

c a p a c i t y

empowering people and communities to create networks
to find solutions that enhance social justice and support a healthy environment



g l o b a l

Using the Law: Access to Environmental Justice Barriers and Opportunities

A paper by Maria Adebowale

Contents

	Page
Acknowledgements	4
Executive Summary	5
Scope & Purpose of the Report	9
Background to the Study	9
Aims and Objectives	9
Methodology	10
Definitions	10
Report Outline	10
Part I: Identifying the environmental justice landscape	12
Global to Local	12
Case Study: England & Wales	16
Case Study: Australia	24
Summary	28
Part II: The Environmental Justice Concerns: Lawyers, NGO's and Communities	30
Communities & Action Groups	31
Non Governmental Organisations	37
Lawyers, Judiciary and Magistrates	42
Part III: Key Themes & Recommendations	48
Environment, Quality of Life and Social Inclusion	48
Advice & Information	49
Funding & Costs	51
Expertise, Independence and an Environmental Court	52

	Page
Glossary	54
References	55
Note about the Author	60
Capacity Global	61

Copyright of this document belongs to Capacity Global. This publication can be copied for non-commercial use subject to the source being acknowledged and written confirmation from Capacity Global.

Printed or electronic copies are available from:

Capacity Global
The Foundry
156 Blackfriars Rd
London SE1 2SD

Or

info@capacity.org.uk

Acknowledgements

Capacity Global would like to thank all the individuals, organisations, lawyers and government staff who have given their time to support this project by being part of focus groups, giving interviews, providing advice and information: Pannaga Avadhani, Lord Justice Carnworth, John Blakesley, John Dunkerly, Charlie Hopkins, IMPACT, The Kernow Grain Action Group, Kate Harrison, Carol Hatton, Robina Rand, Daniel Owen, James Cameron, Professor Richard Macrory, SASAC, St Cyrstamos Church, Sydoney Massop, Ric Navarro, Michael Woods, Phil Shiner, David Stott, Roger Sturgess, Carol Zagrovic. Thanks also to those who gave interviews and information on a confidential basis.

Additional thanks to Jeff Smith at the Environment Defender's Office, Australia, New South Wales.

We would like to gratefully acknowledge the support provided by Jayne Boys and Rachel Solomon Williams of the Sustainable Development Unit, DEFRA¹ without whose support this paper could not have been written.

Finally, the author would also like to thank her colleagues Simon Adams, Stephanie Wagner and Edna Balca, for their support in putting this report together.

¹ Department of Environment, Food and Rural Affairs

Executive Summary

Using desktop research and field work research, this report examines the role of the courts in accessing environmental justice in England and Wales; for the public, lawyers, NGOs and the judiciary. The report reveals that environmental issues, especially those relating to the built environment and neighbourhoods, are closely linked to how people experience their quality of life. The report also demonstrates that access to justice is an important element of a democratic society and that the public must have the ability to protect the environment and improve quality of life by upholding their rights through the legal system.

Over the past decade there has been an increasing interest in the idea of environmental justice and its relation to life and the legal system in the United Kingdom. Several environmental justice issues have become significant within England and Wales.

- the unequal distribution of environmental ‘bads’ such as pollution;
- inequitable access to environmental ‘goods’ such as clean open space;
- the situation of polluting industries;
- the role of the legal system in enforcing environmental law and upholding environment rights and responsibilities.

More recently a number of research reports, policy developments and environmental regulations and statutes have brought the role of and the question of access to the courts into the limelight. The Government’s new agenda for environmental justice has been driven, in part, by the signing of the Aarhus Convention, which creates duties to ensure environmental justice and create structures for its promotion and protection.

Understanding the need for an accessible court or legal system, starting from the first step, access to specialist information and advice, is key in deciding if changes need to be made to the present system. This report suggests that a number of measures need to be introduced if the court system is to be a tool for environmental justice. It also suggests that such measures are essential to allow the public, particularly socially and economically excluded communities, to gain access to the law.

Focus group discussions with members of the public, each with a wide range of experience in accessing the courts, raised a number of concerns. Most notably these concerns were:

- the invisibility of, and the lack of access to, specialist legal advice and information for environmental cases;
- the fear of costs, both in gaining legal advice and taking cases to court;
- the lack of, and difficulty in gaining, ‘legal aid’ funding for environmental cases;

- the need for specific assistance in areas of high social, economic and environmental deprivation;
- the inequalities, both structural and resource based, in the public taking cases against companies, commercial enterprises or ‘the establishment’.

The report also found, in conducting interviews with environmental lawyers and NGOs that their experiences of using environmental law and the courts raised a number of issues and identified a number of barriers in using the law to gain environmental justice. The primary issues that emerged from these discussions were:

- a lack of expertise within the ranks of the judiciary and magistrates;
- a perceived bias of the adjudicators toward development and commerce;
- problems with the rules relating to locus standi and demonstrating direct interest;
- the need for better processes that allowed for appeals to be heard on merit, reducing the pressures to use judicial review inappropriately;
- the ‘winner take all’ approach to costs;
- the need for a specialist environmental court or tribunal.

In conducting discussions with judges and magistrates, the study found that environmental cases presented difficulties to adjudicators both in the nature of the cases and the ways in which such cases were presented to the court. However, interviews with judges confirmed the desk top research that criticisms of the lack of expertise of adjudicators had been noted, as was illustrated by new training for magistrates on environmental courts.

The study concludes that environmental justice and access to courts is closely related to the civil and political ability of the public to act as stewards of the environment and to protect or improve a community’s or individual’s quality of life. As such access to justice is a significant element of a democratic society and is closely linked to wider social, economic and political macro and micro issues such as social exclusion, regeneration and public participation. At present numerous barriers to access of the court system mean that overall the court system does not act as tool for environmental justice. Consequently policies initiatives which would promote environmental justice such as environmental equality, environmental public participation, access to environmental decision making processes and access to information are likely to be undermined if barriers within the court system remain unaddressed. Such barriers stand to weaken any agenda of social inclusion and undermine the enforcement of environmental laws. To tackle these barriers the report suggests the following eight recommendations (see Part III).

Findings & Recommendations

Recommendation 1: *The delivery of public service provision and policy relating to environmental equality and quality of life needs to be developed and carried out across government departments. Integrating issues of regeneration, social inclusion, health and legal services. Joint delivery is therefore required from not only the*

Department of Constitutional Affairs and the Department of Environment Food and Rural Affairs but also the Office of the Deputy Prime Minister, the Department of Health and government agencies such as the Neighbourhood Renewal Unit and the Social Exclusion Unit. These strategies for delivery and operations should be part of a comprehensive public consultation exercise with amongst others relevant community groups, NGOs, the Law Society and the Bar Council, the Community Legal Service and the Environment Agency and Local Authorities.

Recommendation 2: The impact of environmental inequality on socially or economically excluded communities needs to be taken into account when deciding on shifts of legal policy and in any amendments or changes to the present legal system. For example, geographic areas with high deprivation indexes, environmental pollution or heavy polluting industry should be prioritised in the provision of free environmental legal advice, representation and outreach support by Community Legal Service (CLS) and other relevant advice agencies or non governmental organisations.

Advice and Information

Recommendation 3: To improve the role of the CLS its outreach materials need to be improved (i) it should review and amend its website 'Just Ask' to make information on environmental advice and CLS funding in relation to it, far more visible. For example, a separate web site page could be added to allow for easy and identifiable route to when and how environmental cases may be funded by the CLS and providing other links an information on other environmental information and advice providers. This information should also be provided in hard copy leaflet for people without access to the internet (ii) Regional CLS boards should have a duty placed on them to provide information on the provision of advice and funding on environmental public interest cases in their region.

Recommendation 4: In the light of the lack of access to free legal environmental advice, that the government investigate the establishment of a environmental advice agency similar to the Environmental Defenders Office in Australia that is able to offer legal advice and possible representation to the general public. The agency would need to be highly visible and accessible to the public and target, in particular, socially and economically excluded areas. This may mean opening a network of local regional offices. The agency should provide outreach information that is easily understood and available in written format and over the web.

Funding and Costs

Recommendation 5: Public funding for environmental cases with public interest concerns or other payment measures would seem to be woefully inadequate. It is recommended that a separate budget be created that allows for environmental cases to be given direct legal aid.

Recommendation 6: The CLS and Department of Constitutional Affairs need to reform conditions of funding for environmental cases specifically those of public interest. Rules surrounding conditions for funding, such as financial contributions by claimants, need to be reviewed in order to remove any unnecessary barriers to people taking up public funding.

Recommendation 7: *The cost rules need to be reformed to allow for a balance of resources between parties. Orders as to costs should not be made against the losing party in non vexatious the public interest cases. Each party would be responsible for their own costs.*

Expertise, Independence and an Environmental Court

Recommendation 8: *It is suggested from the stakeholder responses within this report that a new environmental court or environmental tribunal be established to deal specifically with environmental cases. The court would however, need to be developed in partnership with the creation of a number of other infrastructures: most importantly an independent, state funded legal environmental advice service and a earmarked budget for the funding of public interest environmental case and the reform of cost rules (See recommendations 1 – 7).*

Scope and Purpose of the Report

Background to the Study

Early in 2001 Capacity Global was established to provide innovative solutions in the areas of environmental and social justice. Capacity's aim has been to work with communities, government and business to provide evidence based policy change and create projects that build community participation in relevant decision making processes. As part of this remit, this report has been commissioned to help identify barriers and opportunities within the legal system for environmental cases.

The signing of the Aarhus Convention by the United Kingdom government, the Royal Commission Report on Pollution, calls for the development of a specialist environmental tribunal, and a growing recognition, including by the Office of Deputy Prime Minister, of the link between poverty and environmental inequalities, are a few of the many political, legal and policy changes that make this report extremely timely. There is increased impetus for gaining clearer insight into the mechanisms for the implementation and development of environmental justice and democracy: access to information, participation, decision making and justice within the legal system.

As such this report's findings should be seen not only in the context of legal reform but within wider policy areas of social inclusion, public participation and citizenship. While it concentrates on the role of access to justice in a more formal sense of the law and the legal system this report is inextricably connected to the greater issue of access to justice, to those who may be excluded from the legal system and therefore from the ability to participate in and effect decision making in the environmental realm.

Aims and Objectives

The main aim of the study is to provide a clearer understanding of what role the legal system plays in environmental justice for community groups, lawyers, legal institutions and non governmental organisations.

In this context the report undertakes four broad investigations:

- to understand the global and national the role of law in environmental justice, public participation and social inclusion.
- to explore how the public gain access to environmental advice services and encounter legal systems, and to what extent their needs are met.
- to identify information gaps relating to the demand for, or reluctance of, the use of the judicial process.
- to examine opportunities in using the present system, and how these opportunities can be developed

Methodology

The study was undertaken in two stages. The first stage involved a literature review of environmental justice in relation to the legal process. This served to examine a broad range of research on the environment and access to justice. The review was in two sections: first, a overview of access to justice and secondly, a closer case study review concentrating mainly on England and Australia and their relevant legal and advice systems as they related to environmental justice.

The second stage of the report research involved the analysis of legal and advice services in England and Wales within the environmental context. This research has identified three main steps to access processes within the legal system. First; access to basic information. Second; access to relevant resources. Third; access to the courts. These three steps were used to define the fieldwork methodology.

Six focus groups were held with individual members of the public and established community groups. The groups were chosen to represent those who had tried to access environmental justice and those who had not. At the same time perspectives were also sought from lawyers, magistrates, judges, advice services, non independent bodies, and non governmental organisations (NGO's).

Definitions

The report recognises there is still an ongoing debate as the definition of environmental justice, environmental law and access to justice. For reasons of this report's remit and context this report does not enter into an examination of the merits of the debate. In this report 'environmental justice' is used primarily to refer to: (1) inequality in the distribution of the burdens and the benefits of environmental 'bads' and 'goods' and (2) the civil and political processes that allow for participation, and decision making (Adebowale, Church et al 2002). This report concentrates on the latter aspect of environmental justice, specifically the use of the legal process to access remedies for environmental injustice.

In relation to environmental law the report notes the debate and the difficulty of ascribing to the phrase "environmental law" a single definition. There is still a great deal of discussion among lawyers and academics as to whether environmental law exists as a separate school of legal study. The discussion centres on the question to what extent laws relating to the environment may be categorised as 'environmental law' when they may stem from and be closely related to other areas of law. Environmental law crosses and includes many other fields of law, from planning to corporate law, international to administrative law and policy. The term, however, is used in this report, as it is generally used, to categorise a plethora of laws relating to both the built and natural environment, such as planning, conservation and environmental protection.

Report Outline

The main body of the report is set out in three parts:

- Part I places the report in context by providing background research on environmental justice, at both global and national level. It provides a global perspective and provides two case study reviews; England and Australia. It identifies the key concerns relating to the report study and provides, readers unfamiliar with the topic a basic grounding.

- Part II presents the main findings of our discussions, with the stakeholders identified above. The three sections of this part of the report draw out the main concerns of each stakeholder group.
- Part III examines the key themes and concerns emerging from the stakeholder discussions and provides recommendations to address them. It also provides a concluding summary.

Part I: Identifying the Environmental Justice Landscape

This first part of the report provides global and national perspectives relating to environmental inequality and access to justice and their interrelation. In addition to the legal perspective the research takes into account political, economic, and social considerations. As such it reflects the need for legal perspectives to engage social and economic issues and for social and environmental perspectives to take on legal issues. In examining these different perspectives tensions are identified but recognising these tensions are an important part of building efficient systems for environmental justice.

Global to Local

The exploration of the relationship between access to justice and the environment is not new. The UN Stockholm Conference on the human environment in 1972, is often seen as a global landmark for the international review of the relationship between human beings and the civil and political processes required to protect the environment, as a means not only of protecting global eco-systems but improving the human quality of life, especially for the most vulnerable (Adebowale & Church 2002).

The conference's UN Declaration on the Human Environment, significantly influenced global discussions on the role of justice and environment within the sustainable development agenda, Gro Harlem Brundtland, Chair of the World Commission on Environment Development (WCED) described the Declaration as 'a global agenda for change' (WCED Report 1987). The Rio Summit 1992 and more recently the World Summit on Sustainable Development 2002, reflect the principles of access to justice: information, participation, decision making and justice and see these as tools not only for humans to act as stewards of the environment but also to address the unequal balance of communities, individuals or states between those who have these processes of address, generally the wealthy and those that do not, generally the poor. In essence, the fundamental elements of sustainable development and the UNCED conventions were about redressing the 'many problems of resource depletion and environmental stress [that] arise from disparities in economic and political power' (WCED 1987).

Laws, strategies and frameworks to mainstream sustainable development call for greater access to justice and the tools required for this to occur. The best reflection of this is Principle 10, of Agenda 21 resulting from the Rio Summit 1992. Agenda 21, a framework for action, is a blue print for national strategies, plans and policies for sustainable development and to address public participation and active involvement in relation to sustainable development (Agenda 21 1992). Chapter eight of Agenda 21 states that the prevailing system, which separates legal, environmental, social and economic systems for decision making, needs to be changed to bring about more effective and efficient integrative policies and infrastructures. The responsibility for bringing about integration lies with governments, in partnership with the private sector and local authorities. In essence it requires the development of decision making processes which relate to the socio-economic factors of environmental justice. The means of implementation are developed in three programmes of action: research and education, economic incentives, and market mechanisms but more specifically, to provide an effective legal and regulatory framework for the development of environmental justice.

The programme of action to provide effective legal remedies strengthens the recognised fundamental right, a right which is essential to the enjoyment of all rights, 'the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by statutory law', stipulated in the Article 8 of the Universal Declaration of Human Rights 1948 (Cunha 2003) and the right to a fair and public hearing in Article 6 of the European Convention on Human Rights (ECHR) and the U.K. Human Rights Act 1998.

In practice human rights law and sustainable development policy or 'soft law' seeks to create and protect practical and effective legal systems such as courts or tribunals to secure the right of individuals to access courts. Effective legal systems include legal aid programmes, free legal assistance and a fair and effective legal process. For example; free legal assistance when, without this effective access could not be secured. As such access to justice, reifies the right of the individual to exercise her or his citizenship through the utilisation of the courts.

As Anderson (2003) and Cunha (2002) point out that an egalitarian judicial or legal system is the best way to guarantee civil rights by its ability to present grievances, solve disputes and uphold basic human rights. The system provides for transparency and accountability of decision makers, at various political levels. The legal system is a 'system', as Anderson explains and although the judiciary is often seen as the sum of the system it is only a part of the system's entirety. The legal system is made up not only of judges, who are there to act as the stewards of probity, but also consists of the courts, and tribunal processes and related services such as advice agencies. The judicial system is fundamental to recognising environmental justice or 'environmental rights'. An efficient system offers a tool for recognising environmental citizenship. That is, the ability to participate in civil, political and administrative structures. Legal mechanisms provide essential routes for the enforcement of human rights, public participation and empowering vulnerable groups or communities (Herskoff 2000). A fair legal system has the ability to create social change. Using the law to develop social change is a mechanism used by many social movements, including the environment movement. NGO's, community groups, government and business have used the law internationally and domestically to restrain or extend powers relating to environmental protection. In addition the laws established to protect the environment are also used to protect human rights. As such environmental law and human rights law can be used either collectively or separately to improve quality of life (Anderson 1996).

The potential to use the law to reform legal rules, enforce laws and formulate policy through case law is a cornerstone of environmental campaigns. These campaigns by the public and NGO's, such as Greenpeace or Friends of the Earth has led to the development of what Herskoff describes as public interest litigation or, as Chayes (1976) calls it 'cause lawyering' or social activism litigation. Environmental justice provides a realm for public interest litigation as it seeks to create changes that transform environmental inequality or injustice. As Agyeman and Evans (2003) state, environmental injustice and environmental crises are often caused or effected by unsustainable production and discrimination around the world; from the Mississippi Chemical Corridor in Louisiana, to Papua New Guinea, to the Niger Delta in Nigeria and the Durban South Basin in South Africa. In many cases access to the legal system is used to transform or liberate marginalised groups, as has been witnessed globally in environmental justice campaigns. The environmental justice movements have used the legal system, federal, state and international, to challenge disproportionate impacts of environmental 'bads' on poor, Black, indigenous, and marginalised communities. As Eddy (2002) notes the law, can be 'a sword' in the US

to stop environmental injustice impacts on marginalised groups. Robinson and Dunkerly (1995) when exploring public interest perspectives in environmental law, suggest that using the law is essential means by which citizens ‘can bring their concerns to bear on faltering steps by government’. They go on to say that there are seven prerequisites for effective public interest environmental law in ‘developing’ and ‘developed’ countries, as described below in Table 1.

Preconditions	Description
Participatory democracy	Democracy that supports the public and the judiciary developing checks and balances on decision makers, parliament and bureaucracies
Strong law and administrative procedures	‘Laws that set achievable and equitable goals’ with supporting rules or policies that create accountable and transparent procedures, and effective time frames
Public Interest environmental lawyers and informed activist networks	Lawyers who seek to create environmental and social change working with activists who have access to information and have broad alliances, specifically with marginalised or excluded groups
Broad eligibility of citizens to bring public actions (i.e. rights of standing)	Right of the public or organisations to take cases to court which have public interest, without having to illustrate direct interest to themselves
Funding	Financial resources to take cases, such as legal aid and immunity against cost order (i.e. removal of loser pays costs rules)
Accessible Court practice and procedures	Ensuring simple court process or procedure, that are timely and provide support and advice
Communitarian Judges	Judges who support the idea of representative democracy and are able to understanding principles of sustainable development and the precautionary principle

Table 1: Seven Prerequisites for Public Interest Environmental Law
Adapted from Robinson & Dunkley (1995)

The role of legal system to ensure environmental justice is only effective if it is universally accessible. The ability to develop democracy and civil political participation exists where the system of access is fair, and does not directly or

indirectly exclude specific individuals, groups or organisations. Research reviewing international access to justice notes that there are a number of gaps or barriers to justice. In regards to Latin America, Cunha (2002), concurs with O'Donnell in that even democratic states or regimes with formal guarantees to legal remedies show deficiencies in their application. Cunha notes, that there are five main barriers: (1) legislative flaws, that allow discriminatory treatment of women and minorities; (2) criminal impunity and the discretionary application of the law; (3) state bureaucracy that reflects 'sharp' hierarchical social status; (4) access to a fair trial or judiciary does not address equally grievances of all groups; and (5) daily ineffectiveness of the legal system that endures illegality. This flaw, amongst other things, means that little access is afforded specifically to the poor. The poor in 'least developed countries' (LDCs) are according to Anderson (2003) particularly likely to encounter access problems and are infrequent users of the legal system and for many stigma, mistrust, inadequate legal representation and lack of access to information act as barriers. Where the poor are more likely to encounter the legal system in LDC's is primarily in criminal prosecutions because they often have to live within illegal infrastructures such as employment or housing. Terzieva (2003) comparative study of Eastern and Central European countries use of legal aid as a means of access to the legal system found: limited legal aid, vague criteria for legal aid, lack of transparency in the appointment of lawyers, under utilisation of legal aid, poor quality of legal aid and a lack of institutional management.

When considering obstacles to environmental justice or access to justice, in general reformers have sought to remove obstacles that pay specifically effect disadvantaged groups. Shiner's (2001) World Bank report on access to justice movements comments that in the 1960's reformers were committed to widening social services and increasing opportunities for the poor and legal aid was seen as an extension of the welfare state. The US, Shiner goes on to illustrate, established in 1963 the right to legal assistance for criminal defendants and in India, the 1976 constitution created a duty of the state to provide legal aid and establish 'extensive' legal aid network schemes. Liberalised rules and class actions under the notion of increasing public interest also created, she believes, greater representation of collective interests and the relaxing of rules surrounding who can bring a case to court (standing/locus standi). In the 1980's and 1990's neo liberal political influences concentrated on encouraging market economies and reducing public spending. Access to justice reforms were pursued out of this desire to reduce state costs and bring in market mechanisms such as legal insurance schemes. The United Kingdom, is one such example of where economics have created impetus for new approaches to accessible justice. The U.K. situation will be reflected on, in the case study section, later in the report.

Understanding the nature of environmental law also plays a part in getting to grips with the wider complexities of environmental justice. As Birnie and Boyle (2002) suggest, the complexities of environmental law begin with the definition of the environment itself. International environmental law, for example, is seen as 'encompassing the entire corpus of international law, public and private relevant to environmental issues or problems'. They continue on to say that environmental law has significant overlaps and interactions with human rights law, the law of the sea, natural resources law and international economic law. U.K environmental law encompasses the complexity of international environmental law and is made up of a cornucopia of common law, administrative law, environmental statute and EU directives. It is also heavily influenced by environmental policy and international soft law relating to sustainable development and public participation.

Environmental issues emerge from social, political and economic factors and cannot be dealt with from only a legal perspective. The ability to use the legal system allows for public participation in a wider context but more specifically it can create or support social change, most importantly the inclusion of marginalised communities or groups into mainstream environmental decision making (Agyeman 2001, Burningham 2000, Sustainable Development Commission 2002). Perhaps more importantly for the U.K., access to environmental justice is central to issues of urban renaissance and regeneration. The following case studies seeks to provide an U.K. perspective, particularly a perspective from England and Wales, on access to environmental justice and its relationship to relevant policy areas.

Case Study: England and Wales

The England and Wales provides an interesting case study for environmental justice. As explained earlier in the report, this section offers an overview on access to justice, environment and social inclusion. In many ways the case study reflect aspects of the global access and environmental justice issues: the connection between environment and poverty, the use of environmental public interest law to create social change, and the barriers to justice, specifically for excluded communities. Table 2, below reflects the connection between these issues.

Environmental Inequality in the U.K.
<ul style="list-style-type: none"> • People living in the 44 most deprived areas in England listed pollution, poor public transport and the appearance of their estate as major concerns about where they lived (Social Exclusion Unit, 1998) • The 44 most deprived areas in England contain four times as many people from ethnic minority groups as other areas (Seraaj, 2001) • Families living on incomes of less than £5,000 are twice as likely to live next to a polluting factory than families with incomes of £60,000 or more (Friends of the Earth, 2001) • 66% of all carcinogenic chemicals emitted into the air come from factories in the most deprived 10% of communities in England (Friends of the Earth, 2001) • Pollution is a major factor in poor health and health inequalities, with over 24,000 people affected by environmental-related illnesses (Archeson, 1998) • Child pedestrians from poorer communities can be 5 times more likely to be killed by vehicles than children from the most affluent areas (Roberts and Powers 1996) • Over 700,000 people in Scotland live in relative fuel poverty, spending more than 10% of their income on heating (Scottish Executive, 2002) • One in four older people living alone occupy homes with the worst level of energy efficiency (Scottish Executive, 2002) • Asian children are more likely than white children to be injured in road accidents (DETR, 2001)

Table 2

Source: Eames, M & Adebawale M. (2002)

The case for environmental justice, environmental inequality and access to the legal and civil process have been made by a number of studies, relating to law (Macrory

and Woods 2003, Birnie and Boyle, 2001), politics (Agyeman and Evans 2002, Dobson 2003), health (ESRC 2001) and social inclusion (Adebowale & Schwarte, 2003, UK Sustainable Development Commission 2002, Burningham 2002). An analysis of these studies show that while there are different socio-political perspectives as to how environmental justice can be defined, there is a common recognition that the connection between social exclusion and lack of environmental justice, is a concern for environmental citizenship, equality and democracy in the U.K.

The connection between social change, quality of life and environmental regulation is not new, it can be traced back to environmental health legislation which sought to reduce pollution and improve health of the poor in the eighteenth century. As in the global sustainable development perspectives environmental law and access to the legal system is seen by Robinson and Dunkley (1995) as having three functions (1) the appropriation of management rules for conflict resolution associated with environmental goods (2) to act as a catalyst for change and (3) to protect the public interest.

Reforming the legal system to deliver environmental justice, gained impetus in England and Wales, from the late 1980's and early 1990's. The establishment of environmental law organisations and political campaigns for environmental courts and new environmental legislation were part of a formal and informal network of public interest environmental lawyers, community action groups, NGO's and political decision makers. A number of U.K. and EU environmental laws were established in this period including the cornerstone of U.K. environmental law: the Environmental Protection Act 1990 (See table 3 below). Nonetheless, the lack of fair legal system for environmental cases, was highlighted by a senior member of the judiciary, Lord Woolf noted that the judiciary was in general 'environmentally myopic'. The call for political reforms to ensure environmental justice is best reflected in the fact that the call for an environmental court and funding for environmental cases was a central part of the Labour Party Manifesto whilst in opposition. While the election of the Labour Party into power did not bring about an environmental court in England and Wales, the call for environmental justice continued.

Legislative and institutional changes which influenced the call for access to justice, relate more recently to the enactment of the HRA 1998, the signing of the Aarhus Convention by the U.K. government, and new EU directives relating to the Convention. In addition there have been constant calls from the Environment Agency (England and Wales), NGO's, members of the judiciary and businesses for heavier fines on polluters. In 2000, Professor Malcolm Grant's study of environmental courts and tribunals in Australia and New Zealand suggested six possible models that could be established in England, from planning appeal tribunals to a new environmental court.

Influences	
Aarhus Convention 1998	Concentrates specifically on Access to Information, Public Participation and Access to Justice in Environment Decision-Making, signed but not yet ratified by the U.K., it has the potential to play a major role advancing environmental justice issues in all parts of the

	<p>UNECE region</p> <p>Places duty on public authorities or organisations with public authority duties to provide access to environmental information</p> <p>Guarantees rights to public participation in relation to present consent procedures</p> <p>The agreement of the U.K. to ratify the Convention has meant the need to review whether the present infrastructure for environmental cases, requires amendment or change</p>
<p>Human Rights Act 1998</p>	<p>The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Art 6) provides a basis for discussion as to whether existing court routes are sufficient for dealing with environmental cases, strengthening the argument for a new independent Environmental Court or Tribunal</p>
<p>Social Inclusion and Environmental Equality Policy</p>	<p>Policy and spending review on environmental equality announced by the Office for the Deputy Prime Minister (ODPM), provides top level commitment to understanding of the connections between social inclusion and environmental equality and will require cross departmental review of related policy and legislative issues, between the NRU (Neighbourhood Renewal Unit), DEFRA (Department of Environment, Food and Rural Affairs) and the DCA² (Department of Constitutional Affairs).</p>

Table 3

Environmental Justice Related Law & Policy

The recognition of the need to take environmental crime more seriously, was taken up more recently by the Magistrates Association, and in 2003 it published a training manual for magistrates, 'Costing the Earth', launching it at their annual general meeting (Magistrates Association 2003).

A review of the present English 'access to justice' mechanism provides a useful perspective on barriers to environmental justice. The recent reforms under the Access to Justice Act (1999) also provide useful reflections. Essentially like other legal cases environmental law cases can be heard at magistrates, criminal or civil courts. In addition cases related to integrated pollution control and planning appeals can be heard by the Planning Inspectorate. While this report does not allow for a review of the English legal and court system, or environmental law, comprehensive information can be found in a number of text books on the English legal system

² Formerly the Lord Chancellor's Department

(Elliott and Quinn 2002) and environmental law (Ball and McGillivray 2000). An comparative analysis of access to other areas of justice and access to environmental justice illustrates that similar barriers occur, however, there are problems that relate specifically to environmental cases. The U.K. has no specific information or advice service for environmental cases or a specialist tribunal or court. Environmental cases, except for cases which are under the remit of the Planning Inspectorate go through the general court system.

Access Analysis

In order to determine how accessible the present system is for environmental cases the report reviewed the process of access. As a result of desk top analysis the report suggests that there are three main stages of access, as illustrated by Diagram 4.

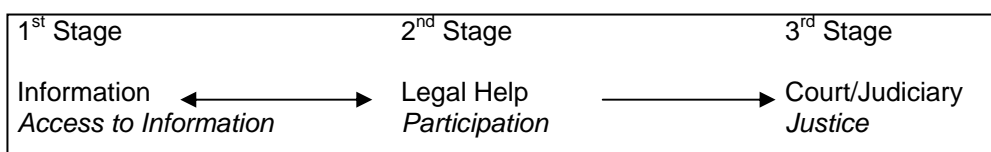


Diagram 4

Three Stages of Access

Access to information is the first and perhaps the most crucial stage as it determines whether the individual will pursue the case to the court system. 'First stage' help is defined as the first point at which an individual, group or organisation wishes to find out more information about their grievance and how their desired end may be achieved. The information sought required falls into four main queries in regards to: What are our/my rights? Where do I/we stand? Who else can help? Is it going to cost anything? How much is it going to cost? Will we get the outcome we want/need?

There is little research relating to access to justice in relation to environmental issues in England and Wales. It is therefore difficult to provide a detailed desk top analysis. Genn (1999) however, provides the most comprehensive review on paths to justice in England and Wales. She looks at how 'justiciable'³ problems are managed and public preferences for handling them. Genn identified several groups based on the strategies her respondents used to deal with their justiciable problems.

Those that sought no advice or help and handled their problems with no advice, Genn described as the 'Lumpers'. This small group constituted 5% of the 1134 respondents. Over half of this group earned less than £10,000 and were likely to have no or low educational achievement. The reason often found for not taking actions surrounded feelings of powerless. Although taking into account the lack of data in this area it seems that a relatively small number of low income households would be likely to seek environmental assistance. The connection between poverty and environmental inequality makes the access issue of low income households especially important, as evidence from would suggest that these households are more likely to be impacted by pollution, specifically in relation to health and safety (Archeson 1998 , FoE 2001, ESRC 2001, Walker et al 2000). The ability of socially or economically excluded people to feel themselves to be empowered to address environmental issues is therefore crucial. *Further data is required in relation to individuals seeking advice for environmental issues.* In addition the barriers to low

³ Defined as a matter 'which raises legal issues'. Environmental issues in this survey were not identified as 'justiciable', although matters which raised property and health issues may have had a indirect connection.

income individuals seeking environmental help need to be fully explored. These barriers must also be examined in relation to the social and economic circumstances of low income individuals.

Genn's survey found that 35% of the respondents took no advice but sought to help themselves when a justiciable problem occurred. In this context of general justiciable problems, the 'self helpers' tended to earn higher incomes. Only 35% earned less than £10,000 compared to the 41% of the 'lumpers'. The cases on which self helpers sought no advice was when the dispute concerned an issue, more likely to be a consumer issue, where the substance of the dispute concerned a monetary sum less than £500. Even though there is a lack of data related specifically to environmental justiciable problems using Genn's findings on general legal cases may suggest that individuals may seek to solve an environmental problem themselves without advice if they also perceive it as not serious and are confident of, and persistent in seeking, redress.

Analysing the responses of those taking advice for general justiciable problems, Genn, noted that a diverse range of approaches to seeking advice were used, although most sort external advice after trying to deal with the issues themselves, as can be seen in Table 5 which examines the different avenues. Many of these approaches however, are not directly related to environmental cases. It is suggested that unlike other justiciable problems environmental issues suffer from a 'visibility deficit' in gaining access to information and advice. That is to say there is a distinct lack of visible advice avenues. This highlights the fact that there is no single body, responsible for environmental issues or law and capable of providing 'one stop' advice.

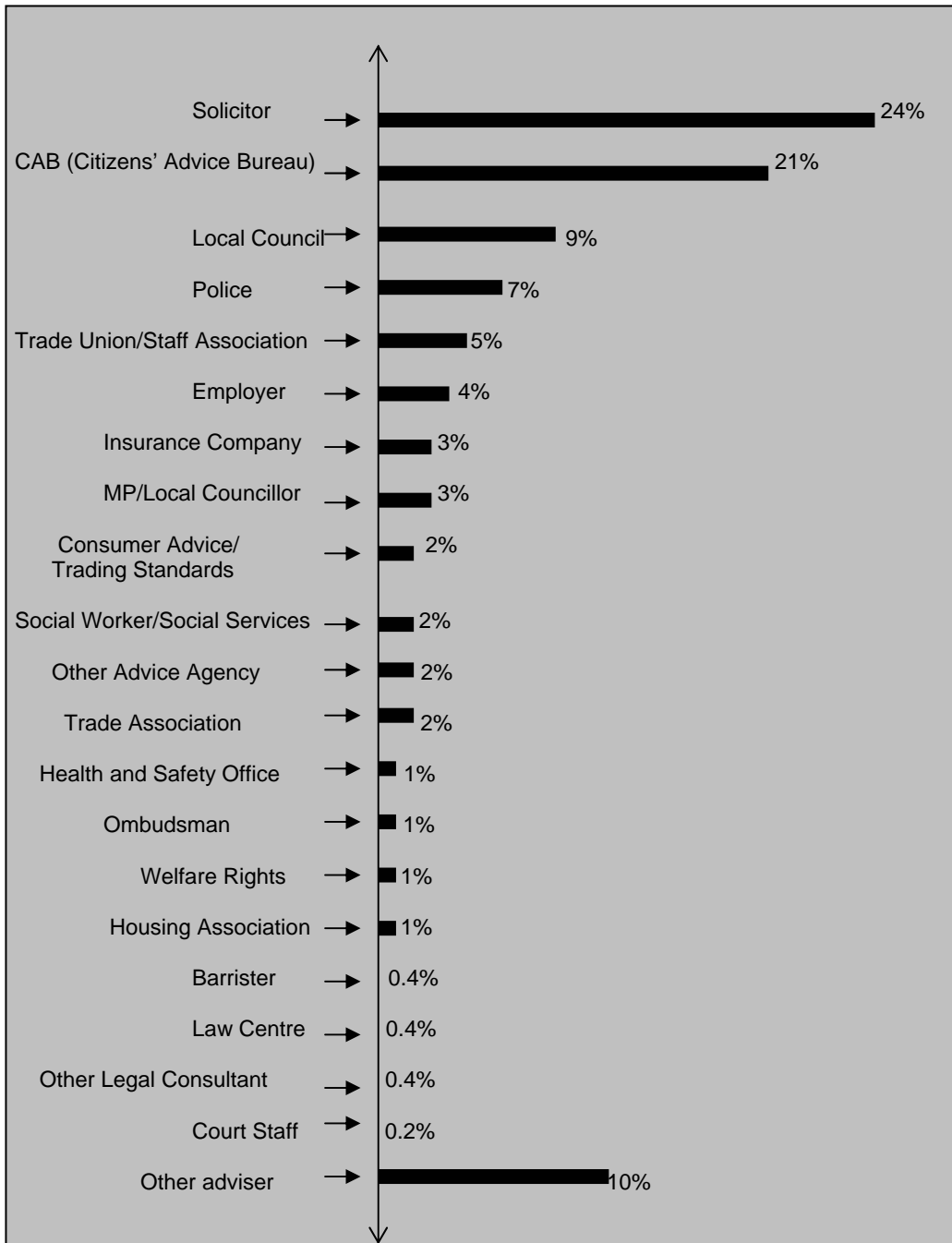


Table 5

Genn (1999): Paths to Justice – First Source of Advice

As can be seen from Genn's findings on where people go to for first source advice a number of these advice contacts are not relevant to environmental cases, and it is unlikely that advice would be sought from these avenues. For example, advice from a social worker or social services. Many of these are recognised as avenues for specific legal problems not related to environmental issues.

However, for those without any knowledge of environmental issues, it is not easy to determine which if any of these sources of advice would be useful. By analysing Genn's chart and applying a process of elimination the most likely routes for seeking advice for environmental cases are likely to be: lawyers (barristers & solicitors),

citizens' advice bureaus, other advice agencies, a law centre, the MP/local councillor, an ombudsman, the local council and the health and safety office. In addition it is likely that environmental NGO's with household names such as Friends of the Earth or Greenpeace, may also be approached for assistance, who may then refer individuals to one of the few environmental public interest lawyers or organisations working on environmental justice issues, such as Earth Rights, Capacity Global, the Environmental Law Foundation or Public Interest Lawyers. The role and even more likely the name of the Environment Agency is also likely to make it a target for first source information.

The most common sources of first point contact identified by Genn, solicitors and citizens advice bureaux (CAB's), though likely first contact points for environmental cases have a number of barriers. In regards to solicitors it would seem unlikely that a high street lawyer capable of dealing with more general legal issues experienced by Genn's respondents, such as divorce, welfare, consumer advice or property are would have an in depth or even basic knowledge of a highly specialised area of environmental law. The CABs also have similar barriers, as they are set up to deal with the more domestic issues of debt, rent and welfare advice. Although they operate a referral service and have a wide database to other advice agencies, the adviser may have difficulties referring a client with an environmental problem to the right organisation or solicitor. Because these two avenues are unlikely to provide the required advice, it is suggested that people with environmental cases are more likely to have to take second or third source advice before finding the required specialist advice. These findings are examined further later in the report.

Access to Justice Act

The Access to Justice Act 1999 (AJA) was established to reform state funded legal services, the intention while aiming to improve quality and accessibility, also aimed according to Zuckerman (1999) to introduce market mechanisms into the system and reduce state costs. The Legal Services Commission (LSC) was established to deliver the system through building partnership networks with different suppliers of legal services and through their website. In theory a new partnership network and the website could assist in providing first contact specialist advice. The AJA also allowed 'no win –no fee' (conditional) arrangements to be made, the client only having to pay the lawyer's costs if their case was lost. This report is able to provide only a brief analysis of the AJA changes and their impact on environmental justice. In general, however this report suggests that there are four main barriers relating to the LSC and the AJA reforms that create resource deficit, at the first and second stages of access.

CLS Funding

England's legal aid funding prior to the AJA has been called one of the best in the world (Zuckerman 1999) for its ability to provide state funding for legal cases. Previous to the AJA, civil cases only got funding if they met merits and means tests. This has now changed and the Community Legal Service Fund, has a fixed amount of money, set each year by the government spending plans (Elliott and Quinn 2002). Solicitors or advice agencies holding a contract with the CLS can receive funding from the Commission but this is only for specific areas of law: immigration, mental health, family law. Despite lobbying by environmental organisations at the consultation stage for the AJA, environmental law is not an area of law specified to receive funding from the CLS.

The Funding Code does, however allow for public law cases to be state funded in certain circumstances. They must pass both the merits and means test. The case

must be deemed to be significant to the wider public interest (the Merits test) and the applicants income must be below a set threshold (the Means test).

Even if these tests are passed there is the possibility that individuals will have to make a contribution to the CLS for the costs of their case. The possibility of open-ended costs means that these contributions may take away resources from an individual's or household's other important needs. The CAB's report (2003) on the AJA and funding noted that this could lead to household debt or an increase of household debt. This debt may be less likely to be taken on if the individual involved is taking a public interest case where they may have to be the sole bearers of financial risk, yet will not be the sole beneficiaries of a positive outcome.

'No win no fee'

This private arrangement for funding cases is a widely used mechanism in the United States. It allows solicitors to agree with their clients that no fee need be paid to the solicitor if the case is lost (or only a reduced fee is required). Previously banned in England⁴, the AJA encouraged the use of this arrangement as a measure to increase the accessibility of lawyers and reduce costs to the state, especially for personal injury cases that received no state funding.

The solicitor will only agree to this kind of arrangement based on likelihood of winning a case and the amount of the likely recovery if successful. The likelihood of winning will of course be based upon the strength and complexity of a case. It is important to note that while there is a distinct lack of data on the costs of an environmental case the often complex nature of environmental cases, their length and the difficulty of assessing and recovering damages for environmental cases would make it seem unlikely that 'no win no fee' will be a popular arrangement for environmental litigation. A lawyer is unlikely to take on the risk of a lengthy and costly case where no fees have been received or may ever be received. Costs without CLS assistance (or legal aid) will still be prohibitive for environmental cases.

Outreach

The CLS provides numerous outreach or information mechanisms, a website and leaflets. Outreach materials of this kind are useful due to their potential to reach the general public. The CLS 'Just Ask' website provides extensive information on the service and information on where to find a list of possible partnership organisations.

At the time this report was written there was no information which was clearly sign-posted as relating to environmental issues, unlike other areas of law. While this is likely to be because environmental issues are not one of the areas directly funded by the CLS the possibility of obtaining funding under public interest law is not highlighted. In addition while lists of other organisations are provided for advice in other specialist areas, there is no list provided for organisations providing advice on environmental issues. Only when the name of one environmental law organisation is typed into the search engine that details are shown. This is not particularly helpful if the individual or group is searching the website because they have no knowledge of organisations able to assist. This lack of information is also reflected in CLS leaflets for the public.

⁴ In 1991 the Courts and Legal Services Act removed the ban.

Community Legal Service Partnerships

The CLS operates nationally and regionally. Decisions on which solicitors or advice agencies will be allowed to hold a CLS contract to provide CLS funded advice, help and representation are made by CLS regional boards. Community Legal Service Partnerships are also regional allowing for regional co-ordination of regional funding and planning.

At the time of this report while there are a number of environmental lawyers who are members of an environmental law advice referral service and offer pro bono advice, there is a distinct paucity of public interest environmental lawyers. Although CLS contracts may be applied for regardless of the geographical location of the lawyer to the case, the simple lack of public interest environmental lawyers means only a limited number of environmental cases are able to be undertaken. Compounding the problem, the low number of public interest environmental specialists lack visibility especially beyond the areas in which they are based. Where visibility is poor and numbers are low, only those who are lucky enough to have an environmental specialist operating in their “backyard” have a real chance of access to the advice they need in addressing their environmental concerns. This creates a potential post code lottery of access to specialist lawyers and although not created by regional CLS boards it can be perpetuated by the boards if they do not recognise that environmental public interest law is a particular service required in their area.

Case Study: Australia

The discussions on environmental justice in Australia reflects the global connection of sustainable development and environmental degradation and the U.K. environmental justice agenda. Environmental degradation is seen as closely linked to health and social risks. There is a call from environmentalists, Aboriginal groups and public interest lawyers in Australia for the incorporation of new ethics of social and environmental justice into the legal system (Australian Conservation Foundation 1999). These global connections are also illustrated in environmental and social trends, as suggested by the Australia: State of Environment Report, which charts environmental degradation, loss of bio-diversity, and damage and loss of inland waters.

Environmental justice as premised in this paper is also recognised in Australia. That is, that environmental justice is about the inequitable distribution of ‘attractive and safe’ and ‘ugly and hazardous’ environments (Griest, Douglas et al 1999). It is akin to what Low and Gleeson (1999) in their report on Environmental justice in Australia, note is the ‘A Far Go’ principle, one of the Australian core values of social justice applied in the environmental context. Low and Gleeson go on to discuss the connection in Australia, similar in the England and Wales, between relative poverty and environmental risk. Figure 1 below provides an example of the distribution of hazardous industries in Melbourne and the high correlation to social and economic disadvantage. In addition, a high proportion of the excluded groups are indigenous aborigines who are more likely to suffer from health problems caused by environment issues such as access to water and sanitation, and proximal geographical location of their homes to hazardous industrial developments.

An important element to recognising environmental protection and environmental justice in Australia has been developing the legal system and processes specifically in line with environmental and civil participation requirements. While Australia has a

similar legal system to England, that is a magistrates court, high court, civil and criminal system, they also have a number of specialist environmental courts and planning tribunals. These specialist tribunals and courts have been established by state legislatures within the Australian federal system.

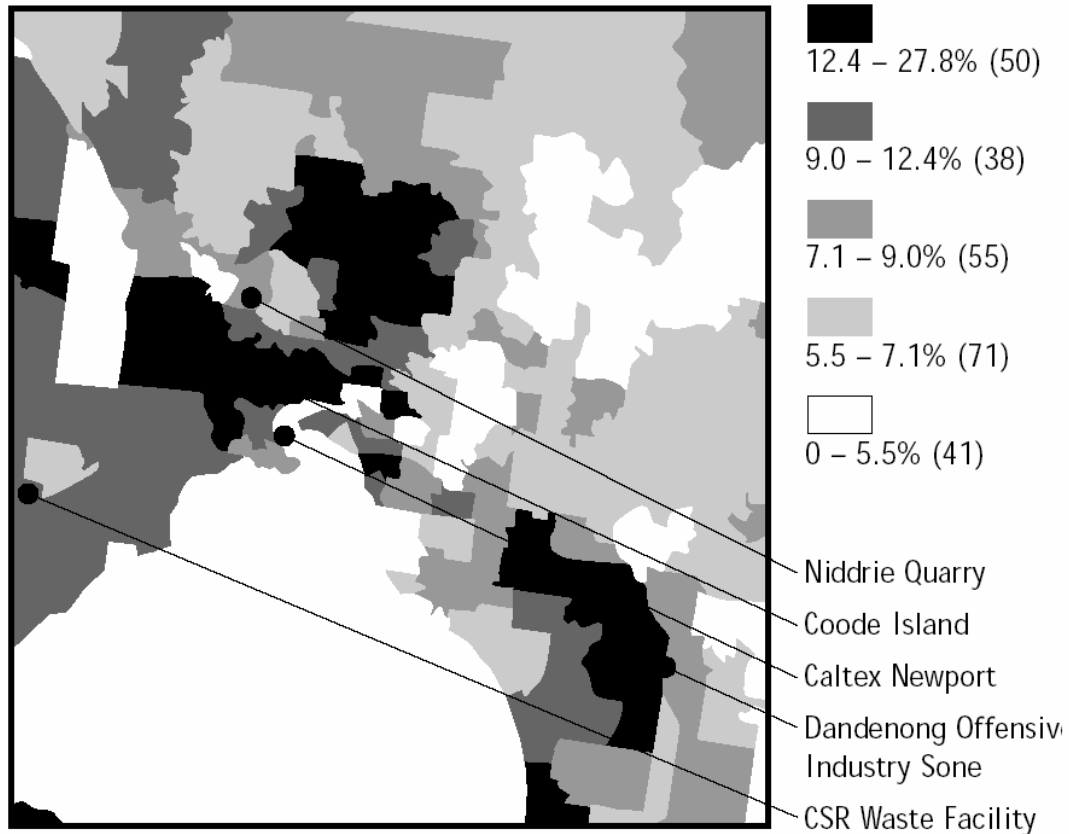


Figure 1. Rates of unemployment in Melbourne and the location of toxic chemical sites (Melbourne Statistical Division by Postal Area).

Source: Low and Gleeson (1999)

Australia, however is often used as an example of good environmental justice because of its specialist environmental and planning courts and tribunals, these include the Planning and Environment Court in Queensland, the Environment Resources Management and Planning Appeal Tribunal and the New South Wales Land and Environment Court (NSWLEC). NSWLEC is seen as unique because of its exclusive and comprehensive jurisdiction in all matters of environmental and planning law, its status as a superior court, its specialist composition and use of lay Assessors (now Commissioners) and because it is the only court in the state (except the Appellate Court) that may administer legal redress in those fields, civil and criminal (Birtles 2001). For this reason the report concentrates primarily on the Land and Environment Court in New South Wales.

The NWSLEC is seen globally and in Australia as an innovative system for environmental justice. It was established as part of a number of planning and environmental reforms including the Land and Environment Court Act 1979 (Stein 1995). The Court has the power to determine environmental, development, building and planning disputes and it has the same status as the Supreme Court of New

South Wales. The establishment of the Court and the other reforms enacted at this time in NSW were part of a package designed, in part, to increase public participation⁵. While the full features of the Court cannot be comprehensively reviewed here, the Court's operations are viewed as flexible, informal and cable of dealing with sometimes very complex cases in a timely manner. The benefits of the court are also seen in its ability to hear environmental cases not only on administrative issues but also on issues of merit. In addition the court has a number of specialist judiciary and commissioners (non technical experts) who serve the court with expertise in environment and planning law. The Court is not without criticism. The main two issues are: (1) calls have been made by environment public interest lawyers for improvement such as the call for the appointment of a independent duty solicitor to assist the public with legal environmental problems that are public and non public interest, (2) that environmental and planning issues should be incorporated within existing systems. The first criticism although related to how the Court can be improved as to assist participation of the public in environmental cases in general, is not a criticism of the Court's purpose or its role. The later criticism, however, is. Stein (1995, 2000) suggests that this criticism would be correct if in segregating environmental law environmental justice issues were marginalised. What is perhaps the most interesting observation about the court, in relation to public participation, is that the Court's establishment did the opposite. The court heightened the importance of environmental law, increased participation and propelled environmental justice issues into the public arena.

The importance of the Court would seem to be born out in reports analysing environmental access, participation and decision making in New South Wales. The Court in itself concentrates public and media attention on environmental justice issues, in a way that seems to be missing in England. What is equally important to environmental justice in New South Wales is the plethora of administrative, resource and funding components provided to the public that assist in access to environmental information.

Access to Information

There are a number of recorded avenues to receiving environmental information in NSW. The NSWLEC itself produces accessible information on how it works, what it does, and how it can be used. As such there is an obvious first point of contact for free environmental law advice. Further assistance is specifically provided by the Environmental Defenders Offices. The first EDO was established in Sydney in 1985 and the NSW EDO also opened that year. All the EDOs are part of the National Environmental Defenders' Office Network. The Network was established in 1996 and consists of nine independently constituted specialist environmental legal centres situated in each State and Territory of Australia. The network has set of principles and objectives to which all the members agree. These principles underline their role as defenders of public participation and their right to receiving professional, prompt advice and representation in environmental public interest matters. As such they see objective as 'empowering the wider community to understand law and participate in environmental decision making' and it has a education program to build community skills and knowledge in environmental participation (Access to Justice Roundtable 2002). Confidential advice can be given on any environmental law matter by

⁵ See, for example, Section 5 of the Environmental Planning and Assessment Act 1979 whose objective is to enforce environmental law and to recognise and acknowledge the right of the public to participate in the legal system (Stein 1995).

telephone or by interview, by EDO in house solicitors and volunteers. They also use different media, a website, workshops and leaflets to provide advice and assistance.

While there is no doubt the EDOs play a crucial role in providing accessible and visible first point of contact advice in environmental law, many EDOs often complain that the demand for their assistance requires more staff and better funding and resources. Information received by the authors of the report from the NSW EDO notes that while it is occasionally able to provide assistance to unrepresented litigants in relation to court requirements its limited resources restrict the extent to which they are able to do so. Information from the Access to Justice Foundation and the NSW EDO also notes that the EDO Networks are only able to work on environmental cases which are which fall into the legislative definition of 'substantial public interest'. Free advice may also be limited only to first stage or initial advice, possibly leaving the client having to find funds for further assistance.

Access to Resources

Funding: In a report submitted by The Environmental and Planning Law Association (1998-1999) the cost of environmental and planning cases were calculated between \$8000 - \$12,000⁶ depending upon the complexity of the case and the need for external consultants. These figures seen as quickly escalating with the use of senior solicitors or barristers. As in the U.K., it is difficult to get complete data on the costs and division of costs between parties on environmental and planning cases. Nonetheless it would seem that the ability to receive legal aid for public interest environmental cases in New South Wales, redresses, in part, the chilling effect that the issue of costs creates when the public decide whether they will use the legal system to redress a justiciable issue (Genn 1999, Fowler 2003). A discussion paper prepared for the Law Council of Australia (2001) also confirms that due to the nature of environmental cases, costs and thus funding is a major issue.

The issue of funding and costs are alleviated, to some extent, in New South Wales by two measures: (1) the NSWLEC practice as to costs and (2) the NSW Legal Aid Commission's specific budget for public interest cases.

Practice as to costs is that no order is made as to costs except in what the EDO NSW state as in exceptional circumstances. As they suggest the rules as to cost are based on case law that stipulates the longstanding policy of the Court not to discourage parties seeking review by burdening them with the risk of an award of costs being awarded against them⁷. This practice, the EDO goes on to say, is considered to be 'of great benefit in encouraging the use of the Court for the resolution of disputes and in ensuring that the public is not dissuaded from using the Court'. In addition it allows the public to control levels of costs to which they may be exposed. This is in stark contrast to England, as noted in earlier in the report.

Legal Aid: De Torres's (2002) review of legal aid funding of public interest litigation suggests that NSW has operated through the Legal Aid Commission a successful program of legal aid funding for environmental cases. Legal aid is available in NSW for environmental matters of public concern. In such cases legal aid may provide for the cost of legal advice and representation plus undertakings by the Commission to

⁶ These calculations were only in relation to Council costs with regards to Class 1 development appeals.

⁷ This is based on Justice Pearlman's referral to *Berk v Woollahra Municipal Council (No 2)* (1992) in *Outdoor Australia Pty Ltd v Auburn Council* (1996)

pay any cost order against the person receiving legal aid. There have however, been calls for a larger budget for such cases from the NSW EDO, specifically to permit for greater provision of advice and legal representation in relation to development cases.

The definition of public interest may mean, however, that a large number of cases are not able to receive funding from the Commission. The Commission considers funding only for cases that have *substantial* public concern, the activity in question must be likely to have a *significant* impact on the environment of NSW, or *substantially* effect the public use or enjoyment of that environment. The Court examines, among other considerations, the scarcity of the particular attributes of the environment; and the community interests that may be affected, including the social and cultural needs of the community. The greatest obstacle to funding is seen to be establishing that the case demonstrates a substantial concern or represents a significant impact. As these conditions relate to the environment 'within NSW' cases with national or international environmental significance cases may lack legal aid funding from NSW and other federal funding commissions in Australia.

Standing: The rules for standing in the NSWLEC also allow cases unable to be funded by communities or individuals to be taken on by public interest groups or NGOs, thus they are able to act as legal resources for the general public. Stein (2000) comments that the liberalising of rules of standing was particularly important in removing barriers to environmental justice. It allows any 'person' to bring criminal or civil cases to the Court. He concurs with, with that it has been made clear that the Court task is to not only to administer justice between parties but also to go beyond that and administer social justice⁸. While public interest groups are also able to be considered as persons able to be accorded standing, the Court tends to take additional considerations into account. These factors are generally related to the 'representative nature' of the group and if they have an 'established interest'. In some ways the test for standing of public interest groups may be higher, than for natural persons, but it would seem from the desk top review that standing for public interest groups is not considered a barrier to their accessing the legal system, arguably in contrast to England and Wales.

Summary - Global and National

As can be seen from this brief overview environmental justice is concerned with the issue of inequitable distribution of environmental 'goods' and 'bads', both at global level, between states and at a national level, within states. Environmental justice research and discourse suggests that access to law, is an essential though not singular part of environmental justice. As such access to the civil and political processes of environmental citizenship; access to information, decision making and participation are essential. Access to an effective and fair legal system is therefore a cornerstone of environmental justice.

The review suggests that access to an environmental legal system is an important tool for environmental justice. Access to an environmental legal system allows an examination of national and global legislation, soft law and policy in relation not only to sustainable development but human rights, building community and increasing governmental transparency. This is because environmental issues and the decisions made about them are inextricably linked to social, economic, political and policy paradigms.

⁸ Chief Justice Street in *F Hannan Pty Ltd v Elcom*. (1985) 66 LGRA 306 at 313

A closer review of England and Australian, New South Wales system of accessing civil and administrative environmental justice via the legal system illustrates a number of similarities and sharp contrasts. The greatest similarity is that both wealthy 'developed' countries can provide geographical and epistemological mapping of environmental injustice. These injustices often relate to the siting of hazardous industry in areas where there are higher deprivation indexes and households of 'ethnic' or indigenous backgrounds.

Yet while both environmental justice agendas recognise the importance of the legal system in ensuring environmental equality and citizenship, England, despite legal reforms has sought an almost business as usual approach to environmental justice while Australia has implemented specific and targeted legislative and political reform.

In the U.K. while there have been policy discussions around environmental justice, there has been no real change in regards to how the legal system is implemented for environment or planning cases. While environmental law is arguably complex and time consuming, reforms in the legal system implemented by the Access to Justice Act 1999 have not removed, but may have created further barriers to using the legal system for environmental cases. The main problems are a lack of visibility of avenues of access for first point of contact information, advice and assistance, and the paucity of and difficulties in obtaining resources, both financial and informational, including CLS funding and assistance. Further complicating these issues are the issues surrounding costs, in terms of both the cost of taking and action and the rules concerning awards of costs, and standing, although the liberalisation of the judicial interpretation of standing for public interest groups seems to have lowered this administrative barrier.

In Australia, the New South Wales example illustrates that the late 1970's reforms to planning and environment legislation and administrative procedures have created high level visibility for environmental issues for the public, government and the judiciary. The establishment of the NSWLEC, although not without some criticism has developed into an accessible legal institution for environmental justice. With the Court's establishment a network of advice and support systems, mainly from the EDO has meant that the public are able to gain advice and representation for public interest environmental law cases. Open rules of standing and greater judicial discretion in awarding costs against public interest plaintiffs have supported individual and collective access.

While a desk top review provides insight into the issues, there is little actually known about the opinions of stakeholders involved: public, lawyers, the judiciary, NGOs, and other relevant organisations. To help address this knowledge gap the second part of the report seeks to establish an insight into their views through focus groups, face to face interviews, telephone and written questionnaires. The results are reported in the next part of the report.

Part II: Environmental Justice Concerns: communities, NGO's and lawyers

The aim of this qualitative research was to consider the opportunities, barriers through an examination of the concerns of key stakeholders on issues of the legal system in relation to environmental justice. The researchers also wanted to identify key themes for policy, project initiatives and legislative development or change.

As experiences relating to the subject area differ markedly, participant were divided into four main groups, mainly in line with their professional relationship to the legal system. The four identified groups were:

- environmental lawyers (barristers and solicitors);
- magistrates and judiciary;
- NGOs;
- community groups and individuals.

The research was then based on separate discussions with members of these groups via face to face interviews, focus groups and questionnaires (written or via telephone). The intention of the research was not to discuss or provide information on specific environmental cases, but instead to explore more general experiences relating to expectations, experiences and knowledge relating to the subject area.

The focus group questions were designed to be flexible to be able to explore the concerns and issues of interest to each group and to allow comparisons between the groups in relation to attitude, perception and experiences. The focus group methodology was used for discussion with community/action groups and individuals who were identified as:

- having *no previous experience* of using the legal system to remedy environmental grievances

and

- having *some previous experience* of using the legal system to remedy environmental grievances

Other stakeholders, environmental lawyers, NGOs, magistrates and judiciary were interviewed using questionnaires tailored for each of their 'sectors' and designed to be specific for the experience and perspectives of each of these groups. As such three different questionnaires were used for (See Appendix I):

- NGOs⁹

⁹ The questionnaire respondents were the legal officers or in-house lawyers for charitable organisations but also members of environmental agencies with a regulatory role.

- individual lawyers
- magistrates and judiciary

It is not the purpose of the report to present all the discussions in their entirety but to draw out the main issues that arose from each group in the following sections.

Community and Action Groups

Environmental Protection and Quality of Life

To begin discussion the focus groups were asked how they defined the environment. The response was that it comprised both global issues of climate change and rainforests and the local issues of local air quality and the built environment. All the groups were keen to note the importance of local environment in relation to where they live. This included local environmental degradation connected to litter, quality of housing, graffiti and local air pollution. Five out of six of the focus groups were also keen to state their belief that there was as strong correlation between their poverty or the lack of financial resources in their neighbourhoods and the state of the polluted or degraded environments they endured on a daily basis.

I think we have been cheated because we put up with the pollution because it brought us jobs and affluence and now were paying the price. We've got all the crap and none of the benefits

the environment agency and that lot should be putting more resources the way the government does in underprivileged areas

The three focus groups based in geographical locations with high deprivation indexes noted that poor people were often suffering from the brunt of old and new industrial pollution without perhaps any of the earlier benefits of jobs.

NGO's think all the problems are in the Third World countries. But no one thinks about us here in Cleveland....no one battered an eyelid to pull out the forest here to put up the pylons up there

Concerns around environmental pollution, specifically the impact of air pollution on local health, were connected to the lack of environmental enforcement protection. All of the groups stated that although the environment was a complex issue and difficult to define that it was as important to the quality of life of people in the U.K. as it was for people in Africa or Asia.

Advice and Information

In the case of both types of focus groups, both those with no previous experience and those with some experience of using legal remedies for environmental issues, not one member of any of either of the focus groups stated that they knew where to go for first point of contact for environmental advice. While they were aware of providers of advice for non environmental issues such as the CAB, or community advice centres, their perceived lack of knowledge of environmental issues meant that

participants would not use them for referral to another organisation. First points of contact, in order of most often mentioned were:

- Friends of the Earth
- Greenpeace
- The Environment Agency
- Local MP
- Internet
- Seek help from a professional in the community
- Local Council or Planning Department
- CAB/ 'One Stop' Advice Shop

In the case of the focus groups with previous experience, all but one group after their first point of contact had experienced two or three referrals to the agencies mentioned above. Only one group mentioned not having had to be referred to an agency as they had a case which fitted into the campaign remit of an environmental non-governmental organisation who were then able to give full legal and campaign advice.

Well I'd contact the people...my neighbours, friends and stuff like that then get the ball rolling and ask them what they know ...hold a meeting and go from there

The feeling is that the machine is too big they would never take any notice of us

For the groups with no previous experience all decided that before seeking outside assistance they would seek carry out what this report terms 'self help actions'. These self help actions included conducting further research, but most prominently gathering other people in the neighbourhood to discuss the issue, swap information, and gauge the level of interest in the community for finding out more information, seeking further assistance or taking action.

Accessibility & Quality

For those who had experience of seeking legal advice for an environmental issues the lack of accessibility to specialist environmental advice was noted as one of their main concerns as to whether they should take the case further or seek further advice. Complaints about first point of contact advice were as follows:

- No sign posting to finding the 'right' information and advice
- Length of time in finding and receiving the 'right' information and advice
- Long distance travel to information point
- Lack of technical assistance
- Cost

Groups often found that when information was available it was often too technical or expensive to make use of it. For example, requesting photocopies of specific

documents from local councils was quoted from 50p to £3.50p per sheet, this was seen as prohibitively expensive, especially as some documents may comprise hundreds of pages and access to more than one document was required. Once the information was received it was often perceived to be too technical and there was no support provided to answer the technical questions the information raised. In addition much of the information was not specifically directed to environmental issues, which is why further referrals or assistance were required from different bodies or organisations. Each group had to go through on average three points of contact before receiving the required information or assistance. The invisibility of environmental advice caused a number of problems, not only in using the 'wrong' advice source but also in delaying access to the required information. The groups felt that it was their perseverance as an individual or as part of a community group that actually made them continue with their case rather than the quality or accessibility of advice. Only one member of a focus group stated that they were happy with the level of advice at first point of contact.

Using the Law and Lawyers

The perception of use of lawyers or the law to further environmental justice was heavily connected to the perception of the groups of law and lawyers as a whole. Where groups had no previous experience of using the law for environmental issues there was deep suspicion of the legal system, groups felt that they would be unable to obtain a fair and impartial hearing. There was concern that cases put forward that effected the poor rather than the wealthy, were less likely to be sympathetically viewed by the judiciary. For two groups based in geographical areas of deprivation using the law also had a stigma attached to it.

You don't use the law unless you have to.

I wouldn't know what to do about legal action.

For these reasons lawyers or legal advice would in their words 'never' be the first point of contact but rather the 'last option'. These groups spoke of the feeling of 'disempowerment' that existed in excluded communities, especially those who had lived with pollution or a degraded built environment all their lives. It was difficult, the groups thought, for some of their neighbours to begin to think about the using the law to change, protect or improve their environment when, a 'poor environment is all you know'. Using the law was also seen in many ways as raising the stakes. That is to say that it made the issue more serious and placed it in the public arena, making the group or individual taking the case open to intimidation, specifically from the defendant. But this also risked being ostracised from their own communities or neighbourhoods if the pollution was caused by a company or industry that provided local jobs.

When asked to discuss issues further around using the law and lawyers for environmental justice the barriers for those with and without experience of using environmental lawyers and the law were:

- **Lack of specialist environmental lawyers:** high street lawyers were perceived as unlikely to have specialist knowledge of environmental or planning issues. As such it was likely to mean committing time to finding a specialist solicitor. This would also mean having to travel outside of local areas and would involve extra funds and time;

*I wouldn't know where would you go to for the right solicitor
I mean you couldn't just go to a high street solicitor*

*We were told there's only a few public interest lawyers that deal with
environmental cases especial*

- **Lack of funding:** the lack of public funding or legal aid for environmental cases. No one was aware of the possibility of funding for environmental cases under public interest CLS rules. The thought of having to fund a case without a specific time line was the major factor for not using the law even if an environmental lawyer had felt they had a good case;

*Why should community groups or individuals have to foot the bill
for a case which benefits the whole public, there should be a budget
specifically to pay for these type of environmental cases*

- **Financial implications of losing:** the risk of losing a case and having to pay the other side's (and their own) costs was seen as a risk not worth taking. The thought of losing their savings or their homes was seen as not worth the gamble, especially in a case where they were not going to be the only ones to benefit. It was felt that the risk should not have to be taken by one individual when the public stood to gain from the case being heard or won;

*It would difficult to go to court with companies as they're going to
throw more money at than you could think of and you might have
to pay for that if you lose*

- **Inequality of environmental law and enforcement:** environmental law was perceived as having a large number of anomalies. One person asked how does it make sense for large industries complexes to pollute in places of poverty when dog owners can be fined for allowing their dogs to foul the pavement. It seemed that industries' 'permission to pollute' stopped environmental laws from being properly enforced by environmental regulators or the legal system. Publicity around low fines given to industries for pollution were seen as examples of this.

The comments of the focus groups that had sought legal advice for environmental cases on their experience of using the law proved that the concerns of the inexperienced groups were valid. Those who were seeking ongoing assistance at the time of writing this report noted the following as their main issues of concern:

Funding and Costs: Costs were constantly mentioned as an issue of concern. All the groups had sought legal aid for their cases but none had, as yet, been granted any assistance. In some cases individuals on low incomes, willing to take on the case, had been sought. In all but one instance no one willing to come forward was found. A fear of being 'the fall guy', if costs against the claimant were awarded, was often cited as the reason for this failure. Although the groups had agreed to assist the individual to pay back any costs awarded against them if the case was lost, the individuals involved felt unable to take the risk.

They'd been told if they lose they would have to pay the costs of the other side which could be a minimum of £3000. That would fall on one individual and that individual has to take risk even if the rest of the community say they will fund it

While all the groups had found pro bono assistance at some point in the case, this assistance had run out. Although the pro bono assistance was useful, it was not seen as a complete answer as the lawyer's fee still had to be found. One group had spent approximately £10,000 of their own money to fund the case's costs and this was seen as a considerable burden. Anecdotal stories of other groups having to fundraise through jumble sales or raffles were told, some groups were said to have formed companies so that the company rather than an individual took the case to court; so that in theory costs would be awarded against the company, rather than the individuals, should the case be lost.

Lack of public funding for environmental cases, cases which were often seen as benefiting the public good, was a constant source of frustration and often the reason for considering whether to continue taking a case through the court system. While environmental NGOs had been stated as a first point of contact for advice the groups were critical of the amount of support NGOs were able or willing to give, particularly where the case did not fall into their campaign remit. Although advice and support from a single member of the NGO's local groups was often given and welcomed, it was felt that NGOs themselves had difficulties in helping the public take legal action.

Time, Commitment and Support: Cases had taken, what was felt to be a considerable amount of time; gathering the material to substantiate the case was perceived as extremely complex, requiring technical and other expert assistance. While support for the case was a team effort, the person selected as the spokesperson from an action or campaign group carried the greatest load, in relation to information gathering and time put in. This meant cases were sometimes dropped if that individual had reached a 'burn out' point. The lack of state or local support was often quoted as the reason for community groups or individuals failed to continue public interest environmental cases.

You do feel burnt out sometimes but you just keep on going and there's usually someone else willing to help

Intimidation: Apprehensions over intimidation voiced by the inexperienced groups were borne out by the responses of the more experienced groups. Focus group members spoke of intimidation by local councillors, the defendant company, and in some cases from members of the neighbourhood in which they lived.

We're told by the Local Authority and people in power that we stand being ostracised from our communities as trouble makers

Intimidation ranged from phone calls asking why the individual was involved in the case, to in one case, councillors visiting an individual's address without invitation and speaking to the individual in a manner which they felt to be threatening. In this case as a result of the councillor's behaviour, the individual wrote a letter to another member of the action group informing them where the information relating to the case could be found should anything happen to her.

A New system or the Old System for Environmental Cases ?

In light of the view points expressed by the focus groups on the use of the legal system for environmental justice, the question was posed what, if anything, would they change in the present legal system. The groups were also asked whether England and Wales required the establishment of a new specialist environmental court and what would be the benefits or problems if such a court or tribunal was established. Only two members across all six of the focus groups did not feel that a new system to deal with environmental cases was required. The predominant response was that a number of changes were required to the present system, but that these changes were better implemented as part of a whole new system of support and advice attached to a specialist environmental court or tribunal. The two members who did not want an environmental court or tribunal were concerned that environmental cases could be marginalised by a specialist court and not seen as serious criminal or civil cases, but as 'just environmental cases'. These two respondents also suggested that the introduction of a specialist environmental court might not deal with the underlying problem of proper enforcement by the present court system and environmental regulators.

While virtually all respondents were supportive of the establishment of a new environmental court, there emerged the concern that the new court would be of little assistance if it did not address the present barriers within the legal system. Respondents discussed the need for state supported public funding and an advice and information system specifically for environmental cases that would need to be partnered to an environmental court system. The discussions identified the crucial need for the following services be put in place in support of public use of a specialist environmental court:

Public funding or legal aid for environmental cases: the idea of a specific legal aid or public fund for environmental cases was raised. This fund was seen as being specifically earmarked for environmental cases. Financial resources for the fund were envisioned as initially coming from the government and then supported from polluter fines.

An independent legal environmental information and advice agency: the discussions suggested that a national, independent advice service capable of providing information and legal advice, representation and support should be established and that this would create a visible first point for contact advice. Such an agency was seen as a potential 'one stop shop' for environmental cases. Although it was thought that the agency would be supported by government funding, it was seen as important that the advice was impartial and independent.

Requirements for the new courts were:

An independent judiciary supported by non legal experts: a new environmental court was seen as a way to start again with a clean slate. It was felt that the judiciary chosen to hear the cases should be independent of industry influences and mirror the diversity of wider society. Additionally the legal expertise of the judiciary should be complemented by a panel of technical or scientific advisors who would also hear the cases put forward to the court and assist the judges with technical information.

Free and easily accessible information about the court: the need for accessible, cheap and easily understood information about the court and how to use it was widely discussed. The information should be accessible on the internet, in places

where people usually seek advice, as well as in places where people often visit, such as places of worship or the supermarket.

An informal process: a number of the discussions centred on making the processes of an environmental court simple. Focus group members favoured an informal service. For simple cases one respondent suggested procedures similar to the small claims court, which was simple to access and had an informal procedure.

Support for community groups or individuals taking action: special support should be provided by staff of the court to plaintiff community groups or individuals who were taking a case to the court. Such systems should include advice on how the court works and its processes. This could also include some kind of witness protection service.

Quick response: it was viewed as very important that the court should deal with cases quickly. Cases should be heard in a preliminary hearing within six months, and there should be constant updates as to where the case was within the system and what the final hearing date was likely to be.

Two tier system: in light of the complexity of some environmental cases, respondents suggested that an environmental court could have a two tier system. One tier could hear minor simple cases quickly and a second that would deal with more important, complex or lengthy cases.

Ability to hear cases locally or have regional environmental courts: the location of an environmental court was identified as an issue of concern. The majority of the focus group members felt that the court should have the ability to hear cases in different regions. They suggested this could be as a 'travelling environmental court' or through 'regional environmental courts'.

Investigative powers: two respondents stipulated the need for the court to have the powers to run enquiries into environmental cases in the same way that enquiries were made into other public issues, such as those seen in child abuse and social services. The respondents noted that this investigative power might belong to a separate body outside of the remit of the environmental court.

Non Governmental Organisations

This part of the report looks at the main concerns of four NGOs; two large environmental NGOs with household names and two smaller NGOs. All the NGOs we spoke to had an environmental remit, which included using the law for environmental protection campaigns or the provision of advice on environmental law via a referral service or pro bono assistance. Representatives from the NGOs were asked to complete questionnaires either by phone with one of the report's researchers or to provide a written response. The representatives were responsible for the provision of legal advice within their organisation, either to the public, through a referral service or as 'in-house' lawyers.

Questions posed covered: the nature of environmental law, the types of assistance they provide to the public or to their members (where relevant) and their experience of using the legal system for environmental cases either for their clients or their organisations.

They were also asked what changes if any they would make to the legal system. Their main concern over costs, both in terms of costs awards and legal fees, mirrored those concerns discussed in the community focus groups. This was seen as the major obstacle to environmental justice for the public and for environmental NGOs. The other main issues were as follows:

- complexity of environmental law
- lack of legal aid funding
- prohibitive costs rules
- unclear position on direct interest/standing rules
- bias of the judiciary
- lack of specialist knowledge of the judiciary and magistrates

Complexity of environmental law: All the respondents felt that environmental law was by its nature extremely complex. The reasons given were the vast array of laws directly and indirectly covering environmental issues, not only common law, such as nuisance but also European law and international law. In addition, for one NGO whose work centred around environmental campaigns, it also meant understanding and working with international trade and competition law:

There are so many different areas of law that deal with environmental issues. If you use the law strategically it means also dealing with injunctions, competition law and laws covering subsidies to nuclear plants. In addition you need to deal with the complexity of European regulations and regulatory systems.

The complexity of environmental law was seen as adding burdens to the costs and length of cases. This often prohibited the use of the law or meant the law was used as one of many campaign tools. For NGOs working to provide advice to the public complexity caused a number of problems in relation to costs and funding and often acted as a barrier to the use of the legal system.

One respondent however, noted that while environmental law was complex it was not necessarily more complex than other areas of law she had worked in. However, all respondents noted that what was different about environmental law compared to other areas of the law was the public interest element. The impacts of environmental decision making were more likely to affect a wider community or geographical area or have national implications for the public. In one case one NGO's research, related to environmental cases they had dealt with, suggested that on average 869 people were affected by each environmental problem.

Funding and cost rules: As mentioned earlier all the respondents emphasised the concern regarding the cost of using the law for environmental cases. The three main areas related to:

- (1) Legal aid/CLS funding: the difficulty of gaining CLS funding for environmental cases for members of the public was seen as a major concern. CLS funding was seen as variable and more often than not funding was not gained for

environmental cases, despite the public interest element. One respondent noted that before CLS funding was awarded, passing the merits test meant having to tick a box on the application form stating that the case had a 50% chance of success. Most lawyers did not feel able to give such a bald assurance, bearing in mind the difficulty of winning public interest environmental law cases. Where clients did qualify for CLS funding, by meeting both the merit and means tests, unrealistic cost limitations or requests for contributions prevented clients from being able to take on cases. It was also noted by one respondent that many environmental cases were not eligible for funding under CLS rules at all and therefore many did not receive funding.

Many cases are not eligible for CLS funding. ..However, these cases that qualify do so marginally which hinders negotiation with the CLS when it makes unrealistic costs limitations or requests for contributions

(2) Risk of liability for costs: Another barrier discussed were the rules relating to costs. The complexity of cases often meant raising thousands of pounds for individuals and tens of thousands of pounds for NGOs before taking cases to court. It was suggested that these costs stopped many individuals or community groups from taking action, particularly as they may have to not only pay their own costs, without pro bono assistance, but also the other side's costs. These two factors acted equally as barriers for NGOs wishing to take on cases, especially against wealthy companies or contentious developments. The risk of not knowing whether the costs of the other side were going to be awarded against you often prevented legal action being taken.

The problem is finding your own costs really. The starting point for us is between £10,000 - £15,000. That's a lot. Small environmental organisations wouldn't be able to do that. The main issue is the possibility of costs being awarded against us.

(3) Market mechanisms: One NGO respondent that provides direct legal advice to the public noted that the market mechanisms meant to cover problems of funding, such as 'no win, no fee' or insurance, were not necessarily useful or relevant to environmental cases. While the respondent offered fee arrangements at a reduced basic rate, the possibility of clients gaining insurance cover for legal costs for environmental agreements were not seen as useful for their area of law.

We've investigated [insurance cover] and have yet to find an insurer willing to insure environmental judicial reviews which is what we specialise in.

Standing/Locus Standi: Three quarters of the respondents noted their concerns about rules relating to direct interest or standing. While it was noted that it was easier to gain standing as an environmental NGO or community action group, due to liberal interpretations of the rules in past case law, the issue of standing could still act as a barrier for NGOs wishing to take environmental law cases alone or as a third party.

Members still find it hard to prove locus standi. In spite of the public interest issue the courts are not taking this into account.

Where rights of standing were not statutorily protected, concerns were expressed that the standing rights currently enjoyed by NGOs might be subject to change.

One respondent felt rights of standing were dependent on whether the judiciary remained libertarian in their approach:

The application of rules began to relax from 1991 in R & Poole Borough Council ex parte House of Lords. Since then we have not had a problem. The courts are liberal now but they could actually move back to a conservative, a less liberal approach.

The Judiciary & Magistrates:

All the respondents felt the complexity of the law meant there was a need for a better trained or specialist judiciary and magistrates. Adjudicators at all levels were required who understood the nuances of environmental cases and most importantly the public interest issue, which respondents felt was at the cornerstone of most environmental cases.

They [the judiciary] do not have the necessary training about the issues before them

All the respondents were concerned that the judiciary and magistrates hearing environmental cases often lacked the required specialist background. This was compounded, in their opinion, by what was described by one respondent as an intrinsic bias toward economic development over environmental protection. All noted that that more training was required for magistrates and the judiciary and that there was a need for technical experts to assist judges and magistrates in hearings.

There were some judges who were noted as having expertise in environmental cases. Some of these judges had gained respect for this, though there were concerns that this expertise was *'not necessarily helping the environment if the judges still embody the pro-economy values'*. In addition it was suggested that when cases were initially heard by such judges there was an added drawback that Appeal court judges *'are in awe'* of them and unlikely to grant an appeal, despite the merits, in deference to an adjudicators perceived greater expertise.

A New or the Old system?

When asked about what changes could be made to the present system or what new systems could be established to create environmental justice, discussions centred around how the present legal system could be changed to make it a more useful tool for environmental justice. Respondents made the following suggestions:

Non legal expert panel: a panel of experts (technical and scientific) that would assist in the hearing of the cases. The panel would add expertise and knowledge that the judiciary or magistrates did not have. The panel would need to be independently appointed and there must be transparency in the appointment process.

Independent specialist judiciary: it was felt that environmental cases should be heard only by judiciary and magistrates with specialist environmental training and experience. This should include new recruits who were again chosen

independently and in a transparent process. It was felt that new appointees should reflect the diversity of the general public and not be a part of, what was seen as the 'old school' system.

Other changes discussed centred around the barriers to environmental justice mentioned earlier:

- Costs: establishment of rules that meant NGOs or the public would not have the costs of the other party awarded against them in cases of environmental public interest;
- Funding: specific CLS budget for public interest environmental cases and relaxation of CLS funding rules that require large contributions from the applicant;
- Locus Standi: formal liberalisation of the rules allowing NGOs to take up more cases in the public interest.

Perhaps surprisingly the NGO respondents discussions about improving the legal system of environmental justice were not centred on the need for a new environmental court or tribunal. A new court or tribunal was not seen as the answer if the old problems of bias, funding and standing still occurred.

In my opinion, it's not the judicial machine that's the problem but it's 'ghosts'.

However, it could be argued that the changes perceived as being required amount to a new environmental court in all but name. For example, the need for an expert panel and new specialist judges and magistrates under whom environmental cases could be heard is similar to many of the environmental court or tribunal models discussed earlier in the report.

Lawyers, Judiciary and Magistrates

This final part of section two is based on the responses of fifteen environmental lawyers (barristers and solicitors) including three magistrates and members of the judiciary. All were asked to respond to a questionnaire (see Annex) either in a face to face or telephone interview. Some of the respondents replied to the questionnaire in writing via email. Responses of the judiciary and magistrates will be discussed separately in the latter part of this section.

The lawyers were from commercial and non-commercial firms based in England and Wales. Similar questions to those asked of the NGO representatives were posed but were more specifically targeted to their experiences as environmental barristers or solicitors. The questions covered: the nature of environmental law; their experience of using the legal system for environmental cases; and features of the legal system they felt aided or hindered environmental justice. They were also asked what changes, if any, they would make to the present legal system and whether a new system was required. The main issues relating to the environmental justice and the legal system which emerged from the interviews and questionnaires were:

- Public interest element of environmental law;
- Difficulty of client finding costs, awards of costs;
- Lack of public funding;

- Invisibility of environmental lawyers and information;
- Lack of training and expertise of Magistrates/Judiciary;
- Judicial bias;
- Ineffectiveness of judicial review;
- The need for a new environmental court.

Environmental Law: Complexity and the Public Interest

The opening question asked lawyers to give their perspective on environmental law. In virtually all cases they felt, like the NGOs, that environmental was a complex area of law. Environmental law was drawn from and interconnected with, not only the common law but EU law, international and many other areas of law such as trade, planning and competition law.

Environmental law has many levels of interaction i.e. planning law, with international law, European law, U.K law. In addition there are vertical and horizontal levels of complexity that include criminal law, civil, administrative, etc. It is difficult for lawyers and Judges to always be on top of all of these issues..

However, one third of respondents noted that although environmental law was complex it was not necessarily more complex than some other areas of law. The particular difference in environmental law, as opposed to other areas of law identified as complex, was in the distinct public interest element of environmental law. The respondents noted that even though, for example, tax or medical negligence were complex areas of law, environmental cases were more likely to have a wider impact on the public, in relation not only to the protection of local environments but to inequalities of public health and quality of life. This public interest element meant that many respondents felt that environmental cases, and indeed environmental law in general, required greater state support. Respondents felt that not only greater funding was required for environmental cases, but that action needed to be taken to address structural barriers, particularly in the areas of costs.

Invisibility of environmental lawyers and information

Virtually all the respondents noted the difficulty for the public in obtaining environmental legal advice and information. Legal environmental information needed to be given greater visibility. It was also noted that finding a specialist environmental lawyer was often a difficult process for the public. Some respondents suggested this could be remedied by the establishment of a separate environmental law panel within the Law Society, who could provide a referral list of environmental lawyers. The role of technology, naturally the internet, was seen as playing a vital role in providing access to environmental law, advice and the courts.

Difficulty of rules relating to costs and lack of public funding

Most respondents believed that the costs of environmental cases were higher or were potentially higher than cases in many other areas of law because of the complexity of environmental law and the need for scientific or technical research.

Because of environmental law's complexity and the need to consult technical experts. This means there are very few bog standard cases, so often means more research and therefore more cost

The issue of costs created what one respondent stated as an inequality of litigating power, where wealthier parties, often the polluter, have far more resources to fight against a case taken to court by an individual or a group. This inequality was keenly reflected in clients' fear of losing a case and having to pay the winner's costs. Corporate defendants, retaining and instructing a number of lawyers from city firms, present very large estimates of costs and damages at the early stages of a case and this has a chilling effect on large numbers of potential claimants. Due to the difficulty of proving harm in many environmental cases and the uncertainty of winning such cases the potential for massive awards of costs against well meaning and public minded individuals and groups will very often prevent cases from being pursued. Reform of the rules for costs, ensuring that individuals or groups who undertake non vexatious cases in the public interest will not be crushed by huge orders for costs, was seen as essential in providing greater access to justice for environmental issues. Indeed, costs issues were seen by lawyers as the greatest barrier to justice for environmental issues.

For those lawyers that dealt with potential CLS cases noted the '*immense difficulty*' in trying to get CLS funding for environmental cases. Interestingly lawyers that had not dealt with CLS funding also noted that it was well known that there was great difficulty in the public gaining legal aid for environmental cases. The reasons for this difficulty were seen to be:

- stringent conditions;
- required financial contributions from the client;
- unrealistic limited periods of funding;
- insufficient funding limits.

One respondent noted that CLS funding was easier to get for environmental cases under some regional CLS boards than others. It was suggested that the willingness to provide CLS funding was affected by the extent to which an environmental lawyer in that area had a good working relationship with the CLS board. As such gaining CLS funding may be easier to gain if applied for through certain lawyers based in specific CLS regional boards.

As with the NGO respondents it was also noted by respondents that conditional or 'no win, no fee' agreements and legal insurance were not viable in environmental cases. Only one of the respondent firms offered a conditional fee agreement. This was seen as almost theoretical as not one case had met the conditions of the respondent's firm for offering such an agreement.

We don't offer conditional fee agreements because it wouldn't be worth wiping your arse on them for what they are worth. These agreements are not remotely appropriate for environmental cases.

The complexity and length of cases meant that a considerable risk was taken by any environmental lawyers who offered such an agreements. Environmental cases were also seen as inherently unsuited to conditional agreements, due to the difficulty both of assessing 'damage to the environment' and the paucity of the sums assessed when damages were awarded. It was seen as a kind of loan to both the state and the public that may never be paid back. The agreements were seen as being used as an excuse by the state not to provide sufficient public funds for environmental cases.

Judicial Bias and Expertise

Like the focus groups and NGO respondents, questions over judicial bias and expertise were raised by the lawyer respondents. While over half noted the difficulties handling environmental cases presented judges and magistrates all the respondents noted that there seemed to be an adjudicatorial bias in favour of protecting property rights and planning developments.

There seems to be a lack of even handedness by judges dealing with environment cases they also need be more familiar with subject matter. This probably means better training or complete judicial reform

It was suggested that this pro development bias was illustrated by the lack of use of injunctions to halt developments while a case was being heard.

As to injunctions I think we do need the power for courts to issue interlocutory injunctions, but with security for costs coming out of public funds where the public interest is involved. I don't think they have this power at present or they certainly don't use it

Along with perceived adjudicatorial bias, lawyer respondents expressed concern over judicial expertise in environmental law and related issues such as the relationship of environmental law to human rights issues. This was seen as a particular problem in those cases that were heard by magistrates. Respondents suggested these concerns could be remedied by better training for judges and magistrates or the appointment of an environmental panel for an new environmental court or tribunal.

There is a general lack of expertise, there are some exceptional judges/magistrates who are very good but for most judges and magistrates in the general course of their work they don't see environmental cases on a regular basis. So they don't they get a chance to practise even where they are given training and can lose the skills gained in training through lack of use. There does need to be better training for judiciary.

The lack of expertise and to some extent the bias of the judiciary was seen as being reflected in the low fines handed down to polluters. These low fines were seen as a sign to polluters that they can pollute with little punitive action against them. Fines for environmental cases were still seen as not fitting the damage done.

The damages in criminal environmental cases are still very low. Serious harm is not acknowledged, even in big cases where a fine of £100,000 is given but this is still relatively speaking very small

Ineffectiveness of judicial review

The majority of respondents were concerned about the pressure to use judicial review as a forum of appeal for merit rather than administrative based cases. Judicial review was seen as the only way by which many environmental cases could be pursued and therefore essentially merit based cases were forced into administrative judicial review. The absence of any other appeal mechanism for these cases means that many 'forced' cases of judicial review dealing with environmental issues are lost or never even pursued.

judicial review may not often be the right appeal mechanism but it now seems to be the only appeal mechanism for environmental cases

The difficulty of gaining CLS funding for environmental cases was in part seen as a result of these 'forced' appeals. 'Forced' cases result in a poor number of judicial review successes for environmental cases, and therefore a great deal of difficulty in demonstrating a likelihood of success high enough to gain funding.

The respondents felt that the problems of the incorrect use of judicial reviews could be addressed by the establishment of an environmental court or tribunal. A specialist tribunal or court it was felt would reduce the need for judicial reviews if environmental cases were heard by a specialist court that could make sound legal and technical findings.

The need for a new environmental court

When asked about amendments to the present system virtually all the respondents felt that the barriers to environmental justice mentioned above required a complete overhaul of the legal system, the keystone of which would be the establishment of a specialist environmental court or tribunal. This new court however, was only seen as useful if it addressed the concerns relating to costs, funding, judicial review and the judiciary.

The court was seen as being able to offer specialist expertise and handle environmental cases with the seriousness they required. However, it was also suggested that the court would be of no use if it failed to deal with issues such as the need for an independently appointed and impartial judiciary. It was proposed therefore, that the new court would have an independent and transparent system by which judges are appointed. This would also mean recruitment beyond the number of judges that are presently sitting and seen as having environmental law expertise but being generally pro development. This independent panel of judges was envisioned as being part of a wider panel with technical and scientific experts who as a whole would hear the case.

Although the creation of a specialist environmental court or tribunal was favoured, its design, the geographical location of the court, the place of the court in the hierarchy of the court system and its jurisdiction were all seen as a complex issues requiring careful thought.

I am in favour of setting up a specialist environmental court. Because these cases [environmental] have a complex inter relationship between science, policy and law. But the difficulty is in determining which cases belong where. Thus establishing the proper jurisdiction is important for a specialist court. The planning and public law route to such a court is the easiest to justify as opposed to the civil route...

the court should be able to draw on other skilled professionals to judge cases fairly. It would be a big challenge to create, but if you get the jurisdiction question right and build a specific bar to go with it then you increase the chances of making better decisions and because good environmental decisions are especially in the public good then it is worth while investing in this...

Judiciary and Magistrates

The opinions of the judiciary and magistrates did not differ significantly to those of the lawyers, except in relation to the issue of adjudicatorial bias.

Complexity and Costs

Environmental law was discussed as a complex area of law in the interaction of policy, planning and EU law. This meant that environmental law was perceived as being closely related to the European Convention on Human Rights and influenced by case law from the European Court of Justice. This complexity and interaction often lead to difficulties:

It's not always easy to see how it all relates

The complexity of environmental law was also seen in the costs of the cases, although one judge felt that the cost of environmental cases was related more to the nature of adversarial proceedings than the complexity of the cases. This kind of proceeding had the potential to make the costs of a case very expensive.

One judge noted that more research needed to be done as to the cost benefit analysis of CLS funding for environmental cases.

Expertise and Bias

It was recognised that a lot of changes were being made to improve access to justice and that this also benefited environmental cases. However, more expertise was seen as required from magistrates and the judiciary and the legal system needed to be made more user friendly.

There needs to be more expertise and more user friendly

An example given of the need for more expertise was the recent launch by the Magistrates Association of a training pack for magistrates which dealt with environmental crime. While this kind of training was welcomed, it was noted that unless a magistrate or judge regularly got to hear environmental cases that this specialised training would soon be lost. This was seen as especially likely to happen in the case of magistrates as they rarely heard environmental cases. The criticism of magistrates being unable to deal with complex cases was noted, but it was

suggested that the complexity of such cases was compounded by the lack of clarity of parties arguing such cases. It was felt that better preparation by parties presenting cases, especially in clearly presenting the main issues of the case, would greatly aid adjudicators in complex environmental cases.

Suggestions of bias directed toward the judiciary or magistrates in favour of development or commercial business were not recognised. Respondents suggested that this perception might result from the large number of unsuccessful judicial reviews, where mechanisms of judicial review had been inappropriately used. One judge expressed the opinion that environmental cases concerning large developments often overlooked the social and economic issues surrounding development, such as local employment.

Issues such as employment are often overlooked in development cases.. I am also aware that delays cost money

As such development cases were seen as having a good deal of public interest issues and not purely concerning the struggle of an individual or group against big business. Delays in getting developments off the ground were seen as economically extremely costly and often of no benefit to anyone. This attitude is likely reason why injunctions are not often granted in development cases.

The difficulty in hearing environmental cases was seen as possibly being aided by the introduction of non-legal environmental experts, but this change was seen as needing to be made as part of wider changes in the court system for environmental cases. Such changes were thought most appropriately introduced as part of a specialist environmental court or tribunal.

Environmental Court and an environmental advice agency

The need for greater advice and assistance to the public regarding environmental law was seen as an important issue. Such advice, possibly provided through a specific agency or organisation, would need to be visible. The need for a specialist agency emerged from the public interest element of environmental law. The introduction of an advice and information agency was envisioned as connected to the development of a new court or tribunal for environmental cases.

An EDO could work but an environmental tribunal could work with an advice agency attached

An environmental court was seen as way of providing sound legal and expert findings on environmental cases but also of providing the visibility public interest environmental law required.

Part III: Key Themes & Recommendations

The scope of this paper has been to provide an overview of access to justice issues within the context of environmental law. Its remit was not to provide a full examination of the complexity of all of the issues raised by the focus groups and questionnaire respondents. Ideally we would have liked to have been able to talk to a larger number of focus groups and respondents. The methodology used in this report was not aimed to elicit quantitative but rather, qualitative results.

As such, the report aims to identify some of the concerns of the public, lawyers and NGOs in relation to environmental justice and the accessibility of courts. The aim of this final part of the report is to identify and discuss the common themes that emerged from the research and which cut across the idea of access to environmental justice. These key themes are analysed to provide recommendations to aid in the development of environmental justice in England and Wales in the present policy and legal climate.

Findings & Recommendations

Environment, Quality of Life and Social Inclusion

Through the course of the research of the report, it became clear that while global environmental issues may not be given sufficient attention the connection between the local environment and quality of life was widely recognised. In particular the state of the local environment was seen as relating to:

- inequality of income;
- health inequalities;
- unequal burdens of pollution;
- benefits from the environment unevenly distributed;
- better housing;
- the effects of industry borne inequitably.

The findings are in keeping with previous work by Burningham and Thrush (2001) and the ESRC (2002), which showed that localised environmental issues were of great concern to the public, especially to communities who felt they had to suffer the effects of environmental pollution, upon not only their neighbourhoods but their health.

Community groups campaigning on environmental issues were often concerned with inequalities of health. Many of the members of the group felt that the pollution in their area was caused or heavily impacted by local industry. Yet those who were most effected by negative environmental impacts were often unaware of where help could be sought and felt fearful of using the law or that they would be stigmatised by its use. The focus groups brought to light information that many of the residents of socially or economically excluded areas had come to accept as inevitable that they would live in polluted areas. This reinforced and combined with the results of the desk top review to highlight the inequality of burdens of environmental degradation on poorer communities on their impact on health and quality of life. Lawyers, NGOs

and the judiciary also noted the strong public interest component of environmental cases.

Recommendation 1: *The delivery of public service provision and policy relating to environmental equality and quality of life needs to be developed and carried out across government departments. Integrating issues of regeneration, social inclusion, health and legal services. Joint delivery is therefore required from not only the Department of Constitutional Affairs and the Department of Environment Food and Rural Affairs but also the Office of the Deputy Prime Minister, the Department of Health and government agencies such as the Neighbourhood Renewal Unit and the Social Exclusion Unit. These strategies for delivery and operations should be part of a comprehensive public consultation exercise with amongst others relevant community groups, NGOs, the Law Society and the Bar Council, the Community Legal Service and the Environment Agency and Local Authorities.*

Recommendation 2: *The impact of environmental inequality on socially or economically excluded communities needs to be taken into account when deciding on shifts of legal policy and in any amendments or changes to the present legal system. For example, geographic areas with high deprivation indexes, environmental pollution or heavy polluting industry should be prioritised in the provision of free environmental legal advice, representation and outreach support by Community Legal Service and other relevant advice agencies or non governmental organisations.*

Advice and Information

There needs to be a better central record kept of the number of environmental lawyers, their geographical location and the availability of those lawyers to provide advice to non-commercial clients. This data should be made available from the Department of Constitutional Affairs, the Department of Environment Food and Rural Affairs and the Community Legal Service (CLS). This data would help identify where there may be gaps in the provision of and access to environmental lawyers. All the groups, especially the focus groups, gave damning views of the lack of access to specific legal advice and information for the public. First points of contact for advice normally visited for justiciable problems were seen as irrelevant or not up to dealing with environmental issues. The lack of advice and information and the inability of the public to find useful information meant information seekers experienced multiple referrals before finding the right source of help.

When information was gained it was often seen as excessively difficult to gain access to due to the geographical location or expense of the information. This report found a distinct lack of information on; where to go to get legal advice, legal advice on environmental cases and if support was available for environmental cases. Most worryingly the CLS outreach material and website failed to make visible advice and assistance for public interest environmental cases. As such the role of the CLS as an information provider fails in the context of environmental issues. Whilst environmental law is not a category funded by 'legal aid' as such its ability to be funded under the category of public interest law would warrant it greater visibility within the CLS outreach materials.

Recommendation 3: *To improve the role of the CLS its outreach materials need to be improved (i) it should review and amend its website 'Just Ask' to make information on environmental advice and CLS funding in relation to it, far more visible. For example, a separate web site page could be added to allow for easy and identifiable*

route to when and how environmental cases may be funded by the CLS and providing other links an information on other environmental information and advice providers. This information should also be provided in hard copy leaflet for people without access to the internet (ii) Regional CLS boards should have a duty placed on them to provide information on the provision of advice and funding on environmental public interest cases in their region.

While there are a handful of organisations able to give limited legal advice they were not visible to the public at first point of contact. Referral services available were also seen as limited as they only provided a limited amount of 'initial free advice' to the public via their members. Membership numbers of the United Kingdom Environmental Law Association (UKELA) suggests that there are hundreds of environmental lawyers only a few of these are public interest environmental lawyers. The lack of data on lawyers who are able to work with non commercial clients and offer CLS contract work makes it extremely difficult for community groups considering action to find and contact these public interest environmental lawyers. The focus groups and the lawyers named no more than five environmental lawyers as having public interest or environmental law experience in working with the general public. Even though these numbers are anecdotal it would seem that there are an extremely low number of public interest environmental lawyers making it very difficult for the public, especially those living in areas where a lawyer is not visibly engaged in public interest environmental law.

Beyond access to lawyers, the unwillingness of many groups and individuals to use the law for any type of issue, not only environmental cases, needs to be reviewed. The responses of focus groups based in areas of high deprivation highlighted the stigma of going to a solicitor for help. A solicitor for them was often seen as someone you go to in extreme or difficult circumstances such as divorce or threat of jail. Fear in relation to using a lawyer, generally stemming from issues of cost, was generally the first reaction of those in the focus groups. In relation to environmental cases however, unwillingness in using the law was often stemmed from a lack of knowledge of environmental rights and how environmental laws could be used to protect these rights. The creation of a highly visible advice and information agency, not tainted by the stigma of other justiciable issues, would be an important tool in reducing the fear of using the law and promote environmental justice.

Community group representatives in the focus groups spoke of frustration and the feeling of abandonment that this lack of advice created. The inability to gain advice, whether perceived or experienced, created a feeling of disempowerment which led to groups giving up on pursuing information and support, before they had even got within the legal system. Part II, page 31 of this report quotes the focus groups who had managed to find the required information from local authorities and other public bodies being asked to pay between 50p and £3.50 per A4 sheet copy of the information they required. Such costs at the early stage of information gathering or action are prohibitive to environmental justice specifically for low income households or communities.

Recommendation 4: *In the light of the lack of access to free legal environmental advice, that the government investigate the establishment of a environmental advice agency similar to the Environmental Defenders Office in Australia that is able to offer legal advice and possible representation to the general public. The agency would need to be highly visible and accessible to the public and target, in particular, socially and economically excluded areas. This may mean opening a network of local*

regional offices. The agency should provide outreach information that is easily understood and available in written format and over the web.

Funding and Costs

All the groups provided a worrying and perhaps damning picture of the legal system on the issue of funding. Although in theory, environmental cases can be funded by the CLS service if it falls under a public interest case. CLS funding was found to be extremely hard to gain for public interest environmental cases. Equally concerning was the difficulty of meeting the conditions attached to gaining CLS funding, such as financial contributions having to be made by the applicant or only short periods of funding that made taking up the offer of funding prohibitive. Research by Stookes (2003) also points to the negative effect of this lack of funding, specifically for low income groups, on the public taking cases to court. This report's findings would support this conclusion.

The recognised complexity of environmental law by the lawyers, judiciary and magistrates in this study was also seen as one of the reasons that increased the potential costs of environmental cases. In addition the fear and risk of having to pay the other side's costs should you lose acted as barrier to individuals and groups seeking initial legal help and assistance or pursuing a case to court. Instruments such as 'no win no fee' or legal insurance used for other types of legal cases were not seen as adaptable to environmental cases. It was felt that environmental cases were often complex and costly and required too high a risk on the lawyers side to provide free advice based on the probability of winning the case, and in the case of insurance companies providing a product that was probably not capable of making a profit. The concerns relating to costs means that a number of environmental blights or environmental crimes are not being pursued by the public and that the public is scared out of their right to use the legal system. despite the strong public interest element of a number of environmental cases.

The focus groups evidence suggests that unless the issue of inadequate funding is addressed, even those having to endure environmental pollution would just not try to access the legal system to uphold environmental justice. Some focus group respondents stated that the lack of access to the legal system might result in them taking direct action against environmentally harmful installations that had been placed in their neighbourhoods, for example factories, nuclear waste ships or chemical production facilities.

Recommendation 5: *Public funding for environmental cases with public interest concerns or other payment measures would seem to be woefully inadequate. It is recommended that a separate budget be created that allows for environmental cases to be given direct legal aid.*

Recommendation 6: *The CLS and Department of Constitutional Affairs need to reform conditions of funding for environmental cases specifically those of public interest. Rules surrounding conditions for funding, such as financial contributions by claimants, need to be reviewed in order to remove any unnecessary barriers to people taking up public funding.*

NGOs and lawyers also saw the issue of costs rule as particularly problematic. The environmental NGOs saw the lack of clarity around the rules governing costs and the

fear of having to pay the costs of large businesses or commercial enterprises as a reason to stop using the legal system to tackle environmental cases. This meant that it was highly unlikely that an NGO would provide legal support to the public unless a case fell clearly within a campaign remit and had an extremely strong chance of winning. There are a number of examples in other countries where cost rules have been changed so that parties taking non vexatious cases, clearly in the public interest can be protected from orders as to costs. Such measures clearly need to be adopted in England and Wales.

Cost rules need to be changed to balance out the disparity of resources between parties often found in environmental cases. The present cost rules unfairly benefit those parties with greater resources and who are able to take advantage of advantageous tax rules and corporate structures. Considering the importance of many environmental cases and the damaging effects of the rules as to costs, the benefits of such a change would be marked and would not, in all likelihood negatively impact upon or inhibit a defendant's ability to fairly represent themselves.

Recommendation 7: *The cost rules need to be reformed to allow for a balance of resources between parties. Orders as to costs should not be made against the losing party in non vexatious the public interest cases. Each party would be responsible for their own costs.*

Expertise, Independence and an Environmental Court

Virtually all of the respondents across all of the groups agreed that environmental posed unique and often complex problems. This idea of the complexity of environmental law is in keeping with the research of Birnie and Boyle (2003) who suggest that environmental law deals not only with questions over definitions of the environment but emanates from broad national and international legal and policy sources. The complexity of environmental law meant that the expertise of the judiciary and magistrates hearing environmental cases was crucial to obtaining sound legal results based on a solid understanding of not only legal but environmental principles and the connection of the public interest element of the cases. Criticism by the groups that judiciary and magistrates often lacked the expertise required in environmental cases and were pro development is incredibly damaging to the search for environmental justice within the legal system. Most respondents saw the remedy for this problem not only in better judicial training but also as needing to make a sweep clean to the present court and judicial system for environmental law. Approximately three quarters of the respondents thought this was best accomplished in the creation of a new specialist environmental court or tribunal. The new court or tribunal was seen as away of bringing in changes and removing some of the barriers to environmental justice discussed above. Key features of such a court were:

- a new panel of experts legal and non legal to adjudicate cases;
- an infrastructure for appeals of decisions on merit based grounds;
- a legal environmental advice and information agency;
- a process that dealt with cases quickly.

Arguably these amendments could be made without the establishment of a specialist court or tribunal. Certainly, some of the respondents felt that an environmental court had the potential to either marginalised environmental issues or that it would not necessarily deal with the 'ghosts' of the previous court system. Changes to rules on

costs, the establishment of a budget for public interest environmental law and a legal advice service could all be made without a new court system. The court was seen, however, not only in terms of providing a clean sweep but also as a way of providing environmental justice with the visibility it needs. Although it was not the remit of this report to provide an overview on the jurisdiction or the role of an environmental court its findings would go some way in supporting the recent report by Macrory and Wood (2003). They suggest that an environmental tribunal would provide greater coherence and authority to the development of environmental law and policy.

It is crucial to note that a new court on its own would not address many of the main barriers to environmental justice raised by the stakeholders in this report. The court could only be successful in the development of environmental justice if it came without a supportive advice and funding infrastructure as well as reform of rules relating to costs and CLS funding.

- a specific budget for legal aid funding for environmental public interest cases;
- an independent but state funded environmental and legal advice, information and support service;
- witness protection for members of the public who were been intimidated by the other party.
- CLS rules that facilitated the take up of funding by the public without personal financial risk
- Cost rules that did not award costs against a the losing party in non vexatious cases

The court would also need transparency in the way its expert panel and judiciary were appointed, and members who were seen as being independent from commercial interests and without a pro development or economy bias.

Recommendation 8: *It is suggested from the stakeholder responses within this report that a new environmental court or environmental tribunal be established to deal specifically with environmental cases. The court would however, need to be developed in partnership with the creation of a number of other infrastructures: most importantly an independent, state funded legal environmental advice service and a earmarked budget for the funding of public interest environmental case and the reform of cost rules (See recommendations 1 – 7) .*

Glossary

AJA – Access to Justice Act

CAB – Citizens Advice Bureau/x

DCA – Department of Constitutional Affairs

DEFRA – Department of Environment Food and Rural Affairs

ECHR – European Convention on Human Rights

HRA – U.K. Human Rights Act

NGO – Non Governmental Organisation

NRU – Neighbourhood Renewal Unit

NSW – New South Wales

NSWLEC – New South Wales Land & Environment Court

ODPM – Office of the Deputy Prime Minister

WCED – World Commission on Environment and Development

UNCED – United Nations Conference on the Environment and Development

UDHR – Universal Declaration of Human Rights

References

- Acheson, D. (1998) Independent Inquiry into Inequalities in Health (*The Acheson Report*), The Stationary Office
- Access to Justice Foundation (2002) Access to Justice Roundtable Proceedings at the Law and Justice Foundation of New South Wales
- Adebowale, M. (2003) Environmental Justice, Links and Lessons, (in draft: to be published Nov 2003 as a Joseph Rowntree Foundation Report)
- Adebowale, M., Schwarte, C., (2003) Integrating Social Inclusion and the Environment, Exploring the Potential for Joined Up Thinking, The Greens European Free Alliance
- Adebowale, M (2003) Global Perspectives on the U.K. Environmental Agenda, (to be published University of Westminster)
- Adebowale, M., Church, C., Nduta Kairie, B., Vasylyvsky, B., Panina, Y.(2002) *Environment and Human Rights: a new approach to sustainable development*, International Institute for Environment and Development, IIED Briefing Paper
- Adebowale, M, and Eames,M. (2002) *Sustainable Development and Social Inclusion Towards An Integrated Approach to Research'*, Policy Studies Institute and The Joseph Rowntree Foundation
- Agenda 21, (1992) United Nations Conference on Environment and Development Conference
- Agyeman, J (1990) Black People in a White Landscape: Social and Environmental Injustice, Built Environment
- Agyeman, J., Bullard, M, and Evans B, (eds) (2003) Just Sustainability, Earthscan
- American Bar Association (1994), Legal Needs and Civil Justice, A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study, American Bar Association
- Anderson, M., (2003) 'Access to Justice and legal process: making legal institutions responsive to poor people in LDC's' IDS Working Paper 178, Institute of Development Studies
- Anderson, M., Boyle, A. (1996) Human Rights Approaches to Environmental Protection, Clarendon Press Oxford
- Asian Development Bank, (2001) Law and Policy Reform At The Asian Development Bank, Asian Development Bank
- Australian Conservation Foundation (1999) Sustainable Australia: Reforming Government, Issue 3, Australian Conservation Foundation
- Ball, and McGillivray (2000), Ball and Bell on Environmental Law, 5th Edition, Blackstone

- Benda-Beckmann von, F., (2000), Legal Pluralism and Social Justice in Economic and Political Development, IDS International Workshop on Rule of Law and Development, Institute of Development Studies
- Bignold, N.R (2000) Land and Environment Court of New South Wales
- Birtles, W. (2001) Why We Need An Environmental Court, Legal Week, 01-13
- Brahams, D., (1999) 'Access to Justice – Let Them Eat Cake', Medico Legal Journal, Vol. 67 Part I, 1-2
- Burningham, K,(2001)'Rainforests are a long way from here', Joseph Rowntree Foundation
- Cappelletti, Mauro and Garth, B, (1978) 'Access to Justice: The Worldwide Movement to Make Rights Effective – A General Report', in eds. Dott, A, and Guiffre Editore, A, Access to Justice: A World Survey (vol. 1, book 1), Milan
- Chayes, A., (1976) The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281
- Citizen's Advice Bureau (2003) Social Policy, Community Legal Service: Financial Conditions for Funding by the Legal Services Commission – A Response to the Consultation Paper, Citizens Advice Bureau
- Community Legal Service, (2003) 'A Practical Guide to the Community Legal Service', Community Legal Service
- Community Legal Service Website, Just Ask, www.justask.org.uk
- Community Legal Service (2000) – 'Right for You', Community Legal Service
- Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, UN Economic Commission for Europe and the European Commission, June 1998
- CRE, (2001) Talking about Regeneration, Commission for Racial Equality, www.cre.gov.uk/publs/connections/conn_01sp_regen.html
- Day, M., eds (1998) Environmental Action, A Citizens Guide, Pluto Press
- De Torres, J. (2002) Legal Aid, Environmental Defender, Autumn 2002
- DEFRA, (2000) 'Public Participation in Making Local Environmental Decisions', The Aarhus Convention Newcastle Workshop, Good Practice Handbook, Department of Environment Food and Rural Affairs
- Dobson, A, (2003), Social Justice and Environmental Sustainability: Ne'er Thwain Shall Meet?' Ed by Agyeman, J., Bullard, R., and Evans, B., Just Sustainabilities, Development in and Unequal World
- Dunkley, J., & Robinson, D., eds. (1995) Public Interest Perspectives in Environmental Law, Wiley Chancery

Eady, V., (2003) *Environmental Justice in State Policy Decisions*, Ed by Agyeman, J., Bullard, R., and Evans, B., Just Sustainabilities, Development in and Unequal World

Environment Defence Office, Fact Sheet 38: Land and Environment Court

Elliott, C., & Quinn, F., (2002) *English Legal System*, 4th Edition, Longman

ESRC (2001) 'Environmental Justice – rights and means to a healthy environment for all', ESRC Global Change Programme, Special Briefing no. 7 ERSC

Ferris, D. (2002) *Promoting Community Building Through Collaborative Environmental Justice Legal Strategies and Funding Approaches*, Resource Paper Series, October 23, Second National People of Color Environmental Leadership Summit – Summit II

Fowler, B. (2003) *Access to Justice in Rural and Remote Areas*, Broken Hill Community Inc.

Friends of the Earth (2001) *Pollution Injustice*, Research Report, Friends of the Earth

Genn, H., *Paths to Justice* (1999): What People Do and Think About Going to the Law, Hart: Oxford Publishing

Grant, M. (2000) *Environmental Court Project Final Report*, Department of the Environment Transport and the Regions (U.K.)

Griest, C., Douglas, R., Woodruft, R.,McMicheal, T.,. (1999) *Health and the Environment*, Australian Conservation Foundation

Gross Cunha, L, (2003), *Notes on Access in a Megalopolis*, IDS Working Paper 181, Institute of Development Studies,

Harris, P., (2000) 'Reforming English Civil Justice: A Market Strategy for Delivering Access to Justice', Lord Chancellors Department, Paper Produced For A Seminar of the World Bank Legal Institution Thematic Group

Hershkoff, H., (2000) *Public Interest Litigation: Selected Issues and Examples*

JUSTICE, (1999), *In The Matter of The Access To Justice Bill and In the Matter of the Justice Parliamentary Project and in the Matter of a Human Rights Audit*, Joint Opinion, JUSTICE

Kravchenko S , Taylor M, (2000) '*Citizens' Environmental Rights Under the Aarhus Convention*', European Environment Bureau

Law Council of Australia (2001) *2010: A Discussion Paper, Challenges for the Legal Profession*, Law Council Australia

Liberty, (2002), *Magistrates' Courts and Public Confidence, A Proposal for Fair and Effective Reform Of the Magistracy*, The Civil Liberty Trust

Lord Chancellors Department (2002) *Legal Services Commission Annual Report 2001/2*,

- Low, N., Gleeson, B., (1999) *Social and Environmental Justice*, Australian Conservation Foundation
- Macrory, R., Woods, M., (2003) *Modernising Environmental Justice, Regulation and the Role of an Environmental Tribunal*, Centre for Law and the Environment, University College London
- McLeod, G. (1995) *Do We Need An Environmental Court in Britain*, in Robinson, D., Dunkerly, J. (1995) *Public Interest Perspectives in Environmental Law*, Wiley Chancery
- ODPM, (2002) *Living Places, Cleaner, Safer, Greener*, Office of the Deputy Prime Minister, London
- Petcova, E., Maurer, C., Henninger, N, Irwin, F., (2002), *Closing the Gap, Information, Participation and Justice in Decision Making for the Environment*, World Resources Institute
- Queensland Courts, (2002) *Our Courts An Inside Look*, Queensland Courts
- Robinson, D.(1995) *Public Interest Environmental Law – Commentary and Analysis*, in ed Robinson, D., Dunkley, J. (1995) *Public Interest Perspectives in Environmental Law*, Wiley Chancery
- Scottish Executive (2002) *Closing the Opportunity Gap*, Scottish Executive
- Scottish Executive, (2000) *The Public Perspective on Accessing Legal Advice and Information*, The Scottish Executive
- Seraaj, M. (2001), *Policy Briefing - Minority Ethnic Issues in Social Exclusion and Neighbourhood Renewal*, Black Regeneration Forum
- Shinar, S, (2001), *Access to Justice Movement, Legal Institutions of the Market Economy*, The World Bank Group
- Social Exclusion Unit (1998) *Bringing Britain Together: a national strategy for neighbourhood renewal*, Social Exclusion Unit
- Stein, P. (2002) *Use of Expert Assessors in the Hearing of Environmental Cases*, Paper presented at the Queensland Planning and Environment Court Annual Conference, 26th March 2002, Brisbane
- Stein, P. (2000) *Down Under Perspectives of the Environmental Court*, Conference Paper presented at The United Kingdom Environmental Law Association Seminar on the Final Report Environmental Court Project, 27th June 2000
- Stein, P. (1995) *A Specialist Environmental Court: An Australian Experience*, in Robinson, D., Dunkley, J. (1995) *Public Interest Perspectives in Environmental Law*, Wiley Chancery
- Stoot, D, (2003) 'Making Sure Pollution Doesn't Pay' in *Environment Action*, April, Issue 37, Environment Agency
- Stokes, P. (2003) *Civil Law Aspects of Environmental Justice*, Environmental Law Foundation

Sustainable Development Commission, (2002) Regeneration – The Missing Link, Sustainable Development Commission

The Human Rights Act 1998, (1998), The Stationary Office Ltd,

Terzieva, V., (2003), 'Access to Justice in Central and Eastern Europe: Comparative Report, Public Interest Initiative

Terzieva, V, (2001), The Right to Access Court under the Case law of the European Court of Human Rights, Legal Institutions of the Market Economy, The World Bank Group

Stokes, P (2003) Civil Law Aspects of Environmental Justice, Environmental Law Foundation

Stott, D. (2003) Making Sure Pollution Doesn't Pay, Environment Action, Environment Agency, April 2003

UN Declaration on Human Environment (1972),

Walker, J., Fairburn, J., Bickerstaff, K, (2000) Ethnicity and Risk: The Characteristics of populations census wards containing major hazard sites in England & Wales, Occasional Paper 15, Department of Geography, University of Staffordshire

World Commission on Environment and Development (1987), 'Our Common Future', Oxford University Press

Wolf, (1996) Access to Justice – Final Report,

Zuckerman, A., (2000) 'Reforming Civil Justice Systems: Trends in Industrial Countries', PREM Notes, Public Sector, Number 46, The World Bank

Note about the Author

Maria Adebowale, Director, Capacity Global

Maria Adebowale is an environmental lawyer and the Founder and Director of Capacity Global (Capacity). Capacity works on environmental justice, environment and human rights, social inclusion and community participation. Maria has a Masters in Public International Law and is the author of numerous publications in her specialist areas, including reports for the Joseph Rowntree Foundation and the Policy Studies Institute. She is also a Research Fellow at the Centre for Sustainable Development, University of Westminster, London.

Maria specialises in environment, poverty and human rights law. She a Commissioner for the English Heritage and a former is a Commissioner of the U.K. Sustainable Development Commission. Maria is an advisory member of One World Trust and the Neighbourhood Renewal Unit Environmental Equality Advisory Group.

Capacity Global

Capacity Global (Capacity) works as a catalyst for social justice and sustainable development. Its key aim is to empower marginalised people around the globe who suffer the indignities of social, environmental and economic deprivation. It believes that the solutions for poverty elimination, good health and a clean environment need to be integrated.

Capacity aims to facilitate partnerships and the sharing of knowledge between grass root organisations, non-governmental organisations, business and the public sector. Capacity does this by working on environmental justice, human rights, social inclusion, sustainable development, and regeneration, in the following three areas:

- Research & Training
- Advocacy
- Community capacity building & participation

For further information please contact: Maria Adebawale, Director

Email: info@capacity.org.uk

Website: www.capacity.org.uk

Address: Capacity Global, The Foundry, 156 Blackfriars Rd, London, SE1 8EN

