



# e-law

Better law for the environment

September/October 2019 | Issue 114



**Welcome to the September/October edition of e-law where the focus is on nature conservation and biodiversity.** This is a timely focus given that the nature conservation party has recently celebrated its 30 year anniversary and Tom Huggon has also recently been awarded Honourary Membership for his contributions to the working party.

We are most grateful to Jessica Allen for her article on [The human dimension of nature conservation](#), which sets out the crucial contribution of the social sciences in understanding the human dimension of nature conservation. The article is one of two written by Jessica, following time spent in Summer 2018 as Research Assistant to Professor David Doyle at Maynooth University where she undertook research into conservation criminology as well as the cultural and legal implications of the de-extinction of non-human species. In recognition of this research, she was awarded the 2018 wildlife law bursary by the UKELA nature conservation working party.

I'd also like to thank Joanna Smallwood for her piece [Influence of the 1992 United Nations Convention on Biological Diversity \(CBD\) on UK Law](#), which explores the nature of the CBD Aichi Biodiversity Targets (ATs) and how they have been implemented in the UK to find explanations as to why most will not be achieved by 2020. The article uses the interdisciplinary theory of interactional law, which understands that legal obligations can drive compliance when they fulfil certain criteria, and argues the interactionality of the ATs can be strengthened to better achieve compliance.

Land use and agricultural issues have an undoubted impact on nature conservation and biodiversity and we have two excellent pieces from Gwyneth Everson: ['Land for the Many' – an environmental perspective](#), produced with assistance from Jamie Whittle, Partner at R & R Urquhart LLP, and Chloe Anthony: [UK agricultural law and policy and the small agroecological farm](#). Both pieces promote the environmental benefits of small-scale farming.

The 'Land for the Many' report proposes radical changes to land use and management and Gwyneth's article summarises the main environmental issues identified in the report and assesses the potential impact of the proposals, aimed at helping small and low-impact farmers. Gwyneth asserts that the report's proposals could help mitigate the fact that concentration of rural land ownership and industrialised agriculture is having a negative impact on the natural world.

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Chloe's article views contemporary UK agricultural law and policy through the lens of the small agroecological farm and recommends that three areas of reform are addressed to support these farms and improve land governance: agricultural and environmental governance frameworks; targeted public support for small agroecological farms; and land law reform.

This edition also includes a student submission from Huw Thomas: [A critical analysis and evaluation of the law concerning the claims for pleural plaques in the United Kingdom](#), which asserts that the legal position in England and Wales, whereby sufferers are no longer entitled to compensation, requires urgent statutory reform. I'd like to extend my thanks to Huw for this informative piece.

We are also very lucky to be able to include Duncan Mitchell's piece [EU Exit: a personal perspective from inside government](#), which offers a personal perspective on the experience of working in a government department during EU Exit and gives a fascinating insight into the sheer scale of the exercise, highlighting the critical role of government lawyers, in the context of delivering the four Exit statutory instruments. Many thanks Duncan for sparing your time to produce this at such a busy time!

Best wishes,

*Sophie Wilkinson*

**Sophie Wilkinson**  
UKELA e-law Editor

## E-law editorial team

**Sophie Wilkinson**, Editor – Sophie is an environmental law specialist at LexisPSL with 13 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

**Cecily Kingston** is a trainee solicitor at R&R Urquhart solicitors based in northern Scotland.

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# Words from the Chair



How timely for this e-law edition to be focused on nature conservation and biodiversity, not only because this season of mist and mellow fruitfulness is a glorious reminder of nature around us, but because it is in recognition of the tremendous efforts that have been made over the years, decades, to support efforts to conserve nature and biodiversity.

Some of you may have noticed that Apple Day festivals are upon us, providing communities and individuals the opportunities to press their apples into home-made juice to last the winter; or indeed swap, sell, or share any apples they might have from their trees. I always find these days a wonderful reminder of how connected we can be to nature when we take the time to celebrate it; and also how much nature provides for us and our needs.

I had the privilege recently of joining UKELA's nature conservation working party meeting in September where they were celebrating 30 years of their great work and achievements. Many of you will recall also that at the annual conference this year we awarded [Tom Huggon Honorary membership](#) for his extremely valuable contributions to the working party and broader environmental law career (you can read more on the history of the group and highlights of its work later on in this e-law). What is notable, to me at least, is that even prior to the establishment of UKELA, lawyers were already congregating to discuss and work on issues of nature conservation and biodiversity, as part of firstly the Solicitors Ecology Group and subsequently the Lawyers Ecology Group.

In the midst of all the news of the UN Climate Summit being hosted in New York recently, the [Fridays for the Future climate strikes](#), and the more mainstream and widespread reporting of climate issues; I think it is important to reflect on the long history and culture of nature conservation and biodiversity work that has informed so much of our approach to and understanding of using the law for the betterment of the environment around us.

A seminal milestone in the public being made aware of such issues was without a doubt [Rachel Carson's Silent Spring](#), first published in 1962, exposing the use of DDT and the damage it caused to wildlife, birds, bees, agricultural animals domestic pets, and even humans. A sentiment subsequently immortalised by [Joni Mitchell's Big Yellow Taxi](#), where she melliflously sang about the end of DDT, not caring about "spots on [her] apples", but wanting to be left with the birds and the bees.

Following the decade of *Silent Spring's* publication and the world waking up to the great crises that faced both people and nature the response was not insignificant. The United Nations held for the first time a [Conference on the Human Environment](#), hosted in Stockholm, Sweden. That meeting in 1972 proved to be a turning point in the development of international environmental politics; and demonstrated that politicians could recognise and respond to a global problem collectively.

Some 20 years later all eyes were on Rio de Janeiro where the [UN Conference on Environment and Development](#) brought to the fore once again these critical environmental concerns culminating in the [Rio Declaration](#) (many principles of which have embedded themselves in legal instruments at the regional and national levels. Indeed, consider that list of principles that are set to be enshrined in the [Environment Bill 2019](#)); the [Convention on Biological Diversity \(CBD\)](#); and later the [Framework Convention on Climate Change \(FCCC\)](#).

Some of you might even recall the rallying [speech a 12 year old Severn Cullis-Suzuki](#) gave to conference delegates, imploring them to fix the environment and her future, chastising them for not doing enough to solve the problem, and acting as a powerful reminder that young people have always played a valuable role in being our moral conscience and insisting that short-term gains are not pursued to the detriment of long-term future needs.

The echoes of these momentous occasions continue to reverberate around us today, and these important legal frameworks represent the cornerstones of many laws and approaches that we have established to tackle those problems that affect biodiversity and nature. They are grounded in setting clear targets for nation states to meet, and are consequently judged on how well and whether these targets have been met.

You can read in these pages of e-law more about the academic perspective on how successful this has been in actuality – transposing the global ambition into nationally relevant and executable plans. Equally, you can yourselves judge the relative success or merits of these regimes based on your own experience I am sure. What I find interesting is the motivation and drive behind these agreements, and how it came about that the world collectively took a moment to reflect and decide how to act.

Such a moment is upon us again. 2020 marks an important year for these Conventions, in particular the CBD. It is when new targets are going to be thrashed out and the next trajectory of ambition will be set by

world leaders. The combined warnings of the [IPBES](#) and [IPCCC](#) reports indicate in no uncertain terms that this is our critical window of opportunity to reverse the negative trends we are now all-too familiar with. Let's call this window of opportunity the Decade of Ambition and Action.

To kick-start the Decade of Ambition and Action UKELA has just started its Strategic Review process – reflecting on the years gone by and looking ahead to the next five year strategy period (keeping in mind of course the broader context) to ensure it continues to provide relevant, valuable, and timely support as your professional association. I outline in more detail what is coming up in the strategic planning process later on in this e-law; and I do look forward to working with and alongside your Council and staff team, as well as those of you who are interested in participating in the consultation period to deliver this.

Additionally, the UKELA events schedule continues to provide fantastic opportunities for diverse perspectives to debate important topics such as 'The role of natural capital in policy-making and decision-taking', which I had the pleasure of attending last week, to climate mitigation, wild law, and waste. I am very much looking forward to catching the sleeper train up to Edinburgh for the annual UKELA Scottish conference on 10 October and gaining a deeper understanding of the Scottish perspective on environmental law matters too.

I also want to recognise the hard work of the regional groups – Eastern, NW and NE – for getting the Autumn off to a great start with their AGMs and new teams in place that will lead each of those to deliver the regional programme of events and meetings. I look forward to hearing more about progress being made here and learning from them about how UKELA can continue to support these efforts.

Between now and 2030 we all have the chance to focus our efforts and do what we can to ensure that we honour the great tradition of lawyers caring about the environment and dedicating their skills and expertise to doing something about it. The Lawyers Ecology Group laid the foundations for what is now the UKELA nature conservation working party, standing the test of time and demonstrating that with the dedication and commitment of its founding and newer members it has continued to deliver invaluable work through arranging its meetings, providing expert responses to government consultations on the topic, and more generally creating a network of like-minded lawyers who care deeply about this subject.

I am proud to be working for and with you in supporting you to achieve your professional goals and ambitions and continue to use the law to defend, protect, and enrich our natural environment and the biodiversity within it.

Thanks to your hard work, looking ahead to the next five year period and beyond, we can collectively aspire to ensuring that Apple Days will continue to be a feature on our Autumnal calendars – spots and all – and we will always be reminded of the great value and importance of our natural world.

With best wishes,



**Kirsty Schneeberger**  
UKELA Chair

# UKELA news

## Strategic Planning session 2020 – 2025

As those of you who keep an eye on the current UKELA Strategic Plan will have noticed, it is set for the period of 2016 – 2020. This means that it is time again for UKELA's Council, staff, and membership to participate and engage in the Strategic Planning process to set the agenda and direction of UKELA for 2020 – 2025.

UKELA has a great track record of setting Strategic Plans and delivering successful work programmes for its membership. I am delighted to let you know that we – UKELA's Council and staff team – have just begun the Strategic Planning process; and so thought it would be helpful to you to outline below the timetable and milestones that we have set to ensure we publish the Strategic Plan in time for next year's annual conference.

We kick-started this process last week with the Executive Committee and staff team undertaking a half-day session to reflect on the successes and achievements of UKELA across the 2016 – present Strategic Plan period, and to identify areas for enhancing and strengthening UKELA's work. The in-depth deliberations will be reported to the wider Council at the next Council meeting that will also include an additional Strategic Planning session on 18<sup>th</sup> November.

Following on from these deliberations, a paper will be released in the new year and a consultation process will be undertaken to engage with many of UKELA's stakeholders (including but not limited to, for example: Working Party and Regional Group Convenors, the Membership Development Group, Patrons, former Chairs, Honorary Members) before sending out a survey to the wider UKELA membership.

We will then review the input as part of the April 2020 Council session and refine the draft plan accordingly and in line with feedback and input shared as part of the engagement process. Finally, we will be signing-off the Strategic Plan at the June Executive meeting in time for our Annual Conference in June 2020!

We will be in touch with more information following the 18<sup>th</sup> November Council meeting. We thought it would be helpful and of interest to you, as members, to know about the Strategic Planning process now, so that should there be any points you wish to raise, you can do so as outlined above.

If you wish to be in touch about any of this, you can always contact me directly on my UKELA [email](#).

After all, the UKELA team is here to support you and we are always keen to hear feedback and your views on how to enhance your membership.

Council and the staff team are very much looking forward to working with you all on this.

Kirsty Schneeberger, Chair

## Membership fees increase

The Board of Trustees has recommended that, in line with its current policy, subscriptions should be increased for 2020 by the current cost of living. This will be with the exception of the lowest tier which will remain at £15. The current and revised 2020 prices are shown below:

Tier	Current 2019	2020 fees
Individual	£77	£79
Private Company	£450	£459
Statutory Body	£170	£174
NGO/non profit	£77	£79
Local Authority	£100	£102
Public sector Individual	£60	£62
Retired	£60	£62

These prices will come into effect for any new members joining from the start of October 2019 and for those members renewing for 2020. If you have any questions regarding the increase in subscription fees, please contact UKELA's Senior Administrator and Membership Manager, [Elly-Mae Gadsby](#).

# Working party news

## Nature conservation working party is 30 years old

The nature conservation working party is 30 years old, having been founded in 1989. Graham Machin gave the following speech at the working party's September meeting.

### UKELA Nature Conservation Working Party 1989 – 2019

The remit of the working party is to:

- Monitor the application and interpretation of UK and European legislation and relevant policy and guidance, for and affecting nature conservation.
- Raise awareness and where necessary concerns, as to its effectiveness.
- Advise on proposed legislation, policy and guidance and
- Conduct research in areas of interest or concern.

This we have done to the best of our ability for the past 30 years. A few of us have been involved from the start, but for the benefit of less venerable members I will concentrate my remarks mainly on the early years, to explain how it all began and why the group was, and remains, based in Nottingham.

I chaired the inaugural meeting on 14 October 1989, at the Nottingham offices of Browne Jacobson, which has ever since provided the main base and logistic support for the working party. For some of us initially involved, this represented a very natural redirection of activities to which we were already committed as members of the Lawyers Ecology Group (LEG), whose leading members locally included Jack Garner and Tom Huggon. By the late 1980s the LEG as a national actor had declined to the point where the national body and the East Midlands section were identical, so that the foundation of UKELA in 1987 came as a welcome relief and we were happy to hand over our remaining assets to the new body. Tom had by then already established the "Green Team" at Browne Jacobson, and given a concentration in and around Nottingham of lawyers, academic lawyers, planners and ecologists particularly interested in nature conservation, it seemed natural that our local grouping should offer to take responsibility to establish that particular UKELA working party.

It is important however to note that from the start membership of the group was drawn from across the UK, and we have always enjoyed good support and co-operation from the Nature Conservancy Council (NCC), and then the successor country agencies and the Joint Nature Conservation Committee (JNCC).

Indeed, the breakup of the NCC, suddenly announced in July 1989, was one of the first issues on which we made representations to government. Another early pre-occupation was commenting on the relevant parts of the Environmental Protection Bill.



Our activities as a working party were not purely reactive to events. At the inaugural meeting we decided that a major medium-term project should be undertaken to identify the existing wider legal context for the conservation of fauna and flora and their habitats. This led in March 1991 to the publication of a monograph "Nature Conservation – The Legal Framework and Sustainable Development" by one of our members, Neil Hawke, then Professor of Law at Leicester Polytechnic, with the assistance of a research contract with the Nature Conservancy Council. In the introduction Neil recorded his thanks to, amongst others, Mark Felton and Wyn Jones at the NCC and to members of the working party who 'often sacrificed their Saturdays in support of the project'.

Michael Fry's Manual of Nature Conservation Law was published in 1995, a compilation of immense value to all professionals in this field, and when Michael produced a second edition, in 2008, it was actually published by this group (via NCWG Publishing Ltd), with assistance from, in particular, Tom Huggon, Fred Baker and Richard Barlow.

Time does not permit even a selective description of the issues we have taken up over the years, but in recently reviewing my extensive files I have been struck by the fact that we have always responded to relevant events and consultations, by the breadth and quality of the material the group has produced, and by the large number of busy professionals who have contributed to that effort.

I believe that the group has had beneficial effects in the development and effective application of nature conservation law, and occasionally our influence has been visible and acknowledged. In part our influence is indirect. Our members are almost all engaged at the 'coal face' of environmental law; serving regulatory authorities, advising clients, fighting inquiries, conducting litigation, or developing policy. The opportunity for us to meet, debate and co-operate has helped us all to broaden our knowledge and hone our skills, not merely to our mutual advantage but also in the public interest.

The group has always been active in promoting education and training, for instance by the provision of bursaries. Our most direct input has been by means of the annual Introduction to Wildlife Law course, provided by a dedicated team of tutors. This year's course runs in Nottingham from 13 to 15 November and the tutors are Fred Baker, Richard Barlow, Bernie Fleming and Wyn Jones.

I chaired the group for only about 18 months, followed for longer periods by Jacqui Fisher, Richard Buxton, Tom Huggon, Penny Simpson and, since 2013, Richard Barlow. But the more vital and burdensome role is in fact that of Convenor, filled, in order, by Nick Goddard, Wyn Jones, the late Robert Simpson, Fred

Baker, jointly by Christina Cork and David Harrison, Wyn Jones (again) and, since February 2018, jointly by Pip Goodwin and Eunice Pinn. All deserve our thanks, but Wyn's two long stints are particularly noteworthy, especially since our field of operation becomes legally ever more complex, and servicing the group requires specialist knowledge and expertise as well as a great deal of time.

Most of our meetings are still in Nottingham, a conveniently central location where Browne Jacobson continue to provide a home; and, as our presence here confirms, they have obligingly established an office in the City so that we can hold a meeting in London at least once a year. They deserve our thanks.

## Wildlife law bursary award 2019

Applications are invited to be submitted to Wyn Jones, former convenor of the nature conservation working party, by **31<sup>st</sup> October 2019** briefly setting out the proposed research project (no more than a page of A4 is suggested). The project must address a legal issue, or issues, affecting nature conservation in the UK or within the UK's overseas territories. Applications will be considered by the Chair and convenors of the working party together with at least two of the wildlife law course tutors. The award will be made by 30 November 2019. The successful candidate will produce a paper and be required to give a presentation on the project and the conclusions reached at a meeting of the nature conservation working party, either at the UKELA annual conference, or in September 2020. The paper will be published in *elaw*. For further information please contact [Wyn Jones](#).

# Students news

## Annual careers evening

The annual careers evening will be held on Monday 18 November 2019 at 6.30pm. Once again, we will kindly be hosted by Francis Taylor Building in London. Our annual careers evening is open to students and anyone else interested in a career in environmental law. A variety of professionals will be on hand for informal conversation, careers advice and helping you make the most out of your CV. Attendees will include private practice solicitors, barristers, the Environment Agency, DEFRA, environmental consultants and NGOs. Not only will this event be an opportunity to gain insight into the practice of environmental law, it will also be a fantastic opportunity to network with experts in the field. More details to follow. Please check the events calendar and student network section on our website. [Bookings](#) are now open!

## Student publication opportunity

Interested in co-authoring a hot topic article 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 Advisers, [Sophie Tremlin](#) or [Beatrice Petrescu](#). 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 natural capital and the environment, expected to be published in early December.

# UKELA events

## Annual Scottish conference: 10 October 2019

Organised by UKELA Scotland

We will once again be at the Apex Hotel in Edinburgh for our annual Scottish conference. With Brexit delayed but imminent we find ourselves still awaiting the realities of a break from Europe. However, much has evolved in environmental law this year so please join us for an update on the highlights along with a look ahead to 2020. For more details and to book your place please go to the [website](#).

## Young UKELA social event: London nature walk: 12 October 2019

Organised by Young UKELA team

Explore London's wild side with Brenna Boyle of Wild Capital

In this two hour walk we will explore nature in Kensington Gardens, and perhaps also a little of Hyde Park, identifying and discussing everything of natural history interest, from wild flowers to birds. This free event is for our Young UKELA members and spaces are limited so [book your place](#) now.

## South West regional group climate change seminar plus AGM: 16 October 2019

Organised by SW committee

The topic will be 'climate change mitigation and adaptation: perspectives on current actions and future plans'. This event will be preceded by the AGM for the SW Committee, to be held at 5.30pm. [Bookings](#) are now being taken.

## UKELA West Midlands regional group AGM: 22 October 2019

Organised by UKELA WM regional group

This will start at 5pm at the offices of BLM. Please contact [Jill Crawford](#) if you wish to attend.

## Wild law annual conference: Wild law and activism: 9 November 2019

Organised by wild law team

Join us at the University of Sussex to explore the connections between wild law and activism of different kinds. Book your place now; more details are on the [events](#) page.

## Going underground: 13 November 2019

Organised by planning and sustainable development working party, British Geological Society and Squire Patton Boggs

The planning and sustainable development working party along with the British Geological Survey and Squire Patton Boggs will be providing an event exploring the storage of energy in underground strata. More details are on the [website](#). Bookings are now open.

## Annual careers evening: 18 November 2019

Organised by UKELA

The annual careers evening will be held on Monday 18 November 2019 at 6.30pm. Once again, we will kindly be hosted by Francis Taylor Building in London. Our annual careers evening is open to students and anyone else interested in a career in environmental law. A variety of professionals will be on hand for informal conversation, careers advice and helping you make the most out of your CV. Attendees will include private practice solicitors, barristers, the Environment Agency, DEFRA, environmental consultants and NGOs. [Bookings](#) are now open.

## Wildlife law course: 13 – 15 November 2019

Organised by nature conservation working party

Whilst it is expected that the UK will have left the EU by November, the EU derived legislation will substantially remain the same, albeit by means of the new replacement regulations. Join us for this introductory course on wildlife law; more information and how to book is on the [website](#).

# Non-UKELA events

## **Bang to rights: where conflict, violence and river rights meet: 11 October 2019**

Organised by University of Nottingham.

Free full-day workshop held at B7, The Helmsley, University Park, University of Nottingham for the exchange of realities and ideas between Colombia's Atrato River Guardians, academics, practitioners and others with interest in bio-cultural and environmental rights. The workshop offers a unique opportunity to explore the potential of and barriers to environmental rights for rivers through the lived realities of those tasked with realising them and the sharing of experiences, ideas, concepts and vocabularies. For further information visit: [www.chocoriverstories.org/bang](http://www.chocoriverstories.org/bang) and for registration visit: <https://tinyurl.com/UoN-bangtorights>.

## **Bang to Rights: the potential and reality of environmental rights on the front line: 11 October 2019**

Organised by University of Nottingham.

Public lecture held from 7-9pm at A48, Sir Clive Granger Building, University Park, University of Nottingham. Join members of Colombia's Atrato River Guardians and researchers from the University of Nottingham Rights Lab to learn, first hand, about the benefits, challenges and risks of upholding environmental rights on the frontline... For further information visit: [www.chocoriverstories.org/bang](http://www.chocoriverstories.org/bang).

## **Friends of the Earth: Phil Michaels Legal Interns Scholarship Fund: 14 October 2019**

Organised by Friends of the Earth.

The Phil Michaels Legal Interns Scholarship Fund was established by Friends of the Earth to commemorate one of the UK's leading environmental lawyers, who sadly passed away in 2014. Set up in 2016, the fund is the first ever paid legal internship at an environmental NGO. Uniquely, it pays a living wage to interns, and so provides an opportunity for people from diverse backgrounds and walks of life to gain valuable experience in the field of public interest environmental litigation and campaigning at the country's leading grassroots environmental NGO. Our legal interns are an integral and valued part of our legal team, and significantly increase our capacity and ability to undertake more cases of vital public significance, concerning issues ranging from defending the right to protest, to holding government to account over its climate change commitments, as in our Heathrow challenge.

Join Friends of the Earth on Monday 14 October to celebrate the success of the fund and hear of the organisation's legal achievements over the past year, and how our legal team are fighting for our planet at this crucial time. The event will be held at The Place, 17 Duke's Road, London WC1H 9PY, 6.30pm – 8.30pm. To reserve your place, or if you wish to make a donation to the fund, please contact Anna Musgrave at [anna.musgrave@foe.co.uk](mailto:anna.musgrave@foe.co.uk) or 020 7566 1692.

## **Statues of Conflict and Mockery: A View from Margaret River on participation in planning law: 22 October 2019**

Organised by University College London.

Lecture by Brad Jessop, Melbourne Law School being held at 6pm at ECL Faculty of Laws, Moot Court (Bentham House). This paper concerns a conflict over a statue built by a wealthy landowner in the Margaret River wine region in contravention of the Western Australian Planning and Development Act 2005. Despite community opposition to the statue and a refusal of the local council to grant a retrospective development approval for it, the landowner resisted dismantling the statue, and instead succeeded in obtaining approval from the State Administrative Tribunal of Western Australia in the case of Pivot Group Pty Ltd v Shire of Busselton [2007] WASAT 268. Throughout the legal process there was minimal conventional community consultation despite persistent media coverage, and the community considered itself unheard during the planning and tribunal processes. The local community's view about the process and the statute itself is captured by and embedded in a ridiculing statue that it erected nearby. The paper looks at the contemporary transnational conflicts over statues in place, and ideas of objects and people belonging, and it seeks to apply those ideas to the statutes of Margaret River. The paper argued that the controversy was about whether the statue or its owners belonged in the landscape, and it asks whether the mocking statue was an expression of participation in a process that community members felt excluded from. For more information and to sign up visit: <https://www.eventbrite.co.uk/e/statues-of-conflict-and-mockery-a-view-from-margaret-river-on-participation-in-planning-law-tickets-70893796253>.

## **The role of narrative in environmental law: tales of nature and the nature of tales: 29 October 2019**

Organised by University College London.

This CLE annual lecture by Professor Chris Hilson, University of Reading, is being held at 6pm in Gideon Schreier Lecture Theatre (Bentham House). While framing has become quite fashionable in environmental law, we have heard much less of narrative. In this lecture, Chris Hilson will explore the role that narrative plays in environmental law. Although the term is often used rather loosely, there is a rich academic tradition on narrative approaches to law which the current paper will be drawing upon. Much of this scholarship lies outside environmental law and varies significantly in terms of methodological underpinning. In examining its relevance for environmental law, it is crucial to keep this variation in mind. In the end, the paper comes down in favour of a strategic, rational choice version, which is carefully located alongside other discursive devices including framing and storylines. Hilson argues that narrative is part of an emotional tradition in environmental law, which has distinct advantages but also disadvantages.

For more information and booking visit: – <https://www.eventbrite.co.uk/e/the-role-of-narrative-in-environmental-law-tales-of-nature-and-the-nature-of-tales-tickets-70897178369>

## **Public health and legal principles: a fresh approach to environmental protection and social justice: 7 November 2019**

Organised by Legal Sustainability Alliance. Hosted by Norton Rose Fulbright this symposium will feature two plenary sessions: 'Plenary 1: public health and social responsibility', chaired by Dr Veneta Cooney and 'Plenary 2: legal principles: the architect of change?', chaired by Estelle Dehon. These will be followed by a variety of discussion groups and then a chance to network over drinks. You may register [here](#) for this free event.

## **The Chancery Lane Project: 8 November 2019**

Apart from UKELA, what is the collective noun for a group of lawyers fighting climate change? The Chancery Lane Project. The project is a unique collaboration of lawyers from across the profession coming together to re-wire contracts and create model laws to enable communities and businesses to achieve a 1.5 degree world. If you want to get involved in the Project's hackathon in National Pro Bono Week or have some brilliant ideas to share please visit [www.chancerylaneproject.org](http://www.chancerylaneproject.org)

## **CL:AIRE's 20th anniversary conference: innovation, efficiency & standards: 14 November 2019**

Organised by CL:AIRE.

This event is being held at One Great George Street, Westminster, London. There will be over 25 speakers with two lecture theatres running parallel sessions: the first on innovation in brownfield site investigation and monitoring, sustainable remediation, data visualisation, ground gas risk assessment and the second on sustainable reuse of excavated site materials. For more information visit <https://www.claire.co.uk/events-training/cl-aire-20th-anniversary-conference>. Book soon to avoid disappointment!

## **Legislation and the stress of environmental problems: 21 November 2019**

Organised by University College London.

This inaugural lecture by Professor Eloise Scotford is being held at UCL Faculty of Laws, Bentham House, Gideon Schreier Lecture Theatre at 6pm. As lawyers and legal scholars, we know what we are doing with legislation. We read, interpret, apply it. Legislation is a known quantity – a relatively permanent, public expression of our democratic processes in parliamentary democracies and of the rule of law. That settled, 'knowable' character can however be misleading. This is particularly the case in the field of environmental law. In this lecture, Professor Scotford will examine why research into environmental legislation is challenging but critically important. The times we live in are providing salient examples of political stress and highly complex, and even unknowable, environmental legislation, from the draft Environment Bill (in preparation for post-Brexit English law) to legislation that responds to our climate emergency. Collective environmental problems demand legislative responses in shaping individual behaviours and guiding social policies – but knowing how to craft these responses and how to evaluate the resulting legislation is often uncharted legal territory. Navigating this legislative terrain is a vital task for legal scholars, and highlights the importance of what we do as legal researchers and how we do it. For more information visit: <https://legislation-and-stress-of-environmental-problems.eventbrite.co.uk>.

# UKELA diary dates

## **Annual Garner lecture: 14 November 2019**

Organised by Garner team.

We are delighted to let you know that our speaker for 2019 will be Baroness Brown of Cambridge. Sitting on the cross benches, Baroness Brown is Vice Chair of the Committee on Climate Change and Chair of the Carbon Trust. Keep your diary free – full details to follow later in the year.

## **The human habitat: using the law to balance health, wellbeing and nature protection: 21 November 2019**

Organised by the public health and environmental law working party and the nature conservation working party.

This is a half day seminar on Thursday 21 November from 13:00 to 17:30 to explore the state of nature in the UK, the link between biodiversity and health and legal tools to accommodate the needs of humans and wildlife. The venue has yet to be confirmed, but will be in London. Save the date!

## **London meeting: UK environmental law: where are we now?: 27 November 2019**

Organised by London meeting team.

Join us for a look at the current picture across environmental law.

Chaired by our Patron, Lord Justice Lindblom, we are delighted to welcome distinguished speakers, Professor Eloise Scotford of UCL and Stephen Tromans QC of 39 Essex Chambers. Kindly hosted by Herbert Smith Freehills. [Bookings](#) opening soon.

## **Young UKELA 'the basics': plastic waste: 5 December 2019**

Organised by the Young UKELA team.

Our early evening seminar will look at the regulatory framework for controlling pollution from plastic waste, a highly topical theme. Keep your dairies free and look out for more details, including how [to book](#), coming later in the year.

# The e-law 60 second interview



## **Richard Barlow, Partner and Head of Government Sector at Browne Jacobson LLP and Chair of the nature conservation working party**

*I was born and brought up in Rochdale. I gained a love of the outdoors from my parents and whilst camping and hiking with the scouts, particularly in North Wales, the Yorkshire Dales and the Lake District. I have walked the Pennine Way twice – most recently 35 years ago! Now I live in Nottingham with my wife and two children and try to go cycling at the weekend.*

### **What is your current role?**

I am a Partner and Head of Government Sector at Browne Jacobson LLP and I specialise in environmental, planning and public law.

### **How did you get into environmental law?**

Through learning geography and geology at school and then being taught environmental law by Simon Ball at the University of Sheffield.

### **What are the main challenges in your work?**

The range of environmental issues which clients face is broad yet always stimulating. Personally, I find the ever-increasing burden of emails to be a challenge!

### **What environmental issue keeps you awake at night?**

Finding practical ways to reach carbon neutrality. As a city Nottingham has committed to net zero carbon by 2028 which is bold. I would like to be a catalyst for the introduction of affordable sustainable means to support modern life.

### **What's the biggest single thing that would make a difference to environmental protection and well-being?**

Winning hearts and minds. We have a huge job to empower people to be green and enduringly sympathetic to our environment and biodiversity.

### **What's your UKELA working party of choice and why?**

As Chair of the nature conservation working party – that is an easy one! We want to make a difference. We explain the effect of our ecology laws and how they can be more effective.

### **What's the biggest benefit to you of UKELA membership?**

The lasting friendships and common purpose. Membership of UKELA is what any member wishes to make of it. You can gain so much from getting involved and talking to fellow members. I always enjoy encouraging potential members to join UKELA.

# Environmental law headlines

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

## Conclusion of consultations relating to plastics, packaging and waste

[Lexis®PSL Environment](#)

In July 2019 HM Treasury published the [response](#) to its consultation on plastic packaging tax, designed to encourage greater use of recycled plastic and help to tackle plastic waste. This sets out that the government will continue to consider which approaches will best support the objectives of the tax, are most administratively feasible and do not have a disproportionate impact on business. HM Treasury will also continue to work closely with the Department for Environment, Food and Rural Affairs (Defra) to ensure that the plastic packaging tax complements the reforms to the Packaging Producer Responsibility Regulations and proposals for consistent collection of waste in England and a potential deposit return scheme for drinks containers. The government will set out the next steps at Budget 2019. HMRC will publish a technical consultation on the detail of the tax design at a later date, and publish draft legislation for consultation in 2020

At the same time Defra, Welsh government, Scottish government and the Department of Agriculture, Environment and Rural Affairs for Northern Ireland published the [outcome](#) to their consultation on reforming the UK regulations on the producer responsibility for packaging waste. An extended producer responsibility for packaging will be produced in 2023. Defra will seek to introduce the powers to extend the producer responsibility system via the Environment Bill and it is expected that the final proposals will be expected to be consulted on in 2020.

In addition, Defra published the [outcome](#) to its consultation on introducing a Deposit Return Scheme (DRS) for drinks containers. Defra has stated that it will introduce a DRS for drinks containers in England and Wales into law via the Environment Bill. Defra expects to consult on the proposed scope and model of the DRS in 2020. The scheme is to start no later than 2023.

Finally, also in July 2019, Defra published the [response](#) to its consultation on plans to make local authorities collect the same kind of materials for household recycling and on improving how businesses recycle in England. Next, the government will work with local authorities, waste management businesses and other stakeholders to develop more detailed regulations and guidance for implementing consistency in recycling across England. The measures are to come

into effect from 2023, with more detailed proposals expected in early 2020.

For more information, see: [Waste types and controls – plastics](#).

## Habitats Regulations appropriate assessment clarified where outline planning permission and reserved matters decision overlap ECJ 2018 People over Wind judgement

[Practical Law Environment](#)

A local resident, Elizabeth Wingfield, (the claimant) applied for judicial review (JR) of the decision of the Local Planning Authority (LPA), Canterbury City Council, to grant approval for reserved matters relating to a mixed-use development by Redrow Homes South East. The site is near a European designated site and included a Special Area of Conservation (SAC), a Special Protection Area (SPA), a site of special scientific interest (SSSI) and a Ramsar protected wetland site.

In 2015, the LPA issued a screening opinion to the original site developer stating that an environmental statement was required and that, without mitigation to exclude likely significant effects on the environment, a Habitats Regulations Assessment (HRA) would also be required. The original site developer applied for outline planning permission which included a 'Report to inform a HRA'.

In 2017, the LPA granted outline permission, subject to detailed conditions. The site was subsequently acquired by Redrow Homes South East (which was the interested party in the JR).

In light of the 2018 European Court of Justice (ECJ) Judgment in *People Over Wind v Coillte Teoranta* (C-323/17), the LPA carried out a HRA in February 2019. The LPA concluded that the site developer had addressed the proposed mitigation measures, and so granted approval of the reserved matters.

The claimant submitted that the LPA had breached EU law by failing to undertake an HRA before granting outline planning permission and by taking into account mitigation measures when screening the proposed development, contrary to the *People Over Wind* Judgment. That Judgment had clarified that mitigation measures should not be included at the screening stage of the appropriate assessment required under the EU Habitats Directive (92/43/EEC)

for developments likely to have a significant impact on protected sites. The claimant also submitted that the HRA was deficient in various respects.

On 24 July 2019, in [R. \(Wingfield\) v Canterbury City Council \[2019\] EWHC 1974 \(Admin\) \(24 July 2019\)](#), the High Court (Administrative Court) (Lang J) dismissed the claimant's JR application.

By analogy with case law in the context of the Environmental Impact Assessment (EIA) Directive 2011 (2011/92), where national law provides for a consent procedure comprising more than one stage (here, outline permission followed by approval of reserved matters), the effects of the project on the environment should be identified and assessed at the time of the procedure relating to the principal decision. However, where the need for an EIA was overlooked at the outline permission stage, an assessment should be carried out at the reserved matters stage. Applying those EIA case law principles, the need for an appropriate assessment was overlooked at the outline permission stage because the case law at the relevant time was that mitigation measures could be considered at the screening stage. That understanding was not corrected until *People Over Wind* in 2018.

For more information see [Legal update, Habitats Regulations appropriate assessment clarified where outline planning permission and reserved matters decision overlap ECJ 2018 People over Wind judgment \(High Court\)](#).

Immediately before this case, Lang J also delivered judgment in the related JR case of *R (Wingfield) v Canterbury City Council [2019] EWHC 1975 (Admin)* (confusingly, the names are almost the same). The High Court dismissed a challenge on EIA grounds. The same claimant was refused permission to argue a HRA ground of appeal similar to that raised in this case.

The government amended its HRA guidance in July 2019, having already implemented amending regulations (see [Practice note, Habitats and wildlife: EU and international regimes, Screening](#)).

## Recast Persistent Organic Pollutants Regulation

[Lexis®PSL Environment](#)

[Regulation \(EU\) 2019/1021](#) of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants entered into force on 15 July 2019 (the Recast POPs Regulation). The Recast POPs Regulation replaces and repeals the original persistent organic pollutants regulation, [Regulation \(EC\) 850/2004](#) (the Original POPs Regulation).

The Recast POPs Regulation aligns the content of the Original POPs Regulation with the provisions of

international agreements on POPs and EU legislation on chemicals. In some aspects such as control measures and rules on management of POPs stockpiles, it goes further than the international agreements emphasising the aim to eliminate the production and use of the internationally recognised POPs.

Some new elements include involvement of the EU Chemicals Agency (ECHA) in several administrative, technical and advisory tasks, improvement of definitions and insertion of new ones, streamlined reporting requirements, and amended annexes.

The recast follows the October 2017 EU Commission Report on POPs, part of a series called Future brief—Science for Environment Policy, entitled [POPs: towards a POPs-free future](#) and the March 2018 Commission proposal for a recast POPs Regulation.

Under the Original POPs Regulation, Member States had to establish their 'competent authority' and create specific offences and penalties for breach of the Regulation. This was done in the UK through the [Persistent Organic Pollutant Regulations 2007, SI 2007/3106](#).

The Persistent Organic Pollutants (Various Amendments) Regulations 2019, [SI 2019/1099](#), came partly into force on 15 July 2019 and fully into force on 12 August 2019. They make consequential amendments to the [Environment Act 1995](#), the Hazardous Waste (England and Wales) Regulations 2005, [SI 2005/894](#) and the Persistent Organic Pollutant Regulations 2007, [SI 2007/3106](#) in light of the Recast POPs Regulation.

For more information on the Recast POPs Regulation, see: [Persistent Organic Pollutants \(POPs\) Regulation \(EU\) 2019/1021 Recast—snapshot](#).

## UNFCCC Paris Agreement: IPPC publishes special report on climate change and land

[Practical Law Environment](#)

The United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement 2015 was the outcome of the 21st Conference of the Parties (COP 21) and includes key major greenhouse gas (GHG) emitters, including India, China and (currently) the US. Its main overall objective is combating climate change, by ensuring that global temperature increases above pre-industrial levels remain well below 2°C, and by driving efforts to limit temperature increase to 1.5°C. Parties will aim to reach peak emissions as soon as possible and thereafter to reduce emissions with the aim of achieving zero net emissions by the second half of the century.

The Intergovernmental Panel on Climate Change (IPCC) provides expert scientific advice to the UNFCCC. On 8 August 2019, the IPCC published the [Special Report on Climate Change and Land](#) (SRCLL). This was the second of three special reports the IPCC had been invited to produce. The first was published in October 2018 on the impact of global warming of 1.5°C. The third, on the impact of climate change on the oceans, was published on 26 September 2019.

The SRCLL highlights that:

- Keeping global warming to well below 2°C, if not 1.5°C, can only be achieved by reducing GHG emissions from all sectors, including land and food.
- Land is a critical resource already under growing human pressure and climate change is adding to these pressures.
- Governments must take early, far-reaching action across several areas of land management. But there are limits to the contribution of land use to addressing climate change, such as through energy crops and afforestation.
- Bioenergy needs to be carefully managed to avoid risks to food security, biodiversity and land degradation.
- Plant-based foods and sustainable animal-sourced food are key to tackling land degradation, and to preventing or adapting to further climate change.

For more information, see [Legal update, UNFCCC Paris Agreement: IPCC publishes special report on climate change and land](#).

## Amendments to the Civil Procedure Rules in relation to environmental claims

[Lexis®PSL Environment](#)

[CPR 45.41–45.44](#) introduced new directions for costs in environment judicial review claims under the Aarhus Convention, known as the environmental costs protection regime (ECPR).

The Civil Procedure (Amendment No 3) Rules 2019, [SI 2019/1118](#) effective from 1 October 2019 extend costs protection in environmental claims to bring statutory reviews relating to national environmental law within the ECPR. This will facilitate full compliance with Article 9(3) of the Aarhus Convention.

CPR 45.42(2)(a) which defines an Aarhus Convention Claim is amended, so that the definition includes a Statutory Review which is within the scope of Article 9(3) of the Aarhus Convention, in addition to a Judicial Review within the scope of Article 9(3).

For more information, see News Analysis: [CPR changes—1 October 2019](#).

# Nature conservation and biodiversity

## The Human Dimension of Nature Conservation



*Jessica Allen, Trainee at the European Court of Human Rights*

### At a glance

- Environmental scientists argue that we are now witnessing a sixth mass extinction event: the first to be triggered by, and pose a serious threat to, human life on Earth.
- With its focus on ecosystems and biodiversity, the generation of relevant knowledge and information for the purposes of nature conservation has traditionally been the domain of the environmental sciences.
- Lacking in this body of literature is a considered and explorative assessment of human actors, who are those charged with designing and implementing responsive strategies, law, and policy.
- More recently, social scientists have been applying their own tools and methodologies in the conservation context in order to generate key knowledge and information about the individual, societal, and cultural factors that influence human behaviour.
- The contribution of the social sciences to understanding this human dimension of nature conservation is crucial in tackling the key ecological problems of our time.

### Introduction

It has been said that conservation efforts must be based on a comprehensive understanding of ecosystems, full awareness of the ecological impacts of harmful activities, and an appreciation of the ways in which these consequences can be alleviated.<sup>1</sup> Yet many scholars highlight the limited capacity of the environmental sciences to resolve some of the key ecological problems of our time,<sup>2</sup> such as habitat loss and wildlife trafficking. Given that it is human actors who are charged with tackling such issues, particularly those that they themselves have created, understanding and addressing the human dimension of conservation is crucial in the development of responsive conservation strategies, law, and policy.<sup>3</sup> Indeed it will be argued that this can be most effectively achieved by recognising the contribution of the social sciences to tackling conservation issues and applying a range of social science methodologies in the generation of key information and knowledge.

### 1. Human dimensions

According to Mascia et al., conservation efforts rely to a significant degree on altering human behaviour, activities, and policies for two reasons: to prevent or mitigate harmful impacts on biodiversity and ecosystems, and to promote protective ones.<sup>4</sup> In order to facilitate this change, however, Mermet et al. stress that it is necessary to understand the kinds of societal actions that can bring about specific desired changes – whether economic, legal, political, or educative.<sup>5</sup> Early efforts by environmental scientists to address the ‘human dimension’ of conservation, typically by reflecting on the relevance and accessibility of their work to society,<sup>6</sup> were hindered by their failure to employ the tools developed by social scientists for the very purpose of understanding the dynamic and complex matrix of individual, societal, and cultural factors that influence human behaviour.<sup>7</sup>

For instance, in the context of human-wildlife conflict, Marchini has drawn attention to the limited impact of purely ecological conservation efforts.<sup>8</sup> The encroachment of individuals into wild habitats and the ability of wild animals to adapt to human-dominated landscapes gives way to negative interactions which impact on conservation efforts, such that it has become one driver for decisions to poach or traffic wildlife.<sup>9</sup> In order to prevent or mitigate against the negative effects that human-wildlife conflict may have on conservation efforts, Marchini explains that a strategy frequently adopted by environmental scientists has been to change the ecological context and thereby alter the nature and frequency of encounters between humans and wildlife.<sup>10</sup> Examples include the adoption of area-based management measures, such as the establishment of nature reserves and protected areas supervised by rangers.

Unfortunately, the ever-increasing rate of biodiversity loss and extinction has led Marchini and other scholars to conclude that a purely ecological approach, with its emphasis on species and their habitats, has been unable to address the social nature of many current conservation and management problems.<sup>11</sup> Whereas environmental scientists inform policy makers of what can be done and what may happen with(out) a given intervention,<sup>12</sup> it is social scientists who are able to describe, understand, predict, and affect human thought and action.<sup>13</sup>

For these reasons, 'human dimension' has recently emerged as a sub-discipline of wildlife management, and a crucial prerequisite for developing effective mitigation. At present, the three core components of this sub-discipline are impacts, stakeholders, and capacity.<sup>14</sup> This field of study may be defined as one which seeks to apply social science methodologies to examine human-wildlife relationships in order to provide information that contributes to conservation efforts.<sup>15</sup>

The potential for research within this field is vast. Already, Dickman et al. have studied the various factors that inform human thought and action. On an individual level, they recognise the influence of knowledge, experience, attitudes, emotions, values, power, and control on those who are to be engaged by and/or subject to regulation.<sup>16</sup> Indeed they emphasise the fact that human-wildlife conflict studies necessarily rely on self-reported attitudes and actions, which are significantly influenced by social norms, perceived expectations of responses, and concerns about whether behaviour is potentially illegal or unacceptable.<sup>17</sup> On a societal and cultural level, they contemplate the impact of collective experiences, social norms, social identity, social rewards and penalties, social tradition and religion, income, and livelihoods.<sup>18</sup>

However, those working within this novel 'social' sub-discipline of the environmental sciences should nevertheless take care to draw upon the array of tools and methodologies developed by *all* of the social sciences. Much of the existing literature seems to draw on those developed in the fields of sociology and social psychology.<sup>19</sup> Such disproportionate representation between the social sciences in the conservation context is exacerbated by the lack of appropriate forums for collective discussion between them.<sup>20</sup> In order to foreground a dimension of conservation that is increasingly acknowledged but remains inadequately addressed, it is imperative that social scientists within each discipline individually apply their tools and methodologies to the conservation issues that are most accessible to their field so that their studies can be appreciated – if not replicated – by those outside of it.

## 2. Conservation criminology

It is perhaps in response to the call for more social scientists to provide a range of insights into the human dimension of conservation that the application of criminological methodologies to ecological problems has emerged as an innovative and dynamic discipline, namely 'conservation criminology'.<sup>21</sup>

The limitations of the early literature on 'green criminology' – which predated 'conservation criminology', although the terms may sometimes be

used synonymously – resulted from the excessive reliance placed on abstract theoretical and normative reasoning. Halsey was one of the early critics of this field of research, taking issue with the ambiguity of 'green' and its inability to properly capture the inter-subjective, inter-generational, or inter-ecosystemic processes which combine to produce scenarios of environmental harm.<sup>22</sup> Though conceding that the geography, intensity, frequency, and visibility of environmental harms may legitimately occupy criminological thought,<sup>23</sup> he observed that early green criminologists tended to abstractly draw implicitly or explicitly upon one or a combination of entrenched environmental perspectives.<sup>24</sup> Despite being an advocate of the discipline, Gibbs agreed with Halsey that the early research tended to lack the methodological depth and breadth of other facets of criminology.<sup>25</sup> A purely theoretical discourse permitted criminologists to arbitrarily pluck anthropocentric, biocentric, or ecocentric mantra and propagate a priori assumptions about the causes and solutions to environmental risks.<sup>26</sup>

It was in reaction to such criticism that more systematic research began to materialise under the guise of 'conservation criminology'. Within that context, Lynch and Stretesky pioneered the conception of 'environmental justice',<sup>27</sup> which encompasses the broader notion of social justice that is already the subject of criminological research and theories.<sup>28</sup> In their view, criminological methodologies used to determine whether the application of law produces a just outcome could be applied in a similar way to the distribution of environmental harms and differentials in the enforcement of environmental regulations.<sup>29</sup>

Later, Gibbs recognised a nexus between criminology and the notion of 'environmental risk'.<sup>30</sup> This nexus succeeds in inviting analysis of how, why, and when actions are defined as risks; allowing for the definition of hazards as environmental risks to change to reflect current knowledge, perception, and levels of concern; accounting for direct, indirect, and latent effects at multiple scales; and adapting sufficiently to incorporate various environmental problems.<sup>31</sup> On this view, criminologists can help to settle contests over defining environmental risks as illegal,<sup>32</sup> invoke statistical and methodological tools to explore issues of environmental crime and criminal behaviour,<sup>33</sup> and identify the cases in which legal tools may be more effective than others in shaping that behaviour.<sup>34</sup>

More recently, the formal recognition of environmental crime as an independent field of law enforcement has rekindled interest in such research. From the outset, it must be observed that the notion of environmental crime has attracted various definitions. In this respect, Gibbs et al. suggest that these definitions of environmental crime each reflect a

particular philosophical stance on the appropriate relationship between humans and nature, the causes of environmental crime, and the appropriate intervention to address them.<sup>35</sup> On the one hand, legal scholars tend to define environmental crime as violations of criminal laws designed to protect the environment, the health and safety of people, or both.<sup>36</sup> Socio-legal scholars, on the other hand, define environmental crime more broadly as including illicit activities amounting to civil or regulatory violations.<sup>37</sup> Whereas social justice scholars use an anthropocentric lens to define environmental crime as environmental racism or classicism,<sup>38</sup> certain green criminologists use a 'deep green' or biocentric lens to define environmental crime as any human activity that disrupts a biotic system.<sup>39</sup> Recognising that different definitions of environmental crime exist is important because it will clearly impact the scope of criminological study.

Whatever the appropriate definition may be, research undertaken by Brack and Hayman into the various drivers of environmental crime represents an example of where and how criminological methodologies may be usefully applied.<sup>40</sup> Specifically, they identify drivers relating to market failure (e.g. product cost or consumer demand), regulatory failure (e.g. defective rules or lack thereof), and enforcement failure (e.g. resources or willingness).<sup>41</sup> It is necessary to acknowledge these different drivers because each one will require a tailored control mechanism. For instance, in the context of wildlife trafficking, different measures may be implemented in order to reduce demand, affect supply, or control trade, depending on the driver.<sup>42</sup> In this endeavour, criminology provides a useful lens through which to disentangle the various drivers of environmental crime, to evaluate the limitations of the existing regulatory regimes that seek to suppress them, and ultimately to inform the development of a more suitable and effective policy framework.

### 3. Case study: wildlife rangers

The potential to apply criminological methodologies to tackle specific conservation issues has recently been tested in the context of poaching and the illegal wildlife trade. Specifically, attempts have been made to better understand how rangers feel about their work, their major concerns, the challenges, the rewards, as well as their overall job satisfaction.<sup>43</sup> This is because rangers are the frontline staff who witness or experience the actuality of many conservation problems,<sup>44</sup> and they play a central role in collecting and documenting data, monitoring, and enforcing laws and regulations.<sup>45</sup>

One of the earliest direct studies of rangers (or 'conservation officers') was undertaken by Warchol and Kapla in South Africa.<sup>46</sup> The demographic potential was extensive, given that South Africa had

19 national parks, 303 provincial parks, and hundreds of privately-owned game parks. In this study, the research sample comprised rangers from three national parks, one provincial park, one private commercial game farm, one private game reserve, two private field ranger schools, and one public university. There were a number of key reasons behind the site selection, including the need to survey sites that varied by size, location, biodiversity, and the nature and extent of poaching threat.<sup>47</sup>

The research team adopted a systematic approach to gathering data by drawing up a list of interview questions based on a review of the literature, the researchers' past experience studying wildlife crime and consultation with known experts regarding the role of rangers in South Africa.<sup>48</sup> Personal interviews were conducted on-site. In addition, the researchers undertook personal observations of rangers on patrol, at picket camps, at security structures and ranger housing. The adoption of a criminological approach in this study was innovative at this time, as it allowed the researchers to produce a series of findings that charted the full timeline of the working life of rangers – from their initial qualification,<sup>49</sup> selection, and training,<sup>50</sup> to their daily field operations and first-hand experiences tackling conservation issues.<sup>51</sup> Speaking with rangers and observing them in close proximity revealed some of the human thoughts and actions that directly impact upon the nature and extent of the wildlife illegal trade, otherwise represented by environmental scientists in numbers and statistics.

When conducting similar fieldwork in Uganda, Moreto explicitly acknowledged the utility of criminological methodologies by drawing on metrics of crime concentration and the principles of situational crime prevention.<sup>52</sup> Moreto also chose to apply an ethnographic – or 'grounded theory' – methodology.<sup>53</sup> Again, the demographic potential was extensive, given that Uganda had ten national parks, six wildlife sanctuaries, ten community wildlife areas, and 506 forest reserves. Yet an immersive and thus time-intensive approach meant that Moreto could only be based within one national park for the duration required. 24 formal interviews were conducted, with purposeful sampling used to identify and select law enforcement rangers and supervisors for interview.<sup>54</sup>

Unlike Warchol and Kapla, Moreto did not compile a structured list of guided questions, but rather asked open-ended semi-structured questions that allowed for further inquiry.<sup>55</sup> Moreover, in a more frequent and discrete manner, Moreto undertook naturalistic observations of rangers engaged in both official and non-official activities. More novel, perhaps, is the fact that Moreto personally participated in ten law enforcement routine day foot patrols so as to gain an 'action perspective' and maximise time spent informally interacting with rangers.<sup>56</sup> The systematic

use of specific criminological tools and methodologies meant that Moreto's findings were able to build on the research of Warchol and Kapla and others to provide a deeper and more rounded insight into the lives of rangers.

Though confined to one national park, Moreto was able to more closely assess and compare the prescribed responsibilities of rangers with the realities of their daily actions. As a result, his findings are extensive: ranging from rangers' informal intelligence gathering function,<sup>57</sup> and the decision making behind patrol deployment,<sup>58</sup> to the challenges and pressures confronting rangers,<sup>59</sup> as well as the nature of and motivations for ranger misconduct.<sup>60</sup> These findings are significant because they reveal, for example, the ways in which a sense of duty drives many rangers to go above and beyond their formal roles, which advances nature conservation, and some of the reasons why others may exploit or abuse their positions, which undermines nature conservation.

The effectiveness of Moreto's research methods in understanding the human dimension of conservation resulted in his contribution to two continental ranger perception surveys that were conducted by WWF in 2016.<sup>61</sup> The demographic potential of each survey was vast, purporting to cover the entire continents of Asia and Africa. In Asia, the research sample totalled 530, with responses sourced from rangers in 11 tiger-range countries. In Africa, the research sample totalled 570, with responses sourced from rangers across 65 sites in 12 African countries. Common to them both was the recognition that site selection would have to be based on accessibility and contacts in the field.<sup>62</sup> Interviews were therefore conducted in collaboration with fieldworkers working for conservation organisations who were already based in the target countries.

Yet the rationale for adopting Moreto's methods was not simply logistical: an ethnographic approach ensured that respondents were familiar and comfortable with the interviewers, and that personal interviews were conducted instead of impersonal online surveys.<sup>63</sup> These factors explain why Moreto had adopted an ethnographic approach in his own fieldwork, observing and conversing with rangers in closer proximity than Warchol and Kapla had. Due to the scope of these studies, the research team had to adopt a more structured approach than Moreto and gather data through the means of a set questionnaire. However, the responses that were given to the ten closed research questions, each measuring a different aspect of ranger motivation,<sup>64</sup> were no less informative.

## Closing comments

A cursory survey of some of the tools and methodologies that have already been applied by social scientists in order to better understand the human dimension of conservation issues demonstrates the value of fostering an interdisciplinary discourse between the environmental sciences and the social sciences. The successful application of these tools and methodologies is evident in the findings and insights offered in the cited reports of Moreto and others, which directly bear upon the efficacy of existing conservation strategies, law, and policy. It should also be noted that there is significant potential to apply social science methodologies in other contexts than those discussed in this article. For example, in the European Union (EU), Fauré observes that environmental criminal law has already undergone a spectacular evolution such that it now occupies a prominent place in the legal framework.<sup>65</sup> The Environmental Crime Directive was adopted to ensure that Member States establish offences and penalties for *any* violation of EU environmental law committed intentionally, or at least with serious negligence.<sup>66</sup> The broad scope of the Directive means that there is a range of environmental crimes – long-existing and pervasive problems from pollution to overfishing – to which criminological methods may be usefully applied. It can only be hoped, therefore, that social science methodologies will be utilised by a greater number of scholars in order to contribute to the development of more effective and responsive conservation strategies, law, and policy in the future.

*Jessica Allen was called to the Bar at Gray's Inn in 2019. She previously graduated with honours in the Law with French and French Law undergraduate degree at the University of Nottingham, and with Distinction in the Bachelor of Civil Law postgraduate degree at the University of Oxford. In the summer of 2018, Jessica was a Research Assistant to Professor David Doyle at Maynooth University and undertook research into conservation criminology as well as the cultural and legal implications of the de-extinction of non-human species. In recognition of this research, she was awarded the 2018 Wildlife Law Bursary at the generosity of the UKELA Nature Conservation Working Party. This article is one of two written by Jessica drawing on the research that she conducted whilst in Ireland.*

## Endnotes

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# Influence of the 1992 United Nations Convention on Biological Diversity (CBD) on UK Law

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## At a Glance

- The article explores the nature of the CBD Aichi Biodiversity Targets (ATs) and how they have been implemented in the UK to find explanations as to why most will not be achieved by 2020.
- It uses the interdisciplinary theory of interactional law, which understands that legal obligations can drive compliance when they fulfil certain criteria.
- The article is based on results from a doctrinal analysis, thematic analysis of qualitative interviews and a theoretical analysis of the journey of two specific targets – AT2 and AT9 – to the UK.
- It highlights the importance of interactions and processes at all levels of governance around the ATs but particularly at the domestic level where it is argued the interactionality of the ATs can be strengthened to better achieve compliance.

## Introduction to the CBD

The CBD is an international framework treaty which addresses the global biodiversity crisis and contains legal obligations designed to be binding on its 196 Member Parties.<sup>1</sup> The CBD is the first global treaty addressing multiple aspects of biodiversity. It supplements the existing fragmented array of multi-lateral environmental agreements (MEAs) relating to biodiversity conservation.<sup>2</sup> The objectives of the CBD contained in Article 1 are threefold: 'The conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'.

CBD legal obligations require implementation by Member Parties and the CBD framework gives some flexibility as to how they contribute towards the achievement of global targets, but Member Parties are expected to implement national targets that align with the global targets.<sup>3</sup> 27 years after its inception the CBD has failed to meet its objective in relation to, 'the conservation of biological diversity' and global levels of biodiversity loss are at their highest ever.<sup>4</sup>

Traditional understandings of law see the CBD in terms of 'hard law', in other words international legal obligations arising from the CBD treaty, a formally recognised source of international law.<sup>5</sup> Other obligations are often described as 'soft law', arising from the CBD regime, but not from a recognised source of international law (treaty, custom and general principles). It is argued that complexities in this

framing arise because sometimes soft law arising from the CBD (and other MEAs) can be influential and this raises questions in relation to traditional understandings of law.

CBD treaty obligations are a formally recognised source of international law as are formally recognised protocols arising from the Article 28 mechanism. This mechanism was intended to be a way of creating further hard international legal obligations to flesh out the provisions of the treaty, but only two have been adopted to date.<sup>6</sup> In reality, the CBD has mostly been built upon through decisions made by the CBD Conference of the Parties (COP), its main institutional body. CBD COP decisions are traditionally recognised as 'soft' law. The CBD COP has agreed a number of strategic plans, targets and numerous other decisions and recommendations. The current 2020 strategic plan set 20 targets, known as the Aichi Biodiversity Targets (ATs).<sup>7</sup> Despite being seen as an improvement on the initial 2010 targets,<sup>8</sup> there are still alarming rates of biodiversity loss and most ATs will not be met by 2020.<sup>9</sup>

There are three main requirements placed on CBD Member Parties under the CBD:

- To develop national strategies, plans or programmes under Article 6, referred to as 'National Biodiversity Strategies and Action Plans' (NBSAPs).
- To produce National Reports under Article 26.
- To implement the 2011-2020 Strategic Plan and its ATs.

This article focuses on how the UK has implemented the ATs through a theoretical analysis of the internalisation of AT2 and AT9.

## Moving beyond traditional understandings of compliance

Traditional legal theories of compliance with international law may attribute the lack of progress towards the ATs due to their 'soft' nature and the lack of enforcement mechanisms at the CBD. The interdisciplinary theoretical framework of my research proposes a different elucidation. It understands that it is not necessarily whether a law is hard or soft that is key to achieving compliance. It proposes that in order for law to draw compliance it must be 'interactional' and fulfil certain criteria both at the international level

where it is created and also by the practices that internalise international legal obligations to domestic levels.

The theory of interactional law proposes that under certain conditions what traditionally would be labelled as soft law can be effective.<sup>10</sup> Interactional law is seen as effective not necessarily because it arises from a formal source but if it adheres to certain criteria. It draws upon constructivist theory but distinguishes legal norms from non-legal norms. Interactional theory sees that legal norms can be made legitimate in three ways:

- 1) Through the presence of certain internal characteristics which make them 'law' and give them legitimacy and persuasiveness. The legal theorist Lon Fuller proposed eight principles of legality which if present define if norms should be considered 'law'. Laws should be: general, promulgated, not retroactive, understandable, non-contradictory, require reasonable conduct, constant, and congruent with their administration.
- 2) Interactional law should involve the participation of all relevant actors in the construction and reconstruction of legal norms and rules in a 'practice' of legality.
- 3) Interactional law should be broadly congruent with the 'practices and shared understandings of society.

My work argues that law-making activities at the CBD COP are just the beginning of a long and complicated journey to bring the ATs to the UK. At each 'stepping stone' on the pathway to the domestic level, the ATs are considered by a different community of practice. Each particular community of practice can shape the ATs and make them more or less interactional. Further, the discussions around the ATs can influence the actors and actions of that particular community of practice to influence their shared understandings. Moreover, communities of practice at the domestic level provide feedback to communities of practice at the international level. In this way all the stepping stones are connected in some way as well as forming unique spaces for interactions at particular levels of governance.

My work proposes that in order to better understand the limited progress that has been made towards achieving the ATs, as well as the successes, focus must be placed on social and legal practices at each level of governance in addition to the eight internal criteria of legality.

## Achievement of the 2020 Strategic Plan and ATs

**AT2: By 2020, at the latest, the biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.**

AT2 addresses mainstreaming 'biodiversity values' across government. The UK sixth national report identifies this target as being on track to be achieved by 2020.<sup>11</sup> My analysis finds that whilst AT2 has triggered legal and policy responses in the UK it has not achieved all the requirements of interactional law. One way in which AT2 has been internalised is through the reference to natural capital in policies in Europe, Scotland and England, although it is not yet clear exactly how natural capital will be used in decision making. Further, AT2 has been internalised in the four countries through statutory biodiversity duties.<sup>12</sup>

Scotland's NBSAP includes an outcome to increase Scotland's stock of natural capital for the next generation and identifies 'investment in natural capital' as one of the six big steps to help deliver the 2020 Challenge.<sup>13</sup> The pioneering Natural Capital Asset Index (NCAI) system accounts for natural capital in Scotland. It measures the quality and quantity of habitats in Scotland according to their potential to deliver different ecosystem services, now and in the future. This is a step towards incorporating natural capital in decisions of different public bodies.

England is also moving towards a natural capital approach as detailed in the 25-year Environment Plan.<sup>14</sup> England's 25-year environment plan states the intention to use a 'natural capital' approach as a tool to help make choices and decisions, although there is no detail of how this approach will be developed.

Another means on internalisation of AT2 is through the creation of biodiversity duties in all four UK countries which aim to mainstream biodiversity across 'public authorities'. There is considerable variation between the wording of the four countries biodiversity duties and what they aim to achieve from 'having regard' to biodiversity in England to 'maintaining and enhancing' biodiversity in Wales. My work sees this as a reflection of the shared understandings within the different communities of practice in each country. My analysis highlights that they are not yet interactional law and a key shortcoming was found in relation to some of the reporting systems around the biodiversity duties. Not all countries require public bodies to produce a report and for those that do, there is great variation in the depth and content of the reports. Further, there is a lack of clarity as to what is required to go in reports

and no proper review mechanism. The lack of feedback given to public bodies on their reports is problematic in creating a sustained practice of legality essential for interactional law.

**AT 9: By 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated and measures are in place to manage pathways to prevent their introduction and establishment of invasive alien species.**

European, UK and country levels of governance have adopted formal laws and policies relating to AT9.<sup>15</sup> Despite significant implementation of laws and strategies addressing the threat of invasive non-native species (INNS) the number of INNS established in Britain has remained constant in terrestrial environments and has increased in the freshwater and marine environment.<sup>16</sup>

Whilst these laws and policies are argued to have gone some way to forming a practice of legality founded in AT9, my analysis found that they are not yet interactional law. Limitations were found in relation to the requirements of interactional law including internal criteria such as 'clarity', 'asking the impossible', as well as limitations in relation to forming 'sustained practices of legality' and a lack of reciprocity to INNS laws and policies in society.

It is not all bad news. My analysis found that some INNS policies provide greater clarity in relation to the control of IAS and also practices around INNS policies were found to sustain important interactions.<sup>17</sup> Broad participation in some INNS groups fulfil the interactional criteria of shared understandings. These interactions are vital to both the creation of interactional law and in gaining congruence between laws and policies on INNS and society.

Additionally, my work argues that that legal and political discussions at the UK level of governance triggered the beginnings of interactional law which influenced EU and international shared understandings in relation to IAS. This illustrates that the influence of interactional law can travel from the bottom up and exposes an interesting dynamic highlighting the role domestic levels can play in furthering the interactionality of legal obligations at higher levels of governance.

A key obstacle to the successful internalisation of AT9 relates to the criteria of 'not asking the impossible'. AT9 calls for priority species to be controlled and eradicated by 2020. Controlling INNS involves the assessment of many species and their different pathways. Deciding 'priority' species is a complex scientific process and eradicating INNS is often complex and resource heavy. Even in an ideal world where there are sufficient resources to do this, attempts can often fail. Coupled with a gap in

congruence with understandings at the societal level, which do not understand the threat of INNS to biodiversity, key interactional criteria are not fulfilled. This offers an explanation as to why the requirements of AT9 have not been achieved in the UK.

AT9 can be seen as a target where boundaries are being pushed beyond existing shared understandings to stimulate normative change. Whilst AT9 may not be realistic in the timeline set, if domestic UK policies and laws and systems of internalisation pay more attention to the criteria of interactionality, then it may be possible to move closer towards the goals of AT9 in the next decade of the CBD strategic plan.

## Conclusion

Positive steps have been taken towards achievement of the ATs in the UK but the laws and policies in place in relation to AT2 and AT9 do not yet fulfil all the requirements of interactional law and this explains why they have not achieved compliance.

Improvements are needed in relation to: better fulfilment of the internal criteria of legality; strengthening practices of legality around the ATs, including systems of review; and strengthening shared understandings within legal and policy making processes. Adhering to the interactional criteria is important at all levels of governance but there are opportunities at the domestic level, to better meet these criteria that are free from the constraints of gaining near global multi-lateral consensus. There is an opportunity for strengthened interactional law formed at the domestic level to feed back to the international level at the CBD COP and to influence and push forward shared understandings at the international level and in this way increase the interactionality of the ATs.

In summary, the interactionality of the ATs can be achieved through reversing the process of obligation creation, that is, the development of domestic practices which subsequently develop shared understandings among Member Parties and influence decision making in the international arena.

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# 'Land for the Many': an environmental perspective



Gwyneth Everson, with assistance from Jamie Whittle, Partner at R & R Urquhart LLP

## At a glance

- 'Land for the Many' is a report that proposes radical changes to land use and management.
- This article summarises the main environmental issues identified in the report and assesses the potential impact of the proposals.
- Concentration of rural land ownership and industrialised agriculture is having a negative impact on the natural world.
- The report's proposals, aimed at helping small and low-impact farmers, could help mitigate this.
- There remains scope for further diversification of rural land use beyond farming.

## Introduction

'Dig deep enough into many of the problems this country faces, and you will soon hit land'.<sup>1</sup> So begins the preface to 'Land for the Many: Changing the way our fundamental asset is used, owned and governed', an independent report published in June 2019. Commissioned by the Labour party, the report is edited by journalist and activist George Monbiot and authored by six academics and experts. The report's primary focus is on land ownership and prices. Half of the land in England is owned by less than 1% of the population, with the largest owners being corporations and the aristocracy.<sup>2</sup> Alongside this, land values have risen 544% since 1995,<sup>3</sup> leading to wealth inequality and housing shortages. Land for the Many essentially asks two questions: why has this happened, and what can governments do to mitigate the effects?

Although environmental policy was not within the remit of Land for the Many, it is all but impossible to propose radical land reform that will not have an impact on emissions, biodiversity and natural habitats. This article will discuss the potential environmental impact of some of the proposed reforms.

## Rural land ownership

Land for the Many argues that 'current policies, tax breaks and subsidies encourage consolidation of land holdings' in rural areas,<sup>4</sup> while the price of farmland drives out new entrants. In the past, new entrants to farming were aided by County Farms. These are farms owned by local authorities that are let out to young and first-time farmers in order to mitigate the high up-front cost of farming. In the last forty years, the acreage of County Farms has halved<sup>5</sup> as they are sold off by local authorities, often to large industrial farm units. Difficulties for small and new farmers have been exacerbated by the EU's Common Agricultural Policy (CAP), under which farm subsidies are paid by the

hectare.<sup>6</sup> This means that many smallholders (below five hectares) are cut off from subsidies altogether, while bigger landowners receive large sums of public money. The tax breaks available for farmland have led estate agents to describe it as a 'safe shelter for wealth and a tax-efficient means of transferring wealth from one generation to the next'.<sup>7</sup> The result is to encourage consolidation of rural land ownership; a fifth of English farms have disappeared in the last 10 years, mostly small farms.<sup>8</sup>

So why does it matter for the environment that small farmers are being edged out of agricultural land ownership? It matters because large rural landowners tend to be large industrial farms. Currently industrialised agriculture is the biggest driver of natural habitat loss and species decline in Britain.<sup>9</sup> Agriculture is responsible for 10% of the UK's annual greenhouse gas emissions,<sup>10</sup> leading the Committee on Climate Change to propose reducing livestock production, restoring peat bogs and increasing woodland cover.<sup>11</sup> The CAP itself is ecologically destructive. A landowner cannot claim subsidies for 'permanent ineligible features', including ponds, wide hedgerows and regenerating woodland. This has led to the destruction of wildlife habitats in order to increase the area of land in 'agricultural condition', which is eligible for subsidies.<sup>12</sup> Farmland currently accounts for about 70% of England's land;<sup>13</sup> its management has an enormous impact on emissions and biodiversity. Unless we change the current patterns of use and ownership, species numbers and natural habitats will continue to decline.

There is an alternative to large industrial farming: small-scale, low impact farms and local food production. A recent Food Research Collaboration report indicates that buying up land for allotments and getting more people involved in local food production would help solve the environmental crisis.<sup>14</sup> The report's author, Professor Goulson, argues that allotments and gardens can help us produce food more sustainably while restoring biodiversity. Of the 6.9 million tons of fruit and veg we consume in the UK, 77% is currently imported. Yet allotments can produce as much as 35 tonnes of food per hectare, comparing favourably with large arable farms, because they are well suited to sustainable food production.<sup>15</sup> Allotments are high in insect diversity, the natural enemy of pests, which reduces pesticide use. Pollinator populations are also high, and different crops can be grown between one another, maximising

use of space. The allotment is never stripped bare, so the soil does not erode and consequently has a high carbon content. Goulson notes that farming systems using these principles, such as permaculture, agroforestry and biodynamic farming, have the same environmental benefits but are rejected in favour of industrial farming because they are much more labour intensive.<sup>16</sup> The reforms suggested in Land for the Many, aimed at facilitating entry for new farmers, could help to alleviate this disadvantage.

Currently, however, 90,000 people in England and Wales are on a waiting list for an allotment.<sup>17</sup> For the authors of Land for the Many, this is just one example of community disconnection from nature. Public space in cities is increasingly privately owned,<sup>18</sup> and the current 'right to roam' covers only 10% of England and Wales. If we are to diversify rural land ownership, that should be both by helping individual new farmers, and by encouraging communities to engage with land use and governance.

## Reform

The authors of Land for the Many propose a program of reforms to support small-scale, low-impact farming. These include:

- Reverse the sell-off of County Farms by implementing a legislative 'lock' on their sale, alongside the creation of new County Farms. Some tenancies should be offered at below-market rates.
- Encourage Community Land Trusts to buy rural land for farming, forestry and conservation. This would be facilitated by a Community Land Fund, financed by surplus accumulated by the Land Registry.
- Protect agricultural ties to dwellings in order to guarantee accommodation for land workers.
- Extend the planning system to cover major farming and forestry decisions.

Linked to this are changes to public space and communal land use. The report recommends extending the Countryside and Rights of Way Act 2000 to grant a right to roam across all uncultivated land, with limited exceptions, as is current policy in Scotland.<sup>19</sup> Alongside the proposals for protecting green urban spaces, the report suggests amending the Allotments Act 1908 to introduce a time limit of one year for the mandatory provision of land for allotments,<sup>20</sup> as well as allowing green belts to be used for community food growing projects. Taken as a whole, the proposals would see diversification of rural land ownership, with a focus on community use and ownership.

It is clear that increasing small-scale farming and the subsequent reduction in industrialised agriculture would have environmental benefits, but how effective would the suggested policies be in achieving this?

One means of assessment is to compare the reforms with a country that has already implemented many similar strategies: Scotland.

## Comparison with Scotland

Many of Land for the Many's proposals for diversifying land ownership are modelled on Scotland. For example, the report recommends setting up Land Commissions for England, Northern Ireland and Wales, modelled on the Scottish Land Commission (SLC). This would be an independent body charged with reporting into the ownership, use and control of land, proposing new policies and scrutinising current law.<sup>21</sup> The SLC has been instrumental in creating a Land Use Strategy, which directs long-term sustainable decision-making.<sup>22</sup> Another policy that could be easily replicated is the right to roam. In Scotland, the right of access over most land and water, subject to specific exclusions, is accompanied by an Outdoor Access Code. The Code is reciprocal; it includes a section on the rights and responsibilities of the general public, including care for the environment, and of land and water managers.<sup>23</sup> Despite initial resistance from Scottish landowners, the Scottish Rural Affairs and Environment Committee reported in 2011 that the right to roam was working well.<sup>24</sup> Similar implementation across the UK would ensure that the right is enjoyed responsibly and sustainably.

However, in 2019 about 1,125 owners hold 70% of Scotland's rural land.<sup>25</sup> A report published by the SLC in March 2019 found that concentrated land ownership was having significant negative impacts on society and the environment.<sup>26</sup> Since these problems continue 16 years on from the Land Reform (Scotland) Act 2003 (2003 Act), we should examine Scottish land reform to identify what has been most effective, and how that can inform English policy.

A key instrument of reform is the community right to buy. This was introduced in Scotland by the 2003 Act, but does not currently exist in the rest of the UK (only a 'community right to bid').<sup>27</sup> In Scotland, the community right to buy is somewhat limited because communities are only granted first right of refusal should the land come up for sale. However, the Community Empowerment (Scotland) Act 2015 introduced a new right to buy land that is abandoned or causing harm to environmental wellbeing. The existing landowner may then be compelled to sell the land to the community body.<sup>28</sup> Another new right to buy was created by the Land Reform (Scotland) Act 2016: the right to buy land to further sustainable development. This is another absolute right to buy, and so can be forced even when the owner is not contemplating a sale if sanctioned by Scottish Ministers.<sup>29</sup> To be fully effective, English proposals for a community right to buy could also be absolute where there is an environmental wellbeing issue. This is touched upon in Land for the Many, which

recommends compulsory sales orders to accompany the right to buy.<sup>30</sup> These would give public authorities the power to require certain land to be sold by public auction, with community groups offered the right of first refusal.

Crofting offers another way for small farmers in Scotland to own land. Crofters have the absolute right to buy the site of their croft house and garden for the bare land value, since they build or buy the house themselves, and also a right to buy the rest of their croft for 15 times the annual rent (which typically is a low amount). This makes purchase far more affordable. Separating the cost of buying land from the cost of housing is the idea behind Land for the Many's proposal of a Common Ground Trust, a 'publicly-backed but independent non-profit institution'.<sup>31</sup> When someone wanted to buy a house, they would ask the Trust to purchase the land, and they themselves would purchase 'only the bricks and mortar'. The scheme is intended to alleviate the housing crisis by stabilising prices, rather than to facilitate the purchase of agricultural land by new entrants. However, crofting indicates that the principle of separating bare land value and the cost of housing might also help diversify rural land ownership in the rest of the UK.

## Changing land use

Many of Land for the Many's recommendations aim to break up monopolies of ownership to make it easier for new small farmers to obtain land. However, the wider environmental community is calling for a diversification of land use away from farming in order to halt climate change. Indeed, the report's editor, George Monbiot, has been vocal in his calls for re-wilding Britain. A study by ETH Zurich earlier this year found that planting billions of trees has immense potential to combat carbon dioxide emissions, making it 'overwhelmingly the top [solution]' to climate change.<sup>32</sup> Professor Crowther, who led the research, has suggested that financial incentives to land owners for tree planting are the only viable means of achieving this.<sup>33</sup> But that would further entrench the pattern of rewards for big landowners and the concentration of rural land in the hands of large farms. Guy Shrubsole argues that England's current approach to land reform is voluntary – the onus is on landowners to implement changes which they are free to reject or accept, depending on the incentives available. Any constraints on landowners have been bitterly resisted, but with the climate emergency increasingly in the public eye, now might be the time to enforce some conditions of responsible land ownership.

In Scotland, there is potential for net zero carbon emissions by 2045 due to its large land area per person and 'significant CO<sub>2</sub> storage potential'.<sup>34</sup> But the land suggested for reforestation is overwhelmingly

privately owned. We can't ignore the potential for carbon storage by reforesting the UK, but as Land for the Many makes clear, continuing to reward landowners based on the area of land further entrenches wealth inequality and may not be the best long-term solution. This could be an opportunity to diversify land ownership at the same time as enforcing a more sustainable use of rural land.

## Conclusion

Land for the Many indicates that reversing the concentration of land ownership can have a positive effect on the natural world as well as the human one. Although the negative response in most of the mainstream media might be disheartening,<sup>35</sup> there is at present a sense that the time has come for drastic action in response to the climate emergency. Following in Scotland's footsteps, land reform is creeping onto the agenda in English politics and activism. This report could help to inform how tackling wealth inequality and the housing crisis can be a sustainable process.

*Gwyneth Everson has just completed the Graduate Diploma in Law.*

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# UK agricultural law and policy and the small agroecological farm

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## At a glance

- Viewing contemporary UK agricultural law and policy through the lens of the small agroecological farm<sup>1</sup> finds small farms are at the margins of contemporary debate, despite their significance to the sector and their potential to deliver environmental and social outcomes.
- UK implementation of the Common Agricultural Policy (CAP) has not taken full advantage of opportunities available to target support to small agroecological farms.
- There has been little recognition of small farms in proposals for reform of UK agriculture policy. There is a gap between UK government policy ambition for agriculture and the environment and EU Exit legislation so that the future direction of policy is uncertain.
- Governance models for small agroecological farms exist in the UK, such as county farms, crofts and low impact development policy, however the broader policy landscape is not currently supportive of their development.
- To support the small agroecological farm and improve land governance, it is recommended three areas of reform are addressed: agricultural and environmental governance frameworks; targeted public support for small agroecological farms; and land law reform.

## Introduction

Agricultural land use occupies 72% of land in the UK<sup>2</sup> and the poor status of designated conservation sites is attributable in part to agricultural practice.<sup>3</sup> In the context of UK withdrawal from the EU (Brexit), the UK government is proposing a new 'environmental land management system' for England<sup>4</sup> and consultations are also underway in Wales, Scotland and Northern Ireland.<sup>5</sup> Small farms constitute a significant proportion of the sector: around half according to official figures, which may underestimate the number of small agricultural holdings.<sup>6</sup> Small agroecological farms have been identified as having much potential to deliver environmental and social outcomes.<sup>7</sup>

This review examines how law and policy currently constrains or facilitates the small agroecological farm by addressing selected areas of contemporary UK agricultural law and policy: UK implementation of the CAP; government action on reform of agriculture policy in the context of Brexit; and certain areas of law and policy specifically applicable to small farms.<sup>8</sup> It is suggested that small farms are at best at the margins of contemporary debate, despite their significance for

the sector and their potential to deliver environmental and social benefit. Devolved, deliberative policy development and coherent environmental and social policy frameworks are recommended to transition to improved land governance frameworks.

## Key findings

### Opportunities to target support for small agroecological farms not taken full advantage of in UK implementation of the CAP

The Small Farmers Scheme (SFS), a voluntary alternative to basic payments<sup>9</sup>, was not taken up in the UK.<sup>10</sup> This provided for simplified direct payments limited to €1,250 and exemption from greening obligations. The two objectives for the SFS<sup>11</sup> were to encourage the 'development of economically viable small farms'<sup>12</sup> and the 'restructuring of the agricultural sector' in the form of an annual or one-off payment for farmers who transfer their holdings to another farmer.<sup>13</sup> This provision for small farms therefore could be implemented with two very different consequences: supporting the development of small farms or facilitating the concentration of agricultural holdings. Further, economic viability and not environmental conditionality was an essential element of this SFS. Basic payments are not available to holdings of less than five hectares in England and Wales and three hectares in Scotland and Northern Ireland. Only Scotland introduced measures specific to small farms: the Small Farmers Grant Scheme and the Crofters Agricultural Grant Scheme under the Pillar II Rural Development Scheme, aimed at capital investments.<sup>14</sup>

The CAP and EU environmental law more broadly, significantly impacts those responsible for agricultural land. While the EU framework has been criticised for allowing discretion to Member States in their implementation of agricultural policy, contributing to a lack of integration of environmental protection<sup>15</sup>, the EU framework does not prevent enhanced environmental ambition which may offer an opportunity to formulate an agricultural policy more supportive to small agroecological farms. Further, the CAP is itself not preventative of supporting agroecological farms: in Italy, social agriculture, often linked to organic farming and local food systems, operates within a targeted legislative framework, as does support for agroecology in France.<sup>16</sup> Opportunities to support small agroecological farms within the CAP framework were thus not fully taken advantage of in the UK's implementation.

## Little engagement with small agroecological farms in proposals for reform of UK agriculture policy and future direction uncertain

The UK government suggests Brexit offers the opportunity to implement a 'public money for public goods' model of agricultural support. Only outlines of new agricultural policy exist and consultations are progressing differently in the four countries (see the table below for more detail). Devolution is a key issue for agriculture policy in respect of unresolved legal questions surrounding the location of decision-making powers as well as financial and trade dimensions.<sup>17</sup> The need to establish UK-wide 'common frameworks' to replace those provided by EU law has been recognised by the devolved administrations, including many relating to agriculture<sup>18</sup>, however progress has stalled in the policy development phase.<sup>19</sup>

The Agriculture Bill<sup>20</sup> is intended as an 'enabling act' to 'provide the legal framework for the UK to leave the CAP and establish a new system based on public money for public goods for the next generation of farmers and land managers.'<sup>21</sup> The Delegated Powers and Regulatory Reform Committee found that the Bill proposes 'a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland' and suggested that Part 5 of the Bill on 'marketing standards and carcass classification' warranted a 'bill in its own right.'<sup>22</sup> The Bill provides no detail on future support: 'public goods' are not defined in the Bill, financial assistance 'may be given subject to such conditions as the Secretary of State considers appropriate'<sup>23</sup>, and devolution issues remain unresolved. Some stakeholders find the drafting lacking in application to food production and quality, public health and rural development<sup>24</sup> and the conflict between a policy aimed simultaneously at environmental land management, productivity and cutting regulatory burden has also been highlighted.<sup>25</sup> As it stands, the Bill does not provide legal certainty on future agriculture policy or food standards, rather it works as a framework allowing for implementation of agriculture policy by secondary legislation.

Policy development is taking place simultaneously with the introduction of secondary legislation under the EU Withdrawal Act 2018<sup>26</sup>, much of which is directly applicable to agriculture and the environment. Criticism of this approach to retaining and amending EU law has been voiced<sup>27</sup> in that it 'accords very considerable power to the executive in making regulations and limits legislative oversight of amendments to current law and policy frameworks.'<sup>28</sup> The broader policy context of reform of environmental law found in the draft Environment Bill<sup>29</sup> has been criticised to be unduly restricted in its application: it is England-only<sup>30</sup> and the scope and status of environmental law is limited in comparison to EU

law.<sup>31</sup> As such agricultural and environmental policy development and EU Exit legislation do not facilitate a recognition of the small agroecological farm by improved targeting of support or enhanced environmental duties.

## County farms, crofts and low impact development as models for small agroecological farms require a coherent policy landscape

A brief look at three legal frameworks for small agricultural holdings finds an unsupportive policy context at the current time. The Smallholdings Acts of 1892 and 1908 created the County Farms Estate in England and Wales, providing for smallholdings owned and managed by local authorities to support new entrants to farming. The extent of the County Farm Estate in England has, however, halved between 1977 and 2017.<sup>32</sup>

In Scotland, law relating to small farms exists in respect of 'small landholdings' and croft law.<sup>33</sup> The number of statutory small landholdings in Scotland is 74<sup>34</sup> and the number of active crofters is declining.<sup>35</sup> Jones' review of crofting support found policy measures 'must address the needs of the small-scale and low-intensive producer' and would require significant change to the current system.<sup>36</sup>

Welsh planning policy provides for 'land-based One Planet Development'<sup>37</sup> (OPD) as 'potentially an exemplar type of sustainable development.'<sup>38</sup> Since 2010, 26 OPD applications have been approved<sup>39</sup>; a further 11 developments have been granted permission under Pembrokeshire's 'low impact development' policy.<sup>40</sup> The emerging OPD planning policy is innovative in respect of its environmental conditionality, however the decline of county farms, small landholdings and crofts indicates a lack of contemporary policy support for small farms and suggests broader environmental and social policy contexts are key to effectively supporting small agroecological farms.

## Recommendations

### Deliberative governance at appropriate scale integrating environmental protection duties

It is suggested that policy development and legislative reform is best carried out utilising deliberative or participatory governance methods at local, regional, national and UK-wide scales.<sup>41</sup> The wider policy context of environmental governance must be coherent with that of agriculture and impose an overarching duty to regenerate the environment for all public bodies in all their activities, facilitating the integration of environmental considerations in public decision-making and the implementation of environmental law. The establishment of devolved and independent bodies to monitor, review and

advise on land governance as well as hold government to account are recommended to provide multi-layered, evidence-based governance systems.

### **Targeted support for small agroecological farms**

As well as a reframing and integration of agricultural and environmental law and policy, it is suggested targeted support is necessary to support the development of the small agroecological farm as a model for land governance that delivers environmental and social benefit. Constraints arising from international obligations as to restrictions on agricultural support coupled to production and maintenance of standards in trade deals must be considered carefully against duties to conserve biodiversity, reduce greenhouse gas emissions and promote sustainable development. Whether dedicated support structures for specific practices are appropriate or effective must be considered: a whole farm systems approach may allow for localised and individual decision-making specific to environmental and social contexts. A move away from area-based payments to payments for public goods may improve support for small agroecological farms depending on funding levels. Aside from financial support for farm development, successful implementation of new environmental and social duties necessitates facilitating diverse and accessible learning opportunities in respect of soil and water ecology, agroecological practices and animal welfare. This may be successfully integrated with a deliberative governance approach.

### **Further enquiry into land reform**

In his work on agricultural and conservation law, Rodgers demonstrates an incoherence of legal frameworks for agricultural holdings, planning law, and environmental law in England and Wales and recommends the introduction of environmental stewardship as an attribute of property entitlement.<sup>42</sup> Recent and innovative attempts to integrate environmental considerations through sustainable development legislation in Wales and land reform legislation in Scotland are instructive. Further research is recommended into alternative forms of property entitlements with the potential for providing environmental and social benefits, such as conservation covenants, land trusts, community ownership and common land models.

## **Conclusion**

This review has considered contemporary UK agricultural law and policy through the lens of the small agroecological farm. Such farms are at the margins of contemporary debate despite their significance to the agriculture sector and their potential to deliver environmental and social benefit. Innovation in land governance and use exists across the UK in the law and policy of the devolved administrations and amongst practitioners of small agroecological farms. Consideration of the small agroecological farm may offer insight into the reform of land governance frameworks that is necessary to achieve positive environmental and social outcomes.

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## Proposals for UK agricultural policy post-Brexit

	Proposals
UK government (England)	<p>Defra, <i>Health and Harmony: the future for food, farming and the environment in a Green Brexit – policy statement</i> (September 2018). Agricultural support is to move to ‘public money for public goods’ for farmers who deliver ‘beyond the regulatory baseline, where enhancements are valued by the public but not sufficiently provided by the market’ together with a ‘changed regulatory culture’, under a new ‘environmental land management scheme’. There is a policy commitment to maintain standards of animal welfare, food safety and environmental standards. UK arrangements for the transition period of phasing out direct payments will ‘delink’ payments from the requirement to farm land, indeed there will be no need for the recipient to have land or payment entitlements.<sup>43</sup> Transition payments until the new system is introduced may be taken as a lump sum and, it is suggested, farmers may either invest without the ‘bureaucratic paperwork that accompanies the Basic Payment Scheme’, diversify their business or use the payment to contribute to their retirement. Delinking removes the requirement to follow retained EU law in the transition period, however farmers must continue to comply with ‘good land management and husbandry standards’ under new enforcement mechanisms to be introduced. This creates considerable uncertainty in respect of land management due to cross-compliance and agri-environment measures no longer needing to be adhered to.</p>
Welsh government	<p>Welsh government, <i>Sustainable farming and our land</i> (2019). A single new ‘Sustainable Farming Scheme’ is set in the context of the ‘internationally-recognised concept’ of sustainable land management<sup>44</sup> and provision for sustainable development in Welsh legislation.<sup>45</sup> Two types of support are foreseen: an ‘outcome-based’ Sustainable Farm Payment and targeted business support. Entry into the scheme would be through an expression of interest, a Farm Sustainability Review undertaken by the farmer and an advisor integrating priority environmental outcomes and local environmental concerns, leading to a Farm Sustainability Plan. The scheme would be supported by an advisory service, ‘effective regulation’ and monitoring through self-assessment, audit and inspection. Examples of actions include soil nutrient management, semi-natural grassland management, creation of new habitat, management of heritage features, animal health planning, skills development and innovation.</p>
Scottish government	<p>Scottish government, <i>Stability and simplicity: proposals for a rural funding transition period</i> (June 2018); Scottish government, <i>Consultation on Good Food Nation proposals for legislation</i> (December 2018). The Scottish government’s post-Brexit agriculture policy is being developed by means of an advisory report on the future of Scottish agriculture,<sup>46</sup> a consultation on rural funding post-Brexit and a consultation on a new ‘Food Bill’. The paper on funding post-Brexit is based on four principles: stability, simplification, sustainability and security. Views were sought on simplifying Pillar I payments, including payment capping and alternative inspection regimes, and modification of Pillar II schemes. It is proposed to close the Small Farms Grant Scheme due to ‘limited uptake’ with consideration to be given as to whether ‘projects could be eligible for other schemes’; views on continuing support for crofting were requested.<sup>47</sup> The paper points to two further processes: detailed examination of funding under the Simplification Task Force and ‘civic engagement to develop new and innovative approaches for agriculture, the environment and the rural economy.’<sup>48</sup> The Food Bill consultation proposes framework and secondary legislation placing duties on ministers and selected public bodies in regard to food policy: to lay a policy statement on food before Parliament for information; have regard to the statement in the exercise of their functions; to consult on the draft statement; report every two years on the implementation of policy; and review the policy statement every five years.<sup>49</sup></p>
DAERA (Northern Ireland)	<p>DAERA, <i>Northern Ireland future agricultural policy framework: stakeholder engagement</i> (DAERA 2018). In the absence of a functioning executive, DAERA consulted on a transitional support regime for 2019–2021 and future agriculture policy. Income support payments are recommended to continue as ‘basic farm resilience support’ either as a reduced area payment or one based on productivity and environmental sustainability. The proposals are based on policy outlined by former ministers and the views of four stakeholder groups established in response to Brexit: environment, trade and agriculture, fisheries and rural society.<sup>50</sup> The Northern Ireland Affairs Select Committee heard evidence that DEFRA had not engaged with stakeholders in Northern Ireland in the Health and Harmony consultation and calls for government to work with the Northern Ireland Civil Service, agri-food sector and farmers to identify opportunities for targeted funding and sectors in need of priority assistance.<sup>51</sup></p>

## Endnotes

- 1 The 'small agroecological farm' is defined as operating commercially under 20 hectares and identifying as providing environmental and social benefit, including but not limited to those certified organic. Agroecology is defined by the UN Food and Agriculture Organisation as 'an integrated approach applying ecological and social principles to the design and management of food and agricultural systems' and has been found to have the potential to deliver healthy food, a reduction in greenhouse gases and support restoration of biodiversity. UN FAO, *The 10 elements of agroecology: guiding the transition to sustainable food and agricultural systems* (UNFAO 2018); Poux, X, Aubert, P-M, *An agroecological Europe in 2050: multifunctional agriculture for healthy eating: findings from the Ten Years for Agroecology (TYFA) modelling exercise* (Institut du développement durable et des relations internationales 2018).
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- 11 Regulation (EU) No 1305/2013, preamble, para 17.
- 12 Support is conditional on the submission of a business plan and not to become an 'operating aid.' Regulation (EU) No 1305/2013, Art 9(1)(a)(iii).
- 13 The maximum payment for transfer of holding is set at €15,000. Regulation (EU) No 1305/2013, Art 9(1)(c).
- 14 See <<https://www.ruralpayments.org/publicsite/futures/topics/all-schemes/small-farms-grant-scheme/>> and <<https://www.ruralpayments.org/publicsite/futures/topics/all-schemes/crofting-agricultural-grant-scheme/>>.
- 15 For example, G Alons, 'Environmental policy integration in the EU's common agricultural policy: greening or greenwashing' (2017) 22(11) J Eur Public Policy 1604; K Hart, A Buckwell, D Baldock, *Learning the lessons of the greening of the CAP* (IEEP 2016); I Hodge, J Hauck, A Bonn, 'The alignment of agriculture and nature conservation policies in the European Union' (2015) 29(4) Conserv Biol 996. The IEEP has found the current proposals for the next CAP cycle, as a result of continuing discretion allowed to Member States in implementation, 'leave the bulk of CAP spending potentially unaligned to the ambitious delivery of public goods... [and] continue a system that has been shown to be an inefficient, ineffective and inequitable way of supporting policy goals.' IEEP, *Feedback on Multiannual Financial Framework – CAP Strategic Plans* (August 2018).
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# Student submission

## A critical analysis and evaluation of the law concerning the claims for pleural plaques in the United Kingdom



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### At a glance

- Sufferers in England and Wales are no longer entitled to compensation for the condition pleural plaques.
- At present, the contemporary approach in England and Wales is far from satisfactory, leading to criticisms of hardship and inequality.
- This article will assert that the legal position in England and Wales requires urgent statutory reform.

### Introduction

Pleural plaques (“plaques”) are defined as ‘discrete localised areas of fibrosis that typically affect the lining of the inner chest wall,’<sup>1</sup> caused by the inhalation of asbestos fibres.<sup>2</sup> The occurrence of plaques ‘is no longer a compensatable condition in England and Wales.’<sup>3</sup> Previously, it was possible for those with plaques to claim damages for the condition, and the anxiety associated by its discovery.<sup>4</sup> However, in 2007 the House of Lords ‘overturned a twenty year old tradition of awarding damages for pleural plaques in England and Wales,’<sup>5</sup> concluding that, ‘there is no cause of action under which damages may be claimed for pleural plaques.’<sup>6</sup>

Despite the Scottish Parliament and Northern Ireland (NI) Assembly enacting legislation to ‘ensure those in their jurisdictions with pleural plaques are not affected by the judgment,’<sup>7</sup> consecutive governments in Westminster have refused to legislate to change the law in England and Wales.<sup>8</sup>

### The current law in England and Wales

In the case of *Rothwell v Chemical & Insulating Co Ltd and another* (“*Rothwell*”),<sup>9</sup> it was unanimously held that those diagnosed with symptomless plaques, with or without accompanying anxiety or psychiatric illness, cannot be compensated in negligence actions against former employers who unlawfully exposed them to asbestos dust.<sup>10</sup>

### Cause of action in contract

In *Rothwell*,<sup>11</sup> the majority of their Lordships expressly noted, ‘a potential route for claimants to seek compensation for pleural plaques by claiming in contract,’<sup>12</sup> providing support for the contemporary approach concerning such claims in England and Wales. Evidence supports this notion as it was stated

*obiter* that, ‘those who have been negligently exposed to asbestos during the course of their employment could, in theory, bring actions based on breach of the contract of employment’<sup>13</sup> as ‘a cause of action in contract can exist without demonstrating damage.’<sup>14</sup> Consequently, Lord Scott opined that ‘individuals with plaques could in future bring claims against their employers for breach of the duty to provide a safe working environment for employees, with damages assessed on the basis of compensation to employees for “subjecting them to the risk of contracting in the future a life-threatening asbestos related disease.”’<sup>15</sup>

A. Gore QC has challenged this notion, asserting that an alternative claim in contract would face a number of difficulties.<sup>16</sup> Gore pioneers the view that if there were no injury as such, ‘then the cause of action in contract is not an action “in respect of personal injuries” within the meaning of s.11 of the Limitation Act 1980’<sup>17</sup> and ‘therefore would not benefit from the date of knowledge relaxation of the primary limitation period in contract, with the six year limitation period from date of breach continuing to apply.’<sup>18</sup> In such circumstances, Gore emphasises that, ‘any contractual right of action becomes statute barred six years after the cessation of the defendant’s exposure of the claimant in breach of duty,’<sup>19</sup> demonstrating the inadequacy of the approach in England and Wales concerning claims for plaques.

### An unfair divergence?

In 2012, the government ‘publicly recognised there was an apparent unfairness created by differences in the laws of the separate legal systems’<sup>20</sup> and confirmed in 2014, that ‘despite the Scottish and Northern Irish legislation, it would not legislate to change the law in England and Wales.’<sup>21</sup>

Despite opposing commentators<sup>22</sup> criticising the government of ‘washing their hands of pleural plaques victims’<sup>23</sup> and of ‘creating a postcode lottery for asbestos victims,’<sup>24</sup> the government has justified the contemporary regime in England and Wales concerning claims for plaques, asserting that ‘in light of the current medical evidence, the government do not consider it appropriate to overturn the House of Lords judgment that the condition of pleural plaques is not compensatable under the civil law.’<sup>25</sup>

A recent report<sup>26</sup> from the Industrial Injuries Advisory Council ("IIAC") reviewed substantial medical literature and concluded that no case existed for 'awarding no-fault state benefits for disability arising from pleural plaques,'<sup>27</sup> providing substantial support for the contemporary regime concerning such claims in England and Wales.

However, a recent systematic review<sup>28</sup> published in the British Medical Journal of Occupational and Environmental Medicine challenges the IIAC perspective, providing evidence to support the more appropriate notion that, in terms of physical effects, plaques are associated with 'significant decrements in lung function.'<sup>29</sup> Evidence supports this as the systematic review and meta-analysis found, 'statistically significant 2–4% decrements in lung function in people exposed to asbestos with pleural plaques relative to asbestos-exposed people without abnormalities.'<sup>30</sup> Further, the systematic review indicated a strong association between plaques and deterioration in lung function,<sup>31</sup> demonstrating the limitations of evidence propounded by the IIAC.

## Response in Scotland and NI

The *Rothwell*<sup>32</sup> decision was effectively overturned by the Scottish Parliament with the introduction of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("2009 Act"),<sup>33</sup> which provides that plaques 'constitute actionable harm for the purposes of an action of damages for personal injuries,'<sup>34</sup> thereby allowing pursuers the opportunity to seek compensation for pleural plaques.<sup>35</sup> Further, the 2009 Act<sup>36</sup> made provision to 'pause the time-bar on any claims for the period between the handing down of the judgment in *Rothwell*... and the commencement of the 2009 Act.'<sup>37</sup> Additionally, both 'sections 1 and 2 are to be treated "for all purposes," other than in relation to claims that have already settled when it came into force, as having always had effect.'<sup>38</sup>

Near identical legislation has subsequently been enacted in Northern Ireland<sup>39</sup> via the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2011,<sup>40</sup> ensuring that 'pleural plaques remain a condition attracting compensation within Northern Ireland.'<sup>41</sup> This has led to a 'problematic situation'<sup>42</sup> as some UK citizens are entitled to compensation for plaques whereas others are not,<sup>43</sup> demonstrating that the legal position in England and Wales 'remains unsatisfactory and problematic.'<sup>44</sup>

## Conclusion

In conclusion, it is submitted that the current approach concerning claims for plaques in England and Wales 'remains unsatisfactory and problematic.'<sup>45</sup> Therefore, this article advocates the need for urgent statutory reform to the legal position in England and Wales, as in comparison, the approaches in Scotland and NI prove far superior, holding promise as the most effective mechanisms to governing such claims.

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# Matters in practice

## EU Exit: a personal perspective from inside government

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- This article offers a personal perspective on the experience of working in a government department during EU Exit. As such, any views I express in this article do not necessarily reflect those of Defra.
- My aim is to give readers an idea of, first, the sheer scale of the exercise and, second, to highlight the critical role of government lawyers, in the context of delivering the four Exit statutory instruments (SIs) for which I have been personally responsible.

### The scale of the exercise

While the UK has aimed throughout its negotiations with the EU for a good withdrawal deal, we have had to prepare in the first instance for the eventuality of a no-deal Exit. Defra is one of the departments of state most extensively affected by EU Exit. About 80% of Defra policy is underpinned by EU legislation; Defra-owned legislative areas represent 25% of all the EU legislation that has to be converted into domestic law when we leave the EU.

The Defra EU Exit programme contains approximately 100 SIs. Under normal circumstances, delivering this volume of legislation in the two years following the triggering of Article 50 would have been near-impossible. Defra has remained on target throughout which, by any standards, is a massive achievement. It has necessitated a massive and rapid redeployment of resources to the EU Exit programme, and this has been achieved through outstanding leadership and teamwork, and Defra's incredible spirit and professionalism.

I want to draw particular attention to the critical contribution of Defra lawyers. UKELA members need little explanation of the immense additional workload that has been placed on lawyers. EU Exit involves no policy change in most cases: indeed, it is principally about continuity, ensuring that legislation remains operable on the day after we leave the EU. I would therefore argue that the practical burden has fallen most heavily on lawyers, who have undertaken painstaking, forensic legal analysis and then drafted the complex amendments needed to ensure post-Exit operability. For more than 40 years EU law has progressively and organically become woven into our domestic legal system, and finding a way out of this a huge and unprecedented task. Nor could the challenge be addressed simply by bringing in more lawyers, given the expertise that resides in the Government Legal Service.

### My 4% of the total

I can illustrate the points I have just made with reference to the four SIs which I have been responsible for delivering:

- The Environmental Permitting (England and Wales) (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 39).
- The Environment (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No 458).
- The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 (SI 2019 No 473).
- The Environment (Legislative Functions from Directives) (EU Exit) Regulations 2019 (at the time of writing yet to be laid before Parliament).

Each of these SIs is cross-cutting, in that it delivers Exit amendments for a number of different policy areas within Defra (and in some cases BEIS). In each case this has involved co-ordinating the work of a number of policy teams and their lawyers, and then developing a composite set of amendments.

The SIs also apply more widely than just in England, but in a complex variety of ways. Co-operation with the devolved administrations has therefore been essential, to maximise efficiency while respecting devolution settlements. At the start of the process it was unclear whether we would be able to achieve this, but solutions have been found.

SI 2019 No 39 amends only the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154) (the EPR 2016). This was originally expected to be a short and very technical instrument, making the necessary changes to ensure that the EPR 2016 continue to function legally (by this I mean removing references to 'Member States', changing references to the UK's obligations as a Member State, and so on).<sup>1</sup> What made the exercise more challenging was the need to check all cross-references to EU Directives in the EPR 2016 and, where appropriate, to modify the effect of the cross-reference. The EPR 2016, as anyone familiar with them knows, transpose a large number of EU Directives. We identified over 300 cross-references. While we initially hoped that most would either need no amendment, or could be dealt with in a generic manner, the majority needed more tailor-made solutions. Readers can easily imagine the concentration and dedication required of Defra lawyers, and especially the lawyer co-ordinating the

inputs from the numerous policy teams and drafting the Exit SI itself.

SI 2019 No 39 was at least subject to negative resolution, which made its passage through Parliament relatively straightforward. The other three SIs were/are affirmative, which necessitates extensive work with the relevant Ministers' private offices, and debates in both Commons and Lords.

SI 2019 No 458 was the first of these and used 'Henry VIII' powers in the EU (Withdrawal) Act 2018 (EUWA 2018) to amend primary legislation (the Environmental Protection Act 1990, the Environment Act 1995 and the Pollution Prevention and Control Act 1999). As with SI 2019 No 39 above, these were limited amendments largely relating to technical operability, but Parliament was keenly interested in any use of Henry VIII powers. Matters were further complicated by the inclusion in SI No 458 of operability amendments to three cross-cutting, England-only SIs (covering contaminated land, environmental noise and environmental damage); and the revocation<sup>2</sup> of directly-applicable EU legislation relating to the EU's environmental management and accreditation (EMAS), and eco-labelling schemes, and two Decisions relating to Environmental Action Programmes.

Because of the number and diversity of the components of this SI, the 'Henry VIII' element, and the complexity of territorial application, it was a complex package and an unattractive 'sell' to Parliament. While our co-ordinating lawyer might well take a different view given the complexity of the drafting, for me the challenges really started when the collective efforts of policy leads and lawyers first encountered the political process. I had not appreciated how different a perspective and skill-set are needed to explain an SI to Parliament, even in the calmest of political waters; and Parliament was by this point in the throes of the most heated stage of the EU Exit debate. Preparing for the debates on these three affirmative SIs, and supporting Ministers in the House was quite an experience.

The other two SIs mentioned above transfer powers to make tertiary legislation from the European Commission to UK authorities, so that those authorities can exercise those powers for domestic purposes after Exit. An SI made using the powers in the EUWA 2018, which provides for a function of an EU entity to make an instrument of a legislative character to be exercisable by a UK public authority instead, has to be made in accordance with the affirmative resolution procedure. For a number of Defra policy teams, the transfer of such a power was the only 'affirmative' element in their Exit work. By placing these transfers into one, dedicated instrument, the 'home' Exit SIs from which they had been extracted could pass through Parliament by negative resolution. The transferred powers are, again, limited and

technical. They allow the Commission to flesh out the detail of specific regimes, and then adapt them to scientific and technical change. They are the kind of measure for which, in the domestic context, we would normally use secondary legislation, or even administrative measures. That did not, however, guarantee that these affirmative transferring SIs would pass easily through Parliament; or that the drafting would be straightforward, not least because so many different policy areas were brought together in each instrument.

SI 2019 No 473 covers powers relating to persistent organic pollutants (POPs), timber, the European Pollutant Release and Transfer Register (EPRTR), the Nagoya Protocol, mercury, leghold traps, the Convention on the International Trade in Endangered Species, and – the one power in a Directive – establishing Best Available Techniques under the Industrial Emissions Directive. All the transferred powers are to be exercised by subordinate legislation subject to negative resolution. It should be noted that this enhances Parliamentary involvement in a process which, hitherto, was carried out by the Commission with no national parliamentary control. The powers are transferred to the Secretary of State for reserved matters under the devolution settlements, and to the Secretary of State (for England) and devolved administrations for devolved matters. It is possible for the Secretary of State to act on behalf of devolved administrations, but only where they consent.

The last SI which, because the powers to be transferred are not needed immediately upon Exit, has yet to be laid, transfers powers from Directives relating to air quality, floods and water, marine policy, infrastructure for spatial information (the INSPIRE Directive) and environmental noise.

## Issues and challenges

We were pleased (and not a little relieved) that the Opposition has – to date – accepted that these instruments are limited and technical in nature, and has therefore not opposed the passage of the legislation. The debates that have taken place, particularly in the House of Lords, have nevertheless raised important issues. These include the sheer volume of Exit-related legislation with which Parliament is having to deal, and concerns about maintaining standards of environmental protection in the longer term, the balance of power between Westminster and devolved administrations (both in terms of respecting the devolution settlements and the risk of divergence of environmental standards within the UK), and the future role of expert advice and public consultation as powers are exercised after Exit.

## Conclusions

Moving from the Environment Agency's Legal Services to a temporary policy role within government would have been interesting at any time. Being involved in the EU Exit process has been utterly compelling. The Civil Service's response to a challenge of unprecedented and historic dimensions has been magnificent in the circumstances. Within that, government lawyers have shouldered the workload with a professionalism worthy of recognition.

*The author is a senior lawyer with the Environment Agency's Head Office Legal Services, but he has spent the last two years on secondment to Defra in a policy role. Responsibility for delivering four EU Exit SIs has taken up the majority of his time over the past year.*

## Endnotes

- 1 We made no policy changes, and the SI covers England and Wales only (Scotland and Northern Ireland have their own permitting arrangements and are dealing with these independently).
- 2 I should perhaps explain my use of 'revocation'. The EU (Withdrawal) Act 2018 brings all directly-applicable EU legislation into national law. In the case of EMAS and eco-labelling, this would not have been appropriate. Businesses wishing to take advantage of these voluntary schemes register with competent bodies in EU Member States. When the UK ceases to be a Member State, our competent bodies will lose the ability to register businesses, and existing registrations will lose their validity. While this will not prevent businesses exporting their products to the EU, unless they re-register in an EU Member State offering this service they will no longer be able to hold themselves out as possessing EMAS accreditation or an eco-label. SI 2019 No 458 does not itself have that effect, but ensures that the relevant EU Regulations and subsequent implementing Decisions are not brought across into UK law, which would serve no legal purpose and only tend to confuse.

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