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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

EXECUTIVE SUMMARY

Using the Law: Barriers and Opportunities for Environmental Justice

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Scope and Purpose of the Report

Background to the Study

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 development and innovative 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 justice.

The report's findings should be seen not only in the context of legal reform but within wider policy areas of social inclusion, regeneration, environmental equality, public participation and citizenship in England and Wales.

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 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 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.

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).

Summary

Focus Group Discussions and Stakeholder Responses

Focus group discussions with members of the public, each with a wide range of experience in accessing the courts, raised a number of concerns illustrated in Table 1 below.

- 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'.
- Failure of the government and the legal system to recognise the strong public interest element of environmental cases

Table 1 Public concerns relating to environment and the legal system

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;
- difficulty of rules relating to costs ;
- 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;
- the inability of present rules and regulations to recognise the public interest element of a number of environmental cases

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 suggests that at present numerous barriers to the legal and court system means that overall they do 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 to environmental advice and within the court system remain unaddressed. Such barriers stand to weaken any agenda of social inclusion and undermine the enforcement of environmental laws.

Based on the reports findings eight recommendations have been made to facilitate the delivery of environmental justice in England and Wales.

Findings & Recommendations

Environment and Quality of Life

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 in the U.K. and their impact on health. 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 funding 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. The full 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) .*

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