

Perspectives

Legal updates for the world of higher education



March 2020

Dear Colleague

Many commentators say that this is the “decade for action” for the planet and that the United Nations’ Sustainable Development Goals (SDGs) 2030 are our global “to do” list. The SDGs cover a number of interconnected themes that are highly resonant today, including the importance of good health and wellbeing, climate action and the need for quality education. The impact of Coronavirus is challenging the best laid plans across the globe in all aspects of human activity, and it remains to be seen what the longer term impact of the virus will be. Ultimately it may result in a renewed focus on sustainability issues and of how to address the challenges of living in a highly populated, highly connected world. Some parallels can perhaps be drawn between the political and legal frameworks developing in response to the global challenge posed by climate change (the focus of this issue of Perspectives) and the efforts required from all of us to meet the latest challenges posed by Covid-19.

Whilst the drama of 2020 is still unfolding, the word or expression of the year for 2019 according to Oxford University Press was “climate emergency”. The uncontrollable bush fires in Australia - and before that the forest fires in California and the Amazon - have shown the world the reality of global warming. On 1 May 2019, the UK Parliament passed a motion to declare a national climate emergency. Although this Parliamentary motion did not create new legal duties, declaring a climate emergency is increasingly being used by governments, institutions and campaign groups to express concern about the environmental crisis facing the planet. In November last year, some 11,000 scientists from around the world warned of the “untold human suffering” that would happen unless urgent action was taken on global warming.

While some of the solutions to mitigate against, and adapt to, climate change may be found in technology, it may require a more holistic approach to the causes and strategies to tackle this major threat. The SDGs present a coherent framework for action for all 193

countries which signed up to the Goals. They seek to stimulate action “in areas of critical importance for humanity and the planet”. While the 2030 Agenda for Sustainable Development contains commitments made by Governments from across the world, it was based on significant consultation with wide sections of society and recognises the role to be played by all stakeholders, whether in the private, public or charity sectors.

Although it is beyond the scope of this briefing to consider in detail the meaning of the phrase ‘sustainable development’, the 2002 New Delhi Declaration on the Principles of International Law provides a helpful insight into the core of the concept of ‘sustainable development’:

“A comprehensive and integrated approach to the economic, social and political processes, which aim at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realise the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.”

How does the law work in this landscape ?

One important perspective is to consider whether we are talking about international law or domestic law.

The 2030 Agenda for Sustainable Development (which includes the 17 SDGs) was agreed by the UN General Assembly in 2015 and forms part of the UK Government’s international treaty commitments. However, as was explained in the High Court’s judgment about the legality of the Government’s approach to the third run-way at Heathrow airport (quoted by the Court of Appeal in its [judgment](#) on 27 February 2020 at paragraph 192):

“It is well established that English law is a dualist legal system under which international law or an international treaty has legal force at the domestic level only after it has been implemented by a national statute.”

We will return to the Court of Appeal’s ruling at the end of this briefing to consider the interplay of International law and domestic law further.

Later on this year (9-20 November 2020), Glasgow is scheduled to host the Conference of the Parties number 26 (COP26) under the UN Framework Convention on Climate Change (UNFCCC). Key to the success of COP26 will be the action which countries agree to take in tackling the climate emergency. This will include updating by countries on what are called Nationally Determined Contributions (NDCs). These are the efforts which countries agree to take to reduce carbon emissions and to adapt to the impact of climate change.

UK Legislation and common law

The UK was the first country in the world to legislate (the Climate Change Act 2008) for a target to cut emissions by 2050 and last year it was the first country to set that target at “net zero emissions” by 2050.

But environmental measures pervade many areas of both our common law and our statute law. In terms of legislation, we now have a new Environment Bill. The Government has heralded this as a flagship piece of post-Brexit legislation for the UK to continue to lead the world in defending the environment. A new regulator will be established to enforce environmental law - the Office for Environmental Protection (OfEP).

An obvious example from our common law is how a landowner is provided with a right of action by the tort of nuisance for the escape of a polluting material from another person’s land. Action can also be taken against persons who trespass on land and this is one of the legal causes of action which can be taken against those campaigning on environmental issues where their right to protest crosses the line of lawful activity.

Information law includes the Environmental Information Regulations 2004 (EIRs). The EIRs require a public authority to disclose recorded information about “the state of elements of the environment”. This is akin to the Freedom of Information regime, although the EIRs are rooted in the UN’s Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental

Matters. Public authorities must make environmental information available pro-actively and members of the public are entitled to request such information from public authorities (subject to some exceptions).

While the European Convention on Human Rights and the Human Rights Act 1998 do not expressly include a human right concerning the environment, the various provisions may be called upon in different contexts. Reference for example may be made to Article 8 (the right to a private and family life) in interpreting the Aarhus Convention. It remains to be seen how far the concept of human rights is extended into protecting the environment through judicial processes rather than political processes.

Some domestic legislation makes specific provision for environmental concerns. The whistleblowing legislation - the Public Interest Disclosure Act 1998 - specifies that a category of qualifying disclosure is: “that the environment has been, is being or is likely to be damaged.”

The Equality Act 2010 (EA2010) provides protection from discrimination for those with a specified “protected characteristic”. One such protected characteristic is someone’s “religion or belief”. The EA2010 goes on to confirm that “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.” Such a belief must be genuinely held and more than an opinion. It must be cogent, serious and apply to an important aspect of human life or behaviour. The [Employment Appeal Tribunal has held](#) that a strong belief in anthropogenic climate change where someone feels that they have a duty to live their life in a way which limits their impact on the earth to help save it for a future generation would be classed as a belief and protected under the earlier religion and belief regulations (now incorporated in the EA2010). At the start of this year, an individual was [successful in a crowd-funded legal claim](#) in which he argued that his ethical vegan beliefs were protected in principle under the EA2010.

HERA 2017 and the OfS

As we know, the Higher Education and Research Act 2017 (HERA2017) was passed to provide for a new regulatory and funding framework for the research and teaching elements of higher education in England. The Office for Students (OfS) was established as the new statutory regulator for English higher education providers. However, OfS was given no express statutory role to regulate registered providers in respect of environmental issues. It would seem

possible for an issue to fall within the definition of a 'reportable event', namely that the issue "materially affects or could materially affect the provider's legal form or business model, and/or its willingness to comply with the conditions of registration". The extent of what constitutes a reportable event falls outside the scope of this article.

We note, however, that the Chair of the Board of the OfS in a blog in February this year stated categorically that "OfS will not be silenced on sustainability." In the blog it was accepted that OfS had no statutory power to set emissions targets for registered higher education providers but that the OfS Board was of the view that it "should consult about how we might collect and publish data on carbon emissions for registered providers." It is unclear what statutory power this would be based upon. The OfS also proposes to "publish data about students' attitudes to climate change, as part of a package to encourage further action from universities and colleges."

The Heathrow decision

Returning now to the recent Court of Appeal's decision in the challenge to the Government's approach to a third run-way at Heathrow. This decision has been described in the press as "ground-breaking" as the Court of Appeal over-turned the High Court's earlier decision and found the Government to be in breach of public law for not having taken into account its treaty commitments in the 2015 Paris Agreement on Climate Change. It should be noted that the Court of Appeal made clear that it was not the role of the court to stray into the "forbidden territory of assessing the merits of a public decision under challenge by way of judicial review." The Court of Appeal's judgment gives a detailed analysis of the relevant legislation under which the Secretary of State had promulgated the Airports National Policy Statement (ANPS), in particular section 5(8) of the Planning Act 2008. That legislation -

passed by Parliament - expressly required the Government to "include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change." The Court of Appeal concluded that the ANPS was unlawful by reason of a failure to take into account the Government's commitment to the provisions of the Paris Agreement on Climate Change, concluded in December 2015 and ratified by the UK in November 2016." It remains to be seen the extent to which reference to the Paris Agreement will feature in further challenges to the decisions of Government and other public authorities.

Greening universities and the OfS

Linking with the themes in the SDGs, the United Nations Environment Programme has published a "[Greening Universities Toolkit](#)" which is "designed to provide universities with the basic strategies and tactics necessary to transform themselves into green, low carbon institutions with the capacity to address climate change, increase resource efficiency, enhance ecosystem management and minimise waste and pollution". The toolkit draws on experience from a number of jurisdictions, including the work undertaken by the UK's Environmental Association for Universities and Colleges (EAUC). The work of EAUC, the Association of University Directors of Estates and other sector bodies has also been referenced by the OfS in its recent [board paper](#) on reducing carbon emissions. It will be interesting to see how this work develops, against the backdrop of the global challenges underpinning the SDGs.



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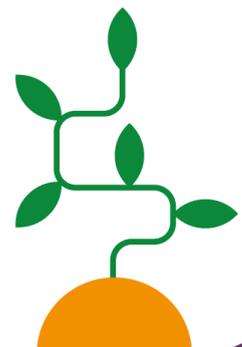
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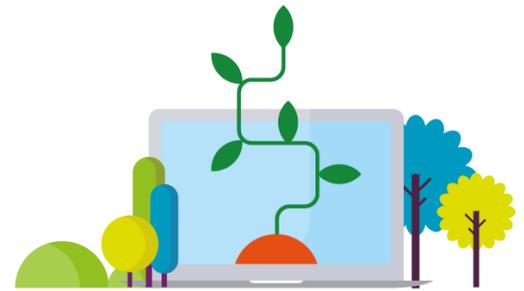
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Sustaining the campus - How should a university develop its estate responsibly?



A university's estate is one of its key assets in attracting new students and the fees they bring with them. Clearly, universities face competing pressures when planning estate development, including financial and technological challenges, but the fundamental requirement is that the estate must enhance the student experience and meet the students' expectations. Students see inspiring environments as evidence that their university truly values them. However, with many universities now declaring climate change emergencies, how does the need to maintain an attractive campus compete with the sustainability expectations of today's (and tomorrow's) students?

Many universities, both in the UK and internationally have signed the Sustainable Development Goals (SDG) Accord issued by the Environmental Association for Universities and Colleges (EAUC) to demonstrate their commitment to delivering the UN's Sustainable Development Goals. Furthermore, many have set the incredibly ambitious target of being "net zero" by 2030. But how does this translate into better development practices on campus?

The 2019 Student Academic Experience Survey of some 14,000 undergraduates was carried out jointly by the Higher Education Policy Institute and Advance HE. The results make interesting reading, as a strong correlation emerges between higher levels of student satisfaction and not only teaching quality, but also facilities and resources and the campus and the built environment. Accordingly, despite the development of the virtual environment and the rapid changes we are seeing in the ways in which learning is delivered and received, conventional face to face teaching and a supportive campus environment remain highly important to students.

Innovation, flexibility and adaptability

This does not mean that universities should not innovate. Whilst the didactic "sage-on-stage" form of teaching may have fallen out of favour, in its place, we

are seeing student-led learning and "flipped classrooms" (using face to face teaching time to discuss ideas the students have already self-taught). As a result, shared learning spaces and large flexible floor space will undoubtedly feature prominently in new campus designs.

Further, the rise of technology in remote learning, AI, virtual reality and even the holographic lecture theatre – as already seen at Harvard – is having a huge impact on what sort of space is needed within an estate. These options may lead to fewer journeys to/from and around campus and reduced space requirements. Intelligent campuses, as promoted by Jisc, are also on the horizon. These campuses can provide data and "intelligence" to students, so they can make the best use of facilities on offer. Arguably, maximising the efficient use of its estate should mean facilities are used more effectively and thus help the university in reaching its sustainability goals.

It is becoming increasingly clear that this flexibility and adaptability of the estate is key. Not only must development be done in a way which allows future adaptation as technology advances, but we are seeing many of our clients repurposing their estates, with mixed-use facilities shared with the local community and businesses. This engagement is so important – universities must support their civic surroundings as ultimately, both will benefit (and without this synergy, both can fail). Collaborating early with local partners should be a win-win for all if the university takes the lead on promoting sustainable development which works for everyone.

The retrofitting opportunity

However, whilst it may be easy (at least relatively) for a university to commit to developing new buildings on campus which are net zero carbon and have all the latest "green" bells and whistles, it is from its existing campus that the university may be able to make the biggest gains to meet its sustainability targets. Some of

the UK's most historical and prestigious buildings are owned by universities and are still in everyday use even though their green credentials leave much to be desired. Universities will carry out retrofitting projects to adapt these buildings to meet the needs of their student population, but they should not shy away from retrofitting to boost sustainability. Such projects can consider: energy sources and reduction of demand; thermal issues; insulation issues; air tightness strategy; humidity management and smart energy technologies. We also need to move away from building out of concrete and glass, which is extremely damaging in terms of carbon dioxide emissions. The desire to update must be balanced against planning and conservation issues and considerations of how the building will cope with the new design. It is disheartening and disincentivising for a university to develop retrofitting plans which will make a large environmental difference only to be stymied by the local planning process when applied to an historical building, but neither should heritage be destroyed in a rush to modernise.

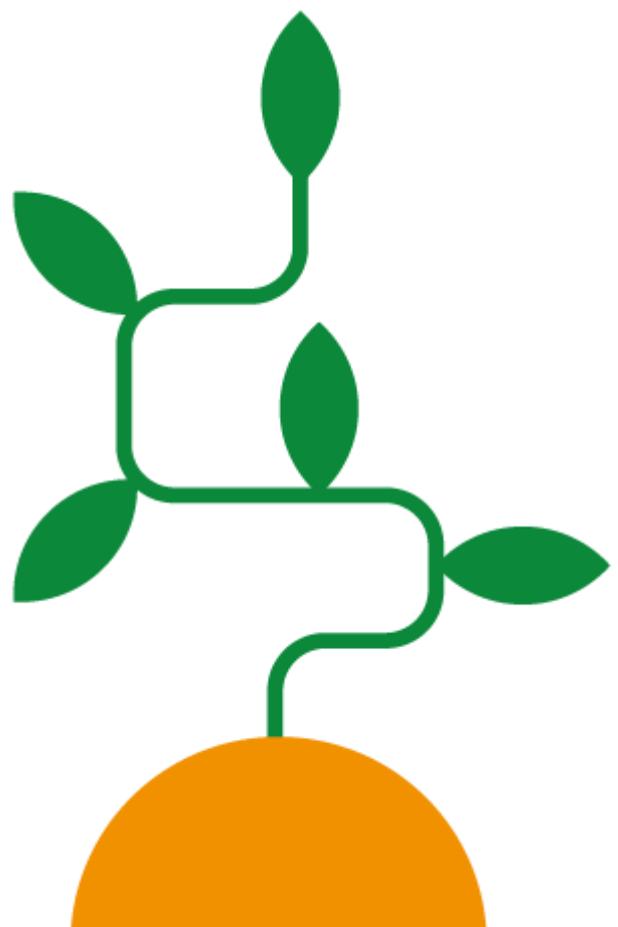
Retrofitting and achieving net or even absolute zero carbon can seem expensive, but universities know that they must consider more than just financial costs. There is currently a huge variation across the sector in addressing sustainability issues, but it is clear that all universities are thinking about it. The universities able to make the biggest steps will be those where their senior leadership teams engage. A collaborative approach is necessary – the university working with the local planning authority (particularly those universities needing to adapt historic, possibly listed, buildings) and other local partners to ensure carbon reduction commitments can be met.

The future

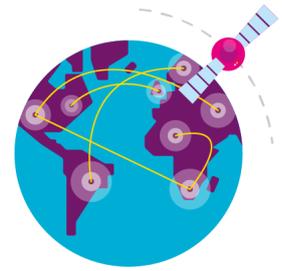
Universities are critical in providing leadership on sustainability issues. As world leaders in research, UK institutions have the knowledge, expertise and capability to make a difference. However, it is their students who are driving change on campus – they are looking for flexible, well-connected space which is sustainable and meets challenging environmental targets. Universities must adapt to attract. The university's estate is one of its key assets and so the university must be sure to use it to its full potential.



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The role of universities and climate change: carbon trading



In the wake of the youth climate strikes, universities are in the spotlight to combat the climate crisis and achieve sustainable development. Universities, by definition, have already accepted the task of the propagation knowledge and the pursuit of best practice, but for a challenge as big as saving the planet, many may be looking for additional methods of “greening” their toolkit. This environment is fuelling interest in carbon pricing.

Carbon pricing

Carbon pricing is a financial concept used to set a price on units of carbon dioxide (and other greenhouse gas) emissions released into the atmosphere. It can take various shapes and sizes, the key examples being emissions trading systems (ETS), carbon taxes and carbon offset mechanisms. There are pros and cons to each, for example, theoretically an ETS can provide environmental certainty because it places a cap on total emissions but allows the carbon price to fluctuate according to the market. By comparison, a carbon tax provides certainty as to the carbon price, however, the environmental impact is ambiguous because emissions aren’t capped. Yet, the different pricing mechanisms all share one aim: to help shift the burden for the damage of ghg emissions back on to the polluter responsible for emitting them. Forcing polluters to internalise the cost of emissions creates an incentive to limit such emissions and strengthens the case for investing in clean energy technology.

The World Bank Carbon Pricing Dashboard confirms that as of 2019, there were 58 carbon pricing initiatives implemented or scheduled to be implemented spanning 46 national jurisdictions and 31 subnational jurisdictions. Those initiatives were expected to cover 11 GtCO₂e (gigatonnes of carbon dioxide equivalent), representing 20.1% of [global ghg emissions](#). So, the global significance of carbon pricing is clear.

The EU ETS

The European Union Emissions Trading System (EU ETS), launched in 2005, was the first international system for trading emissions allowances. Operating in

all EU countries, Iceland, Liechtenstein and Norway, the EU ETS is regarded as the “[cornerstone of the EU’s policy to combat climate change and its key tool for reducing greenhouse gas emissions-cost effectively](#).” It remains the largest international ETS and currently regulates 11,000 power stations and industrial plants across the EU with [1,000 of those being in the UK](#). It also covers the airlines operating between those countries. And, the reach of the EU ETS continues to expand; on the 1 January 2020, Switzerland became the first country to link its emissions trading system with the EU ETS after a process which [took nearly a decade](#).

What does this have to do with UK universities?

Although power stations, airline operators and heavy industries (like oil refineries and iron, steel, cement and other chemical producers) make up the bulk of EU ETS participants, other types of organisations, including universities, may also be captured by the EU ETS if the combustion capacity of equipment at their sites achieves a certain level.

How does it work?

Legislation creates freely tradable “allowances” which can be thought of as the right to emit one metric tonne of carbon dioxide or any other ghg gas listed in the EU ETS Directive with an equivalent global warming potential. A centralised EU-wide cap on the absolute quantity of ghg which can be emitted by participants is established which corresponds to the number of allowances in circulation. The intention of the cap is to confine emissions to a specific pre-determined level that should not be breached during the period the cap is applicable to ensure emissions reductions targets are met. The EU ETS cap is designed to reduce each system year so the number of allowances available decreases annually.

Allowances are either auctioned or freely allocated to reduce the risk of carbon leakage whereby emitters move their operations to an unregulated jurisdiction. Participants must surrender an equivalent number of allowances for their tCO₂e emitted during each system

year and must submit independently verified reports of those emissions. In the UK, failure to comply with the EU ETS can attract significant civil penalties, e.g. for failure to surrender sufficient allowances and/or breach of the monitoring, reporting, accreditation and verification requirements.

Is the EU ETS working?

The European Commission's [carbon market report](#) shows that in 2018, emissions from stationary installations regulated by the EU ETS decreased by 4.1% or 73 million tCO₂e from 2017. In 2020, emissions from sectors covered by the EU ETS will be 21% lower than in 2005 (when the EU ETS was launched) and by 2030 it is anticipated that emissions from sectors covered will be [43% lower](#).

What about Brexit?

In the short term, the UK government has confirmed the UK will remain in the EU ETS during the transition period (until 1 January 2021) and comply with the 2019 and 2020 system years. The Withdrawal Agreement provides that from 1 January 2021, the UK will have the obligation (and will retain the ability) to enforce the EU ETS 2020 obligation to surrender emissions allowances.

The long term future of carbon pricing in the UK remains undetermined. However, the government [continues to affirm its position](#) that it is “*deeply committed to domestic and international efforts to tackle climate change*” and that “*any future system will be at least as ambitious as the EU ETS.*”

It is worth remembering the UK is a Party to vital international climate change agreements made under the United Nations Framework Convention on Climate Change including the Kyoto Protocol (which introduced international emissions trading as one of the three flexible market-based mechanisms to achieve emissions reductions alongside the clean development mechanism and joint implementation) and its successor, the Paris Agreement (which contains the long-term goal of maintaining the increase in global

average temperatures to well below 2°C above pre-industrial levels and the aim to limit that increase in temperature to 1.5°C so as to significantly reduce risks and the impacts of climate change). Also, in June 2019, the UK became the first major economy to [pass legislation](#) to end its contribution to global warming by bringing all ghg emissions to net zero by 2050.

Carbon pricing of some form will continue to be relevant in the UK for the foreseeable future. The government's May 2019 [consultation](#) sought views on proposals for future pricing options, but noted the preference to establish a domestic ETS linked to the EU ETS i.e. similar to the approach recently adopted in Switzerland. Other the options being considered included a standalone domestic ETS or a carbon tax.

Going forward

If successfully implemented, the Paris Agreement will hopefully cause carbon markets to become more important. UK universities captured by the EU ETS can draw on their experience to maximise their chances of success in achieving sustainable development. Rather than thinking of the EU ETS as yet another regulatory regime to adhere to (and all the costs that go along with it), universities should celebrate being part of a regime producing results in the fight against the climate emergency. At a time when students are refusing to go to school at all because of climate change, those who do go will undoubtedly consider how their university is contributing to sustainable development.



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Environmental Information Regulations or Freedom of Information? A reminder...



When receiving a request for information, often one tends to immediately start considering it under the Freedom of Information Act 2000 (“FOIA”). However an alternative statutory regime may, in fact, be appropriate even if the requestor themselves asks that the receiving party deals with the request under the FOIA.

The Environmental Information Regulations 2004 (“EIR”) may have been in force for over 15 years, but are often the forgotten sibling of FOIA. However, section 39 of the FOIA provides an exemption for any environmental information held by a public authority which is subject to the EIR, and it is that regime which the request should correctly be considered under.

“Environmental information” is defined in regulation 2(1) of the EIR and involves:

- The state of the *elements* of the environment (eg air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and genetically modified organisms) and the interactions between the elements.
- *Factors* affecting, or likely to affect, environmental elements (eg substances, energy, noise, radiation, waste, emissions, discharges and other releases into the environment).
- *Measures* (including administrative measures, policies, legislation, plans, programmes and environmental agreements) and activities affecting, or likely to affect, the elements and/or factors (see above).
- Reports on the implementation of environmental legislation.
- Cost benefit and other economic analysis used in environmental decision-making.

The state of human health and safety, conditions of human life, the food chain, cultural sites and built structures insofar as they are, or may be, affected by elements / factors / measures.

As such, “environmental information” is far broader than one might immediately assume, to include not just information relating to development, planning, pollution,

and energy management or waste, but also data relating to, for example, financial information relating to the costs of developing land and pest control.

It is important to make the distinction between whether FOIA or EIR applies because while both pieces of legislation have similar effects, there are some differences in their application. Broadly speaking:

- The EIR has potential to extend to a wider range of entities than just bodies deemed to be “public authorities” under the FOIA – including (1) bodies or persons carrying out functions of a public nature and (2) any other body or person “under the control of” an entity subject to EIR that has public functions relating to the environment.
- Requests under the EIR need not be in writing.
- Bodies subject to the EIR may be able to charge for disclosure of information if the request is wide ranging (there is no equivalent “cost cap” provision to that provided under the FOIA), although the charge must be reasonable and should not serve as a deterrent.
- A body subject to the EIR is deemed to “hold” the information requested even where it holds it on behalf of another person.

There is a presumption in favour of disclosure of environmental information, particularly insofar as the request relates to emissions. Under EIR the “exceptions” from disclosure are subject to a public interest test; ie the public interest in maintaining the exception must be balanced against the public interest in disclosing the information. This contrasts with the position under FOIA, whereby not all “exemptions” are subject to a public interest test.”

We have in depth experience advising on the application of the EIR and FOIA in a range of contexts for education institutions and other bodies; do get in touch if you require further information or assistance.

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Climate change litigation



Environmental campaigners are increasingly using litigation as a tool in the fight against climate change. The Court of Appeal's [decision](#) on 27 February 2020 that the Government's policy in favour of a third runway at Heathrow was, in its present form, unlawful ("**Heathrow Decision**"), shows the possible impact of climate litigation. This article considers global trends in climate litigation, types of environmental litigation in England & Wales and what this trend means for the higher education sector.

What is climate litigation?

Climate litigation is an umbrella term covering varied claims connected to climate change. Claimants are mostly campaigners looking to tackle climate change or victims looking for compensation.

The global picture

The volume of climate change litigation is increasing globally, as noted in "[Global trends in climate change litigation: 2019 snapshot](#)" produced by researchers at the LSE's Grantham Institute on Climate Change and the Environment. The majority of cases have been brought in higher-income countries, but there has also been growth in cases in lower-income and middle-income countries.

Cases against public sector bodies form the majority of cases. Claimants in these cases are mostly individuals, sub-national governments, and NGOs. Claims against governments can be categorised according to their goals including:

1. ensuring compliance with emissions targets;
2. holding governments to account for not having ambitious enough emission targets;
3. challenging potentially harmful government infrastructure projects; and
4. enforcing the human rights of individuals affected by climate change.

An example of this is the landmark judgment [The State of the Netherlands \(Ministry of Infrastructure and the Environment\) v Urgenda Foundation](#) [ECLI:NL:HR:2019:2006](#). The Supreme Court of the

Netherlands held in December 2019 that the Netherlands government was contravening its duties under the European Convention on Human Rights (specifically, the Art 2 right to life and the Art 8 right to a private and family life) by not pursuing an ambitious enough greenhouse gas (GHG) reduction target. The court has confirmed that the Netherlands government should reduce GHG emissions by at least 25% by the end of 2020, compared to 1990 levels.

A significant proportion of cases are also against private sector defendants. The LSE analysis shows that these can also be categorised according to claimants' goals:

1. requiring compliance with environmental disclosure rules;
2. not disclosing the extent that the risks of climate change pose to their investments, and
3. holding companies, mostly in the fossil fuel sector, to account for damage caused by their contribution to climate change.

Developments in climate science are also driving trends in climate litigation. An improved understanding of how emissions contribute to extreme weather events (the science of "attribution") makes it easier to establish causation in cases. This means that companies may increasingly be held liable for the damage they have caused on a contributory basis.

What types of claim does climate litigation in England & Wales include?

Claimants in climate litigation in the English courts, as internationally, use a range of legal arguments to achieve their goals. These arguments use varied types of law to make their case, ranging from UN treaties to case law from 1868, as shown in the examples below.

International treaties

The 2015 Paris Agreement is a non-binding international agreement entered into by 196 nations. The agreement's central goal is to keep the global temperature rise this century well below 2 degrees above pre-industrial levels.

In the recent Heathrow Decision, the Court of Appeal

held that the government had unlawfully failed to consider the Paris Agreement when making the policy decision to build a third runway at Heathrow. Whilst international agreements do not automatically form part of English law, the relevant domestic statute (the Planning Act 2008) required the Secretary of State for Transport to take “Government policy”, including the Paris Agreement, into account.

Human rights

Under the Human Rights Act 1998 (HRA) individuals can claim against “public authorities” if an authority has acted incompatibly with a convention right and the individual is a victim of that violation. The definition of public authority for HRA purposes includes any entity whose functions are “of a public nature”.

Developments in climate science have made it easier to establish causation in these cases, making human rights claims increasingly likely. However, there are still a number of other hurdles that a claimant under the HRA has to overcome to succeed in the English courts.

For example, in *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin), Plan B argued that the government’s refusal to revise the UK government’s 2050 carbon emission target to a more stringent figure was a breach of various human rights: the right to life, right to respect for private and family life, right to protection of property, and the prohibition of discrimination. The court did not think that this claim was arguable, as no identifiable victim’s rights had been violated and also as the government has a wide discretion to assess the advantages and disadvantages of different courses of action in relation to climate change.

Environmental information

The Environmental Information Regulations 2004 (“EIR”) provide the public with access to environmental information held by public authorities (a broad term that includes sub-national governments, fire and rescue authorities, and many universities). The EIR were implemented pursuant to the UK’s obligations under the UN Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The EIR are discussed more fully in an article [on page x].

In a recent [decision](#) (reference: FER0678164) the Information Commissioner found that energy supplier EON is a public authority and had to supply information about fishing near an offshore windfarm. EON may appeal the decision.

Planning

Planning decisions are increasingly open to challenge on environmental grounds. Domestic and EU law requires consideration of environmental factors when making planning decisions including the biodiversity of sites.

In [R. \(on the application of Morge\) v Hampshire County Council \[2011\] UKSC 2](#) a local resident unsuccessfully challenged a decision by Hampshire County Council to build a bus and cycle route on the basis of the impact it could have on a local population of protected bats. That the environmental survey in this case had considered in detail the potential harm and mitigation measures was an important factor in the judge’s decision, upheld by the UK Supreme Court.

What does this mean for the HE sector?

The above gives a flavour of the ways in which environmental and climate considerations can affect a range of spheres of activity. Increasing emphasis on sustainability, climate change and environmental issues make it likely that the scope and volume of legal challenge will increase. Institutions, their advisers and insurers therefore need to ensure these matters are properly taken into account when planning their activities and making relevant decisions, whilst also being mindful of any disclosure obligations under the EIR.



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