

## Conference on access to justice on environmental matters

30 November 2004

### Note on discussions by Derek Osborn, Conference Chair

1. This note outlines the main themes to emerge from the discussions.
2. I believe there was widespread agreement that there are three interconnected parts of the environmental justice system that will need to be strengthened in a reform package:
  - Access to environmental justice is difficult for individuals and poorer communities. This is partly because of the inherent complexity of environmental cases and the law relating to them and the absence of good enough sources of advice; and partly because access to the Courts is too expensive (and the final costs too uncertain) for many groups to embark on. Better advice and some well-targeted additional help with costs are needed.
  - Some of the Courts that take these cases are themselves not sufficiently well versed in the complexities of environmental law and policy. They sometimes reach inadequate or inconsistent conclusions, or fail to impose adequate penalties or to enforce adequate compensation or restitution. Better training of magistrates and judges and more specialisation within the Courts system are needed
  - Some of the enforcement authorities (the Environment Agency and local authorities) are themselves overstretched and have difficulty in securing adequate levels of compliance when their only remedy is to take criminal prosecutions that are costly and slow-moving and often result in inadequate penalties to enforce respect for the law. A wider range of penalties and other remedies are needed together with a simplified process for imposing fixed civil penalties for the simpler or more technical breaches.
3. Action seems to be needed on all three fronts, each of which would reinforce the others. A well-rounded package might include:
  - Measures to strengthen the capacity of CABs and other specialised channels of advice to individuals and communities affected by environmental problems; together with a limited amount of additional but well-targeted resources to help such individuals and groups to take legal action when appropriate. Action is also needed to improve community input to strategic decisions affecting the environment, such as the formulation of land use plans, as well as in the consideration of individual proposals that have environmental consequences.
  - Measures to improve the capacity of the Courts to deal adequately with such cases, either through some level of specialisation and specialised training for an appropriate cadre of 'ticketed' magistrates and judges, or by the establishment of a specialised environment tribunal. (Some think there would never be a better time to establish specialist Environment

Tribunals in the context of a more general reform of Tribunals and under the particular spur of the Aarhus Convention and the need for a wider range of environmental penalties and remedies for environmental breaches. Others think that as a first step it would be simpler to experiment with developing a cadre of specialised and specially trained magistrates and judges – there was no consensus on this point.)

- Measures to enable the enforcement authorities to seek a wider range of penalties for environmental breaches, ranging from direct imposition of fixed penalty fines for technical breaches to the imposition of full costs of compensation or restoration, or sequestration of economic gains resulting from flouting environmental rules.

4. Reforms in any one area, for example advice and information, need to take account of the impact on others such as access to funding and the award of costs. Different parts of the system are closely interconnected. It is no good making more information about challenge and appeal routes available to individuals and communities if in practice they cannot afford to pursue them. Similarly it would be no good broadening the range of remedies in theory available to the enforcement authorities if the Courts are not trained and ready to apply them effectively.

5. While it is important to keep the big picture in mind the details of any proposals for reform are critical. For example against whom might civil penalties be used -those who commit a technical breach, those who make an unintentional mistake and pollute or those who deliberately flout environmental legislation for commercial reasons? The first step in each case is to be clear on the objective sought.

6. There was a general feeling at the Conference that the time is ripe for a push forward across this broad agenda. There are some clear failures of justice in the present arrangements. There has been good research on possible ways forward. The ratification of the Aarhus Convention will provide another spur to action.

7. At the same time there was general awareness of the dangers of trying to make too many changes too quickly. An incremental approach across a broad front within a clear long-term agenda for reform might be the most practical way forward.

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**Note of Points made in Discussion on individual issues.**

ADVICE AND INFORMATION

1. There is a lot of information available but present arrangements for access are not effective. There is a low awareness of rights. Key requirements are immediacy of access and the availability of expertise. Conference participants had little appetite for new structures for the dissemination of information such as had been set up in Australia. They saw the challenge as being how to make existing structures and systems work better.

2. Citizens Advice Bureaux are a frequent first point of enquiry but often they do not have the expertise required to advise upon environmental issues. NGOs might have the expertise but do not have the resources to handle individual cases unless they happen to fit their current campaigning profile. Specialist bodies such as the Environmental Law Foundation and UKELA have the expertise but do not have the scale and resources for many of the disadvantaged to access.

3. Discussion in the break out groups suggested that potential areas worth exploring further are:

- How to improve deprived communities input to strategic decisions such as land use planning
- Use of community workers to help signpost those needing advice on specific issues to the CAB
- Improved training (and funding) on environmental issues for CAB staff, who would also then be better placed to refer on to specialist advisers where necessary.
- Clarification of the respective roles of those who give advice, such as local authorities, the Environmental Law Foundation and Community Legal Service so as to enable first ports of call such as the CAB to signpost on where necessary.
- Funding for CAB specialist training, and for specialist referral points such as ELF.

CIVIL PENALTIES

4. This was seen by most as a potential area for development but also one where clarity of objective was particularly important. Civil penalties are not a stand-alone solution to improving delivery of environmental justice but should be seen as part of a series of changes needed.

5. The majority favoured the development of an initial scheme that would cover technical breaches of environmental rules or licence conditions, where more than a formal warning is warranted, or where a formal enforcement notice has failed to secure improvements. In such cases taking criminal prosecutions through the Courts is too slow and heavy an instrument for dealing with numerous small breaches. It would be useful for enforcing authorities such as the Environment Agency to be able to impose small fines directly according to a prescribed tariff of fixed penalties for the various kinds of breach.

6. In most such cases the facts would be obvious and uncontested and the effect of the fixed penalty would simply be to reinforce the pressure on the offender to get back into compliance as promptly as possible. The tariff might provide for daily penalties in some cases until compliance is restored. In most cases there would be little for the offender to dispute and they might be expected to pay up as for a parking penalty. But if an offender did wish to dispute a penalty the onus would be on the offender to appeal to the Secretary of State (or an alternative appeal route) to dispute the facts or the application of the rules.

7. If successful such a scheme might then be extended to cover at least some of the kinds of breaches that lead to small-scale environmental damage but where there is no criminal intent. In such cases the penalty might appropriately include an element relating to the costs of the damage done or the cost of restoration, or to any economic benefit the offender has secured by failing to comply with their environmental duties. In such cases it is unlikely to be acceptable to place the whole burden of proof on the offender. There is likely to be more disagreement both about the facts of the case and about the appropriate quantum of the penalty, and arrangements will be needed to allow the cases to be argued either in a sufficiently expert court (with specially qualified magistrate or judges) or by appeal to the Secretary of State.

8. Where there is criminal intent (i.e. deliberate flouting of environmental laws) criminal prosecutions should continue to be the preferred route for enforcement. But in addition to any criminal penalties it should also be possible for the Courts to require the defendant to pay compensation or restoration costs or to sequester any economic gains made by the wrongful act (i.e. as at Para 7 above).

9. There were divided views about the appropriate destination for the proceeds of civil or criminal penalties for environmental offences. Some thought that it would be appropriate for these to flow to the Environment Agency or other enforcing authorities to assist in their task of enforcement. Others thought that this would provide an undesirable incentive to excessive zeal or over-enforcement by enforcement authorities.

## COSTS AND FUNDING

10. The potential costs of bringing cases to Court can be a serious barrier to individuals or communities seeking redress against environmental

injustices. Potential plaintiffs can to some extent calculate and control their own legal costs. But if they lose their case they will normally also have to bear the defendant's costs, which are uncertain at the outset and may rise to very substantial sums.

11. The discussion revealed however that there are a number of barriers to change. The existing rule about costs falling on the loser (which is not peculiar to environmental cases) is long established and offers important protections against misuse of the courts. Courts do already have the power to set this aside. They can also make pre-emptive orders about the allocation of costs early in a case, or may make rules to limit the level of costs. But in practice Courts are reluctant to use these powers, probably partly because limiting costs or predetermining their allocation could itself cause injustice in some cases. It was also pointed out that environmental cases come within the remit of the CLS, and that advice is already given and cases supported where there is sufficient merit and the individual does not have the resources required. Similarly where cases involving the EA are supported by legal aid the EA does not seek to recover their own costs

12. Nevertheless discussion suggested that:

- While communities opposing a public body or commercial enterprise (and doing so without legal aid) could calculate and manage their own costs they often face considerable uncertainty as to their opponents' costs, which could be a powerful deterrent.
- The Environmental Law Foundation and other legal specialists in this field see a need for financial support for those with limited resources going beyond the level or scope of help currently provided by the CLS.
- Environmental cases merit a more supportive cost regime because of the commitments that flow from the Aarhus Convention to which the Government is a signatory and the seriousness and longevity of any adverse environmental impacts for the community.

13. Uncertainty over costs should not be a barrier to bringing worthwhile cases. Pre-emptive orders were one way forward, but there were difficulties in defining the public interest. For environmental cases this could involve assessing considerable technical detail. Would the courts have the capacity? The Public Interest Panel of the Legal Services Commission offered a potential model. The Treasury Solicitor's commitment to fee capping might also offer a useful precedent in tackling uncertainty. Another possible avenue might be to provide additional funding to such bodies as the Environmental Law Foundation so as to enable them to support more deserving cases.

## ENVIRONMENTAL TRIBUNALS

14. Discussion centred upon the proposal in the Macrory/Woods report for a Tribunal that dealt with appeals arising from environmental legislation. Conference participants had little appetite for anything more wide ranging. There were no firm conclusions but useful points made were:

- There is a need for clarity on the purpose of a tribunal: is it to adjudicate on points of law or to rehear the merits of a case?

- Given the current trend in EU legislation decisions on merits were likely to have a high policy content. This tended to support making appeals lie to Ministers or to Inspectors acting under their delegated authority. Alternatively if points of law or legal consistency are the prime consideration appeals might lie better with the Courts system. Recognising however the considerable technical complexity of the law and principles involved there would be a strong case either for identifying and training a class of specially qualified or 'ticketed' magistrates or district judges to handle these cases in the existing Courts or to establish a special Environmental Tribunal within the general structure of the Courts.
- Specialist environmental tribunals might deliver more consistent results, and might offer efficiencies if there is a sufficient workload.
- An environmental tribunal is a potential element in the longer term in the reform of access to environmental justice. While existing structures could be used, certainly initially, the widespread introduction of civil penalties and the reform of costs, if successful, could strengthen the case for a tribunal.