to the Environment Tribunal – in line with the vision of the UCL report, and its jurisdiction and work-load increased. For instance, in 2012 there were 455 appeals concerning nitrate vulnerable zones. In other areas, the number of cases has been more modest – less than a dozen concerning environmental civil sanctions, and a very small number under the Reservoirs Act 1975, the Green Deal Framework regulations, and Climate Change Agreements. Last year, the Upper Tribunal determined an appeal on a point of law from the Environment Tribunal concerning the use of stop notices under RESA, and made important rulings on the interpretation of the legislation (Forager Ltd v Natural England). Earlier this year, the Tribunal has given a significant ruling on the Environment Agency’s powers to vary Climate Change Agreements (Geo Speciality Chemicals v Environment Agency).

What of the future? The Environment Tribunal and the Upper Tribunal could play a far greater role in environmental law generally. Compared to ordinary courts, the Tribunal has the advantage of very flexible procedural rules, informality, and can sit anywhere. Furthermore, the procedural rules of both the General Regulatory Chamber Tribunal and the Upper Tribunal emphasise the overarching objective of dealing with cases fairly and justly. The rules state these concepts include dealing with a case proportionate to its importance and complexity, and the resources of the parties; ensuring that parties can participate in the proceedings; avoiding delay; and encouraging and facilitating the use of alternative dispute resolution. In many ways, these goals mirror the aspirations of environmental justice contained in the Aarhus Convention.

There are three areas where I would personally like to see more development. First, there are many more statutory environmental appeals which could be transferred to the Environment Tribunal including those under water legislation and environmental permitting. Defra had been planning to do this, but the Ministry of Justice currently imposes financial charges on other Departments wishing to make use of the tribunal system. The current MoJ charging scheme has deterred Defra from transferring new classes of existing appeals (at present carried out by the Planning Inspectorate), and this issue needs resolving if further progress is to be made.

Secondly, there is a case for transferring environmental judicial reviews to the Upper Tribunal. The Upper Tribunal has the power to determine judicial reviews in classes of case designated by order in any particular case where the High Court considers it just and convenient. The general practice is that each side bears its own costs before the Tribunal, and the expertise that the Upper Tribunal (which can also include non-legal expert members) together with the procedural rules would meet many of the concerns about the compatibility of current conventional judicial review procedures with Aarhus. Planning judicial reviews would remain with the Planning Court, and there will of course be boundary issues in deciding whether a case is predominantly environmental or planning, but that is resolvable.

Finally, we now have on the agenda the possibility of some new form of independent Environment Commission, replicating some of the enforcement functions of the European Commission post-Brexit. At the time of writing, Defra’s consultation paper on the subject had not been published, but it is likely the new body will have some sort of enforcement
If, for example, the model of the Equality and Human Rights Commission were used, it could have the power to serve compliance notices. The obvious route of appeal against any such notice would be to the Environment Tribunal. Some have argued that there should also be the power to impose financial penalties equivalent to those available to the European Court of Justice. Again, one could envision that if, say, a government department failed to comply with a compliance notice after appeal, the Environment Tribunal could, on application of the new Commission body, have the power to impose a financial sanction.

It is clear that the next few years will be a disturbing period for environmental law, but equally one that could provide many opportunities for rethinking current approaches and practice. I believe that the Environment Tribunal has the potential to play a very significant role in the future development of environmental law in this country.

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Endnotes
1 In 2014 a Planning Court was established as part of the Administrative Court dealing mainly with planning judicial reviews and statutory appeals, but also European Union environmental legislation and domestic transpositions. At the time of writing it is not clear whether it will continue to have an environmental jurisdiction post Brexit.
Does Wednesbury protect the environment? The need for an Environmental Court

Sir Crispin Agnew of Lochnaw Bt QC, Westwater Advocates

At a glance

- This article examines, from a Scottish perspective, whether the Court’s insistence that it will only review planning type decisions on Wednesbury grounds, and holding that the planning authority has the expertise to assess scientific evidence, in fact protects the environment.
- The author concludes that generally it is not safe to hold that the decision maker has this expertise, and recommends that a Scottish Land and Environmental Court should be established based on the Scottish Land Court.

Background

The Court’s reluctance to engage with the merits of an environmental challenge to a planning decision is well illustrated in the recent case of Douglas v Perth & Kinross Council (“Douglas”). A nesting pair of osprey and wildcat, which the court recognised ‘enjoy highly protected status under conservation legislation’, were in the vicinity of the site. The challenge was on the grounds that the authority did not have enough environmental information to be able to conclude that the species would not be adversely affected when planning permission was granted.

The Court’s approach

The Douglas decision clearly reiterates the Court’s position that it will not engage in a consideration of the merits of the decision including the decision maker’s assessment of scientific evidence. The courts consider that the decision maker has the expertise to make these decisions. As Lord Drummond Young said in delivering the Opinion of the Court:

[24]…It is plain that, so far as any planning decision is affected by that (European) legislation, the relevant planning authority is still the decision-maker. In that situation the court’s ability to interfere must be limited. There are good reasons for this: it is the planning authority that has the expertise necessary to make a proper decision. Furthermore, it is the planning authority that has the powers necessary to ensure that the measures taken to protect highly protected species are based on adequate information, are properly directed and are proportionate. The court, in short, is not well qualified to make planning decisions, including those about highly protected species; it can only interfere if the planning authority’s decision is legally defective in the manner set out in the leading cases, including Wednesbury. [emphasis added]

Note the comment that ‘the planning authority that has the expertise necessary to make a proper decision’. This approach is similar to that in Mott v Environment Agency and WWF-UK Ltd v Secretary of State for Scotland. The planning authority’s expertise

Does the planning authority have the “expertise to make a proper decision” – particularly where the decision involves a consideration of scientific and technical evidence?

The author made a freedom of information request to two planning authorities that regularly deal with wind farm applications, which asked how many decision makers had degrees/postgraduate degrees in an environmental science or in landscape architecture etc. Council A had 10 decision makers, four of whom had environmental science degrees, but no landscape degrees; and Council B had 12 decision makers, one of whom had an environmental science degree and one had a landscape degree.

This suggests that Scottish planning authorities do not have in-house expertise to assess scientific and technical issues when there is a dispute between the environmental statement (ES) and information from an objector or the nature conservation body. In England, a Report by the Association of Local Government Ecologists (ALGE) concluded that with budgetary restrictions, decision makers did not seek specialist input, only 1/3 planning authorities had in-house ecologists and that the majority of planners lacked ecological qualifications and had little ecological training from which to discharge their duties.
The Parliamentary Office of Science & Technology⁶ reported that ‘Many Local Authorities lack the capacity and expertise to examine the ecological content of planning applications and enforce planning conditions’ citing the ‘Nurturing Nature’⁷ report which looked at the issue in detail. The Parliamentary Office continued, ‘in a sample of planning cases from 2007, in nearly half the cases the planning officer received neither internal nor external ecological advice. These cases had poorer outcomes for biodiversity.’

In considering a council planning officer’s ability to assess viability information in a planning application, the Guardian⁸ reported that councils did not have the expertise to challenge viability Reports because they could not argue back and could only instruct consultants who also worked for developers.

The Institute of Historic Building Conservation expressed concern at the loss of local authority conservation officer posts ‘because it reduces the level of service that owners and the public have a right to expect. … this loss of expertise is exposing them to a very real risk of ill-informed, poor decision-making…’⁹.

From these sources it is clear that planning authorities do not have the in-house expertise to assess ESs and other technical information with the effect that biodiversity and other outcomes are prejudiced. It is therefore difficult to justify the court’s insistence that ‘it is the planning authority that has the expertise necessary to make a proper decision.’

**The Scottish Ministers’ expertise**

Where Scottish Ministers make the decision, instead of planning authorities, unless a local authority objects, the Scottish Ministers are not required to hold a public local inquiry. Where there is no objection, in many cases, the Scottish Ministers will make the decision without an inquiry. Does the Energy Consents Unit (ECU)¹⁰ – which is the Government Department that advises Ministers on applications for consent under sections 36 (generating) and 37 (overhead lines) of the Electricity Act 1989 – have the expertise to assess competing scientific and technical evidence?

Alexander Burnett MSP asked a written parliamentary question of the Scottish Government:¹¹

> … how many people are directly employed by its Energy Consents Unit to assess section 36 and 37 applications under the Electricity Act 1989, and how many of them are (a) environmental experts, broken down by specialism, (b) chartered landscape architects, (c) planners and (d) solicitors. In assessing such applications, the Scottish Government has access to expert advice from its statutory stakeholders namely, Local Planning Authorities, Scottish Environment Protection Agency, Scottish National (sic) Heritage and Historic Environment Scotland. …

Note the ECU has no experts of its own but has ‘has access to expert advice from its statutory stakeholders’. In two recent cases the Scottish Ministers have rejected advice from Scottish Natural Heritage (SNH), whose duty is to secure the conservation and enhancement of Scotland’s natural heritage¹², preferring the advice in the developer’s ES. It is, therefore, difficult to see how the ECU could advise the Ministers on which scientific advice to prefer, when they were going against the advice of their own advisers and do not have the in-house expertise to make such an assessment.

In *Sustainable Shetland v Scottish Ministers*¹³ SNH objected to the proposed development of a large windfarm of 103 turbines on Shetland on the ground, amongst others, that the development would significantly impact on the national conservation status of the whimbrel, a migratory species protected by the Wild Birds Directive. The Shetland population of about 290 breeding pairs is 95% of the UK population and there was a predicted loss of 3.7 whimbrel per year. SNH objected ‘due to the high likelihood of a significant adverse impact of national interest in the favourable conservation status of the national population of whimbrel … (and) … is highly likely to result in a significant adverse impact on the conservation status of the national population of whimbrel’ and went on to say that the outcome of the habitat management plan was so uncertain that they could not predict if it would improve the conditions for the whimbrel.

Notwithstanding SNH’s objection, the Scottish Ministers decided that the loss of 3.7 whimbrel per year was very small in the context of the annual deaths of between 72-108 from other causes and went on to reject SNH’s advice, which was supported by the RSPB, saying that ‘Ministers are not satisfied that the estimated impact of the development on whimbrel demonstrates such a level of significance’ and considered that ‘the potential beneficial effects of the Habitat Management Plan (HMP) can reasonably be expected to provide some counterbalancing positive benefits.’

Where the Scottish Ministers have no environmental experts and state that they have access to advice from SNH, it is questionable on what basis the Scottish Ministers could reasonably reject SNH’s advice.

The Lord Ordinary reduced the decision on the
grounds that the Scottish Ministers had not properly taken account of their obligations under the Wild Birds. On appeal the Inner House allowed the appeal saying that the question of whether or not there was a material adverse impact on the population of whimbrel “was an entirely factual question for the Scottish Ministers to determine”. The Supreme Court upheld the decision of the Inner House. This was ‘entirely a factual question’, but was a question to be determined using complex scientific information. In this case, the Scottish Ministers did not have independent scientific advice because they rejected their own advisers’ advice.

A similar issue arose in John Muir Trust v Scottish Ministers where a wind farm was proposed at Stronelairg within a Search Area for Wild Land (SAWL). SNH objected on wild land grounds that the development ‘will have significant adverse impacts, resulting in a loss of wild land’. It will not be possible to mitigate these impacts. We therefore object to the principle of a wind farm in this location.

Nevertheless the Scottish Ministers concluded that ‘that the development is well designed to minimize the impact on the surrounding areas of wild land’ and expressed the view ‘that the application site itself is not an area of pristine wild land’. Again, in circumstances where the ECU does not have a chartered landscape architect on their staff, it is difficult to understand on what basis the Scottish Ministers could make that assessment, going against the objection of their own adviser.

**Does Wednesbury protect the environment?**

It is therefore questionable whether planning authorities or the Scottish Ministers are in a position to assess scientific and technical evidence properly which is in dispute, particularly where (in the case of the Scottish Ministers) they do not accept the advice of their own advisers, such as SNH.

The Aarhus Convention as applied by Article 11(1) of the EIA Directive requires member states to ensure that members of the public can ‘challenge the substantive or procedural legality’ of environmental decisions.

The “substantive legality” of a decision, absent a public local inquiry, cannot be challenged where the court will only consider the legality of the decision under the Wednesbury or Wordie Property approach. In R (on app Evans) v Secretary of State for Communities and Local Government the court rejected an argument that the Aarhus Convention required a different approach to Wednesbury approach to allow a challenge to the substance of a decision. This is despite the fact that the Aarhus Compliance Committee had expressed concern that the Wednesbury test is too strict and does not allow for a proper assessment of a challenge to the substance of a decision.

Accordingly the Wednesbury approach does not protect the environment, because decision makers, absent a PLI, do not have the expertise to make decisions on difficult environmental science and the substance of these decisions cannot be challenged. As Professor Colin Reid, in referring to the complexities of environmental cases both scientifically and legally, noted that:

This complexity is then exacerbated by the lack of expertise in handling such cases. The legal personnel – advisers, prosecutors and judges – may well not have the scientific or technical background to understand the significance of what has occurred and lack the familiarity with the intricacies of environmental law to be comfortable in dealing with cases.

**The case for an Environmental Court in Scotland**

A properly constituted environmental court with a jurisdiction to review both the merits and the legality of an environmental decision will go a long way to protecting the environment. George and Catherine Pring report that in 2016 there are over 1200 environmental courts in 44 countries. It is disappointing the Scottish Government, after a consultation, concluded in 2017 that it does not consider it appropriate to set up a specialised environmental court or tribunal at present.

The Land and Environment Court of New South Wales (“NSW LEC”), established by the Land and Environment Court Act 1979, is a good model with an exclusive and wide criminal and civil jurisdiction in relation to environmental, planning and land matters. Preston J, Chief Justice of the NSW LEC, identified 12 characteristics of successful environmental courts and tribunals, namely:

- status and authority;
- independent from government and impartial;
- comprehensive and centralised jurisdiction;
- judges and members are knowledgeable and competent;
- operates as a multi-door courthouse;
- provides access to scientific and technical expertise;
- facilitates access to justice;
- achieves just, quick and cheap resolution of disputes;
- responsive to environmental problems and relevant;
- develops environmental jurisprudence;
- underlying ethos and mission; and
- flexible, innovative and provides value-adding function.
An environmental court should sit with a legal chair and an expert member versed in the relevant discipline that the case concerns. For example the NSW LEC can sit with a Judge or a Commissioner, selected for their relevant expertise. The court also promotes alternative dispute resolution, such as mediation, conciliation etc.\(^{27}\) The Chilean Environmental Courts,\(^{28}\) which are superior tribunals with both a judicial review jurisdiction and the assessment of environmental damage including power to suspend damaging activities. Members of the public can represent themselves and the court has the power to instruct expert reports if the applicant is unable to do so. It sits with three justices – one of whom has to be an environmental or economic scientist. Its decision can only be reviewed by the Supreme Court.\(^{29}\)

The judges and expert members of an environmental court, develop expertise in the complex interrelationship of the law and science of environmental protection, which is important when considering the complexities of environmental science and regulation. Preston J noted that:

> An essential characteristic of successful ECTs is specialisation. Environmental issues and the legal and policy responses to them demand special knowledge and expertise. In order to be competent, judges and other ECT members need to be educated about and attuned to environmental issues and the legal and policy responses – they need to be environmentally literate.\(^{30}\)

The expertise of specialist tribunals has been recognised by Lady Hale, now President of the Supreme Court, in considering appeals from the Social Security Commissioners and the Asylum and Immigration tribunal.\(^{31}\)

The court having this expertise means that practitioners appearing before the court do not have to explain the law and practice each time to a judge who is not familiar with environmental law and practice, thus saving time and the judges will have an understanding of the science and technical material before the court.\(^{32}\)

Lord Carnwath suggested that a tribunal might develop a role, which goes beyond the traditional limits of judicial review, as practised by the courts … which may cross the traditional boundaries between law and fact as understood by the courts.\(^{33}\) This, together with judicial training in environmental law,\(^{34}\) makes for a more efficient and quicker resolution of environmental disputes. Judicial expertise will produce a greater consistency in decisions. International co-operation between environmental courts allows for exchange of ideas for the development of environmental protection. For instance, the Supreme Court of the Philippines has developed a Writ of Nature for forest protection and abatement of pollution, while in Canada the courts have developed innovative rules to place corporations on probation in criminal cases.\(^{35}\)

If an environmental court followed the tribunal practice of being an investigatory tribunal before which legal representation was not required, then this would make access to environmental justice for members of the public both easier and less expensive as required by the Aarhus Convention. The court, like the Chilean Environmental Court, could order expert reports where the litigant could not provide them, and could ensure that the party appearing before them was not prejudiced by lack of legal representation.

For Scotland, it is suggested that the Scottish Land Court, which already sits with a legal chair and an expert, and is used to parties representing themselves, which already has some environmental jurisdictions, should be established as the Scottish Land and Environmental Court.\(^{36}\)

**Endnotes**

3. [2016] EWCA Civ 564; [2016 1 WLR 4338, Beaston LJ at 69.


Natural Heritage (Scotland) Act 1991 (c. 28) s.1(1A)(a).


[2013] CSOH 158 at [289] to [291].

[2014] CSIH 60; 2015 SC 59 at [23] and [27].


Wordie Property Ltd v Secretary of State for Scotland 1984 SLT 345, Lord President at p. 347/8.

ACCC/C/2008/33; Findings and Recommendations of The Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom, paragraphs 125 & 126.


Chilean Third Environmental Court; Judicial Adjudication of Environmental Disputes and Ecosystem Services, paper delivered by Michael Hantke-Domas & Sibel Villalobos Volpi to Legal Adjudication and Ecosystem Services workshop Dundee University 12 April 2016.


Cooke v Secretary of State for Social Security [2001] EWCA Civ 734; AH (Sudan)v Secretary of State [2007] UKHL 49 para [30].


Crispin Agnew, An Environmental Court for Scotland, Scottish Planning & Environmental Law, 178 December 2016 pp 133 to 135.
Too expensive to win?
Costs neutrality in tribunals

William Rundle, Friends of the Earth

At a glance

• This article looks at costs rules for environmental cases, imagining that the environment tribunal has expanded its jurisdiction.
• It highlights problems associated with ‘costs neutrality’ and suggests an alternative.
• Reference is made to controversial changes in 2017 to costs protection in environmental judicial reviews, and the litigation taken against them.
• It concludes that we should not keep a system that restricts access to justice on the basis of a claimant’s financial weakness, not least because so often the least well off bear the greatest brunt of environmental harm.
• An Environment Tribunal could have a key role to play in this regard.

Imagine for a moment that the long-running debate about whether or not we should have a fully-fledged environment tribunal with full jurisdiction in the UK has just been won.

Those in favour of broad access to justice in accordance with the principles of the Aarhus Convention made a compelling argument, and business got behind the idea of a more reliable, cheap and timely forum. Government recognised the public interest nature of environmental matters and that Judicial Review (JR) in the High Court was not giving a good enough service. I’ll let you choose if it also conceded that third party rights of appeal were also necessary, perhaps just for regulatory appeals. Anyway, its view was to hive off environmental matters, including JR, into the tribunal system – better dealt with by a specialist panel in a more flexible form – and we’d nail that tricky “prohibitive expense” issue at the same time.

So, here we are. Likely with more claimants accessing the system to have their cases heard, even without a third party right of appeal. Cases in JR are filtered out as normal at permission stage, and because the tribunal system is being properly resourced, cases are heard quickly, and by more specialist panels who understand better the particular nature of environmental cases. The Environment Tribunal is cheaper (or at least much less risky) because it makes each party bear their own costs. Sounds great. However, we could still have a problem.

Unable to recover their costs from the other side when they win, many successful claimants can’t afford their legal bills. ‘No win no fee’ agreements, especially in risky and complex JR cases, are increasingly rare; but anyway are often predicated on the basis that when you do win, the fees are recoverable from the other side (you do this because you can’t afford them yourself).

A case need not be large or complex before it can become ‘too expensive to win’. This could start to reduce cases coming to light. It might also undermine those earning a crust in the environmental claimant legal market, a different but also undesirable risk.

The Current Situation

In this scenario the tribunal hears JR and other cases that fall under the Aarhus Convention. At the moment environmental JRs are heard in the High Court, but the related costs system is a bit of a mess and doesn’t fully comply.

The UK signed the Convention in 1998 and ratified it in 2005. In so doing, the UK confirmed a strong public interest basis to environmental cases, and agreed that it should give wide access to justice for claimants – cases should be heard for all our benefit – the environment is important for everyone.

The treaty requires – among many other things – that claimants should not be put-off from bringing or continuing cases because of the expense of doing so (Article 9, and 9(4)). This is the so called “prohibitive expense” requirement. It’s this bit that has been a longstanding problem, and could remain so under a costs neutral tribunal system.

Cases should not be so expensive or financially risky that people can’t bring them to court – which sounds straightforward. Yet it has actually been tricky for the UK for some time now. In February 2017 the Lord Chancellor brought in new rules, which it said was to bring the system into line with leading case-law on the “prohibitive expense” requirement. They managed
to actually make things worse.

This is partly because underlying it was a desire to use this opportunity to weed out what the government saw as “unmeritorious” claims. This quote is from the Ministry of Justice’s response to the consultation on the draft rules, quoted more fully below. The lack of any mention of the existing procedural safe-guard to stop ‘unmeritorious’ claims going forwards, the permission stage for JR, rather gives the game away for me.

The government believes that the changes will not prevent or discourage individuals or organisations from bringing meritorious challenges. By extending the ECPR [Environmental Costs Protection Rules] to certain reviews under statute, the changes may encourage more challenges to public authorities. Other changes should, however, deter unmeritorious claims which cause delay and frustrate proper decision making, without undermining the crucial role which judicial reviews and reviews under statute can have as a check on public authorities.6

The premise seems to be that if you do not eventually “win” (whatever that means in JR, where the remedies are discretionary), then your case is without merit as it causes delay and frustration and should be deterred. Even if, for example, you have helpfully clarified the law and lanced a systemic issue that government itself had created.

So what were the changes made by the new rules? Before February 2017, England and Wales had a simple scheme of fixed costs protection for environmental claimants. If you lost, the legal bill you paid for the other side’s costs and expenses was capped at the outset: £5,000 if the claimant is an individual; £10,000 in all other cases. This was on top of your own legal costs and disbursements. Now, the previously fixed costs limits are a default starting point – the limit on what a claimant pays a defendant if the case is lost could go up and down at any point in the case, because of the broad drafting of the rules. That became true for a defendant’s position too. An initial cap of £35,000 can be varied, so long as it would be ‘prohibitively expensive’ not to vary it.7

The major problem created was that where before there had been certainty (fixed caps at the outset), there is now no certainty at all. The new rules are also a recipe for satellite litigation as parties rack up further expense arguing over costs protection limits, and by reference to new ambiguous factors. The Aarhus Convention Compliance Committee (the arbiter of what Aarhus Convention “prohibitive expense” means) was of the view that the rules “...overall appear to have moved the Party concerned further away from meeting the requirements [of access to justice etc]...”8

It’s fair to say that from an environmental tribunal perspective, a blanket ‘each party bears their own costs’ rule sounds like it would be a welcome development, even if it restricts those of lesser means from taking cases because they cannot recover any costs. But, is that really ok because it’s a step in the right direction?

An undeterred and “unmeritorious” claim?

Not happy with those new changes, Friends of the Earth challenged the new rules with the RSPB and ClientEarth, and the High Court gave judgment in 2017.9 Whilst the Ministry of Justice seemed desperate to spin this as a “win” (or at least an unnecessary and unsuccessful claim, and so presumably also an example of the sort of “unmeritorious” claims it wants to deter), the ruling provides welcome and authoritative clarity for how the scheme can operate lawfully.

Any challenge by a defendant must now be done at the ‘acknowledgement of service’ stage when a case is started, save for exceptional circumstances. This means costs protection should be fixed early and before significant legal costs have accrued (although it may not always be so in complex cases, which can incur large fees early before permission and costs protection is decided, by which time it is too late to withdraw and avoid them). The MOJ will now bring forwards further new rules to add greater clarity and address other aspects of the ruling (and has paid the claimants’ costs).

However, the real loser here is the public: the system remains messy and uncertain, and will still deter legitimate claimants.

The role of the Tribunal

So, back to our scenario. There remains an important role for an environmental tribunal here.

Tribunals are meant to provide greater and easier access in a variety of ways. Their costs neutrality is generally seen as a simple way of achieving “cheaper” (and so more accessible) justice. It might be a step forwards, but as mentioned at the outset, it does create a situation in which cases are too expensive to win.

Some may argue that ‘environmental claimants have it too good already!’ but let’s remember this isn’t a race to the bottom. What is more, compliance with the Aarhus Convention means putting the claimant’s financial situation before the defendant’s in environmental cases. It’s about access to justice for a claimant (and not the defendant), because there is a strong public interest in facilitating environmental cases coming forwards. We all want to live in a healthy environment. Our health and well-being depend on it. If the environment is affecting your health or that of your family should you be prevented access to the courts because of costs?
The Aarhus Convention powerfully speaks to this in its preamble:

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights…

Given that the UK has signed and ratified this document, and assuming that the majority of people would not disagree with these objectives, is it not time to think more positively about environmental cases?

The legal system is adversarial, but costs allocation need not be so in accepted categories of public importance. See, for example, costs allocations in criminal matters from central funds.10

Were we to end up with a fully formed environmental tribunal, as I hope we do, we would need to consider carefully if it should have new costs rules for environmental matters. Payment of costs from central funds could be a way forwards. Such a fund could be supplemented by environmental fines. It could remove financial pressure on defendant public authorities, as well as allow protection to losing claimants, but enabling recovery if they were to win. The rules could still allow for recovery between parties in some circumstances, such as for bad conduct, or other categories where direct financial responsibility is desirable.

In any event, I think there is a valid argument for recognising the important role that an environment tribunal can have in facilitating access to justice in environmental matters (and so improve environmental governance as a whole), and that the accepted public interest in resolving environmental disputes means that we should make sure that everyone can bring a case if they have a legitimate argument.

Whatever your view on an environment tribunal and where the costs rules should end up, one thing that surely is to be recognised is that it is morally wrong to develop policy and allow court process that can restrict access to the courts on the basis of people’s financial weakness. This is especially so where in this country, like so many places around the world, the less well-off regularly bear the greatest brunt of environmental harm. Unfortunately, that is where we seem to be currently.

Will Rundle is an environmental lawyer at Friends of the Earth, and currently leads their access to justice and Aarhus Convention campaigning. His work involves him in each of their major campaigns on climate, air quality, fracking, nature and Brexit. Prior to joining Friends of the Earth he was Fish Legal’s Head Solicitor; an NGO focused on conserving the water environment for fish and fishing.

Endnotes
3 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII
5 Civil Procedure (Amendment) Rules 2017/95.
7 See Civil Procedure Rule 45.43 and 45.44: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII
A brief look at the Land and Environment Court of New South Wales: 37 years of experience

Hayley Tam, Solicitor, Head of Environment, LexisNexis

At a glance

- The Land and Environment Court of New South Wales, Australia (LEC) was the first specialist environmental court established as a superior court of record.
- It was created as a one-stop shop for environmental, planning and land matters alongside other legislative reforms in the environmental field.
- This article outlines some of the LEC’s key features and relays some of the factors which have contributed to its success.
- The author considers what lessons can be learned from the LEC’s considerable experience, and notes that Brexit presents a unique opportunity for the United Kingdom and devolved administrations to reform environmental law and create comprehensive specialised environmental courts or tribunals (ECTs).

As we celebrate 30 years of the UK Environmental Law Association (UKELA), the LEC observes 37 years of experience as a court with exclusive jurisdiction in relation to environmental, planning and land matters.

The LEC was established on 1 September 1980 by the Land and Environment Court Act 1979 (NSW). It was the first specialist environment court established as a superior court of record in the world.1

Impetus for the creation of the LEC

Prior to 1979, both the judicial system and the law relating to environmental and planning matters in New South Wales was fragmented and inefficient. Cases were dealt with by an ‘uncoordinated miscellany’ of appellate tribunals and courts:

- building, subdivision and development matters were dealt with by the Local Government Appeals Tribunal;
- valuation, compulsory acquisition and land matters were dealt with by a Land and Valuation Court, Valuation Boards of Review and the Supreme Court;
- civil (equitable) enforcement and judicial review of both government and tribunal decisions were undertaken by the Supreme Court of New South Wales; and
- criminal enforcement was undertaken in the Local Court and the District Court of New South Wales.3

Given the synergies in these areas of law and practice, there was an aspiration to create a specialised ‘one-stop shop’ for environmental, planning and land matters.4 The LEC replaced the Local Government Appeals Tribunal, the Land and Valuation Court, the Clean Waters Appeal Board and the Valuation Boards of Review.

Importantly, at the same time as the LEC was created, Parliament enacted new legislation which created a more integrated legislative framework, including:

- Environmental Planning and Assessment Act 1979 (NSW), which “revolutionised the land-use planning system”, introduced an environmental element as well as unprecedented third party appeal rights and Court inquisitorial powers;5
- Land and Environment Court Act 1979 (NSW);
- Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (NSW);
- Heritage (Amendment) Act 1979 (NSW);

Since then, the body of environmental legislation in NSW has proliferated. The LEC has jurisdiction to hear and determine a diverse array of matters ranging from planning and local government to threatened species, heritage, contaminated land, water, biodiversity, forestry, and aboriginal land rights to name a few.

Key features of the LEC

The LEC has a clear statement of purpose6 to safeguard and maintain:

- the rule of law;
- equality of all before the law;
- access to justice;
- fairness, impartiality and independence in decision making;
- processes that are consistently transparent, timely
and certain;
• accountability in its conduct and its use of public resources;
• the highest standards of competency and personal integrity of its judges, commissioners and support staff.

Status and jurisdiction
As a superior court of record, the LEC sits in the NSW Court hierarchy at the same level as the Supreme Court of New South Wales and the Industrial Relations Commission of New South Wales. In its civil jurisdiction, appeals from the LEC go to the New South Wales Court of Appeal, and then the High Court of Australia. In its criminal jurisdiction, appeals from the LEC go to the New South Wales Court of Criminal Appeal, and then the High Court of Australia.7

The LEC has a wide and exclusive jurisdiction including administrative or merits review of government decisions, judicial review of government action, civil jurisdiction, civil enforcement, criminal enforcement, appeals against convictions and sentences in the Local Court and appeals against decisions of Commissioners of the LEC.9

The LEC has eight classes of jurisdiction:11

Class 1: environmental, planning and protection appeals (development and miscellaneous appeals)
Class 2: tree disputes and miscellaneous appeals
Class 3: valuation, compensation and Aboriginal land claim cases
Class 4: civil enforcement and judicial review of decisions under planning or environmental laws
Class 5: criminal proceedings for offences against planning or environmental laws
Classes 6 and 7: criminal appeals against convictions and sentences for environmental offences by the Local Court.
Class 8: mining matters

In 2016, the LEC heard 1340 cases to finalisation; 842 proceedings were registered (filed) in Class 1, 117 in Class 2, 156 in Class 3, 133 in Class 4, 52 in Class 5, 19 in Classes 6 and 7, and 3 in Class 8.12

Composition
The LEC is composed of both Judges and Commissioners.13 All Judges must be qualified lawyers and have the same rank, title, status and precedence as judges of the Supreme Court of New South Wales.14 All Commissioners must be suitably qualified with legal or technical expertise (e.g. special knowledge of and experience in environmental science or matters relating to the protection of the environment and environmental assessment).15 The Commissioners may be full-time or part-time enabling the court to call upon their expertise as required.

Commissioners generally hear merit review cases16 in Classes 1, 2 and 3 given their technical expertise. In complex cases, a Commissioner may sit with a Judge particularly where the matter involves both questions of fact and law. 17 Only Judges are permitted to hear matters in Classes 4, 5, 6 and 7.18 While Class 8 proceedings may be heard by a Judge or a Commissioner who is also an Australian qualified lawyer.19

Other Court personnel, including the Registrar and the Registry staff, play a fundamental role in the administration of the Court. The Court Registrar has overall administrative responsibility, conducts directions hearings and can exercise judicial powers.20

Case management
Active case management is a key feature of LEC administration. Case management aims to deliver just, timely, and cost-effective dispute resolution, for example, by directing parties to comply with specified timetables, and by limiting the number of witnesses and documents that may be tendered at the hearing.21

Flexibility
Parties are encouraged to file documents electronically to reduce time and costs, rather than filing them in person or by post. The original eCourt system was replaced with the NSW Online Registry website on 23 May 2016.22

Directions hearings may be attended in person, on the telephone or online.23 However, online court is generally only appropriate for matters by consent.24 The hearing can be conducted in Court (in all cases), on-site (for class 1 and 2 proceedings), partially on-site (e.g. in Class 1-3 proceedings where the hearing usually commences onsite) or video conferencing (in all cases for taking evidence of remote witnesses).25 In addition, the LEC holds hearings in country Local Courts throughout New South Wales.

Formality of proceedings
The LEC operates akin to a tribunal in Classes 1, 2 and 3, where proceedings heard by Commissioners are required to be conducted with as little formality and technicality, and with as much expedition as the case permits. The Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.26 Formal rules of evidence and practice and procedure apply in proceedings heard by Judges in Classes 4-7.

Availability of alternative dispute resolution (ADR) mechanisms
The LEC offers a range of ADR mechanisms including adjudication, conciliation, mediation, neutral evaluation, and referral to a referee. ADR is provided inhouse by Court personnel and externally by accredited mediators and neutral evaluators.
In some cases, ADR is mandatory before the matter proceeds to hearing. In other cases, the Court may refer proceedings to ADR either at the request of the parties or by its own motion.

Innovative practices, policies and procedures
The LEC manages evidence from expert witnesses to reduce bias and speed-up proceedings. For example, the LEC has the power to:

- order Court appointed experts and parties’ single experts;
- direct the parties’ experts to confer and produce a joint expert report which sets out the areas of agreement and disagreement; and
- order the parties’ experts to give concurrent evidence (also known colloquially as ‘hot-tubbing’).

Such methods not only save time and money, they remove the more adversarial nature of the proceedings.

The LEC has also introduced a novel approach to hearing residential development appeals by way of a combined conciliation conference and hearing. The matter starts onsite, the Court hears from objectors and then the Commissioner seeks to conciliate. If the matter does not settle, then it proceeds immediately to hearing before the same Commissioner.

Another LEC innovation in partnership with the Judicial Commission of NSW, is the development of the world’s first sentencing database for environmental offences. The database provides information on sentencing trends which has improved the quality, predictability and consistency of environmental sentencing.

Development of environmental jurisprudence and principles
The caseload and comprehensive jurisdiction of the LEC has enabled it to develop a significant body of environmental jurisprudence in four main areas: substantive justice (e.g. the development of principles of ecologically sustainable development), procedural justice (e.g. the removal of barriers to public interest litigation), distributive justice (e.g. the polluter pays principle), and restorative justice (e.g. victim-offender mediation).

The LEC has also developed a considerable body of ‘non-binding planning principles’. These are statements of a desirable outcome from a chain of reasoning aimed at reaching a planning decision. They can assist where no policy exists or a policy is ambiguous or otherwise unclear.

Access to justice
The LEC plays a central role in providing access to justice in environmental matters. For example, it liberally construes standing requirements, and does not necessarily require an unsuccessful public interest litigant to pay the costs of the proceedings.

The LEC also provides several services to ensure it is accessible to people with disabilities, for litigants in person, and for those in country locations. A wealth of information, fact sheets and resources are publicly available on the LEC website, including a guide for ‘Litigants in person’.

Transparency
Another key characteristic of the LEC is its openness and transparency. For example, all proceedings are conducted in an open forum, reasons must be given for its decisions which are made publicly available, and the LEC reports on its performance in an annual review.

What has contributed to the LEC’s success?
More than 350 specialised ECTs have been established in 41 countries throughout the world. Some have been more successful than others. Chief Justice Preston of the LEC has identified 12 key characteristics of successful ECTs. These are summarised below:

1. **Status and authority** – status as a superior court of record does not of itself determine the success of an ECT; however, in combination with other features (such as comprehensive jurisdiction, and recognition by governments, stakeholders and the wider community) this is often a characteristic of a successful ECT;

2. **Independent and impartial** – independence from the legislative and executive branches of government as well as external influences (such as local government, the media, political parties, pressure groups etc.) and without conflict of interest or actual or apprehended bias;

3. **Comprehensive and centralised jurisdiction** – comprehensive jurisdiction to hear, determine and dispose of matters arising under all environmental laws, including civil and criminal enforcement, merits and judicial review and damages actions. A centralised ECT with an integrated and coherent environmental jurisdiction enables economic efficiencies as well as creative and innovative problem-solving;

4. **Judges and members are knowledgeable and competent** – ECT members should be educated in environmental issues and continue to receive professional training throughout their tenure. ECTs which have both judges and technical experts tend to enhance the quality, effectiveness and efficiency of decision-making;
5 Operates as a multi-door courthouse – centralised ECTs with a range of judicial officers and technical experts can offer a range of alternative dispute resolution (ADR) options, such as conciliation, mediation and neutral evaluation;

6 Provides access to scientific and technical expertise – in addition to appointing internal technical experts, successful ECTs have implemented procedures to manage parties’ expert witnesses to eliminate or reduce bias;

7 Facilitates access to environmental justice – ECTs facilitate access to justice through substantive decisions which uphold constitutional, statutory and human rights of access to justice and through practices and procedures which remove barriers to public interest litigation (such as liberal standing requirements, allowing litigants in person, etc.);

8 Achieves just, quick and cheap resolution of disputes – specialised ECTs with effective case management procedures can resolve complex environmental disputes effectively, quickly and cheaply. Avoiding delay is vital in environmental matters where the purpose is often to prevent or mitigate environmental harm;

9 Responsive to environmental problems and relevant – specialisation enables ECTs to develop innovative and holistic solutions to urgent and pervasive environmental problems such as climate change and biodiversity;

10 Develops environmental jurisprudence – ECTs with comprehensive jurisdiction and a sufficient caseload can develop a coherent and consistent body of environmental jurisprudence;

11 Underlying ethos and mission – successful ECTs tend to have a clear mission or statement of purpose to uphold environmental law and protect the environment; and

12 Flexible, innovative and provides value-adding function – ECTs can add value in a variety of ways through the development of precedents and principles, to innovations in practice and procedure.\textsuperscript{38}

While the LEC today exhibits all of these features, this was not always the case. Early reviews highlighted areas for improvement, such as gaps in its jurisdiction, perceptions of bias and inadequate monitoring of systemic issues.\textsuperscript{39} The identification and resolution of potential weaknesses is an important part of the evolution of a successful ECT.

Importantly, it is the LEC’s desire to continually seek improvement and strive to be a world leader in court excellence, which has contributed to its success. The LEC was the first court to implement the International Framework for Court Excellence (Framework).\textsuperscript{40} The Framework is a quality management system which provides a structured methodology for assessing the court’s performance. The LEC identified areas for improvement and developed an action plan for implementation. Importantly, the LEC will not stop there. The LEC’s environment is ever-changing and therefore, the court will continue to examine and re-examine its performance using the Framework as a guiding tool.\textsuperscript{41}

Conclusion
There is much to be learned from the considerable experience of the LEC and similar ECTs in other jurisdictions. When properly established, a specialised ECT can deliver numerous benefits, including quicker and cheaper resolution of disputes, greater access to justice, better quality decisions and a more coherent environmental jurisprudence.

While attempts to make a case for an ECT in England and Wales have received less than favourable support from governments in the past,\textsuperscript{42} and more recently in Scotland by the Scottish Government’s decision not to establish an ECT, this should not dissuade proponents from putting forward the best possible case and model for ECTs in the future. Granted, it is important to keep check on what can be achieved. However, if anything is to be learned from the experience of the LEC, it is the combination of the 12 key characteristics set out above which have made it so successful.

The LEC was not created in a vacuum, it was created alongside a new and more integrated legislative framework, which has continued to grow and evolve. Arguably, Brexit presents a unique opportunity for the United Kingdom and each of the devolved administrations to take a fresh look at their environmental and planning laws, and to consider significant reforms which would support and create comprehensive ECTs in each country.

Hayley is Head of Lexis\textsuperscript{®}PSL Environment. She is an environmental lawyer admitted in Australia, England and Wales, with experience in private practice, inhouse and the public sector. Hayley is a UKELA Trustee and editor of elaw.

Endnotes
4 Land and Environment Court, ‘History’ endnote 3.
7 Land and Environment Court, ‘About us’ endnote 1.
8 Land and Environment Court Act 1979 (NSW), ss 16 and 71.
10 Land and Environment Court Act 1979 (NSW), ss 16-21C.
12 Land and Environment Court Act 1979 (NSW), ss 7, 8 and 12.
13 Land and Environment Court Act 1979 (NSW), ss 8 and 9.
14 Land and Environment Court Act 1979 (NSW), s 12.
15 Land and Environment Court Act 1979 (NSW), s 33(1).
17 Land and Environment Court Act 1979 (NSW), s 33(2).
18 Land and Environment Court Act 1979 (NSW), s 33(2A).
19 Preston, B J endnote 9, p 6.
20 Civil Procedure Act 2005 (NSW).
22 Preston, B J endnote 9, p 14.
24 Preston, B J endnote 9, p 14.
25 Concurrent evidence is now also common in the Supreme Court of New South Wales, Uniform Civil Procedure Rules 2005.
26 Land and Environment Court Act 1979 (NSW), s 38(1) and (2).
32 Preston, B J endnote 9, p 30.
33 Preston, B J endnote 9, p 18.
35 Preston, B J endnote 9, p 26.
37 Preston B J, endnote 30.
38 Preston B J, endnote 30 pp. 365-393.
40 Developed by an International Consortium for Court Excellence including the Australasian Institute of Judicial Administration, the Federal Judicial Center, USA, the National Center for State Courts and the Subordinate Courts of Singapore.
Matters in practice
A new independent environmental body for England? Some reflections

Wyn Jones, Convenor, nature conservation working party

At a glance
- Government plan to consult on the creation of a new environmental watchdog for England
- This article sets out why the statutory nature conservation agencies are not suitable for this role.

Introduction
The Defra Secretary of State Mr Michael Gove MP announced before Christmas that he plans to consult on establishing a new independent body that would hold Government to account for upholding environmental standards in England. This is to be welcomed but at the same time one questions whether the role could or should be undertaken by the existing statutory independent environmental agencies. They have the required expertise, knowledge and administrative structure and one could argue that they already have the role. So why are they not being given it automatically? Having worked for and with the nature conservation agencies for some 30 years these are my reflections

Nature conservation agencies
Since 1949 with the establishment of the Nature Conservancy by Royal Charter, it and its successor bodies have been given strategic direction by their respective Councils and Boards. The members of the Councils / Boards are appointed by Government and, for the majority have come from nature conservation and scientific academia; although in more recent years there has been an increase in representation from landed interests. The bodies are all funded by means of grant in aid from their respective Government departments.

Exercising independence
Over time the nature conservation agencies have to varying degrees emphasised their independence from Government, being Quasi-Autonomous Non-Government Organisations. However, the exercise of such independence has been undertaken with great caution especially where decisions taken may affect Government or their constituents. Prior notice and discussion with the relevant Ministers is standard practice.

Since 1949 tensions between different interest groups, sectors, political parties, individual politicians and landowners have resulted in many challenges and conflicts, some almost terminal especially in the early years of the Nature Conservancy. In recent years the main trigger for conflict has been the notification and confirmation of Sites of Special Scientific Interest (SSSIs) under section 28 Wildlife and Countryside Act 1981 as amended. The Council / Board has a duty to notify SSSIs where they are of the opinion that land or water is of special scientific interest. Subsequently, following the consideration of the representations received they have the power to confirm the notification.

In 1982 West Sedgemoor on the Somerset Levels was notified by the Nature Conservation Council (NCC) as a SSSI which resulted in considerable anger in the local farming community. Public protests were held, effigies of local staff and the then NCC chairman burnt, and influential local Conservative MPs made strong representations to the then Secretary of State at the Department of the Environment (DoE) to have the decision to notify overturned. However, the NCC after due consideration of the representations confirmed the notification. Shortly afterwards the NCC chairman’s period of tenure ended and he was not reappointed. In the late 1980s the NCC campaigned to safeguard upland wetland areas from being planted with trees under a tax incentive scheme. The campaign peaked with the publication in 1987 of the NCC report on the Flow country in Caithness and Sutherland entitled Birds, Bogs and Forestry. Consequently, the Treasury withdrew the tax incentive scheme.

In 1989 the Secretary of State (DoE) together with the respective Secretaries of State for Scotland and Wales, announced the splitting of the NCC into three autonomous country agencies and that nature conservation and countryside responsibilities would be integrated in a single body in Scotland and Wales.

The Joint Nature Conservation Committee (JNCC)
The JNCC has been promoted by some as a possible model for a post Brexit independent environmental monitor and regulator. However, it is very much a body of the statutory country Councils / Boards having even less autonomy.

The Committee comprises of an ‘independent’ chairman, chairmen of each of the four country councils plus one other member of the respective councils / boards; and four ‘independent’ members. All are appointed by the Secretary of State or their respective devolved Ministers
Section 133 Environment Protection Act 1990 sets out the special functions of the country councils which are to be discharged through the Committee, the Committee also having the power to delegate. The special functions being:

- To provide advice and disseminate knowledge on nature conservation at a GB or international level;
- To establish common standards throughout GB for monitoring and research into nature conservation; and
- To commission research in support of the special functions.

In addition to these special functions the JNCC is the Government’s advisor on nature conservation for UK offshore waters.

The JNCC is funded by Governments, central and devolved, although funding can also be obtained from other approved sources.

The role of the JNCC support unit is primarily one of facilitation and coordination. The standard setting for monitoring and designation (selection of biological and geological SSSIs) has to be agreed by the specialists from each of the respective Country bodies. In many instances this has resulted in protracted negotiations lasting years. The provision of advice and support to Government on international nature conservation issues has been effective, although facilitating Country body engagement on European Union issues proved contentious, so much so that the JNCC Brussels office was closed on the instruction of Government.

To sum up, the JNCC’s functions are largely derived from the statutory Country nature conservation agencies and are exercised only with their sanction. The organisation is not independent of Government or the Country agencies.

**Conclusion**

The statutory nature conservation agencies do have a measure of independence but in recent years appear reluctant to express it let alone exercise it. Given experiences and their increasing closeness to Government, this is not surprising. They are currently not suitable to provide an independent ‘watchdog’ role or to hold Government to account on environmental standards. They do have the necessary expertise, knowledge and administration but the relationship with Government and the culture within the agencies would have to change considerably for them to have the role. To ensure an objective, accessible and transparent execution of the ‘watchdog’ role a new environmental body is needed.

Wyn Jones retired from the JNCC in 2009 having worked for and with one or other of the nature conservation agencies for some 30 years. He is stepping down from the role as convenor of the nature conservation working party this month.
Evidence to the House of Lords Select Committee on the European Union
The impact of Brexit on the UK’s trade in waste

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* This article was first published in Materials Recycling World.

The House of Lords Select Committee on the European Union through its Energy and Environment Sub-Committee is conducting an enquiry into the impact of Brexit on the UK’s trade in waste. As part of this enquiry, an evidence session on Budget day heard the views of the Green Alliance, Eunomia, Policy Exchange, Resource Association, Environmental Services Association, Chartered Institution of Wastes Management, Local Authority Recycling Advisory Committee, Dutch Waste Management Association and the UK Environmental Law Association. Brexit negotiations until the end of November 2017 were focussed on the UK’s orderly withdrawal from the EU under Article 50 of the Treaty on the European Union and the whole business of post Brexit trade arrangements is still to start in earnest, hence the House of Lords enquiry is both necessary and timely.

Trade is underpinned by law so this article discusses some of the likely impacts of Brexit on UK law in general and waste law in particular.

EU law, regulations and policy

The EU Withdrawal Bill presently commencing its Committee stage in the House of Lords repeals the European Communities Act 1972, the means by which EU law (Treaties, Regulations and Decisions) is given force in UK domestic law. The effect of the Bill is to convert directly applicable EU law, which would otherwise lapse on exit, into UK law. This means that what was EU law will be frozen at the moment of exit and remain in that state until revised by means of UK regulations. Ministers will be given the power of revision – the so-called Henry VIII powers – which will enable primary legislation to be amended or repealed by subordinate legislation, thus obviating the need for full Parliamentary scrutiny. However, the task of adapting vast amounts of EU legislation into UK domestic law will be complex because typically, UK transposing Regulations have referred to the Directive (without the text appearing in full) and contained enforcement provisions – nothing else. This will make the physical effort of redrafting, considerable. Analysis by Thomson Reuters says 52,741 laws have been introduced in the UK as a result of EU legislation since 1990, and research published by Parliament estimates 13.2% of UK primary and subordinate legislation enacted between 1993 and 2004 was EU related.

With respect to policy – and let there be no misunderstanding about this – all EU policy enshrined in EU legislation will remain part of UK law but frozen as at the date of exit. When EU policy changes, UK policy will not so the UK will be out of step with the EU. Many would argue that this is one of the principle benefits of leaving the EU but it will make trade post Brexit more complicated.

Waste/Resource regulation

EU legislation is dominant. Waste and resource management have developed over the last 40 years in accordance with EU law and policy providing long term vision for the sector – Everything from recycling to end of waste is governed by EU legislation and policy. The definition of waste, the waste hierarchy and the Circular Economy are all European in concept.

Presently the UK exports more than 3m tonnes per annum of recyclate to Europe which is used to generate electricity. This recyclate is exported as waste for recovery under the EU Transfrontier Shipment of Waste Regulations 2006. Post Brexit therefore, a question arises as to whether wastes could continue to be traded with the EU. Moreover, substantial quantities of secondary materials are exported to China which may be impacted by the proposed Chinese import ban of materials which fail to meet the GB 16487 Environmental Protection Control standards. If the UK could not continue its trade in waste with the EU and China, it would need substantially more recycling and Energy from Waste facilities to cope with the increased quantities of waste remaining in the UK. So very careful consideration needs to be given to any proposed changes to UK domestic law which would make exports more difficult. There are also concerns that the Brexit debate has already weakened the UK’s influence in the EU and that important policies such as the Circular Economy, where considerable work has been carried out in the UK over the last five years, are being shaped without significant UK input.

However, it could also be argued that if there was less environmental protection in the UK, economic and competitive benefits would result. For example it is
possible to contemplate a second, inward facing, definition of waste so that secondary materials now defined as waste would no longer be designated waste and could more easily be moved and traded within the UK resulting in significant cost saving.

Trade in waste with the EU
As has already been described, the EU Withdrawal Bill when passed into law effectively creates a third body of law frozen at a point in time, unchanging unless the UK tracks European law or makes its own changes – so potentially restricting trade in wastes. The potential problem arising in relation to trade in wastes may be summarised thus: The UK will no longer be part of the EU and Regulation (EC) 1013/2006 on shipment of waste (Shipment of Waste Regulation) differentiates between EU Member States and third countries. The UK, of course, in these terms becomes a third country. Here, however there is good news! The relevant overarching law for trade in wastes is the Basel Convention 1989 which has been ratified by the UK. The Convention has been implemented within the OECD and the UK is an OECD member – as are a further 20 EU Member States. OECD Council Decision C(2001)107/FINAL (as amended) governs wastes for recovery within the OECD area. The Decision requires recyclables to be recovered in an environmentally sound and economically efficient manner by using a simplified procedure as well as a risk-based approach to assess the necessary level of control for materials. – the same system as is used by the EU in the EU Shipment of Waste Regulation, so post Brexit the UK’s trade in wastes with the EU 20 Member States should continue unabated, but subject in future to the OECD Decision rather than the Shipment of Waste Regulation. The simplified control procedure does not apply to those EU Member States outside the OECD.

UK Devolution and Waste
Post Brexit, the devolved administrations of the UK may individually decide on their respective waste policies and regulations, since the environment is a devolved matter and the National Assemblies/Scottish Parliament have powers to make their own legislation. If each country adopted different waste regulations, policies and targets, it could make trade in waste, even within the UK, more difficult.

EU Environmental Standards and waste
In 2017 16 EU Member States, Norway, 19 industrial organisations and one environmental NGO, together with the EU Commission, completed the technical work to define the Best Available Techniques (BAT) conclusions for the waste treatment sector as part of the review of the Waste Treatment Best Available Techniques Reference Document (BREF), dated 2006, under the EU Industrial Emissions Directive 2010.6. BAT conclusions for the waste treatment sector will be the reference for the authorities across the EU to set operational permit conditions for about 4 000 waste treatment facilities in Europe. Post Brexit, the UK (and the devolved administrations) will have freedom to follow the BREF or impose different standards at the risk of finding it harder to trade in an international market.

European Court of Justice and Waste
This is an area likely to be fraught with difficulty. Hard line Brexiteers have called upon the government to remove the UK from the jurisdiction of the European Court of Justice (CJEU) immediately on exit. The new President of the Supreme Court has already asked Parliament for “as much clarity as possible” as the English Courts could be faced with issues of interpretation in terms of established jurisprudence based on EU law up to Brexit date and sufficient guidance so that judges know how far they should “take into account” future CJEU judgments, where EU law remains part of UK law. Waste is one of the topics where the CJEU has exercised great influence over the UK courts and thus early clarification is necessary.

Conclusions
As will be readily observed, this article does not address the detail of any of the issues touched upon and does not even consider all the topics of relevance in this area. Of one matter however, we can be sure, Brexit will have a far-reaching and complex effect on our environmental legislation and on waste management legislation in particular. As is well known, lack of policy, short term policy and changing policies lead to long-term uncertainty and that does not encourage green investment.

This article is based on evidence given by the writer to the of trade in waste round table discussion convened by the House of Lords Energy and Environment Sub-Committee on 22 November 2017.

Endnotes
2 The UK is made up of four countries, with three separate legal systems. Parliament in Westminster is the supreme law-making authority although since 1999, devolution has provided for the transfer of some powers to assemblies in Cardiff, Belfast and the Scottish Parliament in Edinburgh. For the purposes of this article no differentiation is made between the respective legal systems (except where otherwise indicated) and the generic term “UK law” is used throughout.
3 Named from the Statute of Proclamations 1539 which gave King Henry VIII power to legislate by proclamation.
Secondary materials include a range of wastes e.g. metals, plastic and paper which have been through a treatment process before export.

This directive is largely implemented through the Environmental Permitting (England and Wales Regulations 2016, the Pollution Prevention and Control (Industrial Emissions) Regulations (NI) 2013 and the Pollution Prevention and Control (Scotland) Regulations 2012.

The UK Environmental Law Association (UKELA) is the UK's leading networking and events organisation for environmental law professionals. Our aim is to improve understanding and awareness of environmental law – to make the law work for a better environment. We run events and training, seek to influence the law for a better environment and provide information to the public on environmental rights and responsibilities. This is a part-time post in a friendly, largely home-based team offering 1 day per week (0.2 FTE).

Principal Accountabilities
- Track key UK and devolved Government initiatives and environment law developments including proposals related to Brexit and advise UKELA's topic-themed Working Parties of key opportunities for influence.
- Help the Working Parties to influence effectively environment law (formulation and reforms) on priority issues including those related to Brexit.
- In particular: help Working Parties to engage proactively with policy makers and to produce consultation responses and other papers on priority issues.
- Help ensure that this work upholds and advances UKELA's reputation as an expert, objective commentator.
- Support the work of UKELA's Brexit Task Force.
- In particular, manage the production and dissemination of reports prepared by task force members, help programme future events and activities, and help keep the Brexit area of UKELA's website up-to-date.
- Support the Operations Director in helping Working Parties to plan events by: advising on potential topics, advising on and finding speakers and other key participants, where appropriate; and attending events where appropriate.
- Provide oversight on content of updates to the UKELA website from working parties.
- Help with UKELA's internal and external communications to ensure messages about Working Party activities and influencing work get across clearly, including liaison with the Brexit Task Force co-chairs to regularly update the Brexit Blog.
- Support the Operations Director in ensuring that activity across the organisation is in line with charitable objectives and strategic aims.

Person Profile
Candidates should demonstrate:
- A background in environmental law and relevant qualifications or work-based experience
- Good communication skills, both written and verbal
- Experience of the government consultation process and awareness of deadlines and time constraints
- A sound all-round knowledge of the likely impacts of leaving the European Union on environmental laws

Work Pattern, Remuneration & Benefits
- 1 day per week (7.5 hours).
- Competitive salary for the right candidate
- Matched employer pension contribution of 5%
- Annual leave: 20 days plus statutory days pro-rata
- Potential for a flexible work pattern across the week
- Home-based role, with IT and communications equipment provided or contribution paid towards costs, as appropriate to candidate circumstances

Application and Interview Timetable
- Closing date for applications 9am Monday 5 March 2018
- Provisional dates for interviews in London week beginning 19 March 2018
- Applications must include a concise covering letter

Further Information
UKELA is an equal opportunity employer. Please call Operations Director, Alison Boyd, on 01306 500090 for an informal discussion.
The Law Society Planning and Environmental Law Committee

The Law Society’s Planning and Environmental Law Committee is on the lookout for new members and is particularly keen to hear from solicitors practising environmental law. Committee membership involves attendance at four meetings per year (3 in London and 1 in Cardiff), input to Committee tasks such as consultation responses, presentations and seminars, meetings with politicians, officials and stakeholders, and ad hoc assistance in support of the Society’s activities.

The formal application ‘window’ will open in late March, but the Committee is keen to hear from interested solicitors and to provide further information in advance of applications. Travel expenses are paid and two meetings include dinner and overnight accommodation if required. For more details, please get in touch.

Speakers wanted for an Environmental Law seminar series at Anglia Ruskin University

Anglia Ruskin University’s Global Sustainability Institute, in partnership with the Anglia Law Society, are looking for expert practitioners to lead a series of extra-curricular seminars aimed at undergraduate and postgraduate students on the topic of environmental law (which is not currently offered to any students at the university). The purpose of the seminars will be to enable students to gain an insight into the types of cases that practising environmental lawyers might work on, and to share with students the reasons why and how they ended up working in environmental law. The seminars are being organised in response to a growing demand from our student body, and a current lack of capacity (as opposed to interest) among lecturers in the Law School.

We are looking for 3-4 speakers in total. Speakers would be required to present a one hour, lunchtime seminar (1-2pm). Dates are flexible depending on the availability of the lawyers, but we would ideally like to run the seminars from w/c 5 March to w/c 26 March. For more details, please contact Victoria Tait.

Book reviews

The e-law editors are regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please get in touch.
The editorial team is looking for quality articles, news and views for the next edition due out in March 2018. If you would like to make a contribution, please email elaw@ukela.org by 21 March 2018.

Letters to the editor will be published, space permitting.

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