Tackling barriers to environmental justice 🐼

Access to environmental justice in England and Wales: a decade of leading a horse to water
About WWF-UK

WWF is at the heart of global efforts to safeguard the natural world, tackle climate change and enable people to use only their fair share of natural resources. We work with communities, businesses and governments in over 100 countries to help people and nature thrive.

As part of our determination to address the world’s biggest environmental challenges, we believe it’s important that individuals and civil society groups are entitled to access environmental information, engage in decision-making processes that affect the environment around them, and access the courts to challenge the decisions of public bodies and private persons that may be unlawful. Environmental ‘access rights’ are fundamental prerequisites of a democratic society built on the principles of transparency, participation and justice. All of these rights are embodied within the United Nations Economic Commission for Europe (UNECE) Aarhus Convention, which the UK government ratified in 2005.

CAJE is a coalition of the following organisations

CAJE includes a number of leading environmental NGOs in the UK including WWF-UK, Friends of the Earth, Environmental Law Foundation, Greenpeace, Capacity Global and the Royal Society for the Protection of Birds. CAJE’s goal is ensure that access to justice in environmental matters is fair, equitable and not prohibitively expensive; that it is genuinely accessible to all; and that the justice system, so far as possible, works to protect the environment in accordance with the law.

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1. Introduction

The United Nations Economic Commission for Europe (UNECE) Aarhus Convention opened for signature at Aarhus (Denmark) on 25 June 1998. The UK government, a long-standing supporter of the Convention, was among the early signatories. The prevailing view was that the UK, with its developed system of environmental law and liberal rules on standing, would already be in compliance with the provisions of the Convention.

However, in 2003, serious deficiencies in the civil law system in England and Wales regarding the access to justice pillar of the Convention (notably the requirement under Article 9(4) of the Convention that legal review procedures for securing access to justice be “fair, equitable, timely and not prohibitively expensive”) were highlighted in a number of reports partly or wholly funded by Defra. A decade after the Convention came into force – and despite the UK’s ratifying the Convention in 2005 – many of those shortcomings persist. It is for this reason that the Coalition for Access to Justice for the Environment (CAJE) decided to host a major event on the Aarhus Convention in autumn 2011, following the Fourth Meeting of the Parties to the Convention in Moldova in June 2011.

The aim of this paper is to provide that conference with an updated commentary on how perceived barriers to environmental justice have evolved since 2003, and what solutions could be employed to address them.

2. Background

The publication of the 2003 reports drew attention to the normal rule in UK litigation that, in general, the loser must pay the winner’s legal costs. The problem with the ‘loser pays’ principle is two-fold – exposure and uncertainty as regards to costs. In particular, CAJE expressed concern that this rule applies in judicial review, despite the fact that quite different public policy considerations apply, which arguably make the rule much less appropriate.

What followed were notable steps at judicial and international levels. There have been too many to describe in full here, so what follows is a brief canter through the highlights of the
last eight years – with apologies to those whose efforts I have had to skate over in the interests of brevity.

(a) Judicial concern and Corner House

In the 2004 case of Burkett, the then Master of the Rolls, Lord Justice Brooke, first raised the problem of high legal costs in the context of the Aarhus Convention. Shortly afterwards, in 2005, the Court of Appeal case of Corner House laid down a number of governing principles for awarding Protective Costs Orders (PCOs) – an order of the court by which it specifies or constrains at an early stage what the costs outcome of the case will be. These principles include that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. In fact, Corner House was not an environmental case. However, in the absence of an alternative regime for environmental cases the principles established in the case have been applied de facto to them.

Since Corner House, Lord Justice Brooke has indicated extra-judicially that he considered PCOs to be an emerging jurisdiction that would continue to develop over time. Furthermore, while the Court of Appeal subsequently held that the rules were to be applied ‘flexibly’, it has resolutely stuck to them as the guiding principles for dealing with PCO applications. This is unfortunate as a number of them have proven problematic. For example, in Berkeley, Mr Justice Underhill refused an application for a PCO on the basis that the issues raised, despite involving a large development in a prominent local site, was not one of general public importance. The Sullivan Report subsequently noted:

“In Corner House, the Court of Appeal accepted that PCOs should only be granted in ‘exceptional’ cases. But it now seems this ‘exceptionality’ test is being applied so as to set too high a threshold for deciding (for example) ‘general public importance’, thus overly restricting the availability of PCOs in environmental cases. For example, in a recent case, Bullmore, the implicit approach taken in the High Court and confirmed in the Court of Appeal was that there really should only be a handful of PCO cases in total every year. Such an approach if generally adopted would ensure that the PCO jurisdiction made no significant contribution to remedying the access to justice deficit it was intended to deal with, including in the environmental field. Unless the exceptionality criterion is eased, PCOs cannot be used in any significant way to assist compliance with Aarhus.”

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7 R (on the application of Sonia Burkett) v London Borough of Hammersmith & Fulham [2004] EWCA Civ 1342, see paras 74-80
8 R (Corner House Research) v Secretary of State for Trade & Industry [2005] 1 W.L.R. 2600
10 River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State [2006] EWHC 2829, see paragraph 10
Furthermore, in England\textsuperscript{12}, a differently constituted Court of Appeal noted that the requirement that the applicant must not have private interest in the matter was not necessarily consistent with Aarhus.

(b) EU infraction proceedings

In December 2005, CAJE submitted a complaint to the European Commission alleging that the UK was failing to comply with the new Article 10a of the EIA Directive\textsuperscript{13} that access to the courts be ‘not prohibitively expensive’.

The complaint resulted in a letter of formal notice to the UK in October 2007, a Reasoned Opinion on 18 March 2010, and an announcement that the case was being referred to the Court of Justice of the European Union (CJEU) on 6 April 2011. The Commission’s press release on the decision to refer the UK to the CJEU referred to the lack of clear rules for granting PCOs and their discretionary and unpredictable nature, recognising also that interim relief and injunctions generally were beyond the reach of most applicants\textsuperscript{14}.

In the author’s experience, the average length of time between lodging a complaint with the European Commission and judgment in the CJEU is approximately seven years. The complaint is therefore running slightly behind schedule – one reason being that during discussions between the Commission and the UK in early 2008, it was agreed to wait for the government’s reaction to the Sullivan Report (see later) before the Commission took the step of issuing the UK with a Reasoned Opinion\textsuperscript{15}.

Similarly, in light of Advocate General Kokott’s Opinion in case C-427/07 \textit{Commission v Ireland} in January 2009, the Commission decided to wait until the CJEU had delivered its judgment before deciding whether to refer the UK case to it\textsuperscript{16}. Case C-427/07 concerned Ireland’s failure to implement the Aarhus implementation provisions in the Environmental Impact Assessment (EIA) Directive (Art 10a of Directive 85/337 as amended by Art. 4(4) of Directive 2003/35) including the requirement that such cases be ‘not prohibitively expensive’. On that point, the CJEU held that judicial discretion cannot ensure compliance with the Aarhus provisions in the EC Public Participation Directive (PPD).

We do not know how long it will take for the UK case to be heard in the CJEU. However, it is possible that the infraction proceedings will be joined with questions on costs – and specifically on the question of whether prohibitive expense is to be decided on an objective (i.e. an ‘ordinary’ member of the public) or a subjective (by reference to the means of the

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\textsuperscript{12} \textit{R on the application of England v London Borough of Tower Hamlets and another} [2006] EWCA Civ 1742

\textsuperscript{13} Directive 2003/4/ EC on public access to environmental information and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC


\textsuperscript{15} Update letter to CAJE from Julio Garcia Burgues, Head of Infringements Unit, European Commission, dated 15 April 2008

\textsuperscript{16} Update letter to CAJE from Julio Garcia Burgues, Head of Infringements Unit, European Commission, dated 2 February 2009
\end{flushleft}
particular claimant) basis – referred to the CJEU by the Supreme Court in May 2011 in the case of Edwards\(^\text{17}\).

\(\text{(c) Sullivan I}\)

It is doubtful whether anyone – even Lord Justice Sullivan himself – could have anticipated how influential the reports of his Working Group would become in domestic case-law and the deliberations of international bodies on the issue of costs.

The origin of the first report lies in 2007, when Lord Justice Carnwath invited [then] Senior High Court judge Mr Justice Sullivan to establish a Working Group to consider the issue of access to environmental justice and the UK’s potential non-compliance with the Aarhus Convention. The members of the Working Group represented a wide range of experience in environmental litigation\(^\text{18}\). The ensuing report (Sullivan I) concurred with other 2003 reports in concluding that costs, and particularly the risk of exposure to costs should a case fail, inhibited environmental litigation and that unless action was taken, the UK would not be in compliance with Article 9(4) of the Aarhus Convention. In his foreword, Mr Justice Sullivan noted:

“For the ordinary citizen, neither wealthy or impecunious, there can be no doubt that the Court’s procedures are prohibitively expensive. […] Unless more is done, and the Court’s approach to costs is altered so as to recognise that there is a public interest in securing compliance with environmental law, it will only be a matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus.”

The Working Group concentrated on identifying measures that could be taken relatively easily and quickly within the existing legal framework, recognising that more substantial changes may be needed in the long term. Accordingly, the Working Group welcomed a more liberal application of the PCO regime as a mechanism for dealing with uncertainty of costs, but concluded that a number of the Corner House principles were not consistent with Aarhus. For example, the Working Group concluded that the Convention does not require challenges to be of ‘general public importance’ – once a court has determined that a case falls within the remit of the Aarhus Convention a PCO should generally be granted as of right if this was required for the litigation to continue. Similarly, the test of ‘no private interest’ should no longer apply in such cases.

Sullivan I also included other procedural recommendations to bring current practice more in line with the requirements of Aarhus. These covered interim injunctions where the general rule at the time was that a party securing an injunction would have to provide a cross-undertaking in damages should they subsequently lose the case\(^\text{19}\).

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\(^{17}\) R (on the application of Edwards and Another (Appellant)) v The Environment Agency and Others (Respondent)

\(^{18}\) While acting in a personal capacity, the author sits on the Working Group and the Secretariat is provided by Friends of the Earth

\(^{19}\) While the requirement for a cross-undertaking in damages was previously at the discretion of the court, on 6 February 2010, Practice Direction 25A on Interim Injunctions was amended to require any order for an injunction made by the court to contain an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay. See: www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part25a.htm
(d) The Jackson Review

In November 2008 the [then] Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate costs. Jackson, LJ published his preliminary report on 8 May 2009 (in preparation for a public consultation exercise) and his final report on 14 January 201020.

Chapter 30 concerned Judicial Review21 and made specific reference to Article 9(4) of the Aarhus Convention. The report referred to CAJE’s ongoing complaint against the UK in respect of the prohibitive costs of environmental litigation and a number of Communications in respect of the UK and costs being examined by the Aarhus Convention Compliance Committee (see later).

On the basis of the submissions received, Lord Justice Jackson concluded that ‘qualified’ one way costs-shifting (QuOCS) was the “right way forward”, principally on the basis that it is “the simplest and most obvious way to comply with the UK’s obligations under the Aarhus Convention”22. The report also concluded that the existing PCO regime does not protect claimants from excessive costs liability because it fails to provide certainty, is expensive and can come into play too late in the procedure23.

The report recommended that the proposed rule regarding personal injuries litigation24 should be adapted so as to include judicial review cases, as follows:

“Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate.”

CAJE (and others) welcomed the explicit recognition that action was needed to ensure the UK complies with its obligations under the Aarhus Convention. However, Lord Justice Jackson’s review left some significant unanswered questions about the manner in which QuOCS might operate and who it is intended to apply to. For example, the report questioned whether only certain categories of claimant merited protection against liability for adverse costs, including human as opposed to corporate25 – raising important questions in relation to environmental NGOs or community groups, which may exist as a charity and/or a limited company, but can find the costs of litigation prohibitively expensive.

In general terms the Jackson Report envisaged only three situations in which a costs order would be appropriate: (a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim); (b) where the defendant is neither insured nor a large organisation which is self-insured; or (c) where the claimant is conspicuously wealthy. However, Lord Justice Jackson’s recommendations still left open the possibility of a system

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21 Note that chapter 30 should be read alongside chapter 19 as the Report recommends that all cases concerning JR, personal injury and clinical negligence should be treated similarly
22 See n. 14, above – Chapter 30, paragraph 4.1(i)
23 Ibid – Chapter 30, paragraph 4.1(vi)
24 Ibid – Chapter 19
25 Ibid – Chapter 30, paragraph 4.2
being developed in which there was no advance certainty. That was because the system that was set out appeared to work on the basis of an assessment of costs at the end of the case.

(e) Developing case-law

Since the publication of Sullivan I, a number of cases have developed PCO jurisprudence both generally and specifically in the Aarhus/environmental context. Many of these judgments made reference to Sullivan I.

This paper is not the place to provide a detailed analysis of the developing jurisprudence on PCOs. However, it is relevant to make a general observation before noting the key points arising from the case-law. The fact that most of these cases are Court of Appeal cases, which at times conflict on the preferred approach to the application of the Corner House criteria, has continued to cause significant problems on the ground. Not only is such satellite litigation costly and time-consuming, it exacerbates the ‘chilling effect’ associated with prohibitive expense experienced by individuals, community groups and NGOs. Of all the cases, Garner represents the most significant step forward and gives comfort to claimants hoping to challenge decisions covered by the EC Public Participation Directive (PPD). However, in the absence of codification it is simply another Court of Appeal case in the mix and, most importantly, it affords no hope to those seeking to challenge environmental decisions outside the ambit of the PPD.

As of summer 2011, the following key points arise from the case-law:

1. The Court of Appeal has expressly recognised that the requirement that cases be ‘not prohibitively expensive’ applies to the totality of costs in a case – including potential liability for adverse costs (Morgan §47(i));

2. In cases where an Aarhus implementing EU Directive is engaged, then the court has recognised that judicial discretion on costs may be insufficient to ensure compliance with the relevant requirement (Morgan §47(ii); Garner §49);

3. There has been a marked judicial reluctance to develop a separate set of PCO principles for environmental judicial reviews. The Court of Appeal and the High Court have repeatedly stressed that there ought to be a single set of principles applicable across all judicial reviews (e.g. Compton (§20); Morgan §47(iv));

4. The judiciary has expressed concern that the system of applying for PCOs ought not to develop in such a way as to promote satellite litigation on costs (e.g. Compton (§9); Ely (§11));

5. In cases covered by the EC Public Participation Directive (i.e. EIA and Integrated Pollution Prevention and Control (IPPC), there is no justification for the application of the issues of ‘general public importance/public interest requiring resolution of those issues’ in the Corner House conditions (Garner §39); and

6. A purely subjective approach as to whether review procedures be ‘not prohibitively expensive’ under Article 10a of the EC PPD is inconsistent with the objectives underlying the Directive (Garner §46) and may deter members of the public from challenging the lawfulness of environmental decisions contrary to the underlying purposes of the Directive (Garner §50).

26 These include, for example, McCaw (§9), Buglife (§16), Morgan (§§ 16, 32, 33, 38 & ors) and Compton (§19)

27 EC Directive 2003/35/EC
(f) Sullivan II

In light of the ECJ’s decision in Commission v Ireland, the Sullivan Working Group was of the view that a PCO regime entirely dependent on the exercise of judicial discretion cannot provide requisite certainty such as to fully ensure compliance with EU law and the Aarhus Convention. Similarly, while welcoming the findings of the Jackson Review in respect of judicial review, the Group felt that the proposals were insufficiently precise to be welcomed unambiguously.

In Sullivan II, the Working Group welcomed the Jackson recommendation to introduce QuOCS (rather than merely to improve PCOs) across the judicial review board on the basis of simplicity and compliance with Aarhus. However, the Working Group proposed a different formulation of the rule proposed by Jackson, LJ below:

“44.X An unsuccessful claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings.”

The basis for what was perceived to be a simple yet elegant rule was certainty – both at the outset of the proceedings and with regard to the total liability potentially incurred. First, the Working Group felt that a prospective claimant must be sure of the extent of his liability at the outset. Any system of QuOCS must be designed such that the nature of the ‘qualification’ is abundantly clear in order that the claimant knows that s/he will not face liability for costs other than in very clearly specified (and narrowly drawn) circumstances.

Second, the Working Group foresaw difficulties when ‘the amount (if any) which is a reasonable one to pay having regard to all the circumstances’ was applied beyond those financially eligible for legal aid. The reasons cited were multifarious, including: (1) the danger that the amount set would not comply with Aarhus; (2) it relies upon judicial discretion, thus not satisfying the requirements of EU law (see above); (3) it may be applied so as to undermine Jackson LJ’s purported intentions, namely that the claimant’s liability should be nil other than in exceptional circumstances; and (4) it implies a process of evaluation by the court in circumstances where it would be highly undesirable for judges to be required to carry out detailed assessments of the means of the parties (as the proposed rule would require).

(g) Government consultation exercises

In autumn 2010, the government issued three consultation papers in response to the Jackson review. The first, addressing proposals for the reform of legal aid in England and Wales, opened on 15 November 2010 and the government issued its response on 21 June 2011. While widespread changes were made to the basis upon which legal aid is made available for many civil matters (including most family law cases, clinical negligence, employment and immigration), legal aid was retained for environmental judicial review in order to ensure compliance with EU law.

The second consultation paper, covering proposals for the reform of civil litigation funding in England and Wales, opened on 5 November 2010 and the government issued its response on
29 March 2011. There were reputedly over 600 responses to the consultation paper\textsuperscript{29}, including CAJE and the Sullivan Working Group in the form of Sullivan III\textsuperscript{30}.

Strikingly, the response to Lord Justice Jackson’s considered report was almost silent on environmental matters, stating simply that some respondents had “argued for the introduction of QuOCS on the basis of compliance with the Aarhus Convention”\textsuperscript{31}. No further recommendations were made in respect of environmental cases, despite the findings of the Aarhus Convention Compliance Committee (see below) and the Commission’s ongoing infraction proceedings. The government’s proposals did include a system of QuOCS for personal injury claims, the presumption being that the losing claimant will not have to pay the costs of the opponent except to the extent that the court considers it reasonable for him to do so. The problem with this is the obvious uncertainty introduced for claimants: at the end of the case, the claimant may – or may not – have to pay costs and the amount will not be known until then. Clearly, if these proposals were extended to environmental claims they would plainly be in contravention of the need for certainty as per Commission v Ireland. It is, however, understood that the Ministry of Justice plans to issue a consultation paper outlining proposals for environmental cases later in 2011.

A third consultation paper concerning cross-undertakings in damages in environmental judicial review claims was published on 24 November 2010. Article 9(4) of the Aarhus Convention requires contracting parties to provide a review procedure with adequate and effective remedies, including injunctive relief as appropriate\textsuperscript{32}. For many years, NGOs had drawn attention to a major drawback in relation to interim relief, being that the claimant is normally required to give the court a ‘cross-undertaking in damages’\textsuperscript{33}. This can result in a very large potential liability for a claimant (with the effect that most individuals and NGOs cannot contemplate it). Yet the consequences of not pursuing interim relief can be disastrous and irreversible.

The government’s response to this consultation paper – in which views appeared to be somewhat begrudgingly invited – is still awaited. However, while there has at least been some attempt to address prohibitive expense since 2003, the situation with regard to interim relief has worsened. In February 2010, Civil Procedure Rules were amended to require claimants to provide a cross-undertaking in damages in order to secure interim relief, as opposed to an undertaking being (as previously) at the discretion of the courts\textsuperscript{34}.

(h) Aarhus Convention Compliance Committee

In April 2011, the 31st meeting of the Aarhus Convention Compliance Committee (ACCC) reported on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention\textsuperscript{35}. This report addressed the combined findings of the Committee in relation to Communications C23, C27 and C33 – all of which raised (among

\textsuperscript{29} See www.justice.gov.uk/consultations/jackson-review.htm
\textsuperscript{30} Available from WWF-UK
\textsuperscript{31} Consultation paper available at: www.justice.gov.uk/consultations/389.htm
\textsuperscript{32} Article 9(4) of the Aarhus Convention
\textsuperscript{33} An agreement in which the claimant undertakes to reimburse a party prejudiced by the decision (usually a third party) for any profit lost as a result of ceasing the activity likely to cause environmental damage) in the event that it loses the substantive case
\textsuperscript{35} The findings of the Committee are available at: www.unece.org/env/pp/compliance/CC-31/ece_mp.pp_c1_2011_2_add.9_adv%20edited.pdf
other issues) the UK’s compliance with Article 9(4) of the Convention and prohibitive expense.

CAJE acted as *amicus curiae* in respect of Communication C33 (submitted by NGO Client Earth), as many of the reports upon which CE based its general assertions were published by CAJE or its members. David Wolfe (Matrix) and the author of this paper represented CAJE at hearings of the Compliance Committee in Geneva in July and September 2009.

The Committee addressed the allegations raised with requisite care and diligence. Its findings were preceded by a long and detailed report 36, which concluded that the UK was in non-compliance with Articles 9(4), 9(5) and 3(1) of the Convention. In particular, the Committee concluded that:

“… by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4.”

The Committee recommended that the UK review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to ensure that such procedures are fair and equitable and not prohibitively expensive and also provide a clear and transparent framework. The Committee also recommended the UK review its rules regarding the timeframe for the bringing of applications for judicial review to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.

(i) Concluding remarks

In the light of the above, is it unduly harsh to characterise the government as a reluctant steed, unwilling to address the issue of Aarhus Compliance in the face of international condemnation and judicial concern? Having reviewed this brief summary and analysing the feedback from some 36 questionnaires, it is difficult to conclude criticism is unjustified. All attempts to secure Aarhus compliance have thus far been made by enlightened members of the senior judiciary, who have repeatedly called upon the Civil Procedure Rules Committee to codify the case-law on PCOs. However, the Committee cannot do so in the absence of a clear mandate from the government.

To say the government has been reluctant to accept that it fails to comply with the provisions of the Convention would be an understatement. Even First Treasury Counsel, instructed to appear before the Aarhus Compliance Committee in Geneva – at a cost of £25,000 to the public purse 37 – failed to persuade the international community that the UK was in compliance. It is perhaps also an indication of the priority afforded to the Convention that neither Defra nor the Ministry of Justice could provide a spokesperson for the CAJE conference on 10 October 2011. It is easy to see why practitioners, campaigners and the judiciary are frustrated that a problem that has been widely documented and debated at the highest international levels appears to have been virtually ignored.

36 The findings of the Compliance Committee dated 18 October 2009 can be found at: www.unece.org/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

37 Defra responses to FOI requests submitted by WWF-UK dated 15 July 2009 and 16 November 2009
3. Methodology

In June 2011, the questionnaire in Annex I was sent to 32 solicitors and barristers representing claimants and defendants in environmental judicial review, 4 statutory agencies and 14 NGOs (see Annex II for a full listing). A general invitation was also sent to the Wildlife & Countryside Link Legal Group, and barrister Richard Kimblin kindly approached some members of the UK Environmental Law Association (UKELA).

In all, 36 questionnaire responses were received. Two recipients preferred not to complete the questionnaire but sent comments in any event. Their comments were taken into account but no statistical adjustments were made. Five recipients were either on maternity leave, had retired, or felt they no longer had relevant expertise. All four statutory agencies declined to comment, primarily because they felt the questionnaire raised matters of policy on which they advise the government. Some recipients declined to grade some questions, which explains why the number of responses does not always add up to 36.

In some sections, a brief comparison has been made with the findings of the civil law questionnaire circulated as part of the Environmental Justice Project (EJP) and published in Environmental Justice 38. However, it should be noted that: (a) more questionnaire responses were received in 2003 (52) than in 2011 (36), although the breakdown of recipients by ‘type’ (solicitor, barrister, NGO) is markedly similar; (b) the questionnaire circulated in 2011 covered additional areas, including the Jackson review, PCOs, and the establishment of the First Tier (Environment) Tribunal; and (3) while there is a degree of overlap between the recipients, they are not the same. It should therefore be stressed that any comparison between surveys conducted in 2003 and 2011 is simply by way of illustration and clearly has no statistical significance.

4. Analysis of questionnaire responses

(a) Standing

In general, how satisfied are you with the current rules on standing as applied in the High Court?

very satisfied = 8 quite satisfied = 24 not satisfied = 2 no view = 2

Article 9(3) of the Aarhus Convention requires contracting Parties to ensure that members of the public meeting criteria laid down in national law have standing to challenge acts and omissions by private persons and public authorities contravening provisions of national environmental law. More detailed provisions apply in Article 9(2) of the Convention in relation to standing, to challenge the procedural and substantive legality of decisions, acts or omissions subject to the provisions of Article 6 of the Convention (concerning public participation in decisions on specific activities). Here, members of the public having a sufficient interest (determined within the framework of national legislation and with the objective of giving the public concerned wide access to justice) should be granted standing. In this respect, the Convention holds that environmental NGOs shall be deemed to have sufficient interest.

The framework in England and Wales respects the provisions of Article 9(2)(a) of the Convention, even though it was established before the Convention was even contemplated. Section 31(3) of the Supreme Court Act 1981 provides that the High Court will not give [leave] for an application for judicial review unless the applicant has ‘sufficient interest’ in

38 See footnote 3
the matter to which the application relates. In determining whether a claimant has standing, the High Court considers the merits of the application, the nature of the claimant’s interest and the circumstances of the case.

The High Court relaxed its interpretation of the requirements for standing in the early 1990s and in the case of Dixon, in particular, it was held that a local resident was “perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment”. Unsurprisingly, in 2003 the EJP reported that 59% of respondents were ‘quite satisfied’ with the position on standing. Respondents in 2011 still do not perceive standing to be an issue, with 66% of respondents ‘quite satisfied’ and 22% ‘very satisfied’ with the court’s approach. The point was also made by one respondent that the “reasonably liberal” standing requirements also render it fairly easy for corporate third parties to challenge decisions.

While one barrister questioned whether the High Court’s current approach to standing might be “too liberal”, one QC observed that “the liberal rules on standing are domestic public law at its best”. However, concern was raised that standing may become an issue in the future, referring to the case of Coedbach, in which Mr Justice Williams held that the Coedbach Action Team – a private limited company incorporated in 2008 – was not a ‘member of the public concerned’ or a person having ‘a sufficient interest’ for the purpose of challenging the grant of planning permission for a biomass-fuelled power station in the Gwendraeth Valley.

The case of Coedbach illustrates what can happen when claimants allow themselves to be lulled into a false sense of security by case-law. It is perfectly possible, as evidenced in 1989 in Rose Theatre, or in the present case, for the judiciary to return to a more restrictive interpretation of sufficient interest at any time. That standing may once again come under the spotlight if the costs regime becomes more favourable to claimants was raised by one respondent and is, in my view also, entirely feasible. After all, there are only two mechanisms through which concerns about ‘floodgates’ can be ameliorated – either the permission filter becomes more rigorous or standing becomes more restrictive. This is perhaps best illustrated by comparison with the CJEU, whose progressive rules on costs are almost meaningless because claimants seeking to challenge the decisions of the Community institutions have not (even in light of the Community’s ratification of the Aarhus Convention in 2005 and the adoption of the Aarhus Regulation in 2006), ever been able to satisfy the requirements for ‘direct and individual concern’ established in the case of Plaumann v Commission.

Thus, while the vast majority of respondents in 2011 were either ‘very satisfied’ or ‘quite satisfied’ with the current situation on standing, it would in my view be preferable for the requirements of Article 9(2) and 9(3) of the Aarhus Convention to be explicitly reproduced in the Civil Procedure Rules to ensure against future inconsistencies.

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39 R v Poole Borough Council, ex parte Beebee (H.L. 1991) and R v H.M. Inspectorate of Pollution, ex parte Greenpeace (D.C. 1994)
41 See Environmental Justice – Report by the Environmental Justice Project (note 3, above), paragraph 46
42 Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors [2010] EWHC 2312 (Admin)
43 R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co (1990) 1 QBD 504
44 Regulation (EC) No 1367/2006
45 Plaumann & Co v Commission [1963] ECR 95
Finally, while not the primary focus of this questionnaire, at least three respondents raised concern about the implications of the judgment in the Court of Appeal case of *Ashton* for the definition of a ‘person aggrieved’ under s.288 of the Town and Country Planning Act 1990. In this case, the claimant’s involvement in the process (he was neither an objector to the proposal in any formal sense nor did he make representations, either oral or written, at the Public Inquiry) was held to be insufficient in the circumstances to acquire standing. One QC remarked that *Ashton* is “based upon a misunderstanding of how the planning system works and if applied by lower courts would either require pointless repetition at application and appeal stage or debar people from courts who have legitimate interest”. Another solicitor observed that it is unsatisfactory to have a discrepancy between the two types of procedure, from which a citizen’s point of view are very similar in effect.

(b) Treatment of environmental issues

In general, how satisfied are you with the courts’ treatment of environmental issues?

very satisfied = 0  quite satisfied = 11  not satisfied = 23  no view = 1

While 31% of respondents were ‘quite satisfied’ with the courts’ treatment of environmental issues, the majority were ‘not satisfied’ (64%). The main reason cited was not the quality of the judiciary – nor the awareness and interest shown by them in environmental cases – but the lack of technical knowledge of the issues (and science in particular). This was noted to be particularly acute among Circuit judges sitting in the Administrative Court. It was commonly reported that the lack of technical expertise leads to “inconsistency” and a “lack of uniformity” in relation to both judicial review and statutory nuisance claims. A common concern was that the outcome is “still too dependent on who the judge is”.

The problems arising from a lack of specialist knowledge appear particularly acute in relation to some aspects of EU law, alongside complex and emerging environmental issues. One QC noted that the courts can be “unwilling to try to understand difficult issues, particularly around climate change”. Another solicitor agreed that “the court’s approach to issues surrounding climate change and the duties set out in UK legislation (as far as they have considered them at all) has been disappointingly conservative”. The point was made that this contrasts markedly with the courts’ approach to breaches of human rights/discrimination law, which appear to be taken “much more seriously”.

A number of respondents were concerned that a background in planning or commercial law can lead judges to adopt a somewhat narrow, conservative or ‘hands off’ approach to the subject matter. One QC observed that “the courts tend to focus on the protection of individual contract and property rights, which have tangible and direct human interests to engage with”, while another QC remarked that “leaving aside the strong body of EIA case-law, the level of scrutiny is far too weak, being rooted in planning law perspective and Wednesbury unreasonableness, notwithstanding the wealth of progressive environmental legislation emanating from the EU”. Yet another QC put it rather more bluntly “The courts are clearly biased towards economic operators”. But a fourth remarked that “some claimants’ lawyers may feel the system is biased against them […] but as someone who appears regularly on both sides I think it works reasonably well”.

One thing is clear, however: EU law and the Aarhus Convention will increasingly require a fresh approach to judicial review. While ostensibly a process whereby the procedural and substantive legality of a decision can be challenged, in practice the ‘threshold’ for irrationality or Wednesbury unreasonableness has proven almost impossible to meet in environmental cases. Applications for judicial review have, therefore, become increasingly procedural, with

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*Ashton v Secretary of State for Communities and Local Government* [2010] EWCA Civ 600
the associated frustrations of trying to “shoehorn environmental issues within the traditional judicial review framework”.

However, Article 9(2) of the Aarhus Convention requires contracting Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of Article 6 of the Convention – essentially decisions relating to proposals requiring EIA. The Aarhus wording is imported into Article 10a of the EIA Directive via Article 7 of the EC Public Participation Directive (PPD). Article 9(3) of the Convention does not explicitly refer to either substantive or procedural legality, instead referring to “acts or omissions […] which contravene its national law relating to the environment”. As such, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision – be it procedural or substantive – in national law relating to the environment.

The findings of the Aarhus Convention Compliance Committee are interesting in this respect47, concluding that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Article 9(2) and (3). This includes, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and Wednesbury unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. Particular reference was made to criticisms by the House of Lords48 and the European Court of Human Rights49, concerning the very high threshold for review imposed by the Wednesbury test, as mentioned earlier. While the Committee, on the basis of the information before it in Communication C33, did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest that the application of the ‘proportionality principle’ by the courts in England and Wales could provide an adequate standard of review in cases within the scope of the Convention.

(c) Costs

In general, how satisfied are you with the current rules and procedures on costs?

very satisfied = 0  quite satisfied = 4  not satisfied = 30  no view = 1

In 2003, 82% of respondents to the EJP were ‘not satisfied’ and 18% were ‘quite satisfied’ with the rules on costs. In 2011, 83% of respondents are ‘not satisfied’ and 11% are ‘quite satisfied’ with the current costs regime.

One barrister described the system as “quite broken”, while at least four other practitioners described the rules as “a complete mess”. A number of respondents were of the view that costs remain the primary barrier to bringing legitimate environmental cases to court. Many respondents cited the costs rules as the primary reason for non-compliance with both Aarhus and EU requirements on ‘prohibitive expense’.

Are you aware of any good arguable cases that have not gone ahead because of concerns about costs or exposure to costs?

Yes = 23  No = 9

48 For example, Lord Cooke in R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26, [2001] 2 AC 532 paragraph 32
49 Smith and Grady v United Kingdom (1999) 29 EHRR 493, paragraph 138
Over three quarters (76%) of respondents are aware of good, arguable cases that have not proceeded because of concerns about costs or exposure to costs. One solicitor said that he could point to at least 10 cases in his first year of practice where clients were “too scared of incurring huge costs – even with a PCO”. One barrister reported that he had advised many smaller environmental NGOs who have not litigated for fear of adverse costs or the costs involved in seeking a PCO where it is opposed, including in cases concerning air quality and transport issues. One NGO reported that it always advises that costs can be managed but “I lose count of the number of community groups who mention to us that they or others thought that they may have grounds for challenge, or were advised they did, but decided not to go ahead because they were put off by the costs risk”.

One NGO pointed out that there is a link between costs and timeliness, particularly in relation to planning cases, which require claimants to move very promptly. Such difficulties can be particularly acute in cases in which a community contribution is required. Another NGO concurred that the Legal Services Commission’s reluctance to fund public interest litigation without making time-consuming and unrealistic demands in relation to potential community contributions has caused good, arguable cases to fall through the net.

The majority of those unaware of such cases were barristers. Some felt they had limited recent experience, others remarked that they had limited contact with clients and were probably “too late in the sequence” to come across such cases. However, one QC was aware of group actions in which this had occurred.

On the other hand, one QC has a degree of scepticism about how ‘good’ or ‘arguable’ such potential cases really would have been, and another barrister argued that most examples he had come across were pre-Garner.

(d) Protective Costs Orders

In general, how satisfied are you, post Corner House, with the use of Protective Costs Orders (PCOs) as a mechanism for ensuring that costs are not ‘prohibitively expensive’ for individuals, community groups and/or NGOs?

very satisfied = 1 quite satisfied = 6 not satisfied = 26 no view = 3

While some respondents believe the development of the PCO regime since Corner House has improved the situation, 72% of respondents were ‘not satisfied’ and referred to the process of applying for a PCO as time-consuming, random, complex, costly, inconsistent and ineffective and one which has resulted in “costly and unhelpful satellite litigation” which is “wasteful of litigant, lawyer and court time”.

One barrister pointed out that the process of applying for a PCO invites repeated exchanges of evidence and submissions. In one case alone, 10 witness statements referred to PCOs. This means that the process of applying for a PCO can be costly in itself, partly because of the time taken to process the application, but also because the judges seem “reluctant to deal with applications on paper”. Indeed, the cost of applying for, but being refused, a PCO can amount to £7,00050. One QC recommended a system for first stage applications for PCOs, so it is possible to advise claimants that they will be at no risk at that stage.

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50 This figure may, in fact, be low. In Garner, the judge was persuaded that the amounts in Corner House (see paras 78-81) were outdated and should be increased. Hence, where the claimant had expected an award against him of at most £2,500 in favour of the defendant, this was increased to £3,000
Many respondents pointed out that while the judiciary deserves credit for devising the PCO system, it was not appropriate that it should have had to have done so on an ad hoc basis, and that this has inevitably led to a system which is insufficiently certain and comprehensive. One solicitor remarked that “the lack of consistency and clarity from the courts means that we are unable to provide our clients with any real comfort that their risk as to costs will be “affordable” – and the huge costs orders sought by defendants cause a real chilling factor amongst individuals, NGOs and campaign groups. As a result, a huge amount of time is spent fighting on these issues rather than on the merits of the cases themselves”. It is also unhelpful that much of the case-law on PCOs emanates from the Court of Appeal and, at times, conflicts with the application of the Corner House principles – making it even more difficult for claimants to predict the outcome of an application.

Moreover, the level at which PCOs tend to be set are still too high to ensure adequate access to environmental justice. One solicitor referred to Eley v Secretary of State51, in which the claimant, after argument of both sides, was granted a PCO limiting liability to £10,000. This was too expensive for the claimant and proceedings relating to the EIA Directive were withdrawn as a consequence. Another barrister concurred that the level at which protection is afforded (commonly around £10,000) is still prohibitive, at least for individuals.

Respondents also highlighted that significant problems persist in relation to the principles associated with the granting of PCOs arising from the Corner House case. Those of particular concern include the need for the issues to be of general public importance (and that the public interest requires that those issues be resolved) and for the applicant to have no private interest in the outcome of the case. The Court of Appeal case of Garner essentially confirmed that there is no justification for the application of the issues of general public importance52 in cases covered by the EC Public Participation Directive (i.e. EIA and IPPC) and similarly, following the judgment of the CJEU in the ‘brown bear case’ (Case C-240/0953), it is reasonably clear that a PCO will be granted in cases involving directive 92/43/EEC (the Habitats Directive). However, this still leaves all other environmental cases – particularly those concerning small-scale, local public body decisions – at the mercy of the Corner House principles. Similarly, while in England54 the Court of Appeal noted that the requirement that the applicant must not have private interest in the matter was not necessarily consistent with Aarhus, there is always an element of uncertainty as to whether it may present a barrier (and indeed, although it was not a environmental case, in Goodson55 the private interest test did prevent an individual from obtaining a PCO).

Clearly, there is also still some confusion (post Garner) as to the whether the financial circumstances of the claimant should be subject to an objective or subjective evaluation. One barrister observed that if a matter is “genuinely one of public interest there is no reason why the availability of a PCO should be assessed against the means of a randomly picked individual. Additionally it must put terrible pressure on that individual”.

While there are clear difficulties in terms of judicial review, respondents report that private law civil claims (especially group actions) are even more challenging. A number of

51 [2009] EWHC 660 (Admin)
52 R (on the application of Garner) (Appellant) v Elmbridge Borough Council (Respondent) & (1) Gladedale Group Ltd (2) Network Rail Infrastructure Ltd (Interested Parties) [2010] EWCA Civ 1006, para 39
53 Leso ochr arianske zoskupenie VLK v Ministerstvo životého prostedia Slovenskej republiky
54 R on the application of England v London Borough of Tower Hamlets and another [2006] EWCA Civ 1742
55 Goodson v (1) HM Coroner for Bedfordshire and Luton (2) Luton and Dunstable Hospital NHS Trust [2005] EWCA Civ 1172
practitioners argued there should be specific provision in the rules for PCOs in ordinary private law (as opposed to public law) cases where these raise Aarhus issues, and some way of ascertaining whether a PCO is available, and if so in what amount before claimants start being exposed to the defendant’s costs. This seems entirely appropriate, given that Article 9(4) of the Convention requires administrative or judicial procedures to challenge the acts and omissions of public authorities and private persons to be not prohibitively expensive. Furthermore, in Morgan\(^6\), the Court of Appeal expressly recognised that the Convention is capable of applying to private law claims. One QC observed that “there are real problems (much greater than in judicial review) in deciding what 'prohibitive expense' is, in the context of claims which to run them properly need very large sums spending on them. Unless this is sorted out, then the death of After The Event (ATE) insurance will be the death of many such group actions”.

On the other hand, one barrister remarked that “PCOs are now very easily obtained in environmental cases – the only issue is the size of the reciprocal cap”, observing that “caps provide a discipline that would be absent if QuOCS were introduced and exposing public authorities to an unjustifiable increase in costs expenditure”. However, many respondents noted a serious problem emerging in relation to the imposition of extremely low cross caps on claimants’ costs, which means that even when cases are won, the costs recovered are insufficient. In most circumstances these cases are funded on a Conditional Fee Arrangement (CFA) basis and the amount recovered in the successful cases needs to cover the cases where the claimant is unsuccessful. The corollary of this is that claimant solicitors end up having to take environmental cases on a non-commercial basis, which – as one NGO observed – affects the ability of individuals and civil society groups to secure appropriate legal representation.

Another barrister pointed out that attempts by some claimants to “side-step” the costs issue by forming a shell company and refusing to pay adverse costs orders (while running up substantial costs bills to which the defendant is exposed) are inequitable. However, it has been observed that the courts are actually much less sympathetic to applications for PCOs in cases where individuals have grouped themselves together. The courts appear to worry that there are an unknown number of people who could individually afford a substantial amount of adverse costs. In one case, the court required the claimant company to be liable for £70,000 as a condition for the grant of a PCO\(^7\). This may have the perverse result that the greater the public interest, the greater the claimants’ exposure is likely to be.

Do you think the criteria established in Corner House could be further modified to achieve access to environmental justice for individuals, community groups and NGOs?

| Yes = 26 | No = 4 | No view = 3 |

Notwithstanding the above, some 72% of respondents believe the criteria established in Corner House are capable of being modified to achieve access to environmental justice. It might not be everyone’s first preference as a starting point, but as one barrister remarked “… given it’s what we have and that the courts now use it as a framework […] it’s probably the easiest place to start”.

The key would appear to be a simple, clear PCO system which is cheap to access and refines the Corner House ‘conditions’ in the light of the Court of Appeal cases such as England and Garner. For example, it should be irrelevant for the purpose of the application whether the issues raised are of general public importance (and that the public interest requires that those

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56 Morgan (1) Baker (2) v Hinton Organics (Wessex Ltd) & CAJE (intervener), [2009] EWCA Civ 107, para 44

57 Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change & ors [2010] EWHC 2312 (Admin)
issues should be resolved) or whether the applicant has any private interest in the outcome of the case.

Second, there should be no distinction between environmental cases covered by the EC Public Participation Directive and those that are not. The Aarhus Convention creates a positive obligation to secure access to justice, and does so in recognition of the public interest in protection of the environment. The courts should exercise their powers consistently with securing those outcomes. That means addressing the costs or other issues that arise: (i) consistently with regard to all environmental cases; (ii) at the earliest practicable opportunity; and (iii) in a way that does not, itself, lead to (or expose a risk of) prohibitive expense for the member(s) of the public involved.

One barrister observed that it might be helpful to have clear guidelines as to the amount claimants could be liable for, as opposed to relying on the discretion of the court – although caution was expressed that this could actually lead to a higher level of costs being payable. Careful consideration would therefore need to be given to what level of costs, on the basis of an objective test, would be ‘prohibitively expensive’ for an ordinary member of the public, a community group and/or an NGO. Clearly, what might be prohibitively expensive for an individual may not be prohibitively expensive for an established NGO, so some form of banding may be appropriate. The important point is that the limits of exposure need to be clear and the maximum liability for making an application should be modest and known in advance.

However, not all respondents were of the view that the PCO regime is capable of being modified to secure compliance with Aarhus. One NGO remarked that “PCOs, whether codified or not, and whether subject to an ‘objective’ or ‘subjective’ test as regards the definition of prohibitive costs, are inherently uncertain and subject to judicial interpretation. This means they are in breach of the Aarhus Convention”.

(e) Qualified one-way costs shifting

Are you in favour of qualified one-way costs shifting (QuOCS), as recommended by Lord Justice Jackson?

Yes = 20  No = 7  No view = 7

Some 56% respondents are in favour of qualified one-way costs shifting (QuOCS), although many cautioned that the formulation proposed by Lord Justice Jackson did not provide claimants with requisite certainty. One barrister remarked that it “did not properly deal with or explain the circumstances in which, and the extent to which, costs would be payable. On one view, his proposal simply left in place the current wide discretion to order costs which would not move things forward at all”.

With suitable refinement, those in favour of a shift towards QuOCS believe that it could facilitate access to the courts, with the appropriate advice and representation of specialised lawyers. One barrister believes that it may indeed be fairer to defendants, who have to pay disproportionate costs when faced with a CFA case.

However, one QC in support of QuOCS suspected that costs to the public purse will prevent this being a realistic option, particularly if there is another potentially compliant alternative available. Another barrister was also concerned that “QuOCS make no provision for reciprocal caps and is simply unaffordable in this fiscal climate” fearing that it would also result in a “flood of claims”. However, another questioned whether there was any great injustice where the defendant is a public body or has insurance to cover the costs since the inherent unfairness in the system is ultimately shared out throughout the general population. Moreover, Sullivan II found no evidence for the ‘floodgates’ argument since whatever the
costs principles involved, judicial review is immensely resource-intensive and would not be undertaken lightly. The report recognised that there would be some increase in environmental judicial reviews but that this would be modest compared with the total number of cases handled by the Administrative Court each year. In any event, if a substantial demand for legitimate Aarhus legal challenges were to materialise, that would have to be accommodated in the administrative system of the courts (or new tribunals) in order to ensure compliance with Aarhus, rather than suppress the demand.

Another barrister suggested qualifying the qualified approach. In his view, it is “sensible in most cases for there to be some potential costs liability towards the other side, but that needs to be controlled in advance and managed”. Another agreed that it is not unfair that a level of costs should be borne by potential claimants, but those costs should be “proportionate and not act as a barrier to justice”.

(f) Interim relief

How satisfied are you with the general rules as applied on interim relief?

very satisfied = 1  quite satisfied = 6  not satisfied = 20  no view = 9

Although 19% of respondents were either ‘very satisfied’ or ‘quite satisfied’ with the present situation regarding interim relief, the majority (56%) were ‘not satisfied’.

A number of NGOs raised the point that the threat of cross-undertakings is too much for most private individuals/small NGOs to consider, and expressed concern that the failure to obtain interim relief can result in significant, irreversible environmental damage. In the respect, reference was again made to the 1997 case of Lappel Bank, in which the loss of part of the Medway Estuary and Marshes Special Protection Area (SPA) was subsequently declared unlawful.

However, it is clear that problems persist. For example, in the private law case of Thornhill, the High Court refused an interim injunction in respect of noise and vibrations arising from a metal recycling yard primarily on the basis that the claimant was unable to afford a cross-undertaking in damages. Also, one NGO observed: “we currently have a case where we need to challenge a developer and prevent the destruction of a fishery on the Trent. The developer has indicated that a cross undertaking would be required (an enormous sum beyond the resources of our organisation or our members). It is inevitable that a court would agree. This therefore puts us in a situation where we need to go for a final injunction – and the possibility that the developer will already have completed the work before the case is heard and an injunction awarded”. This view is shared by practitioners at the Bar. One barrister reported that “the potential need for cross undertakings coupled with a general judicial reluctance to grant interim relief (and the costs risks of even seeking it) means that I would be very wary of promoting a case which required the grant of interim relief”.

On the other hand, one QC remarked that “while some claimant solicitors may feel the system is against them, interim relief can be used tactically by unmeritorious claimants unless the court is careful”. Another was simply baffled by the suggestion that there is any real issue in terms of Aarhus in this regard, claiming that “Where there is a challenge to the grant of planning permission or other environmental consent in most cases an injunction is

58 In 2005, just under 2,000 applications for judicial review were made (excluding immigration and criminal cases), of which 412 were granted
60 Pamela Thornhill & Ors v Sita Metal Recycling & Ors [2009] EWHC 2037 (QBD)
unnecessary as the beneficiary of the permission or consent will await the outcome of the proceedings”. The same barrister pointed out that even where injunctions are necessary the courts have made clear that a cross-undertaking is not essential for the grant of an interim injunction in environmental judicial review cases. In the **Belize** case, for example, the Privy Council recognised that the court had a wide discretion in this regard. Furthermore, reference was made to a number of recent high profile environmental cases where injunctions have been granted despite no cross-undertaking in damages being offered, including **Save Britain’s Heritage** cases in Lancaster, Gateshead and Bolton and **R. (Pascoe) v Liverpool City Council**, in which another barrister noted that the High Court had moved “extremely quickly”.

As of February 2010, however, the judiciary no longer enjoys any discretion with regard to a cross-undertaking in damages, as the Civil Procedure Rules were amended to require claimants to provide a cross-undertaking in order to secure interim relief. It is now not a question of ‘whether’ an undertaking will be required, but ‘how much will it be?’

Despite the promptness alluded to above, concerns also persist in relation to delay. One solicitor observed that “the interplay between protective costs orders and interim injunctions is particularly difficult in urgent cases [...] the Administrative Court can get very busy and the lack of judges means that it can take longer than hoped for the papers to be placed before a judge. In some circumstances, this can be fatal to the success of a claim”. At least three other practitioners expressed concerns about delay in relation to what might be perceived as low-profile judicial review claims.

In April 2011, the Aarhus Convention Compliance Committee found that the high costs involved in pursuing injunctive relief effectively amount to prohibitively expensive procedures that are not in non-compliance with Article 9(4) of the Aarhus Convention. Similarly, when referring the UK to the ECJ in April 2011, the European Commission press release referred to the requirement to provide a cross-undertaking in damages, asserting that this puts applications for such orders beyond the reach of most applicants.

It was interesting to note a higher number of respondents recording a ‘no view’ in response to this question. I am reluctant to conclude that this suggests ambivalence about the efficacy of the system – if it were working, one may have expected a higher number of respondents to be either ‘quite satisfied’ or ‘very satisfied’. One possibility is that claimants (and/or claimant lawyers) are not routinely considering interim relief as a viable option. If so, this would be of particular concern. In environmental cases, the claimant rarely has any personal financial interest in the outcome of the case and does not stand to profit from the granting of injunctive relief – it is society as a whole that stands to benefit if an area of land or a natural resource (for example) is protected in the short term and the claim is ultimately successful. Conversely, that same society suffers the loss of a common good. This raises the question of whether a cross-undertaking in damages in environmental cases is appropriate at all. Indeed, one QC

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61 **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize** [2003] 1 W.L.R. 2839

62 **Save Britain’s Heritage v Secretary of State for Communities** [2011] Env. L.R. 6 ([2011] EWCA Civ 334) and **R. (Save Britain’s Heritage) v Gateshead MBC** [2010] EWHC 2919 (Admin) [2010] EWCA Civ 1500

63 [2007] EWHC 1024 (Admin)


remarked that he was “troubled by any suggestion of a cross-undertaking in damages in a truly environmental case, which strikes me as patently inapt”.

5. Conclusion

In October 2011, the Aarhus Convention will have been in force for a decade. Earlier the same year, the Aarhus Convention Compliance Committee found the UK in breach of Articles 9(4), 9(5) and 3(1) of the Convention, and the European Commission referred the UK to the CJEU for a failure to comply with the ‘not prohibitively expensive’ requirement of the EC Public Participation Directive.

In 2003, the Environmental Justice Project canvassed 52 environmental practitioners for their views on access to environmental justice in the civil and criminal fields. The results were published in Environmental Justice and exposed significant concerns about the rules on costs in judicial review, in particular. Eight years later, a further exercise has been undertaken, concentrating on the rules and procedures relating to judicial review. The results of this survey are summarised in this paper. Unfortunately, the results confirm that, despite judicial effort, practitioners and NGOs perceive that the situation with regard to costs and interim relief has, if anything, deteriorated since 2003.

For example, almost 83% of those sampled are ‘not satisfied’ with the current rules and procedures on costs. This represents an increase of just 1% in the number recorded by the EJP in 2003, but confirms that the costs regime continues to represent a substantial deterrent to the promulgation of genuine environmental public interest litigation. Paradoxically, it can also be seen that is not always fair to the defendant. It is a sad indictment of the extent to which PCOs have thus far failed to alleviate concerns about costs, despite significant judicial effort. In brief, PCOs are perceived to be uncertain, complex, inconsistent and, ironically, very expensive. Practitioners report that a disproportionate amount of time is spent arguing about them and that the imposition of reciprocal caps is not only causing claimant lawyers considerable difficulty, it is also - some say - potentially unlawful.

Similarly, some 56% are ‘not satisfied’ with the current rules and procedures on interim relief (significantly more than double the 21% recorded in 2003). As of February 2010, Practice Direction 25A on interim relief of the Civil Procedure Rules (CPR) requires an application for an interim injunction to include a cross-undertaking in damages. As such, it seems that the rules were only very recently amended to further frustrate the courts’ ability to secure compliance with Aarhus and EU law.

Some 64% of respondents are ‘not satisfied’ with the courts’ treatment of environmental issues (in comparison with 66% in 2003). The main reason cited was not the quality of the judiciary, nor the awareness and interest shown by them in environmental cases, but the lack of technical knowledge of the issues (and science in particular) – particularly among Circuit judges sitting in the Administrative Court. The lack of technical expertise leads to inconsistency and ‘judge dependency’. Furthermore, respondents believe that with one or two notable exceptions, the courts have tended to be conservative when dealing with environmental issues and have rarely seized the opportunity to expand the law in this area in a way that would offer a meaningful opportunity to reverse the ongoing degradation of the environment.

It could be a number of years before the CJEU rules on the infraction proceedings and/or the questions referred to it by the Supreme Court in Edwards. In the meantime, we appear to have two regimes applying to environmental cases – one for cases covered by the PPD (EIA and IPPC) and another for ‘everything else’. Ironically, while Garner is unlikely to cut much ice with the Compliance Committee (as it does little for the vast majority of environmental
cases), it is also unlikely to buy much time in terms of the infraction proceedings. A similar ‘two-tier’ system introduced in the Republic of Ireland following the judgment of the CJEU in *Commission v Ireland*\(^66\) has proven unworkable. Ireland has one general rule on costs for judicial reviews concerning EIA, IPPC and Strategic Environmental Assessment (SEA) (each side bears its own costs) and another rule for all other environmental judicial reviews (the loser pays). The result is confusion as to which rule applies in ‘mixed’ cases (e.g. a case that raises EIA and Habitats or Birds Directive issues), and a stifling of the existing model for most public interest environmental litigation. The impecunious claimant with a lawyer acting on a ‘no win, no fee’ basis no longer works in EIA, SEA and IPPC cases because the ‘loser pays’ rule no longer applies. Thus, while the existing model was by no means perfect, it at least resulted in *some* public interest litigation\(^67\).

The overriding view, therefore, is that the government must take the initiative to address the issue in the form of clear rules that provide certainty at the outset. One barrister observed that “*any government with a true green agenda would recognise that enforcement by individuals/groups of the law through courts is an essential part of creating a state where environmental issues are given the weight they deserve in decision making by both public and private bodies*”.

### 6. Recommendations

(a) The potential development of the First-Tier (Environment) Tribunal

*Do you think there are advantages in developing the role of the First-Tier (Environment) Tribunal as a forum for either judicial review and/or statutory appeals?*

- Yes = 30
- No = 2
- No view = 2

**Chart 1: Potential benefits of developing the Environmental Tribunal as perceived by participants in the survey**

<table>
<thead>
<tr>
<th>Benefit</th>
<th>(all out of 34)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development of judicial expertise</td>
<td>24 (71%)</td>
</tr>
<tr>
<td>Costs <em>(tailored regime)</em></td>
<td>16 (47%)</td>
</tr>
<tr>
<td>Timeliness</td>
<td>12 (35%)</td>
</tr>
<tr>
<td>Specialist advisers</td>
<td>11 (32%)</td>
</tr>
<tr>
<td>Scope of review</td>
<td>10 (29%)</td>
</tr>
<tr>
<td>Coherence</td>
<td>10 (29%)</td>
</tr>
<tr>
<td>Case management</td>
<td>9 (26%)</td>
</tr>
<tr>
<td>Legal representation</td>
<td>5 (15%)</td>
</tr>
<tr>
<td>Interim relief <em>(tailored regime)</em></td>
<td>5 (15%)</td>
</tr>
<tr>
<td>Standing <em>(tailored regime)</em></td>
<td>4 (12%)</td>
</tr>
<tr>
<td>Fresh mindset</td>
<td>1 (3%)</td>
</tr>
</tbody>
</table>

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\(^{66}\) Case C-427/07, *Commission v Ireland*

\(^{67}\) Andrew Jackson, Friends of the Irish Environment, *pers comm*
This study suggests there is an emerging enthusiasm for the development of the current First-Tier (Environment) Tribunal as a potential forum for judicial review and/or statutory appeals. No fewer than 83% of respondents believe there is merit in pursuing this possibility. As part and parcel of securing compliance with Aarhus and EU law, respondents highlighted two key themes: (1) the development of legal and factual judicial expertise in environmental law, thus enabling complex cases to be dealt with in an cost-effective, fair and timely manner; and (2) the opportunity to devise a set of rules and procedures that recognise the unique nature of environmental law and are properly tailored to address it.

A paper by the Hon Justice Preston draws on the 28-year experience of the Land and Environment Court of New South Wales and reinforces the points made above: “bringing together in the one court, officers (both judges and non-lawyer specialists) with knowledge and expertise in environmental law. This creates a ‘centre of excellence’ or a ‘think tank’ on environmental law. Bringing experts together creates a synergy. It facilitates free and beneficial exchange of ideas and information.”

The idea of a specialist forum to address perceived criticisms – such as an environmental court or tribunal – is not new and has previously given rise to a divergence of views. In 2003, Macrory and Woods examined the case for modest and politically realisable institutional reforms in the form of a new Environmental Tribunal to initially consolidate a myriad regulatory environmental appeals. A whole chapter of the report was devoted to Aarhus, noting concerns that the costs rules in judicial review did not appear to meet the criteria in Article 9(4).

The model of a specialised environmental tribunal advocated in Modernising Environmental Justice attracted considerable support within both the judiciary and other interested parties. Three years later, the Tribunals, Courts and Enforcement Act 2007 established a new judicial and legal framework, bringing together individual tribunals into a unified tribunals structure. The Act was designed to reform the tribunals service to speed up justice and make the process easier for the public to understand. Most of the changes resulting from the Tribunals Act influenced the organisation of the tribunals, rather than the content of the hearings. It created the framework for a new two-tier tribunal system: (i) a “First-Tier Tribunal”; and (ii) an “Upper Tribunal” – both of which are split into Chambers. Each Chamber comprises similar jurisdictions – or jurisdictions bringing together similar types of experts to hear appeals – and operates under rules and procedures tailored to the needs of individual jurisdictions within the Chamber. The Upper Tribunal is in some cases a tribunal of first instance and in others hears appeals on points of law from the First-Tier Tribunal. If certain conditions are met, the Upper Tribunal also exercises a statutory jurisdiction which is the equivalent of the judicial review jurisdiction of the High Court. It is designated a “superior court of record” and is typically presided over by a High Court judge.


71 The main exception to this is the system of employment tribunals, which remain as a distinct pillar within the tribunals system

72 See Ministry of Justice website at www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm
The Tribunal Procedure Committee (TPC) was established under the Tribunals Act to make procedural rules for the new tribunals. Each Chamber has its own set of rules supported by Practice Directions and Statements. The TPC has broad powers to make rules. For example, in relation to costs, s.29(2) of the Tribunals Act states that the “relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.” The terms of reference of the TPC state that its power to make rules is to be exercised with a view to securing the following goals, which in many ways echo the requirements of Article 9(4) of the Aarhus Convention:

“a. that, in proceedings before the First-Tier Tribunal and Upper Tribunal, justice is done,

b. that the tribunal system is accessible and fair,

c. that proceedings before the First-Tier Tribunal or Upper Tribunal are handled quickly and efficiently...”.

The new First-Tier (Environment) Tribunal was established in 2010 to deal with appeals concerning new environmental sanctions. Judges and expert members have been appointed and the Tribunal has a great deal of flexibility on where it sits and how it conducts its procedures. More straightforward cases can be heard by a single member, while those raising complex legal and technical issues can be heard by a panel of three with a legal chair and two expert members.

(b) Possible disadvantages

A few respondents raised concerns in relation to the potential development of the current Environment Tribunal. These include the time and cost associated with its establishment and the disadvantages of separating environmental cases from other public interest cases. One QC was also concerned that cases raising substantive public interest points may not have the scrutiny and level of judicial expertise that would lead to sound legal judgments and the setting of legal precedent. However, another observed that we “must not be patronising and suggest only the High Court can determine issues of legal complexity”. While the High Court remains the optimum forum for issues of fundamental constitutional importance (as opposed to complex regulatory matters suitable for an Upper Tribunal), the employment of criteria (which, as one QC observed, need to be more sophisticated than simply ‘complex or non-complex’ cases) would be of benefit.

One QC believes there are good arguments for treating public interest cases (whether environmental or not) in the same way; equally, another barrister saw no inherent problem in treating environmental cases differently in recognition of the fact that Aarhus makes special provision for such cases. Another barrister concurred that the separation issue is not a problem – observing that it might actually be beneficial as most specialist tribunals tend to promote their own area. Moreover, if the judges appointed are High Court or Circuit judges who sit elsewhere they will routinely have contact with mainstream law.

Another QC cautioned whether major private law claims such as group actions should be heard in the Tribunal. His view is that such cases need very hands-on management, particularly in terms of costs control, and there is an advantage in having a costs-experienced judiciary handling them. It may, however, be helpful to establish a ‘Group Actions Division’ where judges experienced in managing such cases sit part-time.

One barrister opposed to the development of the Tribunal feared that we would end up with a limited fixed costs recovery rule or a no costs rule making environmental law unviable for private practice. However, on balance, very few respondents believe that the potential disadvantages outweigh the potential advantages and most appear to believe that the concept of an expanded Environmental Tribunal has “come of its time”.


(c) Prerequisites for Aarhus compliance

Respondents in 2011 highlight several issues that require careful consideration in order to achieve both Aarhus compliance and effective case management. First, the present Environmental Tribunal does not have sufficient weight or expertise to deal with Administrative Court matters and, in any event, judicial reviews can only currently be heard in the Upper Tribunal. As such, judicial review powers would either need to be extended to the First-Tier Environment Tribunal or the Environment Tribunal would need to be transferred to one of the four chambers of the Upper Tribunal. The latter would seem to be the most appropriate option, not least to ensure consistency with the current approach within the Tribunal system and the High Court.

Second, it was suggested that there should be a High Court judge acting as president of the Tribunal, preferably appointed for long enough to ensure continuity in decision-making. Complex cases should be heard by sufficiently experienced High Court judges (or Deputy High Court Judge practitioners) with the support of a panel of transparently selected tribunal members, with requisite expertise in a broad range of environmental matters. All decisions must be reported to enable the development and dissemination of jurisprudence.

Third, the Upper Tribunal would benefit from devising and applying tailored rules and procedures that ensure compliance with Aarhus and EU law. The most important areas concern costs, interim relief and standing – although following the findings of the Compliance Committee in Communication C33, it may also be an opportunity to reflect on the appropriate scope of review.

(i) Costs

Some 56% respondents were in favour of QuOCS as recommended by Lord Justice Jackson. Some 72% believe that the criteria established in Corner House could be further modified to achieve access to environmental justice. Thus, the figures suggest that while some respondents may have a preference, a number appear to believe that both QuOCS or a modified PCO regime are capable of securing compliance with Aarhus and EU law. I therefore find it difficult to be definitive about which regime – QuOCS or PCOs – respondents would prefer to see in place in a strengthened Environmental Tribunal.

CAJE has, however, always maintained that the introduction of QuOCS, as refined in Sullivan II, represents the most simple and elegant mechanism for Aarhus compliance:

Sullivan II qualified one-way costs shifting (QuOCS) formulation supported by CAJE:

“44.X An unsuccessful claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings.”

The basis for the formulation proposed in Sullivan II and supported by CAJE is certainty – both at the outset of the proceedings and with regard to the total liability potentially incurred. First, a prospective claimant must be sure of the extent of his liability at the outset. Second, for the reasons discussed in section 2 (above), the Working Group foresaw difficulties when
the amount (if any) which is a reasonable one to pay having regard to all the circumstances’ was applied beyond those financially eligible for legal aid.

CAJE is therefore of the view that the introduction of the Sullivan II formulation is the optimal mechanism in which compliance with EU law and the requirements of the Aarhus Convention can be achieved, on the basis that it is simple, clear and eliminates undue judicial discretion.

However, if – as seems clear – the government remains intent on pursuing the codification of the PCO regime in the CPR, the following safeguards must be encompassed in order to reduce judicial discretion and guarantee access to justice in environmental cases.

The Aarhus Convention creates a positive obligation to secure access to justice, and does so in recognition of the public interest in protection of the environment. The courts should exercise their powers consistently with securing those outcomes. That means addressing the costs or other issues which arise at the earliest practicable opportunity. It also means doing that in a way which does not, itself, lead to (or expose a risk of) prohibitive expense for the member(s) of the public involved.

If a claimant (individual, community group or environmental NGO) bringing an environmental case and acting reasonably in the circumstances would be prohibited by the level of costs or costs risks from bringing the case, then the court must make a PCO to ensure compliance with the Aarhus Convention and EU law. The following conditions apply:

(i) The level of the PCO will be set by the application of an objective test in relation to what is prohibitive for an ordinary citizen, community group or NGO and subject to a maximum limit, e.g. £500-£3,000 for individuals, community groups and small NGOs; and £3,000-£10,000 for larger NGOs;

(ii) The claimant will not be subject to a reciprocal cap (other than a cap set at the level of a reasonable pre-estimate of the claimant’s costs as they would be assessed on the ordinary basis and allowing for any CFA uplift);

(iii) The process of applying for a PCO (and of the associated JR permission process) itself must not expose the claimant to an order for prohibitive costs in favour of the defendant or any other party. The maximum exposure will be £500 when applying for a PCO at the permission stage;

(iv) PCOs will be available for all claims challenging decisions relating to the environment, not just cases covered by the EC Public Participation Directive;

(v) PCOs will be available for environmental judicial reviews and s.288 statutory challenges;

(vi) It will not be necessary to separately consider public interest/importance, since access to environmental justice is made unconditional by Aarhus and because, by virtue of the Aarhus Convention, protecting the environment is recognised as inherently a matter of public interest/importance;

(vii) The claimant’s private interest, if any, is irrelevant for the purpose of granting a PCO or its terms;

(viii) The PCO will confirm that there will be no claimant exposure to third party costs; and
Do you think the rule in tribunals that each party must bear its own costs would address concerns about prohibitive expense in relation to individuals, community groups and/or NGOs?

Yes = 12
No = 16
No view = 3

Respondents were, on the whole, not in favour of an own costs regime. A number of solicitors pointed out that the difficulty with such a rule is that claimant lawyers would be unable to act for clients under a CFA or modified form of CFA. This means that individuals and/or NGOs would have to pay their lawyers privately or rely on solicitors/barristers to act pro bono. Most UK lawyers providing pro bono representation are large, commercial firms which tend to represent large corporations or very rich individuals. As such, they do not have the appropriate expertise or experience to act for claimants in environmental cases and are unlikely to solve the current difficulties faced by claimants in the courts. To some extent such a regime could work for larger NGOs or campaign groups with wealthy members, but the vast majority of individuals and less well-off groups would find it hard to access appropriate legal representation. Another NGO concurred that having to cover their own costs incurred in taking a case at commercial rates would be prohibitive to most citizens, civil society groups and smaller NGOs – particularly as some cases are very expert-intensive.

Others believed the system could work if legal aid continued to be available. However, one NGO pointed out that, paradoxically, a regime in which the parties bear their own costs will tend to reduce the availability of publicly-funded representation to those of reduced means. This is because legal aid practitioners rely on the commercial rates that can be recovered if inter partes costs orders are available. Another barrister was also unclear how a no costs regime could be consistent with Aarhus since, in effect, it means that “claimants either have to pay above what would ordinarily be ‘prohibitive’ or the lawyers have to subsidise by charging very low rates – neither of which are consistent with the inherently public interest nature of the challenges”.

However, one QC observed that the Tribunal should retain the discretion to make different orders where, for example, the losing party has behaved crassly or in an obstructive way. Occasionally, it may also be appropriate to order costs out of general public or court funds – which could perhaps be resourced by charging a modest (e.g. maximum £200) application fee.

(ii) Interim relief and case management

In addition to tailored rules on costs, the TPC would need to devise Aarhus-compliant rules on other issues, such as interim relief, standing and case management. Recommendations in respect of injunctive relief and case management were addressed in detail in Sullivan I\textsuperscript{74}, so I shall do little more than highlight the main conclusions of that report.

In Sullivan I, the Working Group on Access to Environmental Justice was of the view that Aarhus provides a robust justification for the removal of the need to provide a cross-undertaking in damages in environmental cases. The Working Group recognised that this may prejudice third parties in cases that can take many months to come to trial, and it is clear that timeliness has a critical role to play in environmental cases where interim injunctive relief is

\textsuperscript{74} See paragraphs 73-83 (Injunctions and other remedies) and paragraphs 85-99 (Case management in environmental judicial review of Sullivan I
sought (and indeed is one of the express requirements of Aarhus). It is therefore recommended that the requirement to provide a cross-undertaking in damages in accordance with Practice Direction 25A on Interim Injunctions should not apply in environmental cases where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings. In such cases, it will be incumbent on the court and its administration to ensure that the full case is heard promptly. Furthermore, as the Aarhus restriction on prohibitively costly procedures applies equally to the costs associated with an injunction, it follows that a claimant in an environmental case should not be expected to pay the costs of defendants and third parties in resisting an injunction (whether granted or not) at the permission stage where those costs are judged to be prohibitively expensive.

Timeliness is another important factor in review procedures and, indeed, Article 9(4) of the Aarhus Convention expressly requires that procedures are “timely”. Respondents drew attention to the lengthy delays in the Administrative Court, and Sullivan I noted that “unless something is done to speed up the judicial review process overall, there is a real risk that the court’s procedures will not comply with Aarhus in terms of timeliness”75.

Improved case management could increase the efficiency in handling environmental cases, and assist in reducing overall costs for all parties involved – thereby better meeting the need to improve access to justice in line with Aarhus. Sullivan I discussed how this could be achieved in a number of ways – for example, early disclosure of information, early consideration of costs and related matters, and judges with expertise in environmental law.

(iii) Standing

In line with concerns expressed in section 4.1 of this paper (above) regarding the uncertainties of case-law, it would be preferable if the requirements of Article 9(2) and 9(3) of the Aarhus Convention with regard to standing were explicitly reproduced in rules drafted by the TPC to ensure compliance with Aarhus.

7. Supporting measures to improve access to justice

Respondents suggested a number of supporting measures that could be deployed to improve access to environmental justice. The most recurrent suggestion was to increase public funding, although most recognised this as unrealistic in the current fiscal and political climate. Similarly, pursuing the feasibility of international initiatives, such as the dedicated government fund for legal action in New Zealand, is also unlikely to receive political support, although it could go some way towards addressing the UK’s non-compliance with Article 9(5) of the Aarhus Convention (measures aimed at the removal or reduction of financial barriers). Another NGO highlighted the value of establishing a national, independent information and legal advice service providing specialist information and/or training to individuals and community groups wishing to access the Tribunal.

While an increase in public funding for such initiatives is unlikely to be forthcoming, some respondents recommended a change in the approach currently adopted by the Legal Services Commission in relation to ‘community contributions’. Such ‘contributions’ are often required in cases where environmental issues are involved because the claims tend to be of benefit not only to the claimant but also to the population more widely. The benefit to others is often required to satisfy the cost–benefit test. It is in those circumstances a ‘community contribution’ is requested by the Commission. However, they are currently set at an

75 See paragraph 84 of the Sullivan Report
unrealistic and prohibitively expensive level, which can prevent claimants from obtaining public funding. It is also understood that this issue is currently subject to a number of appeals within the Legal Services Commission (LSC) and may result in a judicial review in due course.

Three respondents suggested that the Environment Tribunal could be developed as a forum for a third-party right of appeal in the planning context, as that would remove a number of cases brought by way of judicial review. Earlier this year, a report published by Professor Richard Macrory referred to evidence suggesting a pent-up need for a right of a regulatory appeal which is currently being met by having to use the judicial review procedure. Macrory referred to current proposals to change the costs rules that could lead to an increased number of applications for judicial review. Introducing new rights of regulatory appeal that could reduce the pressure on judicial review could, in his view, clearly bring benefits to all parties. And developing the Tribunal in this way could lead to “efficient and fair procedures for handling such appeals, and involving the minimum of delays”76.

There were also some suggestions that could be effected at relatively modest and proportionate cost. These include the allocation of sufficiently experienced judges in the Administrative court. Full High Court judges should be used appropriately, while building up the expertise of some non-specialised Circuit Judges through a coherent programme of judicial training. Other respondents also recommended more efficient case management, as recommended in Sullivan I.

76 Professor Richard Macrory, Hon QC, CBE [2011] Consistency and Effectiveness – Strengthening the New Environmental Tribunal, University College London.
Annex I

Questionnaire on Access to Environmental Justice in England and Wales

This questionnaire seeks your views on access to environmental justice in England and Wales, including potential developments such as the evolution of PCOs, the introduction of qualified one-way costs shifting (QuOCS) and/or the development of the Environmental Tribunal. Your response will help to inform a WWF paper presented at a major CAJE event on the Aarhus Convention on 10 October at King’s College, London.

I know you have many calls on your time – so if you can only answer the quantitative section of the questionnaire, that’s still helpful. However, if you can write some comments – however brief – that would help WWF present a more informed and nuanced position at the conference.

Please don’t hesitate to contact me if you would like further clarification and if you could return the questionnaire to cday@wwf.org.uk by 22 July I would be very grateful. All views will be non-attributed.

Questions on the current judicial review regime within the High Court, Court of Appeal and the Supreme Court

1. In general, how satisfied are you with the current rules on standing as applied in the High Court? Please delete as appropriate:
   
   very satisfied   quite satisfied   not satisfied   no view
   
   Comments:
   ………………………………………………………………………………………………

2. In general, how satisfied are you with the courts’ treatment of environmental issues?

   very satisfied   quite satisfied   not satisfied   no view
   
   Comments:
   ………………………………………………………………………………………………

3. In general, how satisfied are you with the current rules and procedures on costs?

   very satisfied   quite satisfied   not satisfied   no view
   
   Comments:
   ………………………………………………………………………………………………

4. In general, how satisfied are you with the current rules as applied on interim relief?

   very satisfied   quite satisfied   not satisfied   no view
   
   Comments:
   ………………………………………………………………………………………………

5. In general, how satisfied are you, post Corner House, with the use of Protective Costs Orders (PCOs) as a mechanism for ensuring that costs are not “prohibitively expensive” for individuals, community groups and/or NGOs?

   very satisfied   quite satisfied   not satisfied   no view
6. Are you aware of any good, arguable cases that have not gone ahead because of concerns about costs or potential exposure to costs?

- yes
- no

Comments:

Questions on amending the current rules and procedures in respect of judicial review and the potential development of the current First-Tier (Environment) Tribunal (the “Environmental Tribunal”)

7. Do you think the “criteria” established in Corner House with respect to the granting of PCOs could be further modified to achieve access to environmental justice for individuals, community groups and/or NGOs? If so, how?

- yes
- no
- no view

Comments:

8. Are you in favour of qualified one-way costs shifting (QuOCS) for environmental cases as recommended by Lord Justice Jackson in his review of civil litigation costs? If so, why?

- yes
- no
- no view

Comments:

9. Do you think there are potential advantages in developing the role of the Environmental Tribunal as a forum for either judicial review and/or statutory appeals? If yes, please go to question 10, if not please go to question 12.

10. Please explain briefly what you think these advantages might be? Consideration could be given to: coherence, standing, timeliness, legal representation, case management, scope of review, costs, interim relief, judicial expertise, specialist advisers, environmental “think tank”

Comments:

11. It is common practice in tribunal appeals for each party to bear their own costs. Do you think this would address concerns about prohibitive expense in relation to individuals, community groups and NGOs?

- yes
- no
- no view

Comments:
12. Do you think there are any potential disadvantages in developing the Environmental Tribunal in this way? Consideration could be given to: separating environmental cases from “mainstream” law, timeliness, complexity of cases, time and costs associated with establishment.

Comments:

........................................................................................................................................

13. Do you think there are any other ways in which the current regime could be amended to improve access to environmental justice in England and Wales? Consideration could be given to: public funding, judicial training, pro bono advice, access to information about legal services.

Comments:

........................................................................................................................................

Questions for practitioners

14. Broadly speaking, what is the breakdown of your client base on environmental cases?

- Individuals with legal aid  ....................
- Privately funded individuals  ....................
- Individuals with ATE insurance  ...............
- Community/residents’ groups  .................
- Environmental NGOs  ...........................
- A combination of the above  .................
- Other  ........................................

15. Broadly speaking, what percentage of your work base is environmental? ...............
Annex II

Questionnaires were addressed to individuals in the following organisations:

**Solicitors**
Berwin Leighton Paisner LLP
Burges Salmon LLP
Browne Jacobson LLP
DLA Piper
Dundas & Wilson
Eversheds
Freshfields Bruckhaus Deringer LLP
Harrison Grant
Hugh James
Leigh, Day & Co Solicitors
Richard Buxton Environmental Law
Sole practitioners (1)
Stephenson Harwood
Stevens & Bolton LLP

**Barristers**
1 Crown Office Row
6 Pump Court
39 Essex Street
Blackstone Chambers
Brick Court Chambers
Doughty Street Chambers
Francis Taylor Building
Landmark Chambers
Matrix Chambers
Monkton Chambers
No 5 Chambers
Old Square Chambers
**Statutory agencies**

Environment Agency England
Environment Agency Wales
Legal Services Commission
Natural England

**NGOs**

Amphibian & Reptile Conservation
Buglife
Capacity Global
Client Earth
Environmental Law Foundation
Fish Legal
Friends of the Earth
Greenpeace
Marine Conservation Society
Public Law Project
RSPB
Whale & Dolphin Conservation Society
Wildlife & Countryside Link Legal Group
WWF-UK
Why we are here
To stop the degradation of the planet’s natural environment and to build a future in which humans live in harmony with nature.

wwf.org.uk