The environment and the law – does our legal system deliver access to justice? A review

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Abstract The Environmental Justice Project has sought to clarify the extent to which the UK's civil and criminal law systems achieve review procedures which are real and affordable and thus satisfy the requirements of the Aarhus Convention. This article describes the findings of the project together with its conclusions and recommendations.

INTRODUCTION

Environmental law carries a responsibility to ensure justice not only for the individual citizen, but for the collective benefit of our environment — both now and for future generations.

In 1998, the UK Government became a signatory to the Aarhus Convention,[1] which seeks to establish a consistent standard for access to information, public participation in decision-making and access to justice in environmental matters. With regard to access to justice, it seeks to ensure contracting parties provide review procedures that are real and affordable. The Environmental Justice Project (EJP) that sought to clarify the extent to which our civil and criminal systems achieve this and, in turn, satisfy the requirements of the Convention.

CIVIL LAW – PRIVATE AND PUBLIC

Practitioners and environmental NGOs were questioned about the number and nature of environmental legal actions undertaken since 1990 and their views on the present system. Although more than 50 legal practitioners and non-governmental organisations (NGOs) responded, the EJP received substantive responses from 18 solicitors, 20 barristers and five NGOs. The remaining 10 NGOs were able to indicate why they did not routinely use the law, but were unable to give detailed views on the efficacy of the system. In a limited field, this represents a high response rate. The findings of the civil law section are based on comments made in response to a questionnaire, which are — by their nature — anecdotal. Although these views should be seen in that context, the commonality of responses reflects a considerable degree of frustration on the part of practitioners and claimants/applicants — and should not be overlooked because of their subjective nature.

The EJP hosted a Workshop in the Law Society in October 2003 and met a number of key individuals in early 2004 including the Lord Chief Justice, Lord Woolf; the Master of the

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1 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

Rolls, Lord Phillips; Lord Justice Carnwath; the Parliamentary Under Secretary at the Department of Constitutional Affairs, Mr David Lammy MP; and the Minister for Environment and Agri-Environment, Mr Elliot Morley MP.

For the purposes of this project, civil law was separated into two fields — private law and public law. The former was destined to include statutory applications and appeals to the High Court and claims for nuisance, personal injury compensation and property damage. Public law primarily covers judicial review, human rights claims and cases taken to the European Courts (including the European Court of Justice and the European Court of Human Rights).

PRIVATE CIVIL LAW

The EJP received a mixed response from respondents in this field. A number of land-owning NGOs[2] reported private disputes including trespass, eviction of gypsies, criminal damage, defamation etc., but on the whole these cases were settled out of court. As a result, substantive views about private civil law came predominantly from practitioners, with the outcome of their claims depending somewhat on their speciality. However, the overwhelming conclusion is of how few claims within this field are now brought — it seems that many respondents now perceive this to be a 'barren field' of the law.

Handling of environmental cases

At first sight, private claims seem more likely to be successful than public claims. Some practitioners reported a success rate of just over 70 per cent. For example, Richard Buxton cited *Dennis* v *Ministry of Defence* (2003), in which the Dennises were awarded £950,000 in damages to compensate for past and future nuisance until around 2012. However, the average success rate for solicitors responding to the EJP was 51 per cent in relation to private claims.

Overall, practitioners involved in nuisance and land damage reported a higher level of success and a reasonable degree of satisfaction with the manner in which the Courts deal with their claims. For injury-related claims the picture was quite different. Practitioners reported a degree of success in claims for acute exposure to pollutants, including one-off spills where those living in the immediate vicinity suffered illness. One such example was a chemical leak in the mid-1990s at the Monsanto plant in Wales, which resulted in nausea and vomiting in several hundred people. Leigh, Day & Co managed to obtain compensation for the acute effects suffered. But practitioners involved in chronic exposure cases reported one failure after another in the Courts, starting with the Camelford aluminium exposure claims of the late 1980s.

In the late 1980s, residents near Sellafield sought compensation from British Nuclear Fuels Ltd for the diminution in the value of their houses caused by radioactive contamination.[3] The judge held that the Nuclear Installations Act was based on the Vienna Convention on Civil Liability for Nuclear Damage 1963 which related to physical damage and should not be extended to economic loss when such was not recoverable at common law.[4] The disparaging trend continued with the electro-magnetic field claims of the mid-1990s.

The crucial issue is why these claims failed. It seems unlikely to relate to the quality of the legal teams involved, as the reports of failure come from some of the country's pre-eminent

2 e.g. Woodland Trust, Wildfowl and Wetlands Trust.
3 Under the Nuclear Installations Act 1965, s. 7 which provides that a nuclear site shall not cause personal injury or damage to property.
4 *Merlin & Ors* v *British Nuclear Fuels Ltd* [1990] 3 All ER 711.

personal injury practices, such as Irwin Mitchell, Alexander Harris and Leigh, Day & Co — all of which have demonstrated considerable success in other ground-breaking personal injury claims. Another possibility is that the pollution emanating from UK manufacturers is not, in fact, causing any harm to local populations, although this seems highly unlikely.

The position simply seems to be that the hurdles claimants have to overcome in these claims are too high. For example, in the US, where many similar claims have succeeded, it is a jury rather than a judge that determines liability. Leigh, Day & Co observes that a jury is likely to be more claimant sympathetic than a judge, and that the ensuing 'lower hurdle' allows in more claims. This theory was supported when comparing the number of cases brought in the UK as opposed to the US. Data from EJP respondents indicate that, on average, practitioners (solicitors and barristers together) undertake approximately 27 personal injury claims each year. Data provided by Greitzer and Locks Attorneys at Law in Pennsylvania (APIL) show the firm has undertaken 875 cases since 1990 (i.e. 62.5 cases a year).

Another suggestion proposed by the Association of Personal Injury Lawyers (APIL) is that an in-depth consideration of the impact of the present law of causation is necessary. It was also suggested that the burden of proof in these claims should be reversed, i.e. that the claimant has to show a *prima facie* case that a particular injury is caused by a particular pollutant and, after that, it is for the corporate defendant to disprove the case, rather than the other way around.

Another major problem for these claims results from the complexity of the proposed causative relationship between the injury and the pollutant, often requiring a large number of experts to give evidence. For example, in the Sellafield case there were some 35 experts submitting evidence in a trial lasting almost a whole court year, to a judge operating without scientific assistance and without any sort of background in this work.

Costs

While the relatively high success rate in some areas of private law renders exposure to the other side's costs less likely, the EJP Workshop concluded that the costs rules are a 'pivotal stumbling block' for those wishing to progress claims in this area. Lord Dan Brennan QC[5] is of the view that much environmental work should not incur cost penalties because the resolution of such cases is in the public interest.

With regard to funding, one participant identified the Funding Code as a problem, alongside convincing the LSC that an environmental case has a 50 per cent chance of success when only about 10 per cent actually do succeed. It was felt important to educate the LSC as to why environmental cases are different, in that they have potentially wide and permanent implications and outcomes.

Both the EJP Workshop and practitioners responding to the civil law questionnaire expressed a general dissatisfaction with 'after the event' insurance and Conditional Fee Agreements (CFAs). Hugh James Solicitors reported extreme difficulty in obtaining Legal Aid or CFA insurance.[6] In this regard, Leigh, Day & Co also cited the 'tobacco cases' of the late 1990s. Because insurance companies are wary of the high failure rates and costs associated with environmental claims, they tend to demand a hefty premium — often as much as 40 per cent of the total risk exposure. As the defendants' costs in the tobacco cases were estimated to be in the order of £10 million, the cost of the premium was £4 million — clearly an impossible sum for the claimants to find.

5 Matrix Chambers.

6 A process whereby applicants take out an insurance premium to cover their own costs, and the costs of the opposing party or parties, in the event of losing a case.

Patwa Solicitors and Veale Wasbrough expressed concerns about the lack of funding for environmental cases. Veale Wasbrough provides a considerable amount of advice that is not actioned due to funding difficulties and costs risks. Barristers William Edis[7] and Charles Pugh[8] both identified the cost of litigating as a barrier to environmental justice.

Questionnaire respondents and the EJP Workshop suggested a number of ways to address the problems outlined above, ranging from a fully-fledged Environmental Court or tribunal to the establishment of an 'industry fund' for potential litigants on the basis of the 'polluter pays' principle. Many of these solutions centred on providing certainty for claimants — both in relation to costs and the provision of a fair platform for environmental interests.

PUBLIC CIVIL LAW – JUDICIAL REVIEW

This section of the report discusses respondents' views on judicial review — thought by many to be an inappropriate mechanism for securing environmental justice but, crucially, the mechanism being relied upon by the UK to satisfy the requirements of the Aarhus Convention. The Convention states that each State '*shall*, within the framework of its national legislation, ensure that members of the public concerned ...have access to a review procedure before a court of law ...'.[9] As Greenpeace pointed out — judicial review is, in fact, a discretionary remedy — a shortfall causing several NGOs concern.

Many practitioners reported that clients are deterred by a lack of funding or the possibility of a costs order against them. Perhaps as a result of this, EJP practitioners undertake a relatively modest number of environmental judicial reviews every year (the average being 13 since 1990).

For NGOs the use of judicial review is a relatively recent phenomenon. There was a significant rise in the number of cases in the early 1990s but the number appears to have reached a plateau in recent years. While a few of the more established NGOs now have in-house legal expertise,[10] the vast majority of specialist groups do not — in fact many have only a handful of staff. Buglife has nothing against using the law in principle, but 'with only one member of staff it is not able to access the sort of legal advice it would need to move forward with confidence'. Other organisations expressed similar intent, and some have lent support to other organisations progressing judicial review, but have thus far refrained from doing so themselves.[11] The main concerns and issues raised by respondents are discussed below.

Standing

The early 1990s saw the Courts relax their interpretation of the rules on standing for public interest groups[12] to the extent that 59 per cent of respondents are now 'quite satisfied' with the current position. However, while the requirement to show sufficient interest remains embedded in statute, a return to a more conservative approach always remains a possibility. Thirteen per cent of EJP respondents are 'not satisfied' with the lack of an *assured* position on standing. Friends of the Earth is concerned there may be a backlash against the liberal interpretation of standing (as has occurred in the US) and point out that the statutory

7 1, Crown Office Row.
8 Old Square Chambers.
9 Article 9(2), Aarhus Convention (own emphasis added).
10 The following organisations have at least one in-house environmental lawyer: Friends of the Earth, Greenpeace, National Trust, RSPB, Woodland Trust, WWF-UK.
11 e.g. Butterfly Conservation, Environmental Investigations Agency, Plantlife.
12 *R* v *Poole Borough Council, ex p. Beebee* (HL 1991) and *R* v *H.M. Inspectorate of Pollution, ex p. Greenpeace* (DC 1994).

hurdle places an additional and unnecessary resource burden on NGOs. This concern is reinforced by a number of practitioners, who variously report that 'standing in judicial review still carries a degree of uncertainty' (Kate Markus[13]) and that 'Environmental NGOs often face an uphill battle on standing before the merits of the action are even considered, especially when there is an aggressive third party whose commercial interests are at stake ...' (Gerry Facenna[14]).

A number of respondents are concerned about the disparity between the existing rules on standing and evolving case law. Furthermore, the Aarhus Convention recognises that organisations promoting environmental protection have both a sufficient interest and rights capable of being impaired and, as such, should have access to a review procedure before a court of law.[15]

Barrister Fiona Darroch[16] observes concisely: 'there should be no barriers to standing on environmental issues. Any citizen concerned about an environmental matter should be entitled to come to court after all other attempts to resolve the matter have been exhausted.' Thus, while the need to demonstrate a sufficient interest in a matter does not appear to present a formidable barrier to environmental cases, the continuing requirement to address it — and the discrepancy between the existing rules and developing case law — cause a degree of concern.

Time limits

Participants in the EJP Workshop reported that a significant number of valid claims run out of time. For example, where local residents object to a planning proposal, they are often not informed that they may be able to challenge the decision of the local planning authority. The Workshop suggested that those making representations to a planning authority should be informed, on or before receiving the authority's decision, of the availability of judicial review. This would not be unduly onerous, indeed developers who do not secure planning permission are informed of their right to appeal.

Treatment of environmental issues

Nearly two-thirds of respondents are not satisfied with the Courts' understanding of environmental issues. A number of practitioners perceived understanding to be variable and dependent upon the judge drawn. Many practitioners, including barrister Kate Cook,[17] have found, with notable exceptions, a lack of comprehension of (and/or sympathy with) central tenets of environmental law such as the precautionary principle and sustainable development, as well as the relationship between EC and domestic law in this area. By way of contrast, a senior judge defended the Courts' record on environmental cases, observing that cases are allocated to judges with appropriate expertise and a thorough grasp of environmental principles. In his view, the demonstrably poor success rates associated with environmental cases are largely due to the absence of a merits-based review, and the fact that a proportion of them are simply 'poor cases'.

Over a quarter of respondents (26 per cent) were concerned about the limited scope of judicial review. The Royal Society for the Protection of Birds (RSPB) notes that most environmental cases concern the interpretation of scientific facts (i.e. are essentially merits-based) and, as such, are outside the scope of the Courts. As the Courts are reluctant to

13 Doughty Street Chambers.
14 Monckton Chambers.
15 Article 9(2), Aarhus Convention.
16 10–11, Gray's Inn Square.
17 Matrix Chambers.

quash a decision unless it is totally and utterly unreasonable, there seems to be 'no middle ground for decisions that are simply poor decisions'. One consequence of this is that claimants often disguise merits-based claims as procedural challenges — an observation reinforced by a study performed by University College London. UCL examined 55 environmental judicial reviews (from an estimated 60–70 which arose during the last three years) and found that two-thirds of them were essentially merits-driven, i.e. seeking a substantial rehearing of the facts.[18]

In judicial review, the Courts are not considering challenges to the merits of the decision, but rather whether it is a decision the body is entitled to make. In reality, this often means the executive body is forced to go back and rectify procedural errors, but ultimately makes the same decision. As such, in many cases, judicial review does not change the final outcome — it merely delays it. This distinction is not always understood by applicants, and can lead to frustration.

The EJP's attention was drawn to the argument that substantive legality is covered by the doctrines of, amongst other things, *ultra vires* and *Wednesbury* unreasonableness as well as, increasingly, of proportionality etc.[19] However, WWF supports the RSPB's view that *Wednesbury* unreasonableness no longer appears to exist as a ground for review. In its experience, Counsel has advised that a decision has to be not just unreasonable but 'fantastic in the true sense of the word' before it provides a potential ground for review before the Courts. As such, poor decisions that do not come within the scope of *ultra vires* etc. fall through the net.

WWF raised the inability to challenge the merits of a decision (as opposed to an ability to challenge substantive legality) as a shortfall in the UK's compliance with the Aarhus Convention.[20] It suggested one possibility would be to lower the 'hurdle' on *Wednesbury* unreasonableness for cases falling under the Aarhus umbrella. As such, allegedly poor decisions on environmental facts could become challengeable.

Handling of environmental cases

EJP respondents reported a success rate of 40 per cent (solicitors) and 30 per cent (barristers) with respect to judicial review. Some respondents observed that successful cases now seem to concern the treatment of Environmental Impact Assessments,[21] in which the presence or absence of pre-determined factors (for example, a Non-Technical Summary, treatment of alternatives or due consultation processes) is largely procedural.

The UCL Project examined 55 environmental judicial reviews and found that only four were successful (18 cases were dismissed, 13 withdrawn, and leave for judicial review refused in 12 cases. The remaining cases were still outstanding at the time of examination[22]). Similarly, the Environmental Law Foundation (ELF) study found that over two-thirds of environmental cases (including a large proportion of judicial reviews) referred to ELF members were not concluded successfully.

18 R. Macrory and M. M. Woods, *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal* (UCL: London, 2003).
19 Friends of the Earth, *pers. comm.*
20 Article 9(2), Aarhus Convention as defined by Art. 6(1)(a) and (b), Aarhus Convention.
21 Practitioner Richard Buxton tends to specialise in this area and reports that 22 of the 51 cases he has progressed in the High Court since 1990 have been successful. This contrasts markedly with the success rates reported by other practitioners.
22 R. Macrory and M. M. Woods, *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal* (UCL: London, 2003).

Exactly why environmental judicial reviews fare so badly is difficult to gauge. Barrister Michael Fordham[23] perceives that 'in general the courts too readily treat environmental issues from a property/planning mindset, as complex scientific areas warranting an unduly hands-off approach'. This view was supported by a significant majority of EJP respondents. McCracken and Jones report that the:

> English courts have sometimes in the environmental field taken what might be described as an approach of technocratic paternalism, viewing with suspicion the calls of participatory democracy as no more than undesirable obstacles to enterprise;[24]

again, a view supported by a large proportion of EJP respondents.

The need to provide a review procedure that is fair and equitable is another requirement of the Aarhus Convention.[25] Participants in the EJP Workshop recommended that the Bar Council and the Law Society incorporate environmental law into the training for all practitioners, and that the judiciary be subject to environmental training.

Remedies

In environmental terms the most useful remedy is an interim prohibitory injunction, which seeks to prevent a respondent from causing (further) environmental damage until a full hearing takes place. The main problem with interim injunctions is that they require the applicant to give a cross-undertaking in damages. Given that in most major construction projects the potential liability could run into several hundred thousand, if not millions, of pounds, interim injunctions are rarely pursued by individuals or NGOs. Yet the consequences of this can be disastrous and irreversible. The RSPB cited Lappel Bank in Kent, which resulted in a landmark legal victory for nature conservation, but during which an important part of the Medway Estuary and Marshes was turned into a car park. Twenty-one per cent of respondents raised an inability to provide a cross-undertaking in damages as a barrier to environmental justice.

The Aarhus Convention requires contracting parties to provide a review procedure with adequate and effective remedies, including injunctive relief as appropriate.[26] If the RSPB, arguably the largest environmental organisation in the UK, cannot afford to give an undertaking in damages, there is little reality that others will be able to do so. Indeed, many respondents contend that they should not be expected to do so. WWF points out that the loss of an internationally important site is a loss to the nation and it is the public purse — not an individual or a private, membership-based charity — that should bear the responsibility for preventing such loss.

Finally, Friends of the Earth drew attention to *The Belize Alliance of Conservation Non-Governmental Organisations* v *The Department of the Environment and Belize Electricity Company Limited*,[27] in which the Privy Council declined to grant an injunction restraining further work on the Chalillo dam. While the Committee of the Privy Council referred to the judgment of the Court of Appeal in *Allen* v *Jambo Holdings*,[28] which held that in England publicly funded litigants are, as a matter of course, exempted from the need to give a cross-undertaking

23 Blackstone Chambers.
24 R. McCracken and G. Jones, 'The Aarhus Convention' [2003] JPL JUL, 802–11.
25 Article 9(4), Aarhus Convention.
26 Ibid.
27 Judgment delivered on 13 August 2003. Available from the Privy Council website at: www.privycouncil.gov.uk/output/page331.asp.
28 [1980] 1 WLR 1252.

in damages, it did not feel it was appropriate to extend this reasoning to this case. As such, the Committee did not take the opportunity to advance the case law and, essentially, restated the current, and very unhelpful, orthodoxy.[29]

Costs

Respondents identified the current costs rules to be the single largest barrier to environmental justice. Concerns focused on the application of the usual rule that costs follow the event (i.e. the loser pays the winner's costs) and public funding for environmental cases.

Costs follow the event

Litigation remains a remote possibility for most people. In 1999, Sir Robert Carnwath remarked:

> Litigation through the courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.[30]

Eighty-two per cent of EJP respondents are 'not satisfied' with the current rules on costs. Eighteen per cent are 'quite satisfied', but none are 'very satisfied'. Practitioners variously commented that 'the rules on costs are a bar to public interest litigation where a serious challenge is being brought for proper reasons' (Ben Jaffey[31]); 'uncertainty about costs causes great difficulty for all our non publicly funded claimants in all domestic courts' (Richard Stein[32]); and 'the current rules on costs are the primary impediment to significant growth in environmental litigation' (Gerry Facenna[33]).

Concerns about an order to pay the other side's costs were echoed by many other practitioners and NGOs.[34] Greenpeace cited a recent case in which a defending junior served a costs estimate for a half-day hearing of £70,000 — which has the clear effect of intimidating opponents. In the Aarhus Convention, the ability to award costs is limited to 'reasonable' costs,[35] but applications of this order simply cannot satisfy that requirement.

In some cases, specialist NGOs are keen to use the law, but their limited size and resources prevent them from being able to expose themselves to the risk of costs. The Council for the Protection of Rural England (CPRE) reports that it has occasionally threatened judicial review (which has had the desired 'change of heart' outcome), but is rarely able to pursue it any further because it is too expensive and too risky.

A number of NGOs are also concerned about the potential costs of third party interveners. For example, in December 2003, the day before the hearing on the 'ghost ships' case in the High Court,[36] interested third party Able UK served Friends of the Earth with a Schedule of Costs for the purpose of Summary Assessment. These costs were slightly over £100,000 for a one-day hearing on a preliminary issue (on which the company chose to instruct leading Counsel and two junior barristers).

29 Friends of the Earth, *pers. comm.*
30 [Then] Sir Robert Carnwath, 'Environmental Litigation — A way through the Maze?' (1999) *Journal of Environmental Law* Vol. 11, No. 1.
31 Blackstone Chambers.
32 Leigh, Day & Co Solicitors.
33 Monckton Chambers.
34 CNP, CPRE, HCT, MCS, RSPB and WWT.
35 Articles 3(8) and 9(4), Aarhus Convention.
36 [2003] EWHC 3193 (Admin).

Where there are multiple respondents (e.g. a planning authority and a developer), some clarification on costs was brought by the House of Lords' decision in *Bolton MBC* v *Secretary of State.*[37] This case established that, where the Secretary of State was successful in defending his decision, he would normally be entitled to the whole of his costs but that the developer would not normally be entitled to a separate award of costs unless he could show there was likely to be a separate issue on which he was entitled to be heard. It has been observed that a developer does not expect to get his costs where the local authority's refusal of permission results in a public inquiry, unless his refusal is shown to be unreasonable; defending his permission in the High Court may be seen as part of the same process.[38]

Many respondents believe the current costs rules simply cannot be justified. A number of cases brought by individuals and NGOs raise important issues of public interest (and involve large numbers of people), yet those progressing them are often paying to protect the 'public good'.

Furthermore, access to a review procedure that is not prohibitively expensive is a pivotal requirement of the Aarhus Convention.[39] Friends of the Earth suggested that the current 'loser pays' costs rule should be dis-applied in cases certified by the Court to be in the public interest and which relate to issues which come under the Aarhus umbrella (via a form of 'Aarhus Certificate'). Patwa Solicitors suggested that developers should cover the costs of a successful challenge against them, and that these costs should routinely be built into their business plans on the basis of the polluter pays principle. This approach has some similarity with a recommendation made by Lord Woolf in his final report on Access to Justice.[40] Recommendation 64 states that where one of the parties is unable to afford a particular procedure, the Court, if it decides that that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome.

Participants in the EJP Workshop were inclined to support a regime in which the judge at permission stage decides whether the issue is one of general public importance, in which case the usual rule could be replaced with an order that within the litigation each party bears its own costs. The downside of this is that if the applicant wins then they will be unable to recover their costs from the other side; however, on balance participants felt that this may be more appealing to potential applicants. It is the certainty of liability that is crucial. An approach along these lines was adopted by the Privy Council in *New Zealand Maori Council* v *A-G of New Zealand.*[41] Lord Woolf referred to the fact that the applicants were bringing the proceedings not for personal gain, but in the interests of preserving an important part of the New Zealand heritage and because there was an undesirable lack of clarity in the law. Finally, in *Oshlack* v *Richmond River Council,*[42] the New South Wales Land and Environmental Court departed from the general rule that costs follow the event due to the character of the litigation and the potential for injustice to the minority side. There is no evidence from New South Wales that the application of this rule opens the flood-gates[43] and this approach has also been supported by members of the UK judiciary.[44]

37 [1995] 1 WLR 1176.
38 [Then] Sir Robert Carnwath, 'Environmental Litigation — A way through the Maze?' (1999) *Journal of Environmental Law* Vol. 11, No. 1.
39 Article 9(4), Aarhus Convention.
40 The Rt Hon. Lord Woolf, [then] Master of the Rolls, *Access to Justice — Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996).
41 [1994] 1 AC 466.
42 (1996) 39 NSWLR 622.
43 M. Grant, *Environmental Court Project — Final Report* (DETR: London, 2000).
44 L. J. Sedley, *Aarhus Convention Conference Report* (Environmental Law Foundation: London, 2002) 6.

Participants in the EJP Workshop suggested a variation on the approach outlined above, in which the judge could make an order that the costs of the applicant be paid out of public funds when a matter of public interest is being litigated. The EJP notes that Lord Woolf also supported this approach in his Final Report.[45]

Many respondents, including barristers David Wolfe[46] and Ben Jaffey,[47] supported the wider use of pre-emptive costs orders, whereby the scope of the applicant's liability is determined at an early stage. The Court has jurisdiction to make a pre-emptive order for costs, although it seems that it is rarely exercised. In *R* v *Lord Chancellor ex p. CPAG*,[48] Dyson J refused to make such a pre-emptive order in favour of a charity seeking to challenge the Lord Chancellor's refusal to extend public funding to certain Social Security Tribunals. He concluded that the necessary conditions for the making of a pre-emptive costs order in public interest challenges were:

> ... that the Court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the Court can be satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive application ...

A senior judge[49] noted that this is a relatively restrictive test and that a leaf might be taken from the Chancery practice in this area, where there has been a gradual extension of the so-called *Beddoe's* jurisdiction (*Re Beddoe*[50]), under which the Court can authorise trustees or beneficiaries to litigate at the expense of a trust fund (see *McDonald* v *Horn*[51]). We are pleased to note that one notable and recent exception to common practice was demonstrated in *Campaign for Nuclear Disarmament* v *(1) Prime Minister of the United Kingdom (2) Secretary of State for Foreign and Commonwealth Affairs (3) Secretary of State for Defence*[52].

Richard Stein of Leigh, Day & Co stressed that an important component of this process would be that any hearing to determine the extent of the applicant's liability should be costs-neutral. The firm suggests the Civil Procedure Rules (CPR) could be amended to ensure that applicants do not face a costs liability at the permission stage. However, in general, respondents believe that pre-emptive cost orders would go some way towards removing the uncertainty experienced by potential applicants and would not upset the present system unduly.

Public funding (Legal Aid)

EarthRights Solicitors reported that whilst Legal Services Commission (LSC) funding has improved marginally since the Access to Justice Act 1999, a significant number of clients are still unable to progress judicial review due to a lack of funding.[53] Solicitors responding to the EJP report that, on average, 33 per cent of their clients are publicly funded, although

45 The Rt Hon. Lord Woolf, the [then] Master of the Rolls, *Access to Justice — Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996) 255, para. 22.
46 Matrix Chambers.
47 Blackstone Chambers.
48 [1998] 2 All ER 755.
49 [Then] Sir Robert Carnwath, 'Environmental Litigation – A way through the Maze?' (1999) *Journal of Environmental Law* Vol. 11, No. 1.
50 [1893] Ch 547.
51 [1995] 1 All ER 961.
52 (2002) EWHC 2759 QB.
53 e.g. RSPB, FOE, WWF, Gamlins Solicitors, Hugh James Solicitors, Patwa Solicitors.

the figure for barristers was much lower (14 per cent). It is possible that a disproportionately high number of solicitors with public funding contracts or franchises may have fallen within our study group, in which case our figure of 33 per cent may be artificially inflated. This observation is borne out by the findings of the UCL Study, which suggests that only four of the 55 (seven per cent) environmental judicial reviews studied in detail have public funding.[54]

The ELF study concluded that public funding is not widely available because of the small number of expert environmental lawyers with public funding contracts or franchises and because of the financial and other restrictions placed on applicants for public funding.[55] This includes satisfying the 'reasonableness' test, which requires individuals to show a reasonable prospect, not only of success, but also of some tangible benefit from the success, such as would justify a person of reasonable means bringing the action if required to finance it himself. There is also a provision for the LSC to reduce the amount paid to the assisted individual if others are going to benefit from the case.

Respondents recognised that moving from a situation where an applicant is unlikely to obtain public funding to one in which public funding is freely available is unrealistic. One suggestion was that public funding could be conditional upon a contribution from the applicant, which could be determined by the LSC on a case-by-case basis having regard to the applicant's means. Leigh, Day & Co felt that this would go some way towards ensuring that the applicant demonstrates a sufficient level of commitment to the case. Similarly, a senior judge observed that the LSC could do more to prioritise environmental public interest cases taken by individuals and NGOs.

CIVIL LAW RECOMMENDATIONS

Ninety-seven per cent of leading practitioners and NGOs questioned in England and Wales believe the civil law system fails to provide environmental justice. The most significant single barrier is perceived to be the application of the current rules on costs, followed by a lack of judicial understanding of, and sympathy with, environmental issues, the limited scope of judicial review proceedings and an inability to obtain injunctive relief.

After much consideration of published material and views received, a number of options for reform emerged. One of these comprised the establishment of an Environmental Court[56] for which the achievement of environmental justice is a constitutional requirement — thus providing a statutory benchmark and a basis for future evaluation. Such a court could hear all civil environmental cases, including judicial review, statutory appeals and private claims. The court could appoint judges from beyond the Bar to include solicitors and academics with relevant legal and environmental qualifications and/or experience. Consideration could also be given to the use of impartial technical experts or witnesses to assist the judiciary where necessary. Any restriction on standing before the Environmental Court should be formally removed or substantially narrowed to ensure compliance with the Aarhus Convention.

54 R. Macrory and M. M. Woods, *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal* (UCL: London, 2003).

55 In March 2002, just 30 out of 8,319 solicitors' firms in England had a full legal aid franchise for public law: P. Stookes and J. Razzaque, *Community participation: The UK planning reforms and international obligations* (ELF: London, 2002) 51.

56 In this context, the authors note that an Environmental Tribunal with the jurisdiction to hear all civil matters may also suit this purpose. Whilst beyond the scope of this report, we recommend that a review of the merits and practicalities of a Court as opposed to a Tribunal be undertaken.

Judges in the Environmental Court could be given the power to certify whether a case falls within the scope of the Aarhus Convention, or is otherwise in the 'public interest', at the outset or permission stage.[57] Such cases could qualify for special rules and procedures. For example, judges could order each party to pay its own costs or that pre-emptive cost-orders apply. With regard to injunctive relief, judges could be given the power to waive the need for a cross-undertaking in damages.

The EJP was persuaded by the concept of a specialist Environmental Court for several reasons. First, we are sceptical that sufficient change can be effected without some degree of structural reform. One NGO observed that we already have judges with specialist environmental expertise sitting in the High Court (achieving *de facto* an important element of a specialist court or tribunal), but that, on the whole, this has done little to improve the prospects of success or to alleviate financial concerns.

Secondly, environmental protection and enhancement is a fundamental principle of sustainable development (along with social and economic progress) and, as such, is deserving of special treatment by the Courts. It is fundamental to the well-being and quality of life of all members of society. Because of this the EJP is of the view that it can be sufficiently distinguished from other deserving public interest issues to warrant the establishment of a specialist court. Thirdly, much environmental law is based on scientific and technical issues, the understanding of which would be enhanced by the regular handling of such cases in a specialist court.

Fourthly, the establishment of a specialist court would have the social benefit of significantly simplifying the structure and procedure for potential claimants and applicants, thereby improving access to justice especially to those who are currently deterred by the complexity of the system. In this respect, we note the preamble to the Aarhus Convention, which is concerned that '... effective judicial mechanisms should be accessible to the public ... so that its legitimate interests are protected and the law is enforced'.

Moreover, the establishment of an Environmental Court as part of the High Court would not be prohibitively expensive. It does not require a new building or extensive structural reforms — it could simply form a specialist arm of the High Court, in much the same way as the Technology and Construction Court.

It is clear from our discussions with senior members of the judiciary that the establishment of an Environmental Court is still viewed with some sympathy and, in fact, continues to be viewed as somewhat inevitable. In 1999, Sir Robert Carnwath observed that he 'remain[ed] confident that the Environmental Court [or Tribunal] is an idea whose time will come'.[58] This feeling is still shared by a number of senior members of the judiciary.

Finally, whilst the creation of an Environmental Court would require primary legislation, its establishment must form part of a suite of measures to improve access to environmental justice. Some of these could be progressed while securing Parliamentary time, including:

- amendments to the CPR (and associated Practice Directions) in relation to costs on the basis of the 'polluter pays principle';

57 Friends of the Earth, *pers. comm.*

58 [Then] Sir Robert Carnwath, 'Environmental Litigation — A way through the Maze?' (1999) *Journal of Environmental Law* Vol. 11 No. 1.

- amendments to the CPR (and associated Practice Directions) in relation to standing and interim relief (injunctions);
- a programme of judicial training and guidance on environmental matters;
- guidance on '*Wednesbury* unreasonableness' as a ground for environmental judicial reviews, to allow the Courts to take the merits of a decision into account;
- prioritising funds within the CLS towards public interest environmental cases, thus ensuring that public funding is available across the board, as opposed to only those who are socially excluded;
- the establishment of a national database (or e-library) of civil cases, providing empirical evidence about the number and nature of environmental cases going through the Courts; and
- action to increase knowledge about 'environmental rights' and how to enforce them.

CRIMINAL LAW

Environmental crime arises from breach of statutory provisions, permits and/or enforcement notices issued by regulators. It predominantly encompasses the management of waste, the pollution of controlled waters, the contamination of land and the failure to abate any of the 'statutory nuisances' that district and unitary authorities control. 'Wildlife crime' can be loosely divided into three categories, including: (1) the illegal trade in endangered species controlled through the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (2) crimes involving native species; and (3) cruelty to, and the persecution of, wildlife.

The Aarhus Convention requires contracting parties to ensure that members of the public have access to judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[59] These procedures should provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive.[60] As such, the Convention provided the EJP with a basis against which the performance of the criminal law system can be measured.

The EJP approached Government departments, local authorities, regulatory authorities and NGOs for data on prosecutions undertaken between 1997–2002. The data were examined for temporal and geographic trends and the results sent to those concerned with environmental offences. These organisations were also sent a generic questionnaire inviting their general views on the efficacy of the criminal justice system and a list of detailed questions teasing out issues of relevance to them.

59 Article 9(3), Aarhus Convention.
60 Article 9(4), Aarhus Convention.

ENFORCEMENT AND PROSECUTION

Number of prosecutions

Data supplied by the Environment Agency indicated that the waste sector was responsible for the largest number of actions between 1999–2002. This trend continued in 2002/3.[61] The next highest category concerned actions relating to water quality, with process industry regulation and water resources in joint third place. The least number of actions occurred in relation to flood defence. The results of the data are summarised in Table 1 below.

Table 1: Summary of actions progressed by the Environment Agency between 1999 and 2002

Sector	Number of actions progressed annually between 1999–2002
Waste	795–1,008
Water Quality	392–450
Water Resources	15–52
Process Industry Regulation	36–51
Fisheries (non-standard offences)	1–35
Radioactive Substances Regulation	10–25
Navigation	3–14
Flood Defences	1–8
Total	**1,315–1,539**

Data provided by the Health and Safety Executive showed the total number of offences prosecuted between 1997/8–2001/2 varied between 1,627 and 2,035 per year. Data provided by the Drinking Water Inspectorate showed the number of prosecutions between 1995 and 2002 varied between one and nine. Data collected from 39 district and unitary authorities showed that over half of them (21) have progressed fewer than 50 prosecutions in the last five years. The most common offence prosecuted was statutory nuisance (25), followed by appeals against, and non-compliance with, Abatement Notices (four).

For offences involving wildlife crime, data from English Nature showed that less than 1 per cent of Sites of Special Scientific Interest (SSSIs) were subject to criminal acts every year. For offences involving wildlife trade and native species, the highest number of charges or summonses between 1987 and 2002 involved birds or birds' eggs and the lowest involved plants. Table 2 (below) summarises the percentage of actions for each species group on the basis of data provided by TRAFFIC and WWF. The proportion of cases for birds and their eggs increased from 47 per cent to 63 per cent between 1987–2002. This is partly because the RSPB is extremely active in the prosecution arena — receiving upwards of 600 reports of wild bird incidents each year relating to the destruction of birds and their nests and eggs.

61 Waste prosecutions accounted for 70 per cent of the total in 2002/3, English Nature's Report 346 (November) 2003, pp. 9–10.

Table 2: Percentage of actions in each species group (1987–2002)

Period	Birds and bird eggs	Reptiles, spiders & amphibians	Plants	Artifacts	Mixture	Total
1987–1990	46.7	26.7	13.3		13.3	100
1991–1994	50.0	27.8	5.6	16.7		100
1995–1998	52.4	4.8	4.8	33.3	4.8	100
1999–2002	62.5	6.3	3.1	12.5	15.6	100
Total	**54.7**	**14**	**5.8**	**16.3**	**9.3**	**100**

Barriers to prosecution

Statutory powers

A number of enforcement agencies identified provisions that would improve their effectiveness. For example, the Environment Agency stated that its statutory powers could be augmented by: (1) the power to stop people/vehicles to request names and addresses; (2) the power to require suspected offenders to take part in interviews; (3) the power to serve notices with immediate 'stop' provisions without the need to obtain injunctions or provide time to comply; and (4) clearer legislation with regard to flood defence enforcement.

The protection of SSSIs was much improved by the passage of the Countryside and Rights of Way Act 2000 (CROW), which created a new statutory right of access to mountain, moor, heath, down and registered common land and increased the protection afforded to SSSIs. The statutory nature conservation agencies[62] can now refuse consent for damaging activities and have new powers to combat neglect. There are increased penalties for deliberate damage to SSSIs and new powers to order restoration. The Act also placed a duty on public bodies to further the conservation and enhancement of SSSIs and introduced improved powers to act against third party damage. English Nature brought the first successful prosecution under these new provisions for third party damage in Wiltshire in February 2003.[63] The Court also made a restoration order to make the offender restore the SSSI to its former condition. Similarly, in December 2003, English Nature also brought the first successful prosecution for damage caused by an occupier of an SSSI.[64]

English Nature now finds its powers to prosecute broadly adequate, although a few difficulties remain, including: (1) many offences are committed by third parties but English Nature (EN) officers are unable to stop people/vehicles and request names and addresses, which sometimes hinders the investigation and detection process; (2) EN investigators can also only request that suspected offenders take part in interviews (Police and Criminal Evidence Act 1984) — again this can hinder the investigation process; and (3) EN does not have a formal and immediate power to require restoration following an offence being committed, but where it might not be in the public interest to bring a prosecution.

62 English Nature and the Countryside Council for Wales.
63 See www.english-nature.org.uk/news/story.
64 Under the Wildlife and Countryside Act 1981, s. 28P(1) (as substituted by the Countryside and Rights of Way Act 2000).

A number of NGOs are keen to strengthen the protection of the marine environment. The UK Government's Interim Report on a Review of Marine Nature Conservation (RMNC)[65] revealed a need to revise and reform the present arrangements. WWF believes the solution is to produce overarching legislation — a UK Marine Act — because anything less is unlikely to provide a proper framework for the necessary integrated and strategic approach to the management of the marine environment.

The Countryside and Rights of Way Act 2000 also introduced a number of important amendments to Part I (species protection) of the Wildlife and Countryside Act 1981 (WCA), including six-month custodial sentences. Northumbria Police claimed the first search warrant and arrest with a suspect arrested for possession of a goshawk on the day CROW came into effect. However, whilst welcoming these amendments, some respondents remain concerned about species protection. In general, legislation has evolved in a piecemeal fashion and, as a result, is poorly worded. This has now been addressed.

Furthermore, an analysis of data provided by the Home Office relating to various wildlife statutes shows a very low conviction rate for offences under the Protection of Badgers Act 1992.[66] North Wales Police explained that the enforcement of this Act often depends upon offenders being caught in the act of committing offences. Improving the success rate therefore turns on granting the police powers of entry onto land, arrest, and search warrants.

The absence of a specific power of arrest for some wildlife offences is a significant shortfall in police powers. Hampshire Conservation Trust cited a case at Poole where an Inspector had decided that the lower half of a single coastal development plot should be left natural for its three protected lizards and their habitat. The house was built, but the owner immediately set-to landscaping the whole plot. The Trust discovered the work and summoned the police, who threatened to arrest the gardener unless he stopped. The landowner correctly challenged the police's power of arrest, and duly completed his landscaping.

Finally, species protection also often requires amendments to other pieces of legislation and longer-term educational programmes. For example, a recent report by the Bat Conservation Trust and the RSPB shows that 67 per cent of offences against bats were committed within the building trade, highlighting the need to target educational resources towards this industry and the planning process to ensure better compliance with legislation.[67]

Resources

A number of respondents pointed out that the number of prosecutions in relation to the number of reported incidents is very low. The Environment Agency does not have the capacity to investigate all complaints and has to prioritise its use of resources. Particular attention was drawn to the shortage of resources to address fly-tipping and the lack of funds to clear up dumped tyres.

Both North Wales Police and Devon and Cornwall Constabulary highlighted resources as an obstacle to prosecution. One operation involving the illegal trade in endangered species is known to have cost in excess of £1 million, but while wildlife crime is a policing issue it is not a policing *priority* and finance for such operations and investigations is extremely difficult to obtain. As a result, a gulf exists between the police's legal duty and their practical ability (and resources) to deal with environmental investigations.

65 See http://jncc.gov.uk/marine/marine_habitat/survey/mncr.htm.
66 21 per cent convicted in 1998, 33 per cent convicted in 1999 and 19 per cent convicted in 2000.
67 *Bat crime: Is the legislation protecting bats?* (BCT and RSPB: 2003).

Finally, nearly one-third (12) of the 39 district and unitary authorities questioned by the EJP raised finance as a significant barrier to prosecution.

HANDLING OF ENVIRONMENTAL CASES

An analysis of data provided by EJP respondents showed average conviction rates of between 66 per cent and 100 per cent. Generally, the conviction rates associated with 'environmental offences' were higher than those associated with 'wildlife offences'. Table 3 (below) summarises the conviction rates achieved by organisations concerned with environmental offences.

Table 3: Percentage conviction rates demonstrated by respondents to the EJP

Organisation	Conviction rate (%)
Environment Agency (1999–2002)	
Waste	96
Water Quality	98
Water Resources	98
Radioactive Substances	100
Fisheries (non-standard offences)	90
Process Industry Regulation	100
Flood Defence	100
Navigation	96
Health and Safety Executive (2001/02)	84[68]
Drinking Water Inspectorate (1995–2001)	97
CIEH (1998/9–2001/02)	
Domestic Noise Nuisance	80[69]
Home Office (1997–2001)	
Killing/taking/sale of wildlife and their products	66

The 90–100 per cent conviction rates for offences prosecuted by the Environment Agency are high.[70] The Environment Agency believes there are a number of reasons why this may be so, including enhanced training of its officers, lawyer involvement in the early stages of investigations and training of magistrates.

The Chartered Institute of Environmental Health (CIEH) finds the Courts generally, and perhaps the Magistrates' Courts in particular, have:

68 Taken from *Health and Safety Offences and Penalties 2001/2002* (HSE: 2002).
69 CIEH, *pers. comm.*
70 English Nature's Report 346 (November) 2003, pp. 9–10 gives the Environment Agency's average prosecution success rate for 2002/3 as 97.9 per cent, with only 15 acquittals.

> [an] inevitably lay view of environmental issues, which reflects the communities they serve. That is not inappropriate even if it is not always scientifically correct and it is not to imply that they do not care about the environment and damage to it.

The CIEH recognised that this may place a small additional burden on witnesses and advocates.

Eleven of the 39 district and unitary authorities sampled do not find that the Magistrates'/ Crown Courts understand environmental issues. A study by ERM found that in one of the Court areas researched, only five to six of the 3,445 cases heard per year are likely to be environmental cases, which could fall to be heard by any of the 149 magistrates (or three-person lay bench).[71] Six of the 39 authorities questioned by the EJP believe judicial training or some form of specialist expertise is needed, although seven perceived an improvement in the situation as a result of Sentencing Guidance and associated training. Barrister Daniel Owen[72] suggested it may be helpful for the Courts to have access to environmental advisers, who answer to the Court rather than the prosecution or the defence, and assist in interpreting both parties' evidence on environmental impact.

If environmental crimes are comparatively rare, then offences involving wildlife are even scarcer. Magistrates routinely encounter only one or two cases a year. Perhaps partly because of this, the conviction rates for wildlife offences are generally lower (66 per cent), although this may also reflect statutory, resource and evidential limitations. While two respondents found that magistrates regard these offences as serious,[73] others, such as Andrew Wiseman,[74] felt their lack of understanding of environmental issues was 'very worrying'. Both the Royal Society for the Prevention of Cruelty to Animals and Devon and Cornwall Constabulary noted that the sentences imposed by the magistrates vary from court to court, and do not necessarily bear any reflection on the seriousness of the case.

On a more positive note, English Nature found the views of magistrates to be proportionate with society's view of the environment generally providing a 'level playing field' for environmental justice. Many respondents were also confident that the Sentencing Guidance will help to address such inconsistencies.

The EJP was interested to note that the Magistrates' Association for London is considering the feasibility of transferring all non-CPS prosecutions to one dedicated location — in effect forming a specialist Environmental Court building out of administrative expediency. This is favoured by the Environment Agency, which also favours the designation of specialist magistrates to hear environmental cases.

PENALTIES

Fines

The fines for environmental and wildlife offences vary significantly, and are rarely commensurate with the level of environmental damage caused. The case of *Environment Agency* v *Milford Haven Port Authority* aptly illustrates this point. In 1999, Cardiff Crown Court imposed a fine of £4 million (plus £825,000 costs) on Milford Haven Port Authority for pollution caused when 72,000 tonnes of crude oil spilled from the 'Sea Empress' tanker

71 C. Dupont and P. Zakkour, *Trends in Environmental Sentencing in England and Wales* (Environmental Resources Management Ltd: 2003).
72 Fenners Chambers, Cambridge.
73 e.g. RSPB and English Nature, *pers. comm.*
74 Trowers Hamlins Solicitors.

outside Milford Haven, damaging 38 SSSIs and killing thousands of seabirds.[75] In 2000, the Court of Appeal reduced this fine to just £750,000 on the grounds that the fine should not 'cripple the port authority's business and blight the economy of Pembrokeshire'.[76] By way of contrast, the Environment Agency[77] estimated the costs of clean-up and salvage to be between £49 and £58 million, and the effects on tourism in Pembrokeshire were calculated at between £20 and £28 million during 1996 alone.[78] Such a fine cannot, in any sense, be regarded as proportionate to the environmental damage caused.

Data supplied by the Environment Agency showed the average fine for offences varied between £277 (fisheries (non-standard offences)) and £20,463 (process industry regulation). Data supplied by the HSE showed that the average fine varied between £5,274 (1996/7) and £8,284 (2001/2). Similarly, the DWI noted that prosecutions in relation to drinking water are relatively rare and, because magistrates have little experience in this field, there has tended to be a fairly wide differential in the levels of fines imposed.

EJP respondents also perceived a degree of variation in the fines imposed. Ashurst Morris Crisp noted that the penalties for criminal offences are 'not consistent nor proportionate' and Penny Simpson of DLA found 'too much variation in the fines awarded to polluters — nobody knows what to expect'. Barrister Fiona Darroch[79] expressed the view that 'the courts do not impose penalties that are either a deterrent or appropriate in view of the environmental damage caused'. Whilst recognising that sentencing judges cannot always be expected to understand the full impact of a complex offence, Darroch believes the fines 'should be more closely aligned to reflect the true cost of the damage caused. This cost should be comprehensively and professionally assessed as part of the litigation process'. Although practitioners representing corporate bodies perceive an increase in the fines imposed, one barrister noted that 'there are no doubt a number of cases where the gravity of the case has not resulted in a fine of significant impact'. This view was endorsed by barrister William Edis,[80] who noted that the penalties imposed are 'an inadequate reflection of corporate culpability'.

However, it is not always appropriate to make comparisons between average fines as they may vary for valid reasons. Fines take into account many more factors than culpability and environmental impact including, in particular, the defendant's ability to pay. The Environment Agency reported the average fine for waste offences to be in the region of £600 as opposed to £6,485 for water-related offences because prosecutions involving water quality are often progressed against corporate offenders. Table 4 (below) shows the average fines for prosecutions progressed by the Environment Agency between 1999–2002. It can be seen that the fines for fisheries and navigation are much lower than those for offences relating to process industry regulation and radioactive substance regulation, reflecting the fact that they are generally imposed on individuals rather than corporate bodies.

75 [1999] 1 Lloyd's Rep 673.
76 (2000) Env LR 632.
77 See http://www.environment-agency.gov.uk/regions/wales/issueswales.
78 Welsh Economy Research Unit, Cardiff Business School and Welsh Institute of Rural Affairs Studies, 'The Economic Impact of the Sea Empress Spillage' in *Welsh Economic Review.*
79 10–11, Gray's Inn Square.
80 1, Crown Office Row.

Table 4: Average fines for prosecutions progressed by the Environment Agency (1999–2002)

Offence	Average fine (£)
Water resources	2,180.19
Radioactive substance regulation	9,621.25
Process industry regulation	20,462.96
Flood defence	1,542.86
Navigation	371.11
Fisheries (non-standard offences)	277.33
Waste	2,826.76
Water quality	6,233.97
All	**4,208.99**

While it may not always be appropriate to make comparisons between average fines, it is appropriate to ask whether the levels of fine are an effective deterrent against environmental and wildlife crime. The Courts now have a number of tools to assist them in setting appropriate fines for corporate offenders. In May 2001, the Magistrates' Association published *Fining of Companies for Environmental and Health and Safety Offences*, which provided magistrates with guidance on the relevant sentencing options. These Guidelines highlight the importance of cases such as *R* v *F. Howe and Son (Engineers) Ltd*[81] and *R* v *Friskies Petcare UK Ltd*,[82] in which the Court of Appeal gave important guidance on the sentencing of companies for offences relating to the environment and public health.

While the HSE welcomes *Howe* as an important step forward, the Environment Agency feels it is unfortunate that the Court of Appeal did not use *Environment Agency* v *Milford Haven Port Authority*[83] as an opportunity to provide more prescriptive guidance on how the Courts should assess financial penalties. The Agency had hoped the Court would address precisely where the level of fine should be pitched, i.e. on profitability or turnover — and what would be a reasonable bracket of financial penalty for the Court to consider. Although this has been done for 'mainstream crime', *Howe* did not go beyond the sentencing of cases on an individual basis to establish any sort of tariff. The Environment Agency believes that this has left magistrates somewhat at a loss as to the correct entry points into the sentencing matrix.[84]

Two recent cases reinforce the case for guidelines (rather than guid*ance*). In *R* v *Yorkshire Water Services Ltd*,[85] the Court of Appeal found a fine of £119,000 for committing four breaches of the Water Industry Act 1991, s. 70 was too high and substituted it with a total fine of £80,000. In so doing, the Court set out a number of considerations a sentencing court ought to have in mind. Similarly, in *R* v *Anglian Water Services Ltd sub nom Hart* v *Anglian Water*

81 [1999] 2 All ER.
82 (2000) 2 Cr App R(S) 401.
83 (2000) 2 Cr App R(S) 423.
84 R. Navarro and D. Stott, *A Brief Comment: Sanctions for Pollution* (2002) JEL Vol. 14/3 and Environment Agency, *pers. comm.*
85 (2002) Env LR 18.

Services Ltd[86] (in which the Environment Agency appeared as an interested party and sought to persuade the Court of Appeal to provide tariff guidance), the Court held that a fine of £200,000 had been 'manifestly excessive' and reduced it to £60,000. Unfortunately, the Court also declined to give tariff guidance on the basis that cases must be sentenced on a case-by-case basis. The Environment Agency now believes it is unlikely that any tariffs or sentencing guidelines will be forthcoming and, accordingly, sentencing will be dependent very much on the expertise of the sentencing judge or bench.

Whilst reporting that total fines imposed in prosecutions are rising,[87] the Environment Agency believes the fines in environmental cases remain 'too low' and should routinely include the costs of clean-up and restoration. This is borne out by the conclusions of *Spotlight on business environmental performance 2002*[88] which showed that while fines for environmental offences are increasing, they are still not high enough to encourage some companies to respect the environment. The Agency would prefer to see turnover and profitability being taken into account when fines against companies are levied.

The EJP's survey of 39 district and unitary authorities found that, generally, respondents were unsatisfied with the level of fines imposed given the statutory maxima. Ten authorities reported that the fines were 'low, poor or insignificant' and another four were 'very unsatisfied'. In fact, of the 39 approached, only four were 'satisfied' with the current level of fines. The same survey revealed that roughly half (20) of those sampled do not perceive there to be any correlation between the levels of fine imposed and the nature of the offence/environmental damage caused.

These findings are also borne out by the results of the ERM study, which notes that although there was a general increase in the average level of fines in the Magistrates' Courts between 1999 and 2002 (rising from £1,979 to £2,730), the average fine still stays well below the maximum magistrates can impose (generally up to £20,000),[89] notwithstanding the DCA encouraging magistrates to apply the maximum fine where appropriate.

Any person carrying out, without reasonable excuse, an operation which damages the special features of an SSSI is liable to a fine of up to £20,000 on summary conviction or an unlimited amount on conviction on indictment. The Courts are also empowered to make an order requiring that person to take certain actions to restore the land to its former condition. Failure to comply with such an order may be punishable by a fine of up to £5,000 and a further fine of up to £100 per day for as long as the offence continues. Despite this, English Nature highlights the particular difficulty in relation to habitats, which are often valued purely on the monetary value of the land itself, not the broader value that they have to society in general. English Nature believes that, in general, whilst the Courts take wildlife offences seriously, the fines remain relatively low.

86 TLR 18/08/2003.

87 The Thames Region of the Environment Agency reports that the total fines imposed in prosecutions completed in 2001/2 amounted to £366,348.00. This rose substantially in 2002/3 to £727,930.00 (an increase of almost 100 per cent). Within this, water quality prosecutions recorded an increase in fines of 139 per cent and waste prosecutions an increase of 275 per cent.

88 *Spotlight on business environmental performance 2002* shows the average fine per company prosecution in 2002 was £8,744 — 36 per cent higher than in 2001.

89 C. Dupont and P. Zakkour, *Trends in Environmental Sentencing in England and Wales* (Environmental Resources Management Ltd: 2003).

Proportionality
Respondents reported that the majority of cases do not result in sentences that provide an appropriate deterrent to offenders, or take account of the full range of sentencing options available. Our survey of district and unitary authorities revealed that 28 of the 39 sampled do not believe the current level of fines acts as a deterrent to would-be offenders. This is thought to be because it is cheaper to offend or that other measures (for example, fixed penalties or the threat of eviction) are a more effective deterrent.

In relation to wildlife crime, a report by the Bat Conservation Trust and the RSPB cited a case in which a property developer pleaded guilty to damaging a roost site for Natterer's bats. The developer was fined £500 and ordered to pay £100 costs. The NGOs were disappointed with the fine on the basis that it did not reflect the environmental damage caused and was unlikely to deter those who may choose to disregard bat legislation in other building projects.[90] Similarly, the RSPCA believes the level of penalties imposed by the Courts has little correlation with the environmental impact caused by the offence.

WWF notes that the penalties associated with wildlife trade offences often bear little or no relation to the profit to be made by those committing the offences. For example, in 1998, a Maltese national was found to be in possession of 800 British finches, which bore all the signs of having been recently taken from the wild. He was in the process of placing illegal rings on the birds in an attempt to pass them off as captive-bred, so that they could be exported to Malta for sale in pet shops and open-air markets. A greenfinch caught in the wild would be worth around £2 in the UK, but can be sold as a captive-bred specimen for £6–8 in Malta. Using various contacts, the individual's travel record was checked and it was estimated that during the previous 12 months he had been responsible for exporting in excess of 25,000 birds — which means he stood to make a clear profit well in excess of £100,000.

WWF believes that when considering the seriousness of these offences, the judiciary should first take into account the ecological impact of the offence and the impact on the sustainability of the species. When endangered species are involved the case may be more appropriately tried/sentenced in the Crown Court. In line with *R* v *Howe*, the level of fine should reflect any economic gain from the offence.

The average fine per case in relation to health and safety offences in 2001/2 was 39 per cent higher than in previous years. The HSE feels that while there is still some way to go 'we hope that this is a step towards fines which are truly proportionate to seriousness and which better reflect huge variations in the "wealth" of organisations'.[91] Many respondents believe a similar line of reasoning should apply to sentencing in environmental cases.

Custodial sentences
Data supplied to the EJP indicated that custodial sentences are a rarity for regulatory offences and represent a very low percentage of general criminal sentences. Table 5 (below) indicates the proportion of custodial sentences awarded for a number of environmental and wildlife offences. This finding is supported by the ERM study,[92] which concludes that there is a very limited use of custodial sentences across all the regions (the average for England and Wales being 1.2 per cent).

90 *Bat Crime: Is the legislation protecting bats?* (BCT and RSPB: 2003).
91 Health and Safety Executive, *Health and Safety Offences and Penalties 2001/2002* (HSE: 2002).
92 C. Dupont and P. Zakkour, *Trends in Environmental Sentencing in England and Wales* (Environmental Resources Management Ltd: 2003).

Table 5: Proportion of custodial sentences imposed in relation to various environmental and wildlife offences

Data source	Type of Offence	Custodial Sentences (as % of total penalties)
Environment Agency (1999–2002)	Waste	1.83
TRAFFIC/WWF	Trade in:	
	Birds and bird eggs	19.1
	Reptiles, spiders and amphibians	8.3
	Plants	20.0
	Artifacts	14.3
	Mixture	50.0

When questioned about the very small number of custodial sentences imposed, the Environment Agency pointed out that they are only imposed where the case is sufficiently serious to warrant it. Another factor is that many of the environmental offences it prosecutes are committed by companies.

North Wales Police highlighted the need to ensure that tougher penalties and custodial sentences are addressed consistently across the UK. In this respect, the Sentencing Guidance should be adapted for use in the Crown Court and other UK jurisdictions. Furthermore, Guidance should be revised to incorporate other offences, including those under the Water Act 1991, s. 70[93] and 'bread and butter' issues dealt with by the RSPCA and the Police Service.[94]

Other penalties

Respondents raised a number of penalties that can be used alongside, or instead of, prosecution. The Environment Agency referred to conditional discharges or deferred sentences in relation to corporate offenders, particularly for offences where the actual environmental impact may be low but the operational failure high. The Agency also takes action against officers of a company, including directors, managers and the company secretary. At least seven directors were personally fined in 2002 and in appropriate cases the Agency will also consider seeking disqualification of directors under the Companies Act. It was suggested that consideration could be given to an environmental 'fit and proper person test' for company directors, in which individuals have to demonstrate a 'clean' environmental record before being allowed to fulfil such a role. With regard to waste, and especially fly-tipping, the Environment Agency also notes that Community Service Orders (CSOs) of up to 180 hours can be effective. More stringent enforcement practices e.g. the seizing of vehicles may also address this problem.

However, while many respondents referred to the efficacy of such measures, the ERM study concludes that they are used very infrequently.[95] The study found that CSOs, conditional/absolute discharges, compensation etc. represent only 4.9 to 8 per cent of the penalties

93 DWI, *pers. comm.*
94 RSPCA, *pers. comm.*
95 C. Dupont and P. Zakkour, *Trends in Environmental Sentencing in England and Wales* (Environmental Resources Management Ltd: 2003).

imposed in the Crown and Magistrates' Courts respectively. The EJP recognises that magistrates are required to limit CSOs to 'serious cases' (undefined), in that they are costly to administer and in some cases health and safety issues are involved. Furthermore, they are, of course, only applicable to individuals and not companies.

Finally, both the DWI and the Environment Agency highlighted the positive contribution that adverse publicity can make. The Agency finds that the attention attracted by prosecution can be embarrassing to companies and suggested that successful prosecutions should be recorded in company annual reports.

COSTS

The Environment Agency routinely seeks to recover the costs of investigation and Court proceedings, and is frequently awarded the full costs claimed. Standard costs are low, in the region of £1–2,000 (subject to means) because the investigation is conducted 'in-house' — although in larger cases the costs can total hundreds of thousands of pounds.

The CIEH reported that only a proportion of the costs incurred are generally awarded to successful authorities — which does little to encourage their enforcement functions. This view is supported by our survey of district and unitary authorities, which revealed that only five routinely recovered all of their costs. Seventeen routinely recover only a proportion of the costs incurred.

With respect to corporate offenders, the *Fining of Companies for Environmental Health and Safety Offences*[96] provides that the order for costs should not be disproportionate to the fine imposed. The Court should set the fine first, then consider awarding compensation, and then determine the costs. If the total sum exceeds the defendant's means, the order for costs should be reduced rather than the fine.

With respect to wildlife trade offences, the *Magistrates' Court Sentencing Guidelines 2002* recommend that the prosecuting authority should be awarded reasonable costs reflecting the costs of the investigation, file preparation and presentation. The Court of Appeal set out principles in *R* v *Associated Octel Ltd*,[97] which were reviewed and approved in *R* v *Northallerton Magistrates' Court, ex p. Dove*,[98] which determined that costs should not be seen as disproportionate to the fine.

RECORDING OF WILDLIFE CRIME

There is no central record of reports of wildlife offences — partly because wildlife offences do not even have to be recorded as crimes. This makes it difficult for enforcers to prioritise their efforts where they are most needed, assess the extent to which their activities are making an impact on wildlife crime and, in turn, pass information back to the relevant scientists, policy makers and enforcement bodies responsible for setting targets and priorities.

CONCLUSIONS AND RECOMMENDATIONS ON CRIMINAL LAW

In contrast to the civil law system, respondents and Workshop participants *do* believe the existing criminal justice framework is one within which environmental justice can be obtained. The EJP does not, therefore, recommend any substantial change to present structures within the criminal system.

96 Magistrates' Association, 2001.
97 (1997) 1 Cr App R (S) 435.
98 (2000) 1 Cr App R (S) 136.

However, the fines for environmental offences, despite recent guidance from the Court of Appeal, remain too low and tariff guidelines (as opposed to Guid*ance*) would be helpful. The need for higher fines for health and safety offences has already been recognised in *R* v *Anglian Water Services Ltd sub nom Hart* v *Anglian Water Services Ltd*.[99] In this case, the Court of Appeal emphasised that magistrates should accustom themselves to imposing much greater fines where appropriate. The EJP believes such reasoning should also apply to environmental and wildlife crime.

It is clear that many determined and persistent offenders do not respond to fines. As such, the criminal system risks failing to meet the basic requirements of the Aarhus Convention, in that the penalties imposed are neither 'adequate' nor 'effective' to address environmental and wildlife crime.

Respondents perceive the Courts' understanding of environmental issues, and treatment of environmental offences, to be variable. While there may be valid reasons for the differential in fines imposed, many respondents believed the penalties should show a greater correlation with the environmental damage caused, thus providing an effective deterrent to would-be and re-offenders. While Guidance in relation to some offences for magistrates does exist (in the form of *Costing the Earth — Guidance for Sentencers*), it is not widely known about within some enforcement spheres and it does not cover all offences. There is also no equivalent guidance for the Crown Courts.

The EJP finds the statutory regime within which the enforcement agencies operate to be broadly satisfactory, with the exception of the marine environment, species conservation and some specific powers of the enforcement agencies. Finally, it is clear that the Police Service, district and unitary authorities and, to an extent, the Environment Agency are not always adequately resourced to perform their statutory duties.

The EJP makes the following recommendations in relation to criminal law:

Penalties

- the introduction and application of tariff guidelines for environmental and wildlife offences, operating alongside the Sentencing Guidance;
- particular emphasis should be placed on the environmental impact of an offence and the level of fine should reflect any economic gain arising from the offence;
- magistrates are encouraged to take account of the maximum fine available for environmental offences, i.e. £20,000;
- magistrates and judges are encouraged to apply the full range of sentencing options available to them, including custodial sentences for serious environmental offences, including those under the Wildlife and Countryside Act 1981 and the Countryside and Rights of Way Act 2000;
- successful prosecutions should be recorded in company annual reports;
- consideration should be given to the development of a 'fit and proper person test' to ensure that company directors have a proven 'clean' environmental record;

99 [2003] EWCA Crim 2243.

- the Courts are urged to routinely award successful individuals and organisations bringing environmental cases all reasonable costs of investigation and legal costs; and

- enforcement agencies and voluntary organisations are encouraged to publicise enforcement action wherever possible.

Handling of environmental cases

- Magistrates are urged to apply *Costing the Earth – Guidance for Sentencers*;

- The Guidance should be expanded to cover other environmental offences, adapted for use in the Crown Courts and accompanied by a programme of training for Crown Court judges. The effectiveness of the Guidance should be monitored and evaluated;

- the EJP supports the designation of specialised magistrates' courts and/or magistrates for environmental cases.

Statutory powers

- The powers of the Environment Agency, English Nature and the Police Service should be augmented as outlined above.

The statutory regime should be strengthened by:

- a UK Marine Act, which enables stakeholders to take an integrated and strategic approach to the protection and management of the marine environment; and

- a review of Part I of the Wildlife and Countryside Act 1981 with regard to its effectiveness for species conservation.

Resources

- enforcement agencies should be adequately resourced to investigate offences and pursue the full range of enforcement options available to them; and

- subject to suitable safeguards, regulatory authorities should be able to retain fines imposed by the Courts.

Recording

- the Government should establish a national database for recording criminal environmental cases. To ensure that any such database is comprehensive, wildlife offences should be listed as 'notifiable offences'.