



e-law

Better law for the environment

September/October 2017 | Issue 102



Welcome to the September/October edition of elaw.

Twelve months have passed since I last wrote my editorial for elaw. Since then, I have gained another son, lost about 6 months' worth of sleep, and moved out of London. As much as I have needed, enjoyed, and appreciated this time, I am looking forward to returning to work and getting re-engaged with UKELA.

Firstly, I would like to thank Simone Davidson for doing a superb job as Acting Editor during my maternity leave. I am truly grateful for her time and commitment and I know that UKELA also appreciates Simone's hard work and looks forward to continuing to work with her on future projects.

A huge thank you as well to the ongoing work of the Assistant Editors Ben Christman, Jessica Allen and Lewis Hadler. Your work really makes an enormous difference to the editor's workload and to the quality of the journal. I look forward to working with you again in the coming editions.

It has been six months' since the government triggered Article 50, and one year since Stephen Sykes established UKELA's Brexit Task Force (BTF). So, it seems an appropriate time to dedicate another edition to this important topic.

The BTF has done an enormous amount of work in this time. It has published five reports and factsheets on Brexit and Environmental Law (with more to come), organised a series of events and submitted evidence to several Parliamentary Committee Inquiries. In this edition, Joe Newbigin, Barrister and Brexit Researcher for the BTF, updates us on progress since the BTF's inception, and highlights the recognition it has received through press coverage of events and reports, including by the Guardian, legal publishers and industry press. See [Brexit Task Force Update](#).

The European Union (Withdrawal) Bill 2017-19 (Bill) received its first reading on 13 July 2017. After two days of extensive debate it passed its second reading on 11 September 2017. The Bill provides for the repeal of the European Communities Act 1972, and aims to save the body of existing EU law into UK law, referred to as 'retained EU law'. Undoubtedly a bill with such momentous objectives is under enormous scrutiny, and amongst other issues, critics have raised serious concerns about the proposed use of delegated legislative powers and the approach to devolution.

In relation to the latter, Colin Reid in his article [Who's in charge here?](#) discusses the complexities of Brexit in a devolved administration. Where are powers returned from Brussels to sit within devolved structures?

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Should they be returned to Westminster? Should they be devolved? Colin highlights the constitutional differences between the devolved administrations, and outlines various models for collaborative environmental governance under existing devolution legislation.

In her article, [The European Union \(Withdrawal\) Bill, environmental accountability and governance](#) Maria Lee considers the meaning of 'retained EU law' and outlines the relationship between the Withdrawal Bill and the environmental governance frameworks provided by EU environmental law. In particular, Maria argues that as currently drafted, the Bill largely neglects environmental governance and will not save all existing environmental law into UK law after Brexit.

Finally, we also have some very interesting articles on Matters in Practice, both of which encourage UKELA members to get involved.

In [Planning – going back to first principles](#), the Rt Hon. Nick Raynsford outlines the current state of planning law in the UK and explains the aims and objectives of the Raynsford Review of Planning. The Raynsford Review task force is actively seeking input from practitioners on the review, so please do read his article for more information.

In [Lawyers supporting climate legislation in developing countries](#), Pascale Bird explains the crucial work of Legal Response International (LRI) in providing advice to climate vulnerable developing countries in the UN climate change negotiations. The article sets out the background and model of the LRI, highlights some of the fascinating work it has been involved with, and puts out a call for anyone interested in joining the network.

Best wishes,



Hayley Tam
UKELA Trustee & e-law Editor

E-law editorial team

Hayley Tam, Editor – Hayley is Head of Environment at LexisPSL having previously worked in both the private and public sector at the Environment Agency, Allen & Overy, Stephenson Harwood and Ashurst Australia. She is qualified as an environmental lawyer in Australia, England and Wales.

Jessica Allen, Assistant Editor – Jessica is a postgraduate student pursuing the Bachelor of Civil Law at the University of Oxford, having recently finished her term as Vice President for Academic Activities of ELSA United Kingdom. She graduated with honours in Law with French and French Law at the University of Nottingham in 2017.

Ben Christman, Assistant Editor – Ben is a final year PhD candidate in the School of Law at Queen's University Belfast.

Lewis Hadler, Assistant Editor – Lewis currently studies the BPTC at the University of the West of England, having previously worked as a paralegal with Richard Buxton Environmental & Public law. He graduated in 2015 after completing his LLB at Anglia Ruskin University Cambridge.

Words from the Chair



Welcome to the September edition of e-law. As summer draws to a close and we head into autumn, there is a lot going on to engage us.

Brexit

It's now six months since Article 50 was triggered, and we are still

no clearer about what Brexit will actually look like. The EU Withdrawal Bill passed its second reading in Parliament this week, handing unprecedented powers to the executive from the legislature, although MPs on both sides of the House have promised to table a number of amendments.

UKELA's Brexit Task Force (BTF) has now published four reports in its *Brexit and Environmental Law* series, which have focussed on technical analysis bringing clarity to the issues around environmental law. A very timely piece of work carried out by the BTF was a report published last week on the need for the use of Henry VIII powers. The careful analysis of predominantly English legislation (which was all that time would permit to allow the report to be published before Parliament reconvened) showed that there were relatively few instances where such powers would be required to ensure smooth transition of our laws on Brexit day. However, the government now has these powers and it remains to be seen how they will use them. Similar analysis is underway for devolved legislation.

UKELA has a very important role in providing independent scrutiny which will primarily be achieved through our working parties. I would strongly encourage you to keep an eye on the [Brexit blog](#), and to contact convenors of working parties that you have specialist knowledge of, or a particular interest in, as we move forward into what is totally uncharted territory.

Events

In other news, autumn is traditionally a busy time for UKELA on the events front and this year is no different. October sees the annual Scottish conference in Edinburgh on Access to Environmental Justice; our sincere thanks go to UKELA Patron Sir Crispin Agnew for organising the event. We also have our half-day conference on Brexit, the Repeal Bill and Environmental Law; which has now sold out.

The North East and East Midlands groups also have events planned for October, followed by a half-day conference organised by the North West group in association with the Society of Legal Scholars on fracking. November also sees a London meeting on

Aarhus, our ever-popular student careers evening, a wildlife law course in Nottingham, a Climate Change and Energy Working Party meeting, and culminates in the Garner Lecture hosted by Freshfields on 29 November. I hope to see many of you there, but as in previous years we will have video conference venues around the country for those who cannot travel to London. Full details can be found on our [website](#).

UKELA's 30th Anniversary

Preparations are also underway for UKELA's 30th anniversary celebrations in 2018. Some special one-off events are being planned to mark the occasion; however, it's not just about looking back. We will be using this opportunity to learn more about what UKELA looks like now and how it has to adapt to keep on thriving and offering relevant services to our members for the next 30 years. UKELA is interested in your ideas on how we should mark the anniversary through events and activities throughout the year. For example, would a working party like to host an event/seminar looking at how environmental law in their area has changed and what it might look like in another 30 years? Is there appetite for fundraising events? Please contact our Executive Director [Linda Farrow](#) with your ideas.

And finally, I am delighted and honoured to announce the appointment of a new UKELA Patron, the Rt Hon Lord Justice Lindblom. Sir Keith Lindblom will be well known to many of you and I am sure you will join me in welcoming him.

The next Council meeting is being held on 8 November. If you would like to raise any issues, please contact [Joe Newbigin](#) for Brexit issues or [Alison Boyd](#) for general issues.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

UKELA News

Annual Conference feedback – thank you!

We are very grateful to those of you who attended this year's annual conference for taking the time to provide valuable feedback – all of your comments have been taken onboard by the planning team for 2018. We are delighted that 98% of you felt that the conference was good value for money and that well over 90% found our speakers useful and informative. We have taken onboard your comments about the accommodation, food and Friday night entertainment, and we will be addressing all the helpful comments made in respect of both the CPD and social programmes going forward.

Thank you also to everyone who took the time to respond to our second survey for those not able to make it to Nottingham this year. We were overwhelmed with responses! Your ideas for location, format, topics and speakers for the next annual conference(s) have given us plenty of food for thought. Our 2018 planning team is already busy building the programme, so do look out for more information coming very soon.

The winners of the bubbly were Angus Evers of Shoosmiths (for conference feedback) and David Short of Lux Nova Partners (for general feedback), as drawn out of a hat by staff. Well done to them – we will be in touch to arrange for you to receive your prize!

UKELA's 30th anniversary next year!

Were you in Cambridge in 2013? For those of you who were around for our 25th anniversary, it must seem incredible that 5 years will have flown by once we enter 2018 and celebrate our 30th birthday. Although this year's conference is barely over, we are already planning how we will celebrate next year. Our Trustee team for 2018, led by Simon Tilling of Burges Salmon, welcome any ideas that you may have to mark our anniversary in appropriate style, either at the 2018 conference or during the year. We'll be talking about this more over the coming months, but please feel free to [get in touch](#) with your thoughts in the meantime. We look forward to hearing from you!

Membership Subscriptions

Our Trustees have agreed that an increase of 4% in annual subscriptions will be implemented across the board from January 2018, with the exception of those on the lowest membership tiers and those paying the international rate. This small increase has been agreed to help with the increasing costs across the organisation. UKELA's subscription rates continue to offer excellent value for money, comparing well with other membership organisations in the sector. Membership benefits continue to be valuable, with reduced entry to our wide range of events including the leading annual conference in the environmental law field. Members also benefit from our members' only area on the website, which gives exclusive access to speaker presentations and up-to-date editions of e-law.

The increase will be reflected in your January renewal. Details are in the table below:

Membership Tier	2017 rate	4% increase
Individual	£71	£74
PB individual/retired	£56	£58
Student/grad/unwaged	£15	No change
International Members	£30	No change
Corporate private co	£420	£436
Corporate statutory body	£158	£164
Corporate local authority	£92	£96
Corporate NGO	£71	£74

Direct debits

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

Gift Aid

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

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

Events Fees

As those of you who regularly attend our numerous events will know, the ticket prices have remained the same for many years now. We have worked hard to keep prices low so as to continue to offer members the best possible value. However, Trustees have agreed that a modest increase is now due to help us cover our increasing costs. You will see these increases reflected in ticket prices for our autumn events programme onward. At the same time, Trustees have agreed to increase the differential between a member ticket and non-member ticket, in recognition of member loyalty. We will continue to offer discounted tickets for those on lower incomes and a limited number of free student places to ensure that our events programme remains accessible to everyone. Our Trustees hope that you will understand why we have implemented these increases and that you will continue to believe, as we do, that our events offer excellent value both in terms of CPD and cost.

New Email for Alison Boyd

Please note that Alison has a new email address. It is alison@ukela.org. Please use this email from now on and remove the previous email from your address books. Many thanks.

Regional News

Our regional groups have some really interesting events lined up for you this autumn! More details for each of these can be found in our events listing later in this edition.

North East

First, the North East group is hosting a seminar on 'Enforcement Undertakings & Sentencing Guidelines' on Thursday 12 October in Leeds.

East Midlands

The East Midlands group is then hosting a talk on 'The legal framework for protecting and improving urban rights of way' on Tuesday 24 October in Nottingham.

North West

Finally, join the North West group as they co-host a conference on 'Fracking, Regulation, Responsibility and Risk' in partnership with the Society of Legal Scholars on Wednesday 1 November at Weightmans in Manchester.

Brexit Conference via Webex

If you can't make it to London for our conference on 'Brexit, the Repeal Bill and the Environment' on Friday 13 October, then you can join a webex link in Manchester – please contact [Simon Colvin](#) for more details.

Students News

Student Adviser Role Offers Career Development

UKELA is offering a student with the right skills and outlook an opportunity to join our student team as a Student Adviser. UKELA typically has two Student Advisers at any one time who work with the support and supervision of our Trustees and staff.

The role of student adviser involves:

- Advising UKELA's Council on how to make our services relevant and accessible to student members throughout their education and professional development
- Working with student contributors on articles for our members' journal, e-law
- Managing student mailings, maintaining mailing lists and social media posts to keep members up to date
- Maintaining the student section on the [website](#)
- Providing practical input on specific initiatives, such as our moot competitions and student bursary scheme

Ideally, the student adviser will attend quarterly Council meetings and be available to discuss ideas with UKELA staff and Trustees responsible for the student programme. The adviser is also expected to attend the annual student careers advice and networking evening (held this year at Francis Taylor Building on 8 November) and the competitions day (typically held in Spring or early Summer). Student Advisers are volunteers and usually benefit from a free place at UKELA's annual conference. All reasonable travel and subsistence costs are refunded.

If you would like to be considered for this two-year role, please send a CV and succinct covering letter addressed to UKELA's Executive Director, Linda Farrow, via [Elly-Mae Gadsby](#).

UKELA's existing Student Advisers, [Mark Davies](#) and [Rosie McLeod](#) would be pleased to have an informal discussion in advance of your application. Telephone interviews will be held with shortlisted candidates at the end of October 2017.

The closing date for applications is **midday on Tuesday 17 October 2017**.

Mark Davies talks of his experience as Student Adviser

"Being one of UKELA's Student Advisers for the past two years has been a brilliant experience.

In my opinion it is far too easy to become blinkered by one's personal experiences when confronting environmental issues; being a Student Adviser has given me the opportunity to work with people who are all passionate about the environment, but whose approach to those issues is from a range of different backgrounds and viewpoints. Seeing, from the inside, the collaborative approach UKELA takes to environmental law and issues has been particularly encouraging in what has been such a politically unstable time.

In addition, acting as a Student Adviser has undoubtedly enhanced by CV, both merely by virtue of the position and by putting me in contact with people whom I would otherwise not have had the opportunity to meet. The Annual Conference, at which as a Student Adviser you receive a free space, is a fantastic event and one which I would encourage anyone to go to, regardless of whether you are a Student Adviser or not.

For these reasons I would thoroughly recommend to anyone who is passionate about environmental law, and engaging students with its development, to apply for the Student Adviser role. It has truly been my pleasure.

If you would like any further details from me as to what the role entails, please do not hesitate to contact me using the email address given in the advert."

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 [Mark Davies](#) or [Rosie McLeod](#), 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 'Flooding', expected to be published in the week commencing 27 November.

UKELA Events

UKELA Scotland Annual Conference: Access to Environmental Justice – 5 October

Join us in Edinburgh for our annual conference on the theme of 'Access to Environmental Justice'. Access to environmental justice is a contemporary issue in Scotland, with renewable energy developments, the possibility of the moratorium on fracking being eased, and new proposals for more infrastructure developments. The conference addresses the impact of environmental decisions on communities and the key issues obstructing members of the public who seek to challenge them, advocating for an environmental court. In addition, the conference programme covers regulation, environmental crime and the changing enforcement landscape, sustainable housing development, the key environmental topics of 2017, and a case law update. The conference is an essential networking opportunity for all those involved in environmental law in Scotland with 6 hours CPD. For more details, please visit the [conference website](#).

North East region seminar on 'Enforcement Undertaking & Sentencing Guidelines' – 12 October

Join us in Leeds for a topical seminar with speakers from the Environment Agency and New Park Court chambers. More details can be found on our [website](#).

UKELA Conference: Brexit, the Repeal Bill and the Environment – 13 October

This event is now sold out, but you can join a webex link in Manchester or Bristol. Please see our Regional Group [news page](#) for more details.

East Midlands region seminar on 'The legal framework for protecting and improving urban rights of way' – 24 October

Tom Huggon will be presenting a seminar on 'the legal framework for protecting and improving urban rights of way'. Tom is a consultant at Browne Jacobson and a leading member of the Nottingham Civic Society. More details can be found on our [website](#).

North West region conference on 'Fracking, Regulation, Responsibility and Risk' – 1 November

Join us at Weightmans in Manchester for this highly topical conference on Fracking organised in partnership with the Society of Legal Scholars. Speakers include experts from the universities of Manchester and Cardiff, Kings Chambers and Cornerstone Barristers. The conference will be opened by UKELA Patron, Bishop James Jones. More details can be found on our [website](#).

London meeting on the Aarhus Convention – 6 November

Chaired by Lord Carnwath, this update on access to justice and the Aarhus Convention is not to be missed! Speakers include James Maurici QC and Charles Banner from Landmark Chambers, as well as Elena Fasoli and Alistair McGlone from the Aarhus Convention Compliance Committee. More details can be found on our please visit our [website](#).

Wildlife Law course – 8 to 10 November

Once again, the Nature Conservation working party has arranged an introductory course on wildlife law this year which is designed for those whose jobs require them to understand the practical impact of the legislation surrounding wildlife. The course will concentrate on enabling participants to make best use of the law on the ground and to avoid the pitfalls that accompany such a technical subject as law. For more details on how to sign up, please visit our [website](#).

Student careers evening – 8 November

Join us for our annual careers evening, once again kindly hosted by Francis Taylor Building in Inner Temple. Meet a wide range of professionals from across the entire field of environmental law in an informal setting. Drinks and light refreshments provided. The event is free to attend, but you must book ahead. More details can be found on our [website](#).

Annual Garner lecture – 29 November

We are delighted that this year's lecture will be given by Julie Hirigoyen, CEO of the UK Green Building Council, and chaired by Maria Adebowale-Schwarte, UKELA Patron. Julie will address "The role of law in ensuring that our built environment protects and enhances our natural environment." Once again kindly hosted by Freshfields Bruckhaus Deringer, bookings are now open. For more details, please visit our [website](#).

UKELA Diary Dates – bookings opening very soon

17 November – Joint conference with Birmingham City University on 'The Judiciary and Environmental Regulation' at Weightmans, London

22 November – CCEWP seminar on 'Emissions Reduction Plan' at Simmons & Simmons, London

For more details about these and our whole events programme, please visit our [website](#).

The e-law 60 second interview

Professor Richard Macrory QC, UKELA Patron and Co-Chair of UKELA's Brexit Task Force



About Richard

Richard Macrory was the first professor of environmental law in the UK, and the first chairman of UKELA. He led the Cabinet Office Review on Regulatory Sanctions which gave rise to Part III of the Regulatory Enforcement and Sanctions Act 2008. In his twenties, he invented a board game called 'Man-Eater!' which was a best-seller for short time; though he never made his fortune from it, the game was recently listed on a US site as one of ten board games you should play before you die. For a number of years he was chairman of Merchant Ivory Film Productions and can be seen – fleetingly – as an extra in films such as *Howards End* and *The Golden Bowl*.

What is your current role?

Currently professor of environmental law at UCL and a door tenant at Brick Court Chambers. I formally retire at the end of September and become an Emeritus.

How did you get into environmental law?

After qualifying as a barrister straight after university, I dabbled in film production but then I spent three years as the in-house lawyer for Friends of the Earth – we are talking of the late 1970s when it was still a very small NGO. No judicial reviews but lots of parliamentary work and public inquiries made for a wonderful grounding in issues, many of which are still with us today.

What are the main challenges in your work?

Balancing my legal activities and other interests (I'm developing a feature film project). Together with Andrew Bryce, I am chairing the UKELA Brexit Task Force. This means trying to focus on areas where UKELA can make a difference and a distinctive input to the debates rather than trying to do everything!

What environmental issue keeps you awake at night?

Being a recent grandfather, the implications of climate change. I think we have the technological solutions – it's how to drive the political will that is the real challenge.

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

Recognition that well-designed environmental regulation and its enforcement are essential. On a more practical level, the provision of extensive systems of separate cycle lanes which can be used by families and school children.

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

The Brexit Task Force role keeps me in contact with all the working groups so I haven't focussed on one.

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

The opportunity to be in contact with such a range of lawyers and specialists concerned with environmental law – from those working in NGOs, government and the public sector, to those working in private practice. And the age range – university teaching has been a privilege in that it keeps you in touch with bright young people and UKELA now does the same!

Conference report

Report on the Climate Change and Energy Working Party (CCEWP) session at the UKELA Annual Conference in Nottingham

Becky Clissmann, Co-convenor of the CCEWP, and Editor at Practical Law Environment, Kat Kramer and George Vibetti, UKELA Student Members

William Upton, 6 Pump Court, and Mark Daly, Senior Transport Planner for Nottingham City Council, discussed the impact of air quality plans on planning decisions.

Air pollution can kill. A report by the Royal College of Physicians found that “The annual mortality burden in the UK from exposure to outdoor air pollution [from particulates and nitrogen dioxide, NO₂] is equivalent to around 40,000 deaths.”¹

As well as death, air pollution can cause nervous system damage (lead), cancer and nausea (volatile organic chemicals), cardiovascular problems (sulfur and nitrogen oxides) and respiratory illness (particulates and ozone).

Speaking at the Climate Change and Energy Working Party (CCEWP) session at the UKELA annual conference, Nottingham City Council’s Mark Daly noted that to address air pollution from the road transport sector, government policy promotes ultra low emission transport, with eight areas participating in a pilot phase to install infrastructure, such as charging points, to accelerate the uptake of electric vehicles. Infrastructure investment is needed to get people to change their transportation choices, but there are still practical difficulties to overcome, not least that there is currently no comprehensive information point on charging point locations, as they are run by different companies. With charge range and recharge availability high amongst consumer concerns about electric vehicles, this is not trivial to the uptake of this technology.²

In addition to this infrastructure carrot, the government has adopted a stick approach by introducing Clean Air Zones (CAZ) within Birmingham, Leeds, Nottingham, Derby and Southampton to discourage the most polluting vehicles from entering by charging for access by 2020. There has generally been slower progress implementing CAZs than the low emission transport centres. While there is overlap between the schemes, national policy-makers have not chosen to roll them out in the same localities and, within the implementing councils, air quality and transportation are not always within the same teams, something Nottingham CC has found helpful is creating an integrated approach.

Because of the need to reduce pollution rapidly, there has been a focus on road transport, but infrastructure planning also will play a major role as to whether air pollution targets can be met, both in the near term (e.g. dust from the building process) to the longer term, where infrastructure design and placement will lock in high-impact buildings and behaviours.

Presenting on this aspect of air pollution was [William Upton](#), a barrister at 6 Pump Court Chambers. He explained that the *Client Earth* litigation³ has helped increase the profile of air quality issues; which is important as 37 out of 43 areas in the UK are already in breach of legal limits for nitrogen dioxide under the Air Quality Directive⁴. In *Client Earth* it was established that the UK was in breach of air quality requirements and government action to bring air pollution levels to within EU legal limits had taken too long.

When considering air quality within the context of planning decisions, the normal approach is to have regard to the development plan unless material considerations indicate otherwise. In the absence of a development plan or relevant guidance from the plan, there is a presumption in favour of approving planning proposals unless any adverse impacts “significantly and demonstrably outweigh” the benefits.⁵

However, this is moderated by the National Planning Policy Framework (NPPF) guideline⁶ that planning systems should contribute and enhance the local environment by preventing unacceptable levels of air and other types of pollution. Further, NPPF provisions⁷ require consideration of the cumulative effects⁸ of planning proposals on air quality, and its effects on “health, the natural environment or general amenity”. As air pollution is an existing problem in many areas, local authorities are required to declare Air Quality Management Areas (AQMAs) where pollution objectives are unlikely to be achieved. The NPPF requires that planning decisions in these existing problem spots are “consistent with the local air quality action plan”⁹.

These provisions together help to ensure that air pollution can be a salient consideration in planning matters and that mitigation measures are considered, such as modal shift to low emission vehicles, control of dust from construction, operation and demolition and funding for offset measures.¹⁰

Development Plans

Provisions within the Planning Practice Guidance (PPG)¹¹ provide that where a proposed development, including any mitigation, leads to unacceptable risk from air pollution, the local planning authority should consider how proposals can be amended, where practicable, or consider refusing planning permission. Although exceedance “would not justify a moratorium on development”¹² individual development would need to put mitigation measures in place.

It is clear that a local plan can only partially address local issues¹³: addressing air pollution effectively will require a more strategic approach, including through the emerging Low Emissions Strategy, and perhaps local provisions in the National Air Quality Plan. Achieving satisfactory air quality will require a range of measures to be taken to address the existing problem, while allowing for necessary development compliant with air quality standards.

Case law

A number of recent planning cases illustrate that air pollution provisions within the NPPF are being considered as an important part of planning decisions. Recent reports that Cheshire East Council has falsified its air pollution figures reinforce this: an external investigation concluded that their false data “may have affected” decisions made on planning applications including in Nantwich, Congleton and Crewe.¹⁴

Two cases represent a ‘traditional’ approach to the problem. In an appeal regarding a housing development in Pulborough, West Sussex¹⁵, the inspector pointed out that it would be unreasonable for a developer to be responsible for cumulative pollution problems, other than those caused or exacerbated by the development, and that the NPPF specifies that development should be constrained only in AQMAs themselves.

In Stratford upon Avon, a development was proposed near an AQMA, which had been declared even though NO₂ concentrations were (just) within EU limits. It was accepted by the developer that although the development was just outside the AQMA, it had the potential to affect it as a result of a possible increase in traffic congestion. The Inspector agreed, but was satisfied that “a slight deterioration in air quality alone would not be sufficient reason to refuse the appeal”.¹⁶

In contrast, an inspector refused permission for a housing development in Hassocks¹⁷ partly on the grounds of air quality. The development was close to an AQMA, and although the Council expected pollution to fall to within permissible limits by 2018, the objectors argued that the development could counter this and even push pollution over the EU limits. The Inspector applied the presumption in favor of sustainable development¹⁸ and held that adverse impacts of the proposal would significantly and demonstrably outweigh the benefits.

There has also been one appeal where air pollution was sufficient grounds for refusal of planning permission, although the developers have been granted leave to appeal. In Newington in Kent, 330 houses were proposed near existing AQMAs, and although mitigation measures worth £9,000 per house had been proposed, the Inspector held that “it is more probable than not that both appeal proposals would have at least a moderately adverse impact on air quality...and thus a significant effect on human health. ...there is no clear evidence to demonstrate their likely effectiveness [of mitigation measures], and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts”¹⁹.

With the Client Earth case having put the public spotlight on air pollution, it will be interesting to observe the extent to which this -literally - life and death issue will affect development in this country.

Endnotes

- 1 Royal College of Physicians, 2016 “Every Breath we Take: the Lifelong Impact of Air Pollution”
- 2 Union of Concerned Scientists USA, “Electric Vehicle Survey Methodology and Assumptions” December 2013
http://www.ucsusa.org/sites/default/files/legacy/assets/documents/clean_vehicles/UCS-and-CU-Electric-Vehicle-Survey-Methodology.pdf: 54% of those surveyed expressed concern on range, and 37% on charge availability, n=1004
- 3 *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28
- 4 [Directive 2008/50/EC](#)
- 5 National Planning Proposal Framework (<https://www.gov.uk/guidance/national-planning-policy-framework>), Para 14.
- 6 *Ibid*, Para 109.
- 7 *Ibid*, Para 120.
- 8 *Ibid*, Para 124.
- 9 *Ibid* Para 124.
- 10 Planning Practice Guidance [ID: 32-008].
- 11 <https://www.gov.uk/government/collections/planning-practice-guidance>.
- 12 Interim Findings from the Examination of the Maidstone Borough Local Plan, 22 December 2016.
- 13 Maidstone Borough Local Plan, Examiner’s Interim Report, 22 December, Robert Mellor, Para 124.

- 14 BBC news: "Air quality figures 'falsified', Cheshire East Council Admits, 1 August 2017, <http://www.bbc.co.uk/news/uk-england-manchester-40757465>.
- 15 West Sussex (APP/Z3825/A/13/2202943) dated 29 May 2014.
- 16 Arden Heath Farm, Stratford upon Avon (Appeal Ref: APP/J3720/W/15/3004380, 3 December 2015
- 17 London Road, Hassocks (APP/D3830/A/14/2226987; dated 2 July 2015)
- 18 NPPF Para 14
- 19 Residential development of up to 330 dwellings plus 60 units of Extra Care Appeal Decisions date 9 January 2017, Ref: APP/V2255/W/15/3067553 and APP/V2255/W/16/3148140 on land at London Road, Newington, Kent ME9 7NL

Environmental law headlines

August 2017 – September 2017

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

No contaminated land liability for statutory successor (Powys CC v Price and another)

LexisPSL Environment

The Court of Appeal has held that Powys County Council (Powys) is not liable as an 'appropriate person' under the contaminated land regime as statutory successor to its predecessors in relation to liabilities arising from the operation of a landfill site.

The case adds to the existing House of Lords authority of *National Grid (formerly Transco) v Environment Agency* [2007] All ER (D) 315 relating to liability for statutory successors under the contaminated land regime set out in Part IIA of the Environmental Protection Act 1990 (EPA). The decision confirms that Part IIA does not operate retrospectively so as to impose liability on a predecessor which only arose under legislation which came into force after the predecessor ceased to exist. Very clear words would be needed to impose liabilities on a successor which were non-existent at the date of succession and only created later.

Following the decision, it will be even harder to establish liability of a successor where the succession took place before the commencement of Part IIA. The case establishes that there is no requirement for the wording of the scheme of transfer to refer to liabilities existing 'immediately before' the transfer (as per the *National Grid* case) or for the successor to be a private company rather than a public authority. The distinctions drawn by the judge of first instance were noted but it was held that while these two factors were supportive of the House of Lords' decision in *National Grid*, they were not essential to their reasoning.

For more information, see News Analysis: [No contaminated land liability for statutory successor \(Powys CC v Price and another\)](#)

Green NGO coalition paper criticises the government's proposals on environmental law enforcement post-Brexit

Practical Law Environment

On 23 August 2017, the UK government published a future partnership paper on enforcement and dispute resolution following the UK's withdrawal from the European Union (EU). The paper, which reflects the government's aim to remove the UK from the jurisdiction of the Court of Justice of the European Union (CJEU), proposes a number of dispute avoidance and resolution proposals for consideration, including arbitration models that are used in Free Trade Agreements that the EU has with other countries.

Also on 23 August 2017, GreenerUK, which is a coalition of 13 non-governmental organisations (NGOs), published a briefing paper on enforcement of environmental law after Brexit.

It predicts that the government's current proposals will introduce a governance gap on the enforcement of environmental standards when the UK leaves the EU.

It argues that post-Brexit, UK governance institutions must be sufficiently independent and have the relevant expertise, powers and resources to uphold and enforce the law. Existing domestic institutions (such as the Environment Agency and Natural Resources Wales) do not meet these criteria and are inadequate to fill the expected gap.

GreenerUK considers judicial review will be inadequate as the sole mechanism to challenge the enforcement of environmental legislation post-Brexit. The government's assertions to the contrary overlook the breadth of functions currently performed by EU institutions. Judicial review is too narrow in terms of scope and remit, too restrictive in terms of access (including costs) and too limited in terms of remedies and sanctions to sufficiently protect environmental standards. In addition, the UK, Scottish and Welsh Parliaments do not have the relevant scientific or technical expertise or sufficient time or capacity to fill the expected governance gap.

For more information, see [Legal update, Green NGO coalition criticises government's proposals on environmental law enforcement post-Brexit](#).

Brexit and Euratom: government publishes technical papers on spent fuel, radioactive waste and existing contracts for the supply of nuclear material

Practical Law Environment

On 28 August 2017, the Department for Exiting the EU (DExEU) published technical papers on:

- spent fuel and radioactive waste;
- existing contracts for the supply of nuclear material.

The technical papers provide further information to support the position paper on ownership and responsibility for special fissile material and related safeguards equipment, which was published by DExEU on 13 July 2017.

The technical paper on spent fuel and radioactive waste:

- states that the UK remains committed to its international and Euratom community responsibilities in respect of spent fuel and radioactive waste generated in the UK and present on EU27 territory on the date of withdrawal;
- seeks reciprocal assurances to cover spent fuel and radioactive waste generated in Euratom member states and present in the UK on the date of withdrawal.

For more information, see [Legal update, Brexit and Euratom: government publishes technical papers on spent fuel, radioactive waste and existing contracts for the supply of nuclear material](#).

Aarhus Convention compliance committee publishes draft decision criticising UK rules on access to environmental justice and NGOs partial success in JR challenge to 2017 CPR amendments for Aarhus Convention claims

Practical Law Environment

On 28 July 2017, the UNECE Aarhus Convention Compliance Committee (ACCC) published a draft decision on UK compliance with its obligations under the Aarhus Convention, which states that:

- The 2017 amendments to the costs protection regime under the Civil Procedure Rules (CPR) for courts in England and Wales have moved it further away from meeting the Convention's requirements of ensuring access to environmental justice.
- The UK has made slow progress on establishing a costs protection regime that meets the Convention's requirements.

In February 2017, ClientEarth, Friends of the Earth and the RSPB applied for judicial review of the new CPR costs rules in Aarhus Convention cases, which were introduced in February 2017. The judicial review was brought on the grounds that the new rules weaken financial protection for claimants, as they will face unspecified legal costs and this is likely to deter people from going to court to protect the environment.

On 15 September 2017, the High Court concluded:

- CPR 45.44, which allows the default recoverable costs cap to be varied, complies with EU law implementing the Aarhus Convention and ensures that access to environmental justice is not prohibitively expensive.
- A private hearing is required for all applications for variation of the default costs cap. This is to prevent the disclosure of confidential financial information of the claimant or third party supporters acting as a deterrent to bringing an Aarhus Convention claim. The CPR should also be amended to clarify that applications should be with the acknowledgment of service.
- A claimant's own costs in bringing an Aarhus Convention claim should be included in any assessment of their financial resources to ensure that it is not prohibitively expensive.

This case clarifies the considerable uncertainty over how the new CPR 45.44 works in practice and reduces some of the chilling effect caused by public exposure of private financial information and risk of later applications to raise a costs cap. It has emphasised the importance of any application by the defendant to vary the default costs cap order being made early in the proceedings, unless there is a significant change during its course.

However, amendment to the CPR is awaited and the new regime still does not provide the absolute certainty of the set costs caps used between 2013 and 2017.

(R (Royal Society for the Protection of Birds, Friends of the Earth Ltd and another) v Secretary of State for Justice and another [2017] EWHC 2309 (Admin).)

For more information, see:

- [Legal update, Aarhus Convention compliance committee publishes draft decision criticising UK rules on access to environmental justice](#).
- [Legal update, NGOs succeed in part in JR challenge to 2017 CPR amendments for Aarhus Convention claims \(High Court\)](#).

EU Council adopts emission amendments for Gothenburg Protocol

LexisPSL Environment

The European Council has adopted a decision to accept, on behalf of the EU, an amendment to the 1999 *Gothenburg Protocol* to reduce air pollutant emissions around the world.

The amendment creates more rigorous commitments to emission reduction commitments, set for each country per pollutant and applying from 2020 onwards, for the four main air pollutants: sulphur, nitrogen oxides, volatile organic compounds (other than methane and ammonia) and ammonia. Another pollutant, fine particulate matter, is covered for the first time.

The amendment, known as the 2012 Amendment, comprises two decisions: Decision 2012/1 and Decision 2012/2. Decision 2012/1 automatically entered into force on 5 June 2013. Decision 2012/2 must however be ratified by two-thirds of the parties to the Gothenburg Protocol before it enters into force. Formal adoption by the EU represents a positive step towards ratification.

The emission limits (contained in the 2012 Amendment) have already been implemented in the EU through the National Emissions Ceilings Directive (Directive (EU) 2016/2284) and the Medium Combustion Plants Directive (Directive (EU) 2015/2193).

For more information, see News Analysis: [The Gothenburg Protocol—progress on implementation](#).

Government publishes final UK Air Quality Plan and supplemental zone plans and directions to local authorities

Practical Law Environment

On 26 July 2017, the Department for Environment, Food and Rural Affairs (Defra), the Department for Transport (DfT) and the devolved administrations published the final UK plan for tackling roadside nitrogen dioxide concentrations (Air Quality Plan). The Air Quality Plan was the subject of a number of judicial review challenges by ClientEarth including a challenge in November 2016 in which the High Court ordered the government to publish a new UK air quality plan for consultation by 24 April 2017, and to submit it to the European Commission by 31 July 2017. For more information on ClientEarth's judicial reviews of government air pollution policy, see [Practice note, Regulation of local air quality and ambient air pollution: ClientEarth judicial reviews of air quality plans](#).

The Air Quality Plan includes the following actions for

tackling nitrogen dioxide (NO₂) emissions, many of which are existing UK policy or requirements:

- sale of new conventional petrol and diesel cars and vans to end by 2040;
- an obligation on local authorities to draw up local plans to improve air quality;
- new real driving emissions (RDE) requirements for light passenger and commercial vehicles;
- roadside checks on lorry emissions, from August;
- measures to reduce NO_x emissions from medium combustion plants and small-scale diesel generators;
- call for evidence on a new aviation strategy;
- Automated and Electric Vehicles Bill;
- changes to the government procurement policy to ensure that new vehicles have low NO₂ emissions as well as low carbon emissions.

Local authorities in England must produce draft plans by the end of March 2018 and final plans by the end of December 2018.

ClientEarth criticised the Air Quality Plan for failing to address the immediate air pollution problem sufficiently quickly, and for being another “plan for more plans”.

On 28 July 2017 and on 31 July 2017, Defra published the following documents to supplement the Air Quality Plan:

- Environment Act 1995 (Feasibility Study for Nitrogen Dioxide Compliance) Air Quality Direction 2017, which requires 23 named local authorities to carry out feasibility studies to identify how to achieve compliance with NO₂ limits as quickly as possible;
- zone plans, which are air quality plans for 37 zones that have not yet met NO₂ levels.

For more information, see:

- [Legal update, Government publishes final UK Air Quality Plan](#).
- [Legal update, Government publishes zone plans and directions to local authorities to supplement Air Quality Plan 2017](#)

Circumstances in which fracking licence can be varied (Dean v Secretary of State for Business, Energy and Industrial Strategy)

LexisPSL Environment

In this case, the Planning Court held that the grant of a petroleum exploration and development licence (PEDL) pursuant to section 3 of the Petroleum Act 1998 (PA 1998) was not governed entirely by the statutory code relating to such licences, and so the defendant Secretary of State was able to agree to a variation in the terms of such a licence.

Grant of a PEDL was a property transaction, akin to a mining licence or lease, and was therefore subject to the ordinary laws of contract and could be varied by agreement, subject to any express statutory provisions or clauses contained within the licence.

Nothing in PA 1998, and the relevant secondary legislation and EU legislation, was found to prohibit the variation of a PEDL by agreement.

Accordingly, the court rejected the claimant's contention that a deed of variation of the licence had been ultra vires and dismissed his application for judicial review.

For more information, see News Analysis: [Circumstances in which fracking licences can be varied \(Dean v Secretary of State for Business, Energy and Industrial Strategy\)](#)

EA has choice of powers to carry out new works under the Water Resources Act 1991

LexisPSL Environment

In *Sharp v North Essex Magistrates Court [2017] EWCA Civ 1143*, the court confirmed that where a landowner refuses consent for entry onto land or premises to carry out works, the Environment Agency (EA) is not obliged to use its powers to make a compulsory purchase order (CPO) or compulsory works order (CWO) under s 154 or s 168 of the Water Resources Act 1991 (WRA 1991), but is instead entitled to exercise the powers of entry conferred by the WRA 1991, s 172.

The decision highlights the delicate balance to be struck between individual rights of property and the interests of society in general. In this case the interests of the landowners rivalled crucial flood protection to hundreds of homes and businesses in the Chelmsford area. The court acknowledged that interference with private rights of property requires careful justification, but felt in this case that the statutory wording in the WRA 1991 could not be construed in a manner which would oblige the EA to use its CPO or CWO powers.

For more information, see News Analysis: [EA has choice of powers of entry to carry out new works under the Water Resources Act 1991](#)

EU energy labelling regulation to usher in 'clearer' scale system

LexisPSL Environment

Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 sets a framework for energy labelling and repeals *Directive 2010/30/EU*. It applies from 1 August 2017 and *Directive 2010/30/EU* is repealed with effect from this date.

The new Regulation simplifies and updates energy efficiency labelling requirements for products sold in the EU. The Regulation specifies that all future products will be labelled on a new, updated, and clearer scale system which will gradually replace the current system.

For more information, see: [LNB News 01/08/2017 116](#).

Brexit

Brexit Task Force update



Joe Newbigin, Barrister and Brexit Researcher for the UKELA Brexit Task Force

At a glance

- UKELA's Brexit Task Force is celebrating its first anniversary. In that time, it has released four reports in the *Brexit and Environmental Law* series, with at least another four reports planned. These reports highlight concerns which have not been addressed by the government, underpinned by technical analysis intended to inform discussion of the practical process of withdrawing from the European Union.
- The Task Force has used a variety of means to share information relating to Brexit-related environmental topics. This ranges from publishing factsheets and blogs to responding to requests for comment, and maintaining knowledge-sharing networks to hosting a Brexit-specific conference in October.
- We have an ongoing programme of work which will specifically address problems faced by each devolved administration, further engage with emerging thematic issues, and explore in more detail the roll-over of environmental law and governance in individual sectors of environmental law and practice.

UKELA established the Brexit Task Force in September 2016 to advise on matters relating to the UK's withdrawal from the EU.¹ The Task Force is led by co-chairs Richard Macrory and Andrew Bryce and is composed of 29 experienced practitioners, working with the support of Rosie Oliver and myself². We would like to extend our appreciation to all the UKELA members who have advised us and provided input to our work.

In order to ensure that the UK's current environmental legislation is preserved pending proper review, the Task Force produces expert, technical analyses of the legal and practical implications of separating our domestic environmental laws from the European Union. In June we launched our research programme at E3G's London offices. This event was picked up by [the Guardian](#) as well as the [industry press](#). This article sets out the progress we have made in achieving that programme and the impact that our work has had.

Exit from the Euratom Treaty and its environmental implications

While questions of security and safeguarding were being discussed in relation to Euratom, the question of safety, the protection of human health and the environment surprisingly were not. In response to this lacuna, Paul Bowden and Stephen Tromans QC, two

experts in the field, drafted UKELA's first report in the Brexit and Environmental Law series, [Exit from the Euratom Treaty and its Environmental Implications](#).

The report drew attention to legislative measures necessary to maintain the current regime of nuclear safety, particularly where the possible impact of 'Brexitom' (the constitutionally and legally separate process of withdrawing from Euratom) was not fully appreciated. One key area was the Basic Safety Standards Directive, which was established by Euratom to protect workers, members of the public, and patients against the dangers arising from ionising radiation. How, the report asks, would future development of BSS be received and treated in the UK? And would specific requirements be weakened, given that IAEA standards of radiological protection are not legally binding? Similarly, how would shipments of radioactive substances (including sealed sources) be dealt with at the regulatory and operational levels? And what arrangements were being made for the supervision and control of shipments of radioactive waste and spent fuel? None of these questions were being publically debated, so the authors wanted to flag up these potential issues.

The report also raised the issues of key safety-related bodies, such as ENSREG (the European Nuclear Safety Regulators' Group) and ECURIE (European Community Urgent Radiological Information Exchange) which the UK may not be able to remain in. It highlighted the need to find agreements with Euratom and its member states for continued regulatory equivalence and participation, arguing that this would be beneficial to the UK. The report emphasised that it was imperative that existing Nuclear Co-operation Agreements (NCAs) embracing Nuclear Safety with states outside Euratom (including those with developing civil nuclear capability) were reviewed and re-aligned as an urgent priority. The UK has commitments and also derives benefits from NCAs, particularly in relation to international trade in nuclear services and technology, and R&D.

Stephen and Paul's piece was timely. It was published shortly after the Commission published its [position paper](#) on nuclear materials, and on the heels of [renewed debate](#) about the implications of Brexitom: safety got some airtime. Our report was picked up by the [ENDs Report](#) and the Task Force were invited to an Industry Forum organised by the government on Euratom Exit, where we found that many of these

concerns were shared (and continue to be shared) by other practitioners.

Enforcement and political accountability Issues

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

We were glad to see that this report was picked up by the [House of Commons Library Briefing Paper](#) on the European Union (Withdrawal Bill), which drew on our analysis in their discussion of complaints made to the European Commission. Our report was referred to by David Hart QC in a post on the [UK Human Rights Blog](#), which emphasised why enforcement is a particularly salient issue in the environmental field. Enforcement (and broader issues of governance) featured highly at a [Brexit Environmental Law Workshop](#) organised by UKELA, the Law Society, ELF and the Wildlife and Countryside Link's Legal Strategy Group (a note from this event should be coming soon), as well as appearing high on the agendas of industry groups including the [Environmental Policy Forum](#) and NGOs, as seen in the [Greener UK briefing](#).

Enforcement is now – quite rightly – a mainstay of the Brexit debate, and traction for arguments about an impending governance gap are frequently discussed with particular reference to the environment. The issue featured in the Environment Secretary's [Unfrozen Moment speech](#) in July, where he recognised the need to replace the enforcement functions currently undertaken by European institutions, and it frequently featured highly in the House of Commons debate on the second reading of the European Union (Withdrawal) Bill (HC, Bill 5, 2017-19: "the Withdrawal Bill").

Brexit, Henry VIII clauses and environmental law

In response to frequent discussions about the scope of 'Henry VIII powers' (a provision enabling primary legislation to be amended or repealed by Ministers through subordinate legislation) proposed in the Withdrawal Bill, and a lack of any concrete information on where and to what extent they would be used, we wanted to determine the extent to which these powers were likely to be necessary in the field of

environmental law. The task was simple, if onerous: comb through all major pieces of primary legislation relevant to the environment and identify any references which might require amendment or removal (such as references to EU standards, reporting requirements to EU institutions and reciprocal obligations to other member states). Once we had this list, we turned our minds to deciding whether from a practical perspective these so-called 'deficiencies' needed amendment, and if so whether this was 'necessary' or merely 'advisory'. This work resulted in the report [Brexit, Henry VIII Clauses and Environmental Law](#) and its accompanying Annex.

We found that the clause 7 power (giving the Secretary of State power to make regulations to deal with 'deficiencies' in EU law that is rolled over after Brexit as retained EU law)³ should be used far less than many would have expected – at least in the environmental field. Across twenty-nine Acts of Parliament we found six provisions which would require amendment, and a further thirty where change is advisable, although not necessary. Seventeen Acts of Parliament – the majority – would not require a single amendment. This was a timely report which was picked up by the [ENDs Report](#), as well as Practical Law Environment and LexisNexis. Although our analysis may have helped inform the debate on this issue, we nevertheless hope that the government publishes a similar report setting out where they anticipate this power, as well as the other powers in the Bill, will be used.

The UK and International Environmental Law after Brexit

The Task Force has undertaken a comprehensive mapping exercise of the international environmental agreements that the UK is currently bound by and how each has been implemented through EU and domestic legislation. This exercise culminated in the Task Force's fourth report, [the UK and International Environmental Law after Brexit](#). The Annex to this report sets out our findings in detail and is intended as a living reference document. The report sets out concerns that had emerged from our analysis in terms of the continued applicability of international agreements, its implementation and the enforcement of it through international mechanisms.

Two key issues warrant repeating. First, unless and until the UK ratifies international agreements which have been entered into by the EU alone, the UK will cease to be bound by these agreements and lose the backstop these provide in terms of standards and obligations. For example, the UK has signed but not ratified the 1992 Water Convention which is crucial in relation to the waterways and lakes spanning the boundary between Northern Ireland and the Republic of Ireland: at present the UK is bound by the convention only by virtue of the EU being a party. This

report urges the UK government to clarify which EU-only international environmental agreements it will sign and/or ratify in order to maintain the current level of environmental protection, setting out plainly the process for doing so.⁴ Second, in relation to mixed agreements (i.e. international agreements ratified jointly by both the EU and the UK) the effect of Brexit remains highly unclear. The report recommends that the UK government makes a clear statement of its understanding of the legal position of these mixed agreements after Brexit and the legal basis for this understanding.

This report was picked up in the legal press by LexisNexis and – at the time of going to press - [BusinessGreen](#) were reporting that Defra was considering the report. We also understand that the House of Commons Library is considering this issue for a forthcoming publication on Brexit and Environmental Law. In Parliament, Caroline Lucas MP asked two written questions of Defra on key issues raised in the report (relating to [EU-only agreements](#) and [mixed agreements](#)) which were answered together by Dr Thérèse Coffey MP – our follow-up response to that answer can be found on the [Brexit Blog](#). We look forward to having further clarification from the government on these issues and we will continue highlighting important questions for debate.

Forthcoming reports

First, we are looking at whether and how the UK can and should remain a member of European bodies which allow for cooperation, policy exchange and development in the environmental field. These include institutions set up under EU legislation, and less formal networks of officials and other bodies which have developed independently or alongside EU law. The report identifies the legal options available for remaining part of these bodies, such as observer status, and outlining where changes to legislation would be necessary. It also considers the merit of remaining part of them, in order to focus the attention of those with both the greatest significance and the greatest risk.

Second, a Welsh perspective of the issues arising from Brexit, with a particular focus on the challenges faced in the development of environmental law in Wales after Brexit. Key issues include: divergence in approaches to environmental protection across the four nations; the creation of common UK frameworks for action on environmental protection in a devolved context; sustaining the progress in developing innovative approaches in Wales; the current complexity of the law applicable to Wales; and the process of scrutiny for new legislation.

Third, we are considering standard setting for industrial processes after Brexit. This is a crucial aspect of environmental regulation and there is considerable

activity at the EU level to develop the standards that apply under EU-derived environmental legislation. Withdrawal from the EU raises a number of important issues concerning environmental standards after Brexit. These include: the implications of being required to keep pace with EU standards under the terms of withdrawal or a trade agreement; whether to keep pace with evolving EU standards as a matter of domestic policy; and if standards are to be set domestically, how to repatriate the standard-setting functions currently carried out at the EU level (including decisions about which domestic bodies should perform which roles, whether new institutions should be created, and what the procedures and governance arrangements should be).

Fourth, we have extended the mapping exercise to include the implementation of international environmental agreements in Scotland. Once this is complete we will consult on the implications of Brexit for international environmental law specific to Scotland which have not been addressed in the analysis relating to England (and Wales). We are also scoping the possibility of further research into the implications of Brexit for Scotland.

The Task Force is keeping under review the need for further research. Conscious of resource constraints we are keeping a watching brief on a number of issues including agriculture, fisheries and the wider process of scrutiny. If any UKELA members wish to draw particular issues to our attention, I would encourage you to contact [myself](#) or [Rosie](#).

Brexit and Nature Conservation Factsheet

Conscious that the Nature Directives have persistently received bad press in the UK, and that this has been accompanied by rumours that Habitats laws will not be 'rolled over' after Brexit, we worked with the Nature Conservation Working Party to produce the [Brexit and Nature Conservation Factsheet](#). This factsheet provides a simple and accessible resource which debunks some common myths about this area of law, particularly in relation to the impact it has on infrastructure projects and placing the reviews done of this legislation at the UK and EU levels in context.

A return to sectoral analyses?

Before we began looking at cross-cutting thematic issues the Task Force began by examining the black letter of the law, extracting the technical implications of 'rolling over' EU law in specific sectors of environmental law. The aim of this work was to look for 'pinchpoints' in each topic which would disrupt the operability of EU-derived law after Brexit. This work, which was done with valuable input from the working parties, has not been published but serves instead as a useful reference document. It is currently under consideration whether to broaden these analyses into

reports or factsheets which look at the entire statutory regime within a sector, and highlighting emerging issues (perhaps in relation to deficiencies in retained EU law, regulatory bodies, specific instances of standard setting, etc.).

The utility of these sectoral analyses for the Brexit debate can be seen in the submissions UKELA made to the Environmental Audit Committee inquiry into the Future of Chemicals Regulation. We said that duplicating the REACH regulations and establishing a stand-alone UK system for chemical regulation would create large-scale excessive cost, duplication and confusion for industry and would potentially make the environmental purposes of the regime more difficult to meet. These points remain salient and were picked up again during the second reading debate by the Chair of that Committee.

It remains under consideration that once sufficient progress has been made on cross-cutting issues the Task Force may develop the sectoral pinch-point analyses into full reports.

Meetings with Parliamentarians, Government lawyers, NGOs, industrial bodies and professional organisations

The Task Force have avoided providing academic analyses in a vacuum and we consider it crucial to maintain dialogue with organisations and individuals involved in implementing Brexit in the environmental field. We want to understand both how the information we have will be useful, and if there are any other avenues which others think we should be pursuing. We engage regularly with Parliamentarians, civil servants, NGOs (both individually and collectively), industrial bodies and other professional bodies for environmental practitioners, and any number of lawyers who take an interest in aspects of our work. Throughout this process the Task Force has maintained its neutrality and impartiality, aiming to respond equally to everyone seeking to open dialogue with us.

Brexit Task Force Blog

We have a series of ongoing blog posts – as part of our [‘Brexit Blog’](#) – not only to publicise the reports but also to [respond](#) to events, such as the Environment Secretary’s speech in the Summer.

Conference

The Brexit Task Force is hosting a half-day [Brexit conference](#) on the afternoon of 13 October at 39 Essex Chambers, London. Supreme Court Justice Lord Carnwath will oversee panel discussions looking at many of these issues, from the roll-over of the black letter of the law to key sectoral issues, and from UK-wide thematic issues to intra-national perspectives from the devolved administrations. E3G Chairman Tom Burke will close the event with comments on the political dimension to all this legalese. This event is now sold out, with the overwhelming majority of places being taken by UKELA members.

Joe Newbiggin is a barrister and Brexit Researcher for the UKELA Brexit Task Force.

Endnotes

- 1 Stephen Sykes first introduced the Brexit Task Force in *elaw* January/February 2017 (page 3).
- 2 The Brexit Task Force’s terms of reference, and the minutes to quarterly meetings can be found on the [Brexit section of the UKELA website](#).
- 3 ‘Deficiencies’ are given a non-exclusive definition but will include, for example, provisions that have no practical application in the UK after Brexit or which confer power on Community institutions
- 4 We welcome the recent statement Dr Thérèse Coffey MP [in response to a written question from Caroline Lucas MP](#) that the UK Government “will give due consideration to the ratification of MEAs in the future to which the UK is not currently party in its own right, (recognising that some risks have no relevance to the UK)”, although we would encourage Defra to publish this list as soon as possible.

Brexit

The European Union (Withdrawal) Bill, environmental accountability and governance

Professor Maria Lee, Professor of Law and co-director of the Centre for Law and the Environment at University College London

At a glance

- This article discusses the relationship between the European Union (Withdrawal) Bill and the environmental governance frameworks provided by EU environmental law.
- The Withdrawal Bill largely neglects environmental governance, and shall not bring all environmental law into UK law after Brexit.
- Our future environmental governance arrangements need to be properly consulted on and adequately addressed, so that we leave the EU with a framework for government accountability on the environment that is at least as strong as the one we enjoy now.

It is little exaggeration to say that there are legal complexities and uncertainties in every sub-clause of the European Union (Withdrawal) Bill, which now enjoys a wealth of commentary.¹ Essentially, the Bill provides for the repeal of the European Communities Act 1972,² and for the body of existing EU law, including environmental law, to be saved in UK law. The maintenance of existing law is achieved by creating a new category of 'retained EU law'.

This article begins with the meaning of 'retained EU law', and then focuses on the ways in which the Bill (fails to) address the governance architecture hitherto provided by EU environmental legislation. Retaining, and improving, environmental standards is crucial. But environmental standards are not self-executing, and EU law routinely provides a set of governance arrangements to enhance the possibility of holding government to account for the implementation of those standards. These are as much, and as important, a part of existing law as environmental standards.³ But anyone looking for guarantees that environmental governance will not be weakened by Brexit must be disappointed: the promise that the Bill will carry over all existing EU law is simply not fulfilled.⁴

The Bill is probably not the place for setting out the detail of our future environmental governance framework, and certain aspects of environmental governance, such as replacing the enforcement functions of the European Commission, do not fit neatly in such a piece of legislation. But assurances that our environmental governance framework shall be properly consulted on and adequately addressed

would be very welcome. The much anticipated Defra 25-year plan for the natural environment, and legislation arising out of that plan, provides an important opportunity to ensure an adequate system of executive accountability. It is crucial that the Withdrawal Bill is not perceived to pre-empt this – that it does not undermine those governance arrangements that should properly survive Brexit as they are, and that (absence of) parliamentary debate on government environmental accountability is not allowed to suggest that this is anything other than a crucial element of our democratic system. Hence the importance, notwithstanding the almost overwhelmingly significant and complex constitutional issues raised by the Bill, of continuing to insist that the Bill be considered from an environmental perspective.

Any discussion of Brexit arrangements aims at a moving target. As I write, the Bill has just passed its second reading, and much depends on the nature of any withdrawal agreement with the EU (clause 9 of the Bill makes provision for government to use secondary legislation to implement any withdrawal agreement). Here, I discuss the Bill as presented by government and, as has become orthodox (although this may change), assuming a 'hard' Brexit.

Retained EU Law

Retained EU law survives exit day.⁵ 'Exit day' is to be defined by ministers,⁶ and so is not necessarily the day on which the UK ceases to be a member of the EU. This allows for transitional arrangements, but there are no explicit constraints on ministers in choosing exit day. Subject to exceptions in Clause 5 and Schedule 1, the Bill creates a number of categories of retained EU law:

- Clause 2 retains 'EU-derived domestic legislation', which is domestic legislation that has its basis in EU law, arising out of Directives.⁷ Secondary legislation that was passed under the European Communities Act 1972 (and so needs to be 'saved' on repeal of that Act), is the main category of EU-derived domestic legislation, but the definition extends to statutory instruments passed under other legislation, and indeed to primary legislation.
- Clause 3 retains 'direct EU legislation', which has effect before exit day without having been transposed into domestic legislation, most

importantly Regulations, but also certain decisions and other tertiary legislation.⁸

- Clause 4 retains other 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' recognised in domestic law, including directly effective treaty rights.⁹
- Under Clause 6 'retained case law' is domestic or EU case law from before exit day that relates to any of these three categories of retained EU law.

Decisions of the Court of Justice of the EU handed down before exit day can be overturned by the Supreme Court,¹⁰ on the same basis as it would overturn its own judgments. A domestic court 'need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so'.¹¹

Interpretation by reference to EU case law prior to Brexit would seem to be implicit in the proposition that law is retained 'as it has effect in domestic law immediately before exit day' (Clause 2) or 'so far as operative immediately before exit day' (Clause 3) or which 'immediately before exit day ... are recognised and available ... and ... enforced, allowed and followed' (Clause 4). Indeed, I would argue that if, as promised, the legal position the day after exit day is to be as close as possible¹² to the legal position the day before exit day,¹³ retained EU law should be interpreted in accordance with EU interpretive principles. This would include reference to the recitals in the EU legislation (although not themselves generally retained under the Bill), to the (environmental) purpose of legislation, and to the environmental principles that pervade environmental legislation¹⁴ – that is necessary if what is now EU law is to mean the same in the UK from one day to the next. No doubt alternative arguments will be made, however, and I would not wish to predict the decision of the courts. A clearer approach to judicial interpretation in the Bill has been highlighted as an important issue by the House of Lords Select Committee on the Constitution;¹⁵ any clarity added during the passage of the Bill should work in the direction of maintaining environmental standards.

Governance framework

EU legislation routinely requires government, in a defined time frame, to plan for the implementation of its environmental obligations, and to report on progress, including on failure to comply, or on any lawful use of legal derogations, exceptions or 'alternative' standards, together with explanations of how compliance will be maintained or achieved. Planning and reporting is public, so that government action is more easily scrutinised than otherwise by the public and NGOs. But in addition, it goes to the Commission (as well as other Member States), so that relatively well-resourced, expert and independent scrutiny is possible.¹⁶ All elements are crucial: the

reflection on implementation; the information generation; the publicity; the formally established public scrutineer. The reality of plans and reports may sometimes fall short of expectations, but they have the potential to enhance political and legal, formal and informal, peer and citizen, scrutiny of government action.

In many cases, obligations to plan for and publicly report on implementation will be 'retained EU law', either because they have been transposed into secondary legislation, like river basin or air quality management plans, or because they are contained in a Regulation. Clause 7 of the Withdrawal Bill provides for secondary legislation to deal with 'any failure of retained EU law to operate effectively', or 'any other deficiency in retained EU law'. Deficiencies explicitly include the conferral of functions on EU 'entities', and reciprocal arrangements between the UK and the EU or its Member States. It would be easy to lose sight of environmental law in the constitutional context of a 'tapestry of delegated powers that are breath-taking in terms of both their scope and potency'.¹⁷ It is important however to be alert to changes that may seem banal, but detract from the government's accountability in the environmental field.

It seems fairly clear that any obligation to report to the Commission, or to 'have due regard to' the Commission's opinion,¹⁸ will be considered a 'deficiency', just because of the involvement of EU institutions. Obligations to plan and report publicly should not be considered 'deficient' simply because they include references to EU institutions or other Member States. Nor, at the extreme, must the fact that river basin management planning defines its requirements by reference to EU legislation,¹⁹ and shall need some consequential amendment, be used to undermine the stringency of reporting and planning obligations. But 'deficiency' is not further defined in the Bill, which simply provides an illustrative (rather than exhaustive) list of possible deficiencies. So there is worrying potential for all sorts of quiet changes, subject only to the very limited parliamentary scrutiny allowed to statutory instruments (unless enhanced scrutiny is introduced during the passage of the Bill through Parliament²⁰), and judicial review of vires after the event.

We might initially expect that any governance obligations found in Directives, but not in their UK transposition measures, would simply drop away. Obligations to report to the Commission are generally not included in UK transposition measures, so shall not be 'EU derived domestic law', although they may be part of 'direct EU legislation'. But paragraph 112 of the Explanatory Notes to the Withdrawal Bill is worth citing at length:

'Subsection (2) [of Clause 7] also provides that if a function or restriction is contained in a directive and therefore not retained, and has not been transposed into domestic law, this can be a deficiency. For example if the UK has implemented a directive but has not implemented the provisions in the directive which provide for the Commission or EU agency to carry out a function, the absence of this function in retained EU law could be a deficiency in the implementing legislation ...'

It is unlikely that the very open powers proposed by Clause 7 will be used by government, which enjoys enormous autonomy in secondary legislation, to enhance environmental governance. But, perhaps mischievously, there is scope to argue that the functions of the Commission, scrutinising and enforcing legislation, can be replicated through Clause 7.

Conclusions

The accountability of government and government bodies for their implementation of environmental law is a crucial part of the post-Brexit environmental framework. Environmental compliance is often delayed, something that must be achieved in the future, is also ongoing, rarely simply complete. Planning and reporting obligations maintain the impetus for these delayed and ongoing obligations.

For the purposes of this discussion, I have been concerned with the planning, reporting and associated scrutiny elements of the accountability framework. Some of this, and other EU governance issues such as the impact of Brexit on judicial review, may be better dealt with in other legislation. I suggested in the introduction that a clear commitment to making that happen would be reassuring. At the moment, we see the opposite: a worrying failure to take seriously the significance of environmental accountability, in the White Paper,²¹ and in the broader government assumption that the existing mechanisms of judicial review and parliamentary scrutiny are adequate.²² The new Secretary of State for Environment, Food and Rural Affairs may provide a more hopeful final comment:

'...as we prepare to leave the EU we must give thought to how we can create new institutions to demonstrate environmental leadership and even greater ambition. Not least because we have to ensure that the powerful are held to account and progress towards meeting our environmental goals is fairly measured.

And I mention that because I know that inside the EU, the European Commission and the ECJ have provided enforcement mechanisms and understandably, some are asking what could or should replace them. My view is that we have an opportunity, outside the EU, to design potentially

more effective, more rigorous and more responsive institutions, new means of holding individuals and organisations to account for environmental outcomes.'²³

We might note though that the Secretary of State is concerned (encouragingly) with holding 'individuals' and 'organisations' to account, and indeed 'the powerful'. But there is no explicit mention of the need to hold *government* to account. That is a gap that absolutely must be filled.

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Endnotes

- 1 See e.g. the House of Commons Library, *European Union (Withdrawal) Bill* (Briefing Paper 8079, 1 September 2017), House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (3rd report of Session 2017-19, HL Paper 19), ClientEarth, *Report: The Withdrawal Bill: Destination and Journey* (2017). On Brexit and the environment, see blogs at <https://www.ukela.org/blog/Brexit-Task-Force> and <https://www.brexitenvironment.co.uk>.
- 2 Clause 1.
- 3 See Maria Lee, 'Accountability for environmental standards after Brexit' (2017) 19 *Env L Rev* 89.
- 4 See also ClientEarth, above.
- 5 Defined Clause 6(7).
- 6 Clause 14(1).
- 7 Clause 2.
- 8 Clause 3.
- 9 Clause 4.
- 10 And in some circumstances related to the special status of Scottish criminal law, the High Court of Justiciary.
- 11 Clause 6(2).
- 12 In his forward to the White Paper preceding the Bill, the Secretary of State for Exiting the European Union said that 'wherever practical and sensible, the same laws and rules will apply immediately before and immediately after our departure', Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union Cm 9446* (2017).
- 13 The Explanatory Notes to the Bill state that 'As a general rule, the same rules and laws will apply on the day after exit as on the day before', paras 10, 23, also para 1.12 of the White Paper.
- 14 See Richard Macrory and Justine Thornton, 'Environmental principles: will they have a role after Brexit?' [2017] JPL 907 for a detailed discussion, and slightly different perspective, including the neglect of the principles by the UK judiciary.

- 15 House of Lords Select Committee on the Constitution, above.
- 16 Lee, above.
- 17 House of Lords Select Committee on the Constitution, above, Summary.
- 18 Conservation of Habitats and Species Regulations 2010, SI 2010/490.
- 19 The Water Resources (Water framework Directive) (England and Wales) Regulations 2017, SI 2017/407.
- 20 See eg House of Lords Select Committee on the Constitution, above; Hansard Society, *Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (withdrawal) Bill* (2017).
- 21 See Lee above.
- 22 See eg Department for Exiting the EU, *The Repeal Bill: Fact Sheet 8: Environmental Protections*, <https://www.gov.uk/government/publications/information-about-the-repeal-bill>, in 'Frequently Asked Questions'; Letter from Dr Therese Coffey MP, dated 16 April 2017, <http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Gov-response-Brexit-env-climate.pdf>.
- 23 Michael Gove, *the Unfrozen Moment – delivering a Green Brexit* (21 July 2017), <https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexit>.

Brexit

Who's in charge here?¹

Professor Colin Reid, University of Dundee



At a glance

- The constitutional differences over where powers returned from Brussels are to sit within devolved structures are hindering progress on mechanisms for collaborative environmental governance across the UK in the future.
- Various models for collaboration exist under the existing devolution legislation or can be envisaged.
- At this stage work should be started on planning future arrangements, but major issues remain over the final constitutional resolution, securing the goodwill to work together and ensuring appropriate scrutiny of any collaborative working.

During the Brexit referendum campaign the cry of “take back control” was often heard but never followed up by clear discussion of where the control was to be taken back to. The European Union (Withdrawal) Bill has served only to intensify the arguments over whether power returned from Brussels transfers just to London or also to Edinburgh, Cardiff and Belfast. Does the Bill represent a “power grab” by London or is it simply the natural product of existing arrangements? Not only is this an important issue in its own right, but pending its resolution, it seems that little progress can be made on developing the mechanisms for collaboration and co-ordination between the different levels of government which are widely accepted as essential to ensure proper environmental governance in the future.

Different viewpoints

Many areas currently governed by EU law are ones which are reserved to Westminster. After all, the issues that are regulated to create the Single Market within the EU are also regulated to provide a single market within the UK, e.g. free movement, aspects of employment law and product standards. But other areas where the EU has been active, notably the environment, are ones where powers are devolved. At this point, though, we appear to face a deep disagreement between Edinburgh and London on what is the proper view of the extent of the devolution of powers.

The London approach is that although the loose talk is of powers on the environment or fisheries, agriculture, etc., being devolved, this is not the case. The extent of power transferred to and enjoyed by Holyrood is circumscribed by EU competences and activities, so that what was transferred was not power over environmental law, but only over those areas of

environmental law not regulated by EU law. It follows, therefore, that in providing that any powers held in Brussels revert (initially at least) to London, the Bill does not make any change to the extent of power enjoyed in Edinburgh; the Scottish authorities will enjoy exactly as much freedom of action as at present. Indeed by envisioning competences subsequently being passed on to the devolved authorities, the Bill is actually opening the way to an extension of their powers.

The view from Edinburgh is different. This is that in areas not reserved to London under the devolution legislation, the position is that all power rests with the devolved authorities. The fact that elements of that power are to some extent subservient to the EU at present does not alter the starting point that all matters not explicitly reserved are properly regarded as belonging in Edinburgh. Accepting the supremacy of EU rules, representing wider consensus and made by very distinct procedures, is something quite different from direct control from Westminster. The evaporation of the EU layer should mean that all non-reserved powers are devolved and the proposal in the Bill that they should be exercisable in London alone (unless and until London agrees to pass them on) is seen as a power grab diminishing devolved competences.

Models for collaboration

At the time of writing there is no easy answer to this dispute and it threatens to overwhelm the more detailed and technical work of planning for a post-Brexit environmental future within the UK. Whatever the eventual constitutional resolution, a considerable degree of co-ordination and collaboration across the UK is going to be necessary on environmental matters. A wholly fragmented system is clearly undesirable because of the inter-connectedness of our physical environment, the business needs of industry in terms of internal and external trade and the need (especially in the face of continuing austerity) to avoid wasteful duplication of effort. The question thus arises of what form the collaboration should take.

Inevitably the answer to that question does depend on the constitutional issue since that will determine where the final say on any issue, and the technical power to legislate, will lie. Nevertheless, given that environmental matters cannot be isolated and inevitably straddle reserved, devolved and (in due course, formerly) EU issues, wherever these boundaries are drawn, thought should be given to the new arrangements.

The Scotland Acts already allow for some mechanisms for working together:

- concurrent powers: This is the position in relation to the implementation of EU law, where legislative powers can be exercised by Ministers in either London or Edinburgh (Scotland Act 1998, s.57; see also the Scotland Act 1998 (Concurrent Functions) Order 1999, SI 1999/1592).
- jointly exercised powers: In a limited range of circumstances, e.g. in relation to some statutory bodies, it is provided that powers are to be exercised jointly by UK and Scottish Ministers (Scotland Act 1998, s.56(3)).
- executive devolution: It is possible for UK Ministers to give Scottish Ministers the power to act in certain areas within reserved powers, without altering the fundamental reserved/devolved boundary. The powers may be exercisable by Scottish Ministers alone, by them with the consent of, or after consultation with, UK Ministers, or concurrently (Scotland Act 1998, s.63).
- agency agreements: Either set of Ministers can provide that powers within their competence (other than powers to make subordinate legislation) can be exercised by the other, but responsibility remains with the original authority (Scotland Act 1998, s.93).
- legislative consent: The devolution settlement did not diminish Westminster's ultimate power to legislate on any matter it chooses (Scotland Act 1998 s.28(7)) but this is tempered by the process of legislative consent or "Sewel motions", whereby approval from the Scottish Parliament is normally obtained before such legislation is made (Scotland Act 1998, s.27(8)). As was made clear in the Miller case (*R (Miller) v Sec. of State for Exiting the European Union* [2017] UKSC 5), this does not provide a legal obstacle to legislation by the UK Parliament, but does provide a vehicle for encouraging co-operation.

Other models also exist. The Joint Ministerial Council is supposed to provide a forum for discussion and agreement between the various administrations in the UK. As a recent House of Lords inquiry concluded, this is not working effectively at present, but a re-vitalised structure might be appropriate. (House of Lords European Union Committee, *Brexit: Devolution* (4th report of 2017-19, HL 9)). Similarly, the Concordats and Memoranda of Understanding could be reworked to provide a stronger framework for co-operation.

An alternative is the establishment of separate, technical bodies which can bring together representatives of the various statutory bodies across the UK to discuss particular topics and make recommendations, which are then left to be implemented by the competent legislative authorities. An existing example is the Joint Nature Conservation

Committee (Natural Environment and Rural Communities Act 2006, s.34 and Sched 4), which as well as providing advice and recommendations, e.g. on the lists of plants and animals to be given legal protection, is charged with establishing common standards across the UK for the monitoring of and research into nature conservation and the analysis of resulting information.

Goodwill and scrutiny

Beyond these, various formal or informal arrangements for consultation and sharing information can be imagined. There are, however, two besetting problems which may stand in the way. The first is that just as strong co-operation can work regardless of the structural arrangements when there is goodwill on all sides, no formal structure can work effectively in its absence, and the current constitutional dispute appears to be standing in the way of mutual goodwill.

The second is that the discussions over the Bill have highlighted the question of parliamentary scrutiny. If new forms of joint working are to be created, there is a question over how such activities are going to be overseen. At present the legislative consent process at Holyrood gives the Scottish Parliament a say when primary legislation is to be made at Westminster within a devolved area, but there is no process at all for the Parliament to be informed, far less to intervene, when it is decided that delegated legislation on devolved matters is to be made in Whitehall rather than Victoria Quay (most commonly under the concurrent power to implement EU law). There are gaps that may need to be filled. Moreover, if there is to be effective joint working between the administrations, should there also be joint working between the Parliaments? Is there potential for joint commissions established by all four elected bodies to scrutinise the operation of whatever collaborative arrangements are put in place?

Official statements about the Brexit negotiations frequently call for an "imaginative and flexible" approach, and this will have to be shown in relation to structures within the UK itself. Now is the time to exercise our imaginations so that once the big constitutional question is resolved work can progress quickly. No definitive answers can be found at present, but if some thinking is done on models and options, the next stage can proceed more smoothly. As with so many matters arising from Brexit, concern over the big issues should not overwhelm the more detailed work that needs to be done to establish an environmental governance system that balances collaboration and differentiation and ensures adequate scrutiny of important matters.

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Endnotes

- 1 I am most grateful to my colleague Prof. Alan Page for fruitful discussions when preparing this piece.

Matters in practice

Planning – going back to first principles



The Rt Hon. Nick Raynsford, a former Minister for Housing and Planning and the President of the Town and Country Planning Association

At a glance

- The Raynsford Review of Planning, set up by the TCPA, is aiming to formulate a vision for how a renewed system of planning could better respond to people's needs.
- As the review address the challenges facing the nation, the task force is seeking everyone's input.

Planning at its best has a vital and transformational role to play in securing the long-term wellbeing of our communities through the delivery of sustainable development. Good planning enables us to make efficient and co-ordinated use of resources and infrastructure, offering multiple benefits to society, the environment and the economy.

Britain was one of the first countries in the world to adopt a civilised and democratic system of place-making that recognised the views of the public – something that many others have since replicated. That ground-breaking initiative has been in large part responsible for the preservation of our valued landscapes and heritage, as well as the development of successful new settlements and the regeneration of our older cities and towns. Inspired planning and the robust legislation which underpinned it over the last century have made an enormous contribution to enhancing social mobility and improving the lives of millions of people.

But today planning in England is in a pretty tough place. The planning service is underfunded; its staff are often demoralised; its very purpose is questioned by powerful lobbies; and its processes are criticised as slow, bureaucratic and out of touch with people's lives.

At a time when we need planners more than ever, a career in planning no longer looks such an attractive proposition to talented and ambitious young people. Potential applicants are discouraged by the dilution of what was once a world-changing and creative vocation into a process-driven, restrictive and undervalued function. Many would argue that planning is now in its least effective manifestation since the introduction of the landmark Town and Country Planning Act in 1947.

Everyone recognises that the country is facing an acute housing crisis. The same was true in 1947. Yet the contrast between today's responses and those of

70 years ago is very telling. Then, a major national housebuilding programme was launched by government, with a network of New Towns designated to relieve the pressure on our bomb-scarred cities. Today, the government acknowledges that the housing market is broken and is not delivering the homes that are needed at a price people can afford. But there is no mechanism at either national or regional level in most parts of the country to identify the numbers and types of homes that are required and where they can best be provided. Instead, the government hopes that the sum of local decisions will add up to an adequate supply of homes, when all the evidence shows that the numbers will continue to fall seriously short and that affordability will remain a huge barrier to both owning and renting a home. It is hardly surprising that homelessness – which should not be an issue in a developed country like the UK – has been rapidly increasing in recent years.

Regardless of these well publicised failures, planning reform in England has mainly involved deregulation and tinkering with the system, rather than focusing on the fundamental question of how we are going to live. So we are seeing more extensive permitted development, with little or no consideration of whether the development is adequately served by schools, doctors' surgeries or transport links; and an increasing proportion of decisions are reached on appeal, rather than reflecting an agreed local plan. The consensus which used to exist in favour of a system designed to uphold the long-term public interest seems to have broken down, and there is deep confusion in civil society about what the planning system is designed to achieve. We are currently following a path which is unsustainable and which is tending to widen rather than reduce inequality.

We can and should do much better than this. We need a planning system that recognises and responds to the needs of everyone; that is fairer, better resourced and secures outcomes of which communities can feel proud; and that responds to the economic, social and environmental challenges we face.

The review of planning that the TCPA has set up and asked me to chair is designed to point the way to such an alternative. It will not simply attempt to patch up some of the most problematic elements in the current

system, nor seek merely to apply a sticking plaster to wounds that require much more fundamental treatment. We will be going back to first principles to formulate a vision of how the planning system can best meet the country's needs and wider challenges such as climate change. We will collect research from a broad range of stakeholders and provide an alternative and workable framework to present to the government.

The review will mainly focus on the planning framework in England, which has undergone extensive change in recent years and, as a result, is increasingly diverging from the policy approach taken in other nations of the UK. Many of the emerging challenges the review team are grappling with have a significant legal dimension. A statutory purpose for planning, the degree to which there is any legal basis for our 'plan-led' system, the power of the citizen in decision making and the question of third-party rights of appeal. These questions which touch on constitutional questions surrounding citizen rights and the balance of power between central and local government will require a strong legal input. Ultimately our challenge is to begin to think about a new legal basis of spatial planning one that can consolidate and simplify the mindboggling layers of amended primary and secondary legislation.

We have set the **following three objectives for the review:**

- Engage constructively with politicians and council officers, communities, housing providers, developers, consultants and lawyers – all those interested in the built environment – to examine how to deliver better place-making through a fairer and more effective planning system.
- Set out a positive agenda following the outcome of the general election – and the planning hiatus that it may create – in the form of a solution-focused report setting out a blueprint for a new planning system in England.
- Set out a new vision for planning in England, and rebuild trust in the planning process by communicating with the public as well as with professionals.

Ultimately, although the review certainly aims to inform short-term changes to the planning system, our primary focus will be to provide a holistic appraisal of the kind of planning system that England needs.

The task force started work in summer 2017, launching the official call for evidence on 28 June at the TCPA AGM. As part of the call for evidence, over the summer and autumn of 2017, the review team will be holding several formal and informal events across the country to engage with practitioners and those interested in making a submission. Informal engagement will continue over the entire review

period, and the task force will publish its final report in autumn 2018.

If respondents are not able to attend one of our engagement activities, they may alternatively submit evidence by written statement, video upload or online survey (the latter option being available only to respondents who work outside the fields of housing and planning). The review is informed by background and provocation papers which are all available on the TCPA website including our detailed ToR. Given that the 1947 planning system was framed by some of the finest legal minds of the time, including Justice Uthwatt and Lord Justice Scott, it would seem appropriate that the legal profession be at the leading edge of our fundamental reassessment of the system.

The success of the Raynsford Review is dependent on the amount of engagement we receive, so I would ask that you kindly inform others of our work to help encourage greater participation. This will help us challenge assumptions and build consensus about solutions so that we can produce a blueprint for a new planning system that is robust and indisputable by the government.

Raynsford Review task force members

- **Rt Hon. Nick Raynsford**, Chair of the task force and former Minister for Housing and Planning
- **Maria Adebawale-Schwarte**, Founding Director, Living Space Project
- **Julia Foster**, Managing Partner, David Lock Associates
- **Tom Fyans**, Director of Campaigns and Policy, Campaign to Protect Rural England
- **Kate Henderson**, Chief Executive, TCPA
- **Lord Kerslake**, Former Head of the Civil Service, President, LGA, and Chair, Peabody
- **Professor Yvonne Rydin**, Professor of Planning, Environment and Public Policy, Bartlett School of Planning, University College London
- **Chris Shepley**, Consultant and former Chief Planning Inspector for England and Wales
- **William Upton**, Barrister and Secretary of the Planning and Environment Bar Association
- **Finn Williams**, Regeneration Area Manager for North West London, Greater London Authority, and founder of public sector planning think-tank NOVUS

Full details of the project, including event listings and guidance papers, can be found on the [Raynsford Review webpage](#) of the TCPA website.

Matters in practice

Lawyers supporting climate legislation in developing countries



Pascale Bird, Advice Coordinator for Legal Response International

At a glance

- Legal Response International (LRI) is an award winning pro bono project that relies on the support of a global network of lawyers.
- LRI has been assisting climate vulnerable developing countries in the UN climate negotiations since 2009.
- As developing countries need legal support to implement their climate plans, you can help and join the LRI network.

LRI background and model

The UN climate change negotiations are among the most complex multilateral law and policy-making processes ever. The last conference of the parties in Marrakesh in 2016 was attended by 25,900 participants.

Meetings are characterised by technical jargon, carefully crafted wording and references to international legal principles and obligations. The delegations of industrialised countries therefore include specialised experts, lawyers and other support staff.

Developing country negotiators who represent countries that are most vulnerable to the impacts of climate change can rarely rely on a similar backing. As a result, they are regularly 'outgunned' by the larger delegations of industrialised countries.

LRI was conceived in 2009 as a capacity building response to the unequal access to legal support between countries involved in the negotiations. To create a more level playing field between actors, LRI provides pro bono high quality real-time legal support to negotiation teams from poor and particularly climate vulnerable developing countries and civil society observer organisations during the negotiations.

This support is facilitated by a small team of mostly volunteer lawyers who attend the negotiation sessions and field legal queries (through the London based 'situation room') to expert advisers from a global network of over 170 lawyers from leading law firms, universities and barristers' chambers.

Advisers may, for example, provide an analysis of legal issues, comment on draft decision text or help turn policy positions into legal language text, free of charge. They may at any time recuse themselves if

they fear a conflict of interest. Subsequently, all advice is made publicly available, on an anonymous basis, through the LRI database. In addition, LRI aims to build long-term capacity and, to that end, provides legal training and introduces lawyers from developing countries to the international negotiations.

Ruel Yamuna, a Papua New Guinea diplomat who refers to LRI as his 'guardian angels', says 'For me as a negotiator, I sometimes get lost in translation, because everything is in abstract,' 'LRI definitely comes to the fore in terms of clarifying those different areas where I need a third party analysis of the context of documents.'

Paris Agreement and national legislation

In the lead-up to the Paris Agreement in 2015, LRI assisted the most climate vulnerable nations with around 100 legal opinions on the legal form and content of the new agreement, on a wide range of questions that included options for anchoring nationally determined contributions (NDCs) in the new agreement, linkages between the Kyoto Protocol and the agreement, suggesting legal language on the 5-year commitment cycles or options to include gender equality in the agreement. Legal experts contributed several hundred hours of pro bono support.

However, the Paris Agreement only provides a broad framework for further substantive decisions by the parties on its future operation, national implementation and administrative framework. How, for example, developing countries' adaptation efforts will be recognised or what new opportunities the new market mechanisms may offer is currently unclear.¹

In Marrakesh in 2016, governments, therefore, agreed to develop the necessary processes, methodologies and regulations without delay and to complete their work – the so called "rulebook" of the Paris Agreement – by 2018.² So LRI will continue to support countries at the international level.

In addition, states will also have to develop new policies, legislation and institutions to implement the Paris Agreement and their NDCs. As a result, an increasing number of legal queries LRI receives also concern the domestic implementation of international commitments and other climate plans.

At the last climate change conference in Bonn in May

2017, Patricia Espinosa, the Executive Secretary of the UNFCCC congratulated the small but growing number of countries that soon after Paris started drafting legislation in support of their nationally determined contributions.³

Seth Osafo, Legal adviser to the African Group in the negotiations, says: 'Unlike other multilateral environmental agreements the Paris Agreement provides parties with very limited guidance on national implementation. Additional support and input on legislative initiatives is therefore important to translate international promises into meaningful action on the ground.'

In practice, countries will have to develop new domestic policies, laws and regulations to implement their commitments. In some cases, comprehensive national strategies and policies may suffice to address climate change concerns and the adoption of formal legislation by parliament may at times hamper quick, efficient and flexible responses. However, only law locks countries in a policy direction that cannot be easily reversed, creates legal certainty, encourages coordination of different policy spheres across government agencies. Legal certainty and a robust legal framework are important components of economic stability, working markets and attracting investment.

Clearly, there is no 'one size fits all' solution and legislative approaches will be dictated by the specificities of particular legal systems and cultures. However, where there is a legislative vacuum, bespoke climate change legislation may be an obvious first step to mainstream climate concern across different areas of the law. This may take the guise of a specific

climate framework legislation to initiate and sustain this process. Several developing nations such as Kenya, Papua New Guinea and the Philippines have, therefore, adopted legislation which provides the framework to further develop law and policy (in line with different national priorities) and identifies or establishes the relevant institutions to do so.⁴

Climate change is an all-encompassing phenomenon which impacts on almost all sectors of society. Framework legislation, where it is adopted, will therefore need to be supplemented by sector specific approaches. A wide range of existing law and policy instruments may require review and revision and new rules and regulations may be needed to fill existing lacunas.

In this connection, law and policy makers need to consider a range of regulatory techniques. With regard to the mitigation of GHG emissions and pollution control these may take the form of, for example, quantitative targets, pricing emissions (taxes, cap and trade), command and control mechanisms, subsidies and tax incentives, as well as monitoring, reporting and verification (MRV).

At the same time, legislation should be flexible enough to accommodate the developments at the international level and allow countries to fully benefit from the Paris Agreement.

Get involved!

Good legislation also needs to be sensitive to the country and sub-national contexts.

Whilst national ownership of the process is essential and, ultimately, national specificities will determine



the adequate mix of laws, policies and different strategic approaches, gaps in local expertise mean that developing country law and policy makers will benefit from the experience and expertise of lawyers from other jurisdictions.

The rapid entry into force of the Paris Agreement increases the urgency for supporting developing countries in their legislative efforts to respond to climate change and implement their commitments under the Paris Agreement. In collaboration with UNEP, LRI is therefore offering governments and parliamentarians from developing nations support free of charge in the development and review of climate and climate relevant legislation to implement the Paris Agreement and nationally determined contributions.

For that purpose, both organisations entered into a memorandum of understanding in 2016. They are now preparing to launch a web-based portal to submit legal questions, track their progress, answers and feedback, to be launched at the next climate conference in Bonn in November.

Through its network of lawyers from law firms, barristers' chambers and universities, LRI will make high value and quality legal advice which would otherwise not be accessible to poor and climate vulnerable developing nations available for free. At the same time, LRI brokerage scheme will help law firms and other lawyers to meaningfully engage with new and emerging areas of the law. Experienced environmental lawyers who can contribute some of their expertise and time can make an important contribution to the fight against climate change.

Silke Goldberg, a partner at Herbert Smith Freehills and long term LRI expert adviser says 'As coordinator of our environmental pro bono work I currently have over 70 volunteers. The LRI work can range from a short textual proposal to capture an idea in clear legal language to comprehensive research assignments by a whole team of lawyers. For some of them it has been an eye opening experience.'

The time commitment will necessarily be variable, depending on the nature of the assignment. But whereas the assistance provided during negotiation sessions tends to require an immediate response, the support with review and development of domestic legislation will generally not have the same degree of urgency and allow greater flexibility as to the timing of the response.

If you are interested in joining our network or finding out more, please contact [Pascale Bird](#).

Pascale Bird coordinates LRI's advisory service. She is a qualified solicitor and previously worked as an Associate and PSL in the EU and Competition department of Simmons & Simmons.

The LRI team and a delegate from the Republic of the Congo, Bonn, May 2017

Endnotes

- 1 Paris Agreement, Art.7 para.3; Art.6 paras.4-7 (mechanism to support sustainable development).
- 2 Decision 1/CP.22, Preparations for the entry into force of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement in Report of the Conference of the Parties on its 22nd session, held in Marrakech from 7 to 18 November 2016, Addendum Part two: Action taken by the COP, FCCC/CP/2016/10/Add.1, 31 January 2017.
- 3 14 new laws and 33 new executive policies related to climate change have been introduced since Paris according to M. Nachmany – see PP presentation at Webinar on 'Climate Change Laws of the World – global trends in legislation and litigation', co-organised by the Grantham Research Institute on Climate Change and the Environment and the Sabin Center for Climate Change Law, 05.06.17. See also <https://www.youtube.com/watch?v=-AEhndiMcvQ&feature=youtu.be>
- 4 The Climate Change Act, Kenya, 2016; Climate Change (Management) Act 2015, Papua New Guinea; An act mainstreaming climate change into government policy formulations, establishing the framework strategy and program on climate change, creating for this purpose the climate change commission, and for other purposes (Republic Act No 9729), Philippines, 2009; respectively. Most relevant legislation can be easily accessed via the combined database of the Grantham Research Institute on Climate Change and the Environment and the Sabin Centre for Climate Change Law at: <http://www.lse.ac.uk/GranthamInstitute/legislation/the-global-climate-legislation-database/>.

Adverts, jobs and tender opportunities

Introduction to Wildlife Law Course – 8th-10th November

Under the auspices of UKELA's nature conservation working party, members have arranged an introductory course on wildlife law again this year. It is being held from 8th-10th November at Browne Jacobson's offices in Nottingham.

This course is designed for those whose jobs require them to understand the practical impact of the legislation surrounding wildlife. It will concentrate on enabling participants to make the best use of the law on the ground and to avoid the pitfalls that accompany such a technical subject as the law.

By the end of the course it is anticipated that participants will:

- have gained an overview of the law on the protection of wildlife (including protection of individual animals and plants and EC law);
- have an understanding of general legal concepts that are relevant to nature conservation; and
- know how to work most effectively with a solicitor, if they end up having to take a case to court.

The cost of the course, held over 3 days, is £175. Participants will need to make their own arrangements with regards to accommodation and travel. To book a place on the course, please contact [Debbie Liversidge](#) at the Browne Jacobson offices. If you have any queries regarding the course programme, please contact Wyn Jones on 01270 620988.

Environment Professor tackles big questions in final 2017-18 series

Gresham College, London's oldest Higher Education Institution, is delighted to announce Carolyn Roberts' final series of lectures on the Environment. In her series Roberts, who is Frank Jackson Professor of Environment at Gresham College, will tackle controversies such as fake news, alternative facts and our post-truth society – looking at the Thames, flooding, national parks, organic food and eco-cities.

About Carolyn Roberts

Professor [Carolyn Roberts](#) is the first Frank Jackson Professor of the Environment at Gresham College. She is also a Senior Scientist at the UK Knowledge Transfer Network (KTN) which links business and universities in order to promote research and innovation in environmental technologies.

Her series for 2017-18 will be:

[Cleaning Up the Thames: Success or Failure?](#)

Thursday 28 September 2017 from 6pm at Barnard's Inn Hall

[Organic Food: Rooted in Lies?](#)

Thursday 9 November 2017 from 6pm at Barnard's Inn Hall

[Ecotowns or EgoTowns?](#)

Thursday 18 January 2018 from 6pm at Barnard's Inn Hall

[National Parks and National Park Cities](#)

Thursday 8 February 2018 from 6pm at Barnard's Inn Hall

[Is 'Green Business' a Contradiction in Terms?](#)

Thursday 22 March 2018 from 6pm at Barnard's Inn Hall

[Who's to Blame for Britain's Floods?](#)

Thursday 31 May 2018 from 6pm at Barnard's Inn Hall

About the Environment Professorship

The Frank Jackson Professor of the Environment chair was created in 2014. This is only the second new Professorship created at the College in over 400 years.

About Gresham College

Gresham College is an independent institution funded from the estate of our founder, Sir Thomas Gresham. After his death in 1579, Sir Thomas' estate and control

of his benefaction was left to the City of London Corporation and the Worshipful Company of Mercers, which operate through the Joint Grand Gresham Committee to support the College.

The College fills lecture halls for its four (or so) free public lectures every week, amounting to around 130 a year, with spots available on a first-come first-served basis. A series of six lectures a year is delivered by each of our ten Professors. These are augmented by a number of visiting professors and as many as 40 individual lectures from a range of illustrious speakers selected from the worlds of academia, politics and industry. All Gresham lectures are made available online after the event. This year the College will also live-streaming lectures to make them accessible to those outside of London.

Student Adviser Role Offers Career Development

UKELA is offering a student with the right skills and outlook an opportunity to join our student team as a Student Adviser. For more information, please see the [Student News](#) section in this edition of elaw.

Book reviews

The e-law editors are regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please drop [us](#) a line.

UK Environmental Law Association

elaw

The editorial team is looking for quality articles, news and views for the next edition due out in November 2017. If you would like to make a contribution, please email elaw@ukela.org by 15 November 2017 .

Letters to the editor will be published, space permitting.

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