



Response to the Law Commission's consultation on its 13th Programme of Law Reform, August-October 2016

1. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government and public bodies with the help of its specialist working parties, covering a range of environmental law topics. This submission has been prepared with the help of the water working party.
3. UKELA makes the following suggestion for an area of law that would benefit from reform.

Primary legislation for England and Wales concerning flooding

4. A rather piecemeal legacy of flood defence law (see further, paragraph 10 below) demonstrates its antiquity, but is not necessarily in tune with the new emphasis on management of risk. The specificities of powers to act by flood risk management bodies in particular situations is not well related to broader strategic policy objectives and it is understandable that members of the public are sometimes mystified as to why some projects are found to deserve funding whereas others are not.

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5. At the very least, better structuring and transparency in the exercise of administrative discretion would be desirable.
6. Beyond that, the area is one that might be seen as needing a more integrated legislative approach. The internationally endorsed imperative for Integrated Water Resources Management seems to be flagrantly contradicted by the diverse and fragmented collection of water-related legislation scattered around the UK statute book. Establishing closer links between water quantity and water quality regulation could be a good starting point.
7. One specific suggestion for reform in this area concerns the remit of the Marine Management Organisation (MMO) to regulate coastal or tidal river construction under the Marine and Coastal Access Act 2009. These type of projects are regulated by the Environment Agency and/or planning authorities; often requiring a statutory Environmental Impact Assessment and Flood Defence Permits. Despite this existing regulation, these schemes also require a Marine Licence adding another layer of regulation without adding any additional protection or environmental input from the MMO. Obtaining a licence typically adds 3 months to a project lead in and many thousands of pounds in consultancy time to prepare applications and supporting reports. In general the Marine Licence conditions duplicate planning conditions or permit requirements, and their consultees are the same as those consulted through the planning process or by internal assessments by the Environment Agency.
8. Amending the jurisdiction of the MMO would not only allow more efficient flood defence projects (generally tax payer funded), but also remove considerable

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duplication for statutory consultees; particularly Natural England and Historic England who have been hard hit by the austerity policies.

9. A simple means of achieving this (simple from a layman's point of view) would be to change their remit for licensing construction works (MCA S.66 (1) 7) from the current coverage of all projects below 'mean high water springs' to those below 'mean low water springs'. This would maintain their regulatory overview of projects involving significant marine structures (oil pipelines, off shore wind farms, large quays etc.), but remove their involvement in normal sea/river wall construction. This change could significantly streamline flood defence projects without reducing environmental protection.
10. Further detail of the law relating to flooding (and other key laws concerning water quantity and water quality) is as follows.

(a) Primary legislation on flood defence, drainage, coastal protection and flood risk management

- **Public Health Act 1936, ss 264 - 265; Part XII** - Duty to cleanse and maintain culverts.
- **Coast Protection Act 1949** (as amended by the Flood and Water Management Act 2010) – powers and functions as regards coast protection works and management of coastal erosion risk.
- **Water Resources Act 1991, s 165-167** (as amended by the Flood and Water Management Act 2010) - Environment Agency powers to carry out works to address flood risks from the sea and main rivers, and in some cases other sources too.

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- **Land Drainage Act 1991** (as amended by the Flood and Water Management Act 2010) - powers and functions of internal drainage boards and lead local flood authority powers to carry out drainage works and works to manage flood risk from surface runoff and groundwater.
- **Environment Act 1995, ss 4 & 6** as amended – Environment Agency’s aims, objectives and functions as regards pollution control and flood and coastal erosion risk management.
- **Marine and Coastal Access Act 2009** – see further, specific point above.
- **Flood and Water Management Act 2010** – deals with powers and functions of the Environment Agency and lead local flood authorities in relation to flood risk management. Powers and functions are established by stand-alone provisions under the 2010 Act as well as through amendments to the Coast Protection Act 1949, Water Resources Act 1991, Land Drainage Act 1991 and Environment Act 1991.

(b) *Common law duties and liabilities*

- Action or inaction by an individual or landholder that causes flooding may give rise to liability in **negligence** or **nuisance** for damages or an injunction.
- Freeholders or leaseholders of land by a watercourse are subject to common law rights and duties relating to the use of water (**riparian rights**).

(c) *Other primary legislation concerning regulation of water quantity includes:*

- **Water Resources Act 1991 (as amended by the Water Act 2003)** – provisions include controls on water abstraction and impoundment, and

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Environment Agency functions; flood defence/risk management functions (see above); powers to make drought orders.

(d) Primary legislation concerning regulation of water quality includes:

- **Water Resources Act 1991 (as amended)** – Environment Agency powers to carry out/compel anti-pollution works.
- **Environment Act 1995**, s5 – Environment Agency's pollution control functions.
- **Marine and Coastal Access Act 2009** - marine licensing controls.

(e) Primary legislation is supplemented by a raft of secondary legislation, including:

Environmental Permitting Regulations 2010 – permitting regime for water discharge activities and groundwater activities (ie as a means of regulating activities that may adversely affect water quality), amongst other things. Regulation 38 sets out the principal water pollution offence.

Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 – implement the Water Framework Directive 2000/60/EC, through powers and functions on Secretary of State, Environment Agency and other bodies as regards river basin management planning (monitoring and classifying waters, setting objectives, developing and implementing programmes of measures to meet those objectives etc). Duties and objectives relate both to water quantity (eg groundwater quantitative status, provisions concerning the recovery of costs for water services) and water quality (eg

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environmental quality standards that determine the chemical and ecological status of surface water bodies).

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