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Over the next couple of months there's nearly one UKELA event a week – somewhere in the UK. Our thanks go to all the working parties and regional groups who are doing a great job at organising informative and interesting events for UKELA members. UKELA's Council has worked hard to produce a great 25th anniversary conference for you in Cambridge and we do hope to see you there.

We also owe a big debt of thanks to the UKELA President, Lord Carnwath. With Lord Woolf as chair, he kindly gave a talk at our One Year Only Lunch Club's recent gathering which raised over £3,000 for UKELA. Lord Carnwath is also leading our first sponsored walk – on 19 May – over the South Downs, come rain or shine! And he's providing the anniversary Garner Lecture (you can read more about all these events below), as well as judging the moot finals. We are enormously fortunate to have his support in so many ways.

In this edition we are asking for the reflections of long standing UKELA members, who have been around for nearly the whole 25 years of UKELA's existence; and also the views of current members on what environmental law and regulation have done for us. Plus it's time to step up and volunteer for the hot topics session at the 2014 conference in Edinburgh. Yes, we are already planning ahead!

Catherine Davey

Best wishes
Catherine Davey

News

Garner Lecture 2013 – a special anniversary event – 19 November

Lord Carnwath JSC, who is the President of UKELA and PEBA, is giving this year's Garner lecture which will be held on November 19th at 6pm. The lecture is being held as a partnership with the Journal of Environmental Law – which is celebrating its 25th anniversary alongside UKELA – and PEBA. The title is: "The Common Laws of the Environment – at home and abroad." We're very grateful to Freshfields Bruckhaus Deringer which is hosting and sponsoring the event. Videolinks to the regions will also be available. Please note the date in your diary. Bookings will open in September.



Founder Members

Were you a founder member of UKELA? If so we would love to hear from you in this our 25th year! Can you remember the year you joined and have you been a member ever since? Please share with us any stories from the early days when you joined, for example, were you on Council or did you convene a regional group or working party? Were you at the first ever annual conference? Please send your recollections to alisonboyd.ukela@ntlbusiness.com

Conference 2014 – Hot Topics session invitation

The team planning the 2014 UKELA conference, which will be in Edinburgh, has asked for barristers to nominate themselves, or others, to present the hot topics slot on Saturday 21 June. The 2014 conference will be on a different format from previously – starting after lunch on Friday and finishing with the gala dinner on Saturday evening. Feedback from attendees will help determine which format they prefer for future years. The hot topics slot has traditionally been at the end of the conference on Sunday but this time will feature as the last slot in Saturday morning's plenary session, guaranteeing a big audience. Two barristers will be asked to provide 15 minutes each covering Environmental Law cases from around the UK (so a high level of co-ordination and prioritisation will be needed). Please send your names to the e-law editor Catherine.Davey@stevens-bolton.com

Two questions for you

UKELA is working with the Institution of Environmental Scientists on two special editions of the IES journal focusing on Environmental Law. They have asked us to ask you two questions:

What has Environmental Law done for us?

What has environmental regulation done for us?

We'd be grateful if you could spare the time to pen your thoughts, separately, on each question – 100-200 words each. Please email your answers to Vicki.elcoate@ntlworld.com and include your name, organisation and a two sentence biography. They are looking for people from a range of backgrounds to provide views.

25 4 25 Fundraising for the 25th Anniversary

UKELA Council members have organised a series of fundraising events under the 25425 campaign banner to lay down a firm foundation for UKELA's future. So far a pub quiz and the first Lunch Club gathering have raised nearly £4,000 and the campaign has raised nearly £8,000 in total. Please help us reach our target of £25,000.



One Year Only Lunch Club

By Stephen Sykes

The One Year Only Lunch Club – a new fundraising initiative for UKELA – got off to a flying start last month, raising more than £3,000 for the UKELA cause.

The event was generously hosted by Travers Smith, entirely free of cost. In welcoming our guests, Partner, Doug Bryden, thanked UKELA for playing a vital role over the past quarter century in the prudential development of environmental laws in this country.



The occasion was splendidly chaired by Lord Woolf of Barnes (formerly LCJ) who had some timely, insightful and concerning words to say about the environmental state of the nation.

Our guests were also fortunate to be treated to a talk by UKELA's President, Lord Carnwath, who took as his topic the vital but often overlooked role of the judiciary in implementing national and international environmental laws.

Lord Carnwath described how the world's judiciary, quietly but determinedly, are making a positive contribution to environmental protection. He cited an [article](#) he wrote in June 2012 for the Guardian following attendance at an assembly of judges in Brazil. This was at the time of the Rio+20 summit to address the critical challenge of our warming planet. It could be argued that the judicial assembly has made a greater contribution to environmental justice (eg through the promotion of access to justice) than the 'main event' at Rio.

Lord Woolf turned his sights to developments in the UK in this age of austerity. He was concerned for the environment as policy makers prioritise economic growth. There is a role for environmental lawyers to challenge the viewpoint that environmental protection and growth are somehow incompatible and to make their voices heard in this vital debate.

The lunch was a huge success because of the generosity of our host, 40 guests, and key sponsors – Argyll Environmental, Talisman Environmental and Sykes Environmental. It also depended upon the hard work of Alison Boyd and Travers Smith partners and staff. UKELA are hugely grateful to everyone for attending.

The next debate will be in the Autumn. Please contact me at stephen@sykesenvironmental.com if you would like to be added to the mailing list for information as soon as speakers and venue have been finalised.

News

Earthwalks

Our main Earthwalk event will be on May 19th with Lord Carnwath leading a group over the South Downs between Amberley and Arundel. We'll also be joined by Tony Whitbread, the Chief Executive of the Sussex Downs Wildlife Trust, who will provide a briefing on the biodiversity of the South Downs.

Please sponsor Lord Carnwath, the UKELA Chair Mark Brumwell and the UKELA members and staff walking on Sunday to raise funds.

[Sponsor now](#)

Richard Burnett-Hall is offering an opportunity to discover Nordic walking and join in a fundraising 10 mile walk around Winchester on June 23rd. Training and poles will be provided.

[Sign up here](#)

The last main Earthwalk event is on September 14th with a 16 mile stroll down the Thames from Chelsea Bridge to the Thames Barrier. The walk is being led by UKELA's Working Party Support Officer, Rosie Oliver, who has expertise in leading walks and talks, with a special focus on points of environmental and cultural interest along the way. It should be a fascinating day out. [Rosie's Tours](#)

[Sign up here](#)

It's £10 to register (for earning adults – families very welcome to join in) and we hope you can also raise some sponsorship. If you register please also email Alison Boyd, particularly if you're not paying so we know you're attending, alisonboyd.ukela@ntlbusiness.com



Recyclists

The Recyclists are inviting cyclists to join in their annual bike ride to the conference. This year it will start in London on the morning of July 12th, arriving in Cambridge in time for the first plenary session (60-70 miles). They are aiming to stick to cycle routes and to arrange transport for luggage. If you would like to join in – and meet up for some training beforehand – please email james.burton@39essex.com. The Recyclists organisers are Ben Stansfield of Clifford Chance, Tim Clare of Environ, Richard Wald and James Burton of 39 Essex Street.



The Recyclists are raising money for the Lord Nathan Fund, which looks after UKELA's Law and Your Environment website, providing information to over 300,000 a year. www.environmentlaw.org.uk

Students

The moot semi-finalists and the Andrew Lees prize winner are currently being selected and will be informed shortly.

Entries are still open (until the end of June) for the Simon Ball Prize for Achievement Sponsored by OUP. Please do enter yourself – or nominate someone. The award is open to undergraduate and postgraduate students at a UK higher education institution from any academic discipline so long as the basis of the contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA. The basis of the award is not limited to academic achievement and may extend to any achievement attained by, or contribution made by, the student.

You can read the rules [here](#).

60 Second interview

Haydn Davies



What is your current role?

Currently I am senior academic and deputy director of research at the School of Law, Birmingham City University and also a member of the Centre for American Legal Studies.

How did you get into environmental law?

I was formerly a biochemist teaching environmental technology and toxicology to engineering students. This involved a good deal of training and consultation liaison with the industries that funded and provided placements for the students. The Environmental Protection Act 1990 was then a very new piece of regulation and I became increasingly interested in the regulatory side as well as the technological. Eventually I read for a law degree and transferred to the law school (in 2000) to teach environmental regulation (among other things).

What are the main challenges in your work?

Keeping up to date and persuading the powers that be that environmental law is at least as important as tax law!

What environmental issue keeps you awake at night?

Loss of biodiversity; ultimately, I think, a more intractable challenge even than climate change.

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

Breaking the link between economic growth and environmental degradation – at its heart more a challenge for education than law.

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

I'm the co-convenor (with Bob Lee) of Gweithgor UKELA ar gyfer Cymru (UKELA Wales Working Party). Although I now work and live in England, I was born and grew up in the Brecon Beacons National Park, educated at Cardiff University and still maintain strong links with three Welsh Universities. Now that Wales has a mandate for its own environmental protection policy and law, I'm keen to help ensure that it remains the same beautiful place that I grew up in while improving the well-being of all who live there – including most of my extended family.

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

Contact with the profession. This helps me keep focused on the realities of environmental law, governance and enforcement.

Contributions

ClientEarth – Air Quality case

By Joe Newbiggin, an Environmental Law intern with Wolf Legal Publishers, based in the Netherlands.

An appeal concerning the Air Quality Directive (2008/50/EC) brought by ClientEarth has been allowed insofar as a declaration regarding a breach of Article 13 of the Directive has been made. Proceedings regarding (a) the correct interpretation of the Directive, and (b) the extent of a national court's obligation to provide effective judicial protection have been stayed pending a referral to the CJEU by the Supreme Court in R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs [\[2013\] UKSC 25](#)



Background

ClientEarth contend that air pollution causes more early deaths than obesity and alcohol combined in the UK every year. The EU legislative framework governing ambient air quality seeks to protect environmental and human health by setting limit values on pollution levels based on scientific findings. This appeal concerned the interpretation and implementation of [The Air Quality Directive \(2008/50/EC; 'the Directive'\)](#).

Article 13 of the Directive imposes hourly and annual limit values for levels of nitrogen dioxide (NO₂) in ambient air. The deadline for achieving these values was 1 January 2010. Article 22 provides that, in zones and agglomerations where a limit value cannot be achieved by that deadline, “a Member State may postpone those deadlines by a maximum of five years... on condition that an air quality plan is established”. Such a plan must be approved by the European Commission (“the Commission”) and demonstrate conformity with the limit value before the postponed deadline. Article 23 provides that in the event of exceedances of the limit values prescribed in Annex XI of the Directive, the Member State should set out appropriate measures in the air quality plan to ensure that the period of exceedance is “kept as short as possible”.

The issue on appeal was whether the Secretary of State is required to avoid the continuing breach of the Directive by preparing air quality plans that in accordance with Article 22, demonstrate compliance with the NO₂ limit values by 1 January 2015 (at the latest) for zones or agglomerations where compliance was not achieved by the initial deadline of 1 January 2010. The air quality plans submitted by the Secretary of State to the Commission on 27 September 2011 do not project compliance with the NO₂ limit values in 16 zones and agglomerations until as late as 2025.

The Secretary of State's position, accepted by the Administrative Court [\[2011\] EWHC 3623 \(Admin\)](#), was that Article 22 was discretionary and, therefore, the UK was not required to submit an air quality plan showing compliance by 2015 in order to postpone the deadline for compliance. Instead, it could submit plans under Article 23 that aimed to achieve compliance in the shortest time possible, which could be later than 2015. The Court of Appeal [\[2012\] EWCA Civ 897](#) agreed, in a second short *ex tempore* judgement, adding that the duty to comply with Article 23 was not conditional on proposing an extension under Article 22, with the second half of Article 23 applicable where exceedances occurred after the passing of the deadline. The UK had therefore legitimately proposed compliance in a period greater than five years and any question of domestic remedies was “moot”.

The Secretary of State conceded that the UK was in breach of its Article 13 obligations however the Court declined to grant any relief. The UK Government was free to breach its obligations and wait for the Commission to take enforcement action by way of Article 258 TFEU – a process which, as Ludwig Krämer's [analysis from 2008](#) shows, takes on average almost four years for environmental cases. Mitting J held that a mandatory order for compliance with either Articles 13 or 22 “would raise serious political and economic questions which are not for this court”. The additional declaration sought by ClientEarth, that the UK was in breach of its Article 13 obligations, was also denied, with the Court finding that such a position was “common ground” and as such a declaration would serve no purpose.



Contributions

ClientEarth submitted that the lower courts had erred in law, both with regards to interpreting the Directive and its obligation to provide remedy. They argued that:

- Conferring discretion on the application for extensions under Article 22 was contrary to the requirements of the Directive. The Directive did not give Member States discretion as to whether to follow the Article 22 process, rather, the word 'may' recognised that an application for an extension was possible only when certain conditions were met and would not be automatically awarded.
- Read purposively the legislative aim of Article 23 was not to allow Member States to circumvent the requirements of Article 22. Article 23 established the parameters for a time extension under Article 22 and could not, therefore, be relied upon to further extend the clearly prescribed limited time extension beyond five years.
- Denying an effective domestic remedy for the established breach of law was against the principles of effective judicial protection (Article 19(1) TEU) and sincere co-operation between Member States (including the Courts) and the EU (Articles 4(3) TEU); as well as the right to an effective remedy (Article 47 of the Charter of Fundamental Rights of the EU and Article 9 of the Aarhus Convention). Consequently the Court was required to provide an effective domestic remedy for substantive breaches of the mandatory limit values.
- Economic and practical reasons could not justify refusing relief, including a mandatory order, where such relief was necessary for the effective implementation of EU law.

ClientEarth continued to seek an order quashing the Secretary of State's current plans and requiring that new air quality plans be produced compliant with Article 22, arguing this was the only way for the UK to avoid breaching its mandatory obligations under EU law.

Judgment

Lord Carnwath of Notting Hill, delivering the judgment of the Supreme Court on 1 May 2013, departed from the judgments of the lower courts and allowed the appeal insofar as it was appropriate to grant a declaration that the UK is in breach of its obligations to comply with the NO₂ limits provided for in Article 13. This formal statement of the legal position made clear that "the way is open to immediate enforcement actions at national or European level".

The latter issues of interpretation and implementation of the Directive were not *acte claire* (clearly beyond reasonable doubt) and the Court will make a reference to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The draft questions appear at [39] and are briefly summarised below. The first three questions (i-iii) relate to the correct interpretation of the Directive:

- Whether the Directive obliges Member States to seek postponement of the deadline, where conformity with the limit values cannot be achieved by 1 January 2010?
- If Article 22 is mandatory, are there circumstances where a Member State can be relieved of that obligation (i.e. is it qualified or limited to consider cost or political difficulty)?
- If Article 22 is not mandatory, what is the extent of a Member State's obligation under Article 23 to keep the period of exceedances as short as possible?

The fourth question (iv) relates to the implementation of the Directive. The constitutional importance of its answer extends well beyond the effectiveness of environmental directives:

- In the event of noncompliance with the Directive, and in the absence of an extension to the deadline under Article 22, what (if any) domestic remedies is a national court obliged to provide pursuant to the principle of sincere-cooperation and effective judicial protection?

A mandatory order, to produce valid air quality plans under Article 22, may be the only means of ensuring effective compliance with the Directive. It would also have onerous political and economic implications. Whilst this may be a political quagmire for the CJEU the final outcome of this case could have far-reaching consequences, both for the British courts' application of European law and the executive's observance of the rule of law.

Whilst most references to the CJEU take approximately eighteen months, it is likely that



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an application will be sought under the urgent preliminary ruling procedure given the forthcoming end of the extended deadline period on 1 January 2015. In any event, a decision from Luxembourg, keenly awaited by those concerned for human health and the environment, is unlikely within the next 6 months.

The author would like to express his gratitude to Alan Andrews of ClientEarth for providing a comprehensive briefing for UKELA Student Members and subsequent assistance.

Contributions

Should the UK Create an Environmental Rights Commission?

Ben Christman, (PhD Candidate, Queen's University Belfast)
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Introduction

Caroline Lucas has called for the creation of an environmental rights¹ commission (ERC) in the UK, arguing that it is needed because,

*In the UK, people's rights to a decent environment free from pollution, over-development and other forms of degradation are simply not strong enough. . . even where we have rights, it can be incredibly difficult to uphold these against developers, businesses and often the Government itself. For many, legal fees in particular are simply unaffordable.*²

She advocates creating an ERC as a non-departmental public body (NDPB) on a statutory basis with sufficient resources to advance test-case litigation which supports and develops environmental rights and sustainability, and to promote a sustainability perspective in policy and legislation development.

This article discusses whether the UK should create an ERC. It first explores four institutions which are broadly similar to Lucas' envisaged ERC: the Australian network of Environmental Defenders Offices, the Ontario Environmental Commissioner, the New Zealand Parliamentary Commissioner for the Environment and the UK Equality and Human Rights Commission.³ It examines the reasons for their creation, their roles and powers, and determines what lessons can be gleaned from their operation. Using this comparative information it then explores the arguments surrounding the case for creating a UK ERC.

2. Comparative Organisations

This section examines four organisations to identify what lessons can be learned from their experiences for a UK ERC.

2.1 Australian Environmental Defender Offices (EDOs)

a. Introduction

The EDOs are a network of public interest environmental law offices that operate across Australia. There are nine independently constituted offices, one in each Australian state and territory. The first EDO was created in 1985 as a company, following a review of the operation of the Environmental Planning and Assessment Act 1979 and the Land and Environment Court Act 1979 by the state of New South Wales (NSW). This review found that the operation of the legislation threatened its main aim of achieving community involvement due to the existence of a, "significant resource imbalance. . . people other than developers rarely have adequate legal advice and representation".⁴

b. Role and Powers

The EDO was advocated by the Australian Environmental Law Association as a means of bridging the gap between the opportunity for community involvement in decision-making provided for in the 1979 NSW legislation, and the need for legal advice and representation in order to effectively exercise that opportunity. Robinson describes it as a, "radically different legal practice"⁵ for reasons of its ideological commitment to conservation and extending environmental activism into the courts.

Each of the EDO offices are separately constituted companies, sharing broad objectives through the national EDO network. The network links and coordinates the



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offices, its aims include: protecting the environment through law; providing legal advice and representation in public interest legal matters; promoting environmental law reform; empowering the wider Australian community in their understanding of the law to participate in environmental decision-making; and assisting the growth of the national EDO network across Australia.⁶ The core functions of the EDOs are providing legal representation and advice, participating in environmental law and policy reform and providing public legal education. The EDO shares aims often seen in traditional community law centres; but whereas a community law centre tends to be focussed on promoting *social justice*, the EDOs work to promote *environmental justice*.

c. Analysis

The EDOs apply stringent criteria to ensure that their limited resources are used strategically to support and advance litigation.⁷ The cases which EDOs have supported have created valuable precedents,⁸ remedies to prevent environmental harm⁹ and have influenced government agency behaviour.¹⁰ Bates notes the involvement of the EDO in progressing “some of the most important and significant cases in Australian environmental litigation”.¹¹ This claim is echoed by McGrath, who argues that the accessible provision of environmental law expertise and information offered by the EDO network plays a “vital role”¹² in promoting public interest litigation.

In their educational role, the EDOs have produced a high-school textbook on environmental law,¹³ many leaflets, factsheets and conference papers.¹⁴ They are active in promoting policy and legislative reform, making submissions to various state and national legislatures,¹⁵ and they are active at the regional and international level too.

The EDO network has struggled to secure adequate funding. Being predominately publicly funded, political interference in legal aid budgets, lack of funding and conditional funding arrangements have hampered its effectiveness.¹⁶

2.2 Ontario Environmental Commissioner (OEC)

a. Introduction

The OEC was created by the Ontario Bill of Environmental Rights 1993 (OBER).¹⁷ The OBER creates a number of rights to information and participation in environmental decision-making for residents of Ontario.¹⁸ Its drafters envisaged the OEC as providing, “the objective foundation of information from which accountability would flow”.¹⁹ The powers of the OEC represent the legislative intention that political rather than judicial accountability mechanisms are used to ensure that government adheres to the OBER.

b. Role and Powers

The functions of the OEC are set out in S57 of the OBER. It provides, *inter alia*, that the OEC is to: review the compliance of ministries with the requirements of the OBER; provide guidance to government on how to comply with the requirements of the OBER on ministerial request; review the use of discretion under the OBER by ministers; provide educational programs about the act to the public and to report annually on the operation of the OBER.

The OEC is appointed on a five year term by the Ontario legislature, and the legislature also has control of the OEC’s financial budget. The nature of the OEC’s work often means that it is critical of government, so independence from the executive provides essential protection from potential reprisals or interference.²⁰

c. Analysis

The OEC has little in the way of formal powers to enforce the provisions of the OBER, reflecting the intention that it was designed to ensure political accountability.²¹ This has led some to criticise the ‘toothless’ nature of the OEC. Hughes and Lyalomhe note that despite several scathing reports on the government issued by the OEC to the legislature, the legislature often fails to take action and there is no way for the OEC to compel a public authority to act.²² Castrilli advocates a judicial accountability approach to produce better environmental decisions, arguing for a public advocate role for the OEC to allow it to seek legal redress for environmental violations arising from public complaints.²³



Contributions

The OEC has been highly critical of government. The current commissioner has taken an open policy advocacy role in which he has attempted to expand the range of acceptable political discussion to take into account environmental limits (although with little success).²⁴ In its public educator role, the OEC has used several means to engage the public and inform them of their rights under the OBER: responding to information requests from citizens, distributing leaflets, holding public events and providing public OBER teaching resources.²⁵

2.3 New Zealand's Parliamentary Commissioner for the Environment (PCE)

a. Introduction

The PCE was established with the adoption of the New Zealand Environment Act 1986, during a wider restructuring of the country's environmental administration following an OECD report.²⁶ The commissioner is supported by a small interdisciplinary team of sixteen staff and is publicly financed with funding set by the legislature.²⁷

b. Role and Powers

The 1986 act sets out a broad range of powers for the PCE.²⁸ These include, among others, to review the system of agencies and processes established by the government to manage natural and physical resources; to investigate the effectiveness of environmental planning and environmental management carried out by public authorities and advise them on any remedial action; to advise the legislature on environmental matters; to undertake and encourage the collection and dissemination of information relating to the environment and to encourage preventive measures and remedial actions for the protection of the environment. The powers are predominately investigatory, advisory and educational, with no ability to enforce environmental laws or litigate.

The 1986 Act is ambiguous as to the exact role of the PCE. Various titles have been offered to explain its function: Buhrs argues that it should focus on the role of 'systems guardian', assessing environmental management across New Zealand by taking a meta-policy perspective to policy analysis;²⁹ Bosselmann opines that the PCE could be seen as an 'environmental guardian' which provides a voice for values which are often neglected in conventional political forums;³⁰ whilst Allen argues the role is that of a traditional ombudsman where citizens' concerns are taken up at no or low cost to the referrer and handled competently.³¹

c. Analysis

The PCE has achieved much with modest resources: providing advice and assistance to citizens and local governments on a range of environmental issues and drawing attention to many shortcomings in New Zealand's environmental management, while providing useful advice as to how these could be remedied.³²

Several factors hamper the PCE's effectiveness. First, and similarly to the OEC, the PCE has no ability to compel public authorities to take any action on its recommendations. Second, the predominately reactive role of the PCE, responding to parliament and public petitions means that it struggles to take a long-term, strategic approach to problem-solving.³³ Third, the uncertain function of the PCE under the act creates problems, and has meant that the composition of the staff of the PCE is highly determinative of the role which it performs. The role which the PCE plays in policy reform is contentious: Buhrs argues that the PCE's policy advocacy role should be limited to implementation review, and should avoid policy advice given its highly political nature and the need for the PCE to be apolitical.³⁴ Finally, a lack of funding has constrained the PCE's effectiveness and has meant that it has had to be highly selective in its work.³⁵

2.4 UK Equality and Human Rights Commission (EHRC)

a. Introduction

The EHRC began its work in 2007, following its creation under the Equality Act 2006.³⁶ It consolidated the powers of three previous commissions which had worked in the areas of racial equality, gender equality and disability rights promotion³⁷ and was also given new powers relating to human rights and anti-discrimination law. Concerns were voiced from the existing equality bodies that their areas of work would be neglected within the larger organisation.³⁸ However, a single commission was seen as better able to maximise resources, target overlapping issues, continue the effective work of previous commissions into the new equality grounds and to provide a 'one-stop shop' for victims of discrimination and organisations seeking advice on how to ensure compliance with discrimination laws.³⁹

b. Role and Powers

The EHRC is given a wide role to promote human rights and equality. Section 3 of the Equality Act sets out a general duty for the EHRC to encourage and support the development of a society where human rights and equality have become entrenched; described by O'Conneide as an, "ambitious and fascinating attempt to give a legislative definition to the idea of a rights-based society".⁴⁰

The EHRC has several broad powers to achieve its role. In relation to human rights and equality law, it can: provide information, advice and undertake research; issue codes of practice; conduct inquiries and investigations; issue 'unlawful act notices' and 'action plans' to correct unlawful actions; apply to court for injunctive relief in relation to an unlawful act; provide legal assistance or become party to legal proceedings and institute judicial review proceedings.⁴¹

The Equality Act gives the EHRC considerable freedom in how it develops as an organisation, the structure it adopts, and the priorities that it chooses by keeping the legislative obligations imposed upon it to a minimum.⁴² Whilst this offers considerable flexibility, Niven observes that the EHRC will face some difficult choices in pursuing its functions in a manner that, "will provide the best trade-offs between potential results, likelihood of achievement and (direct and opportunity) cost".⁴³

c. Analysis

The EHRC is a more recent creation in comparison to the other organisations studied, making studying its effectiveness more difficult. There have been several high profile successes for the EHRC: including litigation which forced the British National Party to amend its constitution to allow non-white persons to join its membership,⁴⁴ an investigation revealing a disproportionate use of 'stop and search' powers against minority racial groups,⁴⁵ publishing several reports on traditionally neglected topics such as the inequalities experienced by gypsy and traveller communities;⁴⁶ and the EHRC has taken hundreds of enforcement actions and provided a telephone and online advice service which helps tens of thousands of people annually.⁴⁷

The EHRC has experienced a number of teething problems. First, the UK government's austerity drive is likely to hurt the EHRC's effectiveness. A recent consultation announced the government's intention to halve the EHRC's budget by 2015, prompting one author to remark that it is "very doubtful"⁴⁸ that the EHRC will be able to maintain its impact in society. Second, the EHRC is based on the NDPB model, which means that although the EHRC can exercise its powers in an independent manner, the Secretary of State sets its funding and appoints the Commissioners. The Joint Committee on Human Rights has criticised this as reflecting the executive's, "desire to retain an unhealthy degree of control over the Commission's activities".⁴⁹ Given the EHRC's role in investigating and challenging actions of public authorities, its activities are likely to place it in conflict with the executive and may lead to reprisals for the EHRC from an embarrassed government.⁵⁰ Third, concerns have been expressed over the operation and management of the EHRC; particularly that it has not been fulfilling its human rights mandate⁵¹ and that it has been mismanaging its finances;⁵² suggesting problems with the bedding-in of the organisation and senior management.

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Overview of Organisations Studied

| Organisation | Brief Description of Role | Ability to Support and Initiate Litigation | Law and Policy Development | Provision of Affordable Legal Advice and Assistance | Activist or Watchdog in Nature |
|------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|----------------------------|---------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Australian EDO Network | Network of environmental law centres which facilitate the protection of the environment through law, support community empowerment in environmental decision-making and promote law reform. | Yes | Yes | Yes | Activist |
| Ontario Environmental Commissioner | Reviews governmental compliance with the Ontario Bill of Environmental Rights 1987 (legislation which provides rights to information and participation in environmental decision-making in Ontario), provides educational programs on OBER to the public and reports annually on the operation of the OBER. | No | Yes | Provides public training on OBER but not individual legal advice and assistance | Watchdog |
| New Zealand Parliamentary Commissioner for the Environment | Designed to hold NZ government to account for its environmental policies and acts. Reviews, investigates and reports to parliament on environmental resource management in NZ. | No | Yes | No | Ambiguous. |
| UK Equality and Human Rights Commission | Broad role to promote, monitor and enforce human rights and equality in the UK. | Yes | Yes | Yes | Slightly unclear but S3 general duty to encourage and support the development of a society where human rights and equality have become entrenched suggests it is an activist body. |

Contributions

2.5 Lessons for a UK ERC?

The analysis of the above comparative bodies has drawn out four critical issues for creating an ERC-type institution in the UK.

a. Funding

Securing adequate funding to effectively fulfil their duties presents the largest challenge faced by the organisations studied. The need for sufficient financial support to carry out resource-intensive activities such as conducting research, providing advice and information and litigating demand a commitment from government to allocate resources. In an era of austerity this budgetary pressure is likely to be exacerbated, with limitations imposed on the operations of such organisations.

b. The Tension between Accountability and Independence

The duties of the organisations studied require that executive action must be scrutinised, and often criticised. The need for independence from the executive is crucial to ensure that any relationship of sponsorship or powers over staff selection do not interfere with its duties. However, the need for autonomy must be balanced with the requirement that such a body be publicly accountable for the powers it wields and the resources which it employs. The balance struck between autonomy and accountability by the OEC, which is independent of the executive yet accountable to the legislature, is a model which provides best practice.

c. Defining the Role: Activist or Watchdog?

The precise roles of the organisations studied have not always been clear. The EDO network is an activist group, the OEC fulfils a watchdog role over the implementation of the OBER, the PCE's role is highly fluid due to ambiguous founding legislation and the EHRC has a similarly broad mandate with various functions, "provider of 'legal aid'; law centre service; conciliation service; public interest litigant. . . regulator; law reform agency; legal consultant".⁵³

The choice between designing a neutral, reactive body which operates solely to protect threatened environmental rights, or a more expansive 'activist' organisation which both promotes and protects environmental rights through the use of broad powers is a contentious one. Creating an ERC-type body with limited powers and more of a traditional ombudsman's role to receive complaints has merit in requiring limited resources and being apolitical.⁵⁴ Concerns exist over politicising a body by affording it powers to engage in policy advocacy and engage in litigation. However, provided that the role of the organisation is sufficiently defined to ensure that the powers to be used are not excessively expansive, and accountability mechanisms are in place to avoid abuse of the powers, an activist body with broad powers to both protect and promote environmental rights has the potential to be the most effective in supporting and developing environmental rights.

d. Teeth

The need for such a body to be able to wield both the 'carrot' and the 'stick' required is evinced by the criticisms of the PCE and the OEC as 'toothless'. Without sufficient powers to litigate, take action to enforce laws and compel witnesses to give evidence; there is a risk that a well-meaning body could end up marginalised, ignored and ineffective.

3. Should the UK Create an ERC?

Having explored some examples of ERC-type bodies, the potential merits and arguments against creating an ERC in the UK will now be examined.

3.1 Arguments for an ERC

a. Embedding Sustainability: Providing a 'Voice' for the Environment

The short-termism inherent in representative electoral cycles is well recognised, often failing to produce sustainable decision-making.⁵⁵ In 2000, The Sustainable Development Commission was created to scrutinise government and promote sustainable development in the UK, but was abolished in 2011 on the premise of cutting public



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expenditure and internalising its functions within central government. Morrow criticises this move as she fears that, “given the immense breadth of the ministerial portfolios in question, sustainability concerns will simply be swallowed up and disappear from view”,⁵⁶ an opinion echoed by the Environmental Audit Committee which noted further that it would not be able to fill the gap left by the SDC’s abolition.⁵⁷

The environment cannot communicate to protect its interests in the face of harmful human developments or ecologically damaging activities. This lack of ‘voice’ often means that in a conflict of interests the environment tends to lose out, Kramer famously emphasises that, “the environment dies away in silence”⁵⁸ and therefore requires people or organisations to act on its behalf to protect it. The need to give the environment a stronger voice has been a dominant concern for green groups since the birth of environmentalism; reflecting a feeling of powerlessness for environmental groups in the political process where environmental values are largely absent from public decision-making.⁵⁹ An ERC could act as a sustainability champion independent of government to promote sustainability and environmental values in the UK.

b. Developing Environmental Rights and Environmental Law

An ERC able to support and initiate litigation, and to promote policy and legislative reform which promotes and develops environmental rights and sustainability could be of benefit to environmental law in the UK. Dixon argues that an ERC could have an analogous impact for environmental rights in the UK as the Equal Opportunities Commission had in developing and promoting women’s rights.⁶⁰ Strategic litigation could also help to develop environmental law through valuable precedents, for example by giving definition to vague legal provisions such as the duty that all public bodies are to have regard to biodiversity conservation when carrying out their functions.⁶¹ Adopting a watchdog role, it could ensure that hard-won environmental rights are enforced and adhered to; promoting ‘monitory democracy’.⁶²

c. Access to Justice and the Aarhus Convention

The Aarhus Convention requires that citizens have access to legal procedures which are ‘not prohibitively expensive’ to challenge breaches of national environmental law.⁶³ The Aarhus Convention’s Compliance Committee found in 2010 that the costs regime for environmental litigation in England and Wales failed to meet this requirement.⁶⁴ Costs rules and the imbalance of resources in many environmental disputes between polluters, developers or government and their opponents in the UK means that access to environmental justice is often unobtainable.⁶⁵ An ERC could assist the UK in meeting its access to justice requirements by supporting and helping to fund environmental litigation.⁶⁶

d. Providing Free Legal Advice and Education on Environmental Rights

Environmental law is often complex and requires expertise to ascertain the state of the law and to enforce it. The UK lacks a public environmental legal advice agency, and legal aid is hard to come by; meaning that citizens are often unaware of their rights or unable to afford legal advice.⁶⁷ An ERC could fill this gap, helping to educate the British public about their environmental rights and promote the ideal of an informed public being able to participate fully in environmental decision-making.

3.2 Arguments against an ERC

a. Set-up and Operational Costs

An ERC given wide powers to carry out investigations, conduct research and participate in litigation would be a resource-intensive institution. In the age of austerity with an existing consensus amongst the dominant British political parties of the need to reduce the public budget deficit there are significant political hurdles in the way of creating any new public bodies, with a further barrier put up by the Coalition’s ideological ‘anti-quango stance’.⁶⁸ A reminder of the value of the ‘ecosystem services’ which the environment provides the UK (and which an ERC would help to protect),⁶⁹ and the intangible benefits of promoting a richer participatory democracy through protecting and supporting environmental rights might serve as a useful counter-argument.

b. Anti-Democratic

The creation of an inaccessible, omnipotent, unelected body with coercive and regulatory powers could be considered antithetical to democracy. It would be tragic if a



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body designed to enhance democracy was in fact to constrict it. Designing an ERC with mechanisms which ensure accountability, transparency and accessibility to the public would be essential to ensure that the ERC could complement democracy in the UK.

c. Burdening Public Authorities

Creating an ERC could detract from the ability of public authorities to carry out their proper duties; with the need to defend litigation creating wider societal costs. However, an ERC does not necessarily need to adopt an oppositionist, litigious stance; and might even have the paradoxical effect of reducing avoidable litigation for public authorities by seeking best practice in dispute resolution and becoming an experienced 'repeat player' in environmental disputes. Inevitable financial constraints mean that an ERC would have to take a strategic approach and only involve itself in cases of considerable environmental importance in which there would be a significant chance of success. Opposition to the creation of an ERC on the basis that creating an ERC could 'open the floodgates' to volumes of environmental cases which swamps public authorities are unlikely to be realised.

4. Conclusion

This article has discussed the creation of an Environmental Rights Commission in the UK. It has analysed four bodies from different jurisdictions which fulfil a similar role to that suggested for the ERC. The debate would benefit from more extensive research to cover a wider range of comparative institutions in other jurisdictions;⁷⁰ particularly with regards to the multitude of 'national human rights institutions'⁷¹ and public interest environmental law organisations which exist worldwide.⁷²

Obtaining sufficient funding presents the biggest challenge for ERC-type bodies. Difficulties also exist in ensuring the coexistence of accountability and independence, establishing which functions an ERC-type body should have, and there is a need to provide a body with 'teeth' so that it can bite when its bark fails to be heard. The arguments against creating an ERC are not insurmountable; an ERC is unlikely to create a burden on public authorities and could enhance democracy by promoting and protecting environmental rights. Convincing decision-makers that the set-up and operational costs are justified in the era of austerity will present a significant challenge.

The case for the UK to create an ERC is a strong one. A well designed ERC could help to embed sustainability and environmental rights within the UK, develop UK environmental law, support the implementation of the Aarhus Convention and provide a respected voice for the environment. In the context of short-sighted calls for cutting environmental 'red tape' to promote economic growth; the need for credible, authoritative champions of environmental rights has become paramount. The ERC is a concept in its infancy, but it has great potential and requires further research and a concerted effort by its advocates to see it come to fruition.⁷³

Contributions

Footnotes

- 1 'Environmental rights' is used in this article in a broad sense which encompasses both 'procedural' environmental rights (e.g. access to environmental information, public participation in environmental decision-making, access to justice) and 'substantive' environmental rights such as the right to a, "healthy and sustainable environment", proposed by the Joint Committee on Human Rights, *A Bill of Rights for the UK?*, (2007-08, HL 165, HC 150), para 43. See also O Pedersen, *'A bill of rights, environmental rights and the UK constitution'* (2011) Public Law 577 and T Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005).
- 2 'Green Party leader proposes creation of a new environmental rights watchdog', available at <http://www.greenparty.org.uk/news/caroline-lucas-environmental-rights-commission.html> (accessed 18/04/2013).
- 3 The institutions chosen have been selected on the basis of availability of information about the institutions and similarity to the ERC discussed above: independent organisations which are able to provide affordable legal advice on environmental rights, advance test-case litigation which supports and develops environmental rights and sustainability, and to promote a sustainability perspective in law and policy development.
- 4 D Robinson, 'The Environmental Defender's Office NSW, 1985-1995', (1996) *Environmental and Planning Law Journal* 155, p155-156.
- 5 D Robinson, *ibid*, p158.
- 6 See <http://www.edo.org.au/aboutus.html> (accessed 18/04/2013).
- 7 E.g. see the EDO of North Queensland's lengthy criteria which are considered when deciding whether to afford legal assistance to a case, available at <http://www.edo.org.au/edonq/website/general/casework-guidelines.html> (accessed 18/04/2013).
- 8 The 'Nathan Dam' case saw the Full Federal Court declare that all of the adverse influences or effects of the proposed action, whether direct or indirect, including the impacts of third parties, were to be taken into account under federal EIA legislation. *Minister for the Environment and Heritage v QCC* (2004) 139 FCR 2.
- 9 In the *Humane Society International Inc. v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, the EDO of NSW had an injunction granted preventing a Japanese whaling company operating in the Australian Whale Sanctuary.
- 10 Such as forcing the NSW Forestry Commission to carry out environmental impact assessments in respect of its forestry and logging operations, in *Jararius v Forestry Commission of NSW (No. 1)* 1988 71 LGRA 79.
- 11 G Bates, *Environmental Law in Australia* (6th Edition, 2006 LexisNexis Butterworths) p15.
- 12 C McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest', (2008) 25 *Environmental and Planning Law Journal* 324, p356.
- 13 Environmental Defender's Office NSW, *Environment and the Law* (North Ryde, NSW, 1992).
- 14 See <http://www.edo.org.au/edonsw/site/education.php> (accessed 18/04/2013).
- 15 The EDO network policy submissions (available at <http://www.edo.org.au/policy/policy.html> – accessed 18/04/2013) show sixteen submissions made by the network during 2012.
- 16 D Robinson, *op cit*; J Giddings and M Noone 'Local, Regional or Super? Australian Community Legal Centres in the Purchaser-Provider Age', presentation at the International Legal Aid Group Conference in Harvard, USA (20/06/2003) and G Bates, *op cit*, p15.
- 17 Part III, 'The Environmental Commissioner' (ss49-60) sets out the OEC's role and powers.
- 18 M Winfield, 'A Political and Legal Analysis of Ontario's Environmental Bill of Rights', (1998) 47 *University of New Brunswick Law Journal* 325.
- 19 Task Force on the Ontario Environmental Bill of Rights, *Report of the Task Force on the Ontario Environmental Bill of Rights*, (Ministry of the Environment, Toronto, 1992), p68.
- 20 Environmental Commissioner of Ontario, 'Independence, Accountability and Transparency: The Role of the Environmental Commissioner of Ontario', Paper for Public Participation and the Environment Five Years of the Environmental Bill of Rights in Ontario (15/02/99).
- 21 E Hughes and D Iyalomhe, 'Substantive Environmental Rights in Canada', (1998-99) 30 *Ottawa Law Review* 229.
- 22 *Ibid*.
- 23 J Castrilli, 'Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences', (1998) 9 *Villanova Environmental Law Journal* 349.
- 24 D Pond, 'The Role of Parliamentary Officers: a Case Study of two Officers', (2010) *Canadian Parliamentary Review* 19.

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- 25 Environmental Commissioner of Ontario, 'The Role of the Environmental Commissioner in Public Education: Accomplishments and Challenges', Paper for Public Participation and the Environment Five Years of the Environmental Bill of Rights in Ontario (15/02/1999).
- 26 OECD, *Environmental Policies in New Zealand* (OECD, 1981).
- 27 Public funding for the PCE for 2010/2011 was NZ\$2,741,000. PCE, 'Annual Report for the Year ended 30/06/2011', (PCE, 2011).
- 28 Ss 4-27.
- 29 T Buhrs, 'Barking up Which Trees? The Role of New Zealand's Environmental Watchdog', (1996) 48(1) *Political Science* 1.
- 30 K Bosselmann, 'The Environmental Commissioner – A Guardian of the Environment', in G Hawke (ed.), *Guardians for the Environment* (Institute of Policy Studies, 1997).
- 31 S Allen, 'Environmental Commissioners as Ombudsmen: A Successful Role', in G Hawke, *op cit*.
- 32 PCE, 'The First Ten Years', (PCE, 1997).
- 33 T Buhrs, *op cit*.
- 34 T Buhrs, *op cit*.
- 35 K Bosselmann, *op cit*.
- 36 Ss 1-43.
- 37 The Commission for Racial Equality, Equal Opportunities Commission and the Disability Rights Commission respectively. During 2011/2012 it employed almost four hundred people with an annual budget of approximately £42 million. EHRC, 'Annual Report and Accounts 1 April 2011-31 March 2012', (EHRC, 2012).
- 38 The outgoing chairman of the Disability Rights Commission, Bert Massie, cautioned that, "the track record of those others in letting disabled people just get along together is really not that great", in his talk, 'The CEHR: New Beginning Or Dead End?', given at Northampton University, 16/10/2006.
- 39 C O'Conneide, 'The Commission for Equality and Human Rights: a new institution for new and uncertain times', (2007) *Industrial Law Journal* 141.
- 40 O'Conneide, *ibid*, p153.
- 41 Equality Act 2006, ss 13-30.
- 42 T Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent', (2006) 13 *Maastricht Journal of European and Comparative Law* 311.
- 43 B Niven, 'The EHRC: Transformational, Progressively Incremental or a Disappointment?', (2008) 79(1) *The Political Quarterly* 17, p18.
- 44 *Equality and Human Rights Commission v Griffin and others* [2010] *EqLR* 42.
- 45 EHRC, 'Stop and think: A critical review of the use of stop and search powers in England and Wales' (EHRC, 2010).
- 46 S Cemlyn *et al*, 'Inequalities experienced by Gypsy and Traveller communities: A review' (EHRC, 2009).
- 47 EHRC, 'Two Years Making Changes', (EHRC, 2009), p4.
- 48 D O'Dempsey, 'What has been the impact of EHRC enforcement activities in advancing domestic equality and human rights frameworks?' 17/02/2012, p18. Available at http://www.sas.ac.uk/sites/default/files/files/hrc/Declan%20O'Dempsey_Working%20Paper.pdf (accessed 18/04/2013).
- 49 Joint Committee on Human Rights, *Equality Bill*, (2004–05, HL 98, HC 497), para 29.
- 50 C Harvey and S Spencer, 'Equality and Human Rights Commissions in the UK and Ireland: Challenges and Opportunities Compared', November 2011, available at http://www.edf.org.uk/blog/wp-content/uploads/2011/11/Harvey-and-Spencer_Equality-and-Human-Rights-Commissions-UK-Ireland-2011.pdf (accessed 18/04/2013).
- 51 Joint Committee on Human Rights, *Equality and Human Rights Commission*, (2009–10, HL 72, HC 183) para 25.
- 52 The National Audit Office qualified its audit opinions on the EHRC's accounts for 3 successive years, 2007-08, 2008-09 and 2009-10. E.g. see National Audit Office, 'Report of the Comptroller and Auditor General on the 2008-09 accounts of the Equality and Human Rights Commission', (NAO, 2010).
- 53 N O'Brien, 'EHRC – Challenges And Opportunities, Impact Of Enforcement Activities: Lion Tamer Or Fly Swatter?', 17/02/2012, p2. Available at http://www.sas.ac.uk/sites/default/files/files/hrc/Nick%20O'Brien_Working%20Paper.pdf (accessed 18/04/2013).
- 54 See L C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff, 2004), Chs 1 & 2 for discussion of the ombudsman institution.

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- 55 Bosselmann *et al* note that, "Representative democracy creates 'politicians', a type of decision-makers whose jobs depend on meeting the immediate needs of voters. . . There is little to be gained from meeting less immediate needs, let alone the needs of future generations. Short-term achievements can be rewarded with re-election, long-term aspirations won't be rewarded. In this sense, unsustainable decisions are a key characteristic of representative democracy", in *Governance for Sustainability: Issues, Challenges, Successes* (IUCN, 2008) p15.
- 56 K Morrow, 'Of Babies and Bathwater', (2010) *Environmental Law Review*, 179, p179-180.
- 57 Environmental Audit Committee, *Embedding sustainable development across Government, after the Secretary of State's announcement on the future of the Sustainable Development Commission*, (HC 2010-11, 534-I), paras 34 and 64.
- 58 L Kramer, 'The Open Society, Its Lawyers and Its Environment', (1989) 1 *Journal of Environmental Law* 1, p9.
- 59 K Bosselmann, *op cit*.
- 60 E Dixon, 'An ERC for the UK', talk given at the PIEL UK conference in London (16/03/2012). The impact of the EOC in developing women's rights is also documented in C. Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission' in J. Shaw and G. More, *New Legal Dynamics of European Union* (Oxford: Clarendon, 1995); and C Harlow and R Rawlings, *Pressure Through Law* (Routledge, 1992), p285-286.
- 61 Natural Environment and Rural Communities Act 2006, S40 (applies to E&W); Nature Conservation (Scotland) Act 2004, S1; Wildlife and Natural Environment Act (Northern Ireland) 2011, S1.
- 62 J Keane, *The Life and Death of Democracy* (Simon and Schuster, 2009).
- 63 UNECE Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters 1998, article 9(4).
- 64 Aarhus Convention, article 9(4). See the findings of the Aarhus Convention's Compliance Committee on communication 2008-33, para 141. Available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf> (accessed 18/04/2013). Changes have since been made to the costs rules in England and Wales. Practice Direction 45 now prescribes that challengers in Aarhus-type cases may not be ordered to pay more than certain prescribed amounts if they are unsuccessful (£5,000 for individuals and £10,000 for groups). Similar rules have been announced in Scotland (Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81)) and NI (The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (S.R 2013/81)). Whilst these new rules will do much to improve access to justice, doubts remain as to whether the £5,000 cap on adverse costs orders meets the requirement that procedures are not 'prohibitively expensive', particularly for low-income citizens. Recently announced proposals to restrict access to judicial review in England and Wales may cause further harm to the access to justice outlook (see UK Ministry of Justice, 'Reform of Judicial Review: the Government response' (UK MOJ, 2013)).
- 65 M Day *et al*, 'An Environmental Court: Part 2', (2001) 151 *New Law Journal* 672; Working Group on Access to Environmental Justice, 'Ensuring Access to Environmental Justice in England and Wales' (WWF-UK, 2008); R Stech *et al*, 'Cost Barriers to Environmental Justice', (Environmental Law Foundation, 2009); M Church, 'Tipping the Scales: Complying With the Aarhus Convention on Access to Environmental Justice', (Friends of the Earth Scotland, 2011).
- 66 E Dixon, *op cit*.
- 67 See M Adebowale, *Using the Law: Access to Environmental Justice, Barriers and Opportunities* (Capacity Global, 2004), p49-51. It is also notable that one of the main charities providing advice in this area, the UK Environmental Law Foundation, has recently closed due to funding cuts.
- 68 See Coalition Government, 'The Coalition: our programme for government' (2010), p16.
- 69 UK National Ecosystem Assessment, 'The UK National Ecosystem Assessment: Synthesis of the Key Findings' (UNEP-WCMC, 2011).
- 70 Other possibilities for study include the Canadian Sustainable Development Commissioner, the Hungarian Parliamentary Commissioner for Future Generations, the Israeli Commission for Future Generations (now disbanded), the Finnish Future Parliamentary Committee, and the Bolivian Defensor de la Pacha Mama. See World Future Council, 'Future Generations in Constitutions and Institutions', available at http://www.worldfuturecouncil.org/fileadmin/user_upload/Future_Justice/Database_-_countries_-_2.1.pdf (accessed 18/04/2013).

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- 71 See European Union Agency for Fundamental Rights, 'National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU I' (European Union Agency for Fundamental Rights, 2010) and Office of the United Nations High Commissioner for Human Rights, 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (Office of the United Nations High Commissioner for Human Rights, 2010). The UN's 'Paris Principles', a set of criteria providing minimum standards for national human rights institutions, could also be instructive in designing an ERC. See 'National institutions for the promotion and protection of human rights', UN General Assembly Resolution 48/134 (1994).
- 72 E.g. Client Earth and the Natural Resources Defence Council.
- 73 Many thanks to Geraint Ellis, Amanda Kramer, Emma Dixon and Sharon Turner for their thoughtful comments and support with this article.

Working Party News

The Working Party star member for April to June is Nicola French, the Technical Director for Terence O'Rourke. She was nominated for her dedication to attending the Nature Conservation Working Party's meetings as an active contributor. The convenor, Wyn Jones, says: She has only missed one of our meetings in recent years, travelling from Hampshire to Nottingham and back again on Saturdays. She even managed to travel through the snow and ice to attend our meeting in January. Such commitment and enthusiasm needs to be recognised!"



Nicola specialises in advising in relation to the Habitats Regulations, assessing the implications for major developments across all sectors, and drawing on extensive experience of HRA and appropriate assessment. Nicola is experienced in resolving planning and ecological issues and building constructive working relationships between developers, regulators and NGOs. Nicola is a committed member of the Nature Conservation Working Party, which provides a rich and valuable forum for the discussion and dissemination of evolving practice, on-going initiatives and out-of-the box thinking.

Nicola says: "Whilst I am flattered to have been nominated, the value, effectiveness and success of this group stems from the enthusiasm and team work of a number of core individuals and I would be very reluctant to accept this award without acknowledging their very real commitment to the group. My contribution is nothing without theirs!"

The Water Working Party has a new co- convenor, Eluned Watson. She will act as convenor alongside Cate Davey and Nina Pindham. Eluned is an Associate at Pinsent Masons specialising in all aspects of UK and EU environmental law. She advises across a wide range of sectors including development and regeneration; waste and water; energy; and regulatory. She provides full environmental support to corporate and property clients on high value transactions and advises on contaminated land legislation. Eluned holds an MSc from the University of Oxford in Environmental Change and Management.



The working parties have had a busy period working on responses to consultations. The Wales Working Party responded in March to the Welsh Government consultation on the Sustainable Development Bill White Paper. The Waste Working Party responded in April to Defra's consultation on a package of amendments to the Environmental Permitting Regulations (with contributions from the Wales Working Party and Environmental Litigation Working Party). The working parties collaborated on a response to the BIS consultation on a 'growth duty' for regulators, which raises questions about how it would mesh with current environmental legislation, sustainable development duties and policies, proposals for a sustainable development duty in Wales, and the proposed 'sustainable economic growth' duty in Scotland.

Ongoing influencing work includes preparing responses to the Sentencing Council's proposed guidelines for sentencing environmental cases (Environmental Litigation Working Party are leading, and working jointly with the Health and Safety Lawyers Association); and to the Law Commission consultation on conservation covenants (Nature Conservation working party).

The working parties will be holding sessions on a wide range of issues at the summer Cambridge conference: details [here](#).

All working party events are now appearing on the Events page of www.ukela.org. Please check here for their activities and also to avoid organising clashing meetings if you are planning something. Details of all the convenors are on the working party pages.

Book reviews

Burnett-Hall On Environmental Law

General Editors: Richard Burnett-Hall and Brian Jones
Sweet & Maxwell 978-0-414-04807-2 £250

This is a book which will be of enormous interest and of use to those practising in this field providing a critical analysis of the law and procedure, clarifying areas of uncertainty and (hopefully) saving research time for practitioners. It is also a book to draw to the attention of colleagues who are not environmental lawyers, as contributing authors have considered all the important issues surrounding environmental law and explained them fully, and will I am sure leave any reader feeling confident that they have a sound knowledge of the subject!

It provides a most comprehensive analysis of all the principal areas of environmental law which practitioners are likely to come across on a day to day basis covering everything from climate change, EIA and nature conservation, to water, IPPC and air, waste, contaminated land, statutory nuisance and noise, to chemicals, GMOs and nuclear.

I was interested to see that this edition has been expanded to include useful chapters on marine protection (dealing with the newly extended legislation on marine conservation, in particular marine protection zones), and environmental marketing (covering “green” advertising, eco-labelling, eco-design and information labelling).

The book commences with a comprehensive review of the sources of environmental law, including human rights, international and EU law and leaves the reader with a clear understanding of both the EU and domestic framework within which parties operate.

Coverage of the EU chemicals regime under REACH, the Plant Protection Products Regulation, and the proposed EU Biocidal Products Regulation has been expanded.

For me the most useful thing about Burnett-Hall on Environmental Law is that it explains and analyses the relevant law and procedure, and puts environmental issues into a commercial context. It looks at issues from several directions and considers likely prospects of success, e.g. (taking examples at random) of suing a flood risk management or coastal protection authority; or a local planning authority for granting planning permission for negligently granting planning permission for a development likely to flood.

For regulatory lawyers with or without a background in environmental law it provides a detailed examination of issues relating to public accountability, access to information and explains who's who in environmental regulation and their enforcement powers; including prosecution and sentencing for environmental damage. It will also assist practitioners in advising clients in regards to breach of civil liabilities and potential damages claims.

For those practising in commercial and property law it offers detailed guidance on the need for environmental awareness in commercial transactions and in ensuring breaches of environmental legislation do not occur. If all else fails there is always the question of whether environmental insurance is available to cover risks identified in a transaction; or in existence to provide an insured with cover in the event of a pollution incident; and this is explained in the penultimate chapter.

I am sure I am not alone in welcoming the Third Edition of Burnett-Hall on Environmental Law.

Review by Catherine Davey



Book reviews

Feral

George Monbiot
Allen Lane £20

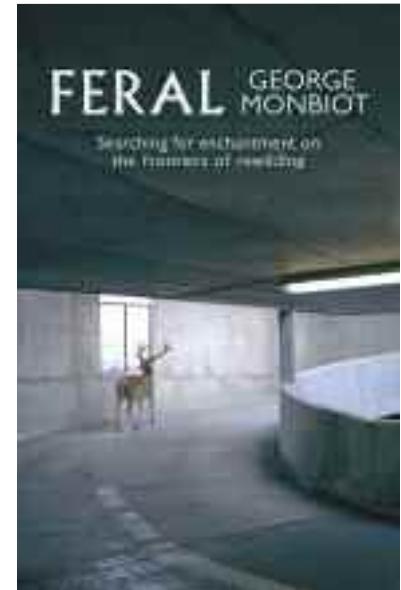
Feral is the gripping and very personal story of George Monbiot's efforts to re-engage with nature and discover a new way of living. He argues that, by restoring and rewilding our damaged ecosystems on land and at sea, we can bring 'wonder' back into our lives.

Making use of some fascinating scientific discoveries, Feral offers a vision of a new, positive environmentalism, in which we resist the urge to control nature and in which nature is allowed to find its own way. The rewilding Monbiot envisages *'has nothing to do with shredding civilisation'*. We can he believes, *'enjoy the benefits of advanced technology while also enjoying, if we choose, a life richer in adventure and surprise'*.

From the seas off north Wales, where he kayaks among dolphins and seabirds, to the forests of Eastern Europe, where lynx stalk and packs of wolves roam, George Monbiot argues that rewilding could repair the living planet, creating ecosystems in post-industrial nations *'even in such depleted regions as Britain and northern Europe, as profuse and captivating as those that people now travel halfway around the world to see'*. Already, large wild animals are beginning to spread back across Europe, and fin whales, humpback whales and bluefin tuna are returning to the seas around Britain.

Feral is a bewitching vision that argues for a mass restoration of the natural world – and issues a powerful call for humankind to reclaim our own place in it. Fortunately I started reading it one rainy Sunday morning- it is a very engrossing read.

Review by Catherine Davey



UKELA Events

London meeting on Environmental Damage Compensation: Legal, Technical and Insurance Perspectives 22 May

Herbert Smith Freehills, London (near Liverpool Street) 6pm

It has long been recognised that the act of a polluter paying fines for environmental pollution does not adequately recompense the loss of ecosystems, habitats and species. Environmental law has evolved to meet the demand for alternatives to fines and the insurance and technical approaches have adapted to meet the demand for better solutions. The application of an ecosystem services approach to dealing with environmental damage (e.g. under the European Environmental Liabilities Directive, and Civil Sanctions Act 2008 in the UK) allows for flexibility in determination of how environmental damage and pollution can be remedied. What remains a developing area is how remedial options are identified, quantified and implemented.

This event will:

- Sum up the legal framework and mechanisms available to polluters in respect of compensation payments
- Examine the ways that damage can be measured and valued in respect of ecosystem services loss, in order that actions of equivalent or greater ecosystem services gain can be implemented or recompensed through monetary means
- Consider the insurer's perspective in responding to pollution incidents and addressing insured risks.

Speakers:

Simon Tilling – Senior Associate, Burges Salmon

Julien Combeau – Executive Director, Willis

Clive Walker – Project Director, Willis

Nicola Eury – Principal, ENVIRON

[More information here](#)

West Midland regional group breakfast meeting: Shale Gas 22 May

Start Time: 7.45 am for 8am

The Seminar will cover the following topics:

- A basic introduction to Shale Gas production
- Shale Gas in the UK
- The international prospective

Speakers: Ed Hough from *British Geological Society* and Kieran Dwyer from *Wragge & Co*

[More information here](#)

Wildlife, Wilderness and Wild Law in Scotland – 24-27 May

This event is now fully booked.



Climate Change and Energy Working Party meeting: Better Regulation 12 June

The Better Regulation team at DECC have kindly agreed to come and talk to the CCEWP about what they are doing on energy and climate change regulation including the CRC simplification.

The session will also include an open forum for those who have experienced practical problems with any energy/climate change regulations or who have views on how they could be improved. Getting an insider's view of how the outcomes of last year's Red Tape Challenge are being implemented will be especially helpful for those advising clients on how things are changing. In addition, the opportunity to input into how changes are to be made will, no doubt, also be a welcome opportunity.

[To book please contact the convenors.](#)

Moot Semi-finals and finals – 18 June

The moot semi-finals and finals will be held before Lord Carnwath, UKELA's President. Semi-finalists will be invited to arrive by 2pm for their competition. This will be judged by the moot sponsor, No5 Chambers, and a leading Environmental Law academic. There will be a short break before the finals, which will start at 5pm (please note earlier times). The Andrew Lees essay winner will also have the option of presenting their paper so it will be an interesting evening, whether or not you're a mooter. Drinks and nibbles to follow. If you want to learn more about Environmental Law or mooting, or want to support the mooters, do come along.

[More information here](#)

Gweithgor UKELA ar gyfer Cymru (UKELA Wales Working Party) Fracking Seminar – 19 June

Hugh James Solicitors, Cardiff, registration at 4.30 for a 5pm start.

Speakers:

James Taylor; Simmons and Simmons

Rob Jeffries; Environ

Prof Alan Riley; City University

The seminar aims to include the relevant legal issues in the UK, the technical aspects and limitations of hydraulic fracturing (particularly as it pertains to Wales) and the experience and impact that fracking has had in the States and the implications for the UK.

[Book here](#)

UKELA Events

London meeting on Nanotechnology – 24 June

UKELA members are cordially invited to this early evening session at Herbert Smith Freehills where the subject will be Nanotechnology. It will look at:

An introduction to nanotechnology, nanoparticles and nanomaterials, their potential uses, are they the great promise for the future?

Nanomaterials / nanoparticles as waste, water and soil clean-up tools, and the nanocomposite approach

Benefits and limitations of a nano-approach to pollution abatement, and towards practical application

Nano-materials in the environment – the case for regulation

Regulation in the face of contingency – the approach thus far

What can we learn from nano-technology: The wider case for responsible research and innovation

[More information here](#)

25th anniversary conference: The next 25 years: what does the future hold for Environmental Law? 12-14 July

As the UK Environmental Law Association celebrates 25 years, the anniversary conference at Cambridge University looks forward to ask where Environmental Law is going? UKELA is very grateful to its main sponsors, Exponent, Landmark Chambers and Thirty Nine Essex St Chambers. The focus of the conference will be international with speakers from Europe and further afield, and practical, with sessions aimed at practitioners who need to know what will influence their work in future. The gala dinner will be extra special – in the beautiful surroundings of King's College. We are also planning some great field visits. The conference is nearing capacity so we do encourage you to book soon if you want to secure your place.

[More information here](#)



Non UKELA Events

Environmental Law – Master of Laws by Distance Learning

This flexible distance learning course is for professionals looking to expand their knowledge of environmental law and to further their career. Study while you work and tailor the course to suit your job role and industry by choosing your own unique combination of modules.

[Start improving your future today...](#)

Brownfield Briefing Conferences

15% discount for UKELA members at these events (quote UKELA15)

Site Investigation 2013 – London, 13 June

The revised statutory guidance for Part 2A has presented significant challenges to local authorities, consultants and contractors in interpreting new regulations, including the identification of Categories 2 and 3, plus the development of new Category 4 screening levels. **Site Investigation 2013** will open with an assessment of how this has been dealt with in the revision's first year. Plus the programme will cover risk assessment in the new regulatory climate, research developments in asbestos, case studies on advances in in-situ techniques and advice on enhancing Conceptual Site Models.

[Click here](#) for the in-depth programme, the full speaker line-up and to register – to claim your 15% discount please quote UKELA15.

Environmental Insurance Claims – London, 27 June

The area of environmental claims is shrouded in secrecy, but this forthcoming conference from Brownfield Briefing and insurance broker OAMPS will lid answering many pressing questions including:

- How do lawyers defend against statutory pollution claims?
- How do consultants defend themselves against PI claims?
- What about operational claims under the Environmental Damage Regulations, and what is going on in the world of flooding claims?
- What are the trends in terms of actions, prosecutions or civil sanctions? How do you cover against contamination and reputational risks?

[Click here](#)

Update on Part 2A – London, 2 July

By attending Update on Part 2A you'll have the opportunity to hear – in one place, in one day – everything you need to get to grips with the new guidance and implement it effectively. The conference will bring together many of the key players involved in the implementation and further clarification of the new guidance, including members of the Government-appointed expert panel. The keynote address "Update on Part 2A – examining how the industry has responded to the changes and next steps forward" will be given by Dr Morwenna Carrington, Soil Framework Directive and Contaminated Land, DEFRA.

[Click here](#)



Non UKELA Events

Renewables on Brownfield – Nottingham, 10 July

Renewables on Brownfield will include a legal update on the latest developments in renewables and alternative brownfield development including:

- Assessing the impact of the National Planning Policy Framework (NPPF) and planning support for renewables
- Examining legal challenges against development
- Outlining changes to the Green Deal, Renewables Obligation and Renewable Heat Incentive and their implications
- Exploring future legal changes and challenges to renewables development

It will also cover innovative strategies & new technologies for developing brownfield & on-site renewables to maximise the value of land and property assets.

[Click here](#)

Castle Debates

(early morning seminars free of charge at the Law Society)

Wind Power 22 May

At the beginning of March 2012 the installed capacity of wind power in the UK, both offshore and onshore, was 333 operational windfarms and 3506 wind turbines, with the UK being ranked as the world's eighth largest producer of windpower. Obtaining planning permission for onshore wind farms however continues to prove difficult. 1.5 CPD points

Speakers

Issues: David Milborrow, Renewable Energy Consultant

Law and regulation: Marcus Trinick, Partner, Eversheds

Policy: Olivia Knibbs, Head of Independent Renewable Generation, DECC

[More information here](#)

Population Growth 18 June

There is scientific consensus that the current increase in world population (estimated to reach 9 billion by 2050) threatens the global ecosystem and the availability of resources including energy, food and water.

Historically, population control has been implemented, often controversially, by limiting the birth rate by voluntary contraception or government mandate.

Speakers

Issues: Sir Crispin Tickell GCMG KCVO

Law and Policy: Roger Martin, Chair, Population Matters

[More information here](#)



Non UKELA Events

Information and Communications Technology for Environmental Regulation: Developing a Research Agenda Workshop, National University of Ireland Galway, 20 – 21 June

Keynote Speaker: Professor Bradley C. Karkkainen, University of Minnesota School of Law

As society considers how to alter individual, social and economic choices in order to better deal with the challenges of climate change, loss of biodiversity and environmental pollution, the continuing refinement of more effective means of environmental regulation requires urgent attention. Information and communications technology (ICT) can play an important role in this process. While there is some research on how ICT can be used for environmental regulation, we have not yet developed a full understanding of the issues.

The aim of this workshop is to build a network of researchers dealing with these issues in order to prepare joint projects, funding applications and work towards an international conference dealing with this topic.

Papers are invited from scholars and practitioners across all disciplines for a workshop on the application of information and communications technology for environmental regulation. Abstracts (maximum 500 words) to be submitted by Friday 15 March 2013. [More information here.](#)

Enquiries to: ronan.m.kennedy@nuigalway.ie or to Rónán Kennedy at +353-91-495626.

Fresh approaches to tackling climate change 29-30 June

St Lawrence's Parish Room, Colebrook Street, Winchester Hampshire, SO23 9LH.

Environmental activists and anyone with an interest in environmental law are cordially invited to a weekend seminar organised by FEASTA (The Foundation for the Economics of Sustainability) and WinACC (Winchester Action on Climate Change). The seminar will consider fresh approaches to tackling climate change and how they might be put into action. It will appeal to those who like to hear alternative perspectives, challenge conventional thinking, and explore ideas through discussion with others. Leading experts will be participating. Saturday's workshop (10.00 – 17.00) questions: "How might the courts be used to tackle climate change?" and on Sunday (10.00 – 17.00): "Which other societal or economic approaches could be fruitful?"

The workshops are free to attend. If required accommodation for any or all of the three nights Friday 28 to Sunday 30 is available at the University of Winchester. Standard Accommodation – £31.50 per person per night. Please email david.knight77@ntlworld.com before 25 of May to reserve your place at this meeting and to obtain further information, or visit [here](#).



UK Environmental Law Association

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For information about working parties and events, including copies of all recent submissions contact: UKELA, PO Box 487, Dorking, Surrey RH4 9BH or visit www.ukela.org

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The editorial team wants articles, news and views from you for the next edition due to go out in July 2013. All contributions should be dispatched to Catherine Davey as soon as possible by email at: catherine.davey@stevens-bolton.com by 12th July 2013

Letters to the editor will be published, space permitting

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