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DEFINING COMMON EUROPEAN PRINCIPLES ON THE ENVIRONMENT

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The project 'Young people devise laws for Europe' was launched towards the end of 2003. The project brought together trainee judges from the Ecole Nationale de la Magistarture, legal professionals from three EU countries (UK, Spain and Germany) and two non-EU countries (Hungary and Turkey). Together, they worked on legal principles to devise new ideas to make a more efficient judicial system, which would better respond to the aspirations of Europe's citizens. Martha Grekos, one of the UK's representatives, describes the project and its aspirations.

Introduction

Four projects were launched on the environment, company law, road safety, and new technologies and ethics. The British study groups had until the end of 2003 to complete the research and make proposals, and were constrained to producing a document not exceeding 15 pages. The group leading the environmental study project consisted of three solicitors: Claire Brown, Guy Linley-Adams and Elizabeth Seymour: and myself as a Barrister. It is important to note that the opinions expressed in the group's report were personal to the authors and did not represent those of their employers or the UK Government.

We chose to focus on three main areas: stakeholder involvement, laws and their implementation and enforcement, and transboundary issues. The report summarises the current situation at both UK and EU levels, describes current failings in the environmental field, and sets out proposals for improvement.

We stressed that governments should not lose sight of the ultimate aim which is environmental protection. We need to recognise that for environmental laws to be truly effective all stakeholders must be aware of and take account of environmental issues. Laws must be adequately drafted, and sufficient resources should be available for their implementation and enforcement. Ultimately we must all work together to tackle this global problem. Otherwise all our efforts could simply be too little too late.

Our recommendations and proposals are described, in summary, below:

Citizen participation

Given that democracy and accountability, particularly in relation to the EU, are of increasing concern in the member states, a more robust approach to public-participation in decision-making in environmental matters is required. We should introduce a procedure for effective public participation in the environmental field by adopting and developing the concept of 'social partners' (Articles 137-8 of the EC Treaty).

Representatives of all stakeholders should be involved in drafting legislative proposals at EU, UK and local levels. We suggested that these proposals may be adopted as Council/government legislation on the basis of qualified majority voting. The Council of the European Union and governments should not be able amend the proposals, but may refuse to adopt them.

Failing adoption of legislation the various representative organisations could enter into a voluntary agreement on the basis of their proposal, and the relevant government level should provide funding and resources to facilitate the stakeholders. In addition, such stakeholders should have the ability to bring

infringement actions against member states and EU institutions for their failure to correctly apply EU legislation, including the treaties and their principles.

We further concluded that this right should not be limited to legislation adopted using the 'eco partners' model or narrowly restricted to legislation adopted under the environmental provisions of the EU Treaty, as it is widely recognised that environmental issues span all fields and therefore a failure to consider environmental protection sufficiently should be challengeable by stakeholders at all times and in all fields. In adopting such an approach to policy-making, we should learn from the flaws of the 'social partners' model, particularly in relation to the representativeness of the various stakeholder organisations.

Corporate social responsibility

On corporate social responsibility, the group concluded that EU-based companies and companies operating in the EU or selling products or services in the EU should be required to:

- produce and publish reports on their social, environmental and economic impacts, with directors being personally liable for any failure to do so;

- consult with their stakeholders on company activities and impacts, in particular prior to embarking on new projects;

- ensure that directors consider the environmental and social impacts of their operations and give weight to the interests of all stakeholders when making decisions on these aspects; and

- take all reasonable steps to minimise any negative social and environmental effects of their operations. Non-shareholder stakeholders should be able to require companies and directors to meet these obligations and hold companies and indeed directors, strictly liable for any harm caused by corporate activities.

Enforcement

On enforcement, the group concluded that at national and EU levels, the quality of environmental legislation should be reviewed to ensure clearer texts, greater transparency, harsher penalties, fines and sanctions as well as more rigorous enforcement and prosecuting powers. Regulation will remain, thus regulators should be our 'champions' of the environment, preventing environmental harm and altering people's behaviour for the better.

National and European administrations must be more inventive and use a full range of instruments and tools to apply and enforce environmental laws to find the right mix between incentives (carrots) and threats (sticks). There should be better co-ordination at national, European and international levels as well as empowerment of the European Environment Agency (EEA), and empowerment and enhanced transparency in the Commission. There should also be better liaison with national government's standard-setters. The European Court of Justice must be able to impose fines that are effective in deterring member state breaches. Also, the whole system of access to national and EU courts, as well as speed, effectiveness and understanding of environmental law issues must be reconsidered. Only time will tell whether the proposed European Constitution will make a difference in this area.

The role and utility of civil and criminal law

We concluded that tort law and its dependence on private litigants for enforcement is not best suited to the task of environmental protection. Environmental issues deserve special treatment and the civil liability principles should be generously interpreted to provide adequate remedies for environmental damage. The law of tort is too much concerned with culpability, which obstructs the environmental aim to attack the causes of environmental degradation.

We need to bear in mind the precautionary principle, as measures should be taken despite scientific uncertainty about the likelihood of harm, even in cases where there is no scientific proof of a causal link. For example, a much lower standard of proof for environmental causality is needed. We must make greater use of criminal law to penalise polluters.

Corporations should not be able to hide behind the ‘corporate veil’. English common law traditionally requires that a corporate body only be liable under the ‘identification doctrine’. This applies only where the individual responsible for the default can be described as the so-called 'alter ego' of the company. At the very least, the actor must have full discretion to act independently of instructions from the board of directors. In larger English companies, few officers have such authority. It is therefore more likely that smaller owner-managed businesses, which arguably cause less environmental damage (due to their size and possibly the general nature of their business), are more likely to be caught under this doctrine than the larger, more polluting corporations that are able to hide behind the veil. Following the case of R v P&O European Ferries (Dover) Ltd (1991) 93 Cr App Rep 72, a corporation may also be guilty under the identification doctrine, but only if the person who is the embodiment of the corporation has the required 'mens rea'. The 'directing mind and will' principle, requiring a guilty mind to be found, remains a hurdle to establishing liability.

The current position is therefore unacceptable as one must prove that those controlling and managing the company's affairs comprise the company itself. We must move away from the ‘controlling mind’ concept and develop liability along the lines of the corporate killing bill.

The proposal in the corporate killing bill is that the company or organisation as a whole could be charged with corporate killing where, as the result of systematic management failure resulting in death, their behaviour fell below what could be considered ‘reasonable in the circumstances’. The new proposal targets ‘management failure’ covering ‘substantial and operating causes' including diffuse negligence of health and safety requirements, which are endemic in the organisation and result in the death of an individual. For the first time an organisation as a whole may be prosecuted without having to identify evidence of a ‘controlling mind’ behind the tragedy. Companies should be proactive in reporting health and safety and environmental issues. Companies should not escape accountability. Compensation should be used to repair the environment. Regulatory inertia in the prosecution of environmental damage needs to be eradicated.

Attitudes must also change. Companies should be proactive in reporting health and safety and environmental issues. Companies should not escape accountability. Compensation should be used to repair the environment. Regulatory inertia in the prosecution of environmental damage needs to be eradicated.

The environment needs a special legal forum, as environmental law can no longer be regarded as a ‘people-centred’ discipline. There is a marked trend of specialisation in the court structure, which arguably goes part way to addressing the need for judicial specialisms in environmental cases. Perhaps the UK should consider establishing an environmental tribunal, which can deal with cases swiftly, effectively and consistently whilst permitting access to the public, including interest groups.

The group believes that access for interest groups should be interpreted more widely than under either the current UK court system or in the draft Access to Justice Directive. Legal aid should be provided to individuals and groups bringing claims to the tribunal on a similar 'means tested' basis as currently applies in criminal cases, with the addition of a substantive consideration of the merits of the case (e.g. for individuals to bring a case even if they do not have a 'property interest' or live in the locality, because the environment affects us all).

The tribunal could deal with regulatory appeals, issues relating to contaminated land, statutory nuisance and pollution control as well as enforcement actions and prohibition notices. It should be made up of a chairman with specialist knowledge of environmental law issues, who would sit alongside other experts in the environmental field. Decisions of the tribunal would be subject to appeal to a higher environmental appeals tribunal and from there to the Court of Appeal and House of Lords. The tribunal could be brought under the wing of the newly established unified Tribunals Service.

Transboundary issues

Whilst the European Union and the World Trade Organisation must be encouraged to consider the environment as a fundamental concern when taking decisions, neither are environmental organisations and may not therefore be the best forums to resolve such issues.

To achieve a balanced outcome, a neutral body should be established to define the systemic relationship between environmental and trade rules, to set the boundaries for liability and action as a result of transboundary pollution incidents and to ensure that 'developed' nations assist 'developing' nations through technology transfer and other such mechanisms to achieve international environmental goals.

To be successful, such a body requires mandatory powers to take action against transgressors, to require remediation where environmental harm has been caused and to recover the costs from transgressor states. A global environmental protection fund should be created, along the lines of the US Superfund, which would be funded by contributions from all nations based on a percentage of GDP and staffed by experts able to conduct remediation exercises. Such a fund could be extended to contribute towards the costs of remediation of environmental damage caused by natural disasters, many of which are in any event seen as being linked to climate change.

In addition, nations that prove to be persistent polluters should be required to make additional contributions to cover the costs of remediating their polluting activities, perhaps on a daily basis until the polluting activity ceases or the damage has been remediated in a similar way as under Article 228 EC Treaty.

In the case of war, the resultant environmental and social costs should be borne by the aggressor. Such a funding body must have 'teeth' and be able to enforce its decisions. An international environmental court should therefore be created with compulsory jurisdiction to hear cases concerning international environmental matters, with the power to order remediation and payment through the fund outlined above.

Concluding event

All six participating countries and their Justice Ministers, including our own Lord Falconer, attended the final conference in Paris in March 2004. The European Justice and Home Affairs Commissioner, Mr Antonio Vitorino, and the Secretary General of Interpol France, Ronald Noble, were also on the panel. The French Minister of Justice warmly welcomed and thanked all the young lawyers. The Ministers and the speakers from each country presented the conclusions for each project and suggested whether this was a recommendation that should be taken forward. All study projects were handed to Mr Antonio Vitorino on a CD to take back to the European Commission.

The study projects showed that co-operation in devising new ideas is possible, though harmonisation might be more problematic. Each country faced different issues and certain projects were seen as more important to them than others. Whether the go-ahead was given for a certain project or recommendation really depended on what was important in that country in terms of its economy and society, political situation and priorities, institutional structure and available funding.

Control of Asbestos at Work Regulations 2002: Regulation 4 – "Duty to Manage"

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The purpose of this note is to act as a reminder that regulation 4 of the Control of Asbestos at Work Regulations (CAWR) 2002 came into force on 21st May 2004.[1] It introduces a duty to manage the risk posed by the presence of asbestos in non-domestic premises. 'Non-domestic premises' means all premises or parts of premises which are not private dwellings where people live. In a block of flats, this would exclude the flats themselves, but include the common parts such as stairs, lifts and service areas.

The Health & Safety Executive (HSE) introduced regulation 4 as it was particularly concerned about the potential risk of exposure to asbestos dust from materials which are part of the fabric of the workplace buildings, plant and premises. Although CAWR 1987 helped to protect workers in situations where it was foreseeable that asbestos may be encountered, a major problem that faced workers was that they did not know when, and where, they might encounter the substance. The concern was that there simply was not enough information available in order for thorough risk assessments to be carried out.

Regulation 4 places an explicit duty on persons in control of non-domestic premises to assess the risks from asbestos in the premises in circumstances ranging from normal occupation of a building, to repair, refurbishment and, where necessary, removal of asbestos, and to formulate an action plan to show how they intend to manage those risks. Regulation 4 is intended to help prevent accidental exposure to asbestos in the workplace by ensuring that a system is in place that documents its presence, location and condition on all premises.

The HSE has issued an Approved Code of Practice (ACoP) to explain the new regulation and a Guidance booklet.[2]

Regulation 4(1)

The key to regulation 4 is to understand the identity of the person upon whom the duty is imposed. The duty to manage rests with the "dutyholder". The dutyholder is defined under regulation 4(1). It includes everyone who has any obligation, either by being the landlord or by a contractual arrangement, for

[1] The Control of Asbestos at Work Regulations 2002 came into force on 21st November 2002.
[2] Health and Safety Executive's Approved Code of Practice and Guidance "The management of asbestos in non-domestic premises", L127, (ISBN 07176 23823).

maintaining or repairing non-domestic premises. Where there is no contract or tenancy, the person in control of non-domestic premises (or who has the means of access or exit) is the dutyholder. Shared arrangements are defined. The Guidance says where a change in ownership or tenancy occurs relevant information about the presence of asbestos should be passed on. Depending on the circumstances, the dutyholder could include, for example, the assignor of a lease; architects; surveyors; managing agents, an employer who is a freeholder/occupier; and builders working on the premises (see below). The duty may be delegated to someone who is competent and properly briefed (e.g. a surveyor). There can be more than one dutyholder. Multiple duties will be either complementary (e.g. the landlord for the external and common parts and the lessee for the internal parts) or overlapping (e.g. all the intermediate landlords in a chain of sub-tenancies). Each duty holder remains responsible for ensuring that their duties under regulation 4 are carried out. No dutyholder can 'contract out' of their duties.

Regulation 4(2)

Everyone is required to co-operate with the dutyholder. The Guidance identifies architects, surveyors, building contractors, etc.

Regulation 4(3)

The dutyholder must carry out a suitable and sufficient assessment of whether asbestos is present in any premises. A full professional survey consisting of safe sampling of substances and professional analysis is not required. The identification of asbestos could be achieved through engaging a surveyor to inspect the premises and take samples as appropriate; or presuming materials contain asbestos and acting accordingly. If there is any doubt regarding the presence of asbestos, an appropriately qualified specialist should be engaged to advise on the best course of action.

Regulation 4(4)

In making the assessment such steps as are reasonable in the circumstances shall be taken and the condition of any asbestos present shall be considered.

Regulation 4(5)

The dutyholder shall also:

1. take into account building plans, other relevant information and the age of the premises;
2. inspect the reasonably accessible parts of building;
3. review the assessment if there is reason to believe it is no longer valid or there has been a significant change to the premises.

A systematic search must be made of all the documentary information that can be obtained including: plans; drawings; specifications; builders invoice and maintenance records. A systematic search of the inside and outside of the building must also be made: the materials actually used in construction may not be what was specified; earlier removal of asbestos may not have been carried out to modern day standards. The search should include hidden areas within, e.g., roof voids, pipe ducts, fire doors and walls. Any material which looks as if it might contain asbestos should be presumed to be asbestos until analysed.

Regulation 4(7)

The dutyholder must record the conclusions of the assessment including any reviews.

Regulation 4(8)

Where the assessment shows that asbestos is present or liable to be present the dutyholder shall:

1. determine the risk from that asbestos;
2. have a written plan or drawing of where the asbestos could potentially be found;
3. specify in the plan the measures to be taken for managing the asbestos risks.

A risk is the chance that someone will be harmed and will depend upon a number of factors, including the type, location and condition of the material; what maintenance and other disturbances are likely to take place etc. Delegation of the risk assessment phase of the exercise is not permitted.

The plan must specify the measures to be taken to counteract the risk, which must include the means by which the asbestos is to be properly maintained or safely removed; the condition of the asbestos which is to be monitored; and the information about the asbestos that is to be made available.

Regulation 4(9)

The measures to be specified in the plan should include adequate measures for:

1. monitoring the condition of any asbestos or any material suspected of containing asbestos;
2. ensuring any such substances are properly maintained or where necessary safely removed;
3. ensuring information about the location and condition of the above is provided to any person likely to disturb it and to the emergency services.

The ACoP states no-one must work on asbestos-containing materials unless the requirements of CAWR 2002 are complied with. The Guidance says as a minimum the condition of the material should be checked every 6-12 months even if it is in good condition and not likely to be disturbed. The Guidance suggests the labelling of all asbestos as one way of alerting people.

The Guidance gives two examples of how plans may be managed:

1. a full professional survey with sampling and professional analysis leading to once and for all removal of asbestos;
2. a presumption that all likely materials do contain asbestos plus an intention to deal with it as needed. There should be systems in place that prevent any work being done on anything that might contain asbestos until professional analysis is carried out and any necessary removal completed safely before work commences.

The HSE comments that most situations are likely to lie somewhere between these two examples.

The plan should specify the measures by which information about the location and condition of the asbestos is provided to every person liable to disturb it (e.g. employees; contractors involved in building maintenance; contractors involved in installing telephone wires, computer / electrical equipment etc.) and made available to the emergency services (e.g. fires services; safety representatives etc.). For example, the measures will have to include a means for providing this information to new employees as part of their induction training and to existing employees moving from a different location. The plan should provide for the possibility that the main contact may not be available when their knowledge is required. (N.B. Additionally, the Health and Safety at Work Act 1974 requires the employer to protect the health and safety of people who might be affected by the organisation's undertaking, whether they work for them or not. The Management of Health and Safety at Work Regulations 1999 expand on these duties by requiring employers to assess risks to health and safety of employees and others who might work on their premises and to identify what measures are needed to protect them. Employers must make

appropriate arrangements to put in place the necessary preventative or protective measures). The regulation does not state that you have to inform your liability insurers. However, it is advisable to inform them of the discovery of asbestos-containing materials on your premises and to state the steps you are taking and/or provide them with a copy of the plan to show them how you intend to manage those risks.

Regulation 4(10)

The dutyholder must:

1. review the plan regularly and also when there is reason to suspect it is no longer valid or there has been significant change to the premises;

2. ensure measures specified in the plan are carried out;

3. ensure measures taken to implement the plan are recorded

If any asbestos is to remain at the premises, the plan will need to specify if it needs to be repaired and how it is to be managed in the future. The initial survey assessment and the plan must be reviewed and revised at regular intervals (especially if either is suspected to be no longer valid or if there has been a significant change in the premises). The Guidance states that as a minimum, the arrangements should be reviewed every six months, even if there have been no changes.

Enforcement

Breach of the regulations and failure to co-operate with a dutyholder are criminal offences, thus liable for prosecution in the Magistrates' Court or Crown Court.

THE ENVIRONMENTAL JUSTICE PROJECT

Pamela Castle, Chairman, Environmental Law Foundation

The Environmental Justice Project (EJP) comprising the Environmental Law Foundation , Leigh, Day & Co and WWF-UK reported in March on its research into the efficacy of environmental law in England and Wales with regard to providing environmental protection and enabling all members of society to realise their environmental rights. It covers both civil law (public and private) and criminal law.

Methodology

In the absence of centrally held data on the civil law system the subjective opinions of some 50 respondents, (including 18 solicitors, 20 barristers and 15 environmental NGOs) were obtained by means of responses to questionnaires and attendance at workshops.

Data on environmental and wildlife crime was gathered from a range of Government departments, enforcement agencies and NGOs.

The draft Report was also refined in the light of discussions held with politicians, civil servants and senior members of the judiciary in early 2004.

Civil Law

Ninety seven per cent (97%) 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/or sympathy with, environmental issues, the limited scope of judicial review proceedings and an inability to obtain interim (injunctive) relief.

Costs

Eighty two per cent (82%) of respondents are "not satisfied" with the current rules on costs. Of the remaining respondents, eighteen per cent (18%) are only "quite satisfied", and none are "very satisfied". Practitioners advise many potential clients about Judicial Review (JR), but arguable cases are often not progressed because of the costs implications. As such, many practitioners believe the current costs rules are a major impediment to access to environmental justice by a highly significant proportion of the population. These concerns are echoed by the NGOs, who take strategic decisions on legal action with an eye as much to resources as legal principles. Many respondents point out that the current regime precludes the UK from compliance with the Aarhus Convention and by implication, social exclusion from the Courts, and believe that a review of the current costs regime for public interest cases lies at the very heart of achieving access to environmental justice.

Handling of environmental cases

Nearly two thirds of respondents (66%) do not think the Courts' understand environmental issues, and 44% of respondents recommend environmental training for the judiciary. However, there is an important distinction to be made between different types of civil claim. Private claims relating to property damage and nuisance appear to fare reasonably well if they get to court, but private law claims concerning environment/personal injury and public law claims do not fare as well. This may be because these claims often concern wider issues, affect large numbers of people (hence raising concerns about floodgates), or require the judiciary to take a bold or expansive approach.

Limited scope of judicial review

Although not questioned directly about this issue, over a quarter of respondents (26%) raised the limited scope of JR as a barrier to environmental justice.

Injunctions and standing

Other concerns raised about JR include an inability to obtain interim relief (injunctions) (21%) and uncertainty on the position with regard to standing. Thirteen per cent (13%) of respondents are "not satisfied" with the application of the current rules on standing, and a further 59% are only "quite satisfied".

Land-use planning and awareness

Respondents are clear that public inquiries must be seen as part of the access to justice regime, however, the absence of public funding for third party objectors is perceived to be a barrier to public participation by two respondents. Eighteen per cent (18%) of respondents are concerned about the absence of a third party right of appeal in the land use planning system.

RECOMMENDATIONS

Amendments to the Civil Procedure Rules

The EJP strongly recommends amendments to the Civil Procedure Rules and Practice Directions by means of which Judges would be empowered to certify that in certain cases of public interest there would exist:

-a revised costs regime, in which the judge could dis-apply the present costs rules and substitute them with an order that each party bears its own costs. The revised rules could also give the judge the discretion to order that the costs of the applicant be paid out of public funds. Alternatively, the judge might rule that a pre-emptive costs order were appropriate. The revised rules could also give the judge the discretion to waive court fees in certain cases;

-a presumption against the requirement to provide a cross undertaking in damages in order to achieve interim (injunctive) relief;

-clarification of the current rules on standing.

Judicial Training

There is a need for changes in judicial understanding of, and empathy with, environmental issues.

Environmental Court or Tribunal

The EJP is of the view that change of this magnitude can best be realised by the creation of a specialist forum, that is, a separate environmental court or tribunal, with the jurisdiction to hear all civil law claims with a significant environmental component. Not all EJP respondents are sympathetic with this view on the grounds that environmental cases might be sidelined.

The EJP supports the concept of a specialist environmental forum for several reasons.

Firstly, it is 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 and because of this we are 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 or tribunal 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 socially excluded 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*".

On the question of resources, we do not believe the establishment of an environmental court as part of the High Court would 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. The relative costs and benefits of specialist environmental courts at County Court level are beyond the scope of this Report, as are those relating to an environmental tribunal, although this will obviously need to be clarified as part of the process of taking any such initiative forward.

The establishment of an environmental court/tribunal must form part of a suite of measures to improve access to environmental justice by all sections of society, some of which could be progressed while securing Parliamentary time.

These include:

- amendments to the Civil Procedure Rules (and associated Practice Directions) in relation to costs, standing and interim relief (injunctions) –see above;

- a programme of training and guidance. The EJP recommends that the Judicial Studies Board be asked to initiate a programme of judicial training, to include the principles of sustainability;

- guidance on "*Wednesbury* unreasonableness" as a ground for judicial review in environmental cases, which would allow the Court to take the merits of an environmental case into account;

- prioritising funds within the Community Legal Service towards public interest environmental cases. This will ensure that public funding continues to be 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. This may include consideration for the establishment of an environmental advice agency or the provision of information about issues of concern (waste, nuisance, pollution etc.) and details of organisations active in environmental law (and how to contact them).

- miscellaneous: the introduction of a limited third party right of appeal in the land-use planning system; individuals making representations to a planning authority should be informed, on or before receiving the authorities' decision, of the availability of JR; removing the requirement for duplicate documents in the Administrative Court and requiring skeleton arguments to be served earlier; further research into complex issues of causation (e.g. the effects of pesticides and hazardous chemicals on the environment).

CRIMINAL LAW

In contrast to the civil law system, respondents and workshop participants do believe the existing criminal justice framework is reasonably satisfactory. The EJP, therefore, does not recommend any substantial change to present structures within the criminal system.

Fines for environmental offences, despite recent guidance from the Court of Appeal, fines remain too low and tariff guidelines (as opposed to Guid*ance*) would be helpful and it is clear that many determined and persistent offenders do not respond to fines.

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 believe the penalties should show a greater correlation with the environmental damage caused, thus providing an effective deterrent to would-be and re-offenders. While such 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 other specific powers of the enforcement agencies (see below).

RECOMMENDATIONS

Penalties

- Tariff guidelines for environmental and wildlife offences should be issued by the Sentencing Guidelines Council.

- When sentencing, the judiciary should place particular emphasis on the environmental or ecological impact, or potential ecological impact, of an offence. Wherever possible, the level of fine should reflect the economic gain arising from the offence. Magistrates should be encouraged to take account of the maximum fine available for environmental offences, i.e. £20,000.

- Greater use of custodial sentences should be made.

- Magistrates and Judges are encouraged to apply the full range of sentencing options available: the fining or imprisonment of individual company directors, disqualification of

company directors under the Company Directors Disqualification Act 1986 and the imposition of Community Service Orders in respect of individuals.

- 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 company directors have a proven "clean" environmental record.

- The EJP supports the concept of civil environmental penalties, although they should represent an additional measure, in terms of flexibility and proportionality, over and above an effective criminal justice system. Consideration be given to requiring the enforcement agencies to provide a reasoned decision as to why it has chosen to pursue a civil penalty rather than a criminal prosecution when significant environmental damage has ensued. Furthermore, the use and effectiveness of such penalties should be monitored closely, and guidelines drawn up regarding the level of the penalty. Such guidelines should place particular emphasis on:

    - the nature of the offence (seriousness, repeated etc.);
    - the environmental damage caused;
    - any profits gained;
    - the defendant's ability to pay; and
    - other aggravating or mitigating circumstances.

Handling of Environmental Cases

Magistrates should apply "*Costing the Earth - Guidance for sentencers*" which should be expanded to cover a wider range of environmental offences and information on sustainable development. Guidance should be produced for use in the Crown Courts and accompanied by a programme of training for Crown Court Judges (a responsibility of the Department of Constitutional Affairs). The effectiveness of the Guidance should be monitored and evaluated.

Specialised Magistrates' Courts and/or Magistrates should be designated.

Statutory powers

The powers of the enforcement agencies should be augmented, for example, in relation to the power to stop people/vehicles and to request names and addresses; the power to require suspected offenders to take part in interviews; the power to serve notices with immediate "stop" provisions without the need to obtain injunctions or provide time to comply.

Resources

Enforcement agencies such as the Police Service, CPS, Environment Agency and district and unitary authorities should be adequately resourced to investigate offences and pursue the full range of enforcement options available to them.

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

Other

As with civil law, the EJP supports the development of a national database of criminal cases and action to increase knowledge of environmental rights and how to enforce them.

CONCLUSION

The EJP Report sets out the first analysis of how the whole spectrum of environmental law is working in practice. It is hoped that at least some of its recommendations are acted on in the near future. We are grateful to DEFRA for partially funding the research.

The Report is now available on the UKELA website at www.ukela.org in pdf format or can be obtained from the Environmental Law Foundation office at:

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NEW GUIDANCE FOR SMALL BUSINESSES ON ENVIRONMENTAL LAW

The UK's environmental regulators have joined forces to launch a free website – www.netregs.gov.uk – to help small businesses understand their environmental obligations and avoid green fines.

Smaller businesses generate about 60% of commercial waste and are responsible for as much as 80% of pollution incidents. Alarmingly, only 18% of 8,000 small UK businesses recently questioned could name any environmental legislation. Less than a third (31%) had heard of the Duty of Care Regulations, which control the storage, handling and disposal of waste and apply to all UK businesses.

The NetRegs website contains clear, authoritative guidance on the environmental regulations governing a wide range of industry sectors, including construction, agriculture, hotels and restaurants, land transport and a number of manufacturing industries. It also includes information on forthcoming legislation and good practice advice that can help businesses save money and become more competitive.

Law firms are being urged to recommend NetRegs to their small business customers and also to check out their own environmental responsibilities on the website. The newly launched guidelines for office-based businesses offer advice on the environmental regulations affecting them and ways to minimise their impact on the environment and reduce costs by improving the use of office resources.

As a regularly used source of advice for small businesses, solicitors are well placed to help them improve their environmental performance. NetRegs should help smaller businesses understand and comply with the environmental legislation affecting their particular activities. These days compliance is not just good for the environment, improving their green credentials can help small firms save money and win business.

Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage

Issues for Discussion

This paper briefly describes the main provisions of domestic law that will be supplemented by the Environmental Liability Directive ("ELD") when it is transposed into domestic law by 30 April 2007. The paper then sets out several scenarios to illustrate some of the potential overlaps or other difficulties in transposing the ELD. Finally, the paper raises several issues for discussion and comments.

This paper assumes, for purposes of discussion, that the ELD will be transposed by amending and adapting existing regimes, with additional provisions in respect of the new liabilities under the ELD by either statutory or secondary legislation (depending on the nature of the provisions).

A. Existing domestic law

The following are the main provisions of existing domestic law that will be supplemented by the ELD. Some of the main differences with the ELD are indicated. In addition, none of the provisions include the exceptions or defences in the ELD, its limitation periods or liability for complementary or compensatory remediation. Further all of the provisions have a different threshold of harm for liability under the ELD and a different standard of remediation than the ELD.

1 Part IIA of the Environmental Protection Act 1990 ("EPA 1990") imposes liability for remediating:

- contaminated land (with a higher threshold for harm to human health than the ELD but a wider definition of "contaminated land");
- contaminated land that significantly harms or poses a significant possibility of significant harm to designated ecological areas (with a wider range of protected ecosystems than the European sites that must be covered by the ELD); and
- contaminated land that significantly harms or poses a significant possibility of significant harm to crops, livestock, animals subject to hunting rights, fish subject to fishing rights, pets and buildings (not covered by the ELD); and
- contaminated land that significantly harms or poses a significant possibility of significant harm to controlled waters (when section 86 of the Water Act 2003 is brought into effect);

2 Sections 161 to 161D of the Water Resources Act 1991 ("WRA 1991") and the Anti-Pollution Works Regulations 1999 impose liability for remediating the threatened or actual pollution of controlled waters and the restoration of damaged fauna and flora that are dependent on the aquatic environment (with a different definition of natural resources than the ELD);

3 Section 59 of the EPA 1990 imposes liability for removing unlawfully deposited controlled waste (with a potential overlap with the ELD concerning damage to land);

4 Regulations 24 and 25 of the Pollution Prevention and Control (England and Wales) Regulations 2000 ("PPC Regulations") impose liability on an operator to remedy environmental damage or to reimburse the competent authority for its remediation costs (with a wider scope of environmental damage than the ELD);

5 Schedule 4 of the PPC Regulations requires an operator to restore the site of an installation to a satisfactory state when the operations cease (with a wider scope of environmental damage than the ELD);

6 Section 39 of the EPA 1990 requires holders of waste management licences to ensure that the licensed site does not cause pollution of the environment or harm to human health before the Environment Agency ("EA") will accept the surrender of the licence (with a wider scope of environmental damage than the ELD). (Section 38 of the EPA 1990 provides similar liabilities in respect of the suspension of waste management licenses.);

7 Section 31(1) of the Wildlife and Countryside Act 1981, as amended by the Countryside and Rights of Way Act 2000, provides for a restoration order to require a person who is convicted of destroying or damaging the features of a site of special scientific interest ("SSSI") to restore the SSSI to its former condition (covers more sites than the ELD); and

8 Regulation 26(1) of the Conservation (Natural Habitats, etc) Regulations 1994 provides for an order to require a person who is convicted of breaching a special nature conservation order to restore a European site to its former condition (lower threshold than the ELD).

9 The above list does not include the Integrated Pollution Prevention regime because it will have mostly been superseded by 30 April 2007.

B. Scenarios to illustrate overlaps and other difficulties in transposing the ELD

1 On 15 June 2007, the EA requires the operator of an occupational activity under legislation listed in annex III of the ELD to remediate environmental damage to groundwater caused by a release of diesel from an above ground storage tank. The tank began to leak on 1 June 2007. During the remediation, the operator discovers hydrocarbons in the ground and in the groundwater from corroded underground storage tanks ("USTs") that he discovers on the site. The USTs leaked diesel prior to 30 April 2007. The harm to the groundwater is indivisible (that is, it is not possible to distinguish the source of the pollutants in it and it is not possible to separate the measures to remediate it). The owner and operator of the USTs is discovered to have been dissolved for many years and the current operator had no reason to believe that the USTs were on the site when it purchased the site. The WRA 1991 and the ELD (and, perhaps, the PPC Regulations) apply to the remediation of the contamination from the above ground storage tank. Part IIA applies to the remediation of the contamination from the USTs.

2 Assume the facts of the first scenario except that the leaked diesel from the USTs is entirely in the groundwater so that the WRA 1991 applies to the loss of diesel from both the above ground storage tank and the USTs and the ELD (and, perhaps, the PPC Regulations) apply to the loss of diesel from the above ground storage tank.

3 Assume the facts of the first scenario except that the operator is conducting an occupational activity that is not listed in annex III of the ELD and a European site is harmed due to the polluted groundwater entering the site via a spring in it. The WRA 1991 and the ELD apply to the remediation of the site.

4 Assume the facts of the second scenario except that a buried corroded UST containing creosote is also discovered on the site. Further, the creosote is continuing to seep to the groundwater and the current owner or occupier did not know and had no reason to know of its existence when it purchased the site. The harm to the groundwater from the diesel and creosote is indivisible in

that the remediation measures for both are the same. The WRA 1991 and the ELD (and, perhaps, the PPC Regulations) apply to both of the losses of diesel. Part IIA applies to the loss of creosote.

5 On 1 July 2007, there is a substantial spill of benzene from a large above ground storage tank at a petro-chemical facility that is located next to a river. The cause of the spill is a malfunction in a new crane, operated by an employee, leading the crane to drop a large piece of equipment onto the tank and its bund, severely damaging both. The spill causes severe damage to a European site next to the facility. The environmental damage includes the destruction of fauna and flora that are dependent on the aquatic environment. The PPC permit does not contain an emission limit value for benzene. The operator of the factory is otherwise fully in accordance with the conditions of his PPC permit. The operator is liable for remediating the contamination and restoring the fauna and flora that are dependent on the environment under the WRA 1991 and the PPC Regulations. Depending on whether and, if so, how the compliance with a permit defence is transposed into domestic law, the operator has a defence to liability under the ELD.

C. Issues for discussion and comments

Please assess the merits and disadvantages of the following approaches to transposing the ELD. In doing so, please discuss any issues raised by the various approaches.

1 Transposition of the ELD by:

- amending and adapting the legislation listed in section A of this paper and if so, which legislation;
- introducing a free-standing set of regulations for the ELD;
- both; or
- another method.

2 Establishing the competent authority(ies) for the ELD as:

- the EA;
- the EA and local authorities;
- the EA, local authorities and English Nature; or
- other authorities.

3 Transposing the ELD so that it reflects:

- the liability system under Part IIA; or
- the liability system under the WRA 1991 and other regimes for current and future pollution.

4 Establishing the scope of liability for indivisible environmental damage under the ELD as:

- joint and several liability;

- joint and several liability with a system for considering equitable factors in apportioning liability; or
- proportionate liability.

5 Applying the exceptions in the ELD to:

- some of the legislation listed in section A of this paper; or
- all of the legislation listed in section A of this paper.

6 Adopting the compliance with a permit and state of the art defences (assuming they are adopted) as:

- partial defences; or
- total defences.

7 Adopting the compliance with a permit defence:

- at all;
- if it is adopted, applying it to all of the legislation in annex III of the ELD;
- if it is adopted, applying it to some of the legislation in annex III of the ELD;
- if it is adopted, limiting it in respect of the IPPC regime to a defence for environmental damage from pollutants that are discharged pursuant to the emission limit values in a PPC permit;
- if it is adopted, applying it in respect of the IPPC regime to a defence to all liabilities resulting from the operation of an installation;
- if it is adopted, applying it to some of the legislation listed in section A of this paper; or
- if it is adopted, applying it to all of the legislation listed in section A of this paper.

8 Adopting the state of the art defence:

- at all;
- if it is adopted, applying it to all of the legislation in annex III of the ELD;
- if it is adopted, applying it to some of the legislation in annex III of the ELD;
- if it is adopted, applying it to some of the legislation listed in section A of this paper; or
- if it is adopted, applying it to all of the legislation listed in section A of this paper.

9 Adopting the standard for remediation for land in the ELD (“significant risk of human health”) for:

- some of the legislation listed in section A of this paper;
- all of the legislation listed in section A of this paper; or
- none of the legislation listed in section A of this paper.

10 Adopting the limitations periods of the ELD for:

- some of the legislation listed in section A of this paper;
- all of the legislation listed in section A of this paper; or
- none of the legislation listed in section A of this paper.

11 Article 8(3) of the ELD states that "Member States shall take the appropriate measures to enable the operator to recover the costs involved [in certain situations when environmental damage is caused by a third party]". Article 10 entitles a competent authority to initiate cost recovery proceedings against such a third party. How do you envisage these provisions being transposed.

WORKING GROUP
CONFERENCE SESSIONS – SATURDAY 3 JULY 2004-07-08

UKELA WATER WORKING GROUP

The Water Working Group held a session at the UKELA Annual Conference to review the practical impact of the Water Framework Directive. The session was chaired by Mark Brumwell. Mark introduced speakers Tim Jewell from DEFRA, Pete Carty and Huw Williams from the Environment Agency and Peter Howsam from Cranfield University. Tim Jewell outlined the timetable and chief stages to the introduction of the Water Framework Directive; Pete Carty and Huw Williams reviewed the Agency's proposals for public participation and Peter Howsam gave a non-legal perspective, focussing on the underlying purposes and effect of the Directive. Speakers emphasised the importance of getting involved in the developing implementation of the Water Framework Directive. The Directive introduces outline objectives and structures with much important detail being established over the coming months. Various opportunities for involvement in this process are available.

Mark J Brumwell
Convenor – Water Working Party
Update for e-law

Future Training Events

UKELA is planning two further training events in partnership with the Association of Personal Injury Lawyers (APIL). Following the success of this April's event we have scheduled a Practice and Procedure update early next year, following by a Hot Topics update next April. They will be based on the same popular half day format as this year's event with excellent papers and presentations. Some of the topics we propose including are nuisance, health and safety, case and comment, costs and funding, inquests and access to information. If you have any suggestions for topics or speakers that you think will be attractive and useful to members of both organisations, please email Vicki.elcoate@ntlworld.com.

E-library Funding

UKELA and the Centre for Business Relationships, Accountability, Sustainability and Society (BRASS) based at Cardiff University are looking for funding to establish an e-library on environmental law (the research which led to this proposal was published in the last edition of e-law). About £165,000 is needed

to set up a fully-fledged e-library covering the main areas of environmental law which are likely to be of most interest to the public. This initial phase will take a year and involve 2 members of staff with supervision from UKELA and BRASS. A voluntary editorial panel will oversee the updating and maintenance of the e-library after that. Funding is being sought from charitable trusts, government sources and others are being considered like the Landfill Tax Credit Scheme. If anyone has any suggestions or is a trustee of a charitable trust which may be able to help please email Vicki.elcoate@ntlworld.com. Some UKELA members may be in firms of solicitors which administer charitable trusts and may be able to advise on appropriate approaches. This is a substantial sum without which the project will not be able to go ahead, although we do not need the whole amount in order to be able to start work.

Photographic Library

UKELA now has a small photographic library and members will be able to borrow photos from it. Topics covered include landscape, biodiversity, energy, quarrying and development (both good and bad examples). The photos were commissioned from Chris Swan, a photographer living in north Wales, and are in publish quality digital format. The copyright belongs to UKELA. You can see some examples on the website at www.ukela.org or email Vicki.elcoate@ntlworld.com with a specific enquiry.

Environmental Industries Commission (EIC) Conference
Threats or Opportunities, the Regulatory Challenges Facing the Environmental Solutions Industry
3 November 2004 – London

Speakers include Rt Hon Margaret Beckett MP, Environment Secretary; Barbara Young, Environment Agency Chief Executive and Chris Davies MEP, Liberal Democrats' leader in the European Parliament.

The EIC promotes and supports the development of a strong, competitive UK environmental technology and services industry with a sound home market from which to compete successfully worldwide. It represents over 240 companies providing environmental solutions.

Attendance costs £345 plus VAT with UKELA members receiving a £50 discount.
For more information and to book email info@eic-uk.co.uk or phone 020 7935 1675.

E – LAW

The editorial team want letters, news and views from you for the next edition which will be issued in September 2004 – **Copy to Catherine Davey by 10 September 2004. Please use Word in Arial Font 12pt size. Thank you**

By Email to: Catherine.Davey@stevens- bolton.co.uk

Letters to the editor will be published, space permitting

Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

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