



e-law

Better law for the environment

May/June 2019 | Issue 112



Welcome to the May/June edition of elaw.
The focus of this issue is waste.

To this effect we are grateful to Laura Tainsh for her very interesting article: [The landfill ban in Scotland – what is the practical reality?](#), which considers the likely impact of the impending ban in Scotland on all municipal waste going to landfill from 1 January 2021. The impacts are certainly of a large scale.

We also thank Joanna Fox and Michaela Belham, for their article: [Circling around: recent circular economy developments](#). This piece provides an excellent summary of recent developments in this area, including publication of the Resources and Waste Strategy for England and launch of four consultations under the Strategy, concerning extended producer responsibility, deposit return schemes, consistency of recycling collections and a plastic packaging tax.

In this edition, we also hear from Scott Blair, in his piece: [Driven grouse shooting in Scotland – time for a rethink?](#) on why driven grouse shooting is a source of controversy, the REVIVE campaign, the current legal framework in this area and the possible environmental impacts of the sport.

Best wishes,

Sophie Wilkinson

Sophie Wilkinson
UKELA e-law Editor

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Words from the Chair



My two years as UKELA Chair is almost up. At the AGM in Sheffield, I will be handing the mantle to Kirsty Schneeberger MBE. After eight years on Council, the end of my tenure as Chair also marks the end of my time as a UKELA trustee. I may be disoriented for a little while, but I

am sure that I will soon find plenty to do behind the scenes, just as many UKELA members do.

I would like to take the opportunity in delivering my final words as your Chair to say firstly, that it has been a huge honour. I am continually in awe of the breadth of knowledge and expertise within UKELA and the spirit of collaboration to achieve our goal of developing the law for a better environment. More than that, UKELA members are in my experience an amazing group of people who it is a pleasure spending time with. Secondly, a lot has happened in the past two years, so before I take my leave I wanted to reflect on some of the things we have achieved.

- In early 2018 our staff body changed almost completely, with the departure of Linda Farrow, Rosie Oliver and Joe Newbiggin and the appointment of Alison Boyd as Operations Director, Dr Paul Stookes as Working Party and Brexit Advisor, Lizzie Blair as Junior Administrator and the promotion of Elly-Mae Gadsby to Senior Administrator. Under Alison's leadership, our staff team works hard to deliver a stellar service for and on behalf of UKELA members that belies the size of the team. We are currently implementing a new CRM system that will help Alison and her team deliver an even better service to members, investing in the organisation to improve our members' experience.
- Early 2018 also marked the end of the first stage of UKELA's Brexit activity, where we published a number of documents including the Brexit and Environmental Law series of reports and established UKELA's profile and reputation in relation to advising on technical issues arising from Brexit. Having been successful in setting the agenda, the first co-chairs of the Brexit Task Force (BTF), Professor Richard Macrory and Andrew Bryce, stood down to be replaced by Begonia Filgueria and Angus Evers. Under their direction, the work of the BTF is now led more by the working parties and ad-hoc working groups created and disbanded as required. We continue to offer an objective and influential voice in the debate, having hosted half-day seminars in both England and Scotland this year to contribute to the consultations on environmental principles and

governance and submitting written and oral evidence to numerous parliamentary committees.

- Enhancing the role of women in UKELA: In 2016, Pamela Castle OBE became the first woman to deliver the Garner lecture. She was followed in 2017 by Julie Hirigoyen, CEO of the UK Green Building Council and in 2018 by Advocate General Dr Juliane Kokott. This year's Garner lecture will be delivered by Baroness Brown of Cambridge DBE FEng FRS, Julia King. Pamela was also the first female chair of UKELA, elected in 2001. It took fifteen years to get round to having another woman chair, so I am delighted in that respect to be handing straight over to Kirsty. UKELA's Council is gender-balanced and also this year for the first time, our programme for the annual conference is an almost 50-50 split.
- 2018 was our busiest year yet for events and 2019 is shaping up to be even busier. We held Brexit-related events in Wales, Scotland, England and Northern Ireland. We have events coming up all over the country, including Bristol, Cardiff, Sheffield, Cambridge and Edinburgh.
- Links with overseas organisations: we are delighted to have, for the fourth year in a row, the chair of the American Bar Association speak at our annual conference in Sheffield. We are invited to speak at their conferences in return, and I was honoured to represent UKELA in Orlando last April. Ben Stansfield and Simon Tilling have also represented UKELA at these events and I am grateful to them for doing so. We have also helped facilitate meetings for delegations of environmental judges visiting from abroad, particularly China (thank you Paul Davies) and next month Alison and Kirsty are meeting with the President of the Resource Management Law Association of New Zealand, Rachel Devine.

The prospect of being Chair of UKELA was very daunting to begin with, but it was made much easier by the fantastic support I received throughout from our President Lord Carnwath, from the staff team of Alison, Elly-Mae, Lizzie and Paul, from the past Chair Stephen Sykes and from the Vice-Chairs Kirsty, Simon Tilling, Ned Westaway, Karen Blair and previously Ben Stansfield and Haydn Davies. Many of you will know Haydn personally and will be aware that he suffered significant injuries last year as a result of a road accident. Alison is in regular touch with his family and we have been gladdened to hear that he is making amazing progress in his recovery. However, it is likely to be a long process. I would particularly like to record here my thanks to Haydn and my gratitude for his patience, humour and wise counsel in my early days as Chair. I would also like to thank UKELA's trustees and the many, many members who contribute in myriad ways every day to UKELA.

UKELA plays a unique and important role in the civic discourse on environmental law. We provide an objective and authoritative voice and can create space to bring people together who otherwise would not cross paths and share views. I look forward to seeing what comes next under Kirsty's direction and being.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

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.

Sefki Bayram studied law at the University of Leicester (LLB) and the University of Nottingham (LLM). He is pursuing a career at the Bar in Public and Environmental Law and will begin the BPTC in September 2019.

UKELA news

UKELA Council elections

If you are voting member, you will have received your voting instructions for this year's Council elections on Tuesday 28 May 2019. Please do take a few minutes to cast your vote, as your Council members are trustees of the charity and take forward the strategic direction of the organisation. We are very grateful to all those who have stepped forward to stand for election and look forward to working with the successful candidates. Your candidates are:

- Lucy Bruce Jones, Norton Rose Fulbright
- Estelle Dehon, Cornerstone Barristers
- Matthew Fraser, Landmark Chambers
- Emma Lui, Office for Nuclear Regulation
- Georgie Messent, Pinsent Masons
- Kim Moreton, Camborne School of Mines, University of Exeter
- Ben Stansfield, Gowling WLG
- Nick Whitaker, Honorary Treasurer, UKELA
- Jamie Whittle, R & R Urquhart LLP

The results will be announced at the AGM on 28 June 2019.

Notice of Annual General Meeting (AGM)

**The United Kingdom Environmental Law Association
Company Number: 2133283**

Companies Act 2006

The Annual General Meeting of the Association will be held at the UKELA Annual Conference, University of Sheffield

6.15pm Friday 28 June 2019

AGM AGENDA

- 1 Apologies for absence
- 2 Minutes of AGM 2018 and matters arising
- 3 Chair's report
- 4 Adoption of the annual report and financial statements for the year ended 31 December 2018
- 5 Re-appointment of the reporting accountants MacIntyre Hudson
- 6 Declaration of Council of management election results 2019
- 7 Any other business – presentations

Please note that a quorum of 25 members is required for the AGM to proceed

It should be noted that the maximum number of Council members for the period is 20, as agreed at the Council meeting of 27 March 2019.

Alison Boyd
Operations Director

The registered office of the Association is:
1 Glass Wharf
Bristol, BS2 0ZX

Working party news

UKELA Council: updated working party guidance

Following a review of the previous 2015 guidance, the UKELA Council approved revised working party guidance (March 2019) at its recent meeting. The provisions were not substantively changed, although the text was simplified slightly. Most notably, the idea of a working party team was introduced into the revised guidance to provide more flexibility in who does what, when, how and where within each working party. Whilst this is typical of most, if not all, working parties, we are pleased to announce this shift in emphasis and wording for the guidance that will support how the working parties operate.

The working party team introduced into the revised guidance encourages the idea of a student UKELA member being a part of the working party team. The aim of this is to help develop informal mentoring for younger members, and also to encourage student members to work within specialist areas and contribute to the wide range of activities carried on by the working parties. For further information, please see our [student news] section within this edition of e-law that invites expressions of interest from student members to join the working parties.

Overall, the revised guidance aims to encourage active involvement with working parties and, importantly, aims to ensure that being part of one or more parties is both rewarding and enjoyable and, on occasion, even a party! The revised guidance is available on the members section of the UKELA website.

Brexit Task Force and Brexit activities

Despite the uncertainty as to when Brexit may occur, UKELA's Brexit-related work has continued through the work of the Brexit Task Force and the specialist working parties. Since providing detailed submissions to the government's the Environmental, Food and Rural Affairs Committee /Environmental Audit Committee joint committee inquiry at the beginning of the year (see the [Brexit pages](#) on the UKELA website for details) the following work has been carried out:

- Regular attendance at government stakeholder meetings by Brexit Task Force members, with particular focus on the work in England (e.g. how to develop the proposed Office for Environmental Protection).
- Conference on 2 May 2019 at Edinburgh University focusing on the Scottish government consultation relating to environmental principles and governance (EPG).
- Submission of detailed responses to the Scottish government's EPG consultation by the Scottish working party on 11 May 2019 (see UKELA's website).
- Roundtable meeting in Cardiff co-ordinated by the Wales working party on 14 May 2019 in order to inform and develop responses to the Welsh government consultation on EPG.
- Finalising responses to the Welsh government's consultation by the Wales working party.

The work of the Brexit Task Force and the working parties will continue over the summer and is likely to intensify once again when a date for Brexit is finalised.

Wildlife Law Bursary Award 2019

Applications are invited to be submitted to [Wyn Jones](#), former convenor of the nature conservation working party, by **Wednesday 25 September 2019**, briefly setting out the proposed research project (suggest no more than a page of A4). 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 the 25 October 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](#), nature conservation working party.

Students news

Andrew Lees essay prize 2019

We are pleased to announce that the winner of the Andrew Lees essay prize 2019 is Ryan Ross. Ryan is a History graduate (MA, MSc) from the University of Glasgow. He worked in academia for several years, obtaining a PhD in history, before undertaking the Graduate Diploma in Law and then the Bar Professional Training Course. He is currently employed as a paralegal with a major public inquiry and will commence pupillage with Old Square Chambers in October 2019. Congratulations Ryan!



Thank you once again to our brilliant judges Bob Lee and Donald McGillivray, as well as all the other entrants for their hard work. Each entrant shall receive UKELA 2019 membership, with our winner receiving a place at the UKELA annual conference.

Read the winning essay [here](#).

Student UKELA members wanted for UKELA working parties

As detailed in the working party news section of this e-law edition, the working party guidance was recently revised and approved by the UKELA Council. The revised guidance aims to improve and enable better flexibility in who does what, when, how and where within each working party by introducing the working party team. For most, if not all working parties they already operate in this way. Most notably, the working party team will encourage one or more student UKELA members to be part of the working party team. The aim of this is to help develop informal mentoring for younger members and also to encourage student members to work within specialist areas and contribute to the wide range of activities carried on by the working parties.

If you are a student member and are interested in joining one or more of the working party teams then please contact [Lizzie Blair](#) providing a short note (ideally no longer than a paragraph) explaining which working party team you are interested in joining and

why you have an interest in this area. If you could also provide a short CV and full contact details including email, and telephone number, that would be very welcome.

Details of the UKELA working parties are found on the [UKELA website](#).

UKELA looks forward to hearing from you.

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 [Sophie Tremplin](#) or [Beatrice Petrescu](#), our student advisers. 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 Wild Law, expected to be published in early August. Deadlines for submissions will be 17 July 2019.

UKELA events

UKELA South West region: urban walk: 19 June 2019

Please join the UKELA South West regional group for an urban wildlife walk in Bristol's city centre, led by two experts from the Avon Wildlife Trust. The one and a half hour walk will be an opportunity to refocus on the everyday wildlife that we share our city with, taking in the river, rooftops, streets and green spaces. Please note that numbers are strictly limited so be sure to [book](#) your place early!

Environmental Impact in Wales: 20 June 2019

Organised by the Wales working party. Environmental Impact Assessment is one of the most important legal tools for environmental protection. This seminar will explore some of the issues that arise in the implementation of the EIA Directive, especially as they relate to the devolved context in Wales. [Bookings](#) are now open.

Annual conference 2019: 28 June – 30 June 2019

Organised by the conference team. Please join us in Sheffield University's beautiful campus from 28 to 30 June 2019 for the UKELA annual conference 2019.

Our conference programme starts at 11.20am on Friday 28 June to give you maximum CPD value. Registration is from 10.30am. With seven plenary sessions covering a broad range of topics, there is something for everyone. We also have our working party sessions, which have always proved to be a popular end to the main business of the weekend. With a relaxing social programme to complement the working day, including some new activities such as running and walking clubs, we are sure you will have an enjoyable weekend with colleagues and friends. [Book](#) your place now!

East region seminar: contaminated land update with 39 Essex Chambers: 16 July 2019

Organised by the East region committee. Join us at Birketts LLP in Cambridge for an update on contaminated land matters. Contaminated land continues to be a central focus of environmental law, presenting some difficult challenges. This seminar will provide an overview of the law governing the topic which goes far beyond Part IIA of the Environmental Protection Act 1990. [Bookings](#) are now open.

Non-UKELA events

Introducing the Sustainable Development Goals: 12 June 2019

Organised by Legal Sustainability Alliance. Join us at Simmons & Simmons in Bristol for one of our interactive workshops, each hosted by leading law firm members of the Legal Sustainability Alliance. [Book](#) your place now.

Castle debates: taking climate action: 5 July 2019

Organised by Castle Debates. Our free debate, which is part of the Mayor's London climate action week, is a follow-up to our debate on climate change litigation held on 3 December 2018 which concluded that, currently, litigation has had limited success.

The effectiveness of demonstrations, strikes, media campaigns etc., particularly in comparison to regulation and litigation, and involving a broad spectrum of participants, including children and young people, lawyers, journalists, NGO's and policy makers, will be highlighted. For more details and to book your free place please see the [website](#).

RWM – Recycling & Waste Management expo: 11 – 12 September 2019

Organised by RWM, the UK's leading trade show for recycling and waste management, providing the biggest platform for the latest innovations shaping the sustainability sector. RWM, in partnership with CIWM, is the only UK event of this scale and brings the entire industry together in one location. To put it into figures: 500 exhibitors, 350 seminars and 50 free-to-attend theatres across the exhibits. Please see the website for more details and to [book](#) your place.

Brownfield Briefing awards 2019: 19 September 2019

Organised by Environment Analyst. This will be the 15th year for the Brownfield Briefing awards, which will once again recognise all that is best practice in the remediation sector by UK-based companies. The awards gala dinner provides the brownfield community with a chance to celebrate excellence, undertake some relaxed networking with peers, enjoy some quality entertainment and have a great night out! Please see the [website](#) for more details and to book your place.

UKELA diary dates

Going underground: 4 July 2019

Organised by the planning and sustainable development working party, the British Geological Society and Squire Patton Boggs. This event will explore the storage of energy in underground strata. More details are on the [website](#); bookings open soon

Royal Welsh show, Bulith Wells: 23 July 2019

Organised by UKELA Wales working party and hosted by Wildlife Trusts Wales. Dr Ludivine Petetin, lecturer in law at Cardiff University, will be speaking on the topic of agricultural law and environmental protection. More details are on the [website](#), bookings open soon.

London meeting: natural capital: 23 September 2019

Organised by the London meeting team. Join us at Herbert Smith Freehills in London for an early evening seminar looking at natural capital. [Bookings](#) opening later in the year.

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. Keep the date free in your diary and look out for more [details](#) coming soon.

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

Please join us for this early evening session updating on environmental law issues with expert speakers Professor Eloise Scotford and Stephen Tromans QC. Chaired by Lord Justice Lindblom. [Booking details](#) coming soon.

The e-law 60 second interview



Eleanor Reeves, Head of London Environment & Safety team at Ashurst LLP

What is your current role?

I lead the London Environment & Safety team at Ashurst LLP.

How did you get into environmental law?

Serendipity, I was taught EU law by environmental law professor Dr Jane Holder at UCL, naturally we covered environmental cases. My first seat as a trainee solicitor was with Jacqui O'Keeffe who was advising on the Mayer Parry II case before the court formerly known as the European Court of Justice, and I have been working on waste matters ever since.

What are the main challenges in your work?

Keeping up to speed with such a wide range of topics and issues whilst doing more for less more quickly! Digital tech is helping us to navigate these challenges.

What environmental issue keeps you awake at night?

Most recently the B word (not Brexit): Biodiversity. The recently published UN IPBES global assessment report on biodiversity and ecosystems services was shocking. It calls for urgent and concerted efforts to deliver transformational change to conserve and restore nature.

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

More plants and trees. The lungs of the earth and home to so many species, they can provide more sustainable nourishment and make us more productive, healthy and happy.

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

Unashamedly biased, I have been involved with the waste working party for over 10 years. A well informed, inquisitive and friendly group of people who seek to improve waste regulation, preferably over a drink. New members are always welcome!

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

The opportunity to work and interact with an immensely talented group of people who are making a positive impact. The annual conference is excellent, too.

Environmental law headlines

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

Government consults on post-Brexit carbon pricing options, including UK emissions trading system

[Practical Law Environment](#)

The government has been considering options for the UK's long-term approach to carbon pricing. Options include:

- Continuing to participate in the EU Emissions Trading System (EU ETS).
- A UK emissions trading system (ETS) (linked or stand-alone).
- A carbon emissions tax.

In November 2018, the UK government published a draft of the negotiated political declaration setting out the UK-EU co-operation and areas of shared interest after Brexit (see [Legal update, Brexit: full political declaration on framework for future relationship agreed in principle \(full update\)](#)). The political declaration indicated that the UK's preferred option for carbon pricing after Brexit was a UK ETS, linked to the EU ETS.

The Finance Act 2019 contains provisions relating to carbon pricing after Brexit. These are provisions for a new carbon emissions tax to replace the EU ETS in a no-deal Brexit and the power for the Secretary of State to incur expenditure in preparing for the introduction of a UK ETS (see [Legal update, Finance Act 2019: key environmental tax measures including carbon emissions tax](#)).

On 2 May 2019, the Department for Business, Energy and Industrial Strategy (BEIS) and the devolved administrations published a consultation on options for carbon pricing in the UK after Brexit. The consultation explores the following options:

- A UK ETS that is linked to the EU ETS. This is the government's preferred option.
- A stand-alone UK ETS.
- Continuing to participate in the EU ETS in Phase IV.

The consultation considers the detailed features of a potential UK ETS (such as the scope of greenhouse gases and sectors, distribution of allowances, exemptions, how allowances would be managed, enforcement and penalties for non-compliance). The proposals are mostly the same or very similar to the EU ETS.

The consultation closes on 12 July 2019.

For more information, see [Legal update, Government consults on post-Brexit carbon pricing options, including UK emissions trading system](#).

Environmental Audit Committee and Environmental, Food and Rural Affairs Committee express concern over the draft Environment Bill

[LexisPSL Environment](#)

On 25 April 2019 the EAC published its report [Scrutiny of the Draft Environment \(Principles and Governance\) Bill](#), raising serious concerns with the draft Environment Bill (the Bill). Concerns were raised over the Bill being limited largely to England. In addition, a number of areas where the Bill is not fit for purpose were identified, including:

- The definition of 'environmental law' as the Office for Environmental Protection (OEP)'s remit.
- Environmental principles which guide EU legislation and policy, have been 'severely downgraded'.
- The environmental principles should be put on an unqualified legal basis and all public bodies should have a duty to act in accordance with the policy statement and apply the principles.
- The OEP, constituted as a non-departmental public body, will not have the independence required of a watchdog of this nature. It should report direct to Parliament and not be beholden to the Secretary of State.
- Administration by the OEP is limited to administrative compliance and not the failure to attain environmental standards and targets.
- A lack of government agency with responsibility to enforce climate change mitigation measures, and MPs believe enforcement of climate change mitigation has been 'purposefully excluded' from the scope of the OEP.
- The definition of 'environmental law' as the OEP's remit should expressly include international law and extend to the enforcement of climate change law.
- The procedure to address failure by public bodies set out in the Bill is too slow and inflexible and relies on judicial review, which is not appropriate for environmental problems. The OEP should be entitled to bring cases against the government, be a statutory consultee on changes to the environmental law and have a broader right to take proceedings. A new right of challenge in the Upper Tribunal is also proposed.
- The reporting cycle for environmental improvement plans needs to be tightened.
- Lack of environmental accountability for action by government departments.

The policy statement on environmental principles is yet to be published, but the EAC proposes that approval to the policy statement should always be obtained from Parliament.

For more information on the contents of the report, see News Analysis: [Environmental Audit Committee expresses concern over draft Bill](#).

In addition on 30 April 2019 the Environmental, Food and Rural Affairs Committee published [Pre-legislative scrutiny of the Draft Environment \(Principles and Governance\) Bill](#). The committee states that it does not believe the draft provisions for principles and governance are equivalent to the environmental protections that are currently afforded by membership of the EU. The committee makes 32 recommendations and conclusions for the government to consider. The committee recommends that the government make significant changes to the Bill before it is presented to Parliament, including:

- Setting out a clear overarching objective for the UK's future environmental governance and ensuring that environmental principles do not lose the legal status and priority they currently possess in European law.
- Ensuring that Ministers and all relevant public authorities act in accordance with environmental principles, rather than the weaker duty proposed in the draft Bill that Ministers must 'have regard to' environmental principles.
- Strengthening the OEP's independence from government by ensuring all decisions relating to the membership of its board require the consent of the Committee, and by committing to a multi-annual budgetary framework in the Bill.
- Sharpening the teeth of the OEP's proposed enforcement powers by providing it with further compliance tools beyond review in the courts and empowering it to issue emergency and interim measures in urgent cases of environmental harm.
- Providing the OEP with the necessary powers to enforce government targets and objectives relating to climate change to ensure there is no governance gap after Brexit.

The reports follow the joint [inquiry](#) calling for written evidence for pre-legislative scrutiny of the Bill launched on 20 December 2018, the [written responses](#) to which were published on 13 February 2019.

For more information on the contents of the Bill and its shortcomings, see News Analysis: [Draft Environmental Principles and Governance Bill 2018](#).

ECJ ruling clarifies assessment of waste as hazardous waste

[Practical Law Environment](#)

Criminal proceedings were brought in Italy against about thirty people charged with offences connected with the treatment of hazardous waste. The defendants were accused of treating waste as non-hazardous where it could have been assigned a mirror code as either hazardous or non-hazardous.

The Italian courts referred the cases to the Court of Justice (ECJ) for a preliminary ruling.

On 28 March 2019, in *Verlezza and others* [2019] EUECJ C-487/17, the ECJ clarified the obligations of waste holders where their waste could be classified as either hazardous or non-hazardous. In particular, the court said that:

- A waste-holder is not required to rebut a presumption that that waste is hazardous. However, EU waste legislation requires a waste-holder to look for hazardous substances that may reasonably be found in that waste, and, in that respect, it has no discretion.
- Where there are doubts over the hazardous properties of waste, or where it is impossible to determine with certainty that there are no hazardous substances in that waste, the waste must be classified as hazardous waste in accordance with the precautionary principle.

For more detailed coverage of the case, see [Legal update, Clarification of assessment of waste as hazardous waste](#).

Committee on Climate Change issues report recommending 2050 net zero emissions target

[LexisPSL Environment](#)

The Committee on Climate Change (CCC) has declared in its report [Net Zero: The UK's contribution to stopping global warming](#), published on 2 May 2019, that the UK can end its contribution to global warming within 30 years by setting new targets to reduce the country's greenhouse gas (GHG) emissions to zero by 2050.

The CCC believes Scotland can set a more ambitious target of net-zero emissions by 2045, as it is better placed to remove pollution from its economy than the rest of the UK. In contrast, the CCC concludes that Wales has less opportunities than the UK as a whole to lower emissions, and therefore should adopt the target of a 95% reduction in emissions by 2050. The CCC's report was requested by the UK, Scottish, and Welsh governments in light of the Paris Agreement commitments to reduce GHG emissions and the Intergovernmental Panel on Climate Change's 2018 Special Report.

The CCC's findings include:

- The foundations required to deliver key pillars of a net-zero economy are already active or in development.
- For the net-zero target to be met, current policies will have to ramp up significantly. Reaching the target is 'contingent on the introduction without delay of clear, stable, and well-designed policies across the emitting sectors of the economy'.
- The costs of a transition to a net-zero economy are manageable. The 'net-zero greenhouse gas target can be met at an annual cost of up to 1–2% of GDP to 2050'.

For more information on the CCC's recommendations for specific policy areas, see: [Net Zero – will the UK lead the way in combatting climate change?](#) and: [LNB News 02/05/2019 65](#).

The Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, has welcomed the report, stating that the government is convinced of the urgency of action on climate change. However, the government has not immediately accepted the recommendations in the report and will respond to the report findings in due course.

Insurers cannot 'spike' mesothelioma reinsurance claims (Court of Appeal)

[Practical Law Environment](#)

In an important victory for reinsurers, on 17 April 2019, in [Equitas Insurance Ltd v Municipal Mutual Insurance Ltd \[2019\] EWCA Civ 718 \(17 April 2019\)](#) the Court of Appeal unanimously allowed an appeal against an arbitration award and found that the practice of 'spiking' of mesothelioma claims settled under employers' liability insurance policies should not continue at the reinsurance level. Spiking occurs when insurers present their reinsurance claims to any policy year of their choice.

The Court held that an insurer that has settled mesothelioma claims without allocating the loss to any specific year of exposure must present its own claims to its reinsurer(s) pro rata, based on time on risk (rather than presenting the claims to a single year of reinsurance), unless there was good reason for presenting the claims on another basis.

The decision confirms that in mesothelioma cases the insurance and reinsurance positions can be treated differently and provides guidance on how insurers should present their reinsurance claims. The decision also means that a reinsured will bear the risk of insolvency of any reinsurers on risk during the period of exposure. By contrast, if spiking were allowed, the risk would be borne by the spiked reinsurer who would have the right to claim pro rata contributions from other reinsurers who were on risk during the relevant period.

It is possible that the case will be appealed further to the Supreme Court.

For more detailed coverage of the case, see [Legal update, Insurers cannot "spike" mesothelioma reinsurance claims \(Court of Appeal\)](#).

Supreme Court rules on parent company liability for subsidiaries in Vedanta Resources v Lungowe

[LexisPSL Environment](#)

This case concerns more than 1,800 Zambian nationals who had brought a claim against the appellant companies concerning alleged toxic emissions from a large mine neighbouring their land. The mine was run by the second appellant, which was a Zambian company. Its ultimate parent company, the first appellant, was an English registered company.

In the Supreme Court Lord Briggs dismissed the appellants' arguments that the pleaded negligence claim raised a novel issue of law. He considered there to be nothing special about the prospect that a parent company might owe a duty of care to those living nearby its subsidiary and affected by the subsidiary's operations or use of the land on which the operations were conducted. It all depended on the extent to which, and the way in which, the parent company availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operation, including land use of the subsidiary.

In this case, the first appellant had published material in which it asserted its own assumption of responsibility for maintaining proper standards of environmental control over the activities of its subsidiaries and, in particular, the operations at this mine, and both laid down and implemented those standards by training, monitoring and enforcement. That was sufficient on its own to show that it was well arguable that a sufficient level of intervention might be demonstrable at trial to find the relevant duty of care.

Prior to this judgment, the Court of Appeal had held that a parent company was liable to its subsidiary's employee in negligence in [Chandler v Cape plc \[2012\] EWCA Civ 525, \[2012\] 3 All ER 640](#). That judgment has been approved and treated as simply a working example of one of the myriad ways in which a parent company may assume such liability. The principle has also been extended so that the duty can be owed to those living nearby the operations of a subsidiary, not just those employed by the subsidiary. Important guidance has now been provided at the highest level as to the sorts of circumstances in which a parent will become liable, including where it promotes in its annual reports that it is responsible for the activities of a subsidiary's operations. That is not to be treated as mere puff.

For more information, see News Analysis: [Supreme Court rules English court has jurisdiction to try foreign tort claim \(Vedanta Resources v Lungowe\)](#).

Government second consultation on Smart Export Guarantee (SEG) for small-scale low carbon generation: amendments to electricity supply licences

[Practical Law Environment](#)

The feed-in tariffs (FITs) scheme is a financial incentive for electricity generated from small-scale low-carbon sources. It closed to new applicants on 31 March 2019.

In January 2019, the Department for Business, Energy and Industrial Strategy (BEIS) published a consultation on a mandatory supplier-led Smart Export Guarantee (SEG) scheme that would remunerate small-scale low-carbon generators for the electricity they export to the national grid.

On 29 April 2019, BEIS published Part B of its consultation on the SEG scheme, which proposes modifications to electricity supply licences to introduce an obligation on electricity suppliers with more than 250,000 domestic electricity customers to offer a SEG tariff to eligible small-scale low-carbon generators. Under the SEG tariff, the electricity supplier would pay the eligible generator for the electricity it exports to the grid. The consultation closes on 27 May 2019.

The government expects to publish its response to the January 2019 consultation and its response to this consultation on proposed licence conditions in the coming months.

The SEG would be implemented through new secondary legislation and by modifications to conditions of the electricity supply licence, using primary powers in the Energy Act 2008.

BEIS anticipates that the final deadline for mandated suppliers to be required to offer a SEG tariff would be the end of 2019. The SEG scheme would be administered by the Gas and Electricity Markets Authority, and the government expects that Ofgem would publish guidance.

In the meantime, since the FITs scheme closed at the end of March 2019, some energy suppliers have already started offering export tariffs to small-scale low carbon generators, on a voluntary basis.

For more information, see [Legal update, Government second consultation on Smart Export Guarantee \(SEG\) for small-scale low carbon generation: amendments to electricity supply licences](#).

How the government is addressing the state aid suspension of the Capacity Market

[Practical Law Environment](#)

On 15 November 2018, the government suspended the Capacity Market, following a successful state aid challenge by Tempus Energy. The government cannot issue capacity market payments under existing capacity agreements or hold any Capacity Market auctions until the government re-obtains state aid approval for the scheme. The government therefore cancelled the early 2019 auctions.

The European Commission has now opened an in-depth state aid investigation to determine whether the Capacity Market complies with EU state aid rules. The UK government considers the General Court decided that the Commission's original state aid approval was unlawful because of state aid procedural failures. As a result, the government is working on the assumption that the Capacity Market will get full state aid approval in due course.

Pending full state aid approval, the government is:

- Organising a replacement T-1 auction (a transitional auction held one year ahead of delivery) for the delivery year 2019 to 2020, on 11-12 June 2019, replacing the January 2019 T-1 auction. It is unlikely that the Capacity Market will have secured state aid approval in time, so the replacement auction will award conditional capacity agreements, which will convert into capacity agreements when state aid approval is received (provided this is by 1 October 2020). The government expects that state aid approval will be received before 1 October 2019, which would allow capacity payments to be made to successful bidders in the usual way. However, successful bidders will receive back payments if state aid approval is received after that date.
- Consulting on replacing the T-4 auction, which had been scheduled for February 2019, with a three-year ahead T-3 auction, to be held in early 2020 for the 2022-23 delivery year.

The government has made secondary legislation to introduce several temporary measures for the Capacity Market, pending state aid approval, as follows:

- The Electricity Settlements Company (ESC) (the settlement body) will be able to make deferred payments to capacity providers who have met their obligations during the standstill period, once the suspension is lifted.
- The ESC will be able to ensure that suppliers are invoiced in full once the suspension is lifted. In the meantime, suppliers can continue to make payments to the ESC on a voluntary basis. The ESC can hold voluntary payments during the standstill

period and set them off against future supplier charge liabilities. It will collect the full outstanding supplier charge on a mandatory basis shortly after the standstill period ends.

- Capacity providers holding agreements have greater flexibility in dealing with forthcoming milestones affected by the standstill period.

These provisions have been introduced through the Electricity Capacity (No.1) Regulations 2019 (*SI 2019/862*) and amendments to the Capacity Market Rules. Further amending regulations are expected before the summer Parliamentary recess.

In the meantime, Tempus Energy has applied for judicial review of the UK government's measures in continuing the Capacity Market. It takes a different interpretation to the General Court's November 2018 decision, and claims that the court made its decision because the scheme itself was in breach of state aid rules.

For more information, see [Practice note, Capacity Market overview](#).

European Parliament adopts Single-Use Plastics Directive

[LexisPSL Environment](#)

On 27 March 2019 the European Parliament approved the Single-Use Plastics Directive which tackles marine litter by:

- Banning selected single-use products made of plastic for which alternatives exist on the market: cotton bud sticks, cutlery, plates, straws, stirrers, sticks for balloons, as well as cups, food and beverage containers made of expanded polystyrene and on all products made of oxo-degradable plastic.
- Introducing measures to reduce consumption of food containers and beverage cups made of plastic and specific marking and labelling of certain products.
- Extending producer responsibility schemes covering the cost to clean-up litter, applied to products such as tobacco filters and fishing gear.
- Introducing a 90% separate collection target for plastic bottles by 2029 (77% by 2025) and design requirements to connect caps to bottles, as well as a target to incorporate 25% of recycled plastic in PET bottles as from 2025 and 30% in all plastic bottles as from 2030.

On 21 May 2019 the measures were adopted by the Council of Ministers.

The Single-Use Plastics Directive is part of the [EU Plastics Strategy](#) – a comprehensive strategy adopting a material-specific lifecycle approach with the vision and objectives to have all plastic packaging placed on the EU market as reusable or recyclable by 2030 – and

is an essential element of the Commission's [Circular Economy Action Plan](#) as it stimulates the production and use of sustainable alternatives that avoid marine litter.

The endorsement will be followed by the publication of the text of the Directive in the Official Journal of the Union. Member States will then have two years to transpose the legislation into their national law.

[Waste types and controls – plastics](#) provides more information on international, European and national action in relation to plastic waste.

Waste

The landfill ban in Scotland – what is the practical reality?



Laura L Tainsh, Partner and Head of Environment and Waste with Davidson Chalmers Stewart LLP and Chartered Waste Manager of the Chartered Institution of Wastes Management

At a glance

- This article considers the likely impact of the impending ban in Scotland on all biodegradable municipal waste going to landfill from 1st January 2021.
- If the ban is to be implemented as originally intended, there will be a significant volume of waste generated in Scotland which cannot, as matters currently stand, be disposed of within Scotland due to the lack of alternative infrastructure (such as energy from waste). This article examines the options for dealing with that capacity gap and how feasible those are in the longer term.

The legal position

The Scottish government has been committed to forward-thinking policy designed to minimise the impacts of waste management for the last decade. The Waste (Scotland) Regulations 2012 (the Waste Regulations) introduced a number of legislative measures, most of which have been in force since 2014, to encourage recycling practices and reduce the amount of waste being sent to landfill. One of the specific measures detailed in the Waste Regulations was a ban on all biodegradable municipal waste (BMW) going to landfill from 1st January 2021. BMW is defined as any municipal waste (being domestic waste or that which is similar in composition) which is also capable of undergoing anaerobic or aerobic decomposition, such as food waste, garden waste, paper and cardboard subject to the exclusion of such materials if they have gone through certain treatment and pass specified technical tests regarding their organic content (see further below with reference to the Scottish Environment Protection Agency (SEPA)'s guidance document).

The ban, to which reference has been made in various Scottish government policy documents over the last few years, is already fully legislated for, given that the Waste Regulations amended the Landfill (Scotland) Regulations 2003 to incorporate a prohibition on landfill operators from accepting BMW from 1st January 2021. However, SEPA have yet to make the necessary variations to existing landfill licences and permits to bring that amendment into effect. Moreover, there was very little meaningful consideration or further explanation, from the Scottish

government or SEPA, of how the ban would actually be implemented until early in 2018, following pressure and concern from the waste and resource management industry.

SEPA finally published some technical guidance about the ban in April 2018ⁱ but more detailed guidance regarding the sampling and testing regime that will apply is still to be produced and SEPA are still consulting with relevant members of the industry about that additional guidance.

The capacity gap

At the moment, it would appear that, with less than two years to go before the ban comes into play, both the Scottish government and SEPA are still in an 'information gathering' phase.

Many in Scotland's waste and resource management industry have been expressing significant concern, since early 2018, that neither the public sector or the commercial sector are prepared for the ban. The Convention of Scottish Local Authorities (COSLA) has recently confirmed that a number of local authorities have yet to find or settle on an alternative disposal route for banned material which does not rely on landfilling. The primary issue is that, despite some significant investment in new plant by developers both on a private basis and in partnership with local authorities, there remains a lack of alternative disposal infrastructure available or coming on stream in Scotland in time for the introduction of the ban, such as energy from waste (EfW). The underlying result, according to the industry, will be a likely domestic capacity gap of around 1 million tonnes of waste come 2021.

In late 2018, galvanised by the assertions of industry about the size of the capacity gap, the Scottish government commissioned some independent market research to consider: (1) what the capacity gap would look like; (2) the level of readiness for the ban generally and (3) the availability and costs of disposing of the BMW produced in Scotland either: (a) to other UK landfill sites or EfW plants or (b) by exporting the waste as refuse derived fuel (RDF) to continental or Irish EfW facilities.

The results of the research were published at the end of April this year as a 'Waste Markets Study'ⁱⁱ by the Scottish government and indicate the following:

- Of the 32 local authorities: only 14 have a solution in place to deal with the BMW generated in their areas in advance of the ban coming into force; three have a long term solution but no immediate interim solution before that is available (post-2021); six have an interim solution but no long-term secured solution and nine have no alternative arrangements in place at all.
- Many commercial operators do not have a strategy in place.
- The extent of the capacity gap when the ban is introduced will depend, to some extent, on the success of existing (and new) waste minimisation and recycling measures. The best case scenario, if existing targets related to those measures are achieved, will be a shortfall of 1.01 million tonnes of treatment capacity compared to waste generation as at 2021 with the worst case scenario being as much as 1.28 million tonnes.
- The ban will result in significant economic costs to the Scottish economy until such time as the necessary EfW (or infrastructure) comes online with increased haulage, fuel and gate fee costs. When those costs are coupled with the loss of receipts from Scottish landfill tax, the worst case scenario (if waste minimisation targets are not met and sufficient infrastructure is not online by 2025) is a cost of over £1.2 billion.

Options for excess waste beyond domestic capacity

Whilst the lack of EfW infrastructure remains, the options for dealing with excess tonnages of Scottish waste include:

- Landfilling in England – the existing or consented capacity is limited and using this option would result in, at least, Northern English landfill sites reaching that capacity as early as 2024.
- Making use of EfW (or other treatment facilities) in England – much of the existing capacity is already in use.
- Exporting waste as RDF to EfW (or other treatment facilities) in Ireland or continental Europe (or indeed further afield) – the market is by no means secure and may be further impacted by Brexit and recent developments requiring receiving countries to consent to being sent waste materials.

The practical issues

In addition to the overall economic costs, there are number of other issues which are likely to have an impact and/or resultant consequences arising from the implementation of the ban (in its current form), including but not limited to:

- The fact that the environmental impact, primarily from the increased emissions caused by longer haulage routes, will need to be offset against the environmental reasons for imposing the ban in the

first place (see further below).

- The need to find a solution for those local authorities who have yet to secure an alternative disposal route which does not involve landfill and whether that could involve some sort of collaborative procurement route.
- How the new sampling and testing regime, required to determine what constitutes BWM, will work in practice, who will be responsible for carrying out the testing (i.e. producers of waste or landfill operators) and whether there are labs in Scotland equipped to perform the testing.
- The potential for the early closure of landfill sites by operators who determine that the required changes to their business models are too much for them to remain in operation without the banned waste streams, which could have a wider impact on the disposal options for non-BMW waste, such as construction and remediation waste (which is currently landfilled).
- Sourcing additional resources for local authorities, most of whom already have constrained waste management budgets, to ensure that necessary changes and increased costs can be dealt with.
- Dealing with the potential of increased waste crime as the costs of disposing of Scottish waste materials increase across the board.

The climate change angle

There are sound environmental reasons for the implementation of the ban: the inclusion of BMW in landfilled waste is a major contributor to the level of greenhouse gas emissions and also produces leachate into the water environment. The report published in May this year by the Committee on Climate Changeⁱⁱⁱ dealing with the path to net zero emissions, which is already driving rapid policy changes, states that the UK should not be sending BMW to landfill after 2025.

Clearly if such a ban is implemented on a UK-wide basis, the ability for Scottish waste to be treated or disposed of elsewhere in the UK will become almost impossible. It is not yet clear whether the new waste and resources strategy for England takes the imminent ban position in Scotland into account. Should the short-term measures to be legislated for in England (such as those designed to improve recycling rates) fail to be as effective as intended, then a similar BWM ban could be implemented fairly swiftly, creating yet more residual waste with no immediate disposal solution.

Conclusions

The current position clearly demonstrates that Scotland is not yet ready for the implementation of the ban and the Scottish government, following the publication of the results of their commissioned market research, are considering that position and its likely economic and environmental impacts.

However, the fundamental question is whether

Scotland wants to become self-sufficient in dealing with its own waste in the longer term. Depending on whether and how much new EfW infrastructure is constructed in Scotland, that may well be a question that is answered by the market, rather than any policy decisions which are taken now to address the extant issues. There are many who argue that to build such EfW infrastructure would simply make Scotland (and indeed the UK more widely) reliant on a form of waste management just one step further up the waste hierarchy than landfilling. Is that a long term solution or does it inhibit the further progress of waste minimisation and recycling measures?

There are many questions outstanding on this subject for both Westminster and Holyrood but clearly a more consistent and collaborative approach, across the UK, would be preferable, if that is still possible.

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Endnotes

- 1 See https://www.sepa.org.uk/media/352595/sepa_bmw_landfill_ban_guidance_note.pdf.
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Waste

Circling around: recent circular economy developments



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At a glance

- The European Commission has adopted a Circular Economy Package, which amends several key pieces of waste legislation. The Department for Environment, Food & Rural Affairs (Defra) is proposing to publish a consultation on its transposition towards the end of the year.
- The government has published its Resources and Waste Strategy for England, which sets out proposals to move towards a circular economy. Both Scotland and Wales have already published their own strategies – the Scottish Zero Waste Plan in 2010 and Circular Economy Strategy in 2016, and the Welsh 'Towards Zero Waste' Strategy in 2010.
- Four consultations have been launched to date under the Resources and Waste Strategy, concerning extended producer responsibility, deposit return schemes, consistency of recycling collections and a plastic packaging tax.
- A more circular economy will undoubtedly generate new opportunities across a range of sectors, and will drive innovation. To be successful, the policies which aim to deliver a more circular economy will need to be funded, implemented and monitored effectively.

What is the circular economy?

Globally, we are consuming the resources of 1.7 earths. The resource deficit highlights why we urgently need to take a new approach to waste and waste management, such as moving to a circular economy. Delivering a circular economy will require new policy, legislation and incentive mechanisms.

In a circular economy, the value of materials, products and resources is maintained for as long as possible and the generation of waste and use of resources is minimised. This feeds into ambitions to develop a sustainable, low carbon, resource efficient and competitive economy. As well as environmental benefits, a circular economy would provide economic benefits by enabling businesses to protect against the scarcity of resources and corresponding price volatility. Other potential benefits include the creation of innovative business opportunities, through the use of durable, high quality products.

The Circular Economy Package

In order to transition towards a circular economy, the European Commission adopted the Circular Economy Package (CEP) which entered into force on 4 July 2018. The CEP includes a number of recycling targets and amends six EU waste directives: the Waste Framework Directive,¹ the Landfill Directive,² the Packaging Waste Directive³ and Directives on End-of-Life Vehicles, Batteries and Accumulators and Waste Batteries and Accumulators, and Waste Electrical and Electronic Equipment.⁴ Member States are required to transpose the directives into domestic law by 5 July 2020. As this deadline falls after the latest anticipated 'Brexit date', it is currently unclear whether the CEP will be fully transposed into UK law. Defra has indicated that a consultation on transposing the CEP is due towards the end of this year.⁵

The government has made a specific commitment to transpose the amendments to Article 6 (end-of-waste status) of the 2008 Waste Framework Directive in a way that causes as little disruption as possible to recyclers and producers of waste-derived products. However, this statement should be read alongside the Waste (Miscellaneous Amendments) (EU Exit) (No 2) Regulations 2019 which come into force, for the purposes of this amendment, on exit day. These regulations omit and amend the wording in the Waste Framework Directive such that the entirety of Article 6 reads:

'Except where Council Regulation (EU) No 333/2011, Commission Regulation (EU) No 1179/2012 or Commission Regulation (EU) No 715/2013 applies, the appropriate agency may decide case by case whether certain waste has ceased to be waste taking into account the applicable case law.'

This focus on a case by case basis will provide the UK with greater flexibility to determine end of waste status which should help to keep products within the circular economy.

Our waste, our resources: a strategy for England

The government's Resources and Waste Strategy (R&W Strategy) was published in December 2018, forming part of the 25 year environment plan in which the government outlines its commitment to leave the environment in a better condition for the next generation.⁶

The government has stated in the R&W Strategy that its goal is to move to a 'more circular economy'. The R&W Strategy's overarching principles to maximise the value of resources and minimise waste and its impact on the environment are both aligned with the concept of a circular economy. This is also true of the R&W Strategy's five strategic ambitions:

- 1 Work towards all plastic packaging placed on the market being recyclable, reusable or compostable by 2025.
- 2 Work towards eliminating food waste to landfill by 2030.
- 3 Eliminate avoidable plastic waste over the lifetime of the 25 year environment plan (by 2042).
- 4 Double resource productivity by 2050 and
- 5 Eliminate avoidable waste of all kinds by 2050.

The R&W Strategy also includes other important aims including working towards a reduction in waste crime and reducing the amount of plastic pollution in the oceans.

The R&W Strategy states that the government will work with the devolved administrations to coordinate policies, however, it is likely that the approaches taken across the UK will vary as Scotland and Wales already have separate circular economy policies in place. For example, Scotland published a zero waste plan in 2010⁷ and a Circular Economy Strategy in 2016,⁸ and Wales published its 'Towards Zero Waste' Strategy in 2010.⁹ It is unclear how the government is proposing to transpose the CEP into UK law and reflect the different policies of the devolved administrations.

The timeline for the R&W Strategy extends to 2050. This emphasises that changing the way we manage waste and maximise resources is likely to be a long and complex process. However, progress on the R&W Strategy so far has been encouraging. Four consultations have been launched under the R&W Strategy, concerning extended producer responsibility, deposit return schemes, consistency of recycling collections and a plastic packaging tax. In addition to these consultations, the government's first Food Surplus and Waste Champion, Ben Elliot, has been appointed to help promote awareness of the issue of food waste and Defra has announced a £15 million project to cut food waste.

Extending extended producer responsibility

The revised Waste Framework Directive sets out that producers should bear financial and organisational responsibility for the management of the waste stage of a product's life cycle, including separate collection, sorting and treatment options.¹⁰ This concept goes beyond the 2008 Waste Framework Directive which stated that:

'Member States... may decide that the responsibility for arranging waste management should be borne partly or wholly by the producer of the product from which the waste came, and that distributors of the product may share this responsibility.'

In the extended producer responsibility (EPR) consultation, Defra has confirmed its support for EPR stating that:

*'all governments are supportive of the principles of extended producer responsibility as set out in the EU Circular Economy Package... and wish to see these adopted in reformed producer responsibility schemes by the end of 2022.'*¹¹

This consultation is timely in light of high profile environmental campaigns such as on ocean plastics. Further, Zero Waste Europe has claimed that less than 18% of waste eligible for collection is collected effectively,¹² the cost of recycling falls to taxpayers and authorities rather than producers themselves, and incidents of fly-tipping have increased considerably in recent years.¹³ Similarly, import bans on recycling materials by countries such as China have raised concerns about a lack of suitable waste infrastructure in the UK.

The new minimum requirements for EPR schemes set out in Article 8a of the revised Waste Framework Directive will therefore require careful consideration by the government if they are to be successfully implemented. Establishing monitoring and enforcement frameworks will be key in successful EPR schemes.

While the costs of compliance are likely to increase for producers and distributors under new EPR schemes, if implemented correctly, EPR schemes can contribute to brand enhancement as has been seen with M&S' Shwopping scheme and Ikea's reverse vending machines for lightbulbs and batteries.

Deposit return schemes

Another key proposal set out in the R&W Strategy is the introduction of a Deposit Return Scheme (DRS) for single-use drinks containers in England. Plastic pollution is a huge problem with over 14 billion single-use plastic drinks bottles used in the UK every year.¹⁴ DRSs can help tackle this plastic problem by acting as 'reverse vending machines' and once drinks containers are returned, businesses are then responsible for making sure that they are effectively recycled. Trial schemes, such as that introduced by supermarket chain Iceland have been extremely successful. In November 2018 alone a daily average of 2,583 bottles were recycled across five Iceland sites.¹⁵

The DRS consultation was held by Defra in conjunction with the Welsh government and the

Northern Irish Department of Agriculture, Environment and Rural Affairs. The Scottish government held a separate consultation on several DRS options last autumn, which Defra will be able to draw from. Whilst DRSs offer an exciting opportunity for reducing plastic waste, concerns have been raised around the impact upon small businesses, the geographical distribution of such schemes, and contamination issues if DRSs are set up for different materials.

Consistency in recycling rates

Despite public awareness of the importance of recycling, rates in England have plateaued at around 45% in recent years.¹⁶ By way of comparison, recycling rates for municipal waste in Wales are currently 63%.¹⁷ The R&W Strategy has set a target of a 65% recycling rate for municipal solid waste by 2035, a 75% recycling rate for packaging by 2030 and a target of 10% or less of municipal waste going to landfill by 2035. Defra's research has shown that one of the key reasons householders don't recycle as much as they could is confusion over what can and cannot be recycled in any particular area. Defra held a consultation on the consistency of household and business recycling collections in England, setting out various proposals for improving consistency.¹⁸ Defra is also planning to consult on the introduction of a separate food waste collection to reduce the amount of food sent to landfill.

Plastic packaging tax

The consultation on a plastic packaging tax was published in February 2019 as anticipated, following the government's announcement in the 2018 budget that it would introduce a new tax on plastic packaging in response to public concern over plastic pollution. Consultation responses will help the government to determine which packaging should be in scope and how recycled content should be assessed. The tax would apply to businesses that produce or import plastic packaging with less than 30% recycled content and would apply when the packaged product is made available for use or onward sale. It is proposed that the tax will take effect from April 2022 and will be set at a rate that will provide a clear economic incentive to use recycled materials. This in turn will create greater demand for recycled plastics, stimulating increased levels of collection and recycling of plastic waste. The tax is designed to complement the proposed EPR reforms and drive the development of more sustainable packaging.

Successful implementation

In order to successfully transition to a circular economy, the various initiatives proposed will require financial investment. Defra and the Waste and Resources Action Programme (WRAP), who have both been at the forefront of advocating the transition to a circular economy, are both facing cuts to their

funding. Defra currently faces severe budget constraints and will see no additional funding up to 2021, with its capital budget frozen at £600 million for each financial year.¹⁹ WRAP is under increasing pressure, with its funding from Defra having decreased by 72% since 2010.²⁰

Improving data collection and analysis should give confidence to stakeholders and encourage investment. The government's Chief Scientific Advisor's 2016 report on productivity states that 'without a strong and open understanding of our waste data, we will have no firm basis to unlock the resource productivity potential of waste.'²¹ The report also highlighted that we should reconsider how we measure waste. Traditionally, waste has been measured by weight, however, Scotland has developed a carbon metric, measuring the whole-life carbon impacts of Scotland's waste.²² The R&W Strategy suggests that the government will move towards impact-based targets initially focusing on greenhouse gas emissions and natural capital.

Concluding remarks

Momentum is steadily building to fundamentally change the way that we manage waste. The benefits that a circular economy could bring to businesses, as well as the environment, are also more widely understood. A circular economy will undoubtedly generate new opportunities across a range of sectors and will drive innovation. However, the policies contained within the R&W Strategy will only be successful if they are funded, implemented and monitored effectively.

The government's actions following the publication of the R&W Strategy show that it is taking steps along the pathway to a circular economy. All stakeholders need to stay engaged with this process in order to overcome uncertainties that may be created by the lack of detail and extended timeline set out in the R&W Strategy and to ensure that they are well positioned to take advantage of opportunities that arise.

Endnotes

- 1 Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2019 amending Directive 2008/98/EC on waste – <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0851&from=EN> (accessed 21 May 2019).
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Matters in practice

Driven grouse shooting in Scotland-time for a rethink?



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At a glance

This article will:

- Explain why driven grouse moor shooting is a source of controversy.
- Provide an overview of the REVIVE campaign.
- Outline the current legal framework.
- Examine the possible environmental impacts of driven grouse moor shooting.

Introduction

Grouse shooting is a topical issue, and apart from the long-standing concerns of some animal welfare groups, focused on the annual commencement of the 'Glorious Twelfth', other issues concerning the environmental impacts of grouse shooting, and associated activities have now come to the fore.

On the sixth of November 2018, the Royal Society of Edinburgh saw the public launch of a remarkable campaign by a coalition group drawn from the spheres of animal welfare (Raptor Persecution UK; OneKind; League Against Cruel Sports); environmental activism (Friends of the Earth Scotland) and social reform (Commonweal).

The campaign, 'REVIVE: The Case for Reforming Scotland's Driven Grouse Moors' was introduced in a keynote speech by the well-known naturalist and animal welfare campaigner Chris Packham. In his opening remarks, he sought to stress that in the view of the coalition, what is happening on, and to, Scottish grouse moors calls for reform. His view was that the breadth of the coalition demonstrates the scope of concern shared across a wide range of interest groups.

The campaign seeks to use the law to secure the goal of reform, and a key aspect is not only to highlight the view that current legal controls are not being enforced or policed with enough rigour, but also that new legislation may be needed to help further secure animal welfare and environmental protection.

Whilst one can understand that there may be a reasonable animal welfare case to be made in relation to any activity which involves the killing of birds, just what is it in driven grouse shooting that has aroused concern by the wider environmentalist community? To quote from the foreword to the case made by REVIVE-

"But what of that landscape? Grouse moors have only been with us since Victorian times. It's too easy to look out over expanses of barren, depopulated and exposed moors and think that's what the uplands naturally look like. But they look that way because misguided human intervention has made them look that way. And they've been made that way to ensure that there are as many red grouse as possible to shoot for recreation. They are an amazing national resource which is being squandered, one of Scotland's biggest failures of potential and an economic loss to us all".

Context: the red grouse, moorlands and driven grouse shooting

The red grouse is a sub-species of the willow grouse. It lives mostly on a diet of heather. For over 150 years, moorland in Scotland has been managed for the purposes of red grouse-shooting.

During this period, Scotland's upland landscapes have been transformed by the construction of access infrastructure, the burning of heather moorland, and the extermination of species such as white-tailed eagle, goshawk, and red kite through poisoning, trapping and shooting.

These intense habitat modifications were made for the purposes of red grouse shooting, and driven grouse shooting. The latter is where wild red grouse are 'driven' by beaters towards a static line of shooters, and relies upon the availability of high numbers of grouse.

To achieve this surplus, grouse moor managers incorporate three core elements of management with moor managers seeking to maintain the surplus in three ways:

- Habitat manipulation (rotational burning of heather) to produce a mosaic of nutritious young heather for grouse to eat and older heather to provide nesting cover and protection from predators.
- Parasite control, which includes medicating the grouse with a veterinary drug dispensed via medicated grit and direct dosing coupled with the mass culling of mountain hares that host some parasites.
- Lethal predator control – typically of foxes, weasels, stoats, crows and other birds of prey.

Driven grouse moor management has been the subject of increasing public and political concern, resulting in the Scottish government commissioning, in 2017, a review called the Werritty Review on the environmental impacts of grouse moor management and the costs and benefits of large shooting estates to Scotland's economy and biodiversity. That review is due to report in spring 2019.

Current legal framework

As a wild bird, the red grouse is *res nullius* in law (ownerless property). Its status as a game bird was ended by the Wildlife and Natural Environment (Scotland) Act 2011, which removed the distinct legal category of game species and added the species to Schedule 2, Part 1 of the Wildlife and Countryside Act 1981 as a bird that may be killed or taken (captured).

The management of red grouse is mainly under the control of those who own the land upon which the bird nests and feeds. The law only has a role in regulating matters such as the species that can be killed, the seasons and the hunting method, together with some regulation of management activities, such as moor burning or muirburn. Apart from specific legislative provisions, and wider environmental and wildlife law, there is no specific body of law on grouse shooting. In contrast, fourteen other European countries regulate game bird hunting through legislation, including the licensing of individual hunters coupled to a strict requirement to report harvest quotas and bags. In general, such licences can be revoked if the legislation is contravened and penalties can be imposed for serious breaches. In many of these countries, hunters must pass a two-part practical and theoretical examination to qualify for a hunting licence.

In 2016, the Scottish Raptor Study Group lodged a petition with the Scottish Parliament calling for a state-regulated licensing system for all game bird hunting in Scotland. As part of the Werritty Review, the Scottish government is currently considering a potential licensing option, as part of a wider commissioned review of grouse moor management. REVIVE has identified a number of concerns arising from the absence of any comprehensive system of regulation. These are as follows.

Muirburn

Grouse moor managers routinely burn patches of heather (known as 'strip muirburn') to create a structurally diverse patchwork habitat to favour red grouse. This technique is governed by the recently-revised Muirburn Code produced by Scotland's Moorland Forum in 2017 and which provides a combination of statutory requirements and 'good practice' guidelines². Muirburn is permitted only during the statutory season (1st October to 15th April inclusive) although it can be extended to 30th April

with landowner's permission. Scottish Natural Heritage (SNH) may also licence muirburn beyond the season in certain circumstances.

The enforcement of the Code (apart from the seasonal restrictions) is limited. There have been suspected breaches of the Code including the burning out of hen harrier nests on heather banks and the torching of golden eagle eyries which have been explained by grouse shooting representatives as being due to accidents relating to muirburn.³ Excessive muirburn has also been suggested as a contributory factor in the long-term decline of breeding merlin on grouse moors in the Lammermuir Hills⁴

REVIVE considers that policies to reverse the damaging environmental effects of peatland burning must be implemented as a matter of urgency.

Mass outdoor medication

A parasitic worm (the nematode worm, *Trichostrongylus tenuis*, a gut parasite causing strongylosis) plays a role in the population fluctuations of red grouse. In attempts to encourage a consistently high population density of grouse available to kill, one of the intensification methods adopted since the 1980s has been the use of medication to reduce the incidence of the worm and so avoid such fluctuations⁵

The medicated grit is dispensed via grit trays regularly distributed across the moor. The use of medicated grit is supposed to be administered under veterinary supervision and only as annual worm counts dictate, but there is no required system of monitoring for the use of medicated grit, including in particular, monitoring of the 28 day withdrawal period to ensure the veterinary drug *Flubendazole* does not enter the human food chain via shot grouse⁶

Lethal predator control

Lethal predator control is one of the three management requirements for a successful driven grouse moor. Red grouse are a ground-nesting species, and as such are highly vulnerable to aerial and ground predators.

Under European and Scottish law all wild bird species are protected, but the killing of 'pest' bird species by 'authorised persons' is permitted and regulated either by individual licences or by general licences issued by SNH.

Domestically the key legislation is found in the Wildlife and Countryside Act 1981, as amended by the Nature Conservation (Scotland) Act 2004. In European terms, Directive 2009/147/EC (the Birds Directive), provides protection. The Birds Directive is the 'codified' or consolidated version of Council Directive 79/409/EEC. This was the original legislation that was enacted in

1979. It was then amended many times before the current version came into force. The Wildlife and Countryside Act 1981 was enacted to implement the Birds Directive and also the Bern Convention- Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the convention on the conservation of European wildlife and natural habitats in Great Britain. Therefore, all wild birds in Great Britain are protected today under the Wildlife and Countryside Act 1981.

Licences are granted under section 16 Wildlife and Countryside Act 1981. There are three types of general licence which are tied to the licensing purposes which are broadly conservation of wild birds, damage prevention and disease control.

General licences avoid the need for individual licensing, which means that anyone without a recent conviction for wildlife crime may kill certain bird species under certain circumstances without needing any prior permission (except the landowner's), training or certification of competence. General Licences do however define conditions of use including authorised trap designs, restrictions on manner of use, provisions for the welfare of decoy birds, and the tagging of traps to identify the owner.

Failure to comply with these conditions may constitute an offence under various wildlife and animal welfare legislation. However, many of these conditions have been widely and repeatedly criticised as being ambiguous and wide open to misuse and abuse.⁷

The extent of lethal bird control on driven grouse moors is unknown, as there is no statutory requirement to report the number killed under a general licence with the exception of the herring gull.

Apart from having no idea how many birds are killed, or even how many traps are in use, there is no routine inspection of traps by the statutory authorities and no register of individual trap operators.

Enforcement of breaches of the general licence conditions is especially problematic, particularly on large commercial driven grouse moors where multiple gamekeepers are employed.

Lethal control of mammals

The lethal control of some mammals, notably foxes, stoats and weasels, is widely undertaken on driven grouse moors but is not covered by a general licence. Grouse moor managers may kill as many of these species as they wish, whenever they wish, with no requirement to report on the number killed.

Mountain hares are also killed in large numbers on many moors in Scotland. The mountain hare is Britain's

only native hare and has an important ecological role in the uplands, especially as a source of prey for top predators of conservation concern such as golden and white-tailed eagles. It is, for example, listed on Annex V of the 1992 EU Habitats Directive which requires Member States to maintain populations in favourable conservation status and is also protected by a closed season under the Wildlife and Natural Environment (Scotland) Act 2011, which makes it an offence to kill a mountain hare in the closed season (1st March to 31st July) without a licence from SNH.

Mountain hares are killed on driven grouse moors to seek to control the viral disease 'louping-ill' (LIV) in red grouse which can be transmitted by ticks that are hosted by mountain hares and other mammals and can affect grouse chick mortality. However, some studies have found there to be 'no compelling evidence base to suggest culling mountain hares might increase red grouse densities.'⁸

Illegal raptor persecution

Full legal protection for all raptors followed with the enactment of the Protection of Birds Act 1954 as amended. Further legislation to protect raptors was also introduced during this period including a complex array of Scottish, UK and European-specific laws. These afforded raptor species the high level of legal protection they have today, making it an offence to poison, shoot, trap, destroy nests or recklessly or deliberately interfere with a nesting raptor.

The main protections are found in the provisions of the Wildlife and Countryside Act 1981 and the Birds Directive. Section 1 of the 1981 Act makes general provision for the protection of wild birds, their eggs and nests. Further residual protection might also exist under the Animal Health and Welfare (Scotland) Act 2006, insofar as a wild bird has been brought under the control of a person.

Infrastructure

Hilltracks can ease access for grouse moor management purposes, but can also have major visual and environmental impacts, particularly on the wilder landscapes for which Scotland is so highly-regarded. Private tracks constructed for agriculture or forestry use have been allowed under Permitted Development Rights (PDRs) since 1947, which exempts them from the normal planning process. This has allowed tracks to be constructed without application for planning permission, the satisfaction of minimum standards, or any need to inform local authorities, statutory bodies, or the general public. Negative impacts include, but are not limited to, loss of visual and environmental amenity; damage to sensitive vegetation and soils, especially in upland environments and increased disturbance to wildlife.

Disturbance

Another controversial management technique that has emerged over recent years is the deployment of propane powered gas guns on grouse moors. Also known as scare cannons, these devices are routinely used for bird scaring on lowland agricultural fields by producing a periodic booming noise to cause a flight reaction in pigeons and geese etc. to remove them from crops. The intermittent audible bang can reach volumes as high as in excess of 150 decibels.

Lead ammunition

Grouse are killed with shotguns using lead shot. Lead is a highly toxic metal that occurs naturally but has been widely distributed by human activity.⁹ It is known to pose significant threat to human health and wildlife health. REVIVE consider that no 'safe' blood lead level in children has been identified below which negative health effects cannot be detected¹⁰ but all game birds (including red grouse) appear to be exempt from statutory testing for lead shot, in sharp contrast to other meat types destined for human consumption¹¹

Conclusion

There are of course contrary views to those maintained by REVIVE, however one of the aims of REVIVE is to open up the debate from all stakeholders. This short paper can only touch on and summarise areas of possible concern and space precludes greater coverage and views contrary to those advanced by REVIVE. However, it is fair to say that in launching this campaign and with the Weritty Review due to report soon, contributions from all sides will heighten the debate. In the view of the writer at least, it appears unlikely that driven grouse moor shooting and associated practices will remain subject to relatively light touch regulation as we move further forwards in a new vision for the rural environment in a 21st century Scotland.

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Endnotes

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