House of Commons
Environmental Audit Committee

Environmental Crime and the Courts

Sixth Report of Session 2003–04

Report, together with formal minutes, oral and written evidence

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The Environmental Audit Committee

The Environmental Audit Committee is appointed by the House of Commons to consider to what extent the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development; to audit their performance against such targets as may be set for them by Her Majesty’s Ministers; and to report thereon to the House.

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References

In the footnotes of this Report, references to oral evidence are indicated by ‘Q’ followed by the question number. References to written evidence are indicated by page number as in ‘Ev12’.
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Conclusions and recommendations

1. We are concerned that the general level at which fines are imposed neither reflects the gravity of environmental crimes, nor deters or punishes adequately those who commit them. This is clearly unsatisfactory. (Paragraph 16)

2. For many forms of environmental crime, compulsory remediation work on the sort of blight for which the offender was himself responsible would be a more appropriate sentence than a fine. (Paragraph 17)

3. We consider it unfortunate that community sentences have for so long been tied inflexibly to custodial sentences. This has markedly reduced the ability of courts to pass appropriate sentences for environmental offences. (Paragraph 17)

4. It is clear that, given the current paltry range of sentences available, there is simply insufficient scope to properly tailor sentences to offenders. (Paragraph 18)

5. It appears to us that the profits made from crimes form too little a part in decisions as to the size of fine or sentence to be given. Courts—and prosecutors—need to bear in mind that unless the polluter pays substantially more than the sum he profits by from his crime there will be no real deterrent or punishment value to the sentence given. (Paragraph 21)

6. Both the low level of payment of fines and their indiscriminate destination are unsatisfactory. It is evidently far too easy to avoid payment: and even were 100% of fines to be paid, it would be of no benefit to those leading the fight against these crimes. This is hardly a just situation. (Paragraph 22)

7. We believe that there may be grounds for establishing guidance that crimes against the environment merit an automatic aggravation before the court—in other words, that one of the aggravating factors included as guidance for magistrates or judges is damage to the environment or threat to local sustainability. (Paragraph 24)

8. The current sentencing system is just not flexible and imaginative enough adequately to punish corporate bodies or those in senior managerial positions within them. It is disgraceful that some companies openly boast about their crimes as though they manifested some sort of commercial talent or marketing genius. The Government must adopt a much tougher stance with businesses—regardless of their size and nationality—which flagrantly flout the law. (Paragraph 26)

9. It is noteworthy that sections 43-7 of the Anti-Social Behaviour Act 2003 have recently come into force which assist prosecutors and sentencers in dealing more flexibly—thus effectively—with local environmental crime, particularly graffiti and fly-posting. This is very much to be welcomed. (Paragraph 27)

10. Investigating and prosecuting bodies must be congratulated for continuing to bring cases before courts when the chances of a satisfactory outcome realistically appear so slight. (Paragraph 28)
11. Preventing the common-or-garden fly-tipper, “the man with the white van”, from owning or driving a van is more useful than fining him a negligible amount which he will more than make up with his next “job”. (Paragraph 30)

12. We expect DEFRA to move on from its welcome consultations over fly-tipping to consider wider and more detailed changes that will assist the Environment Agency and local authorities in particular in ensuring that those they detect and prosecute successfully will receive sentences that are robust and appropriate to the crimes committed and to the type of offenders involved. (Paragraph 32)

13. We acknowledge that there may be little scope for increasing the custodial maxima, but expect the Government to look into the limits on traditional sentencing across the range of environmental crimes to see where benefit may accrue from appropriate increases. (Paragraph 33)

14. The Government should seek to assist the Judicial Studies Board (JSB) to commit judicial training to environmental impacts and the principles of sustainable development. Government has a duty to encourage all engaged bodies to assist in tackling environmental crime as seriously as other crimes which blight lives: it would be wrong for government to consider this duty as one which does not extend to the judiciary. (Paragraph 36)

15. Information is key to fighting crime, and all those dealing with environmental offences, whether they be sentencers, prosecutors, investigators, or those dealing with clean-up or with prevention, require a good corpus of information on which to build effective strategies. We look to the Government, in co-operation with other engaged bodies, to examine practical means to set up a comprehensive database of environmental crime to improve information in this area. (Paragraph 38)

16. We expect the Government to ensure that those agencies who handle community sentences are sufficiently resourced to cope with what we hope will be an increasing number of such sentences. (Paragraph 39)

17. We call on the Home Office and the Environment Agency to look again at these proposals to deal more effectively with corporate or business environmental crime; and to ensure that such proposals are quickly cast in a legislative shape upon which Parliament can then come to a decision. (Paragraph 41)

18. DEFRA should look at the possibilities of granting to environmental bodies a power similar to that the Health and Safety Executive (HSE) possesses in the form of the issuing of prohibition notices. (Paragraph 42)

19. If the Government believes that extending those powers to impose fixed penalty notices currently available in most places only to police officers or their equivalent to agents of the Environment Agency or local authorities is a good idea and will assist in tackling environmental crime then it ought to do something about it. Government inaction in the first instance led to the private legislation the precedent of which the Government now cites as reason not to act. (Paragraph 43)
20. The Government and other appropriate bodies must look seriously at the proposals for such specialist training on environmental crime and for the establishment of teams of dedicated magistrates. It is clear that without such concentrated experience and expertise the courts will continue to be a lottery often unfavourable to deterrence and proper punishment. (Paragraph 45)

21. The Government has shown itself to be sufficiently joined-up to begin to tackle anti-social behaviour. It now needs to ensure that it works in a co-ordinated fashion, and with other bodies, to tackle the currently poor sentencing record for offences against the environment. Only by doing so will it effectively begin to deal with the blight that is environmental crime. (Paragraph 46)
Introduction

1. During the late summer of 2003 we decided to set up a Sub-committee on environmental crime. We had been increasingly aware over that year of concerns expressed about prosecutions and sentencing in this area, and we were interested in the overlap between environmental crime and local environmental aspects of the anti-social behaviour agenda being highlighted by Government and local authorities across the country, largely in response to public concern. We were also aware of some discrete areas within the broad scope of environmental crime, such as wildlife crime, which were continually prominent in the media and in the concerns of members of the Committee. It was decided to confine the Sub-committee’s work to England and Wales on account of the different legal system in Scotland and Northern Ireland.

2. The Sub-committee on environmental crime was established on 12 November 2003. At its first meeting on 10 December, the Sub-committee decided to pursue a number of different inquiries beneath the umbrella of environmental crime. As its first inquiry, the Sub-committee decided to look into the matter of environmental crime and the courts, in the light of anxieties prevalent in the environmental media and anecdotally passed on to the Committee by agencies and bodies dealing with such crimes that there were problems with the proportion of crimes dealt with by the courts, and with the level of sentences given. It was argued that, given the low level of sentences handed out for the few cases that were successfully prosecuted, the courts were not providing the necessary deterrent to those engaged in environmental crime nor adequate punishment for their activities.

Scope of inquiry

3. The Sub-committee announced this first inquiry on 10 December 2003. It wished in particular to hear views on:

- the scale and nature of sentences for environmental crimes, and whether or not they were commensurate with the seriousness of the crimes for which they were given;
- whether sentences were appropriately set to act as a deterrent;
- whether sentencing for environmental crimes was sufficiently flexible to allow appropriately sentencing;
- whether the guidance currently available for magistrates’ courts was sufficient – and whether or not it was being used; and
- to what extent the principle of sustainable development, or other broad environmental principles, was seen by practitioners as the basis for sentencing decisions.

4. Twenty-three memoranda were received, some also relevant to inquiries that the Sub-committee intends to cover following this first inquiry. Oral evidence was heard from seven witnesses. We are grateful for all the evidence given to the Sub-committee and for the co-operation extended to it during its inquiry.
5. We are aware that there have been a number of recent developments in the area of environmental crime, not least on account of the recent enactment of anti-social behaviour legislation. Some of these developments promise to answer some of the concerns expressed to us before the Sub-committee commenced its inquiry. We are likewise aware of a number of developments that are to be expected during the remainder of this calendar year. On 23 February of this year, the Department for the Environment, Food and Rural Affairs (DEFRA) released two consultation papers dealing with fly-tipping which will hopefully result in a strengthening of the due process of law.¹ There is increasing governmental concern, local and national, and there is now more than just that – there is also action to deal with some of the problems manifest in this area.² We are however concerned at the rate and extent of this improvement: it is slow, sometimes unnecessarily so, also uncertain and patchy. This rate of improvement also sadly falls within the context of environmental crime not having been taken seriously enough for many years, during which time it has festered, leading some people to become habitual offenders and others to accustom themselves reluctantly to predictable and seemingly inescapable blight. It is also clear that, despite the praise due for progress made recently by Government and many local authorities in particular, environmental crime still remains in some areas far from the priority it ought to be.

What is environmental crime?

Statute

6. Environmental crime includes all offences either created by statute or developed under the common law that relate to the environment. The environment is, in simple terms, the surroundings in which we live. Section 1 of the Environmental Protection Act 1990 defines the environment as ‘all, or any, of the following media, namely the air, water, and land’. That Section also defines pollution of the environment as pollution ‘due to the release, into any environmental medium from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment.’ Successive governments have legislated to give powers to executive agencies to protect the environment and enforce environmental legislation. International environmental law and principles have been transposed into national law to ensure compliance with state commitments. Environmental crime has not been codified or consolidated into a single Act but is found in a range of separate pieces of legislation. Some of the most frequently used criminal sanctions are found in the Environmental Protection Act 1990 (as amended) and the Water Resources Act 1991.


² see Living Places: Cleaner, Safer, Greener, 11th Report of the Select Committee on the Office of the Deputy Prime Minister, Session 2002-03.
Key organisations

7. The main organisations for securing environmental protection in England and Wales are the Environment Agency (hereafter, the Agency) and the environmental health teams of local authorities. The main aim of the Agency is to prevent or minimise harm to the environment and it has a range of enforcement and other powers available. It manages significant environmental impacts such as waste management, water pollution, the integrated pollution prevention and control regime and radioactive substances. Local authorities have powers and responsibilities for looking after the well-being of their communities. They manage local air pollution, land use, trees and open spaces and matters relating to anti-social behaviour including noise, dog fouling and fly posting. There is overlap in responsibilities between the Agency and local authorities, particularly in relation to waste, which is governed by a protocol defining the key roles. This protocol is currently the subject of one of the DEFRA consultations referred to above. In terms of environmental crime, each agency has investigation and prosecuting powers and must comply with investigating and prosecuting codes of practice. Aside from the Agency and local government, other bodies involved in investigation include the police who are responsible for investigating wildlife crime and certain cases of criminal damage. The Crown Prosecution Service is the prosecuting agency for the police. Other prosecuting bodies in this area include HM Customs and Excise, the Pesticide Safety Directorate and the Health and Safety Executive.

Uniqueness of environmental crime

8. It is estimated that there are up to 10,000 environmental prosecutions annually. This number is comparatively small. There were in total 1.93 million offenders proceeded against in the year 2002-03 with 33,000 for burglary alone.³ This might suggest that, in comparative terms, environmental crime should be given less attention than many other crimes. However, Dr Leith Penny, Director of Cleansing at Westminster City Council, suggested to us that, roughly speaking, only 10% of all known environmental offences end up in court.⁴ The bald statistics fail to reflect the unique nature of environmental crime. It is distinct from other aspects of law because of the potential impact of any given incident on a large sector of the community, wildlife and habitats. There may also be long-term adverse effects on the environment and future generations, effects that go way beyond simple visual blight, and loss of amenity. With reference to the local environment, there is also increasing evidence that there is a connection between local environmental degradation and increasing incidences not only of environmental but of other crimes. Whereas many other crimes involve the concept of risk of harm—drink-driving for example—that risk in environmental crimes can often be less evident at first sight but the harm more pervasive. Environmental offences also may have significant health implications.

³ Criminal Statistics in England and Wales 2003, Cm6054.
⁴ Q197.
Relevant principles of criminal law

9. All criminal cases begin in magistrates’ courts. If a defendant pleads not guilty to the charges the case will proceed to trial and may transfer to the Crown Court. Magistrates hear over 95% of all criminal cases. This proportion is even higher for environmental cases: in most environmental cases, the defendant will plead guilty. This is often because the majority of environmental offences are ‘strict liability’: in other words, the offences do not require proof of *mens rea*, or guilty mind, in respect of one or more elements of the offending act, but simply proof that the relevant act has been committed, unlike, say, murder which requires intention to kill the victim. Once a defendant has been convicted or has pleaded guilty to the offences, the court will pass sentence.

Sentencing

10. Section 142 of the Criminal Justice Act 2003 has introduced new statutory purposes of sentencing which include the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders. These sentencing purposes are supported by a range of sentencing options including imprisonment, suspended sentences, community service orders, fines, conditional and absolute discharges. For companies, excluding directors or the controlling minds of a company, fines are often the only option. Courts decide sentences by taking into consideration both the aggravating and mitigating factors of each particular case. Before imposing a fine the court is also under a duty to consider the offender’s financial circumstances. In 2000, the Sentencing Advisory Panel issued guidance to the Court of Appeal in environmental cases. It stated that for most environmental offences the starting point should usually be a fine and this should then be adjusted to take into account any aggravating or mitigating factors.

11. Many environmental offences carry exceptional summary maxima that allow magistrates to impose fines of up to £20,000 per offence. This is four times the value of the current statutory maximum fine on summary conviction for most other crimes (conviction in the magistrates’ court). A few environmental offences have exceptional summary maxima of £50,000 and in one instance £250,000 (for the discharge of oil in UK waters). Many environmental offences also attracted unlimited fines if sentenced in the Crown Court. At present, DEFRA is consulting on whether the maximum summary sentence for certain waste offences should be increased from £20,000 to £50,000.

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5 Q243.
7 Ev58.
8 Ev59.
Sentencing guidelines and guidance

12. In 2001, the Magistrates Association issued guidance entitled: *Fining of Companies for Environmental and Health and Safety Offences*. It issued guidance on wildlife crimes in 2002 entitled: *Wildlife Trade and Conservation Offences* as well as guidance for sentencers entitled: *Costing the Earth*. The Court of Appeal has declined to issue guidelines on environmental sentencing. In the case of *R v Anglian Water Services* (2003) it endorsed the Magistrates’ Association guidance but stated that sentencing should be considered on a case-by-case basis. In the absence of any more rigorous guidance there is inevitably a great diversity of sentences given for broadly similar crimes across the country.

Environmental crime: the challenges

Infrequency of environmental crimes

13. Environmental crime, being a broad and diffuse area of offence whose gravity is not at first always evident, presents many challenges to those authorities tasked with dealing with it. In its first inquiry, the Sub-committee chose to focus in particular upon sentencing because it was clear that here the broad nature of such crimes, and the comparative infrequency of their coming before a court, was causing the greatest problems for practitioners in terms of setting sentences appropriate for punishment and/or deterrence. As Mr Ric Navarro, Director of Legal Services to the Environment Agency, explained to the Sub-committee, “we know on average that only once in seven years a magistrate will have an environmental crime case”. While this may somewhat overstate the infrequency with which magistrates consider environmental crimes in reality, it is clear that this lack of practical experience underpins many of the problems we will touch upon during this Report. It is also worth noting that, as Mr Navarro went so to say, “judges who are sitting day after day dealing with normal crime […] find it difficult to know where to pitch environmental crime”. We will come later to the matter of guidance that might assist in addressing this difficulty.

14. This infrequency is not just a problem afflicting magistrates and judges. Some of those prosecuting are also less than well-practised. In 2000, the Sentencing Advisory Panel in advice to the Court of Appeal pointed out that the standard of prosecution in environmental cases was often deficient. For local authorities this may indeed have been down to lack of experience and expertise, and many local authorities have begun to take steps to address this problem. Some local authorities, of course, have always prosecuted environmental cases well. For the Environment Agency, whose prosecutors could be expected to be both experienced and properly trained, it is clear that standards were lower.

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9 Ev96.
10 Q5.
11 Q6.
12 Ev70, para 17.
than they should have been. At the time that the Sentencing Advisory Panel made its comments about standards of prosecution, the Agency began a new rolling training scheme for prosecutors and investigators, and since then the EA has assured us that standards have risen.13

**Level of sentences**

15. In broad terms, one of the principal concerns that confronted us was the fact that the level of sentences given in courts—principally magistrates’ courts—for environmental crimes was too low for them to be effective either as punishment or as deterrent. This was particularly the case with repeat offences. As Councillor Sir David Williams from the Local Government Association explained to us: “When you get somebody going to court for fly-tipping for the third or fourth time and they get the same standard fine which is a small fraction of the amount of money they have gained from fly-tipping… that is not only wrong in principle but very frustrating for local councils, and only encourages the crime”.14

16. Many different reasons were cited for this phenomenon of low sentences. Some proffered the view that magistrates were unsympathetic to the idea that environmental crime was real crime. Others felt that they were sympathetic but lacked the proper guidance or the necessary experience. It was also suggested that the higher maxima involved in many environmental crimes dissuaded the practitioner from using the full scope of sentencing available by dint of their very rarity: a magistrate used to sentencing by fines of no more than £5,000 will baulk at going higher, even when permitted, in an area in which he feels he has little experience.15 Although we were told that “prosecutors are reporting a perception of a greater confidence, understanding and awareness by sentencers”,16 almost all witnesses agreed that sentences were generally too low, the maxima were not being taken advantage of, and that consequently the punishment for environmental crimes was slight and no real deterrent. We are concerned that the general level at which fines are imposed neither reflects the gravity of environmental crimes, nor deters or punishes adequately those who commit them. This is clearly unsatisfactory.

**Nature of sentences**

17. For the vast majority of current environmental crimes, the only options open to a court until now have been to fine, or, for more serious crimes—and more serious criminals—to imprison. Only in the case where a prison sentence would be given can the option of a community sentence for some crimes be used instead. In 2002, we were told, “something like 30 people received a community sentence [for all environmental crimes prosecuted]… and a handful went into custody”.17 Given the breadth and unique nature of environmental

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13 Q19-20.  
14 Q177.  
15 Q23.  
16 Ev4.  
17 Q234.
crimes, this restricted choice of substantive sentences is particularly problematic. It has been suggested that, regardless of the severity of fines, financial penalties are a blunt instrument and often inappropriate both for the sorts of crimes that fall within this category and for the sorts of offenders who commit them. For many forms of environmental crime, compulsory remediation work on the sort of blight for which the offender was himself responsible would be a more appropriate sentence than a fine. As Mr Simon Baxter, Chief Enforcement Officer of the London Borough of Southwark, told us: “if a child is caught doing graffiti, they should be made to go and clear that graffiti off for the next six weekends…the magistrates and the judicial system need to be creative in how they punish individuals”.

However, as noted above, at the moment, for most crimes, such work, in a community service order, can only be given if the offender had committed a crime serious enough or been thought deserving of imprisonment. For the vast majority of environmental crime cases brought before the courts neither of these factors applies. We consider it unfortunate that community sentences have for so long been tied inflexibly to custodial sentences. This has markedly reduced the ability of courts to pass appropriate sentences for environmental offences.

Appropriateness of sentences to offenders

18. As we have seen, it is commonly felt that environmental criminals are best punished, and their sentence best put to use, by practically mitigating the ugly face of other environmental crimes—whether by cleaning up graffiti, fly-tipped waste or by making restitution to some environment damaged by crime. However, there is a further dimension to this: the extent to which the sentence should fit not just the crime but also the criminal. Clearly, one-off offenders and those with a record of repeat offences should be dealt with in different ways. Likewise, someone in a large corporation sentenced on account of an environmental crime (organised flyposting, for example) perpetrated in order to further his business interests should be dealt with differently to an employee who through negligence allowed some small environmental damage to occur. In the instance of a company where the identity of the real individual culprit is unknown or unknowable, fines are the only sentence currently available. It is clear that, given the current paltry range of sentences available, there is simply insufficient scope to properly tailor sentences to offenders.

19. There are two particular areas where this is most of all a problem. A significant proportion of offenders who are presented before courts in environmental cases receive as sentences fines which verge on the derisory in the context of the seriousness of the crime. In R v James, James and James & Gilbert Gardens Nurseries, thousands of tonnes of waste was dumped in 18 separate offences between 1999 and 2000. The individuals concerned were fined only £750 and the company £80 at Cardiff Crown Court.

Sometimes they are discharged without any fine at all. In many instances this is because the offenders claim that they are without sufficient means to pay a more appropriate level of fine, as they are on benefit or income support. Offenders also claim that substantial fines would harm their

18 Q184.
19 Ev2.
20 Q170.
business and may perhaps result in commercial insolvency.\textsuperscript{21} The inability of the sentencing system to deploy a punishment other than an insignificant fine in these instances is self-evident and deeply unsatisfactory. Magistrates are compelled to take account of an offender’s means and of the ability to pay off a fine within one year.\textsuperscript{22}

20. There is also a proportion of offenders who come before a magistrate who find even a significant fine derisory in terms of their ability to pay. Often there are commercial bodies or companies whose monthly turnover dwarfs the size of even the maximum possible fine from a magistrates’ court. Magistrates of course have the option of transferring the case upwards to the Crown Court where some crimes attract an unlimited fine as sentence, but this happens very rarely.\textsuperscript{23} Moreover, when cases have been transferred to the Crown Court and received very substantial fines, these fines have been reduced, often to a very marked degree, upon Appeal. One example of this is the case of the Milford Haven spillage of some 72,000 tonnes of crude oil which damaged 38 Sights of Special Scientific Interest (SSSIs), where a fine of £4 million was reduced to £750,000 on appeal, despite the fact that the Agency costed the remedying of the damage to between £49 and £58 million.\textsuperscript{24}

**Polluter does not pay enough**

21. It is a further problem that many of those who claim to have insufficient means to pay a reasonable and appropriate level of fine are nonetheless making significant profits from their crimes. Bodies involved in prosecuting environmental offences, such as the Environment Agency, are aware of many individuals who claim poverty or near insolvency yet who regularly offend and who can make substantial amounts of money from their offences. This seems to apply in particular to fly-tippers, although there are instances where individuals concern themselves in a variety of areas of environmental offence within a short period of time—they appear to have a portfolio of environmental and other contraventions which they can pursue and profit from (including dealing in red diesel, the dumping of construction waste, fisheries poaching, &c.,).\textsuperscript{25} This is clearly unsatisfactory, and reinforces the sense that environmental crimes pay and that the polluter does not pay sufficiently if at all. Repeat offenders in particular need to be given more than just a slap on the wrist in the form of a very low fine which they will probably not pay anyway and which will have no impact upon their habit of lucrative offending. It appears to us that the profits made from crimes form too little a part in decisions as to the size of fine or sentence to be given. Courts—and prosecutors—need to bear in mind that unless the polluter pays substantially more than the sum he profits by from his crime there will be no real deterrent or punishment value to the sentence given.

\textsuperscript{21} Q29.
\textsuperscript{22} Q138.
\textsuperscript{23} Q222.
\textsuperscript{24} Ev65; also R v Anglian Water Services Ltd (EWCA Crime 2243).
\textsuperscript{25} Evidence given to the Sub-committee by the Environment Agency, 25 March 2004, Q95: not yet printed.
Non-payment of fines

22. The Department for Constitutional Affairs (DCA) reported that only 55% of fines in 2002-03 (in terms of total monies) was actually collected.\(^{26}\) The Department has no information as yet on what proportion of individual fines this represents because individuals who have been fined a number of times have an accumulated financial total to their names rather than a number of individual fines. Clearly, many of those fined do not pay—this represents an even clearer signal that fines as sentences are not just low, insufficient as punishment and as deterrent, but ineffectual even in wringing a pitiful amount of money from offenders’ hands. In addition to this, magistrates take account of likely payment or non-payment when giving fines as sentences. This again tends to reduce the level of the fine given.\(^{27}\) Furthermore, what money is collected goes into the Central Fund and at the moment—unlike monies from fixed penalty notices—cannot be poured back into prosecuting or investigating environmental crime, or into the environment in general, which is clearly what those involved in this area would most like to see. The Environment Agency stressed to us that it would very much like to retain these monies, “to go on increasing [the] enforcement effort… or on projects to benefit the environment”.\(^{28}\) Both the low level of payment of fines and their indiscriminate destination are unsatisfactory. It is evidently far too easy to avoid payment: and even were 100% of fines to be paid, it would be of no benefit to those leading the fight against these crimes. This is hardly a just situation.

Mitigating and aggravating factors in sentencing

23. Courts are obliged to follow guidelines on factors which may mitigate or aggravate the severity of the sentence being considered. We have already touched upon sentences being reduced upon account of an offender’s ability to pay. This is an example of a mitigating factor. There are a number of other grounds for similarly reducing sentences. It appears that mitigating factors are applied more freely than aggravating factors and this may lead to an imbalance in sentencing. The principal reason for this imbalance, leaving aside the frequency of questionable recourse to mitigation on account of insufficient means to pay, may be that most environmental offences are of strict liability and do not require a proof of intent, only that the criminal activity has been carried out by the offender. The absence of the need to demonstrate intent appears to assist mitigation in that some crimes may not be considered real crimes because the offender did not intend to commit them.

24. It is arguable that prosecuting authorities could do better in putting aggravating factors before the courts with greater energy. Investigating authorities could also do more than expose the bare minimum—that an offence was committed by a particular person or body

\(^{26}\) Q265-7.
\(^{27}\) Q138.
\(^{28}\) Q46.
\(^{29}\) Q276.
—and to look into the intention behind the crime. Was there malice, or design to avoid cost or to benefit from gain? This would of course eat up more resources, take longer and perhaps lead to fewer prosecutions with prosecutors trying to prove more than they currently need to. We consider it unfortunate that the lack of need to prove intention means that the level of fines is more likely to go down than up as crimes are assessed more on strict liability grounds rather than in the context of malice or clearly culpable negligence. Risk of harm in crimes is already taken into account where appropriate: perhaps a factor that recognises the uniqueness of environmental crime and its peculiarly wide effects should be placed before the courts so as to ensure a more balanced outcome to trials. **We believe that there may be grounds for establishing guidance that crimes against the environment merit an automatic aggravation before the court—in other words, that one of the aggravating factors included as guidance for magistrates or judges is damage to the environment or threat to local sustainability.**

**Corporate offences**

25. While many environmental crimes are caused by lazy, negligent or malicious individuals, some of the worst instances of such crimes are the responsibility of companies or—in the most flagrant cases—are deliberately carried out by commercial bodies. Such bodies range in size from very small organisations, employing two or three individuals, to very large multi-national businesses. Their turnover and profitability also range across a very large spectrum, and in the case of the latter does not necessarily have any connection with the size of the business concerned. In other words, it may be unjust to fine a large company which is seldom very profitable or whose profits are necessarily slight in comparison to its size more than a smaller company which makes much more in terms of profit for its business, perhaps because it habitually commits environmental offences in order to avoid greater costs. Much of the evidence presented to us was directed at problems in dealing effectively with corporate crime: prosecuting the most appropriate individual in a business (the formally guilty party) rather than whoever is easiest to connect materially with the crime; finding any responsible individual in a business at all when intention does not have to be discerned and the company just wishes to pay the relevant fine, no questions asked; adjudging the appropriate level of fine when there is often no evidence of the general profitability of a company or its turnover, and no evidence as to the financial weight (avoided cost or earned profit) of the offence itself; and dealing forcibly with companies who deliberately and repeatedly flout the law for reasons of commercial profit.

26. It would appear from the evidence we received that prosecuting bodies spend more time and more resources on such corporate environmental crimes than their frequency would proportionately entail. Whether the form of corporate crime be the posting up of prostitutes’ cards in a telephone box or the spilling of oil which blights an entire regional coastline, some of the problems outlined above seem in most instances to apply. In both the above, the person most easily prosecuted—the individual posting up the cards or who allowed the oil to spill—is not necessarily the only person who ought to be punished. It is very difficult to get behind the crime to the principal offender. Cases in which intrusive
investigation to establish who is at greatest fault is clearly most necessary when an offence results from culpable negligence or deliberate intent. Examples of the latter include fly-posting campaigns approved of by companies involved—Sony Records, for example, or Ansell, the owners of the Mates condoms range, whose business development manager was quoted in *Mediaweek* as saying that fly-posting gave the Mates brand “more street credibility”. In such cases, where the offence may result in considerable profits for the company involved, prosecutors rightly think it almost beside the point to deal only with a lesser individual carrying out the crime for which a senior executive is effectively responsible. Even putting aside the often extreme difficulty of finding and successfully prosecuting the individual behind the decision that led to an environmental crime, the current sentencing system is just not flexible and imaginative enough adequately to punish corporate bodies or those in senior managerial positions within them. It is disgraceful that some companies openly boast about their crimes as though they manifested some sort of commercial talent or marketing genius. The Government must adopt a much tougher stance with businesses—regardless of their size and nationality—which flagrantly flout the law.

**Recent developments**

27. In the light of these anxieties, we are therefore pleased to see that with regard to fly-tipping, one of the most prevalent and significant of environmental crimes, DEFRA has, in its recent consultation, proposed increasing the fines for fly-tipping offences to take into account, in particular, repeat offending. It is clear that magistrates must be encouraged to pass higher sentences, and that higher maxima are appropriate. It is however not certain that the option to give a higher sentence alone will lead to higher sentences, since at the moment the average fine for fly-tipping is under one half of the current maxima. It is also noteworthy that sections 43-7 of the Anti-Social Behaviour Act 2003 have recently come into force which assist prosecutors and sentencers in dealing more flexibly—thus effectively—with local environmental crime, particularly graffiti and fly-posting. This is very much to be welcomed.

**Summary of the existing challenges**

28. Given all of these factors it is remarkable that prosecuting bodies have the determination to prosecute as many cases as they do. Justice must often appear to be a lottery, and a lottery that costs the authority pursuing the case more than it is likely to receive in costs and more than the offender is likely to receive in terms of any fine. Investigating and prosecuting bodies must be congratulated for continuing to bring cases before courts when the chances of a satisfactory outcome realistically appear so slight.
29. In conclusion, fines are too low and community sentences are not used frequently enough, despite their particular appropriateness. Current sentencing, even taking into account these three alternatives, is still too inflexible, especially when it comes to offenders who claim insufficient means—at one end of the scale—or those whose means are very great—at the other. Current guidelines for the mitigation of sentences work in favour of the offender and fail to recognise the peculiar nature of environmental crime and its gravity. In terms of fines, minima are probably inappropriate—for custodial sentences clearly so: maxima for fines in magistrates courts are not high enough for some offenders and offences, but there is also no sign that anywhere near the limit is commonly being given anyway.

30. The use of custodial sentences at all for environmental crime is rare and probably should remain that way. More scope needs to be given to the application of community and alternative sentencing at this level and at the lower level of crimes. In particular, the Government needs to look at enabling courts to deal more practically with criminals in this area—in particular, with repeat criminals. Preventing the common-or-garden fly-tipper, “the man with the white van”, from owning or driving a van is more useful than fining him a negligible amount which he will more than make up with his next “job”. While the current guidance for magistrates on environmental crimes is good it is not necessarily being used as much as it might be. Training for magistrates is infrequent and often superseded by training which relates to more common crimes. The general problem remains that the exposure of magistrates to these crimes is infrequent and most therefore lack experience and expertise. The current situation is clearly unsatisfactory and has been so for a number of years. That it is beginning to improve is welcome, but it is too late, and progress is still too slow. Habits of environmental crime that would not have formed but for the inadequacy of sentencing now have to be broken.

31. In one sense there appears to have been collective failure to deal effectively with environmental crime once they reach the courts. The failure of such crimes to be considered as any sort of priority was made to clear to us by Mr Keir Hopley, Head of the Sentencing Policy and Penalties Unit at the Home Office, when he said “to be absolutely honest in terms of my day-to-day job and life, environmental crime is not at the forefront of my agenda”: DEFRA however has to accept principal responsibility for not having addressed what it must have known to be an unsatisfactory position with regard to sentencing for environmental crimes. The Agency has certainly before now made DEFRA aware of the problems it faces. Local authorities also, once they—late in the day—decided that environmental crime was a real problem, passed on their concerns. It is the job of DEFRA to present those concerns to the Home Office whose interest in crime is so broad—necessarily—that it cannot be expected to have any special consideration for one area of crime over another. Yet DEFRA appears to have been a lacklustre agent for positive change. It may be significant that the Department neither sought to give oral evidence

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31 Q147-8.
32 Q297.
During this inquiry nor, until one was directly sought, submitted a written memorandum—and that memorandum treats environmental crime almost entirely within the narrower scope of wildlife crime. It is perhaps unsurprising, given DEFRA’s seeming absence from the environmental crime debate that took place during the course of the Sub-committee’s inquiry, that so little was done earlier. Only the Government’s concern with anti-social behaviour, a sadly euphemistic term that covers a variety of local environmental and other crimes (no less serious for their being local), seems to have kick-started any real interest in DEFRA with the crime and punishment agenda.

32. DEFRA must seize the initiative and push forward a bold and radical agenda to implement whatever changes are necessary to progress this unsatisfactory area of sentencing. Without deterrence and real punishment it cannot be expected that the incidence rate and gravity of environmental crimes will reduce. It is a problem that needs to be tackled not stroked into submission. **We expect DEFRA to move on from its welcome consultations over fly-tipping to consider wider and more detailed changes that will assist the Agency and local authorities in particular in ensuring that those they detect and prosecute successfully will receive sentences that are robust and appropriate to the crimes committed and to the type of offenders involved.**

### The way forward: suggestions and solutions

#### Increase in level of environmental sentences

33. Historically, sentences have been financial or custodial. In a simple world, raising the maxima for environmental crimes in either or both of these areas might have the desired effect of deterring and properly punishing offenders. As we have seen, however, the world of environmental crime is far from simple. That is not to say that there is no scope for increasing maxima for some crimes. DEFRA is consulting on just such increases for repeated fly-tipping offences. While it is clear that maxima are properly seen as caps on sentencing rather than as targets, higher maxima gives greater scope to the sentencer and may well lead to greater average sentences. **We believe an upwards drift in the level of sentences for some environmental crimes following the imposition of increased maxima to be desirable. Moreover, increased maxima send out an important signal to sentencers, prosecutors, offenders and the public at large that environmental crimes are to be understood as serious matters. A little bit of such understanding can do a lot of good. We acknowledge that there may be little scope for increasing the custodial maxima, but expect the Government to look into the limits on traditional sentencing across the range of environmental crimes to see where benefit may accrue from appropriate increases.**
Achieving higher sentencing in environmental crime

34. Raising formal limits for sentences can only be one part in the battle against environmental crime. Sentencers need to be encouraged to make proper use of the full existing range of fines and custodial sentences, encouraged in particular to consider higher fines across the board, especially for repeat offences. If this is not done, then the question of whether or not to raise maxima will remain an academic one. While environmental prosecution is only one part of better environmental protection and sustainable development, it is a key part and, as it is largely a regulatory system underpinned by the criminal law it must be robust. Prosecutors also must be encouraged to press persuasively for higher sentences, and to use all the means at their disposal to call for tougher sentencing. Prosecutors will hold back from this if they feel that their arguments will be set aside by the courts. Likewise, courts will not apply tougher sentences unless a good case for it is put by a professional and determined prosecutor. The stagnancy that results from this impasse must be overcome.

Training and raising awareness

35. One way to encourage those involved in environmental cases to treat them more appropriately and more seriously is through training and raising awareness. There have been efforts to raise the profile of environmental sentencing by the Magistrates Association including publishing guidance for magistrates and running workshops and seminars for prosecutors. However, there is still some way to go. Recent research by Environmental Resources Management found that less than a quarter of all magistrates surveyed were reasonably aware of environmental sentencing guidelines published in 2001. There is the opportunity to encourage and support further training of magistrates. Both the Agency and local authorities stressed the importance of this to us in evidence: and the former is currently helping to train magistrates in environmental crime. There is also concern that there has been no comparable training or guidance issued for the Crown Court or appellate courts and although the Judicial Studies Board (JSB) have been approached by the Environment Agency to offer training in environmental matters, the offer has not yet been taken up. To an extent this is a ‘chicken and egg’ situation. Until the JSB and the appellate courts are aware of the broader impacts of pollution and environmental harm, they will not place it sufficiently high on the agenda. However, until it is on the agenda, raising awareness will be difficult. It is evidence that there is good will towards proper and due consideration of environmental crime that the first thing that the Sentencing Advisory Panel did when it was set up was to consider and deliver guidance for environmental crime. This goodwill needs to be encouraged.

36. The Government has a duty to see that the Judicial Studies Board takes to heart the centrality of environmental crime to other areas of crime and to problems faced by the

34 Ev71, para 32.
35 Q6.
36 Q26.
37 Q32.
sustainable development agenda. The new statutory purposes of sentencing should assist in environmental protection, for example, in making sure that reparation fits squarely with the polluter pays principle. The well-understood “broken windows” theory, that small environmental crimes easily lead on to more major ones, which can in turn lead on to crimes of a different sort and different degree, should also be cause enough for the JSB to realise that dealing satisfactorily with environmental crime will reduce the possible incidence of other crimes. The Government should seek to assist the JSB to commit judicial training to environmental impacts and the principles of sustainable development. Government has a duty to encourage all engaged bodies to assist in tackling environmental crime as seriously as other crimes which blight lives: it would be wrong for government to consider this duty as one which does not extend to the judiciary.

37. There is also a continuing need to train prosecutors. The Agency stated that, following the report of the Sentencing Advisory Panel in 2000, it began a more substantial rolling programme of regular training for its prosecutors. There was little evidence that all local authorities have taken the same approach yet, although no doubt standards vary widely across the country. The recognition by local authorities that better training is needed may have great potential in eventually securing increased and more appropriate sentences in the courts. In addition, there is no doubt greater scope for local authorities, especially those which neighbour upon each other, to share experience and expertise in dealing with this area of crime. While many such crimes can be local, some of the effects of these crimes cross boundaries very easily, as do many of the individuals committing these offences. Co-operation is essential; and current levels of co-operation must improve if the fight against growing trends in particular in some areas of environmental crime—fly-tipping, for example—are to be combated.

**Information**

38. Curiously, less is known about environmental crime than is often supposed. One reason for this is that it covers a very broad range of offences. Another is that it is dealt with by many different bodies, some national (such as the Agency) but most (such as local authorities) regional or local. The idea of maintaining a national public database of environmental prosecutions to publicise offenders and provide more consistency in sentencing was raised by us in evidence. This received a subdued response from the Agency despite the publication of their annual name and shame publication *Spotlight on the Environment*. The Agency is co-operating with local authorities to establish a fly-tipping data-base, *Flycapture*, which will be used by them to fight this particularly serious and widespread offence. However, because of the nature and scope of environmental crime, and the diversity of those dealing with it each reporting offences in a different way, it appears unlikely that any time soon there will be established a broader “envirocrime” database, public or otherwise, to assist in consistency in sentencing and in supplying relevant information to prosecutors unless it receives direct central government assistance. We consider this to be unfortunate. **Information is key to fighting crime, and all those**
dealing with environmental offences, whether they be sentencers, prosecutors, investigators, or those dealing with clean-up or with prevention, require a good corpus of information on which to build effective strategies. We look to the Government, in co-operation with other engaged bodies, to examine practical means to set up a comprehensive database of environmental crime to improve information in this area.

**Options in sentencing**

39. Even were higher fines to result from better training and guidance, and more resort be made to custodial sentences, there would still be instances when fines or imprisonment were simply not as appropriate and therefore not as effective as other possible sentences or punishments. There would similarly be instances when increased fines or custodial sentences were clearly inappropriate and therefore subject to a level of mitigation that rendered them of negligible effect. With the coming into force of Part 12 of the Criminal Justice Act 2003 community sentences will now be able to be imposed in lieu of fines rather than, as before, in lieu of imprisonment.\(^{39}\) This ought to make such sentences more frequently used to punish offenders. This is very much to be welcomed as community sentences are particularly appropriate, and, we believe, effective, in dealing with environmental crimes. This will however, require support from other criminal justice agencies, such as the probation service, to help enforce and implement community service orders. There is concern that, even with the existing options for community penalties, there is too much pressure on the probation service.\(^{40}\) *We expect the Government to ensure that those agencies who handle community sentences are sufficiently resourced to cope with what we hope will be an increasing number of such sentences.*

40. The Agency in its memorandum and in evidence to us stated that it had put forward a number of proposals for sentences that it felt would be effective in dealing with the crimes it faced on a day-to-day basis. A number of these were general proposals, such as the confiscation of a vehicle used for repeated criminal activity such as, for example, the illegal dumping of waste; or remediation orders that would require an offender to remedy the environmental harm to the satisfaction of the Agency within a specified time. The majority of these proposals were however focussed on the commercial end of environmental crime. They included equity share issues that would enable a court to require companies to issue shares for a specified sum related to the avoided costs or benefits obtained through the commission of the offence; corporate rehabilitation orders where the court would grant an order that for a specified period, for example, two years, the company would have to undertake specific activities and actions; corporate bonds whereby a corporate offender either pays funds into court for a finite period or is ordered to obtain compulsory insurance to a specific value; and means whereby, in addition to any sentence imposed, the court could order that a notice be placed about the offence in the local or national media, and in the company’s annual report for the benefit of shareholders.\(^{41}\)

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39 Q235.  
40 Q121.  
41 Ev17.
41. The Agency told us that it had been in discussions with the Home Office over some of these proposals, but that the discussions had ended at the last General Election. The Agency also admitted that the fault for not attempting to resuscitate these talks lay as much with them as with the Home Office. It is clear that neither side considered them a priority. While fines hit companies in the pocket, that pocket is often very deep indeed, and alternative sentences may prove a better punishment and a stronger deterrent. **We call on the Home Office and the Agency to look again at these proposals to deal more effectively with corporate or business environmental crime; and to ensure that such proposals are quickly cast in a legislative shape upon which Parliament can then come to a decision.** Corporate crimes may represent a minority of environmental crimes, but these offences are often at the more serious end of the spectrum. The same sort of prominence should be given to these sorts of offences as has been given to those at the lower end of the spectrum through recent anti-social behaviour legislation.

**Alternatives to prosecution**

42. One of the main alternatives to prosecution is the use of civil penalties whereby the regulator imposes a financial penalty on an offender instead of initiating a formal prosecution. Such a system is used widely in several European countries, in the United States and in Australia. The Agency suggested to us that civil penalties would provide a useful additional tool for dealing with non-intentional and less serious offending but added that it would wish to reserve the right to pursue prosecutions where appropriate.42 In the United States of America, this system is accompanied by one where enormous penalties attach to those offences which are actually brought before a court. In October 2003, Chevron Texaco paid a $3.5 million civil penalty for air emissions. Unless a similar scale of penalties could be applied here, such a system would prove ineffectual. Nonetheless, serious thought needs to be given to those areas where the Agency considers the system may have some benefits. While we believe that courts have a central role to play in tackling environmental crime it may be that there is scope for dealing with certain crimes by civil penalty. After all, it is clear that what is paramount to tackling these crimes is what works and not any necessary recourse to the courts.

42. There may be the possibility of adapting how the Health and Safety Executive (HSE) deal with companies or organisations which regularly contravene health and safety regulations. The HSE has the power to place a prohibition notice on such bodies which forbids them to carry out their business from which the contraventions result. Clearly, this sort of power, prohibiting a business from operating on account of repeated breaches of regulations, would be directly applicable to certain areas of environmental offence and would have significant impact on such contravening businesses without the costly and time-consuming need to go to the courts. Likewise, an analogous power to this might permit a body such as the Agency summarily to confiscate a vehicle or other instrument which had repeatedly been used in environmental offences. **Clearly, DEFRA should look at the possibilities of granting to environmental bodies a power similar to that the HSE possesses in the form of the issuing of prohibition notices.**
43. One obvious existing alternative to prosecution, issuing fixed penalty notices (which currently applies for certain litter and dog-fouling offences), is not as effective as it might be due to the restricted authority of enforcement officers: they are currently often unable to secure the correct identification of offenders. This difficulty is being dealt with by a number of local authorities through private legislation for their local authority areas, to empower local authority officials to demand confirmation of an individual’s stated identity and prosecute an individual who refuses to give his identity or provides a false identity [the London Local Authorities Bill, clause 29; currently before the House of Commons]. Bizarrely, the Government is citing the passage of this private legislation into law as reason to hold back from passing public legislation to this effect for the whole country. In fact, this legislation was only proposed in the first place by local authorities when the Government declined, despite much lobbying from local authorities, to propose its equivalent in public legislation for the country as a whole. This seems utterly unreasonable and counter-productive. If the Government believes that extending those powers to impose fixed penalty notices currently available in most places only to police officers or their equivalent to agents of the Agency or local authorities is a good idea and will assist in tackling environmental crime then it ought to do something about it. Government inaction in the first instance led to the private legislation the precedent of which the Government now cites as reason now not to act.

An Environmental Court

44. The idea of specialist environmental tribunals or courts was raised in written and oral evidence. The Magistrates Association did not support the idea of an environmental court, believing that environmental matters were best dealt with at the most local level (a species of judicial subsidiarity). As Ms Rachel Lipscomb, Chair of the Association, explained: “That …[creates] a very strong link in that people who are dealing with cases in their own area are also more aware of dangers, difficulties and prevalence [of environmental crime] than they might be, doing it on a specialist basis”. Given that the level of sentencing is currently so low as to suggest that magistrates do not find the local nature of the crime that they are considering sufficiently strong a motive to attach to it a robust penalty, we are somewhat sceptical of this point. However, we do accept that there would be very considerable cost involved in establishing a nation-wide environmental court or tribunal—it would also require primary legislation. While it would give welcome national prominence to the issue of environmental crime, it would not necessarily deal practically with such crimes any more effectively than other proposed alternatives.

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43 For example, Ev91.
44 Q144.
45 Q283.
Specialist environmental magistrates

45. Another idea put before the Committee by a number of bodies was that there should be a corps of specialist environmental magistrates as there are for health and safety offences, or crimes involving children, for example. Given that so few magistrates encounter environmental offences in court more than very rarely it seems only sensible to consider the establishment of specialist magistrates in each region to deal with such crimes. They would then build up expertise and experience both of which would cascade down into a more appropriate and flexible use of sentencing, and would assist in local and regional deterrence and accountability. Indeed, the idea of nominated specialists tends to find support from the London-wide specialist Health & Safety magistrates currently in operation. It is still far from certain whether the number of environmental crimes taken to court in each area would provide a sufficient body of work for such specialists, if they were to deal with such crimes exclusively. The Agency suggested that two specialist environmental magistrates in each court area could hear all environmental and health & safety cases.\textsuperscript{46} The Government and other appropriate bodies must look seriously at the proposals for such specialist training on environmental crime and for the establishment of teams of dedicated magistrates. It is clear that without such concentrated experience and expertise the courts will continue to be a lottery often unfavourable to deterrence and proper punishment.

Endnote

46. It seems to us that the key to ensuring that environmental crime is properly and effectively dealt with in courts, so that offenders are robustly punished and deterred from repeat offences, is co-operation: co-operation between Government departments, agencies and local authorities in sharing expertise and in assisting each other wherever possible; co-operation between those prosecuting and those sentencing to ensure that all are aware of relevant and practical guidance that explains the gravity of environmental offences; and co-operation between DEFRA and, in particular, the Home Office in giving environmental crime the prominence it deserves and the legislation it needs to be effectively tackled. The Government has shown itself to be sufficiently joined-up to begin to tackle anti-social behaviour. It now needs to ensure that it works in a co-ordinated fashion, and with other bodies, to tackle the currently poor sentencing record for offences against the environment. Only by doing so will it effectively begin to deal with the blight that is environmental crime.
The Committee deliberated.

Draft Report (Environmental Crime and the Courts), proposed by the Chairman, brought up and read.

Ordered, That the Chairman’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 46 read and agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the provisions of Standing Order No. 134 (Select Committees (reports)) be applied to the Report.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Wednesday 12 May at 3.30pm.]
Witnesses

Thursday 22 January 2004

Ric Navarro, Director of Legal Services, Mr David Stott, Chief Prosecutor, Ms Anne Brosnan, Principal Solicitor, and Mr Arwyn Jones, Process Manager (Enforcement), The Environment Agency. Ev. 5

Thursday 29 January 2004

Ms Rachel Lipscomb, Chair; and Ms Ann Flintham, Communications Manager, Magistrates’ Association. Ev. 20

Thursday 5 February 2004

Councillor Sir David Williams, Lib Dem, Vie Chair of LGA Environment and Regeneration Executive, Mr Phil Davies, Head of Waste Management, and Mr Simon Baxter, Chief Enforcement Manager, LB Southwark; and Dr Leith Penny, Director of Cleansing, and Mr Peter Large, Deputy Director of Legal Services, Westminster City Council. Ev. 35

Thursday 12 February 2004

Mr Keir Hopley, Head of Sentencing Policy and Penalties Unit, the Home Office, and Mr Paul McGladrigan, Head of Enforcement Programme, Unified Administration and Magistrates’ Court Administration Directorate, Department for Constitutional Affairs Ev. 49
List of written evidence

Bat Conservation Trust/RSPB  Ev. 60
City of Westminster Council  Ev. 33
Confederation of British Industry (CBI)  Ev. 60
Department of Food and Rural Affairs (DEFRA)  Ev. 96
Environment Agency  Ev. 1, Ev 16
Environmental Industries Commission (EIC)  Ev. 62
Environmental Justice Project, WWF  Ev. 64
Environmental Services Association  Ev. 69
Home Office  Ev. 46, Ev. 58 & Ev. 97
Law Society  Ev. 72
Leeds City Council  Ev. 75
Local Government Association  Ev. 30
Magistrates’ Association  Ev. 19
Northgate Information Solutions  Ev. 77
Police Federation of England and Wales  Ev. 81
Ramblers’ Association  Ev. 82
Royal Society for the Protection of Birds (RSPB)  Ev. 84
Tarka Foundation  Ev. 89
UK Environmental Law Association  Ev. 92
University College London (UCL), Professor Richard Macrory  Ev. 91
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Oral evidence

Taken before the Environmental Audit Committee

on Thursday 22 January 2004

Members present

Mr Peter Ainsworth, in the Chair
Mr Colin Challen
Mrs Helen Clark
Mr Simon Thomas
Paul Flynn
Sue Doughty

Memorandum from the Environment Agency

SUMMARY

Environmental offending is multi-faceted, involving not just the causing of pollution to land, water or air which may have long term consequences, but also encompasses the breach of complex Licence conditions. The Agency’s task may also involve not just protecting the environment but also public health as many serious offences can result in long term impacts. The primary aim of the Agency is to prevent or minimise harm to the environment and it has a range of enforcement and other powers to deploy. For instance the serving of formal Notices requiring specific action, the prohibition of specific activity, or the revocation of a permit. The Agency also has a broad range of criminal powers aimed at punishing and deterring offenders including formal prosecutions. This Memorandum deals mainly with this last aspect of the Agency’s activities.

The process for sentencing of environmental offenders continues to develop. Improvement is slow and this may in large part be due to the fact that very few magistrates or judges deal with environmental cases on a regular basis. Guidance to the courts on fine levels would be desirable particularly in relation to corporate offenders along with a wider range of sentencing options.

— The number of environmental incidents reported to the Agency remains relatively constant at about 45,000 per annum. The vast majority relate to unregulated, unpermitted sites.
— The Environment Agency has been taking more prosecutions in relation to environmental offending but average fines are only rising very gradually. This is a general pattern for other environmental regulators as can be seen in the DEFRA/ERM Report at Annex 1.
— The Magistrates Association initiative in producing guidance in October 2002 on the sentencing of environmental and health and safety offences has assisted the process. This could be repeated to advantage at Crown Court level but the production of tariff guidance which indicated a suggested financial “entry point” would assist all involved in the sentencing of offenders.
— Serious offences are attracting appropriately large penalties despite variations on appeal.
— We are however not seeing general deterrence in respect of large scale, organised unlawful activity, (particularly in the waste disposal field), probably due to the profits that can be made.
— It is considered that the ability of the Agency to impose “administrative penalties” on regulated bodies for limited types of offending, (eg failure to provide data returns) thus removing them from the court process, would enable courts to concentrate on the more obvious types of environmental offending.

1. INTRODUCTION

The Environment Agency is the principal regulatory body for environmental regulation in England and Wales. Its remit covers granting enforcement of environmental licences, the apprehending of serious illegal unlicensed activity and the prosecution of environmental offences.

In the exercise of its enforcement and prosecution activities the Agency follows its own publicly available Enforcement and Prosecution Policy and Functional Guidelines. It also adheres to the Code for Crown Prosecutors.

The Agency has contributed heavily this year to two significant reports both commissioned by DEFRA, into the area of environmental justice (see Annexes 1 and 2.) It has provided data on its enforcement activities along with interpretation and comment. The first study undertaken by ERM on behalf of DEFRA (Annex 1) focused on Environmental Sentencing. The second undertaken by Leigh Day and Co., Solicitors in association with WWF and ELF (Annex 2) considered the issue of Access to Environmental Justice.
2. The Agency has addressed the specific questions raised by the Sub Committee:

(1) Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

Offence provisions in relevant statutes lay down the maximum sentences available in both the Magistrates and Crown Court. In general in a Magistrates Court the maximum fine is £20,000 per offence. In the Crown Court the fine can be unlimited. Additionally, except for corporate offenders, most offences carry the possibility of a custodial sentence of six months in a Magistrates Court per offence with a total maximum of 12 months. In the Crown Court the maximum custodial sentence can be two years, rising to five years for offences involving special waste. Community punishment is possible as an alternative to a custodial sentence in the form of either a Community Punishment Order or Community Rehabilitation Order. In addition courts may also make Compensation Orders in respect of injury, loss or damage suffered by a victim. Some statutes also carry provision for remediation orders.

It should be noted that corporate offenders cannot be made subject to custodial or community penalties.

The Agency’s view is that sentencing powers for small, medium enterprises (SMEs) and individuals are already sufficient, although the actual sentences imposed do not on many occasions reflect the seriousness of the case. The difficulty for courts however, when dealing with either SMEs or larger companies is that there is no guidance by way of tariff to indicate a suggested value for any fine imposed having regard to the gravity of the particular offence. This is unlike the situation for “ordinary” criminal offences where magistrates and Crown Courts are provided with suggested penalties based on gravity and means of the offender. The Agency has twice sought unsuccessfully to obtain such guidance from the Court of Appeal. The lack of a tariff has led to inconsistency in sentencing between courts in particular at Crown Court level. Graphic examples are:

- EA v Milford Haven Port Authority: Fine of £4 million reduced to £750,000 by Court of Appeal—the case involved the escape of thousands of tonnes of crude oil from a holed tanker onto the beaches of South Wales.
- R v Yorkshire Water Services Ltd: Fine of £119,000 reduced to £80,000—the company had supplied water unfit for human consumption on four separate occasions affecting hundreds of properties and faced a total of 17 charges.
- R v James, James and James & Gilbert Gardens Nurseries—thousands of tonnes of waste dumped between 1999–2000—18 offences—the individual offenders fined a total of £750 and the company £80 at Cardiff Crown Court.

However, for large-scale corporate offenders the Agency believes there to be scope for the creation of sentencing provisions additional to fines. The Agency has lobbied for Corporate Governance provisions that could provide for a duty of care on environmental issues; annual reporting of environmental performance and other issues. Additionally the Agency has worked in the past with the Home Office on consideration of additional sentencing options namely equity share issues, (which would directly affect shareholder value and therefore ensure that a company changed its practices); corporate bonds,(where a company would lodge money with the court for a finite period as a guarantee of environmental compliance); corporate probation and community projects. The use of civil (or administrative) penalties has also recently been canvassed such as are used to good effect in other jurisdictions and the Agency would welcome an in-depth review of alternatives to financial penalties. These could provide alternative options, where for instance a company was in financial difficulty and a court felt unable to impose a high fine which might hasten its liquidation. Also they may be of use where an organisation was publicly funded so that imposition of a high fine was effectively a tax on the public purse.

Although there exists guidance for sentencing courts as to the criteria which should be taken into account and the Court of Appeal case R v F R Howe and Sons (Engineers) Ltd [1999] 2 All ER gives very helpful guidance in relation to the sentencing of corporate offenders it does not provide a tariff or sentencing “bracket” providing an approximation of the value of any fine. It is that lack which the Agency believes has led to inconsistencies.

(2) Are sentences appropriately set to act as a deterrent?

As referred to above there is inconsistency in sentences that are imposed by courts. Attached at Annex 3 is a schedule of average fines over a four-year period. It can be seen that the average has risen only slightly from £4.1 thousand to £4.4 thousand per annum. However in this same period there has been an overall rise in the number of prosecutions brought by the Agency from 638 to 737 (16%) (see Annex 4.) Furthermore in respect of waste offences (which represent the highest number of prosecutions) the number has risen from 446 to 511 per annum (Annex 5) and the average fine has risen from just £2.2 thousand to £2.7 thousand.

The Agency in addition publishes on an annual basis in its Spotlight on Environmental Performance, a league table of the worst offenders. This has proved effective in publicising the deficiencies of corporate offenders. It is apparent that some companies are repeat offending, in particular the water companies and the larger waste management operators, (see Annexes 6 and 7). In fairness to these operators the nature and
scale of their businesses makes it more likely that this will happen. However these companies have demonstrated extreme concern over repeated court appearances which indicates that adverse publicity associated with court appearances can act as a deterrent.

The Agency’s view is that court appearance and sentencing deters most of the regulated operators as they are sensitive to the public exposure. However, in relation to high value, repeated, unlawful activity (in particular practised in the waste disposal field) it is felt that (apart from the individual fly-tipper who has been caught and taken before a court) there is no general deterrence. Generally sentencing is not such as to be sending out stark messages to determined offenders, especially those who are operating in a large scale quasi-professional capacity. It may be that the risk of being apprehended is perceived to be low along with the likely sentence. The adoption of confiscation provisions contained in the Proceeds of Crime Act 2003 may help to change this situation but they can only be applied following detection and conviction of the offenders. If they are applicable however they would enable the Agency to apply to courts to confiscate assets to the value of the benefit realised from criminal activity. This could be a most powerful deterrent. The Agency is also currently working to enhance its intelligence capabilities along with forging closer links to other enforcing bodies such as the Police, Inland Revenue and Customs and Excise so as to confront such criminality.

(3) Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means are punished appropriately?

This issue has been touched upon at (1) above. Sentencing of environmental offences is dealt with by courts in exactly the same way as the sentencing of other offences save for the lack of tariffs. This is of particular concern with regard to large financially secure corporations who may be perceived to be saving money at the expense of the environment. The courts find such corporate offenders difficult to sentence and there may be some scope here for consideration of civil penalties and other alternatives. (Note for instance the recent comments of HH Judge Tabor at Gloucester Crown Court on 5 December when sentencing the waste disposal company Cleansing Services Group (CSG) for a range of offences, who referred to this problem of a lack of guidance after hearing the details of a complex case—nevertheless he imposed a fine of £250 thousand and together with costs of £400 thousand). The issue of training of Judges and other sentencers is addressed in the next section.

(4) Is the guidance currently available to magistrates and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

The Agency has worked hard with the Magistrates Association to provide what guidance it can to magistrates. The Agency initially assisted in the drafting of guidance issued in May 2001 by the Magistrates Association to its members on “Fining of Companies for Environmental and Health and Safety Offences”. Subsequently the Agency has contributed to the preparation of training materials entitled “Costing the Earth” which has been available on line and in hard copy since October 2002 to all 28,000 members of the lay magistracy. Regionally in the Agency, considerable training has been provided to local Benches of magistrates who have expressed an interest in learning more about environmental offending.

To date the Crown Court judiciary has not received such training nor has there been a partnership to formulate guidelines for sentencing at Crown Court level. However the Court of Appeal in the recent case of R v Anglian Water Services Ltd approved the Magistrates Association guidelines and these are now brought to the attention of all sentencing courts.

In addition courts are encouraged to take account of the cases of R v Friskies Petcare Ltd 2000 2 CAR(S) 401 and R v F R Howe & Son (Engineers) Ltd [1999] 2 All E R. These important decisions, along with the Magistrates Association Guidelines are routinely brought to the attention of courts by Agency prosecutors. Courts should also have access to the Costing the Earth training pack.

The Friskies case directs that the salient points of each offence are set out in writing together with the aggravating and mitigating features and that these should, where possible, be agreed between the parties before plea. The Agency has adopted this procedure and this led in the recent case mentioned above (CSG), to the imposition of the highest fine, £250,000, along with £400,000 costs, yet imposed for waste offences in England and Wales.

The R v Howe case sets out the criteria and factors which should be taken into account by courts when sentencing corporate offenders and is authority for the proposition that any fine should be large enough to send a message to the company and the share holders, so that if necessary it should change its practices and procedures. It also requires the defence to produce details of their financial position.

(5) Are Magistrates and other courts following any guidance available?

Whilst training has been offered and made available to all magistrates the likelihood of a particular magistrate dealing with an environmental case is remote due to the infrequency of such cases coming before the courts (approximately 800 cases per annum to be dealt with by 28,000 magistrates). Thought should therefore be given by the Dept of Constitutional Affairs to nominating individual magistrates/District Judges.
to handle environmental cases. The same approach could also apply to Judges as only a small proportion of
the Agency’s cases (approximately 10%) are dealt with at Crown Court level. There would be no cost
implications for such a proposal and it would have advantages in limiting the number of individuals who
would require training and refresher training.

As yet average fines and the number of custodial sentences imposed have not increased. However, the
most serious cases dealt with by the Agency are beginning to attract appropriately large penalties (see Annex
9) and it is hoped that the trend will continue. Certainly prosecutors are reporting a perception of a greater
confidence, understanding and awareness by sentencers of the applicable factors when handling such cases.
It is hoped that in due course the benefits will become apparent.

(6) To what extent are courts sentencing on the basis of broad environmental principles including the principle
of sustainable development?

The legislation, which sets out the offence provisions, is drafted against the backdrop of broad
environmental principles. Courts are made aware of these principles, but as mentioned earlier, it is the
Agency’s view that sentences could be far harsher.

The Agency’s Enforcement & Prosecution Policy and Functional Guidelines set out the criteria for its
decision making in relation to enforcement activity. These encompass enforcement by way of formal Notices
(which for instance can prohibit a company’s operations or revoke its Licence); the issuing of Cautions and
Warnings and prosecutions. In respect of prosecutions, courts are encouraged to reflect broad environmental
principles in that for example risk of harm should be treated with as much gravity as actual harm itself.
Courts are also given an indication of the likely direct cost of the unlawful behaviour and its wider
implications for the environment for instance its effect on sustainable development. Any risk to human
health for instance, or obvious environmental harm eg a fish-kill or pollution effect is clearly identified.
However where clear loss or damage is not present (perhaps because of the timely intervention of the
Agency) it is difficult for a court to identify matters of fact upon which it will sentence rather than
hypothetical risk. If the Agency is to put an issue of risk before a court it must provide evidence to
substantiate this.

The Courts are routinely directed by Agency prosecutors to the Polluter Pays principle and generally is
awarded its investigation and court preparation costs.

3. The Way Forward

With particular regard to sentencing issues the Agency would welcome the establishment of the following:
— Sentencing Tariffs to provide courts at all levels with a suggested “bracket” or starting point for
fines.
— Nomination of specialist Magistrates and Judges to deal with environmental casework.
— Regular training for those nominated.
— Creation of a range of alternative sentencing provisions.

The biggest cases the Agency deals with come before Crown Courts and are beginning to attract
appropriately large penalties, (see Annex 9). The Agency sees a need however to have access, via the Judicial
Studies Board, to Judges so as provide appropriate training which may help in reducing the problem of
inconsistency.

Local Authorities share a responsibility with the Agency to deal with fly-tipping. However it can be seen
from the DEFRA/ERM Report (Annex 1) at pages 37–42 that many Authorities find this obligation difficult
to fulfil. If environmental offending is to be addressed with determination at all levels however, then this is
a difficulty that needs to be resolved.

The Agency has directed itself to issues that might make the tasks of enforcement easier or more effective.
A “wish list” for proposed legislative and other changes has been compiled and submitted to DEFRA the
Agency’s sponsoring body. An extract from this, setting out some of the most salient points is attached at
Annex 8. Some of these are attempts to equip the Agency with the means of dealing with the large scale
determined offenders with whom we are confronted. In particular better intelligence sharing with other
organisations and the ability to call on assistance and act jointly with those organisations would be very
beneficial. These, allied to powers to stop and search vehicles, to require names and addresses and providing
a limited power of arrest until such information had been given, would greatly enhance the Agency’s
capability.

January 2004
Witnesses: Mr Ric Navarro, Director of Legal Services, Mr David Stott, Chief Prosecutor, Ms Anne Brosnan, Principal Solicitor, the Environment Agency, and Mr Arwyn Jones, Process Manager (Enforcement), examined.

Q1 Chairman: Good morning. Thank you very much for coming along. Thank you also for your written evidence, which we received and read with interest. Do you have any opening remarks you would like to begin with?

Mr Navarro: I think I would like to welcome the interest which the Committee is showing in environmental crime and introduce my team. I apologise, in a sense, for coming with rather a large number of people—mob handed—but I think that reflects the breadth of the subject, the fact that we do take this seriously and it is very good experience to be able to appear before the Committee. May I introduce David Stott who is the chief prosecutor for the Environmental Agency. He is an ex-CPS Crown prosecutor and he sits as a deputy District Judge. Anne Brosnan is deputy chief prosecutor and has long experience of prosecutions with the Agency and the NRA. Arwyn Jones is from the operational side of the Agency and is head of the Agency’s enforcement and prosecution process team.

Chairman: Thank you very much indeed. You have a good team and we look forward to hearing the answers to our initial questions. This is, of course, our first evidence session in this inquiry.

Q2 Sue Doughty: I think the first question is very much a matter of us getting our head around the problems and the challenges that we are faced with in this whole field of crime, punishment and justice as regards the environment. What do you believe are the main aims of the criminal justice system in terms of environmental and sustainable development?

Mr Navarro: I think the important first point is how broad environmental crime is and how many players there are involved. We have submitted to the Committee a diagram illustrating that graphically.

Mr Stott: Environmental crime, as Mr Navarro has said, is a very wide spectrum of offending. There are a lot of other organisations who have to deal with it, but in terms of what we are trying to achieve—like with any other criminal offence—is punishment, deterrence, rehabilitation so far as we can get it. As regards the sustainability aspect, that is to do with the environmental impacts so deterrents to try to prevent any further damage to the environment by the penalties and methods that we can bring to bear. Environmental crime as such falls into the sphere of criminal courts—the whole system—and that is where we start to run into problems because it is different to deal with than ordinary mainstream crime assaults—burglary, criminal damage, et cetera—and that is where, I suspect, your further questions will start to probe. In handling environmental crime, like any other crime, we try to punish, to deter and to rehabilitate.

Q3 Sue Doughty: How far do you actually believe that the criminal justice system is effective in achieving this?

Mr Stott: Effective to an extent, but not wholly effective. It depends—and this is the problem—on the span of offenders; they range from the individual (fly tipper, dumper of black plastic bags) to the multi-national. It is such a wide span of offenders which makes it different to the normal conventional type of crime that is dealt with. In dealing with the individual, the smaller offender, I think it is effective and I think the powers are appropriate if they are used properly—which we do not think they are—but when you get outside that into corporations or large companies we think there is a problem.

Q4 Sue Doughty: Do you feel that people who commit environmental crimes really consider themselves as criminals? Thinking about people’s view of it—not only individuals but corporate environmental crime and individuals who work for corporates—the corollary of that is how far do you think those in the criminal justice system take seriously environmental crime, so have we got a problem both with offenders and those dealing with offenders about the gravity?

Mr Stott: I think we probably have. I think individuals—company directors or individual fly tippers—who are brought into the system because we prosecute inevitably do see themselves as criminals because of the process that we bring them into before the courts, with the sentencing and all the rest of it. Again, it is this element of the corporate bodies that we prosecute and licence breakers and I think they look at it differently. There are undoubtedly two stages.

Q5 Sue Doughty: How about the actual justice system and how seriously they actually take environmental crime in the courts—the lawyers, the magistrates, the judges? What is your view about that? Do they take it as seriously as ordinary burglary, for example, or other sorts of crimes?

Mr Navarro: I think the difficulty is the infrequency—certainly so far as magistrates and judges are concerned—with which they actually come into contact with environmental crime. We know on average that it is only once in seven years that a magistrate will have an environmental case. I think that is probably at the heart of some of the problems. Because they do not have the experience of those cases and they do not necessarily understand the real impacts and the seriousness of the cases, they find it very difficult therefore to sentence. We have certainly welcomed the guidance which has been provided to magistrates and we hope that is going to make a difference. We think there are opportunities in terms of specialisation of magistrates and the judiciary to gain experience to be able to be better trained and we think that would have the effect of being able to take environmental crime more seriously.

Mr Stott: On the figures themselves—which I think are in the submissions—there are 28,000 members of the Magistrates’ Association and we prosecute between 700 and 800 cases a year. The spread is very thin. There is no concentrated mass of cases in either location or before the same benches.
Q6 Sue Doughty: We will be looking a little bit more about bringing offenders to prosecution. There is a little bit of an apples and oranges problem here in comparing environmental crime with other criminal activity. How far do you think there is a problem about the gravity of the situation and does environmental crime matter at all? How important is it?

Mr Navarro: We certainly seek to lead evidence on the impact of environmental crime and the aggravating factors that the courts should take into account. However, I think it is true that we do sometimes have the perception—because of the inconsistency in sentencing, particularly in the crown courts—that judges who are sitting day after day dealing with normal crime (shall we say) find it difficult to know where to pitch environmental crime in that spectrum. That is why we are suggesting—and have pressed for—guidelines which would give assistance to the courts to give them a starting point.

Mr Stott: I think there is a change in culture and awareness of environmental issues within the courts generally. Annex nine shows the higher types of penalties that have been imposed and are being imposed. I think the message is getting through. It is like turning a ship round; it filters through the system. We are doing a lot of training of magistrates at a regional level. They are very keen and interested but they then go away after the training and do not see a case for a very long time. That is the problem.

Q7 Mr Thomas: If we look at the Old Bailey we see the scales of justice there. On the one side we might put the idea of the cost that you have of an Crown courts— that judge, who is sitting day after day dealing with normal crime (shall we say) find it difficult to know where to pitch environmental crime in that spectrum. That is why we are suggesting—and have pressed for—guidelines which would give assistance to the courts to give them a starting point.

Mr Stott: I think there is a change in culture and awareness of environmental issues within the courts generally. Annex nine shows the higher types of penalties that have been imposed and are being imposed. I think the message is getting through. It is like turning a ship round; it filters through the system. We are doing a lot of training of magistrates at a regional level. They are very keen and interested but they then go away after the training and do not see a case for a very long time. That is the problem.

Mr Navarro: We do not, of course, know how much environmental crime there is overall so we are only looking probably at the tip of the iceberg.

Mr Jones: Broadly we spend about £12 million a year on enforcement activity, that is activity which directly relates to prosecutions and collecting evidence, everything you do to enforce environmental crime; on the other side of the scales we may put the fines, punishments and so forth that are metered out. Do you think those scales actually balance or do you think it costs an awful lot more to deal with environmental crime than we get back from those who are criminals?

Mr Navarro: We do not, of course, know how much environmental crime there is overall so we are only looking probably at the tip of the iceberg.

Mr Jones: Broadly we spend about £12 million a year on enforcement activity, that is activity which directly relates to prosecutions, cautions and elements of notices. That is about 3% of our regulatory budget that we spend on formal enforcement activity. On the other side, the fines are just one way of penalising or punishing, and building on the earlier evidence and I think there is a need and scope for regulators to have a better understanding of the motivators and de-motivators of those who are committing environmental crime. It may well be that fines are not always the best way of punishing and de-motivating people from committing offences at the lower end of offending. I do not necessarily think there is a strict comparison on that scale. We know DEFRA are very keen to help in actually understanding that better. For example, if a skip hire operator is illegally disposing waste in an area perhaps a better punishment for them might be some form of community punishment which makes them clear up the type of mess they have just created rather than necessarily a fine. We need to understand better what motivates people to commit and what de-motivates them from committing environmental crime.

Q8 Mr Thomas: You say it is about 3% of your regulatory budget. There must be an awful lot of companies and individuals out there who are doing their utmost to follow the rules, follow the regulations. Skips is a very good example of where you will have a company which is doing the right thing, therefore has to charge the customer the right amount, and another cowboy down the road that will be cheaper, getting more business and just disposing of the rubbish in an inappropriate manner. How much pressure do you come under from other companies that you are actually regulating to deal with these bad apples?

Mr Jones: I think it is fair to say that we do come under pressure and we do respond to it. We are trying to transform the way that we undertake our enforcement activity into a more intelligence led approach, so trying to pull together pieces of jigsaw that say it is company X or person B who we really need to be focussing on and concentrating on, but particularly working with partners in the police and local authorities to help us put those pieces of the jigsaw together. We do respond to that and certainly that is the way we want to target our efforts in the future onto those who are really abusing. We had a very good example of that recently with the tyres campaign where the tyre industry were saying that those who actually want to follow the rules and play the came correctly are being undermined by those who are deliberately fly tipping tyres, and by working with DTI and other Government Departments we were able to fund a campaign nationally to both educate and increase awareness of how tyres should be properly disposed of. We took a number of prosecutions to clamp down on those who were abusing and illegally dumping. So we do respond to that. I think we would like to be able to do more but we need to forge stronger links and better systems with some of our partners as well.

Mr Navarro: I think the competitiveness aspects of environmental crime are worth looking at because at the moment we have to fund our enforcement effort from GIA (Grant in Aid); it is not paid for generally. Annex nine shows the higher types of penalties that have been imposed and are being imposed. I think the message is getting through. It is like turning a ship round; it filters through the system. We are doing a lot of training of magistrates at a regional level. They are very keen and interested but they then go away after the training and do not see a case for a very long time. That is the problem.

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Mr Navarro: I think the competitiveness aspects of environmental crime are worth looking at because at the moment we have to fund our enforcement effort from GIA (Grant in Aid); it is not paid for generally by charge payers. If one does look at it as ensuring that legitimate businesses are not undercut by illegitimate operations I think there is justification for the legitimate businesses to contribute towards enforcement we could do more.

Q9 Mr Thomas: There would be a huge expectation on you then to actually up your prosecution and success rate if that were to happen.
Mr Stott: Yes, but there is a big area there, the unregulated side of things, especially in the waste disposal of construction and waste and especially round metropolitan areas like London. There is a big problem there that we need to address; it is not an easy problem.

Q10 Mr Thomas: Staying with prosecution rates, are you able to compare your success rate—if I can put it that way—with other prosecuting authorities. We have this diagram of where you lie; we have DEFRA and local authorities, customs and excise and so forth who also may prosecute for environmental crime. Do you ever lean across and compare your success with their rates?
Mr Navarro: We certainly keep statistics about our success rate.
Ms Brosnan: Our success rate is very good, particularly in waste and water quality prosecutions. It is very difficult to read across to other prosecuting bodies because the Environment Agency prosecutes 90% of environmental crime.

Q11 Mr Thomas: So even though on this diagram you look like 10%, you are doing 90% of prosecutions.
Ms Brosnan: In terms of prosecutions, yes we are. It is very difficult to correlate exactly across to other bodies because we keep our statistics in different ways. However, our success rate is particularly good.

Q12 Mr Thomas: Is that, in your opinion, because other bodies have a very different approach to prosecution?
Mr Stott: No, we follow the same criteria and guidelines as all prosecuting bodies which is the Attorney General’s guidelines. In terms of comparison, for example with the CPS, it is a false comparison. CPS are dealing with thousands of cases a year; we are not, nothing like it. The best comparator is probably the health and safety executive. They take around the same annual number of cases as us. I do not know what their figures are, but on our figures on contested cases we lose around 5%. So you could say our success rate is 95%. I suspect it will be very comparable with health and safety because, as I say, we are following the same criteria of evidential sufficiency and public interest.

Q13 Chairman: You have just said that you were responsible for 90% of the cases.
Mr Stott: For Environmental crime.

Q14 Chairman: So your reference just then to customs and excise doing roughly the same amount of prosecutions.
Mr Stott: I do beg your pardon, the Crown Prosecution Service, who are not on our chart, as a success rate comparison. To answer the question: how many do the Crown Prosecution Service lose, for instance, compared with how many do we lose, I think they lose far more because their scale of case load is massive compared with ours; it is in the multiple thousands.

Q15 Mr Thomas: Do you only prosecute those cases that you are almost sure you will win?
Mr Stott: No. The guidelines are: is there a realistic prospect of conviction on the evidence that you have? Can you assess it in terms of: is it more likely than not realistically that you would obtain a conviction? If the answer is yes, you take it; if the answer is no, you do not. Then, is it in the public interest here, is it right, is it worth spending the money to bring this case?

Q16 Mr Thomas: Just to go back a little bit, does public interest include the interest of companies who are legitimately trading in that field and need to protect their business?
Ms Brosnan: Yes, it does. Can I make the point that when we prosecute we do routinely bring to the attention of the court the saving that would have been made by the illegal operator in not obtaining the licence and the fact that the illegal activity undermines the regulated industry who are paying those fees and are abiding by the terms of their licences.

Q17 Mr Thomas: We have had some evidence—for example from the Law Society—that you and other prosecutors in the field of environmental crime may lack some of the necessary powers in dealing with offenders. Would you agree with that evidence? Can you identify where you would like to have different or more powers to take forward other prosecutions?
Mr Navarro: I think on the whole we do consider our powers reasonably comprehensive. We do have quite extensive powers. We have submitted evidence about additional powers.
Mr Stott: Yes, annex eight is a truncated list of some elements that we would like to see changed. We cannot stop vehicles, for instance; we cannot stop cases a year; we are not, nothing like it. The best comparator is probably the health and safety executive. They take around the same annual number of cases as us. I do not know what their figures are, but on our figures on contested cases we lose around 5%. So you could say our success rate is 95%. I suspect it will be very comparable with health and safety because, as I say, we are following the same criteria of evidential sufficiency and public interest.

Q18 Chairman: How many cases of poaching do you deal with?
Mr Stott: About 50 a year, but please do not underestimate poaching. Poaching is a very serious, lucrative and violent vicious area of work. There is a lot of risk attached to the bailiff because the gangs are very highly organised; there is a lot of money in it. We have to be very careful because there is a considerable health and safety aspect for the officers involved.

Q19 Mr Thomas: In our inquiry we obviously need to look at the other authorities and how they prosecute. In terms of your own staff, can you say something about the training that your staff receive and whether you are convinced that you always have
the right staff in the right place, at the right time, with the right qualities and training to convince that bench of magistrates or to take forward the prosecution at the right level? You are a large Agency within England and Wales, are you convinced that all your staff have a consistency of approach in that regard?

**Mr Navarro:** Can we distinguish the operational staff, the technical staff whom Arwyn can talk about, and then we can speak about the training of lawyers.

**Mr Jones:** Certainly in terms of the operational staff we responded to feedback some four years ago and had implemented in the Agency a warranted officers scheme which requires our officers to go through a scheme of competency training which is logged, tracked and reviewed periodically. For our fishery staff that is reviewed annually; for our environment protection staff that is reviewed every three years. Quite recently we put in place the means to actually help staff locally check with their line managers that those competencies are still up to date and also to make more accessible the training materials. We are using new technology such as on-line assessments. In addition to that we have a very comprehensive induction scheme now where we tend to batch recruit new Environmental Agency officers into the Agency and they go through a six month induction programme before they are allowed to actually join a team going forward. I think we feel we have much stronger processes in place now to get the training right and we have actually got a supporting suite that is there through the working life of an environment officer to keep their skills refreshed, but also to update it because we ever new burdens of duty coming at us which bring in new enforcement requirements. The Reservoirs Act is coming out and we shall have some slightly different enforcement angles. Emissions trading will bring in some new enforcement skills. We need to keep up to date with those as well as the more traditional field activities.

**Q20 Mr Thomas:** When was the training of warranted officers introduced into the Environmental Agency?

**Mr Jones:** In 2000. The three year review for our EP officers is actually in play now. It does not happen on day one, there is a six month period whilst that is happening. Our fishery staff go through an annual review to check that their competencies are still up to date before they have their warrant renewed.

**Mr Navarro:** There are three strands of training and experience in terms of calibre of the staff. There is the technical capability as scientists on the technical side. There is their industrial experience: have they got experience of how it actually operates? Then there is their experience as criminal investigators. Obviously they do not all need to have the same sort of training as the criminal investigators, but by a degree of specialisation we can improve and hone those skills. I have to say that we have very dedicated and enthusiastic staff. We have got these programmes, with secondments to industry as well, to raise the general standard of staff over time.

**Ms Brosnan:** You mentioned the Law Society’s evidence earlier. There is a slight mistake that they have made in the submission they have made. They say that our prosecutions are dependent on convincing the Crown Prosecution Service on the likelihood of conviction. That is not right; we make our own decisions and we bring our own prosecutions.

**Mr Stott:** What happens is that the potential offence is identified, the case file is put together by the officer with guidance. That case file comes across into the legal section. The presentation of that file in court is critical for obvious reasons. All the elements have to be presented. In 2000 we developed and devised an advocacy assessment programme whereby we have our own 40 advocates spread across eight regions. The senior lawyer in every region was to assess those going into court and to go into court, and have a look at them. We took the documentation from the Crown Prosecution Service Inspectorate and adapted it for our purposes so we follow that documentation material. That is what we have done to try to raise our game.

**Q21 Mr Thomas:** A lot seems to have happened since 2000 so that would be welcome, I am sure, by this Committee. From the Law Society’s point of view are there any material differences between the way the Crown Prosecution Service would approach a matter like this and the way you in fact do so?

**Mr Stott:** No. The evidence is the same. The evidential requirements are quite the same and the techniques of advocacy are quite the same; they are common. Unless you have covered those grounds, it does not matter what sort of offence you are dealing with—environmental or ordinary crime—you are not going to get anywhere. We have to have the basics covered by all our advocates.

**Mr Navarro:** If we compare the experience of SEPA where they rely on procurator fiscairs to actually take prosecution decisions and the system in England and Wales where the Agency is able to take the decisions, the evidence, I think, is quite strong that we are able to take more decisions than we would if we had to rely on the Crown Prosecution Service who would then—in the same way as the judges—be looking at the offences in relation to ordinary crime. They may not realise the significance of them as we do.

**Q22 Mr Challen:** In your memorandum you say that the sentencing powers are broadly sufficient but the sentences handed out are not. Why do you think that is?

**Mr Navarro:** It is important to realise that, because of the spread of offenders there is the need for flexibility at the one end for the pensioner who leaves their bag of grass cuttings outside the civic amenity site because it is closed, all the way through to the organised fly tipping and organised criminals who are making great sums of money from their activities. There is a very broad range of offences which the courts have to deal with, but we come back, I think to the lack of relative experience of individual magistrates in dealing with these sorts of offences.
Q23 Chairman: Before you go on, can we just establish that the pensioner who leaves his bag of grass cuttings outside the site would not be prosecuted.

Mr Navarro: No, of course he would not.

Ms Brosnan: The usual statutory maximum for an offence in the magistrates’ court is £5,000. That is the normal maximum that magistrates would have to deal with. In most environmental offences that maximum is increased to £20,000 so magistrates have greater sentencing powers for our offences—also for health and safety offences—but they are perhaps not used to dealing with them. We have put a lot of effort into the training of magistrates—we have addressed magistrates at their annual general meeting; we have assisted them in drafting guidance and training manuals for justices—so that they feel more comfortable with the sentencing powers. The Lord Chancellor has suggested to them that they should accustom themselves to imposing much greater penalties than they are used to, but I think they have perhaps taken a cautious approach to sentencing with these extended penalties because they are perhaps uncomfortable in using them, rather than saying that they do not want to impose large fines for these types of offences.

Q24 Mr Challen: Have you picked up any regional variations in sentencing or is it fairly uniform across the country?

Mr Navarro: The magistrates have now had the benefit of the guidance which was provided to them in 2002 which we certainly welcome. It may be too soon to say what the effects of that are. We would hope for an improvement because they have guidance on entry levels. We think there are variations. The report that was submitted to the Committee picked up quite wide regional variations in sentencing.

Mr Stott: It is hard to explain why that is. As I said, we are training magistrates throughout the country but we cannot cover all of them.

Q25 Mr Challen: Would it reflect the number of cases taken to court, for example? Are some regions more precocious than others in doing that?

Mr Navarro: In general terms the weight of prosecution is in the north-east, north-west—where the old industry is—and also down here in what we call the Thames region. That is where the bulk of the case load is found. It is generally waste featured cases.

Mr Navarro: I think in the report submitted to the Committee there was a sort of perverse relationship between the large number of prosecutions and the size of the fines, which tended to be lower. It certainly merits more investigation.

Q26 Mr Challen: Looking at the guidance, has there been any justification by either the courts or the Judicial Studies Board as to why they have not provided more guidance, other than to say that cases should be decided on their merits?

Mr Stott: The Judicial Studies Board covers the training in particular of the Crown Court of judges, as opposed to the Magistrates Association which covers the magistrates’ level. We have not yet been able to get a slot in the Judicial Studies Board training of judges. Bear in mind that their number of cases is very small compared to the number that the magistrates are dealing with. They have a lot of training to cover this year and in the year to come they will have even more with the Criminal Justice Act and all the new changes coming in. It is not easy to get ourselves a slot.

Q27 Mr Challen: What is your view on the size of the penalties metered out to offenders? Judging by the size of their organisation should large companies suffer larger penalties? Should it be according to the ability to pay, do you think?

Mr Navarro: I think if there was specialisation that would enable more training to be given to that cadre of environmental judges or environmental magistrates because we are competing with very significant changes in the criminal justice system each year and there are only scarce resources, there are only a number of training days which magistrates have available, so it is not surprising that we cannot train them all up.

Mr Stott: If you nominated individual magistrates—maybe two for each court area—and perhaps a couple of judges on each circuit to deal with this and maybe health and safety cases together, you would have a chance of a form of specialism at no cost, without going so far as to suggest an environmental court which would have bureaucracy attached to it and would cost. I think that would be worth considering. We are beginning to see the serious offences beginning to attract more significant penalties, although there is an issue about the size of those penalties if we are talking about very large companies and whether—even at the quarter of a million mark—they are significant.

Q28 Mr Challen: Should we go for penalty fares?

Mr Stott: Yes.

Q29 Mr Challen: Or is it simply a sort of slap on the wrist?

Mr Stott: The magistrates’ guidance says that the aim of their sentence should be for any fine to have an equal impact on the company and try to make the fine have an equal impact on the company as it possibly might on the individual.

Q30 Mr Challen: I picked up from your memo that serious offences are attracting appropriately large penalties despite variations on appeal. It appears that those appeals are often successful so is this down to the legal team of a large corporation that
can bamboozle the appeal court judges? Or do the appeal court judges feel that really this is not a terribly serious matter in the first place?

Mr. Stott: I do not think it is that. I think the problem is more fundamental than that. This is the point really, there is no yardstick, no guidance that has been issued by the court of appeal—unlike in other types of offending—as to where a sentencing court should start to look in terms of the amount of the fine. When I sit—and anybody else who is a magistrate here—I know that for an individual offender the gravity of the offence is assessed, there is documentation and then you look at the income and you are given guidance only—it is not a directive—matching one with the other. There is nothing like that for companies. We have asked the court of appeal twice to consider possibly issuing some form of guidance to those sentencing companies against the offences—against the gravity of the waste disposal or the pollution of the river or whatever—to give courts an indication of what bracket the fine should fall in to. Is it based on turnover? Is it based on profitability? What is it based on? They have shied away from doing that and that is the problem.

Q31 Mr Challen: Do any of these cases go to a jury trial and, if so, what kind of result does that produce? I am thinking that there is a parallel here between this and libel cases where guidelines have been introduced on how much you can impose.

Mr. Stott: That is right. There are very few jury trials. The majority will plead at Crown Court to get it over quickly. It is the adverse publicity aspect that they do not want.

Ms. Brosnan: The judge sentences in our cases. I think juries fix libel damages whereas the judge would sentence in our cases. And they are led by tariffs.

Q32 Chairman: Going back to the training of magistrates and judges you were talking about, given the plethora of criminal justice legislation—I have lost track of the number of Home Office bills we have had in the last five years—is it not always the case that these environmental issues are going to come pretty low down on the pecking order? What realistic chance do you think there is of getting the dedicated training that you have been talking about?

Mr. Stott: Environmental crime has risen on the political agenda. Three years ago the Sentencing Advisory Panel was created. It came in 1998–99 to give advice to the court of appeal as to how to sentence all types of crime. The first topic of its remit—the first topic of a new body like that—was environmental crime. That, to us, was an indication that environmental crime is of significance. Unfortunately, they gave their guidance, they gave their criteria and they passed it across to the court of appeal. We hoped that the case of Milford Haven (which was the Sea Empress case where thousands of tons of crude were spilt on the Welsh coast) was to be the vehicle that that court of appeal would use to issue guidelines. The then Lord Chief Justice felt that there was no need for any guidance to be given so that opportunity went. However, that was the first topic of a new body.

Q33 Chairman: Did you have a go at the time of the Anglia Water case?

Ms. Brosnan: We did, yes.

Q34 Chairman: With no success.

Ms. Brosnan: The Court of Appeal said they wished to see each case decided on its merits, on the individual facts of each case. Going back to your point about training, we do offer training to magistrates, evening sessions for various benches. We find they pick up on it, they are very interested and we get a very good turnout, but we do find that we are competing with sessions on drugs for example, and they are more likely to come across drugs offences than environmental offences.

Q35 Mrs. Clark: If we can look at the sort of sentences that are actually metered out, certainly in your evidence you seem to imply that for certain water companies—we have just mentioned Anglian—and some of the larger waste management operators, the actual length of sentence or type of sentence does not really seem to be having the right sort of deterrence. In your view should there be a sort of base line, average sentence that you would like to see and that things should not fall below?

Mr. Navarro: I do think the water companies are increasingly taking their environmental record very seriously.

Q36 Mrs. Clark: Is it not rather patchy, though?

Mr. Navarro: Yes, it is perhaps rather patchy and we have led evidence for alternatives which may be more appropriate for those large corporations.

Ms. Brosnan: Water companies are concerned about their professional reputation and so the number of offences they incur, the number of convictions they occur, the cumulative penalties, their respective positions in relation to each other do now concern them and they do try to avoid offending to try to preserve their professional reputations. OFWAT, the financial regulator, uses the breaches of their licences to record their performance as a statistical measure now for their cost pass through factor. That is of extreme concern to them because if they are seen as a poor performer then they may not be able to recover the same funds as another water company.

Q37 Mrs. Clark: What role does, for example, Water UK, play in setting standards and monitoring throughout the companies?

Mr. Navarro: They do look at the performance measures of the water companies. In general it is all part of a complex picture of levers that we are trying to pull but we do give in Spotlight information on business performance every year, and that has now become an established date on the calendar when we try to present the good and the poor performers. That is becoming of increasing interest both to the business community and to the investment community as well because increasingly—again in
the interest of the city—they can spot that well managed companies that do not pollute are more likely to have a better financial performance. All those pressures are increasing to drive company performance.

Q38 Mrs Clark: Is it not fair to say, though, that some of the culprits do it again and again and again? Is this because the sentences really are not high enough or because they know they can get away with it and just will not get nicked?

Mr Navarro: We do nick them. We do detect those incidents and we have a good record on that and there may well be an element that companies get accustomed to a certain level of tolerance of fines and the fines are just not sufficient to really register with the boardroom. As we say, we are showing evidence of higher fines for the serious and persistent offenders.

Q39 Mrs Clark: I would have thought that being named and shamed would be more of an off-putter than length of sentence, particularly if it gets on the Today programme or The Daily Mail or something like that. I can remember some environmental culprits who have achieved just that, so to speak.

Mr Navarro: That is true. Naming and shaming is certainly effective, but of course we have to take the cases, we have to get the fines before we can name and shame.  

Mr Jones: In the waste management industry there are also provisions round fit and proper persons. Last year we introduced a more rigorous policy about how we assess post-conviction status of somebody continuing to be a fit and proper person. Following some big cases we are now putting in quite a rigorous process of assessing whether the whole of that waste management operator licence is still fit and proper to hold that licence and we have powers there to either suspend or revoke the licence as a result of that. That is specific to those who hold waste management licences. It will not deal with those who are fly tipping or in other industry sectors. This is another quite powerful tool that we are making more use of than we have in the past.

Q40 Mr Thomas: Do you have any powers at all, short of prosecution, of naming companies that are, in your view, not complying fully with regulations?  

Mr Navarro: We do issue press releases when we serve enforcement notices on regulated companies to secure their compliance with their obligations, so there is that process. However, we cannot just issue press releases about people whom we have a poor opinion of. The public register shows the company’s record and we do have operator performance and appraisal systems which rank the performance of the companies and that, again, is an indication of their performance in which investors take an interest. It is interesting that we now have no band E performers, the lowest performers. For regulated industry we are raising the standard.

Q41 Mr Thomas: You mentioned your Spotlight publication as well, and we talked about investment and the city. Is there any evidence that a series of prosecutions—whether the fines are severe or not—is having an effect on shareholder price and therefore is having an effect back to the boardroom through the shareholders themselves? Are you able to trace that at all, or are shareholders not interested in environmental crime done by the companies they have holdings in?

Mr Navarro: I think that is what we are working on, to raise awareness so it does feedback, maybe not directly to individual shareholders but to the institutional investors who will take into account environmental performance as an indication of the general company standard of management, the standard of investment, the attitude of the company and the sustainability of the company. We are trying to address all of those levers and I think with some success. There is no doubt that a series of cases will drive investment by the company. Take the water industry, we know that in order to comply they will need to invest, and this is to be taken into account; it is not just the fine. Very often the major expense of the company is the investment—millions of pounds sometimes—in order to comply with their licensed obligations.

Mr Stott: We have had a considerable success recently with a very high fine on a waste company and we know that as a direct result of that its clients (who are major) are looking very closely at whether or not they should continue to feed their supplies to that company. I think it is going to have a dramatic effect on the company.

Q42 Chairman: Can I explore further the question of remediation? To what extent do the courts have the ability to instruct people found guilty of environmental crime to repair the damage?

Mr Navarro: I think it is important to realise that we do have powers which are not dependent upon convictions in order to require companies to clean up after pollution incidents.

Mr Stott: I think I am right in saying that in terms of water legislation there is power after conviction to order clean up; under water legislation, not under waste. There is a gap there.

Q43 Chairman: What about oil?

Ms Brosnan: Oil is usually found in water offences so it would normally be covered by water.

Mr Stott: But there is a gap there with waste. As Mr Navarro said, we have the power to serve a notice for them to remove it but the court has no power on conviction of a waste offence to order remediation. If there has been damage, loss or injury caused to a victim it can order compensation for that person, but it cannot order remediation.

Q44 Chairman: Do you think it should be able to?

Mr Stott: I think it would be very helpful if it could, yes.
Q45 Chairman: What about the money that is raised by way of fines? The remainder of that goes back into the central coffer, does it not?

Mr Navarro: Yes, it does.

Q46 Chairman: Do you think there is a case for keeping it within the environment so to speak, and applying it to solve either the specific environmental problem that has led to the case or other environmental issues?

Mr Navarro: We do think there is a case and we will be making a submission to the Treasury to that effect. We are talking about fines of three and half to four million pounds a year that at the moment goes directly to the Treasury and would be available—if the Agency were to be able to retain it—to go to increasing our enforcement effort (which, as I said, is not funded, apart from GIA, so it might plug that gap) or on projects to benefit the environment which we would not otherwise be able to do.

Q47 Chairman: That might include remediation measures as well, might it?

Mr Navarro: Yes, although on remediation measures I think if the offender has the means and is still in existence, then the polluter should pay so it should fall on the company or the offender who has caused the pollution. We would not seek to spread that, I think, to the general community. The polluter should pay. For cases where the company has disappeared or the offender has no means, it could be available for that.

Q48 Chairman: That would be in addition to any fines.

Mr Navarro: Yes, in addition to any fines.

Q49 Chairman: Going back to what you were talking about just now about the sort of penalties available in the case of corporate crimes, obviously you cannot lock up a company. There may be some companies that people would like to see locked up, but you cannot actually do it. I think you have been looking at various specific alternatives to that. I would be interested to hear a little bit more for example about your ideas for compulsory share issues.

Mr Stott: That may be a bit radical, but we did enter a dialogue with the Home Office just before the last election on trying to create more imaginative or a wider range of types of sentence. We were looking at Europe and America as well. That committee fell at the election and has never been resurrected. This was blue sky thinking quite frankly and never got solidified, but we were looking at corporate probation, for instance, or maybe the power of a court to order that for a certain period the Agency or another regulatory body was a member of the board, to look at the environmental effort; the issue of a bond of a million pounds to be lodged for a five year period to be set against their environmental performance. Maybe the court could order a block share issue which would make the shareholders sit up immediately. If you are serious about environmental improvements, if you are seriously prepared to go that far, we actually think that the creation of the Sentencing Guidelines Council in the Criminal Justice Act would be the vehicle to take this forward and have a look at whether or not we could create more imaginative types of penalties, especially for the corporate offender. Rather than just the blunt instrument of fines, fines, fines, let us widen it and look at something else.

Q50 Chairman: Are you actively reviving that discussion?

Mr Stott: We would like to.

Q51 Chairman: What does that mean?

Mr Stott: We have not really done any in-depth thinking; we are playing around with these ideas, but I would be keen to take them forward.

Mr Navarro: It is an interesting area which we would like to engage on. The other aspect, of course, is increasing the number of cases against individual directors. Seven or eight directors have received prison sentences. Those tend to be the smaller companies where it is much easier to attribute the actions of the company to the individual. When we get to the larger companies with the layers of management it is much more difficult for us to be able to attribute individual responsibility—quite rightly, because there is a high test—to individual directors. That would certainly also grab their attention, I think, if we were able to do more of that.

Q52 Chairman: What does corporate probation mean?

Mr Stott: It is like any other probation order. For a period of two years or whatever they do not commit any form of environment offence or you bring them back to court.

Ms Brosnan: We also thought about a requirement that they should publish details of the conviction in their annual report so it is brought home to shareholders exactly what the failures are, so that shareholders can have an eye to making sure that those are not repeated.

Q53 Chairman: You said it was blue sky, but you also suggested it might be happening elsewhere in the world.

Mr Stott: Yes, I think it is, certainly in America. In Germany and Sweden they are using the administrative civil type penalty. Rather than prosecuting and taking them into court the regulator sets an amount. There would have to be an appeal provision built into that, but that is another avenue that could be explored.

Mr Challen: If we could have a memo on this I think it would be a very exciting area to examine in more detail.

Q54 Chairman: I agree. Would that be possible? If you have done some work on what is happening elsewhere, it would be very helpful if you could include it.

Mr Stott: I cannot promise it would be a very long paper, but we can certainly provide something.
Q55 Mr Challen: If you have examples from other countries—the United States or Canada—it would be very interesting to see what their thinking is.

Mr Navarro: Certainly.

Q56 Chairman: Who actually terminated these discussions and on what grounds?

Mr Stott: They just fell with the election and were never resurrected. It was a Home Office initiative.

Q57 Chairman: Did you seek to resurrect it after the election?

Mr Navarro: It fell into abeyance at that stage.

Q58 Chairman: Were ministers involved in those discussions at the time?

Mr Navarro: I do not think it had reached that stage. It was discussions between officials.

Q59 Paul Flynn: In your submission you talk about the introduction of civil and administrative penalties. How do you think they would work?

Mr Stott: I think they are being used at the present time by the DTI under the Competition Act. If they believe a monopoly has been breached then the DTI, as the regulator, can actually set an amount for a penalty itself. They have done it a couple of times, and I think the penalty was a million pounds on one occasion. If you prosecute you obviously have to follow the laws of evidence and the Police and Criminal Evidence Act et cetera, so there is a bureaucracy and administration to follow. The burden of proof is different as well; this is on the balance of probabilities that you set the administrative penalty rather than beyond all reasonable doubt. So there are attractions to a regulator.

Q60 Paul Flynn: You mentioned the good work you do with magistrates in training but I understand there is not the equivalent amount of training to the database, but it will be in e et cetera, so there is a picture of bureaucracy and administration to follow. The burden of proof is different as well; this is on the balance of probabilities that you set the administrative penalty rather than beyond all reasonable doubt. So there are attractions to a regulator.

Q61 Paul Flynn: It is hard to see that this type of offence would be done maliciously or deliberately.

Mr Stott: That is right, but I cannot impress enough the scale of some of the waste disposal operations. You are talking about thousands of tons from new construction. Twenty, 60 wagon loads suddenly appearing, very well organised, dumping it quickly—it does not take long—and away. These are well organised operations and there is a lot of money involved here.

Q62 Paul Flynn: It was discussions between officials. database of the environmental prosecutions and sentences. Are there any plans to publish this?

Mr Stott: We do publish our Spotlight publication. I think you are referring to a database to try to capture the whole of environmental crime. We are going to be able to do something in relation to fly tipping.

Mr Jones: In relation to one facet of environmental crime which is fly tipping, in discussion with DEFRA and with local authorities, we are developing a database which is intended to go live from this April. We will log all instances of fly tipping and the local authorities will also be doing that. This will give us, for the first time, a picture of what is going on nationally in relation to fly tipping.

Q63 Paul Flynn: We have had some references to the desirability of you producing and making public a database of the environmental prosecutions and sentences. Are there any plans to publish this?

Mr Navarro: We do publish our Spotlight publication. I think you are referring to a database to try to capture the whole of environmental crime. We are going to be able to do something in relation to fly tipping.

Q64 Paul Flynn: How do you disseminate that?

Mr Jones: Under the Anti-social Behaviour Act the minister will be able to require reports on that, and both ourselves and local authorities will report from that. I am not quite sure if we have decided yet whether we are going to publish ourselves from that database, but it will be in effect an incident database—reports of fly tipping—so that we can actually build that picture up for the first time. That will give us a much better picture of the scale. Is it increasing? Really increasing? If so, what types of fly tipping, what types of materials are being fly tipped? There will also be an indication of how much it is actually costing to clean that up.

Q65 Paul Flynn: Is this extended to other environmental crimes?

Mr Jones: Not at this stage, no.

Mr Stott: That would be a large operation and takes you into other territory because there are a lot of other regulators dealing with environmental crime—drinking water pollution, et cetera—and we all collect our data in different ways, regrettably. Undoubtedly if it could all be corralled and brought into one that would be beneficial, but I would not underestimate the kind of scale of task involved in doing that. However, it does lead on to interesting questions once you have got that into the Environmental Agency’s hands.
Q66 Mr Thomas: I just want to return briefly to this idea of malice because that is not a feature of the actual environmental legislation, is it? That is a concept that the courts have introduced. Am I right in thinking that?

Mr Stott: Most of our offences are strict liability. They have to prove that company A has caused an offence to occur.

Q67 Mr Thomas: When this happens in the court of appeal, this idea of maliciousness, what happens?

Mr Stott: They look closely at negligence, recklessness, poor management et cetera. All those elements are looked at, but we do not have to establish “You did knowingly”.

Q68 Mr Thomas: Why then do you think the Court of Appeal somehow introduced this concept into it?

Mr Stott: They look at fault. They are looking to see what is the degree, the element of fault, that has led to this particular incident occurring. Is it just carelessness? Is it pure accident? Is it deliberate or whatever?

Q69 Mr Thomas: But in the court system—which I think we can already see from this first evidence session—which is not necessarily imposing high enough fines in the first place, we then seem to have another step backwards at an appeal level. Many would say in the Milfordhaven case that four million pounds was peanuts compared to the cost to tourism and the environment and everything that happened in Pembrokeshire, West Wales at that stage. Would you agree with me—from what we have seen at this evidence session—that we have two stages here where there is a problem. One is where the fines in the first place are not necessarily high enough to act as a deterrent and to alert the company in a corporate way. Secondly, there is this extra element—which I agree is there within the appeal process anyway—of taking down the fines yet another level. Putting those together, environmental crime is not getting its just desserts.

Mr Navarro: I could not disagree. I certainly do agree.

Q70 Mr Challen: On the question of fly tipping, do you have a fly tipping hotline or something like that so that the public can contact you directly?

Mr Jones: We do have a standard emergency number for people to contact us.

Q71 Mr Challen: Where is it publicised?

Mr Jones: It is publicised as part of our Environmental Agency hotline. It is published through local authorities and libraries quite widely. The thing to bear in mind about fly tipping is that the majority of fly tipping is the responsibility of the local authorities. There are split responsibilities with local authorities there and the focus for ourselves is really round the hazardous waste side, the organised crime involvement in fly tipping. Nevertheless, if we do not believe it is for ourselves to deal with, then we would pass that on to local authorities and we are currently reviewing the protocol we have for that.

Q72 Mr Challen: There is room for confusion there for the public. They might want to report it to the police, for example, so there is another agency involved.

Mr Jones: I think that is fair to say, and we are aware of that.

Q73 Mr Challen: What evidence is currently being put before the courts so that they can fully assess the appropriate fine? How do you put it in the wider context of environmental, social and economic damage?

Mr Navarro: I think it is important to realise the role of the prosecution in terms of putting evidence in front of the court. We are not there to achieve a particular penalty; we are there to lay the information in front of the court.

Ms Brosnan: It is very difficult to get into socio-economic factors because the courts are wanting to sentence on the basis of actual harm and actual risk, matters that we can prove to them by evidence and if they are disputed could be tried and resolved by evidence. If we put evidence of harm, we can put evidence of impact on a business before the courts, we will do those things. In the environment there may not be victims but we can say that there is fish loss, that there is potential damage to otters, for example. We have examined otter spraints to show that a particular chemical may have an impact on an otter community. We do try to put as broad a spread of information as we can before the court, but it has to be very factually based for them to sentence on it.

Q74 Mr Challen: What sort of weight would they put on the risk of harm as opposed to actual harm? Does that carry a lot of weight with them when sentencing?

Ms Brosnan: They are used to dealing with issues of risk, for example with dangerous driving, you do not have to spell out all of the risks associated with a particular course of conduct. With environmental offences you possibly do have to spell out some of the risks because they are not as conversant with them. However, you cannot be too hypothetical in your suggestion of risk; you have to be able to produce evidence to substantiate it and sometimes we have to do modelling to indicate that a particular outfall might spread over a particular area. It has to be based on fact.

Q75 Mr Thomas: Is loss of amenity relevant then?

Mr Jones: It is publicised as part of our Environmental Agency hotline. It is published through local authorities and libraries quite widely. The thing to bear in mind about fly tipping is that the majority of fly tipping is the responsibility of the local authorities. There are split responsibilities with local authorities there and the focus for ourselves is really round the hazardous waste side, the organised crime involvement in fly tipping. Nevertheless, if we do not believe it is for ourselves to deal with, then we would pass that on to local authorities and we are currently reviewing the protocol we have for that.

Q76 Mr Challen: What is a typical reaction from a sentencing court to environmental and sustainability principles? Do you think they actually grasp the importance of these principles?
Mr Stott: I think very much so. Certainly at magistrates’ court level it is. If it is their local river or local playing field that has been dumped on and the impact that would have is not lost on them by any means.

Q77 Chairman: Going back to the question of the database. I think, Mr Stott, you were saying that it is very difficult to do a comprehensive database because there are so many different agencies involved and you all collect information in different ways. Why can you not produce your own database for the cases which you have been handling?
Mr Stott: We do. We have our own.

Q78 Chairman: Is that the same as Spotlight or is that something else?
Mr Stott: Spotlight feeds out of the national enforcement database which is a computerised system which collects all the data with the names, with the offences, with the penalties, et cetera. Spotlight feeds off that, that is where the information comes from, but in our database we are not collecting the same information that the other organisations are collecting.

Q79 Chairman: Is your database in the public domain? Do you publish it?
Mr Stott: No, we do not.

Q80 Chairman: Why not?
Mr Stott: It has individual names on it; data protection.

Q81 Chairman: But these are cases that have been before the courts, are they not?
Mr Stott: Yes, but they fall out of use, do they not?
There is a mix of companies and individuals. I think we probably could put on the Internet the right of appeal to such a tribunal. It would be a useful additional tool in our armoury, I think.

Mr Navarro: That is certainly something that we are exploring actively with the Commission.

Q82 Chairman: I think it would be helpful to magistrates in particular to be able to access this to get an idea of the scale and nature of offences.
Mr Stott: It does not give details. It gives the name of the offender, the sentence and the section numbers under which they were convicted. There is no short synopsis of the type of offence. What magistrates need is a short comparison of facts. That database does not cover that.

Q83 Chairman: Is that something you would like to produce?
Mr Navarro: We do produce those on individual cases, so would the defence. It would be quite normal for us to submit the range of sentences which have occurred in the past; the defence also will submit evidence to the magistrates so that they have information at that stage in front of them about past sentencing.

Q84 Chairman: Given the uncertainties that we have touched on in talking about the difficulties that exist in sentencing, anything that you could provide that adds to what is already there would be very helpful. This is something which you might be able to provide.
Mr Stott: The court is a sentencing body obviously and we can assist the court with their sentencing exercise if they wish to have that form of assistance. However, for every case which is in our favour, as officers of the court we would be obliged to show them the other side of the coin and there are a lot of cases going the other way.
Mr Navarro: With an inconsistent pattern it probably is not of great assistance to the court to have it exposed to them in even greater detail.

Q85 Chairman: Even an inconsistent pattern is better than no pattern at all, I suspect, but maybe that is arguable. I have one final question which goes back to something we slightly skated over. I would very much like to know your view of the suggestion that has been floated that there should be a system which collects all the data with the names, that is arguable. I have one final question which goes back to something we slightly skated over. I would very much like to know your view of the suggestion that has been floated that there should be a system of civil penalties. What position do you take on that issue?
Mr Navarro: I think civil penalties would be a useful additional tool in our armoury which would avoid the overhead for both regulated industry and ourselves to have to go to the criminal courts. I think it then comes down to the level of penalty which Parliament would be prepared to allow the Agency to impose. We certainly would not shrink from exercising that. However, if it is going to be a significant penalty I think we would perhaps need to go to an environmental appeal tribunal for them to set a high level rather than exercising that power ourselves. If we did have the power to impose unlimited penalties, we would expect there to be a right of appeal to such a tribunal. It would be a useful additional tool in our locker, I think.

Q86 Chairman: Such a system exists in the United States, I believe. I read of an oil company that spilled oil and found itself with a civil penalty for $34 million.
Mr Stott: They do not prosecute to the same extent as we do. They do not take the number of cases, but in the cases they do take, they are frequently looking to close the companies.

Q87 Chairman: That would help concentrate the mind, would it not?
Mr Stott: Yes, it would.
Mr Navarro: It is a completely different regime. It is quite clear in the United States that if anything is taken to the criminal courts the penalties are very significant. Nested below those penalties are the administrative penalties which in themselves are significant compared to ours. However, I think you have to have that relationship in order to encourage the take up of the administrative penalties.
Use of civil penalties and an outline of alternative sentencing provisions

1. Whilst taking evidence on the 22 January 2004 from representatives of the Environment Agency, the Chairman expressed interest in the availability of alternative sentencing provisions (particularly for corporate offenders) and the manner in which “administrative” or “civil” type penalties are applied in other countries. The particular questions and responses are to be found at Q49 to Q59 in the transcript. The Agency was asked to clarify those areas.

2. In respect of the use by other countries of administrative/civil penalties, whereby the Regulator calculates and imposes a penalty, the technique has been examined in two specific studies. Rather than reciting the contents of these, the Committee’s attention is drawn to extracts attached from the report prepared by Michael Woods LLM and Professor Richard McRory CBE of University College, London entitled “Environmental Civil Penalties—A More Proportionate Response to Regulatory Breach”. The report was produced in 2003. Five pages are attached which deal in general terms with the position in Europe, Australia and the USA. A further three pages provide more information concerning the use by the US Environmental Protection Agency (EPA) of civil penalties. The position in the USA has also been examined in depth by William Wilson (formerly a DETR lawyer), in his book “Making Environmental Laws Work” published in 1998 after the author had finished a secondment in the USA under the auspices of a Harkness Fellowship.

3. This note seeks only to deal with the issues in general terms, but Committee members will see that several European Countries have adopted various methods of imposing administrative penalties where the regulator imposes a “fine” on an offender as opposed to initiating a formal prosecution leading to a court appearance for the causer of the pollution. Germany in particular has made considerable use of the practice extending it beyond environmental regulation. The Provision would provide a most useful additional capability for the Agency especially in dealing with non-intentional and less serious offending. Considerable study would be required before its adoption and appeal provisions would be needed, but it could eliminate the expense of court proceedings and accelerate enforcement generally.

4. In Australia (para 4.13) it can be seen that the practice has been refined and formalised by incorporation into the Environment Protection and Biodiversity Conservation Act 1999, and para 4.14 indicates civil penalties ranging from A$550,000 for an individual up to A$5.5 million for a corporation.

5. The practice of imposing civil penalties is used to the greatest extent and in the most refined way in the USA. There, as can be seen from para 4.19, the amounts ordered for payment can be extremely large (eg US$30 million). This alternative method of enforcing against the environmental offender is based upon a deliberate attempt to reserve the criminal courts for offenders who deliberately, wilfully or recklessly fail to comply with environmental legislation and either cause or risk considerable harm to the environment. The method of calculation of the penalty is sophisticated and involves use of a computer system (known as BEN) to calculate the benefit gained by the offender from non-compliance or from its activities. Similarly the capability of the offending company to pay the proposed penalty is also calculated by a computer system (known as ABEL) which provides information as to the sum that the company could afford without being put out of business. These methods of calculation are available to the offending company so that it knows the penalty that is likely to be imposed on it.

6. Additionally, the American Environmental Protection Agency also utilises what are known as “Supplemental Environmental Projects” along with the imposition of civil penalties (see para 4.20). Those projects, requiring polluters to undertake environmental projects form part of the overall settlement that may be reached between the Regulator and the offender.

This capability of the Regulator to set such a penalty is of considerable interest to the Agency for the reasons expressed at the Hearing. It could be a most useful additional enforcement provision. The range of the penalties that might be available along with the nature of the offences and the type of offenders who might be subject to such penalties could be the subject of a detailed study possibly under the auspices of the new Sentencing Guidelines Council.
However, the addition of civil penalties should not detract from the need for Magistrates and the Judiciary to impose higher criminal penalties—it would not be right for a civil penalty, imposed on the lesser civil standard of proof to be higher than a criminal penalty imposed on the criminal standard of proof. It would also be important for civil penalties to be set at an appropriate level and regularly reviewed.

**Alternative Sentence Provisions**

7. As mentioned in the transcript at Q49 some initial thought (additional to administrative/civil penalties mentioned above), has also been given to the devising of alternative sentences that might be available to courts when sentencing environmental offenders. Such thinking is embryonic but again might merit the involvement of the Sentencing Guidelines Council. Following the creation of the Sentencing Advisory Panel in 1999, that body had recommended in its initial advice to the Court of Appeal that the sentencing of companies merited further examination (para 25—Sentencing Advisory Panel—Advice to the Court of Appeal—Environmental offences). There was then discussion between the Home Office, the Environment Agency and the Health and Safety Executive on this topic but these discussions were never finalised by way of a report and no firm recommendations were forthcoming. However, initial thought has been given by the Agency to the following types of alternative offences:

(a) Equity share issues—Such a penalty would enable a court to order a company to issue shares for a specified sum related to the avoided costs or the benefits obtained through the commission of the offence. Failure by the company to do so would lead to the company being re-sentenced for the offence. The creation of additional shares would affect the holding of other shareholders thus making them concentrate upon and demand changes in the practices of the company. Such a sentence would mean a company would not have to pay an immediate fine thus preserving its cash flow.

(b) Corporate Rehabilitation Order—This would be an order made by the Court for a specified period (possibly two years), during the course of which the company would have to undertake specific activities and actions. A range of those activities would have to be designed but could, for instance, include training of personnel in environmental matters; adoption and implementation of environmental action plans; remediation of environmental harm to the satisfaction of the Agency; Compliance would be monitored by the Agency but could be attained by the placing of an Agency representative on the company’s Board for the duration of the Order. Failure to comply with the specific activities would lead to the company being brought back to Court to be sentenced in an alternative way.

(b) Community Projects—Here the Court would have the power to order an offender to complete a project to the value of a specified sum related to the harm or benefit that had been obtained by the offender. This project would have to be completed within a specified period. The project would be linked to environmental improvement. This provision would also be capable of application to individual non-corporate offenders who might not be in a position to pay a high fine. Not infrequently the Agency encounters such individuals who may well have caused considerable environmental and amenity damage through fly-tipping for instance but who are not in a position financially to pay an appropriate fine. The ability of a Court to make this kind of order would help to rectify that problem.

(c) Remediation orders—Although there is power to serve a works notice requiring remediation currently available to the Agency under s161 Water Resources Act 1991, there is no provision for a Court to make such an order. No parallel power exists for either the court or the Agency in relation to the commission of waste offences. An order as part of a sentence, requiring an offender to remediate environmental harm to the satisfaction of the Agency and within a specified time would be extremely valuable especially if non-compliance with such an order was in itself made an offence, and the offender capable of being ordered back to Court so as to be re-sentenced for the original offence.

(d) Corporate Bonds—this is a suggested provision whereby a corporate offender either pays funds into a Court account for a finite period or is ordered to obtain compulsory insurance to a specific value. The amount ordered would be dependent upon a Risk Assessment of a company’s potential for causing environmental damage. The offender would pay for that assessment to be done. Once the assessment had been made then the bond would be in an appropriate sum and for a specific period and would make funds available for use by the Regulator should environmental harm be caused during that time so as to remediate any damage. This would be of value where there was a perceived risk of the possible liquidation of the company concerned.

(e) Adverse publicity orders—a suggested provision whereby in addition to any sentence imposed, a Court could make an order that a notice, (with wording agreed by the Agency as to the offence and its circumstances), be placed in the local or even national media within a specific time. Non-compliance would in itself be an offence. Furthermore, the provision of the order could be extended to compel an offending company to place that notice in its annual report.
8. These are ideas that require analysis and detailed scrutiny. Given the particular difficulties of sentencing environmental offenders—especially corporate offenders—it is thought to be a worthwhile exercise that might provide courts with a more far-ranging and effective form of sentencing regime that would help to ensure compliance.

*February 2004*
Thursday 29 January 2004

Members present

Mr Peter Ainsworth, in the Chair

Mr Colin Challen          Sue Doughty

Memorandum from the Magistrates’ Association

The Magistrates’ Association has been aware of the importance of sentencing environmental crime for some time and has taken steps to raise awareness among its members. This has included features in the Magistrate magazine, sample training toolkit for branches, limited guidance, liaison with relevant government departments and NGOs. In 2002 environmental issues given priority with dedicated AGM session, dedicated issue of Magistrate, launch of Costing the Earth.

Costing the Earth

Costing the Earth is an information toolkit designed to help the judiciary, in particular the lay magistracy, to deal with environmental cases. The toolkit was originally launched in November 2002 and is available on the Magistrates’ Association website for anyone to access. The information was gathered together and jointly published by the Magistrates’ Association and the Environmental Law Foundation. The guidance is a living document and as recently updated and extended in November 2003. It has been commended by Lord Justice Carnworth who presented information on Costing the Earth to a European conference of judges looking at environmental crime.

Why the need for this guidance?

— Concerns were expressed that the level of fines and sentences given in environmental cases was not high enough to act as a deterrent, leading to some situations where it is cheaper to break the law and pay the fine rather than to comply.

— The number of environmental cases coming to court is comparatively small and therefore training in this area for magistrates has had a very low priority.

— The infrequency of cases in court is the same for prosecutors as well as the judiciary and therefore magistrates needed to be aware of important factors that should be brought out in court eg profitability, irreversible damage.

— Magistrates themselves wanted more guidance in dealing with cases where their powers of fining are substantially greater then for most of the cases they deal with on a day to day basis.

— Increasing recognition that the impact of environmental crime can be significant, maybe even irreversible coupled with connection with highly organised crime with large amounts of money at stake.

What is the toolkit all about?

The tool kit provides experience and expertise in evaluating cases in order to ensure that the criminal justice system works effectively and appropriately in sentencing those found guilty of environmental offences.

The toolkit aims to:

— explain the effects of pollution and other offences relating to the environment;

— clarify some of the more complex and technical aspects of environmental offences; and

— raise awareness amongst magistrates of environmental impacts and the legislation and case-law relating to environmental crimes.

The toolkit comprises three parts:

— Part I provides an overview of the principles behind environmental sentencing and what particular actions and criminal activities may mean for both human health and the environment.

— Part II is a detailed consideration of the wide range of environmental aspects and the law. Each section is sub-divided into a number of case studies. The case studies follow a set structure:

  — An outline of the relevant legislation.

  — The facts of the case.
— Guidance on assessing seriousness of the offence(s).
— Sentencing criteria.
— Part III provides further information which includes recently published guidance notes on sentencing wildlife and conservation offences.

Costing the Earth has provided sound information for others as well as sentencers

January 2004

Witnesses: Ms Rachel Lipscomb, Chair, and Ms Ann Flintham, Communications Manager, Magistrates’ Association, examined.

Q89 Chairman: Good morning. Thank you for your memorandum, which is one of the briefest I have ever seen sent to any Select Committee inquiry. We are grateful to you for coming to flesh out some of the details that perhaps were not in what you sent to us. May I begin by asking you whether you have a kind of in-house definition of what environmental crime is?
Ms Lipscomb: This is crime that has an impact on the environment and on people’s quality of life and, to a certain extent, on safety as well. Most of the environmental crime comes to the magistrates courts in the first place; they really are in the front line for it. What we have been working towards is raising awareness and also improving the relationship and the understanding between the prosecuting agencies and the courts, because the courts are utterly dependent on the amount of information that they have in front of them. Because they tend to be strictly liability cases, the background, the big picture, is of great importance when it comes to sentencing. They may be a first time offender, so the impact of that first sentence is crucial.

Q90 Chairman: What do you think the main aims are of the criminal justice system in relation to environmental crime, and also sustainable development?
Ms Lipscomb: They are to prevent further offending. With regards to sustainable development, by the sheer deterrent nature of the sentences, that is to deter people either through their work or social pastimes damaging the environment and putting at risk the future life and enjoyment or work situation of other people.

Q91 Chairman: Do you think that retribution has a part to play in the process as well?
Ms Lipscomb: I think in this case it is slightly different because we put great emphasis on the cost of compliance and the cost of clean-up rather than retribution. The financial consequences of a fine, making good and the maxim that the polluter pays, probably outweigh any consideration of retribution, deterrence being of greater importance.

Q92 Chairman: Do you think, in relation to the aims that you have just set out, that the system is effective and working well?
Ms Flintham: It is working better all the time and I think, as people become more aware of the importance of the environment and perhaps irreversibility and issues like that, things are improving.

Q93 Chairman: In what way?
Ms Flintham: I think because people are much more aware of the consequences of environmental crime, they take it much more seriously. I think there is a recognition that we do have to break the cycle, that we have to have deterrents in place, and make sure that it is not attractive to people to avoid from their responsibilities towards the environment.

Q94 Chairman: When you say that people are more aware, do you mean magistrates?
Ms Flintham: I would say magistrates and the general public as well. It is a wider issue but certainly the magistrates, too.
Ms Lipscomb: I think it goes beyond just an awareness; it is an understanding that a particular offence may have a direct impact on the environment, it may have an indirect impact, and it could have a multiple impact.

Q95 Chairman: And yet we have heard from the Environment Agency last week that one of the difficulties is that people regard this as a sort of victimless crime area, that in their view there is not a proper awareness of the gravity or potential gravity of the sorts of crimes we are dealing with here. You obviously take a more optimistic view?
Ms Lipscomb: We did a lot of work with the Environmental Law Foundation, the Environmental Agency, DEFRA and other interested bodies two years ago to produce the piece of work called Costing the Earth. We believe that has had a significant impact. We have heard back from prosecutors that sentences appear to be higher and that the impact on the prosecutors of good, clear reasons from the courts is actually having a snowball effect in that it has given them a very clear idea of what the courts have in mind and what sort of information the courts require. Getting the background information on which to make decisions has been the most difficult aspect of it for us.

Q96 Chairman: Do you think that there is a greater awareness now on the part of people who commit these crimes that they are in fact committing criminal offences? The Environment Agency again suggested to us that one of the difficulties was that people did not think that they were being criminal when they were committing various types of these activities.
Ms Lipscomb: There is more publicity now about the offences and the consequences. I think for everybody working where they are possibly going to cut corners and possibly commit offences. There is a good argument to have a wider national campaign.

Ms Flintham: There is a bit of difference sometimes, is there not, from your single operator who is going fly-tipping and your criminal gangs who are importing endangered wildlife. In terms of the criminal gangs, there is a recognition now that there are vast amounts of money in this; it is being compared with things like drug crimes, for example. I think that message slowly is getting through. It may be that perhaps the smaller operators, as I say, the fly-tippers of this world who maybe think they can still get away with it, is where the enforcement really needs to be and where they need to be brought into the courts and to be dealt with. Perhaps it is at that end where there still needs to be some change in their culture and their attitude.

Ms Lipscomb: They are the most difficult people to deal with. Where you have a company and you can get accurate information as to what their turnover is, it is much easier just to set a fine. With the small operator, it is much more difficult. Any links that we could have with the Benefits Agency and with the Inland Revenue would improve the level of accurate information available, if defendants were required to produce accounts and were aware that the BA and Inland Revenue could be contacted then the accounts would be forthcoming.

Q97 Chairman: We will come on to that issue later, if we may. You have made a very interesting point there. In general terms, the impression one has, looking at the number of prosecutions that are coming through, is that this is a pretty small area of criminal justice. In the context of the overall number of cases that you deal with every year, environmental crimes are tiny, are they not? Do you think that the number of cases you deal with is a true reflection of the scale of the problem?

Ms Lipscomb: No. I am sure that we do not see the smaller cases, the fly-tipping, the other sorts of cases that verge on antisocial behaviour, that are a nuisance and upset communities and make life unpleasant in areas. We do not see the numbers that there are.

Ms Flintham: I think that it is probably a problem for local authorities where their resources are very limited.

Q98 Chairman: The problem is a bigger one than would appear in terms of your workload?

Ms Lipscomb: Yes.

Q99 Chairman: Before we go on to sentencing, I would like to ask about the advice of the Sentencing Advisory Panel set up by the Court of Appeal in 2000, which suggested that the presentation of environmental cases in courts was generally poor. Would you have agreed with that at the time and do you think it has changed or got any better since?

Ms Lipscomb: We would certainly have agreed with that at the time. It is something that we have directly worked on with prosecutors. Coming back to what we were saying earlier about the information given to the court, it is not necessarily the presentation of the cases as they stand but the presentation of the information when you come to the point of sentencing that is crucial.

Q100 Mr Challen: May I start by asking you a couple of questions about the toolkit Costing the Earth on your website, which was started 14 months ago or thereabouts? Have you managed to determine how many hits it has or what the usage or take-up of that particular toolkit has been?

Ms Flintham: We do not have any hard evidence of the numbers of people using it, but we do know anecdotally that a lot of people are using it who are outside the magistracy. We know that a lot of local authorities have picked it up, that the police force has picked it up, and I know by the number of calls I have had from judges ringing me and asking me if there is a particular case that they can use or have some help with if they have not managed to download it. We know the interest is out there. We are also aware that we are still in the process of raising awareness that it is there, so there is still a job of work to be done to make sure that people are accessing it and using it.

Ms Lipscomb: Last year, before the website and before the whole toolkit was opened to everybody, I do know that 50% of local authorities had originally purchased the hard copy.

Q101 Mr Challen: Have you had any feedback from the magistrates themselves so that you can measure how effective it is? Is it aimed at magistrates, is it not?

Ms Flintham: We know that in many courts they have a bound copy sitting in the retiring room and that in some cases magistrates are telling their legal advisers that it is there. There is still a job for us to get that information out there. We make regular references to it in our magazine, which goes to our members ten times a year. We know that some of the cases have been used in our local PR projects where magistrates go out to the community and take members of the public through sentencing exercises. We know that they have used those cases there. I suppose that it is doing two jobs education in that it is helping the magistrates and trying to educate the public as well.

Q102 Mr Challen: That is mainly anecdotal evidence; it is not somebody formally monitoring that?

Ms Flintham: We have not done any formal research to find out how many people are using it.

Q103 Mr Challen: It must sit on the shelf with a lot of other guidance as well.

Ms Lipscomb: Except that, because magistrates are not dealing with those cases very often, they are more likely to use it when required.
Ms Flintham: And to look things up.

Q104 Mr Challen: We have been told that the sentencing powers are broadly sufficient but that the sentences on conviction generally are not. You say in your memo that you are aware of concerns about sentences currently handed down being too low. Do you share those concerns that they are too low?

Ms Lipscomb: The impression we get from the environmental magazines is that sentences have gone up significantly over the last 18 months. Magistrates are using the maximum of their powers, or near to the maximum of their powers, in a way that they were not doing before. That is the best snapshot we can get, and as the cases are not broken out.

Q105 Mr Challen: Would you say that the noticed, in particular, river offences, are probably pinpricks and they will just perhaps write that off as bad luck and carry on in their old ways. Do you think there is a lot of repeat offending because of a low deterrent value of sentences?

Ms Lipscomb: Perhaps I could put that in another way in that you do need is extremely good prosecutions. Provided that your prosecutions have done their job properly, that they have brought out relevant facts and they have made a clear case of economic gain in whatever way it is, then that should be sufficient to counteract the robust defence.

Q106 Mr Challen: Do you think that magistrates are competent in sentencing offenders at higher levels of fines and imprisonment than they are usually accustomed to doing? Are magistrates perhaps unused to dealing with the sorts of corporate offenders particularly who should attract higher sentences?

Ms Lipscomb: Magistrates are used to sentencing people for six months or two offences of six months with a maximum of a year. I do not think they should have any difficulty at all with that, providing the information is there and the level of seriousness can be made out. If it requires a greater sentence than six month, they still have the power to commit to the Crown Court for greater sentence.

Q107 Mr Challen: I am wondering if corporate defendants are better represented. Clearly, if you have your average fly-tipper, they might not be represented at all; I do not know if they might have some legal advice?

Ms Lipscomb: Corporate defendants are easier to deal with because you have their information and you can get better relating to the profitability on the means of the business.

Ms Flintham: It is right to say that quite often their defence is perhaps of a higher standard than for the single operator.

Q108 Mr Challen: They will be able to look for loopholes, get-out clauses and all sorts of things, which your average Joe Bloggs would be unable to call upon?

Ms Lipscomb: If it is strict liability, they would not be looking for loopholes; it would be a question of what sort of mitigation they put forward. There again, as far as mitigation is concerned, that has to be assessed. It is hard to see that a larger enterprise could put forward more powerful mitigation than a single operator.

Ms Flintham: For some companies, some of the fines that are meted out are probably pinpricks and they will just perhaps write that off as bad luck and carry on in their old ways. Do you think there is a lot of repeat offending because of a low deterrent value of sentences?

Q109 Mr Challen: For some companies, some of the fines that are meted out are probably pinpricks and they will just perhaps write that off as bad luck and carry on in their old ways. Do you think there is a lot of repeat offending because of a low deterrent value of sentences?

Ms Lipscomb: There appears to be, I think we have noticed, in particular, river offences such as pollution of water, repeat offending. There is absolutely no reason why these repeat offenders should not be fined up to the maximum.

Q109 Mr Challen: For some companies, some of the fines that are meted out are probably pinpricks and they will just perhaps write that off as bad luck and carry on in their old ways. Do you think there is a lot of repeat offending because of a low deterrent value of sentences?

Ms Flintham: Certainly when you are sentencing, you would be looking at the previous behaviour of a company. If there is a history of offenders, then that would be an aggravating factor in the sentencing.

Ms Lipscomb: And there would be no mitigation available to them.

Q110 Mr Challen: Does that happen? The papers have reported on some water companies many times in the same sorts of case. Are those sentences ramped up each time they reappear or are they just given the same kind of sentence as they had before?

Ms Flintham: Certainly when you are sentencing, you would be looking at the previous behaviour of a company. If there is a history of offenders, then that would be an aggravating factor in the sentencing.

Ms Lipscomb: This comes back to the quality of the information. It is absolutely essential for sentencing that you have documented evidence of the profitability of the company.

Q111 Mr Challen: Should their balance sheets be taken into account when sentences are given out? Obviously, if it is meant as retribution, perhaps the kinds of fines that we are talking about at the moment really are too low. Should we have other more stringent sentencing?

Ms Lipscomb: That is variable. You can ask for it but you cannot require it.

Q113 Chairman: It seems to me to be extremely material. If you take someone on average earnings and they get a £3,000 fine, that is 17% of their annual income, whereas for a company that is earning, say millions of pounds a year, it would be £170,000. I have not seen many fines equating to £170,000.

Ms Flintham: Those, of course, would have to be assessed. It is hard to see that a larger enterprise could put forward more powerful mitigation than a single operator.

Ms Flintham: Perhaps I could put that in another way in that you do need is extremely good prosecutions. Provided that your prosecutions have done their job properly, that they have brought out relevant facts and they have made a clear case of economic gain in whatever way it is, then that should be sufficient to counteract the robust defence.

Q114 Chairman: They would. Am I on to a sensible point here? I am asking about the relative hurt in fixing fines by courts in terms of corporates and
individuals. It seems that individuals have to pay a significantly higher amount relative to their value than companies do.

Ms Flintham: It is a lot more difficult to assess when it comes to companies.

Ms Lipscomb: You should be able to do it on overall turnover.

Ms Flintham: One of the key difficulties in terms of companies, and you are identifying big companies like big water companies, for us is with a very small company where perhaps just three or four people are involved. You are told when you are sentencing that if you fine too highly it is likely to put that company out of business and therefore you will be making two or three people redundant. That is quite a difficult one to deal with because one knows the association sometimes between lack of employment and crime. Obviously that is a big problem for us when fining small companies.

Ms Lipscomb: We are legally required to take into account the means of either a company or an individual when we are setting the fine.

Q115 Mr Challen: Would that also affect the magistrates' ability to ask the offender to remediate the damage done? Perhaps in a waste disposal case they would have to pay for the clean-up?

Ms Lipscomb: This is where it can be quite misleading. Sometimes the fines may look relatively insignificant but the cost of repair and compliance has actually been much higher. One would put the repairment, the cost of repair of the damage, higher than the fine. It would rate above the fine. If they were of limited means, it would be more important that they paid for the repair than had a very high fine. This is quite often where there is a misunderstanding of the level of fining.

Q116 Mr Challen: What power or discretion do magistrates have in this regard?

Ms Lipscomb: They have no discretion but the costs would have been exercised through the authority that was prosecuting.

Q117 Mr Challen: Could you force a company, say the directors, to go out and clean it up themselves, for example?

Ms Lipscomb: That could only be if it was an offence subject to imprisonment, and then you could impose a community sentence as an alternative sentence.

Ms Flintham: You could have a community penalty whereby, as part of that community penalty, somebody did unpaid service in the community. It could well be in doing that that you could require that person to undertake a specific task.

Ms Lipscomb: You could direct that that is done.

Q118 Mr Challen: Does that happen very often?

Ms Lipscomb: No, because usually if they are going to move up into that sentencing band, it would be so serious that the person is likely to go to prison.

Q119 Mr Challen: It could also happen in fairly trivial cases. If it was a discussion on fly-tipping, you could tell them to go and clean up somebody else's fly-tipping.

Ms Lipscomb: In those cases the maximum is a fine.

Q120 Mr Challen: And you do not have any discretion about that at all?

Ms Lipscomb: No, that is what Parliament has set. They all vary; from £2,500 up to £20,000.

Q121 Mr Challen: Do you think the Magistrates' Association would want to have extra discretion in this regard?

Ms Lipscomb: The difficulty would be the pressures on the probation service at the moment. Getting enough supervision, getting the range of community penalties, is really quite tight.

Q122 Mr Challen: Do you have any views as to what should happen to money received in fines for environmental crime? Do you think it should be, as it were, hypothecated to deal with the problem or are you happy to see it all go into the general pot?

Ms Flintham: We had brief discussions on this. I do not think we have canvassed our members about it. It may well assist us if the money did go back into environmental projects or of that nature. It might raise the profile.

Ms Lipscomb: Coming back to the large companies and the small operator, the awareness by the public of what particular companies have done to repair damage caused is an important element alongside the penalty. Possibly larger companies should be required to comment in their annual report on this.

Q123 Mr Challen: That would be as a requirement?

Ms Lipscomb: Yes, as part of the environmental audit on the damage caused.

Q124 Mr Challen: That would also have to apply to quite a lot of other areas as well, perhaps health and safety and so on, would it not?

Ms Flintham: Environmental crime covers a huge amount of legislation covering all sorts of different things.

Ms Lipscomb: Is it worth thinking with the larger companies on how to educate the shareholders? Have they an interest in this?

Q125 Mr Challen: They are the owners of the company. Should they also be punished along with the company?

Ms Flintham: They should certainly be aware of their responsibilities, which I do not think some of them are.

Q126 Mr Challen: How would you make them aware of that? Would that be in the annual report or in a special report, or perhaps a public declaration in a newspaper, as sometimes people are forced to advertise things in the classifieds, as it were?

Ms Lipscomb: I think probably in the annual report and at the AGM.
Ms Flintham: With special undertakings so that they know exactly what they are responsible for.

Q127 Mr Challen: But that would often be 18 months after the event and it might not be topical any more.

Ms Flintham: Better late than never, though.

Q128 Chairman: The problem with that point is that it only deals with the larger companies. As you have already suggested, a lot of smaller companies are creating quite a lot of the harm.

Ms Lipscomb: Yes. Local press, local radio and local television are quite powerful tools in that, I think.

Q129 Mr Challen: Perhaps that could also be on your website. It could be part of the Costing the Earth process that you yourselves as magistrates can list cases.

Ms Lipscomb: There are one million plus cases going through the magistrates courts all over the country in 365 courts. We would not be able to be aware of individual cases.

Q130 Mr Challen: I take it there is nowhere at present where this information is publicly obtainable in a fairly easy way?

Ms Lipscomb: No. If you can get Research and Development Statistics from the Home Office to break out the case, then you would get it.

Ms Flintham: It may well be the case that the prosecutors, when they are successful in a case, should do more to publicise what has happened. Certainly I think in local newspapers some of the local authorities have been successful in getting quite a lot of media coverage, and that is sometimes a way to get through to the smaller individuals who are not complying.

Ms Lipscomb: And that is a way of alerting the public to be on their guard or actually to report other incidents.

Ms Flintham: You have a good example, have you not, with abandoned cars in that that it certainly has become a major problem for all sorts of people especially in terms of local authority’s time in clean-up. Abandoning a car is antisocial behaviour; it brings down an area; people do not like it; it causes problems with the fire services; and children can be injured playing in the cars. There has been a lot of publicity about that. There is much more awareness of abandoned cars and local authorities are taking action and doing something about it now. That is a classic example of where you can raise awareness and perhaps bring about some changes by different people working together.

Ms Lipscomb: The other place you could raise awareness is through the education system in the primary schools. Younger children are probably much more sensitive to and aware of environmental issues than two generations above them. Messages going back through the families that way have a real effect.

Q131 Chairman: I think we would all agree that education has a hugely important role to play in achieving all sorts of sustainable objectives. Can I bring you back to what happens in court? Would you care to compare and contrast, in the light of your experience, the prosecuting skills of the Environment Agency on the one hand and local authorities on the other?

Ms Lipscomb: I think that is variable, to be fair but the Environment Agency has now trained prosecutors and put a lot into that. Some local authorities have prosecutors who are good in particular areas but do not have the training in other areas.

Ms Flintham: May I concur with that from my own experience? The local authorities are just beginning to work on their prosecutors and I have noticed a better standard of prosecution when they brought their cases into court.

Q132 Chairman: The local authorities themselves, in a recent survey, seem not to be wholly convinced that the courts understand environmental issues. I think 20% said that the courts did not understand environmental issues. Do you think that is fair?

Ms Flintham: I do not think it is fair, no. One of the issues for local authorities is to get very cross with magistrates because we do not reimburse all of their costs. Local authorities tend to have quite high costs. As Rachel Lipscomb has said, in terms of sentencing, we tend to put the reparation and fining perhaps ahead of the costs. I think that is a problem for local authorities; they do get very irritated when we do not give their costs in full figures. That is a difficulty for them. We appreciate that it is costly for them to bring a prosecution, and quite often courts are the last resort for local authorities. They have tried lots of different ways to get that particular company or person to comply and they will have spent an enormous amount of time and resources on that before it comes to court. We have a problem of trying to sentence, as Rachel said, according to some one’s means and trying to share the pot accordingly. Costs tend to come at the bottom. That might be the local authorities’ perception of us not understanding the crime.

Q133 Chairman: I think they are concerned that you do not seem to be able to assess an appropriate level of fine.

Ms Lipscomb: That is entirely dependent, first of all, on setting the seriousness of the offence. To set the seriousness of the offence, you have got to know: what that particular offence has meant in terms of damage, danger or risk of harm; what the costs of repair have been to the local authority or to any other organisation; what has happened in the context of other events that have gone on before; whether there have been previous warnings; whether there have been previous prosecutions; what profit has been gained by offending, because often there is a profit involved; and what they have saved by not complying. A prosecutor really also needs to give the
local picture as to what other problems there have been in the area and whether that has a particular relationship to this offence.

Q134 Chairman: Is it possible to provide us a typical example of how environmental principles accord?  
Ms Lipscomb: They will depend entirely on the offence. The difficulty is that they can be quite sketchy.

Q135 Chairman: To what extent is the risk of harm taken into account? 
Ms Lipscomb: If it is given or it is asked for and there is an indication, it would be taken into account alongside the seriousness of the offence.

Q136 Chairman: Do you regard that as an important aspect in these cases?  
Ms Flintham: Yes, if it was a case of pollution of air, for example, then obviously that would have quite long and far-reaching consequences.  
Ms Lipscomb: The risks could be almost as high as somebody actually being affected by it.

Q137 Chairman: Are you able to offer any specific examples, and I know it is difficult, off the cuff? Can you think of any specific cases where the risk of harm has been a material factor in the court’s judgment?  
Ms Lipscomb: Certainly you get it with pollution.  
Ms Flintham: In food health there is a knock-on effect, perhaps even fatalities of human beings if there is food poisoning; that would be far-reaching.  
Ms Lipscomb: Another example is the use of asbestos, and it could apply to water pollution and gases when you have materials being dumped, any of those sorts of offences.

Q138 Sue Doughty: I would like to go back a bit to guidance in sentencing. We had quite an extensive period of looking into Costing the Earth and how that was working. I am interested in that. We have talked a bit about it and there was a general feeling that it was moving up in terms of the magistrates’ awareness and sentences passing down, although in fact the Environment Agency has said to us that average fines are only rising very gradually and that, in relation to high value, repeated, unlawful activity such as illegal fly-tipping, it was felt that there was no deterrent. We talked about possible deterrents. I am interested to hear if it would be possible or sensible to set up sentencing structures for some of the most common crimes, such as statutory nuisance, water pollution and waste offences, so that we are really using formulas much more. Would that help accelerate this process of putting proper fines in that would be a deterrent?  
Ms Flintham: The difficulty is that the fine always comes back to the means of the offender, and we cannot get away from that. We have to abide by that in terms of imposing a fine that has to be payable within a period of 12 months. We have to look at collecting that. I do not think it is any secret knowledge that there is a real difficulty in collecting fines. That is part and parcel of the sentence, that if you impose a fine, it is really important that the person pays the fine. Currently, at the moment, I think only about 50% of fines are being collected. This is not only about imposing the fine but making sure that that person pays the fine.

Q139 Sue Doughty: Is that true also of some of the other things you discussed, such as remediation, actually getting them to carry out the work or do community service or other forms of sentence, are more successful in terms of working?  
Ms Lipscomb: We would only be talking about it at the low scale and, yes, on the whole that work is carried out. The difficulty with the fine, coming back to that again in your question, is that it may be that the courts have been made aware that £30,000 or £40,000 has actually been spent on repairing the damage or putting in new equipment; that will affect the ability of somebody to pay a financial penalty on top. It would rate quite highly in the court’s mind if the situation had been reversed or it had been stopped and that it was not going to cause a further offence.

Q140 Sue Doughty: We have some research by Environmental Resource Management, ERM, and they have suggested that only 22% of magistrates are clearly aware of the environmental sentencing guidelines. How do you get that awareness higher? You have been telling us all the things you have been doing but only 22% of magistrates are aware, despite all the publicity you have put into it.  
Ms Lipscomb: We had not been aware that they have been asking magistrates and so I cannot comment on the 22% figure. I think it is important to remember that magistrates are sitting in benches of three. This has an incremental effect on spreading knowledge and experience; the resources are there and they have a legal adviser. The legal adviser should be bringing past cases and the Costing the Earth material to their attention if they have an offence before them.

Q141 Sue Doughty: Last week when we were asking about the same issues, one of the concerns was that magistrates do not often see these crimes, that they are not getting a lot of exposure to them. Would that be one of the things that you think might contribute to the 22% figure? We are beginning to see that there is information out there for them and they could have the training. It might be several weeks or even months before they actually came across a case where they use it. All sorts of other things intervene, for which there are also guidelines, which they may do much more often.  
Ms Lipscomb: Yes, but because they are not coming across them so often, they are more likely to make use of the material that is there. Another thing that we do is produce a magazine that goes out to all our 28,000 members every month. There is a guideline case in that each month with a sentencing section from a district judge. Many of those cases are on the environment. We are getting constant reminders.

Q142 Chairman: If the system is working so well, why is there such concern about the level of sentences being handed down? The level of sentences
was set in 1990. It has not been adjusted for inflation. In real terms, the sorts of penalties being handed out have diminished very sharply. The average fine is £2,000 to £3,000. That is the key area of concern that we had explained to us. If the whole system is working as well as you are seeking to imply, then that concern would not be there, would it?

**Ms Flintham:** Perhaps we need to see a further breakdown so that we know what large companies are being fined and what the fines are for the small-time operator. The small-time operator is likely to be somebody who is probably unemployed, probably claiming benefit. The level of fine you impose on somebody like that is likely to be £5 a fortnight. You can see that the average is dragged down very quickly.

**Ms Lipscomb:** Looking at Environmental News, which does a back page on cases that have been sentenced recently, the impression you get is that over the last 18 months sentences have been going up, and Environmental News has been putting a very positive outlook on it.

**Q143 Sue Doughty:** There other types of crime where you have sentencing guidelines. Are these guidelines more effective in terms of what you actually see as the sentencing outcome? Do you feel because that is a more established area of casework that you are getting, you have more consistency there?

**Ms Lipscomb:** Not necessarily, and what we seek all the time is a consistency of approach to sentencing so that you are training magistrates through a structured, decision-making approach to sentencing. In sentencing, you are always going to have variation of actual outcome because you are taking into account the level of seriousness, risk factors aggravating and mitigating circumstances. You have to take account of somebody’s means and so you are not going to be sentencing someone to the same sentence for the same offence necessarily. But if you go through the same process and your approach is the same, you should have a satisfactory average across the piece.

**Q144 Sue Doughty:** Thank you for that. I would like to turn on to where we could improve the system now. One of the queries I have is over this whole point about expertise. The Law Society suggested that individual magistrates might only hear an environmental case once every seven years. The Environment Agency has concerns about skill levels. They were wondering, in their evidence to us, whether it might be a good thing to develop expert magistrates who would work on a regional basis to hear this sort of perhaps environmental and health and safety prosecution and so on. Do you think that specialist magistrates are effective and would this be a good idea in this field?

**Ms Lipscomb:** I do not think it would necessarily make a worthwhile difference because there is also the problem between magistrates and relatively local. That is a very strong link in that people who are dealing with cases in their own area, they are more aware of dangers, difficulties and prevalence than they might be doing it on a specialist basis.

**Q145 Sue Doughty:** If we have a problem about awareness and also a problem with the public about environmental crime, the impact of that and their responsibility for it, what do you think should be happening? Are you aware of any steps being taken to raise awareness in general about the fact that environmental crime is a crime?

**Ms Lipscomb:** I do not think enough is happening. It comes back to detection and prosecution to ensure that those areas are not run down and used as dumps and that this is acceptable behaviour. That is one of the great deterrents. If you clean up an area and you keep it clean, then you reduce the likelihood of offences considerably.

**Q146 Sue Doughty:** Is there anything that the Magistrates’ Association can do to promote this idea?

**Ms Lipscomb:** As Ann Flintham mentioned earlier, we do use environmental crime quite a lot when we do these presentations in communities because it is something that the general public find interesting. I do not think they have shut their minds to what is going on around them. It is something that can explain and demonstrate the work of the courts very satisfactorily to local people. Maybe that is something that we should continue to do more.

**Ms Flintham:** Another area you might like to know about is that we run a mock trial competition with the Citizenship Foundation. We are working with the Environment Agency on a case, which I think has been finalised now, that we are going to use in that mock trial competition. There are lots of small things that are happening, but perhaps not something which is really big, to bring this to the public’s awareness.

**Q147 Sue Doughty:** Do you think you get adequate training on environmental crime? We heard earlier evidence that there is training but the problem is in delay. Do you think in the first place training is adequate?

**Ms Lipscomb:** One can always say there should be more training. I think it is an area where there is always going to be some difficulty over the next two or three years with all the changes going on to the criminal justice system and the new legislation of the Criminal Justice Act. These are many of the same principles that are to be followed and so any training that magistrates get ought to have an impact on how they handle environmental crime.

**Q148 Sue Doughty:** Do you think that there is any risk? You mentioned all the other things that are happening, the changes to the criminal justice system. Will magistrates be able to find the time to get this sort of training, given all the other calls on their time?

**Ms Flintham:** When you are appointed to be a magistrate, you expect to undertake a degree of training. There is an emphasis on magistrates taking some responsibility for learning themselves. If you like, by reading our magazine, they will be picking things up all the time. I also think that when...
magistrates do sit on these sorts of cases, they find them interesting; they are different. They will be looking at the material that is available to help them.

Ms Lipscomb: But any public awareness campaign will also have a knock-on effect for magistrates.

Q149 Sue Doughty: We have looked at training, at the skills we have and at publicity. Are there any other issues about getting effective environmental justice? For example, is there any funding there? Do you get the resources you need so that you feel that, when somebody comes before you for trial and sentencing, the resources are there that you need to do that job properly?

Ms Flintham: That is a very difficult question because I suppose everybody would say there are not enough resources. From a magistrate’s point of view, there are but, as I have already mentioned, that is not so in some of the prosecuting authorities. The Environment Agency is a very big one but there are other much smaller prosecuting agencies that deal with environmental crime and they may not have the resources. I am thinking of the RSPB, for example. There are some small charities which specifically look, for example, at the care of horses. That would come under environmental crime. They have very little money to bring prosecutions. Perhaps that is an area where resources are limited but perhaps those sorts of charities could enlist the help of the Environment Agency or the bigger authorities. There could be a lot more pooling of good practice. Just as magistrates hear these cases rarely, so prosecutors actually do not do it that often either. I think there can be something picked up from good practice amongst prosecutors. In fact, many prosecutors find Costing the Earth very helpful because there was nothing in existence for them before. We do know that for them it is a difficulty as well.

Ms Lipscomb: On the magistrates’ side, it is important that magistrates dealing with environmental crime recognise that they have to develop a more inquisitorial approach. To give you an example, there was a case to do with bats. There was a barn, or two barns I think, and the bats had to stay in the barns but the barns were being redeveloped as farmhouses. As it happened, the builders did not leave the bats in place and the prosecution came to court. There was no information. They were presented as barns. It was sentenced on that basis. The upset and concern expressed afterwards was that ultimately because the buildings were sold for something like £750,000 each. None of that information was before the court. The fact that they were going to be built and changed into houses was not before the court. Those are the sorts of issues that obviously have a huge impact on sentencing.

Q150 Chairman: It is interesting to have an example to think about. Who was bringing the prosecution in that case? Was that the local authority?

Ms Flintham: It was the RSPB. It was the time of year when the bats were supposed to be left in place because that was the specific time of year they should be left alone. Quite clearly for the developer it was much more economic for him to carry on with his development and to be able to finish the properties and sell them sooner.

Q151 Chairman: Why was not that critical information made available?

Ms Flintham: That sort of economic gain, whether it be actual profitability or how much money people have saved by either not complying or perhaps by not putting training in place, quite often is not before the court.

Q152 Chairman: What power do you have to request information like that?

Ms Lipscomb: Only the power of asking the questions and keeping on asking questions until you are satisfied with the answers you receive. But of course, if the case comes to court before the properties are actually developed or sold, it could be that the owner or the developer would contest the value of them. The court would have a pretty good idea if it had just got accurate and full information in the first place.

Q153 Chairman: Do you feel you have enough freedom to ask probing questions?

Ms Flintham: Sometimes that is difficult for us because there was nothing in existence for them before. We do know that for them it is a difficulty as well.

Ms Lipscomb: On the magistrates’ side, it is important that magistrates dealing with environmental crime recognise that they have to develop a more inquisitorial approach. To give you an example, there was a case to do with bats. There was a barn, or two barns I think, and the bats had to stay in the barns but the barns were being redeveloped as farmhouses. As it happened, the builders did not leave the bats in place and the prosecution came to court. There was no information. They were presented as barns. It was sentenced on that basis. The upset and concern expressed afterwards was that ultimately because the buildings were sold for something like £750,000 each. None of that information was before the court. The fact that they were going to be built and changed into houses was not before the court. Those are the sorts of issues that obviously have a huge impact on sentencing.

Q154 Chairman: You know that there should be new evidence brought to the case but you are unable to extract it?

Ms Flintham: Yes, and we are unable to extract it because it would be new evidence.

Ms Lipscomb: We may only get further information at the sentencing point. You need the full picture and the evidence right at the beginning.

Q155 Sue Doughty: How to you get this information down then to these other groups? The Environment Agency knows what they are doing. When we are talking about smaller organisations, how do you provide information generally to someone who is bringing a prosecution on a wildlife crime, for example, and say, “This is the sort of information which magistrates will take into consideration if you are able to provide it?”

Ms Lipscomb: The case must be presented in context.

Ms Flintham: There are smaller groups which join together. For example, there is PAWS, Partnership Against Wildlife Crime, which is predominantly run by DEFRA in conjunction with a lot of smaller NGOs. We meet and liaise with them quite frequently. Maybe there are routes through meetings with PAWS where we could try to get across the importance of good prosecutions. ENCAMS is something which is being approached by DEFRA at the moment in terms of running seminars. We have been asked to take a slot at each of those seminars, which are being run regionally, to
talk again about *Costing the Earth* and about our needs for good prosecution in court and what is lacking from our point of view. These are happening in three to four months’ time.

**Q156 Sue Doughty:** Just moving on one bit further, in some of the evidence we have had there has been a suggestion: would it not be better to have environmental courts? How would you feel about that?

**Ms Lipscomb:** The very nature of the crime and the way that it affects somebody’s environment strengthens the case for having it dealt with in that area. Providing you have good information and, if it is a large company, the fines are high and you are looking towards the maximum. I think it is going to continue to arouse people’s interest and respect for their own environment if these are dealt with in other areas or specialist courts.

**Q157 Chairman:** Is that a “no”?

**Ms Lipscomb:** No, they should be dealt with as they are at the moment in the local courts.

**Q158 Sue Doughty:** Can I move on to one or two more options about sentencing? I know we are going round this one again and again but I want to make sure that we have covered everything while we have you here. We do appreciate your patience with us. Antisocial behaviour orders: do you think they are effective and helpful with nuisance and antisocial behaviour?

**Ms Lipscomb:** Providing you can be sure that the right sort of work can go on with local authorities in housing and everybody has been involved, antisocial behaviour orders may be the only option left when it comes to noise and difficult neighbourhood disputes. As regards other environmental crime, I do not think they are likely to have much impact.

**Ms Flintham:** I suppose they can only be as effective as the enforcement of them. If we have a particular problem with graffiti, for example, and there is an antisocial behaviour order where you forbid these young people to carry paint or whatever it is, then clearly it would only be successful if they are checked and, if they are found to have those pencils or paints on them, brought back to the court and dealt with effectively. That is quite difficult, is it not, if you are thinking about enforcing somebody all the time from actually going to a certain area or carrying something or behaving in an appropriate way. It is the enforcement which can bring about difficulties.

**Q159 Sue Doughty:** Do you see repeat offenders where you have issued those, in general terms and not necessarily with environmental crime?

**Ms Lipscomb:** There are breaches of ASBOS going ahead. It is a court order. It is dealt with pretty firmly.

**Ms Flintham:** It is an alternative.

**Q160 Sue Doughty:** If you are able to increase the options of sentencing—put in tougher sentencing, tougher fines, use a harder range of remedies—would you welcome that?

**Ms Lipscomb:** I think we would always welcome sentences that involve reparation: community sentences where people are actually cleaning up things that they have messed up. Long term, that has a good effect. Rather than sentences, what we would go back to is this business of higher quality information and the ability to check an account or go to the Benefits Agency to get addresses and information, and for people actually to have to produce to the court documentary evidence about what they have already done in the past in complying with the regulatory rules.

**Ms Flintham:** I think it is a knowledge of anything that they might have done in terms, for example, of training for their staff, whether it is a half-hour, quick training session or a proper half-day course, that type of thing. Again, anyone can claim that they have done training, but what was the nature and what was the quality of that training? Did it make a sufficient difference perhaps to help prevent something?

**Q161 Sue Doughty:** That is really looking at the issues behind what you have on the table and adding up what the behaviour is now?

**Ms Lipscomb:** Yes.

**Q162 Mr Challen:** Looking back at corporate responsibility, is the law sufficient at the moment to allow directors to be prosecuted for the actions of their company, or is it simply the company itself that faces the penalty? Put it in the context of the corporate manslaughter debate, which clearly is quite an issue.

**Ms Lipscomb:** That is one that is really outside our remit. It would go to the Crown Court. I do not think we would hold a view on that.

**Q163 Mr Challen:** If it goes to the Crown Court, presumably it is a more serious offence, but even for cases lower down, the less serious offences, do you think that perhaps people should be held accountable?

**Ms Flintham:** I was thinking about other areas of law, for example noise. There are, for example, certain streets where lorries are not allowed to go before 6 o’clock, or whatever. In those cases, I think both the owner and the driver are charged and both have a responsibility. In terms of the owner again, you would be looking to see what he had provided the driver. Did he provide the driver with a proper map of where to go? Did he provide the driver with instructions of where exactly he was not to go? What training was the driver given? That is a classic example of where you would look at the responsibility of the owner as well as the driver who had actually committed the offence of going into an area which he was prohibited from entering.

**Q164 Mr Challen:** If a director of a company allowed a junior member of that company to go and dump some stuff somewhere—and there have been cases of this happening, particularly with clinical waste—can the director or the manager be prosecuted or is it the
person who actually is caught handling it, as it were, or is it simply the company as a corporate body that is held responsible?

Ms Lipscomb: In these cases I think it is the corporate body but obviously a director would have to answer for that. Coming back to the others, there would be an advantage in that. Overloading is a classic and it can be very dangerous offence. Most frequently it is the driver of the day and the owner of the company who is prosecuted, and the owner will face a much greater fine than the driver.

Q165 Mr Challen: Just very finally, going back to Costing the Earth, why does it take so long to get this advice out? Why did we have to wait for the 21st century? Was there anything at all back in the 1980s or 1990s of guidance here for environmental offences?

Ms Flintham: You will be surprised perhaps to know that guidance for the average criminal offences has not been with us for that long, and Costing the Earth came out of discussions between the Environment Agency and the Health and Safety Executive and ourselves, and it kicked off probably about four years ago when we first started talking to them. We did produce some very general guidelines but then we felt that we wanted to get environmental crime higher up the agenda, so two years ago we decided to dedicate our AGM to a special session in the afternoon; we dedicated our magazine to it; and we started thinking about bringing about some sort of information and making it available for magistrates, because it became clear that there would not be availability for specific training on this as it covers too wide an area and there are too many pressing issues and priorities. So we looked at ways of trying to get information out to magistrates and of raising awareness against a background of environmental crime coming into a public arena anyway, and it did take quite a considerable time to put that together. It was launched over a year ago and we have updated and added to it so it is a living document; and we are looking at ways of trying to get information out to magistrates and of raising awareness against a background of environmental crime coming into a public arena anyway, and it did take quite a considerable time to put that together.

Q166 Chairman: Thank you very much. Your oral evidence has been a great deal more helpful than your written evidence, if I may say so. Is there anything else you would like to add based on the conversation that we have had today?

Ms Lipscomb: No. I think it comes back to the same message: that it is the question of getting the information across to the court that lies at the heart of it.

Chairman: Thank you both very much indeed.
Thursday 5 February 2004

Members present

Mr Peter Ainsworth, Chairman
Mrs Helen Clark
Mr Simon Thomas
Paul Flynn

Memorandum from the Local Government Association

INTRODUCTION

The Local Government Association (LGA) represents local authorities in England and Wales. Public discontent about the quality of public spaces and the street environment is recognised as one of the highest concerns for people in their locality. Raising awareness of the seriousness of environmental crime is essential in supporting local government work to ensure the local environment is safe, clean and green.

TRANSFORMING THE LOCAL ENVIRONMENT

The Local Government Association has a Shared Priority with the Government on Transforming the Local Environment. The Shared Priority includes work with Government, Pathfinder councils and other partners, to improve local environmental conditions by developing and testing new ideas and sharing good practice on tackling and preventing fly-tipping, abandoned vehicles, littering, graffiti and pollution. Tackling environmental crime and deterring offenders, whether criminal gangs, businesses or individuals, is central to meeting national and local objectives on sustainable development and safer communities and is of particular relevance to local authorities.

The Pathfinder councils involved in the Shared Priority project are developing a proactive approach to improving the local environment. This includes partnership work with a range of local agencies, businesses and the community, backed up by high profile education and enforcement campaigns, including programmes of education in schools.

By establishing strong partnership arrangements with other agencies, a commitment to promote responsible waste disposal and enforcement against offenders, Pathfinder councils are seeking to engage all sectors of the community in taking responsibility for the local environment. Different ideas are being tested in different Pathfinders and findings will then be showcased by the Improvement and Development Agency (IDEA) for dissemination to all local authorities. These ideas, together with existing good practice identified by the project, will help all councils see what is possible in improving local environmental quality.

Work with Pathfinder councils and other partners will also identify if there are any freedoms, flexibilities or legislative changes that are needed for councils to be more effective in improving and safeguarding the local environment. The LGA will then use opportunities such as the Queen’s Speech or a possible Environment Bill, to lobby Government for any necessary legislative changes.

One of the aims of the Shared Priority work that the LGA is currently engaged in is to raise awareness of the seriousness of environmental crime, amongst magistrates and also amongst the local community. It is planned to work with DEFRA and the Environment Agency to establish facts and figures on crime, sentencing and behavioural change, and to identify opportunities to incorporate environmental crime into citizenship classes. It is also planned to meet with the Magistrates Association soon to discuss ideas for raising awareness, training and skills development.

EXAMPLES OF GOOD PRACTICE

The LGA is happy to contribute views and examples from our member authorities, advisers and councillors to aide the committee in this Inquiry. We have requested examples from authorities, some of which are included here. Due to the short timeframe for this Inquiry there has been a limited amount of feedback from authorities, but the views expressed below reflect anecdotal evidence going back over a long period of time that fines imposed on offenders are not usually sufficient to act as a deterrent against a growing industry of commercial fly-tippers.

A recent LGA survey on Abandoned Vehicles attracted a large number of responses and some good examples of how authorities are dealing with an environmental crime that has a serious impact on many communities. Many authorities have developed proactive policies to tackle abandoned vehicles and other environmental crime quickly. This helps to avoid particular areas becoming environmental crime “hotspots”, and so attracting further fly-tipping and littering. Examples of good practice include partnerships with the police, fire, education, housing and other agencies to quickly identify and remove
abandoned vehicles. Vehicle amnesties, whereby the council will remove unwanted vehicles free of charge, are now widespread, as are good practice guides and procedures to cut the cost and time involved in dealing with this problem.

Southampton City Council run “Project Clear”, a free collection service for unwanted vehicles. The council have also developed “Cleansweep”, a partnership with the DVLA, Police, DfT and DSS, targeting different areas of the city to identify abandoned vehicles, clamp, notify and remove within 24 hours. “Crime Reduction and Environment Weeks”, which run every two months, involve many departments and agencies, including DVLA and the Police, in reducing crime and improving the environment by removing vehicles, traffic enforcement, tree planting, road cleaning and re-painting, targeted arrests, play-area repainting, steam-cleaning shop fronts, graffiti removal, bulk rubbish removal and more.

Poole Borough Council have been running a multi-agency partnership for 18 months, involving the Police, Parking Attendants and Housing Officers, all of whom carry statutory notices which they place on abandoned vehicles as soon as they are spotted. The details are faxed or emailed to the enforcement officer who can then make one visit 24 hours later and remove, thus reducing administration and the number of visits, leading to speedier removal.

Welwyn Hatfield District Council have staged several operations to clear a number of abandoned vehicles from private land, by co-ordinating volunteers from a national vehicular rights of way association, The Green Lanes Association (GLASS) and local farmers. The farmers have machinery which can pick up and move the abandoned vehicles to points where conventional recovery vehicles can take over. This is part of on-going work with Hertfordshire County Council Rights of Way section. Other innovative projects run by this authority include environmental clean-up days, run in partnership with the Police and Fire authorities and DVLA, where a variety of environmental problems are tackled and a Vehicle Amnesty is offered. These projects are backed up by revised policies on Abandoned Vehicles, which are now more robust and have significantly reduced response times.

**Future Considerations**

Recent and future impositions of landfill taxes and imminent European directives on waste look likely to increase the temptation for individuals and businesses to avoid rising charges for disposing of waste responsibly by fly-tipping their waste instead. It is imperative that sentencing guidelines are revised to take account of the danger that more stringent regulations will lead to a significant increase in both the amount of waste dumped illegally and the dumping of dangerous substances. Charges for disposing of both cars and fridges were immediately followed by a major increase in abandoned cars and fridges. The forthcoming European directives on Waste Electronic and Electrical Equipment and Hazardous Waste could also be accompanied by a similar rise in illegal dumping of these materials, with the subsequent danger that this would pose to local land, water and air quality and possible harm to local residents and wildlife. Tougher sentencing, including a system to adequately cover the costs of clearing and cleaning up the damage caused by environmental crime, are essential in sending a clear message to individuals and businesses that environmental crime is a serious, criminal offence and that responsible disposal of waste is both a duty and a cheaper option than fly-tipping.

**Answers to Inquiry Questions**

We have structured our submission around the questions prompted in the Committee’s press release, followed by brief answers to each question. Evidence from London Borough of Southwark is presented separately under these headings, as this includes a number of examples and witnesses from Southwark will be present at the Inquiry on 5 February to elaborate on their views and examples.

1. **Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?**

   Most authorities who responded would like to see higher fines imposed. Fines for commercial fly-tippers are seen as paltry and easily covered by the value of the next load that they fly-tip. Authorities communicate with local magistrates and are aware that guidelines restrict their ability to impose bigger fines. Some feel that the guidelines do not take account of the serious local impact of environmental crime. They are disappointed that unpaid Fixed Penalty Notices of eg £50 only attract fines of £50 plus limited costs. There is little incentive to pay if the courts do not increase the fine. Some schemes have reduced rates for early payment, with substantial increases after 21 days. Examples of inappropriate sentences include unconditional discharges for fly-tipping, which authorities feel sends the wrong message to offenders.
Evidence from LB Southwark

If we are to tackle envirocrime effectively sentences need to be tougher. However, thought needs to be given to effective sentences and this may not always be a fine. For example a major fly tip that costs approximately £15,000 to clear has led to a fine of only £500 with £500 costs due to the perpetrator pleading guilty and claiming no means to pay an excessive fine. Whilst a larger fine may be a deterrent, £500 does not reflect the costs local authorities incur in clearing the problems that are caused by major fly tips.

Incurring a small fine is sometimes seen as a risk worth taking by people who continually commit envirocrime, as every time they are caught they may get away with a number of other incidences. It would be useful if magistrates made the link between grime and crime. In particular the effect it has on local residents in terms of the fear of crime generated from an area that has the appearance of being run down generated through envirocrime.

2. Are sentences appropriately set to act as a deterrent?

Authorities report a significant problem with catching habitual fly-tippers who tip as a business. A two or three thousand pound fine is insignificant when they may be making hundreds of thousands of pounds a year.

Views include the observation that successful cases do not seem to significantly reduce the number of offences. Fly-tipping is seen as a by-product of a poorly regulated waste disposal industry. Authorities are frustrated that they cannot force commercial fly-tippers out of business.

Evidence from LB Southwark

In many cases sentences are viewed as just “a risk of the job”. An example is that a fly poster fined £500 plus £700 costs was caught again a few weeks later and given exactly the same fine and costs, which demonstrated that the original sentence had not deterred them in any way.

Additionally, there seems to be no great urgency in chasing fines once levied and no real system in place for local authorities to liaise with the courts to chase fines and costs. This again sends out the wrong message that you can get away with not paying even when convicted. Sentences need to prevent further offences occurring. For example, why give a fly tipper their vehicle back only for them to re-offend using the same vehicle.

3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

Views from authorities include a call for magistrates to be given more discretion on sentencing.

Evidence from LB Southwark

The use of fines whilst a deterrent to some if levied at an appropriate level, do not deter all for re-offending. Consideration should be given to changing the law to allow the use of community service orders to those (a) who are unable to pay fines of appropriate levels and (b) those who see fines as a risk of the job.

Likewise, a greater use of section 146 of the Powers of Criminal Courts (sentencing) Act 2000 should be applied. This allows courts to remove someone’s driving licence for related offences and could be used against fly tippers, fly posting companies etc.

4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

Views on this question tend to suggest not.

Evidence from LB Southwark

Courts are too lenient and the sentences imposed are not enough of a deterrent to prevent others from committing similar offences.

Remediation costs are not levied as part of the sentence for envirocrime and therefore the costs for clearing up incurred by local authorities is effectively picked up by the local residents.

Sentences do not seem to reflect the scale of environmental damage caused, only the ability of individuals to pay.
5. Are magistrates’ and other courts following any guidance available?

Local authorities are probably not best placed to answer this and there are mixed views about this.

6. To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

Environmental crime is seen as very serious at the local level and there is evidence of frustration by local people at the inability of police and authorities to deal swiftly and strongly with offenders. If the burden of proof were to be shifted more in favour of the local authority this might help to get cases before the courts.

Views include a call for the Home Office and Police authorities to prioritise environmental crime because it is seen as so important at the local level.

Evidence from LB Southwark

The principle of sentencing seems to be on the basis of ability to pay rather than any environmental principles.

Whilst each form of envirocrime causes particular problems in the community the reality is that envirocrime degenerates an area and effectively raises the fear of crime.

If we are effectively to reduce the incidences of envirocrime sentences need to be fair, proportionate, but above all robust enough to act as a deterrent not only to the perpetrator but also to others who may think about committing envirocrime.

February 2004

Memorandum from the City of Westminster Council

FLYPOSTING: A PERSPECTIVE FROM THE CITY OF WESTMINSTER

1. Introduction

The City of Westminster is located in the Heart of London and is the home to the Monarchy, the Government and many Commonwealth High Commissions and foreign embassies. The City includes within its boundaries some of London’s most prestigious landmarks and districts, including Westminster Abbey and the House of Parliament. The City’s diverse built environment blends contemporary with period architecture. Within its 2,204 hectares (8.51 square miles) Westminster takes in Regent’s Park to the north, Hyde Park to the west, and Covent Garden to the east. To the south it follows the River Thames.

It has a residential population of over 190,000. With around 500,000 working in the City, Westminster is also home to a large business sector ranging from the international headquarters of many multi-national organisations to a vibrant small business community. Tourism and the retail sector are significant sources of employment and 500,000 visitors come to the City each day.

The City Council is responsible for a wide range of services including refuse collection and disposal and street cleaning. Our street cleaning service is focused on the whole street environment from litter, dumped waste to graffiti and flyposting.

We are very much a showcase for Britain and a tempting location for those who wish to advertise their wares both through legitimate and illegitimate means.

In 2003 we had logged 2,032 cases of flyposting, covering an area of 5,313.4 square metres. This was an increase of 27% over the previous year.

2. The Issue A Summary

2.1 The current approach to dealing with flyposting isn’t working, and isn’t likely to work in the future. In order to make any significant impact on the businesses involved in the industry, it will be necessary either to increase greatly the penalties for the offence, or to bring company Directors to account using the powers and pressures to which they are exposed under the Companies Acts.

3. Current Position

3.1 Some success has been achieved in Westminster by working with the Advertising Association to dissuade “mainstream” companies from using flyposting. More recently, a number of West End theatres have agreed to co-operate with the City Council in combating flyposting. However, media and entertainment companies continue to make extensive use of the medium, as do others seeking to appeal to the youth market (cf the 2003 “ishagedhere” campaign for Mates condoms). Indeed, many within the industry argue that flyposting is a legitimate medium, and criticise those authorities which attempt to enforce the law.
3.2 The offence of fly posting is dealt with by section 224 of the Town and Country Planning Act 1990 and the Control of Advertisement Regulations 1992. Those who derive benefit from an unlawful display are deemed to display the advertisement, but can avoid prosecution if they can show that they neither knew nor consented to the display. The London Local Authorities Bill currently before parliament will restrict this defence so as to require the defendant to prove that he took all reasonable steps to avoid the initial display and bring about its discontinuance. Section 331 states that, “where the offence is committed with the consent or connivance, or be attributable to any neglect on the part of a Director, manager, secretary or any other similar officer of the body corporate, then he, as well as the body corporate, will be guilty of the offence”.

3.3 Despite the proposed changes to the flyposting legislation in London, conventional enforcement against flyposting by these companies remains enormously costly. Westminster’s annual spend on combating flyposting and graffiti exceeds £400,000 per annum, but is almost entirely ineffective in reducing the extent of the problem. Despite 60 successful prosecutions brought against companies since March 2002 (see APPENDIX 1), the process works too slowly and the penalties (between £75 and £2,000) are far too small to deter those engaged in it. It is cheaper to flypost and pay fines than to buy legitimate advertising space. (Advertising spaces on bus shelters in central London can cost from £100 to £500 per week depending on location and season). Moreover, prosecution by local authorities is viewed by some marketing professionals as a positively promoting youthful brand values of rebellion and “street credibility”. The Marketing and Business Development Manager of Ansell, owners of the Mates brand, was quoted in “Mediaweek” last year as saying that flyposting gives a brand more “street credibility”. The company is entirely unrepentant about its flyposting campaign. We are helping, not hurting, the flyposters.

4. AN ALTERNATIVE APPROACH

4.1 We want to have a significant deterrent impact on those companies which use flyposting. To that end the City Council is now seeking to use their own corporate governance structures (eg Companies Act provisions regarding the duties of Directors, DTI regulation, internal policies on ethics, social responsibility or the environment etc) to call Directors to account. The intention is to impose internal costs in coping with our campaign greatly in excess of what they would have to bear in fighting conventional prosecutions in the courts.

5. KEY ELEMENTS OF THE CAMPAIGN

5.1 The key elements of the campaign are as follows:

— We notify individual Directors of offending companies of the activities being carried out on their behalf by their marketing departments (it must be demonstrated that named Directors have knowledge of the illegality for subsequent measures to “bite”).

— We take enforcement action for subsequent offences against the individual Directors rather than the company. Where possible we will seek to prosecute for criminal damage.

— If we succeed in securing convictions for criminal damage or any other indictable offence, we intend to press the DTI for them to be debarred from holding Directorships in UK companies.

— We are planning a media campaign associated with the above activities, drawing Directors’ attention to their personal exposure, and the public’s attention to the conflict between companies’ avowed polices and their actual business practices.

6. HOW COULD GOVERNMENT HELP?

6.1 Make the existing legislation effective. The normal process involved in enforcing against flyposting involves the local authority first in serving notice on the person responsible (whether the agency or the beneficiary) requiring them to remove it within a reasonable time (usually 48 Hours). Taking the 2003 Mates condoms campaign as an example, the City Council served notice on the company to remove posters from four sites within Westminster, which it did. However, at the same time as agents of the company were removing posters from some sites, many more were being put up elsewhere. Moreover the company could, had it so wished, have complied with the original notices by simply overposting the originals with new posters, thereby “resetting the clock” and requiring the City Council to serve fresh notices. This indeed was the action taken by one of our major flyposting companies to a notice served on its Directors in January 2004. The existing legislation is an open invitation to any moderately intelligent and well-resourced advertiser to play the system.

6.2 Set realistic penalties. Where companies fail to comply with our notices then we can and do take them to court. The fines awarded by the courts range from less than £100 up to £2,500 in cases where we have been able to bring evidence of multiple offences. In the context of the marketing budgets available for major campaigns, this is petty cash. Moreover, as the advertisers do not pay for legitimate outdoor advertising space, the overall cost to the company is less than it would be for a conventional campaign, even allowing for fines.
6.3 Create an effective regulatory framework for outdoor advertising. Because flyposting is an illegal medium if falls outside the machinery of self-regulation which controls the content of advertisements in the UK. We are given to understand that a number of complaints about the Mates “ishaggedhere” campaign were received by the Advertising Standards Authority, but that it was been unable to deal with them because illegal advertising falls outside the scope of the British Code of Advertising and Sales Promotion.

6.4 Ensure the DTI backs Councils which take action against Directors. Section 2 of the Company Directors Disqualification act 1986 allows for a disqualification of a director if s/he is convicted of an indictable offence in connection with the promotion of a company. Flyposting is not an indictable offence, but Criminal Damage is. Ideally, the scope of the 1986 Act should be extended to encompass flyposting. Failing that, a statement of intent from the Secretary of State for Trade & Industry that she would give careful consideration to the status of Company Directors who had been found guilty of criminal damage would greatly strengthen the hand of local authorities in their battle against flyposting.

7. Conclusion

7.1 To sum up: the existing legislation is almost entirely ineffective as a deterrent to flyposting. There is no mechanism in place to control the content of flyposting campaigns at all. Despite the Government’s heralded intent to enhance local authority effectiveness in improving the public realm, the 2003 Green Paper proposals do not go nearly far enough. If we are to make any significant impact on the problem, local authorities need significantly stronger powers. The courts need to be able to impose fines which are effective deterrents and proportionate to the benefits the advertisers receive from their illegal activities; the content of illegal advertisements needs to be brought under control; and the Directors of flyposting companies need to feel they may be held personally to account for the activities they sanction.

January 2004

Witnesses: Councillor Sir David Williams, Lib Dem, Vice Chair of LGA Environment and Regeneration Executive; Mr Phil Davies, Head of Waste Management, and Mr Simon Baxter, Chief Enforcement Manager, LB Southwark; Dr Leith Penny, Director of Cleansing, and Mr Peter Large, Deputy Director of Legal Services, Westminster City Council, examined.

Q167 Chairman: Good morning. Thank you for coming. We have a substantial cast of witnesses and, since we have quite a lot of ground to cover, I would be very grateful if you could do your best to keep the answers as short and sweet as possible. We have now heard from the Environment Agency and from the Magistrates’ Association and they have told us that they believe that the criminal justice system is there to punish and to deter. How well do you think that this criminal justice system is working in relation to environmental crimes?

Cllr Sir David Williams: Not very well. If I may, Chairman, I wanted to make a very short opening comment which comes to the point you have just made. The experts in the four local council offices who are here on this will answer your detailed questions, not me, but I have five very brief points to make. First of all, environmental crime is a very wide-ranging area, as you are fully aware, from litter to major pollution. Secondly, it relates to many priority aims of local authorities, particularly sustainable development and environmental improvement. Thirdly, as you say, it is intended to detect and prosecute but a lot of these offences can be difficult to detect and can be difficult to prosecute. Fourthly, there is increasing public expectation around the whole area of environmental crime as it affects individuals. We have people in my borough in Richmond upon Thames who have invested many hundreds of thousands of pounds in a high quality of life, and they are quite vociferous and active in wanting to see their quality of life protected, and I do not have to tell members of Parliament that any more than local councillors. We also have an increasing legislative framework with all of this; the landfill tax is most obviously changing the whole game and framework, therefore particularly as the fiscal effects come into play there is an increasing temptation for people on the margins of the law to save money, cut costs and break the law. On the last point that you asked about specifically, the legal framework is not just imposing penalties to fix the crime: more important than that, and I think you will see this from the evidence we will give, we have to have adequate deterrents within the legal framework and until we make it, across the whole gamut of environmental crime, seriously unpleasant to be caught committing offences and on an escalating basis then we will never get on top of this, because the problem is getting worse because everything else is increasing, as I have said. That is just, if you like, an opener for your question; I think we are largely going to be talking around that but with a lot of detail in response to whatever questions you want to ask.

Q168 Chairman: That is a very helpful opening statement, thank you, and we will proceed to tease out a little more on almost everything you have said. Can I begin by asking you about the perception that environmental crime is a growing menace? You seemed to imply just then that this had something to do with the changing legislative framework. Do you think it also has something to do with the fact that there is more environmental crime around than there was perhaps in previous years?
**Mr Baxter:** On perception, in some areas people do see it as a growing problem and in others not. For example, you might get an area that is quite wealthy and that does not suffer too much from enviro crime, be it fly-posting or an abandoned vehicle, but when they do see it they will report it and know there is something wrong. On the 14th floor of a housing estate, bags thrown out of the 13th floor, abandoned vehicle, graffiti, the perception is slightly different and it is the challenge for local authorities to begin to overcome that in creative and innovative ways, sometimes in ways that may be slightly sexy. That is the ability to pay, then they should be punished in some other form of crime. 

**Dr Penny:** Environmental crime has always been with us as a general phenomenon but what happens are the particular sorts of antisocial environmental activity occur in response to change of circumstances or sometimes genuine innovation. Examples would be the rise in street urination in central London because of the growth in the night time economy; with abandoned vehicles the problem grows and shrinks in line with the prices you get from scrap; fly-tipping increases because of the impact of the landfill tax. Examples of genuinely new environmental crimes are 15 years ago the appearance of prostitutes’ cards in telephone boxes as an example of entrepreneurial innovation, and more recently commercial graffiti, graffiti being used as part of a systematic advertising campaign. So I think it helps to look at individual issues rather than environmental crime across the piece.

**Q169 Chairman:** We will be doing that. In fact, this is the opening of an inquiry into a series of specific areas but our focus in this particular inquiry is on the penalty system, magistrates and the law as it stands and the adequacy, or otherwise, of that. Coming back to what you think is the greatest obstacle that you face in dealing with this type of crime? Is it finding the culprit, for example? Is it the fact that the penalty regime is not sufficiently stringent? Are there other factors that make it hard for you to cost? What is the greatest obstacle that you have? 

**Cllr Sir David Williams:** It is different with each type of environmental crime but I think the handicap of the penalty regime is probably the greatest— that. However, when you do catch those individuals they go before the courts and say to the courts, “I am unemployed” or “I am self-employed and because of this I have now lost my job”, but the reality is tomorrow he will be out with another firm. He gets £500 costs for £20,000 worth of damage, and the courts need to explore their situation slightly more creatively in punishing that individual. I understand, “You cannot pay Mr X. You are unemployed but what I would like you to do is go and clear the graffiti off for the next six months”. If they have not got the ability to pay, then they should be punished in another way. The chances of the £500 being collected is sometimes questionable so that is a slight frustration, but generally I do not think local authorities should be put off. I have seen in other authorities that they see this commitment and they do want to tackle it, but we would like the support of the courts because it is very hit and miss and that is again quite regional. You can have a good relationship with a Magistrates’ court and they will support you, but in other areas that is not always the case.

**Mr Baxter:** To an extent. If you do catch someone, it depends on the type of enviro crime. An eight wheeler being driven by an individual may have a false driving licence and the vehicle may or may not be registered and if it is registered it may not be to the correct address, so there are some challenges around

**Q170 Chairman:** You mean inadequate sentencing powers?

**Mr Baxter:** To an extent. If you do catch someone, it depends on the type of enviro crime. An eight wheeler being driven by an individual may have a false driving licence and the vehicle may or may not be registered and if it is registered it may not be to the correct address, so there are some challenges around...
aggressive about fly-posting perhaps because they have the worst problem—this is commercial fly-posting, not just garden fets and that sort of thing.

**Chairman:** We read the excellent memorandum from Westminster with great interest.

**Q172 Mr Thomas:** Following on from this, I wondered about the cultural values concerning environmental crime. What sort of level of reporting do you understand comes around an environmental crime? Are you very reliant on the public informing you as local authorities very often on areas that are not your responsibility, where they are contacting you first because maybe they can find your phone number in the phone book easier than others, or you are the local councillor, or something like that?

**Dr Penny:** I think the answer is “Yes” to both halves of that question. We run in Westminster a 7 day 24 hour telephone line where members of the public can ring in with any issue of environmental concern, and we get a large volume of referrals through that route, but we also employ in total some 54 field staff who are again deployed across a 24 hours 7 days week who also generate proactively a great deal of work.

**Q173 Mr Thomas:** Just to take Westminster as an example, if I may, are you dealing with environmental crime or dealing with the fruits of it, as it were, that are not your statutory responsibilities, and are there cost implications for local authorities in dealing with a gamut of complaints, things that are happening in the area that you have no enforcement abilities over?

**Dr Penny:** The costs are enormous. Obviously deploying 54 uniformed staff does not come cheap and, just to give you some idea of the scale of the costs, the total client operation at Westminster, all the officers who are involved in enforcing various forms of street-based environmental regulation and running the cleansing service that deals with the aftermath, is about £3 million, and the contract cost for cleaning the streets and taking away rubbish is currently £32 million, and both of those costs would be obviously significantly less if we had less environmental crime to deal with.

**Q174 Mr Thomas:** In your evidence which focused a lot on the fly-posting aspect, you say there that you spent £400,000 a year on dealing with fly-posting and graffiti. Would that include as well the prosecuting costs of offenders, or is that a regulatory cost?

**Dr Penny:** That figure is the total budget that includes the costs of the officers who do the work, the costs of legal cases, the costs of the educational promotions work we do, as well as the actual cost of the contractors that we employ to clear sites and to apply preventative treatments.

**Q175 Mr Thomas:** So it is slightly wider than just the prosecution and so forth, but it does take into account the effects of environmental crime in the area?

**Dr Penny:** Yes.

**Mr Davies:** In terms of enforcement we have a dedicated team of ten officers on environmental crime enforcement. We also will have from 1 April 75 community wardens, all of which are to undertake enforcement action for enviro crimes so we will have 85 uniformed officers around the borough. The ten officers currently have a budget in terms of salary and promotional work akin to what Westminster are doing of about £400,000. On top of that the community wardens, which are not just about enviro crime but about reassurance and social behaviour generally, will have a budget of £3.46 million, so that is the investment the council has made. Add to that only two of the schemes from 1 April 2004 are government funded with the remainder council funded, with antisocial behaviour at the top of the priorities of our administration, therefore the investment they are putting in reflects their desire to change behaviour and perception.

**Cllr Sir David Williams:** This is seriously expensive for local councils.

**Q176 Mr Thomas:** Do you have an idea of average costs around local authorities?

**Cllr Sir David Williams:** I do not but I am sure we can provide it to you.

**Chairman:** That would be very helpful.

**Q177 Mr Thomas:** Following on from that, asking the inevitable, how do the costs you have been talking about, which have been in the millions, compare with what you see in terms of financial penalties being placed on the offenders?

**Cllr Sir David Williams:** They may be adequate on the first penalty, but there is a seriously inadequate escalation of all this—a lack of recognition by the courts that, as I said before, you have to have deterrence. When you get somebody going to court for fly-tipping for the third or fourth time and they get the same standard fine which is a small fraction of the amount of money they have gained by fly-tipping and not disposing of the stuff legally, that is not only wrong in principle but very frustrating for local councils, and only encourages the crime.

**Q178 Mr Thomas:** So we are not talking here about harming the householder who for the first time dumps their grass clippings in the wrong place, but people who are constantly before the courts?

**Mr Davies:** Turning that on its head, I think one of the questions could be by how much have the cleansing budgets of the various authorities gone up in the last five years, and has the incidence of fly-tipping and dumping reduced, and I know from the Southwark perspective it has not. Waste on the streets is growing regrettably and forms and instances of enviro crime are not standing still but increasing. Despite the financial effort from our point of view of nearly £4 million from next year and obviously a considerable amount of money from Westminster and from around the country, because it is not just ourselves, we are not stopping the enviro crime being undertaken, and therefore it gives you the impression that the deterrents the courts are...
putting on for people perpetrating these crimes are not sufficient to stop them and discourage others from doing so. Certainly the cleansing budgets are going up across London and the country, so that might be an issue for you to look at as well.

_Cllr Sir David Williams_: Also, the legal, environmental and commercial background can make a significant difference. For instance, on abandoned vehicles, when I was first a councillor over twenty years ago I had a bloke I knew and I had a wonderful reputation for getting rid of abandoned vehicles in my ward, because I knew “Fred”. I could get hold of him, and he would get rid of the abandoned vehicles and I got a lot of votes for that, probably! That was when there was a market for recycling vehicles. The police used him, and even on one occasion protected him when he took a vehicle away that was a mess but was not abandoned, but there is no market now for abandoned vehicles—although it may change as these things do. Every London borough now removes abandoned vehicles free. It is completely counter-productive trying to charge, although legally that is what we have been able to do, because if you do charge the vehicles are dumped, and if you leave them in the street for a week they are a much more expensive problem to remove, so it is quite a subtle problem getting rid of abandoned vehicles quickly, and ruinously expensive too.

_Mr Baxter_: Coming back to who reports these things, it is a collective responsibility. It is proactive and reactive, we have a call centre and have monitoring that goes on, but it should not be just within one section of the council; it should be overarching. If you work in social services you should be reporting abandoned vehicles, aggressive begging, fly-posting and graffiti; and if you work in housing you should have the same school of thought. It is everyone’s responsibility to tackle this problem. If you see an abandoned vehicle do not think, “Environment has not moved it”; “I am going to report it, I am going to take a picture”. That is what we are trying to engender in Southwark, and ideally throughout the community we want a street leader scheme that tries to do that as well.

_Cllr Sir David Williams_: You have to mobilise the community because it is ton their benefit and they need to know that and they need to be actively involved.

**Q179 Mr Thomas**: On that question you mentioned earlier that you had seen the Magistrates’ Association evidence to the Committee. They hinted that local authorities are only now starting to get their act together on environmental crime, and we have seen some of the ideas happening in terms of cross-compliance, as it were, and getting all the different parts of local authorities involved, which is something we would all welcome. What was your reaction to that sort of suggestion that maybe not just the magistrates but all of us have not really been treating this with enough thought and seriousness until now?

_Cllr Sir David Williams_: I am sure there are cases where local authorities could have taken this more aggressively and more seriously, but the impression that I was left with from the summary I read of the Magistrates’ Association evidence was that it was rather defensive. Like you get in local government in the more timid areas where they fall back on section something subsection something else and so on—it is the challenge of how to deal with something, not feeling the comfort of some bit of obscure legislation that the public or council might have heard of. What is Westminster’s experience of Magistrates?

**Q180 Mr Thomas**: Just on one specific example, we have also had evidence from the Environment Agency and they mentioned what they are have been doing since 2000 when a Sentencing Advisory Panel of the Court of Appeal said that the standard of presentation needed to improve in environmental cases, and the Environment Agency to this Committee set out what they had done since the year 2000 to improve the standard of presentation. Has there been a similar response in local authorities led by the LGA, or could you, Southwark or Westminster, point to what you have done to ensure your officers going into court were making the best possible case?

_Mr Large_: I think the reason the Environment Agency did that was that those comments made by the LGA, or could you, Southwark or Westminster, point to what you have done to ensure your officers going into court were making the best possible case?

**Q181 Mr Thomas**: I think you are right.

_Mr Large_: At Westminster, we do not prosecute environmental offences in an amateurish way at all. We do it on a large scale and have been doing it on a large scale for a long time, and our staff are well trained; my legal staff train the enforcement staff; we always employ specialist counsel to represent us in front of the magistrates, and I honestly do not think it is the case that the reason that the people committing, in our pet subject case, fly-posting offences are not being deterred is because of the poor standard of presentation of prosecutions before the magistrates. There is a range of much more complicated reasons to do with the offences that are available and the way in which the magistrates choose to use the powers they have.

_Mr Davies_: Coming back to other local authorities and how we are all doing it, the issue is London has a particular problem and therefore places like Southwark and Westminster are able to realign their resources to deal with environmental crime. For other local authorities it is not such a priority but they still have an issue, and they have to provide solutions to that issue. The problem they do have is that they can reinvest and realign their budgets which are much smaller than London authority budgets. However, if they get to court the sanction and the deterrent they get from the court does not give them much satisfaction that this is the right way to go, so when you are asking for budgets and you are saying, “I would like £200,000”, in a district authority that is a lot of money and in an urban
authority such as Southwark or Westminster it is still a lot of money but in the great scheme of things, within the £1 billion that Southwark spends overall it is not that much money, and re-aligning money and moving from one priority to another is a lot easier than it is for a district authority. This is really about getting in tune with enviro crime, and if the deterrents drive the required priority through to our members then the budgets will be set aside and the money re-aligned.

Q182 Mr Thomas: So, just to paraphrase, when local members see local headlines about big hits on environmental criminals, if you like, they will start thinking more seriously about sending some serious money towards that in the local authority.

Mr Davies: Yes.

Mr Baxter: On the training, again it is quite regional. On a local basis our officers have been trained in the Police and Criminal Evidence Act, the Procedural Investigations Act, RIPA and the Criminal Justice Act, so they know how to put the case together and, reflecting Westminster’s work, our cases are spot on, but there is an issue for magistrates and associations. I previously worked at Lewisham and we were getting a very low level of fines there, and what we ended up doing was a presentation to the Magistrates’ Association on one of their training days trying to get them to understand what we were trying to do and why. It was not because we were draconian or an awful borough but we were trying to improve people’s lives, reduce enviro crime and other forms of crimes, and affect the impact that people have and their perception of the council and the police and the criminal justice system, and once we had done that the level of fines went up. There was one guy there who said, “If I messed up, I’d pay a fine of £5,000” — I do not know if that ever happened and I am sure it was on a case-by-case basis but that was the sort of enthusiasm we had. Now in Southwark the level of fines can be very hit and miss, so it is about local authorities getting to the local Magistrates’ Association, doing presentations, saying, “These are the issues, this is what people are concerned with, and we would like you, Magistrates, to do something about that and support the council and other agencies in reducing this”.

Q183 Chairman: Going back to something you said earlier on about how environmental crime can lead on to other things like arson, do you approach this whole area within the context of the zero tolerance agenda which could have a huge beneficial impact?

Mr Baxter: Certainly in both Lewisham and Southwark we had a zero tolerance approach backed up by residents. We had a citizens’ panel and they were very keen that we took a hard line on enviro crime, and I do think it does pay dividends because certainly in Southwark there were areas we knew were crime hot spots, and we linked in with the police and when we tackle enviro crime in those hot spots their cleansing levels went up so it was improving cleansing levels. I have dealt with some people in the past—for instance, there was one guy who I was speaking to about a highway obstruction who was repairing a vehicle on a highway on one of our boundaries and he was wanted for burglary, and there was another guy we spoke to who was sleeping in a van which was an untaxed vehicle who was wanted for road traffic offences. Clearly criminality breeds criminality and a lot of the people we deal with in enviro crime may be and have been involved in other forms of crime. There was a case where a licensed waste transfer station in Lewisham was stealing containers from as far away as Haringey and Kensington & Chelsea to supplement their own commercial waste operation, and when we went in there with the police he had a stolen BMW, a speed boat and a jet ski, so these are the sort of people you are dealing with. I am not saying everyone is like that. You mentioned the grass cuttings; I would be reasonable about that. If the dustman has never collected it from outside your house, or you have not got a bin, I do not think you deserve a fixed penalty notice. However, if you have been sneaky and tried to throw it three roads away and have been seen, then you do deserve a fixed penalty notice. That has certainly been my experience over the years and that is the only thing people understand because I can have a kind word with you, you say, “It won’t happen again”, and I go back three days later and we are back where we were. In Southwark it is about a three piece approach—education, publicity, raising awareness, getting the area cleaned up and taking that hard approach at the end of the day.

Mr Davies: You cannot have a zero tolerance approach without the local authority doing their bit. We take the view it is three way: clean it, raise the awareness and then the zero tolerance. If you cannot do it as a local authority and are not prepared to invest in making sure an area is clean, how can you expect your residents to respect it and deal with the waste in an appropriate manner. It is a local authority responsibility as well. We have to stick our hands up and as a priority we have to invest in all those sorts of things.

Q184 Mrs Clark: If I could grasp the nettle of sentencing, quite early on in this inquiry we discovered that there really is a major problem with sentencing—and you have said it today. In fact, local authorities, widely based, do seem to agree with the Environmental Agency whom we saw a couple of weeks ago that the fines imposed for environmental crime are far too low. Do you think this is partially down to the fact that the maximum in law for fines for some offences is pitched too low in the first place?

Cllr Sir David Williams: That is certainly a problem but it is a wider problem than that in that it should not just be fines but should be seriously deterrent penalties which fines in some cases will not be if the maximum fine is still less than the money that they saved. It is about confiscation of vehicles, removal of people’s driving licences for offences involving vehicles and so on, and the point I made earlier about a windscreen sticker makes enforcement that much easier and deterrence that much easier. It
comes down to deterrence in my view, and thinking it is about fines and the level of fines is only part of the problem.

Mr Baxter: A good example is a bit of private land around Surrey Quays that had over £20,000 worth of fly-tip waste on it, and the individual that was caught was only fined £500 and £500 costs because he said he had only done the last three loads that we had a witness for! I probably put him down for at least half of that but it is about ability to pay and the sentence. You could say, for instance, that the maximum fine for fly-tipping could be £50,000 but if I am on income support I am going to be paying, what, ten pounds a week for the next 300 years. It is about being creative, and the magistrates and the judicial system need to be creative in how they punish individuals. Certainly if I had been on the bench or had the power I would be saying under I think it is Section 146 of the Powers of Criminal Courts Sentencing Act 2000, “Unfortunately, Mr X, I am going to take your driving licence away and, by the way, you will be help the local authority shovel that for the next six months”, because that is the only thing people understand. They say sentencing orders are an alternative to prison but for low level offences, if a child is caught doing graffiti, they should be made to go and clear that graffiti off for the next six weekends. There needs to be that creative action to make a difference because that is the only thing people will understand. If I have no money to pay you can award me £100 million fine but you have no chance of getting it, and when I do get fined £2,500 is that money then chased? In my experience it is very rare that there is a warrant out for your arrest for non payment. Should that fine then be connected to benefits? That is something worth thinking about. We have the internet; we can get to Mars; we can do all these crazy things but the DVLA talking to local authorities, and links with business rates just do not exist.

Cllr Sir David Williams: The sentencing fines that are paid are alarmingly low in all this, and that indicates a serious problem with the system.

Mr Large: We have a slightly different problem in relation to fly-posting from an offender who does not have the means to pay. The maximum penalty for putting up an advert without consent, which is what fly-posting is, was £1,000 until 20 January, and it went up then under the Antisocial Behaviour Act to £2,500. But of course a court will never impose the maximum fine on a first offence, or even on a second or third offence, and the reality is that, even if you prosecute a company for a large number of fly-posting offences and they are fined something near the new maximum fine, it simply will not deter them from continuing to commit those offences, partly for the cultural reasons that were being discussed earlier—that they do not really see it as a serious offence and something they should not be doing—and partly because it is so lucrative for them. So we have to think of other ways of trying to bring to book companies who see flouting the law in that way to their commercial advantage. What we would like to be able to do is bring the people within those companies who are responsible for taking those decisions to book, either by managing to get them disqualified under provisions in the Companies Act or by having provisions relating to fixed penalty notices, which are also being brought in under the Antisocial Behaviour Act in relation to fly-posting offences, applicable to company directors and not merely, as they are at the moment, to those people who have put the advert up on the wall.

Q185 Mrs Clark: I was going to talk about ability to pay and fines but I think you feel so passionately about this that I have heard answers to some of that subject before asking the questions, so I am going to abridge a bit. We have talked about magistrates, and I feel you are a little bit sceptical about the way they are treating the whole aspect of environmental crime. Do you think the reason that some of the fines are perhaps so low and not always fitting the crime, as you would say, is because they are taking into account a “Well, I am guilty plea”?

Mr Baxter: Yes.

Mr Large: They are bound to do that. Certainly in the cases that we are concerned about they are taking into account a range of factors including guilty pleas, ability to pay, whether it is a first offence or not. What I do not think they are taking enough into account is the commercial motivation of the offender.

Q186 Mrs Clark: What do you mean? Mr Large: I mean the people who do fly-posting do it for profit deliberately and, when the fine is set, my view is the court should take that into account in deciding what the level of the fine ought to be.

Q187 Mrs Clark: Would you put prostitution in with that in terms of telephone cards, because that is for commercial gain as well?

Mr Large: Westminster has done quite a lot to try to avoid prostitutes’ cards in telephone boxes, and we work a lot with telephone companies to try to ensure that does not happen, but there is an issue about fines there as well.

Q188 Chairman: The cards are all over the place. You cannot go anywhere without seeing them, so whatever you are doing does not seem to be working terribly well!

Cllr Sir David Williams: The other House did stop legislation going through because they said it should not be just London, which was a cop-out. It should be national.

Q189 Mrs Clark: There is a Private Member’s Bill coming up. I know Sally Keeble did try that and she had some connection with Southwark in the past, as I believe, but perhaps we ought to encourage her again. Moving on to repeat offending in environmental crime, this is going on quite a lot and you get that in burglary and arson and the rest, and it does seem to suggest that the penalties and fines just are not deterring. Are you finding that the courts are giving the same type or level of fine to repeat offending, or is it going to be progressive? Surely it should be progressive.
Mr Baxter: I am not allowed to mention the person’s name but when I was in my authority at Lewisham we caught a fly-poster, and the first time we caught him he said he was self-employed and was working for “a company” so we did a vehicle check and that was registered to another company, so when we put it before the courts it was withdrawn because it was too loose. Then we discovered on the second offence that it was the same company and it was his father who owned both companies, so this individual was fined £700 and £700 costs. Now we hoped that would be a deterrent but three weeks later the same vehicle was caught on CCTV, because we had put the word out, and, again, he got £700 fine and £700 costs. So that sends the wrong signal, in our view, and the mindset of the people we are dealing with is that it is a risk of the job and they are willing to take that risk.

If we had the power to, say, remove their driving licence and remove the fly-posters from Westminster for the next ten years then we might deter them, but this is the culture we are dealing with, and that is a good example.

Mr Davies: Colleagues from Westminster have said that the fiscal gains from things like fly-tipping are larger than any fine we impose, and if you can get away with ten tons of waste, which is standard for Southwark, it would cost you £500-600 to dispose of in a waste facility, and if you get away with two of them and a £500 fine you make money. Basically these people make money and it is going to escalate over the next ten to fifteen years with all the EU legislation coming in. Unless we start the process of making a real issue it is going to escalate not only in London but across the country.

Q190 Mrs Clark: And how about prison? You have talked about confiscating cars and driving licences but what about prison?

Mr Davies: Ultimately there should be an escalation of the issue from fine through to community service orders and maybe seizure of vehicles, and if there is non payment of fine for repeat offences then maybe prisons would be an option, but they are overcrowded.

Q191 Mrs Clark: For two weeks? Three weeks?

Mr Davies: It is basically fraud and they are defrauding the country. It is the council taxpayers of this country who pay for cleansing to be undertaken and therefore, by not paying their taxes and not paying for waste or fly-posting or advertising illegally these people are defrauding the country, and basically, if you commit fraud, you go to prison.

Q192 Mrs Clark: What about naming and shaming?

Mr Baxter: I am all for it.

Q193 Mrs Clark: And so is the Environmental Agency.

Mr Baxter: As long as it is proportionate. You have got the human rights factor and it would be wrong to name and shame someone we prosecuted last May. If you prosecuted someone successfully in the last two months and it was for a heinous crime—something like grass cuttings!—they should be named and shamed. I know some authority named and shamed people given fixed penalty notices—

Q194 Mrs Clark: Can you mention the name of that authority?

Mr Baxter: It was Lambeth. I am probably one of the strongest advocates of zero tolerance and clipping these people round the earhole, and if I had my own way I would—no, I cannot say!

Cllr Sir David Williams: Aggressive enforcement is the point we are underlying. Progressive, as well.

Mr Baxter: Yes.

Q195 Mr Thomas: In your experience how do the newspapers, particularly local, treat the cases you take to court? Do you think, for example, you get the coverage that another crime would get, and therefore there is an element of naming and shaming in that process?

Mr Davies: It is probably proportionate to the level of fine. If you get a good result in court they will put it on the front page and, to be honest, it depends what is newsworthy on the day as well. We do get, “The local authority failed to do this”, or “The local authority failed to do that”. What we would like to see is more coverage, but we are at the whim of editors.

Q196 Mr Thomas: But do any of you specifically with your press officers try and get the local press involved in covering environmental crime?

Mr Baxter: Yes, but again it comes down to people like South London Press, who are not always keen to cover the stories because it is not their bag but it is in people’s interest. The other day in Lewisham we took a four-page advert out and named all the people and told them what we were going to do and what our approach was, and I think that was good and is one way of dealing with it, and if it costs me £1,500 for a full page advert that is fine. If we are talking about the media it needs to be far broader than that and I think we should introduce it into Coronation Street and Eastenders and Crossroads and Emmerdale and all these other programmes so that it starts getting on people’s radar that this is unacceptable. They have themes around drink driving and rape and so on, and I do think this is as important. We need to get the producers and the scriptwriters to start thinking about enviro crime because it does impact on people’s lives, and people want things to change.

Cllr Sir David Williams: Yes, and The Archers on rural tipping. My experience with local press is they are more interested in picture stories of appalling graffiti that yet again they say the local council has not done anything about, or an awful amount of dumping. Even if it is in those cases the local councils’ responsibility we are the Aunt Sallies, I am afraid.

Q197 Mrs Clark: I can see you all have an absolute passion for this and I really wish I could transport all five of you over to my local authority in Peterborough so we could get things done, but that
is not going to happen! Can I truncate a few questions into the situation with the magistrates, because it does seem that the buck is stopping with them. What would you suggest? Are they not getting adequate information about the severity of these crimes and the progressive nature of it into criminality? What would you suggest on training? I believe Westminster is planning to meet with the magistrates to try and coalesce ideas.

**Mr Baxter:** It is a sensible idea for local authorities to meet with their local magistrates to try and get them to understand what the local authority is trying to achieve and the impact on people’s lives on a day-to-day basis, and get them to support that authority. They are key partners— as are the police and the other agencies. I am not sure, apart from taking magistrates out on the street and showing them what the real issues are, what else we can do.

**Dr Penny:** Perhaps Mr Large could comment more on our relationship with the magistrates. We must not lose sight, though, of the fact that it is a very small proportion of total environmental crime which ever finds its way to court, probably a ratio of 9:1. The vast bulk of work done in combating environmental crime comes in the form of service of statutory notice or fixed penalties, and it is a tiny proportion of the total crime that ever ends up in a Magistrates’ court. From our perspective, the major problems we have are not with what happens in the court but what happens before and after in terms of the enforcement of penalties.

**Mr Large:** In relation to our relationship with the magistrates it is reasonably good and we do work well with them on a lot of issues—we are working with them on a Licensing Act transition process at the moment—but when it comes to training I think they are a little bit sensitive about local authorities coming to them and purporting to train them on how they ought to exercise their judicial functions. I do not think they see that as our role.

**Cllr Sir David Williams:** Especially if they are councillors!

Q198 **Mrs Clark:** What, for example, can central, national government do on this? You may have a very good channel of communication in Southwark and in Westminster with the magistrates working together, still from the same hymn sheet but what is going on in places like Peterborough and Birmingham? It is no good if it is fantastic in just two authorities regarding sentencing and penalties and crime-fighting and terrible everywhere else. Is there a role for central government here?

**Cllr Sir David Williams:** There is a role for the Local Government Association, which has as one of its functions to disseminate best practice. We have 410 local authorities in the country as well as police authorities and combined fire authorities and so on, so it takes good co-ordination between not just local authorities but also the police, the Environment Agency and so on. It is a very wide spectrum of crime. I do think that one good aspect that will come from this is that your sub-committee is trying to raise the profile of this at central government level, because initiatives have to come from central government in all of this. We are getting pressure from below from the public: but it is patchy and different in different places. If you get some anti-fly-posting obsessive or anti-fly-tipping obsessive then you can have a quite surprising effect within that single local authority, but that is not the way it should be happening. It is connected to all the other environmental improvements that we are trying to do right across the ministries as well as across local authorities, and all these problems that come up now are multi-faceted and multi-authority, and somebody hopefully at central government has got to grasp the nettle and say, "These are the four elements that initiatives must be provided, if necessary with financial incentives", and off we go. Someone has to say, “This is what Westminster are doing, this is what Southwark are doing, this is the best way, this is how they have saved a lot of money and improved the environment”. You have to have a proactive campaign right across the range of public services in this. It is not just the local authorities; it is the Health Service and everybody else.

**Mrs Clark:** It seems we have quite a lot of work to do but you have given us a bit of inspiration.

Q199 **Paul Flynn:** Perhaps we can do a bit of naming and shaming ourselves now. In the City of Westminster memorandum which we greatly valued you pointing out that the business development manager of Ansell, the owners of the Mates brand of condoms, was quoted in *Mediaweek* as saying that fly-posting gives his brand “more credibility”, and I see in the list you have given us many organisations—Polydor Records, the Ministry of Sound—which are substantial businesses, not small enterprises, and the fines were derisory—under £400 in each case. Do you think there should be some better way to deal with the directors of corporate companies, particularly in companies like Ansell, who boast about environmental crime?

**Dr Penny:** Yes, that is right. In a number of instances the effect of this naming and shaming is perhaps questionable and, indeed, with some of the companies on the list you have there we could positively be feeding their communications machine and assisting them because they seek positively to promote the brand values of youthful rebellion and so on which are associated with low level criminality, if you like. We have considered in terms of that approach, if coverage in the local or, indeed, the United Kingdom national newspapers would serve no real purpose in terms of embarrassment to the company, whether perhaps, if they have a Japanese parent company, coverage in the Japanese media might have influence at head office which could make life a little more uncomfortable for the United Kingdom directors. There is always scope to be creative but, as I think you will see, the general thrust of our argument in relation to corporate environmental crime is, as Mr Large was saying earlier, to create some sense of personal responsibility and, indeed, exposure to
risk on the part of the directors to whom the marketing departments and advertising agents are ultimately responsible. It is they who in the end are commissioning what are nowadays very large sophisticated media campaigns that embrace not only fly-posting but also regular press advertising, TV campaigns and so on. As an example of how fly-posting has become almost a respectable part of the advertiser’s armoury, I would point to a campaign that ran in London and other parts of the country a couple of years ago which was associated with the launch of More Than Insurance, the “Where’s Lucky?” campaign, which you may recall. A large amount of money was spent on television and press advertising and associated with that there was a very extensive fly-posting campaign showing how fly-posting has entered into the media mainstream. We must push it back out again.

Q200 Paul Flynn: On that, I drive past that terrible building on the other side of the bridge every morning which is liberally fly-posted and which must be one of the buildings which is so ugly that it might well be improved by fly-posting! I know in other areas they have occasionally put up graffiti boards, and suggested licensed fly-posting or some other means if this becomes an extensive part of the trade. Would that be useful?

Cllr Sir David Williams: One of my officers said it was a licence to spraint, and I think that just about sums it up.

Mr Baxter: On fly-posting I think we should be going after the directors of these companies but if you want to prevent it altogether it has to be a two-pronged approach. The people putting it up need to be dealt with effectively and the people who benefit from it need to be dealt with effectively. If you want to stop it the simplest way is to ban fly-posting apart from on authorised sites which the council may wish to put up subject to planning permission, and the companies who do it at the moment could use that site and pay the council £500 a year rent. Anything outside of that could have an immediate fixed penalty notice of £200 on the company directors of the Japanese company for each poster that is there. Westminster’s paper is excellent. They say, “The existing legislation is an open invitation to any moderately intelligent and well-resourced advertiser to play the system”, and that is what happens. The current legislation allows them to take the posters down or obliterate what the word is, and they just put another poster on top. So you could have an excellent singer or group advertising their latest concert, we serve notice on them, and before the notice period has expired they put another poster on top, so everyone wins apart from the poor old local authority and the people who have to live there. Clearly to me it has to be, “Ban fly-posting and tackle the source”.

Q201 Paul Flynn: In the submission from Westminster you mention that you were unhappy with the co-operation you had from other bodies. Is there something that can be done?

Dr Penny: I think I said in the note that we were very happy with the co-operation that we had had from a number of bodies including the Advertising Association, with whom we have a very good working relationship. The Association, which is the representative body that speaks for the advertising industry, have been extremely supportive; they have used their house journal to promote the message that fly-posting is illegal but, of course, it is not a regulatory body and it has power only to persuade and not enforce.

Cllr Sir David Williams: Adding to that, I have been disappointed by the local press not wanting to join in campaigns against illegal advertising and fly-posting because it affects them commercially, yet they still do not take very much interest in this.

Q202 Paul Flynn: Indeed. It might be a creative way of approaching them, as you say. We have heard proposals from the Environment Agency that have apparently been discussed with the Home Office up to the last general election concerning compulsory share issues or other ways of hitting the corporate fly-posting companies. You have mentioned a number. Can you think of any other ideas that might strengthen your hand against corporate offenders?

Dr Penny: One idea that we did consider, but did not act upon, was actually acquiring shares in the companies and, as shareholders, applying pressure through their internal governance structures, raising awkward questions at annual general meetings and general meetings of shareholders and so on. We took the view that it was not appropriate for Westminster City Council, as a local authority, to do so, but of course interested individuals are free to behave in that way.

Q203 Paul Flynn: Mr Baxter, you mentioned street leaders, and this might be a suitable way, but, as a resident of one of the streets in Southwark, I am not sure who my leader is.

Mr Baxter: We can find out and let you know afterwards.

Q204 Paul Flynn: What you are suggesting is something which has been used by politicians and consumer organisations very effectively in campaigns against large companies, but would this be a legitimate way forward, do you think, for street leaders or others to do, other groups that you have?

Mr Baxter: Yes, it is quite a creative way to tackle the problems and I would encourage any of our active citizens to take direct action against these companies. I think Encams, who recently demonstrated outside the Sony head office, are answerable for fly-posting the whole of their building, not that I am supporting environmental crime, but I do think that direct action needs to be taken and it is totally irresponsible of these companies. They should get the company secretary of Sony Records to live in some of the places that are blighted by this kind of environmental crime and it does impact on investors. I was recently in Manchester, and you have got China Town which is beautiful and across there is fly-posting and I think
it does blight an area, anywhere you go in the inner cities. You mentioned that horrible building across the road, and I would not feel happy if I came out of Waterloo Station and saw that building and that was my first impression of London. It does not bear too well, does it, for our European colleagues, so I do think that something needs to change on fly-posting.

**Cllr Sir David Williams:** I think related to this is mobilising the public. In my experience, you can mobilise the public about animals or trees, though not about homelessness, but you can mobilise them about certain sorts of environmental crime that affect their area visibly and directly. The main amenity society in my ward has been very successful in organising graffiti clean-up campaigns and once you get one or two people who take the initiative to do this, you can mobilise a community. We are not going to stop environmental crime of the sort of fly-posting and graffiti, dumping, that sort of fairly low-level or small-scale stuff without mobilising the public, but you have got to have a public authority with the legislative framework, the enforcement framework because the most serious ones are not going to be deterred by one stroppy local resident buying a share and so on. That is the lower level, but it can be very effective within a community.

**Q205 Paul Flynn:** Is there any need for a broader range of civil penalties for environmental crime? It has been suggested that there should be on-the-spot fines. If there were such penalties, do you think they would be effective or do you have any other suggestions?

**Mr Large:** There is an issue about that because there are some on-the-spot fines already, for example, for dropping litter and, as I mentioned earlier, new ones are being brought in for fly-posting. There are two issues for us there. One is that they do not work in the same way as fixed-penalty notices for parking offences do where, if you do not pay the fine, eventually the bailiffs come round, and non-payment anyway is enforced through the civil debt system, but the way that fixed penalties for environmental crime work is that if you do not pay the fine, you then have to proceed to prosecute them for the offence that they committed and that is a problem for us because there is a high non-payment for litter fixed-penalty notices. The other issue, which I mentioned earlier, is that the fixed penalty provisions that are proposed for fly-posting will only apply to the person putting up the poster and we think that they should be allowed to apply to those who are responsible, who benefit from the display and who took the decision to put it up.

**Dr Penny:** There is a third issue which is also quite important for us which is the problem of correctly identifying the culprit. It is relatively easy to use the fixed penalty if it relates to activity which originates in a premises or which has a vehicle associated with it because you have the opportunity to trace. Fixed-penalty tickets for people on the street will very often lead you to the position of serving a ticket on Mr M Mouse, Disneyland, Florida! Now, in London we are trying to address this in the London Local Authorities Bill which is currently going through where it will become, and Mr Large will correct me if I am wrong, an offence not to identify yourself to a proper authorised officer of the authority, but I worry that that power may not in itself be effective. At the moment the only person who can really require you to identify yourself is a police officer because if you fail to do so, he may detain you. Now, I am not suggesting that local authority officers be given the power to detain members of the public who fail to identify themselves, but I would suggest that it might be worth considering extending the effectiveness of enforcement against on-street environmental crime by considering, for example, whether police community support officers might be enabled to do that and to issue fixed penalties.

**Q206 Chairman:** Can I just go back to the question of cost. Looking at Westminster’s annex, it seems that you are awarded costs in quite a lot of cases, but I take it that the level of the award relative to the genuine cost of bringing these cases to court is insignificant, and I would just be grateful for any idea of the scale of the disparity.

**Mr Large:** It is not quite as bad as that. We do take recovery of costs quite seriously, so we do produce to the court a sort of schedule setting out in some detail (a) the legal costs, and (b) the costs incurred by the investigating officer. In some cases we do get all those costs back and I would say that is only in about 60% of the cases, and in other cases the court will take into account the level of culpability that they judge the offender to be guilty of in the level of the fine they impose and in about 40% of cases we get something less than our full costs.

**Q207 Chairman:** Do you think that as a general rule any clean-up or remediation costs should be covered by the person, if convicted?

**Mr Large:** Yes, the polluter should pay.

**Q208 Chairman:** Do you think that the system with regard to costs is sufficiently clear? Is it set out in a comprehensible way that enables consistency in the award of costs?

**Mr Large:** Westminster City Council does not have a general problem with the way in which costs are awarded by the magistrates’ courts, no.

**Q209 Chairman:** What do you think should happen to the fines? Should they go to the general pot or would you favour them going back into the fight?

**Mr Large:** We have been lobbying for some time for the fines to go to the enforcing authority and of course that is one of the reasons we like fixed-penalty notices, that we get the penalty.

**Q210 Mr Thomas:** From all the discussions we have been having, evidence from the magistrates, associations and so forth, one thing springs out and that is this lack of appreciation of the real effect of environmental crime on our communities. We can look to other countries where environmental crime is actually dealt with by specialist environmental courts, officers and magistrates. Is that something...
that you think we should be looking at in this country or do you think we should just work at what we have got?

Cllr Sir David Williams: I think you should look at it seriously because of the deficiencies in combating environmental crime now which, unless there is a sea change from government downwards, are unlikely to improve.

Q211 Mr Thomas: Would that be specialist-trained magistrates, for example? Would that be one way of doing it, and based in different areas?

Cllr Sir David Williams: Yes, that would certainly help. We are aware in the Local Government Association that the Environment Agency has very different effectiveness in prosecuting environmental crime in different regions of the country, for instance. If it is different amongst the regions of the Environment Agency, it is bound to be very different across several hundred local authorities. It is a worsening problem which we do not have any short or medium-term prospect of getting on top of, so other countries’ experience has obviously got to be valuable and got to be looked at carefully because with a fairly fast-changing area of crime and enforcement like this, learning from the experience of other people is always very valuable.

Q212 Chairman: I think that concludes our questioning. Is there anything else that any of you would like to say now, something which we have not covered which you think we should have, or that you would like to say but you have not yet?

Mr Baxter: I am under instruction not to say anymore!

Chairman: Well, thank you very much. It has been an extremely helpful session.
Thursday 12 February 2004

Members present

Mr Peter Ainsworth, in the Chair

Mr Colin Challen Paul Flynn

Memorandum from the Home Office

— Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

— Are sentences appropriately set to act as a deterrent?

— Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

— Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

Range of Sentences Available

Environmental crime covers a wide range of issues including waste pollution, pollution by controlled substances, pollution of air and water, noise offences and wildlife offences. The courts have available a range of sentencing disposals for offences of this type including custody, community sentences and fines (the most commonly used).

Below are examples of environmental offences with their maximum penalties:

— Depositing, causing the deposition or permitting the deposition of controlled special waste in or on land without a licence under the Environmental Protection Act 1990: maximum penalty on summary conviction—imprisonment for a period not exceeding six months and/or a fine not exceeding £20,000; on conviction on indictment—imprisonment for a period not exceeding five years and/or an unlimited fine.

— Polluting controlled waters under the Water Resources Act 1991 (controlled waters are coastal and territorial waters; and any streams or rivers, and lakes or ponds attached to them): maximum penalty on summary conviction—imprisonment for a period not exceeding three months and/or a fine not exceeding £20,000; on conviction on indictment—imprisonment for a period not exceeding two years and/or an unlimited fine.

— Integrated pollution control and air pollution control—carrying on a prescribed process without, or in breach of, authorisation, under the Environmental Protection Act 1990: maximum penalty on summary conviction—imprisonment for a period not exceeding three months and/or a fine not exceeding £20,000; on conviction on indictment—imprisonment for a period not exceeding two years and/or an unlimited fine.

— Failing to comply with or contravening any enforcement or prohibition notice under the Environmental Protection Act 1990: maximum penalty on summary conviction—imprisonment for a period not exceeding three months and/or a fine not exceeding £20,000; on conviction on indictment—imprisonment for a period not exceeding two years and/or an unlimited fine.

— Killing or injuring protected wild birds, or taking or damaging their eggs under the Wildlife and Countryside Act 1981: maximum penalty on summary conviction—imprisonment for a period not exceeding six months and/or a fine not exceeding level 5.

— Emission of dark smoke from industrial or trade premises under the Clean Air Act 1993: maximum penalty on summary conviction—a fine not exceeding £20,000.

— Failing to control noise on construction sites under the Control of Pollution Act 1974: maximum penalty on summary conviction—a fine not exceeding level 5 and a cumulative penalty for each day that the offence continues after the conviction.

— Acquiring and selling unauthorised fuel in a smoke control area under the Clean Air Act 1993: maximum penalty on summary conviction—a fine not exceeding level 3.
**Fines**

The standard scale of fines used for criminal offences in the magistrates’ courts has a range of maxima starting at Level 1: £200; Level 2: £500; Level 3: £1,000; Level 4: £2,500; and Level 5: £5,000, which is normally the maximum fine available on summary conviction.

However, a number of environmental offences carry exceptional summary maxima (ESM), which allow for heavier fines. The criteria that qualify an offence for an exceptional summary maximum are: that the offence is serious enough to justify a penalty above the normal statutory maximum and the matters involved should be susceptible to fairly easy proof; the offence should also be lucrative, either because it will give rise to large profits or because it will result in significant savings; it must also be likely to be committed by companies or others with considerable resources.

Exceptional summary maxima are set at various levels: examples are £20,000, £50,000 and £250,000 at the top end of the scale.

Generally speaking, exceptional summary maximum fines are available for the substantial environmental offences. And, when the magistrates’ court considers even the ESM to be insufficient, it can transfer the case to the Crown Court for sentencing. The Crown Court can impose an unlimited fine.

In some cases, courts have the ability to impose accumulating fines to encourage offenders to set right the nuisance as quickly as possible.

**Custodial Sentences**

The substantial environmental offences are generally imprisonable—to a maximum of two years in the Crown Court. Again, where a magistrates’ court feels that it is justified, it can remit the offence to the Crown Court for a longer custodial sentence than the six months which is all that magistrates can currently impose. The Criminal Justice Act 2003 increases the magistrates courts’ sentencing powers to 12 months (this has not yet been implemented).

Offences with less scope for wide damage tend to have lower custodial maxima.

The long maximum for “depositing, causing the deposition or permitting the deposition of controlled special waste in or on land without a licence” is set at five years owing to the particularly hazardous and potentially long-lasting effects of the offence. “Special” waste is waste deemed to be particularly dangerous, through for example toxic or carcinogenic properties.

**Flexibility**

Within the broad statutory limits set by Parliament, sentences in individual cases are a matter for the courts alone, taking into account all the circumstances of the offence and the offender, giving weight to all mitigating and aggravating factors, including any previous convictions. There are no statutory minimum sentencing restrictions in respect of environmental offences, so courts’ decisions may range from absolute discharge to a substantial custodial penalty.

Courts can imprison only where they believe the offence is of such seriousness that only imprisonment will constitute adequate punishment. Persistent offences can be taken into account by courts, and persistent offending may lead to a custodial sentence, where any one of the offences alone would be unlikely to justify it.

The Sentencing Advisory Panel (see below) offered advice to the Court of Appeal on environmental crimes, suggesting that custody should only be considered where:

(a) the offence is shown to have been a deliberate or reckless breach of the law, or the defendant acted from a financial motive, whether profit or cost saving; and either

(b) (i) human health has been damaged or put at risk; or,

(ii) the pollutant was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects.

A court may impose a community sentence if it is of the opinion that the offence is serious enough to warrant such a sentence and where it is considered the most suitable penalty for the particular offender. The restriction on liberty imposed by the sentence must be commensurate with the offence. Appropriate community sentences may include requirements to undertake unpaid work.

Where courts set fines, the fines must reflect the seriousness of the offence and also take into account the financial circumstances of the offender. Courts can allow offenders to pay the fine in regular instalments, usually over the course of 12 months. If all other available methods have been tried or considered in an attempt to elicit payment, the final sanction is imprisonment, with the sentence length dependent upon the amount outstanding.
**Actual Sentencing Outcomes**

Fines are the most usual sanction imposed by the courts. We would agree that fines are an appropriate starting-point for the courts as (in the words of the Sentencing Advisory Panel):

- the offences are non violent and carry no immediate physical threat to the person; and
- where committed by corporations, the offences are generally in situations where the defendant has failed to devote proper resources to preventing a breach of the law.

It would be extremely difficult to obtain data to prove that sentences in individual cases are commensurate with offences. However, the sentencing profile for environmental offences in 2002 shows that the courts are using the full range of sentencing options available to them. The fact that courts rarely sentence towards the higher ends of their powers in respect of these offences suggests that they consider the maxima available to provide sufficient range.

**Profile 2002**

- 9 offenders received custodial sentences for environmental offences in 2002 (0.58%).
- 29 offenders received community sentences for environmental offences in 2002 (1.88%).
- 1,292 offenders were fined for environmental offences in 2002 (83.79%).
- 212 offenders received an absolute or conditional discharge (13.75%).

The wide ranges of offences covered under the heading means defendants will range from large corporations to individuals of limited means. The most common offence in 2002 was contravention of an abatement notice served by a local authority for statutory nuisances, for example, in respect to noise in the street: 538 offenders were fined for this offence in 2002.

The Sentencing Advisory Panel considered that an absolute or conditional discharge might be justified when, inter alia:

- the damage has been completely or substantially remedied through steps taken by the defendant; or
- there is strong personal mitigation in the case; or
- the defendant’s financial means are limited, and the court decides that priority ought to be given to compensation and/or costs.

**Deterrence**

The Government believes that it is important that the courts treat these offences with the seriousness they deserve. Deterrence however, is not the only purpose of sentencing. Its statutory objectives (Criminal Justice Act 2003) are: public protection, punishment, crime reduction & reparation and the reform and rehabilitation of offenders.

It is difficult to obtain reliable empirical evidence on the deterrent effect of sentencing severity. It is clear however that the choice of some potential offenders as to whether to offend is influenced by their perception of risk of being caught and punished rather than by the severity of that punishment.

The fact that courts rarely sentence towards the higher ends of their powers in respect of these offences suggests that they consider the maxima available to be sufficient as a punishment and/or deterrent.

**Guidance to Courts**

The Sentencing Advisory Panel (SAP) is a non-Departmental public body which advises the Court of Appeal on guidelines in relation to sentencing for various criminal offences. The Court of Appeal is currently the only mechanism for handing down binding sentencing guidelines to the courts.

The Panel goes through a wide consultative process before advising on appropriate guidelines. In March 2000 the Panel offered advice to the Court of Appeal in relation to sentencing for a number of environmental offences involving, mainly, water and air pollution and illegal handling of controlled waste. Although the Court of Appeal referred to the advice in the case of *R v Milford Haven Port Authority* (16/03/00), the court did not hand down a sentencing guideline for environmental offences. The Government in its publication “Waste Not, Want Not” (Nov 2002—recommendation 13) indicated that the Home Office would be working with the Magistrates’ Association and courts regarding guidance on sentencing for environmental offences. Currently the Panel’s advice, although not handed down as a guideline (and therefore not binding) has been published by the Panel and is known to and available to courts.

Currently, the Magistrates’ Association issues non-statutory sentencing guidelines for use in magistrates’ courts (recently re-issued and effective from January 2004 and which are available on their website [www.magistrates-association.org.uk](http://www.magistrates-association.org.uk). In section 3, offences under the Environmental Protection Act 1990 are
considered alongside offences under the Health and Safety at Work Act 1974 which benefit from guidance issued by the Court of Appeal in the case of R v F Howe & Son Ltd 1999 and derive from the advice of the Sentencing Advisory Panel.

The Magistrates’ Association, in conjunction with the Environmental Law Foundation www.elflaw.org, has compiled an information pack/toolkit for sendencers called “Costing the Earth” which was produced in 2002 and is regularly updated.

Some magistrates’ courts run specific training for environmental offences although there is not currently a national scheme.

The Criminal Justice Act 2003 establishes the Sentencing Guidelines Council (SGC), a statutory body chaired by the Lord Chief Justice, which will issue sentencing guidelines binding on both the Crown Court and magistrates’ courts. The SGC will come into being on 27 February this year. The Council will aim to produce a robust and comprehensive set of guidelines, across the range of criminal offences. The Sentencing Advisory Panel will continue to play an advisory role to the Council. The Council will have a heavy workload and is unlikely to be able to turn its attention to environmental offences in the near future.

February 2004

Witnesses: Mr Keir Hopley, Head of Sentencing Policy and Penalties Unit, the Home Office, and Mr Paul McGladrigan, Head of the Enforcement Programme, Unified Administration and Magistrates’ Court Administration Directorate, Department for Constitutional Affairs, examined.

Q213 Chairman: Good morning to you both. Welcome to our sub-committee. Thank you, Mr Hopley for the memorandum from the Home Office. We are rather thin on the ground today. We have quite a lot of questions to get through, so if you could keep your answers as brief as possible that would be much appreciated. We have heard from pretty well all the memoranda we have had so far that environmental crime is regarded as a growing menace in society. Do you think that is because the number of crimes is increasing or is it to do with the fact that it is now more clearly identified as an area of criminal activity?

Mr Hopley: I suspect it is a combination of the two. I cannot be sure from statistics that we have in the Home Office or that DEFRA have provided, but there is certainly an increasing number of prosecutions and my guess is that part of that is due to some increase in offences but also to local authorities being more vigilant and realising the need to apprehend this sort of crime and deal with it.

Q214 Chairman: Do you think there is a cultural problem with environmental crime in society, and that is reflected in the way that it is dealt with by government and its agencies and it is not really regarded as a very serious form of criminal activity?

Mr Hopley: I think it depends what it is. Environmental crime can cover a wide range of things from stuff at the more serious end, which could involve polluting and potentially causing health problems to thousands of people, down to very minor instances of litter or dog fouling. I think at the lower end there probably is a perception that that is not the most serious thing around, but at the top end I am not sure that is the case.

Q215 Chairman: The problem with dog fouling is that it is cumulative: if an area becomes run down and squalid and it looks as though people do not care about it, there are read-across effects to other forms of criminal behaviour. To that extent, although apparently fairly minor, it can lead to rather more serious consequences. Is that grasped by the Home Office?

Mr Hopley: I think it is. We have over the last few years put in place a number of things to try to tackle the lower level crime, antisocial behaviour. Indeed, as recently as the Antisocial Behaviour Act of last year we have had new fixed penalty notices to enable local authorities and others to deal speedily with these nuisances, so that they can be dealt with without taking up a huge amount of administrative effort but nonetheless quickly getting home to offenders that these things really do matter.

Q216 Chairman: Do you regard it overwhelmingly as a Home Office issue? It is good to see Mr McGladrigan here today from the Lord Chancellor’s Department. What other Government departments do you think might have a key role to play?

Mr Hopley: Most of the policy in this area is owned by DEFRA. My role as head of the sentencing policy unit within the Home Office is really to come at it taking an overview of this in the context of other crimes. The Home Office is responsible for agreeing overall penalties and sentences available to the courts and the DCA of course is responsible for running the courts.

Mr McGladrigan: I think the principal role for us is in the enforcement of penalties, to make sure that they are taken seriously.

Q217 Chairman: Surely there is a role for, say, DEFRA and probably the Office of the Deputy Prime Minister as well.

Mr Hopley: Indeed, I said DEFRA right at the start as the department with the lead on most of the policy in this area.

Q218 Chairman: Do you feel that the Government is joined up when it comes to dealing with these issues, that the lines of communication are clear?
Mr Hopley: I think we are. We try from the Home Office perspective to put in place arrangements with all government departments so that our responsibility for seeing the criminal law and the overall context of sentencing of penalties is informed by the individual perspective of departments with responsibility for the policy area. I think it is fair to say that DEFRA are one of the most committed departments in that and one of the ones with which we have the best relations.

Q219 Chairman: That is reassuring. The problem persists that this type of activity has grown and there is a widespread feeling that the penalties that are handed out are often insufficient. Do you have a view on the overall level of sentencing in relation to these activities?

Mr Hopley: It is difficult to take a view in a vacuum, as it were. I would look at the penalties that are available to the courts. The more serious of the environmental offences are unusual in some respects, in that they have exceptional summary maximum fines, so that the courts have the power to fine for these a great deal more than they would for most types of criminal offence. The number of prosecutions is going up and I think that is important. I do not know about in this particular area, of which I have very little expertise, but in terms of criminal matters generally, one of the messages that is important, in trying to bring it to an end, is that people know they are going to be caught and punished rather than necessarily the level of that penalty. Certainly the fact that prosecutions are increasing and the success rate is high is very good news. It is for the courts to decide in individual cases within the framework that Parliament has set down what is the appropriate penalty for those cases. I think it is very difficult for officials to take a view as to whether they are pitching that right.

Q220 Chairman: The Environment Agency and the Local Government Association have made it very clear to us that they think the current level of sentencing is almost derisory and is not effective at all, which is one of the reasons why the problem is not actually being tackled.

Mr Hopley: I am not sure what evidence they would have to suggest that. It is very difficult for me to take a view one way or the other. All I would do, I think, is point to the penalties that are available. It is true that the average fine is nowhere near the maximum that is available for these offences, but then the court is legally obliged to take into account both the circumstances of the offence, the harm that it caused, the likely harm that it may have caused, the degree of culpability, the degree of intent, and also the individual circumstances of the offender. In that the average fine is considerably below the statutory maximum, that is not unusual for these crimes. For many common criminal offences (for example, if you were to take criminal damage or you were to take theft from the person, shoplifting), the average fine would be well, well within the statutory maximum, so I am not sure we are out of kilter here.

Q221 Chairman: I think you argue in your memorandum that the fact that the average fine is well below the maximum justifies the level of the maximum. I think you have just suggested the same thing here to us. But, if one were to double the maximum, do you think the actual level of fines would also double?

Mr Hopley: I do not think it would double. I think it probably would go up because the courts do often take a lead, in that, if maximum penalties are increased, judges and magistrates take it as a signal that they are expected to increase the generality of their penalties. So that certainly would be one possibility.

Q222 Chairman: So higher maxima would generally lever up the level of fines imposed.

Mr Hopley: It would, I would think, yes. I would point out, of course, that if magistrates do think their powers are insufficient in terms of the “either way” offences, the more serious offences they can commit to the crown court, which has an unlimited power to fine. But the number of cases that magistrates choose to send to the crown court is very small indeed.

Chairman: Thank you.

Q223 Mr Challen: Do you have any idea how many times magistrate courts use these exceptional summary maxima for environmental offences?

Mr Hopley: I do not think I do, I am afraid, Mr Challen. The number of offences runs into the thousands but the average level of offences is well below those. I am afraid I do not have the individual figures.

Q224 Mr Challen: You cannot recollect any examples where somebody has been fined a quarter of a million pounds. It probably has not happened, has it? Would you agree with that?

Mr Hopley: For quarter of a million pounds there are very few offences which would carry that maximum anyway. For most of them, for the summary maxima acceptable of £20,000 it would have to be something like very serious oil pollution or something like that.

Q225 Mr Challen: I was going to ask you what sort of offences would attract the maxima.

Mr Hopley: The very high maxima of £250,000 or £50,000 would be things like very serious cases of oil pollution or very serious industrial fisheries type offences.

Mr McGladrigan: We certainly have examples of fishery cases where quite high fines of over £100,000, £200,000 are indeed imposed. The difficulty we then have is enforcing those fines.

Q226 Mr Challen: These are imposed in the magistrates’ courts?

Mr McGladrigan: Yes.

Q227 Mr Challen: What difficulties are there in enforcing them? Surely a very large fine would attract more enforcement.
Mr McGladrigan: It would, but it is actually the fact that the boat leaves, in simple terms. It falls to the port authority to track the vessel and establish when it is next going to be coming into port.

Q228 Mr Challen: Surely the European Union play a role in that if that is the kind of scenario.

Mr McGladrigan: Certainly magistrates’ courts work closely with the ports authorities but there are no protocols that particularly help us out on this. It is literally the enforcement officers connecting again with the boat involved and not letting it leave until the fine is paid.

Q229 Mr Challen: So clearly those types of offenders could take advantage of this loophole quite easily. If they know it is there, they can just leave port and cock a snook at the law.

Mr McGladrigan: It is certainly an issue that we recognise and it is certainly in the nature of the fisheries business. Magistrates’ courts work hard to ensure that fines are enforced but we have to recognise the difficulties that they face in this type of case.

Q230 Mr Challen: Does the fact that these exceptional summary maxima exist undermine your contention that currently available maxima are sufficient? Or have you already factored that into your statement?

Mr Hopley: It is factored in. If we did not have the exceptional summary maxima, then the law would be inadequate, because if we are talking about offences by companies which can cause serious environmental damage then the normal summary maxima of £5,000 would obviously be inadequate for that and it would result either in penalties of insufficient level being imposed or would unnecessarily be put up to the crown court.

Q231 Mr Challen: Are you satisfied that the range of offences covered by these exceptional maxima is wide enough? Is there an argument that perhaps they ought to be extended to certain other offences?

Mr Hopley: It is not something at which I personally have looked. We would always be very willing to look to see if penalties are thought for any specific offences to be inadequate: then we would look at proposals in the light of whatever circumstances and evidence were brought to us.

Q232 Mr Challen: So it was under review. If there was feedback from magistrates that they thought they did not have sufficient sentencing powers you could possibly extend them?

Mr Hopley: Certainly we do keep generally maximum penalties for all sorts of offences under review and there are frequent changes to them. If either magistrates or other interested and informed persons were to bring that evidence to us, then ministers would certainly want to look at it.

Q233 Mr Challen: I understand that the Criminal Justice Act last year increased the limit for custodial sentences given in magistrates courts. Will that apply to environmental crimes as well?

Mr Hopley: Those offences which are punishable by imprisonment it will, yes.

Q234 Mr Challen: Given that you evidently believe that current maximum are sufficient for environmental crimes, do you expect the increase in last year’s act to be taken up by magistrates in sentencing environmental crimes? Do you think they would use those extra powers?

Mr Hopley: There are very few cases indeed where offenders were sentenced either to a community penalty or to custody for environmental offences, so I suspect that in terms of those increases in magistrates’ powers there would not be a great deal of difference in this area. I think we are talking about something like 30 people received a community sentence in 2002 (which is the last year for which we have the figures) and a handful went to custody. So I am not sure it would have a huge impact in this area.

Q235 Chairman: Do you think that is enough, 30?

Mr Hopley: I do not think I have the knowledge to take a view on that, Mr Chairman. As I said, the court needs to consider in each case what the circumstances of the offence are. Community penalties are available under the general sentencing threshold. They are there for offences that are serious enough to merit them; that is, for where a fine is inadequate. There is a further change under the 2003 Act. At the moment a community punishment order/unpaid work, which is the most likely outcome in the case of environmental crimes, is linked to offences that carry a sentence of imprisonment. That decoupling is made under the 2003 Act, so it may be that at the top end of offences, which at the moment only carry a fine, one of the effects may be that community penalties would be imposed instead of a fine.

Q236 Mr Challen: In your memo you mention the concept of accumulating fines. I wonder if you could explain exactly how that works. If you have an example or two it might be useful.

Mr Hopley: We were referring to, I think—and forgive me if I do not have the correct point—the fact that courts will normally take into account an offender’s record when making sentence. If it is a person or a firm who is a frequent offender, then that will aggravate the seriousness of the offence. Indeed, there are provisions for petty persistent offenders (as the term has been) who commit offences which may not justify a community penalty on their own, but who, because of the fact that they are consistently committing these offences, then would be put up into the community penalty band. Similarly, when a court is deciding the amount of a fine, if an offender has a record then it will often lead to an aggravation of that fine.
Q237 Mr Challen: Say a water company was found to be polluting a river. I wonder if it might actually have an accumulating daily fine until it resolved the problem. Having been brought to court and told that it had ten days to resolve this problem, if it did not do that then every extra day might be, for the sake of argument, another £100 fine.

Mr Hopley: There are some offences that carry that type of fine, yes.

Q238 Mr Challen: What sort of offences would attract that type of fine?

Mr Hopley: It would normally be the type of polluting offences, either water or air, where there is a requirement on the polluter to put that right. There would be a fine for so many days as he did not put that right.

Q239 Mr Challen: Is there any good reason why there are no statutory minima for environmental offences? To what sort of offences do statutory minima currently apply?

Mr Hopley: There are very few statutory minima and they tend to be for very serious offences. There is a mandatory life sentence for murder, which is a statutory minimum. There are offences where repeat rapists, drug-traffickers and repeat burglars get minimum sentences of one sort or another. But it is very rare in law in England and Wales.

Q240 Mr Challen: There is nothing there for environmental crime. Do you think there is a case that there should be?

Mr Hopley: I am not sure why environmental crime should require specific minima when most other crimes do not. I think where I struggle is in seeing where an environmental crime is different in the generality of the overall principles of the criminal law. I think ministers would want to see a good case before they went down that road.

Q241 Mr Challen: I wonder, Chairman—this is in response to an earlier question about exceptional summary maxima—if we could have a note perhaps on the details of those cases you mentioned where people do seem to be able to evade these things. If we could have some information on those types of cases, that would be very helpful.

Mr Hopley: We will do what we can.

Q242 Chairman: I was interested in what you just said about seeing environmental crime as indistinct really from the generality of the rest of criminal activity. That begs the question as to whether environmental crime exists in your mind. Is not one of the features of this type of crime the very high number of repeat offenders?—which tells us something about the sentencing arrangements perhaps.

Mr Hopley: I think it possibly does for some types of environmental crime. I think one of the problems that bedevils the criminal justice system as well is repeat offenders generally and I think you would find if you looked at it an awful lot of repeat shoplifters and repeat thieves and repeat burglars as well. One of our constant struggles is to try to deal with that. The Government has put in place a number of measures to enable that to be done. Certainly, were there to be a case for doing something differently here, then I am sure ministers would be very keen to look at it. It is a question of: if one looks at any particular type of crime, one can always find distinguishing features for that crime, but if one is trying to maintain the overall level of penalties in a coherent framework across the piece, then one has to look at it in that context as well.

Q243 Paul Flynn: The Local Government Association and the Environment Agency both say that deterrence in sentencing is vitally important but it is hardly mentioned or given priority in your submission. I am wondering if you regard the sentencing system as being more to punish than to deter, because both the Local Government Association and the Environment Agency said the present sentencing system is hardly any deterrent at all.

Mr Hopley: The Criminal Justice Act 2003 lays down five purposes of sentencing: punishment; reduction of crime, including by deterrence; reform and rehabilitation of offenders; protection of the public; and making of reparation by offenders to persons affected by their offences. So it is one of the purposes but only one of those purposes.

Q244 Paul Flynn: You say in your memorandum that the chances of being caught and prosecuted are probably more of a deterrent than the sentence given. How can this be? Having seen the figures you give for present sentences and the way they are distributed—84% fines and 14% conditional discharges—how can a court appearance be a deterrent when the sentences are slight or non-existent?

Mr Hopley: The point we make in the memorandum about deterrence being important is in relation to criminality generally. I am afraid I have no evidence either way as to whether that would apply more or less or the same to environmental crime. I think one has to look—as the court is doing when it is making its decisions on sentence—at the circumstances of the offender. If it is a multinational corporation, clearly £20,000 is not going to do very much to get at it; if it is an individual or small business, then fines running into thousands of pounds may have an effect.

Q245 Paul Flynn: You helpfully give in your memorandum the various grounds thereof for reducing a fine or commuting a custodial sentence to a fine or getting an absolute discharge. Do you think there are so many chances of sentences to be reduced that the deterrent effect is pretty much negated anyway?

Mr Hopley: I think there are chances for sentences to be reduced; there are chances for sentences to be increased as well. It depends on the circumstances of individual offenders and how the courts see those.
Q246 Paul Flynn: Do you think the punishment fits the crime now? You have mentioned large companies, and we have the example of the Milford Haven case where a fine of £40 million was reduced to £0.75 million. Is it the case, do you think, that wherever discharge takes place, frequently, dealing with individuals, it is because of lack of means and the situation is that the sentence does not so much fit the crime as actually fit the criminal, the person there. Do you believe that sentences, particularly the ones for corporate offences—for the multinational companies more than individual cases—should be much higher than they currently are, if they are going to be a deterrent to other multinational companies?

Mr Hopley: It is difficult for me to comment on individual cases. There is a guideline judgment which is used by the courts. It is a Court of Appeal judgment in the case of Howe & Son which made it clear that a fine should be sufficient to cause a real penalty for the company—not just for the managers of that but to make the shareholders aware—but not so severe as to result in bankruptcy or loss of jobs. It is for the court to make those decisions in individual cases and it is very difficult for me to second-guess what those may be.

Q247 Paul Flynn: We have had near unanimity of views from these bodies, the ones I mentioned earlier, saying that the fines and punishments were insufficient, inadequate. Do you really think this is a cause for anxiety?

Mr Hopley: I think it is a cause for anxiety if a number of respected organisations are suggesting that penalties are genuinely inadequate. I think I lack—and I would be interested in the extent to which they lack as well—the detail in those individual cases on which they are commenting. A lot of work is being done by colleagues in DEFRA to try to make sure magistrates and others are fully aware of the importance of the offences, and I think we need to keep doing that to make sure the courts and others are fully aware of the potential impact of some of these offences.

Q248 Paul Flynn: The figure you give for the number of offenders who receive an absolute or conditional discharge is 14%. This seems a high figure, knowing the number of cases which never actually get to court anyway. Is this a high figure? Is it peculiar to environmental crime or does it apply to other areas of crime?

Mr Hopley: I do not have that figure with me. My guess is that it is not that different.

Q249 Chairman: Perhaps you would like to give us that later.

Mr Hopley: We can write to you with that.

Q250 Paul Flynn: On the matter of sentences, do you think there is scope for having sentences such as ones that would make the offender remedy the position, in a very direct and relevant way: to clean up the graffiti or the fly-posting and so on? Do you think there is leeway for that?

Mr Hopley: Yes, I do. There are some powers already available for that. The Environment Agency has various powers to require remediation. I think, for things which are environmental offences but very much on the antisocial behaviour side as well. If there are repeat offences, where offenders really are creating a social nuisance and the accumulation of those offences and the seriousness is such as to get them into the community penalty bracket, then I think putting those offenders to work in graffiti cleaning or whatever is an excellent use of that sentence and a number of probation areas have work parties dedicated to that sort of activity.

Q251 Paul Flynn: This is an aspiration, I presume. I do not recall seeing remediation mentioned in your document.

Mr Hopley: It is not.

Q252 Paul Flynn: Is it used to any significant degree?

Mr Hopley: I would need to consult DEFRA on that and come back to you. There tend not to be powers within the criminal law, but the various enforcement agencies on the pollution and waste side have powers to require companies or individuals to rectify the nuisance they have caused, rather than that being a criminal sanction.

Q253 Chairman: Could I return to an issue raised by Flynn’s questions. You have said that you are concerned if respected bodies such as local authorities and the Environment Agency are anxious about the nature of the level of sentencing being handed out. But this is not a particularly new issue. There has been comment, adverse comment for some time, I think, from some of these respected bodies about it. If the Government is so joined up in its approach to these matters, why is nothing being done about it?

Mr Hopley: I am not sure that nothing is being done, with respect. Mr Chairman. We have the new penalties at the lower level which give local authorities additional power in terms of fixed penalty notices for graffiti and the like. We are also looking to see if more offences would be capable of being dealt with in that way. There is a cross-Whitehall review going on where departments have been asked to submit proposals to us and that period for submission has just closed and we will be reviewing those offences. It may well be that there will be some that fall within this environmental area that will fall within that ambit. In terms of views on sentencing generally, it is not uncommon for there to be views either one way or the other that sentencing is too harsh or it is too lenient in all types of crime. When those concerns come from reputable, serious organisations, one has to look at those and keep them in mind. The mechanism is that DEFRA is the lead body, the lead department, on most of the policy in this area. If there are things they believe should be changed in terms of penalties, then they will come to the Home Office and ask for that to be done, and Home Office ministers will then look at it and a collective government decision will be made.
Q254 Chairman: Have they made representations of that kind?

Mr Hopley: There were representations which led to some of the powers in the Antisocial Behaviour Act. I am not aware of any other current ones, though, as I have said, there is the review of fixed penalties currently underway.

Q255 Mr Challen: You said in your last answer to Mr Flynn that there are other ways of pursuing matters, particularly with companies, outside the criminal context. What are those ways? Secondly, should they not perhaps be incorporated into criminal law? Are we talking, for example, about individual bodies having to go out and sue a company to obtain some kind of result?

Mr Hopley: No. Of course the civil law penalties would be available. If there were an individual victim, someone who had perhaps suffered particularly because of an act of pollution, it would be open to that individual to sue the company concerned for civil damages. I was more thinking in terms, as I have said to Mr Flynn, of the powers that the Environment Agency or the water pollution people have to require companies (a) to stop polluting and (b) to put right the damage they have caused. My understanding is that those powers tend to be used quite a lot in terms of individuals or various small companies who offend infrequently, inadvertently without a huge amount of culpability. The bodies will have to decide in each individual case whether that sort of remedial action is sufficient or whether the public interest requires a prosecution to be brought. Certainly in serious cases, in cases with a large degree of culpability, then one would expect a prosecution.

Q256 Mr Challen: How many of those cases might there be?—not the ones which go to prosecution but the ones that are sorted out, as it were, in the first step.

Mr Hopley: I would need to check and come back to you on that. There is not comprehensive statistical information available, though DEFRA are working on a database that will have environmental offences which is due to come into operation later this year, but we will look at what we have and come back to you.

Q257 Mr Challen: Do you think there is a case that more of those should go to prosecution? Following on from that question, should magistrates have more alternative sentences available, so that they have a broader range of punishments or the ability to seek remedial action. I notice that 84% of cases which go to magistrates courts end up in fines, so they do not seem to be using alternative ways of dealing with environmental crime.

Mr Hopley: I think there are several issues on that. The first issue is whether more cases should go to court. It depends on what the objective is. If the agency, be it the Environment Agency or a local authority, believes that the degree of culpability is not large and that it can get a satisfactory result just from remedial action, then it is difficult to know what else would be added by going to court. If, on the other hand, a public point needs to be made—there is a clear public interest to secure a prosecution, perhaps to secure some adverse publicity for the individual or the firm involved—then I think it is right that that should go to court. Costs may be an issue but the prosecutors do have the ability to ask for their costs and perhaps should be a little more robust in doing that. As to the sentences of the court, the Sentencing Advisory Panel, when it looked at this area and very recently issued Magistrates’ Association guidelines, said that the fine will be the most appropriate sentence for cases of this nature, so it is not surprising that something like 80% end up with fines. Where there are more serious offences, then community penalties and in some cases imprisonment are available.

Q258 Mr Challen: Looking at what might be described as the bottom end of the scale, say, for example, unemployed people, people on benefits, they are obviously getting stung with fines as well when they commit environmental crimes. Do you think there should be more alternative sentences available for those people, which may focus more on remediation, for example?

Mr Hopley: Yes, I do. Indeed in the Courts Act 2003 there are provisions which we will be piloting, starting in April, to enable those who, as it were, can’t pay rather than won’t pay to discharge their fines by doing unpaid work in the community. Those pilots are going to be taken forward with voluntary organisations. For the people who genuinely cannot afford to pay, I think that sort of disposal would be ideal in these cases. There are other possibilities that the courts have available to them. For example, they can now impose driving disqualifications, which, if someone is repeatedly using a van to dump things may well be appropriate or—and again it has to be proportionate—there are those powers to seize what are called, in a rather ugly phrase, “instrumentalities of crime”. If, for example, a van were being used repeatedly to commit offences then the court would have available to it powers to confiscate that. Perhaps there is scope for courts to think a little more imaginatively in some ways as to what they might do in that sort of area.

Q259 Mr Challen: Do you think there is any kind of learning from the experience of drug treatment orders, where instead of having a custodial sentence, for example, people are forced to go through a period of drug treatment and testing and so on? We could have the same sort of thing here, could we not? Are those things being discussed in other contexts like environmental crime?

Mr Hopley: That is a very interesting comparison. I thought when you started the question, Mr Challen, you were going to ask about specialised benches, because that is something—

Q260 Chairman: We are coming to that.

Mr Hopley: I wait! Drug treatment I think is a particular case, where we are trying to get to something which as well has being a criminal
problem is also a medical problem, so there is definitely an addiction that needs to be treated. I am not sure if there is a similar addiction to fly-tipping, graffiti-ing, or whatever it was, but certainly were there anything that could be identified we would be very keen to look at that because what we are trying to do is stop people re-offending.

Q261 Mr Challen: These kinds of approaches are more about engagement with the offender, analysing why they offend and so on and trying to treat that, as opposed to the present system which relies heavily on fines. At the moment, are you able to say what percentage of fines are collected?
Mr McGladrigan: For the current financial year the payment rate at the end of September was 73%.

Q262 Chairman: So over a quarter are not.
Mr McGladrigan: That is the year to date: April to December.

Q263 Chairman: How does that compare with previous years?
Mr McGladrigan: We think performance is up. Direct comparison is difficult because for 2003–04 we changed the basis of the target and the formula that underpins it. For example, we focus now on fines, costs and compensation and we do no longer include large confiscation orders that used to skew the imposition rate quite significantly. That was announced back in October.

Q264 Mr Challen: Could I ask if that is 73% of the value of fines imposed or the number of fines imposed?
Mr McGladrigan: That is the value of fines.

Q265 Mr Challen: One can imagine that one of these, perhaps, Spanish fishing boats going off without paying its £100,000 fine might account for 27% of the total value of the fines not paid.
Mr McGladrigan: It certainly has quite an impact on those areas that have those problems. Dyfed Powys is one where they have a number of fishery related fines and it can have an adverse impact on their performance levels.

Q266 Mr Challen: For the broad range of fines imposed then, there is quite a high collection rate.
Mr McGladrigan: We are getting there. I that the payment rate before this year was not acceptable. The out-turn for 2002–03, albeit on a different basis, was only 55%. We therefore have launched a major programme of change to improve the ability of courts to enforce fines. While we see performance moving in the right direction, we have to monitor it closely, although we expect to hit this year’s target of 75%.

Q267 Chairman: Could you give us the percentage uncollected by number of fines issued?
Mr McGladrigan: No, we do not have that information. The systems do not generate it automatically. There is an issue around the number of fines that are consolidated—so a person can have ten or 15 fines on a system—which is to do with the age of the systems and should be resolved when we roll out the new strategic computer systems.

Q268 Chairman: At the moment, you do not have a clue how many fines are not collected.
Mr McGladrigan: Total number of fines, no. It is all cash related.

Q269 Chairman: It is probably quite high, is it not, because a lot of these will apply to very small fines of individuals, who are mobile and duck and weave?
Mr McGladrigan: The number of fines imposed a year are round about one million. We do not know how many people that involves, because there may be multiple offences.

Q270 Chairman: You probably should know, though, should you not?
Mr McGladrigan: We probably would, but the Legacy systems, because of their age, do not provide us with that information, and some courts have consolidated their accounts and some courts have not. It is an issue we are aware of and we are dealing with in this part of the Department’s IT strategy.

Q271 Chairman: When do you think you might have a system up and running that will enable you to gather that information?
Mr McGladrigan: The Libra system is already rolled out in terms of PCs on desks, but the functionality for this will be due towards the latter part of next year.

Q272 Mr Challen: Looking at corporate offenders, it must be quite difficult to start off determining who the culprit is within a corporation but how far up can you effectively chase culprits within the corporate hierarchy? Is that a problem for the courts and the prosecuting authorities?
Mr Hopley: Yes, it can be. Directors do have liability for what happens for offences that are committed by their employees. Where it is clear that company policy is to commit the offence, and it is not the man with the van who has decided to dump the waste into the river but actually his boss has told him to do that, then we expect both of them to be prosecuted. That does happen, and the more culpable the senior managers are then the higher one would expect those penalties to be. The difficulty is always establishing that link—and it is an evidential link, because, whilst it is absolutely right that those at the top should be prosecuted for something which they have caused, the court does need to be satisfied that they have indeed caused it. It would be unjust if a director were to be prosecuted for a totally idiosyncratic act by an employee of which he had no knowledge and there was nothing in the company’s policies and practices that would suggest that should have happened. So that is very difficult.

Q273 Mr Challen: It is difficult for individuals working for a company, including directors. If the company itself is found to be negligent and guilty, is
there any serious consideration being given in government to alternative ways of punishing a company, from the basic thing perhaps of their being forced to report offences in their annual reports, or forced share options, forced bonds issues, things of that sort?

Mr Hopley: There is nothing currently underway. There was a review taken of corporate offences about three years ago. There was a consultation paper and various views were submitted. That did not amount to a great deal, frankly. There was not, I understand, much consensus and there is no work currently underway on that.

Q274 Mr Challen: Should there be a principle that the offender always covers the full legal costs of a court case if that person loses?

Mr Hopley: I do not know if there should be an absolute principle. I think there should be a principle that he should if he can afford it. We are back, I think, to the position that I mentioned, that the court has to take into account the means of the offender as well. If it were a case that the company were to be bankrupted if it were to pay the full costs, then the overall outcome in terms of public good, if people were thrown out of work, may not be the best one. I think we have to look on the individual merits and the court has to weigh up what it wants to do in terms of compensation orders where appropriate, of fines and of costs—and normally the pecking order is that.

Q275 Chairman: Do you accept there might be circumstances where the greater public good were served by effectively killing off a company that had persistently and systematically engaged in criminal activity?

Mr Hopley: Yes, I think that is possible.

Q276 Mr Challen: We are now talking about environmental crimes, of course, and I guess these are fairly general principles, but should fines be, if you like, hypothecated to the remedy or to prosecution costs or whatever relates to that particular crime, rather than going into a central pot and being lost in some computer system upgrade or something?

Mr Hopley: I think we are in quite an area of policy development on that. For many years, the answer to that question was “Absolutely not” with the Treasury very much in the lead in saying no. I think there has been a change and there are various things. For example, local authorities are able to retain the money from the fixed penalty notices we were talking about earlier. There are provisions for police and local authorities in safety partnerships to retain some of the money that is gained from speed cameras, for example. So I think we are moving a bit further along that road. I suspect the extent to which we will go will depend in the end on where ministers decide the balance should lie.

Q277 Perhaps, if not fines, do you think at least the offenders in environmental crime should always be asked to remedy the damage that they have caused? Be it fly-tipping, pollution or whatever, do you think they should pay the full costs of remedying it?

Mr Hopley: If it is practical for them to do that and it is within their means, then I do not see why not.

Q278 Paul Flynn: You explained in your memorandum that the current guidance for magistrates is a toolkit called Costing the Earth. Are you happy that magistrates and the judiciary in general are properly trained in environmental law and have all the appropriate guidance?

Mr Hopley: Yes, I am happy that they are trained. I think magistrates have a real difficulty, in that, because of the relatively small number of these offences compared with the generality of cases they are dealing with, plus the fact that there are 35,000 magistrates all of whom are part-timers, they have the training, but, by the time they come round actually to seeing one of these cases, they will I think need to have their memories refreshed. That is where the toolkit and the recent guidance that was issued come in.

Mr McGladrigan: I think we also find that, more often than not, because of the point about cases not being that common, they tend to consult with legal advisors.

Q279 Paul Flynn: If it is item 16 on their list on a hot afternoon and they have not had a case for two years, it is not likely to have the attention that it should have.

Mr McGladrigan: I think it would have their attention. I think the issue would be refreshing their memory through consultation with a legal advisor on how the case should be handled.

Q280 Paul Flynn: Through all the evidence we have had has come this call for some kind of environmental tribunal. Professor Malcolm Grant did a Government-backed report and came out on balance very much in favour of some kind of environmental tribunal and Professor Macrory last year did another report which asked for an environmental tribunal. The arguments for this seem very powerful. What is your view?

Mr McGladrigan: I think from the DCA’s perspective that raises lots of logistical questions.

Q281 Paul Flynn: Is it—if this is a phrase that you wish to use—in an area of policy development and about which we will not be able to do anything in our life-time?

Mr McGladrigan: I think there are a number of issues to address. As it stands today, cases have to be heard in the area where they take place, so that which is actually needed is some form of tribunal for auditing EEC. You would then have to have sufficient numbers of magistrates trained to hear cases that come up infrequently. So there would be an awful lot to manage through there before you can actually—
Q282 Paul Flynn: You have given us all the negative arguments. The positive one—again coming through from all sides—is that magistrates, worthy as they are, cannot fulfil this function efficiently because of the rarity of cases and unusual cases that come up—the need for specialist knowledge—and if not one environmental tribunal, why not one within the devolved countries of the United Kingdom, or, indeed, regions of the United Kingdom, or others ideas for making sure that the courts have the specialist knowledge that much of the evidence before us says is required?

Mr McGladrigan: I certainly recognise the advantages in terms of expertise and skills and addressing concerns about whether the cases are being taken seriously, but as it stands today, we would have a lot of logistical difficulties in arranging that.

Q283 Paul Flynn: Very few worthwhile things can be achieved without difficulties. Whose responsibility do you think it could be for introducing this concept of the two professors?

Mr Hopley: Well, it depends how one wanted to do it. If one were simply going to set up a particular area court, then I guess that could be done when the Unified Courts Administration comes into being. If you wanted to take that slightly further and perhaps say that particular offences ought not to be dealt with in the general magistrates’ court but perhaps at an environmental tribunal, then there would need to be separate legislation to set that up.

Mr McGladrigan: I think the organisation that we would have to take that before would be Defra.

Q284 Paul Flynn: We are hoping to see Defra later on. In the intervening period, before we have the environmental tribunal, if we have a new array of alternative sentences that magistrates and the judiciary have at their disposal but with higher limits for fines, however, what would you think would be the best way of ensuring that the courts imposed those fines? Do you think it is a job for government to ensure that the sentencing more approximately fits the crime?

Mr Hopley: I think the Government has a role to play there. I understand that Defra are going out with various campaigning organisations to run seminars in each of the nine government regions of England, which will include magistrates and environmental prosecutors, and so on. These are due to take place in April, and the aim is to make sure that magistrates are fully up-to-date and aware of what is available to them.

Q285 Paul Flynn: Your memorandum ends on a very brief note. The final sentence says that “the Sentencing Guidelines Council will have a heavy work load”—of course—“and is unlikely to be able to turn its attention to environmental offences in the near future”. Is it going to stay permanently in this purgatory in the area of policy development, do you think?

Mr Hopley: I am not sure that policy development is purgatory.

Q286 Paul Flynn: Perhaps purgatory is too optimistic, because people come out of purgatory after a limited period. This sounds like a more permanent sentence?

Mr Hopley: I thought you were asking for longer sentences a moment ago. No. The Sentencing Guidelines Council is brand new. It has been set up by the Criminal Justice Act 2003.

Q287 Paul Flynn: This is not one of the priorities, you say?

Mr Hopley: It is not going to be a priority over the next, I would think not for a couple of years.

Q288 Paul Flynn: Well, the near future? Politicians chose phrases: soon; very soon; very, very soon, and so on; everything is going to happen tomorrow, sometime, never?

Mr Hopley: Well, the sort of period I had in mind when we said “in the near future” was over the next two years.

Paul Flynn: Okay; thank you.

Q289 Chairman: What are the priorities going to be instead?

Mr Hopley: The first priority is going to be to look at the new Sexual Offences Act, which was passed last year and completely reforms the structure of sexual crimes. There has been no guidance issued on that and the courts urgently need it. The second area that we have asked them to look at is the use of the new generic community sentence, which is one of the new sentences created under the 2003 Act. It brings together all the various options of community rehabilitation orders, community punishment orders and drug treatment and testing orders, etcetera, and it is important that the courts have got clear guidance as to how to use the very many possibilities that that sentence will offer.

Q290 Chairman: Clearly there is a heavy work load, as you say in your memorandum, but in the absence of any specific initiative on environmental crime via the new Sentencing Guidelines Council, what other options are available to government to move the agenda forward on environmental crime? You will be aware there is a growing feeling in the country that more needs to be done. It is not going to happen through the Sentencing Guidelines Council. Are there other ways in which you can achieve that?

Mr Hopley: I think that is very largely a matter for Defra rather than for the Home Office and that is something you will no doubt take up with them; but I think what they are doing in terms of going out trying to sort through some of the practical issues—why is it difficult to prosecute, why are fines not adequate if they are not adequate—and dealing on the ground with those who are involved and trying to raise the levels of education is important. I also think it is important to prosecute all those offences that need to be prosecuted: because, as I said previously, the fact that something will happen is a deterrent, and that is what we need. I think we are on an upward curve, but we need to maintain that and to sharpen the gradient.
Q291 Chairman: Mr McGladrigan, very briefly. I think this is one for you. Do you think there is any more that could or should be done to ensure that environmental crime, and in particular sentencing, is highlighted in the process of judicial training?

Mr McGladrigan: I think there has already been a fair bit of work done over the last few years to highlight environmental crime. It is not necessarily unique to environmental crime, but there is a lot being done in terms of getting impositions right, getting the sentence right, so that the other important part of the equation—enforcement—can happen in reality; and that will help with the deterrent if people actually believe that the penalties are going to be pursued and are going to have to be paid. I think that is an impact that we are taking very seriously at the moment and doing an awful lot about.

Q292 Chairman: Have you heard what we have heard, which is that there is a feeling out there that these crimes are not very well understood in court?

Mr McGladrigan: I think we have already said that the guidance that people think is necessary is out there. I think there is an issue about people not dealing with these cases very often but I’m not aware that they are taken any less seriously than other crimes that come before the Bench.

Q293 Chairman: There is a difference between taking something seriously and understanding it properly?

Mr McGladrigan: Yes.

Q294 Chairman: We need both.

Mr McGladrigan: Yes.

Q295 Mr Challen: Looking at the very local environment, perhaps a council estate or some area suffering multiple deprivation where we may find graffiti, fly-tipping and whole range of other forms of environmental anti-social behaviour, do you think there is a greater role for the NCJB or local justice boards to be involved in developing strategies to deal with that: because where people suffer from very low self-regard or low sense of worth clearly there is a need for local bodies to develop strategies to try and lift the whole area out of it, not, as you say, “Well, here is a couple of fines. Go away and do not do it again”?

Mr Hopley: I think that is a very fair point, if may say so. I am not sure it is the local Criminal Justice Board or whether it is the crime and disorder partnerships that we would look to in the first instance, given that they are dealing with crime prevention and general environmental crime issues. I think they do have a role to play. I think the youth offending teams probably also have a role to play in looking at this, not just as individual crimes, but, as you rightly say, the environment as a whole and how people behave and live their lives.

Q296 Mr Challen: But is there enough local joined-up thinking? We heard earlier on you saying that magistrates may not force somebody to remedy a situation if they felt that that person did not have the means to do so; but if they worked in partnership with the local council, the council may be able to provide certain facilities to help these offenders go ahead and remedy the situation. Do you think there is enough of that kind of partnership happening at the moment, or does it need a bit of encouragement?

Mr Hopley: I think we are getting there. I think that the way in which youth offending teams now, for example, go across a range, looking not just at the crime but at the circumstances behind them, the way the crime and disorder partnerships have brought together police, social services, local authorities and others and with the new fine payment pilots about to start in the courts, I think we are getting there. I would not say we have gone as far as we ought to, no, but we are certainly improving.

Q297 Chairman: Finally, if I can go back to an exchange we had earlier. You chose not to comment when I expressed some doubt as to whether or not environmental crime really had any meaning for you as a discrete area of the criminal justice system. Can I invite you to comment on that now?

Mr Hopley: We certainly are aware of the importance of some of the offences, and we are in dialogue with Defra over when we need to change things or are receptive to suggestions that the position is not as good as it might be; but to be absolutely honest in terms of my day-to-day job and life, environmental crime is not at forefront of my agenda, no.

Q298 Chairman: Well, thank you very much for that straightforward answer and also for your evidence today.

Mr Hopley: Thank you.

Supplementary memorandum from the Home Office

1. I am writing to offer further information as promised in my evidence to the Environmental Crime Sub-Committee on 12 February. I am sorry to have overshot slightly your deadline of 27 February.

2. At Q241, Mr Challen asked for a note on exceptional summary maxima. Paul McGladrigan is replying on the difficulties of enforcement, but I thought it might be helpful to the Sub-Committee if I were to provide some examples of exceptional summary maxima:

— there is a maximum of £250,000 for discharge of oil from a ship into certain UK waters contrary to section 131 of the Merchant Shipping Act 1991 as amended by section 7 of the Merchant Shipping and Maritime Security Act 1997;
— failure to comply with directions of authorised persons following a marine accident (generally to avoid or minimise pollution) can attract a maximum fine of £50,000 under section 139 of the Merchant Shipping Act 1995;
— offences contrary to section 11 of the Sea Fish (Conservation) Act 1967, as severally amended, have a maximum fine of £50,000; and
— offences of depositing control waste in improper ways contrary to section 33 of the Environmental Protection Act 1990 attract a maximum fine of £20,000.

3. All of these offences attract unlimited fines in the Crown Court; and they also carry penalties of imprisonment (and, by extension, community sentences). DEFRA is at the moment consulting on whether the summary maximum under the last of the offences mentioned should be increased to £50,000.

4. In my answer to Q249, I promised to provide a figure for the percentage of cases that end in absolute or conditional discharge. Mr Flynn suggested that 14% seemed high. In fact, it is slightly lower than the average for all indictable (including triable either way) offences, which is 15%. The percentage varies for different groups of crime and ranges from 21% for criminal damage down to virtually nothing for robbery.

5. At Q252, Mr Flynn asked about remediation. I said that I would need to consult DEFRA, and they have now kindly provided the following advice about remediation on licensed waste disposal sites. Every site that deals with waste should be licensed or register as exempt with the Environment Agency. The Agency has various powers to act against licensed sites that are operating against their licensed conditions. Normally DEFRA would encourage any pollution or illegal disposal of waste to be prosecuted. There are powers to make sure that the pollution or waste is cleared up but then, as a crime has been committed, DEFRA would also expect the authorities to prosecute where sufficient evidence existed.

6. Other powers are available to help deal with the illegal disposal of waste. Under section 33 of the Environmental Protection Act 1990, local authorities and the Environment Agency have power to issue a notice on the occupier of the site requiring him to remove the waste from the land within a specified period and to take within that period specific steps designed to eliminate or reduce the consequences of the deposit of the waste. If the notice is not complied with, the Local Authority or the Agency can enter the land and clear the waste themselves and recover the cost from the occupier. As part of their fly-tipping strategy, DEFRA are proposing to amend the powers to issue notices so that they apply to land owners as well as to occupiers.

7. Finally, at Q256, Mr Challen asked how many cases there may be that were resolved without prosecution. I have checked with DEFRA, as I undertook to do, but no information is currently available. From April 2004, there will be a “flycapture” database that will collect information with regard to the actions that local authorities and the Environment Agency take to deal with incidence of fly-tipping. It will therefore pick up numbers of investigations, notices served and prosecutions in respect of fly-tipping.

8. I trust that this information will be helpful to the Sub-Committee.

March 2004
Written evidence

APPENDIX 1

Memorandum from the Bat Conservation Trust/RSPB¹

1. Over a two year period April 2001 to March 2003 there were six successful prosecutions relating to bats. The total fines for all the prosecutions was only £2,600 (the maximum fine is £5,000 per offence). There were no prison sentences. Bats are declining and endangered and the fines received for the offences do not reflect the seriousness or the effect on bat conservation. A total of 98% of bat offences reported involved roosts (and therefore whole colonies of bats) rather than individual bats, increasing the conservation significance.

2. No. During the two year period April 2001 to March 2003 a total of 144 offences against bats were reported. 67% were as a result of development and building work, often by large companies. A number of companies told bat groups that unless they saw the law being enforced they would continue to ignore the legislation. Other companies told the police that it would be cheaper to pay the fines than to properly take bats into consideration during building works. The fines for damaging or destroying a roost ranged from £200 to £1,500. In each case this would be less than it would cost to properly take the bats into consideration.

3. The introduction of prison sentences under the Wildlife and Countryside Act 1981 could make a difference, but it remains to be seen if they are handed out for any bat crime. Prison sentences are urgently needed under The Conservation (Natural Habitats, etc) Regulations 1994.

4. I try to provide CPS with a case file for each bat prosecution, which details the conservation significance of the case and the need for appropriate penalties in order to act as a deterrent. I understand that WWF has produced sentencing guidelines for wildlife crime for magistrates.

5. In previous bat cases my case file has been used by the crown prosecutor. I do not know if the WWF guidelines are being used.

6. Unknown.

January 2004

APPENDIX 2

Memorandum from the Confederation of British Industry (CBI)

The CBI notes the appointment by the Environmental Audit Committee of the House of Commons of a Sub-committee which will examine how the Government and judiciary are helping to secure access to environmental justice in England and Wales and the intention to hold a series of inquiries, the first of which will look into environmental crime and the courts, in particular the appropriateness of environmental sentencing.

The Confederation of British Industry (CBI)—with a direct company membership employing over 4 million and a trade association membership representing over 6 million of the workforce—is the premier organisation speaking for business in the UK. The CBI represents manufacturing and service companies across all sectors and sizes of business.

In relation to the above enquiry the CBI would wish to offer the following general comments.

BUSINESS SUPPORT FOR EFFECTIVE INSPECTION AND ENFORCEMENT

Reputable businesses seek to comply with legislation, indeed many set their own standards which go beyond legislative compliance. Legislation that is science based and the punishment proportionate are respected by business. CBI and its member companies support effective enforcement to create a level playing field for all. However where pollution is the result of multiple activities of business, public bodies and the public, the temptation to take the easy option and go after the apparent “deep pockets” of business should be resisted.

PROSECUTION AND OTHER ENFORCEMENT MEASURES

This inquiry should be set in context with the published enforcement policy of the Environment Agency, which has been subject to consultation with stakeholders. In particular the Agency consider the purpose of enforcement is to ensure that preventative or remedial action is taken to protect the environment or to secure compliance with a regulatory system.

They have other powers than prosecution eg works notices, prohibition notices, suspension or revocation of environmental licences, variation of licence conditions, injunctions and the carrying out of remedial works, where if the Agency has carried out remedial works, it will seek to recover the full costs incurred from those responsible. These measures may be far more effective in achieving the desirable environmental objectives and the costs to those responsible more onerous than those from fines or other costs associated with prosecutions and hence may be a more effective deterrent.

The CBI supports the raft of measures available to the Agency to be considered in their entirety to achieve proportionality in the application of the law and in securing compliance; consistency of approach, transparency about how the Agency operates and what those regulated may expect from the Agency, and targeting of enforcement action. Public expenditure on the provision of enforcement services for environmental law should remain under close control and be proportionate to the problem that they are set up to address.

ENVIRONMENTAL CRIMES PUT IN PERSPECTIVE WITH OTHER CRIMES

Whilst environmental crimes may affect significant numbers of people, and the range of laws governing such crimes crosses the public/private law divide, we do not necessarily agree that they often go unpunished. This assertion should be tested against other fields of criminal legislation and the cost effectiveness of enforcement in seeking to achieve its objectives. The structure of environmental duties and laws is such that not all have equal importance and urgency nor do breaches of them have equal consequences. The CBI fully supports a system that in all its aspects of enforcement, motivation and punishment is able to differentiate those who act with criminal intent from those who have applied themselves diligently but have had a momentary lapse. Even in the best run facilities, there are upset conditions which may cause temporary pollution, decisions to prosecute and the appropriate punishment should take into account factors such as those below:

The gravity of the offence:
  — a serious and obvious breach of the duty that fell far short of what was reasonable and practicable;
  — a continuing and systematic failure to control risks rather than an isolated lapse within a well described and implemented management system; and
  — carrying out an operation without the necessary permit or licence.

Prior knowledge and corporate history:
  — failure to heed recent and relevant written warnings; and
  — previous offences of a similar nature.

The motive:
  — deliberately and knowingly seeking to profit from failing to take the necessary steps, specifically running a risk to save money.

The scale of sanctions for environmental crimes should be commensurate with the seriousness of the environmental offence (measured in both its immediate impact and also in the broadest terms of its foreseeable and realistic effect on sustainable development) but also be put in perspective with other comparable offences.

GENERAL LEGAL DEVELOPMENTS ON THE OBJECTIVES OF SENTENCING

This enquiry on environmental crime and sentencing should be looked at in parallel with the general debate on access to justice, the criminal justice system and sentencing, which is considering questions such as “whether the penalty should fit the crime or the ability of the criminal to pay”. Currently there are three major aspects in sentencing for crimes—to punish wrongdoers, to deter them or others from crime and for society to have an opportunity to exact retribution. Not all have equal validity for each crime and the arrangements for sentencing should be sufficiently flexible so that the most appropriate objective can be achieved with consistency and transparency. Particularly under environmental law, civil law and the developments on environmental liability there are other more effective mechanisms for restitution and remediation.

ACCESS TO JUSTICE

Access to justice should be structured in such a way that it supports those who have a legitimate concern but prevent those who may make vexatious claims from damaging those who go about their business honestly.
TARGETING THE PERPETRATOR

There are many duty holders for environmental responsibilities and there can be many perpetrators of environmental crimes. Businesses are also the victims of a wide range of crimes such as waste and pollution from unauthorised tipping onto their sites and their employees being subjected to antisocial behaviour. It is important that businesses should not be punished for the activities of the unregulated simply because enforcing authorities do not have the relevant power.

We do not offer comments on the appropriateness of the sentencing to the seriousness of environmental crimes as unless the full facts of the case are heard it is not easy to draw a judgement and there are always commentators that, from their perspective, will feel aggrieved by apparent inconsistencies across a range of instances. However this is not only true for environmental crimes but is similar for crimes in general. Many of the CBI member organisations will be offering comments on general points and will be able to provide examples to illustrate their positions on the specific questions. We would however wish to comment on some recent studies.

ERM SURVEY OF SENTENCING

The recent ERM study provides a good analysis of the sentencing record of magistrates and Crown Courts and the CBI would like to highlight the following issues covered in that report. Although magistrates have a very low level of exposure to environmental offences (fewer than 0.2% of the cases heard), they are well placed to make judgements about environmental standards in relation to sustainable development seeing particularly the impact on a local community.

Fines should relate to the circumstances of the case so their variation around the country is unsurprising. Magistrates are also well placed to relate the level of environmental fines to society’s view of environmental crimes in relation to other crimes.

The impact of the sentencing guidelines for magistrates on environmental offences again should be compared with the effectiveness of similar guidelines for other offences.

Any fundamental rethink about the structures and processes of environmental law should go in tandem with the general legal debate.

PRESENTATION OF STATISTICS BY THE ENFORCING AUTHORITY

The CBI is concerned about the presentation of prosecution statistics in for example the publication Spotlight on business environmental performance 2002 for example comments such as “although there was an increase in total fines increase to GBP 3.6 million from GBP 2.7 million the previous year . . . the average fine remains low at GBP 8,744 and the EA states that although the average fine is increasing, it is still not at a level high enough to encourage some companies to respect the environment” are often taken out of the wider context which is often more positive. Such reports should be presented more neutrally, as they could equally be seen as a comment on the effectiveness of the enforcers and their legal presenter rather than the implied criticism that the view of the Courts on the facts of the case presented to them is somehow biased or inadequate.

January 2004

APPENDIX 3

Memorandum from the Environmental Industries Commission (EIC)

RE: SUBMISSION ON INQUIRY INTO ENVIRONMENTAL CRIME

Thank you for the opportunity to take part in this inquiry. We set out below the views of the EIC on some of the questions the Environmental Audit Committee is considering, as well as raising some additional points we believe to be of relevance to the Committee’s inquiry.

INTRODUCTION

The Environmental Industries Commission (EIC) was launched in 1995 to give the environmental technology and services industry a strong and effective voice with Government.

With over 240 Member companies EIC has grown to be the largest trade association in Europe for the environmental technology and services industry. It enjoys the support of leading politicians from all three major parties, industrialists, trade union leaders, environmentalists and academics.
FINE LEVELS

EIC considers that fines must be high enough to encourage businesses to make the investment in environmental technology, effective environmental management systems and staff training necessary to ensure legal compliance with environmental regulations. Low fines send the wrong message in trying to create a culture where environmental compliance is taken seriously by industry.

The experience of EIC Members is that companies too often find it more economical to pay a fine than to properly address their environmental performance. EIC, therefore, believes that the current fines for environmental offences are both too low and inconsistent and that they need to be dramatically raised to have a real economic impact and deter companies from polluting the environment.

The experience of EIC Members is supported by recent research on behalf of DEFRA. “Trends in Environmental Sentencing in England and Wales” reveals “a lack of consistency in environmental sentencing”. It also notes that, whilst there has been a small recent increase in fine levels in Magistrates’ Courts (to an average £2,730 in 2001–02), fine levels have actually dropped sharply in Crown Courts (to an average £4,600 in 2001–02). It is clear that fines at this level are not a deterrent even to small companies, let alone to large corporations.

It is instructive to compare these sentences with those handed out in the USA, which regularly reach millions of dollars. For example in October 2003 Chevron Texaco paid a $3.5 million civil penalty for air emissions and reached an agreement with the US EPA to spend an estimated $275 million to reduce emissions at five refineries.

In the UK, fines for companies who behave anti-competitively regularly amount to millions of pounds. Argos was recently fined approximately £17 million for price fixing, whilst Littlewoods was fined approximately £8 million.

SENTENCING GUIDANCE

Guidance issued by the Magistrates Association and the sentencing principles enunciated by the courts in cases like R-v-Howe and R-v-Milford Haven Port Authority, appear, in the main, to follow the approach taken in other areas of sentencing and to strike an appropriate tone. In the Howe case, the Court of Appeal emphasised that any fine should reflect the gravity of the offence and the means of a corporate defendant and be large enough to send a clear message to the company’s managers and shareholders. This statement is repeated in the latest guidance from the Magistrates Association.

The problems appear to lie with the approach taken by individual Crown Courts and magistrates’ courts. For most courts, sentencing for environmental offences will be a relatively rare part of their workload and they will be far more accustomed to dealing with individuals (as opposed to corporations) and, in the case of magistrates courts, involved with traffic offences or petty crime. There may be a degree of disinterest, novelty and/or nervousness when dealing with corporate offenders and environmental offences, which may be contributing to the low levels of fines.

To counter the current trends may require either greater expertise and familiarity with sentencing issues in the form of a specialist tribunal, or the provision of more prescriptive sentencing guidelines. By way of example, companies indulging in anti-competitive behaviour will be dealt with by a specialist tribunal and may be liable to a financial penalty of up to 10% of their UK turnover for each year of the infringement, up to a maximum of three years.

The EIC also believes that, in addition to current principles of determining sentences, as laid down in the guidance, it may also be appropriate to include the costs that the company has avoided by not implementing proper environmental policies and safeguards

A GREATER FOCUS ON CORPORATE DECISION MAKERS

Experience suggests that a focus on corporate liability alone is not by itself sufficient to ensure acceptable standards of behaviour. Making directors and other decision-makers in a company responsible for the activities of their companies, is increasingly regarded as an effective mechanism for increasing standards.

Competition law adopts a dual pronged approach—companies may be subject to substantial civil penalties, whilst individuals are subject to criminal sanction and may also be subject to disqualification as a director. In addition there are significant incentives to encourage individuals to disclose wrongdoing by corporates, including immunity from prosecution.

ENVIRONMENTAL PREVENTION AND CLEAN-UP

In addition to punishing companies/directors for environmental damage, cleaning up the damage is also important. Whilst there is statutory provision for the criminal courts to order an offender to remedy the environmental harm caused, it is not apparent that this is often used. Earlier guidance to magistrates recommended a greater use of compensation orders but this does not appear to have occurred (this may be because of uncertainty in applying the concept to environmental offences). In competition law, other
mechanisms for dealing with offenders, aside from public law enforcement by way of sanctions, include provision for victims of any anti-competitive behaviour to sue offending companies for losses incurred. For example, having been fined for price fixing of vitamins, Hoffman La Roche was sued by companies incurring resulting loss.

Furthermore there should also be more focus in the Courts on ordering measures to prevent future pollution incidents and in particular the use of Best Available Techniques to prevent and control pollution in the future. This is a major feature of sentencing for environmental cases in the USA.

**THE USE OF CIVIL PENALTIES**

Recent research sponsored by DEFRA has advocated a new system of civil penalties for environmental offences to allow a more proportionate response to lesser offences. Part of the rationale for the suggestion is that criminal prosecutions can be difficult and time consuming. Experience suggests that regulators can be reluctant to take the draconian step of initiating a prosecution.

The competition authorities may provide a useful model in this regard (the Office of Fair Trading and the Competition Appeals Tribunal). By analogy the Environment Agency could be provided with powers to fine companies who fail to comply with regulations. A right of appeal to a specialist tribunal would satisfy human rights requirements and ensure that specialist bodies are taking decisions on sentencing. The use of the criminal law could be reserved for the most serious offences where the opprobrium associated with criminal sanction is appropriate. This has the advantage of avoiding the current position where, as liability for environmental offences is in most cases strict, companies who behave well and are, for example, the victims of vandalism causing environmental damage, will nonetheless be guilty of criminal behaviour.

**CONCLUSIONS**

— EIC believes that fines for environmental offences are currently too low and must be dramatically raised to provide an effective deterrent and to encourage sufficient investment in environmental performance.

— Whilst the guidance on sentencing and the approach of the courts in the leading cases on sentencing appears reasonable, individual courts appear to lack the necessary experience to apply the principles with sufficient rigour. Solutions may include the development of a specialist tribunal with sufficient expertise or more prescriptive sentencing guidelines.

— EIC considers that new methods of calculating fines should be introduced to take into account the costs that the company has avoided by not implementing proper environmental policies and safeguards.

— It is not sufficient to focus only on corporate behaviour. Making individuals take responsibility for the activities of companies in increasingly seen as an effective way of raising standards.

— Punishment should not be the only objective in responding to environmental damage. Clean up of the damage is another important aspect and the criminal courts should be encouraged to make much greater use of their powers in this regard.

— Use of the criminal law may not necessarily be the only response to environmental offences. Competition law provides a model of a two pronged approach making use of civil penalties, a specialist tribunal and the criminal law. Use of the criminal law could then be reserved for the most serious environmental offences.

*January 2004*

**APPENDIX 4**

*Letter to the Clerk and Memorandum from Environmental Justice Project, WWF*

**RE: ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES— ENVIRONMENTAL CRIME AND THE COURTS**

The Environmental Justice Project (EJP) is pleased to submit evidence to the Environmental Audit Sub-Committee inquiry into Environmental Crime and the Courts.

You will know from your conversations with Pamela Castle, the EJP comprises the Environmental Law Foundation (ELF), Leigh, Day & Co Solicitors and the World Wide Fund For Nature (WWF-UK). For the last 15 months, the EJP has been conducting a review of access to environmental justice in relation to civil and criminal procedures in England and Wales, with a view to identifying inadequacies and making recommendations for change. Our final report will be published in March 2004 and represents the first in depth investigation into the efficacy of environmental justice under all areas of environmental law (both criminal and civil) in the 21st century.
We are pleased to enclose a Memorandum addressing the specific questions raised by the Committee, and also enclose a copy of our (near) final Report. The findings in the Criminal section are largely drawn from a statistical analysis of data (over geographical region and time) in both the Magistrates and Crown Courts together with subjective views on environmental crime obtained from Government departments, statutory agencies and NGOs from 1995 to date, for which we acknowledge funding from DEFRA.

This section of the Report also includes, uniquely, a survey of enforcement procedures undertaken in some 40 District and Unitary Authorities, gathered via telephone interviews, due to the extremely limited availability of public data in this area.

Please also note that we have distinguished between environmental crime and wildlife crime, which coincides with your investigations.

We hope that this information assists the Sub-Committee in its deliberations. The EJP would, of course, be pleased to submit oral evidence to amplify these points. I am aware that Paul Stookes, Chief Executive of ELF, has been appointed advisor to the Sub-Committee, but should you wish to contact Pamela, Martyn or me our details are provided below.

Memorandum by the Environmental Justice Project, WWF

ENVIRONMENTAL JUSTICE PROJECT (EJP)

1. This Memorandum is submitted on behalf of the EJP, which comprises Pamela Castle (Chairman, ELF), Martyn Day (Senior Partner, Leigh, Day & Co Solicitors), Carol Hatton (Solicitor, WWF-UK) and Paul Stookes (Chief Executive, ELF). Personal biographies and a brief summary of the organisations represented can be found in the opening pages of our Report entitled Environmental Justice?—A Report by the Environmental Justice Project.

2. In brief, the EJP was formed in September 2002 as a result of a meeting convened by the (then) Environment Minister, Michael Meacher MP. Since then, its purpose has been to review the operation of environmental law in England and Wales, to identify any inadequacies with regards to access to justice and to make recommendations for change. It covers, amongst other things, environmental crime, in accordance with your definition. As such, the EJP is ideally placed to submit evidence to the Sub-Committee. Our final report will be published in March 2004 and represents the first in depth, across the board investigation into the efficacy of environmental justice in the 21st century.

QUESTIONS

Q1. Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

Evidence gathered by the EJP suggests that this is not the case. Our Report includes a number of case studies illustrating this point, but perhaps Environment Agency v Milford Haven Port Authority best illustrates the extent of the present disparity between the penalty imposed and the level of environmental damage that may result. In 1999, Cardiff Crown Court imposed a fine of £4 million (plus £825,000 costs) on Milford Haven Port Authority for pollution caused when 72,000 tonnes of crude oil spilled from the “Sea Empress” tanker outside Milford Haven, damaging 38 Sites of Special Scientific Interest (SSSI) and killing thousands of seabirds. In 2000, the Court of Appeal reduced this fine to just £750,000 on the grounds that the fine should not “cripple the port authority’s business and blight the economy of Pembrokeshire”. By way of contrast, the Environment Agency estimated the costs of clean-up and salvage to be between £49 and £58 million, and the effects on tourism in Pembrokeshire were calculated at between £20–28 million during 1996 alone. Such a fine cannot, in any sense, be regarded as proportionate to the environmental damage caused.

3. It is widely recognised that fines take into account many more factors than culpability and environmental impact including, in particular, the defendant’s ability to pay. In practical terms, this is best illustrated by examining the average fines for prosecutions progressed by the Environment Agency between 1999–2002 (see Table 1, below). It can be seen that the fines for fisheries and navigation are much lower than those for offences relating to process industry regulation and radioactive substances regulation, reflecting the fact that they are generally imposed on individuals rather than on corporate bodies.

2 Attached to this submission.
5 See http://www.environment-agency.gov.uk/regions/wales/issueswales
6 Welsh Economy Research Unit, Cardiff Business School and Welsh Institute of Rural Affairs Studies. The Economic Impact of the Sea Empress Spillage. Welsh Economic Review.
Table 1
AVERAGE FINES FOR PROSECUTIONS PROGRESSED BY THE ENVIRONMENT AGENCY
(1999–2002)7

<table>
<thead>
<tr>
<th>Offence</th>
<th>Average Fine (£)</th>
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</thead>
<tbody>
<tr>
<td>Water resources</td>
<td>2,180.19</td>
</tr>
<tr>
<td>Radioactive substance regulation</td>
<td>9,621.25</td>
</tr>
<tr>
<td>Process industry regulation</td>
<td>20,462.96</td>
</tr>
<tr>
<td>Flood defence</td>
<td>1,542.86</td>
</tr>
<tr>
<td>Navigation</td>
<td>371.11</td>
</tr>
<tr>
<td>Fisheries (non-standard offences)</td>
<td>277.33</td>
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<tr>
<td>Waste</td>
<td>2,826.76</td>
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<tr>
<td>Water quality</td>
<td>6,233.97</td>
</tr>
<tr>
<td>All</td>
<td>4,208.99</td>
</tr>
</tbody>
</table>

4. In *R v Yorkshire Water Services Ltd*8, the Court of Appeal set out a number of considerations a sentencing court ought to bear in mind. These included: (a) the degree of culpability involved in the commission of such offences of relatively strict, though not absolute, liability; (b) the damage done in a spatial and temporal ambit and its effects; (c) the offender’s previous record, including failure to heed warnings; (d) that a balance had to be struck between a fitting penalty and the effect of that penalty on an already under-funded organisation; (e) the offender’s attitude and performance after the events, including the plea; and (f) that it should determine for any one incident, rather than add up the manifestations of that incident as represented by the courts, in that indictment.

5. The Environment Agency appeared as an interested party in *R v Anglian Water Services Ltd sub nom Hart v Anglian Water Services Ltd*9 and sought to persuade the Court of Appeal to provide tariff guidance for such offences. The Court of Appeal held that the fine of £200,000 had been “manifestly excessive” (reducing it to £60,000) and also declined to give tariff guidance on the basis that cases must be sentenced on a case by case basis. The Environment Agency now believes that it is unlikely that any tariffs or guidance will be forthcoming and, accordingly, sentencing will be dependent very much on the expertise of the sentencing judge or bench.

6. Whilst reporting that total fines imposed in prosecutions are rising10, the Environment Agency believes the fines in environmental cases remain “too low” and should routinely include the costs of clean-up and restoration. This is borne out by the conclusions of *Spotlight on business environmental performance 2002*11 which reports that although fines for environmental offences are increasing, they are still not high enough to encourage some companies to respect the environment. However, the Agency also pointed out that financial liability does not always end with a fine. A company may have to improve its practice around the country to ensure future compliance—and incur costs of a much higher order of magnitude. In one case, a manufacturer of domestic fridges breached its duty of care and was fined £2,000—but had to spend in excess of £250,000 to ensure future compliance.

7. The Drinking Water Inspectorate (DWI) reports that because prosecutions in relation to drinking water are relatively rare, and magistrates have little experience in this field, there has tended to be a wide differential in the levels of fines imposed. However, the Inspectorate was pleased to report the Water Act 2003 has increased the fine on summary conviction for supplying water unfit for human purposes from £5,000 to £20,000, which has brought the penalty for this offence in line with other environmental offences.

8. A survey of some 39 district and unitary authorities conducted by the EJP found that, generally, respondents were unsatisfied with the level of fines imposed given the statutory maxima12. Ten reported the fines were “low, poor or insignificant” and another four were “very unsatisfied”. In fact, of the 39 approached, only four were “satisfied” with the current level of fines. Five noted that fines are often lowered as ability to pay is considered or if it is a first offence, and two noted that the fine may be reduced on appeal. A number of authorities also noted a variable fine rate with respect to commercial or domestic cases. The same survey revealed that roughly half (20) of the 39 district and unitary authorities sampled do not perceive there to be any correlation between the level of fine imposed and the nature of the offence/environmental damage caused.

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7 EJP Report, Appendix 5, figure 2.5.
9 TLR 18/08/2003.
10 The Thames Region of the EA reports that the total fines imposed in prosecutions completed in 2001–02 amounted to £366,348. This rose substantially in 2002–03 to £727,930 (an increase of almost 100%). Within this, water quality prosecutions recorded an increase in fines of 139% and waste prosecutions an increase of 275%.
11 *Spotlight on business environmental performance 2002* shows the average fine per company prosecution in 2002 was £8,744—36% higher than in 2001.
12 EJP Report, Appendix 9 and paragraph 203.
9. In terms of practitioners responding to the EJP, a number of solicitors and barristers indicated they were “not satisfied” with the penalties routinely imposed in the Magistrates’ Courts. Ashurst Morris Crisp solicitors reported that penalties for criminal offences are “not consistent nor proportionate”. One barrister routinely instructed to represent companies stated “there are no doubt a number of cases where the gravity of the case has not resulted in a fine of significant impact”, whilst another noted dissatisfaction that there is “an inadequate reflection of corporate culpability”.

10. Finally, the EJP notes that the average fine per case in relation to health and safety offences in 2001–02 was 39% higher than in previous years. The Health and Safety Executive (HSE) reported that whilst there is still some way to go “we hope that this is a step towards fines which are truly proportionate to seriousness and which better reflect huge variations in the “wealth” of organisations”\(^\text{13}\). Many EJP respondents believe a similar line of reasoning should be applied to sentencing in environmental cases.

11. For these reasons, the EJP recommends the production of tariff guidelines (as opposed to Guidance) for environmental offences. Furthermore, when sentencing, the judiciary should place particular emphasis on the environmental or ecological impact of an offence. Wherever possible, the level of fine should reflect the level of damage and any economic gain arising from the offence.

Q2. Are sentences properly set to act as a deterrent?

12. Again, evidence submitted to the EJP suggests that this is not the case. Paragraphs 208–213 of our Report address proportionality, ie whether the current fines imposed by the courts provide an effective deterrent to would-be and/or persistent offenders.

13. With regard to environmental crime (as opposed to wildlife crime), the Environment Agency believes that higher fines do represent an effective deterrent to individuals, who tend not to repeat offend for fear of larger fines. However, the Agency does not perceive a general deterrence in the fines imposed on operators, possibly because savings of significant amounts of money can be involved in some of these offences. Generally, it seems that sentencing is not sending out stark messages to determined offenders.

14. In the light of this, the EJP recommends the Courts utilise the full range of sentencing options available to them including, where appropriate, custodial sentences, the fining or imprisonment of company directors, the disqualification of company directors under the Company Directors Disqualification Act 1986 and the imposition of Community Service Orders\(^\text{15}\). We were somewhat disappointed to find, from our own research and that conducted by Environmental Resources Management Ltd, that the current use of such measures is very low\(^\text{15}\).

15. The Environment Agency also highlighted the effectiveness of conditional discharges or deferred sentences (whereby companies are put “on probation” for a period of time). In certain circumstances, a conditional discharge can be an effective penalty for corporate offenders, particularly in relation to offences where the actual environmental impact may be low, but the operational failure high. In such situations, during the period of the discharge the convicted company is very much at risk in relation to any repeated breach. It would then fall to be sentenced for the new breach and the original offence. The Agency reports that companies have acted positively to improve their operating practices and environmental performance to prevent repetition.

16. Finally, our survey of district and unitary authorities revealed that 28 of the 39 do not believe the current level of fines act as a deterrent to would-be offenders\(^\text{16}\). This is thought to be because it is cheaper to offend (3) or that other measures (eg fixed penalties or the threat of eviction) are a more effective deterrent (5).

Q3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

17. The EJP refers the Sub-Committee to the points made under Questions 1 and 2, above.

Q4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

Q5. Are magistrates and other courts following any guidance available?

\(^\text{13}\) Health and Safety Executive (2002) Health and Safety Offences and Penalties 2001–02. HSE.


\(^\text{15}\) The average use of custodial sentences across all regions in England and Wales is 1.2% and all other types of sentence, including Community Service Orders, conditional/absolute discharge, compensation etc are used infrequently (from 4.9% to 8% in the Crown and Magistrates’ Courts respectively. See Dupont, C and Zakkour, Dr P (2003) Trends in Environmental Sentencing in England and Wales. Environmental Resources Management Ltd (ERM).

\(^\text{16}\) EJP Report, Appendix 9, Survey Analysis, question 6.
18. EJP respondents report the handling of environmental cases in the Magistrates’ Courts to be quite variable\textsuperscript{17}. The Chartered Institute for Environmental Health (CIEH) feels that this is due to an “inevitably lay view of environmental issues which reflects the communities [magistrates] serve”. However, whilst the CIEH believes this is “not inappropriate”, many district and unitary authorities believe the Courts should provide a more level playing field. For example, our survey revealed that 11 of the 39 sampled do not believe the Magistrates’/Crown Courts understand environmental issues. Six believe that training or independent expertise is needed.

19. The Sub-Committee may be aware that the Magistrates’ Association and the Environmental Law Foundation published guidance\textsuperscript{18} for magistrates in 2002. Many EJP respondents referred to the positive contribution such guidance may make in the future\textsuperscript{19}, whilst recognising that it may be too soon to evaluate its impact. For example, our survey of district and unitary authorities revealed that only four of the 39 sampled believe the guidance has improved magistrates’ understanding of environmental issues.

20. We also note the guidance only covers the Magistrates’ Courts. There is an important distinction to be made between the Magistrates’ and Crown Courts. Crown Court judges encounter fewer cases (because of enhanced statutory maxima) which tends to keep environmental cases in the Magistrates’ Courts. Furthermore, the Environment Agency noted that Crown Court judges routinely deal with serious criminal offences of a very different nature and have not enjoyed environmental training—which may make it difficult for them to sentence such offences. As a result of this, we recommend that judicial training be extended to encompass Crown Court judges (a responsibility of the Department of Constitutional Affairs).

21. Clearly, Magistrates’ Courts should be urged to apply the “guidance for Sentencers” in environmental cases, but we are also recommending that an appropriate body (eg the Magistrates’ Association itself) should monitor and evaluate the effectiveness of the Guidance. We also believe that the guidance should be expanded to cover other environmental offences (eg s. 70 Water Act 1991 and other “bread and butter” issues dealt with by the Police Service and the RSPCA) and to include information on “sustainable development” (see Question 6, below). Finally, the guidance should also be adapted for use in the Crown Courts and other UK jurisdictions—and its effectiveness duly monitored.

22. In addition to the above, one practitioner suggested that it may be helpful for Magistrates’ Courts to have an independent court adviser on environmental impact, who answers to the court rather than to the prosecution or the defence, and assists the court in interpreting the evidence on environmental impact.

Q6. To what extent are Courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

23. Regulatory authorities questioned by the EJP were asked whether they felt the Courts understand environmental issues and treat them seriously enough\textsuperscript{20}. The Environment Agency reported that it has made efforts to educate magistrates—and, as a result, believes they do understand environmental concepts such as the “precautionary principle” and the “polluter pays”\textsuperscript{21}. On the other hand, English Nature noted that on occasion magistrates “struggle to understand the issues”\textsuperscript{22}. Similarly, 11 of the 39 district and unitary authorities approached by the EJP do not believe the Magistrates’/Crown Courts understand environmental issues. As the practitioners’ views were also rather mixed, it seems that magistrates’ understanding of environmental issues is somewhat variable.

[Concluding Remarks]

24. This concludes our written submission to the Inquiry. We refer the Sub-Committee to our full Report attached as Appendix I and reiterate that we would be pleased to submit oral evidence to amplify this Memorandum.

January 2004

\textsuperscript{17} EJP Report, paragraphs 183–191.
\textsuperscript{19} EJP Report, paragraphs 184, 187 and 189.
\textsuperscript{20} EJP Report, Appendix 6, question 7.
\textsuperscript{21} EJP Report, paragraph 184.
\textsuperscript{22} EJP Report, paragraph 189.
APPENDIX 5

Memorandum from the Environmental Services Association

INTRODUCTION

1. ESA is the sectoral trade association for the United Kingdom’s waste and secondary resource management industry, a sector annually contributing more than £5 billion to GDP and working to align the UK’s economic and environmental sustainability.

2. ESA’s members want to be enabled to deliver the United Kingdom’s compliance with the European Union Landfill Directive and other relevant EU law, with appropriate pre-treatment of hazardous wastes and by returning to the productive economy as renewable energy and secondary materials more of the energy and materials contained in waste.

3. To achieve this ambition, which will require the investment of about £8 billion in new regulated infrastructure, ESA’s members need, inter alia, appropriate, enforced and transparent regulation. Without such regulation, criminals who dispose of waste in an unsafe manner, inflicting both economic and environmental damage on the UK, undercut ESA’s members.

4. Virtually every major member of ESA has had to close viable modern infrastructure as a result of the regulatory system failing to prevent waste from going to inappropriate outlets. In our view, zero tolerance should be introduced for criminal evasion of the requirement to manage waste in regulated facilities and this would be a significant departure from current practice.

5. As it is, the regulated industry represented by ESA is among the many victims of environmental crime. Our members informally estimate that such criminals siphon at least tens of millions of pounds annually away from the lawful regulated utilities operated by our members. In the process, these criminals undermine legitimate regulated businesses, deny people the safe and protected employment conditions offered by our members as legitimate regulated businesses and prevent controlled and environmentally benign management of waste. Environmental crime has also been linked to protection rackets: in some areas, employees of ESA’s members have been routinely threatened and intimidated.

6. Our members aim to exceed the minimum requirements of the law. They are all, for example, subject to a binding code of conduct as members of ESA and are ahead of the schedule agreed by ESA in reporting to environmental indicators developed by the Green Alliance. Our members have invested in externally verified environmental management systems and, through published annual environmental reports and otherwise, are achieving much greater transparency in their environmental performance.

7. All this is being achieved in a context where the Government’s failure to implement the Landfill Directive in an orderly manner has created difficult trading conditions for this sector and has decelerated its evolution towards the state required if the UK complies with relevant EU laws.

1. Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

8. On the basis that environmental crimes are an addition to rather than a substitute for the pre-existing law (for example, it is possible where appropriate to prosecute for murder or manslaughter in addition to prosecuting for an environmental crime), we believe the scale and nature of sentences provide sufficient scope to the Courts.

9. We are aware of no instance where the availability of an unlimited fine and/or imprisonment for a term not exceeding five years in the Crown Court, as provided in a number of statutes concerned with environmental protection, including the Environmental Protection Act 1990, would have been inadequate to reflect the seriousness of the crime.

2. Are sentences appropriately set to act as a deterrent?

10. We believe the current powers available to the Courts are capable of acting as a deterrent.

11. However, to be fully effective, there needs to be a broad public understanding not only of the types of sentence liable to be imposed but also that there is a sufficiently high risk of detection and successful prosecution. We suggest the priority for change lies here rather than with the sentencing tariff.

(a) ADDRESSING THE FAILURE TO SECURE CONVICTIONS

12. We are not satisfied that the Environment Agency is doing all it might to create a sufficiently high chance of detection. Indeed, we share the view of the Chief Executive of the Environment Agency that “the problem is the unregulated companies in the market—the illegal end of the market with regulation exemptions which we don’t regularly visit and inspect. Part of our work is trying to track down the illegal ones and fine them”. (ref: LetsRecycle.com 30 July 2003)
13. Even working on the basis of the Environment Agency’s estimates that the annual cost of fly-tipping is about £100 million and that in 2002 fly-tipping accounted for 14% of all serious pollution incidents within the Agency’s remit, the Agency’s performance would not suggest that the problem of fly-tipping is under control.

14. In 2002, the Environment Agency secured slightly less than four convictions a week (in a context where it has since its establishment spent about £5 billion of public money), with most of those prosecuted by the Agency being acquitted. We understand that of 462 prosecutions in 2002 only 207, or 45%, resulted in a conviction. The total level of fines imposed was less than half of 1% of the Agency’s estimated annual cost of fly-tipping.

15. Such a state of affairs cannot accurately be portrayed as the rule of law and we therefore make two suggestions.

16. In the direct experience of ESA’s members, the expertise of the Environment Agency’s staff fluctuates widely. The relatively low level of success the Environment Agency enjoys in prosecuting for fly-tipping might suggest a similarly wide distribution of skill and expertise amongst the officers responsible for prosecuting.

17. Our view would appear to be corroborated by paragraph 4 of the Sentencing Advisory Panel’s advice to the Court of Appeal which states “It has been put to us by some of those involved in the daily work of the courts that standards of presentation in environmental cases need to improve”.

18. We have no reason to doubt that the Environment Agency may have a small number of competent investigative officers and as the Agency pays low salaries to such people it would not be surprising if it had problems recruiting and retaining officers all of whom possess the skill and experience successfully to investigate and prosecute environmental offences.

19. We would suggest that, as a minimum, before embarking on cases on behalf of the Agency, all investigative officers should be required successfully to complete an appropriate course overseen by experienced and external prosecuting counsel.

20. In addition, the Government must provide resources to the Environment Agency sufficient to enable it successfully to pursue criminals. We particularly emphasise that this is the Government’s responsibility, not that of our members who already pay ample taxes to contribute towards, for example, the cost of domestic and international security for the UK. Even if the Government had not chosen to depress our sector’s opportunity to add economic value, there could be no justification whatsoever for providing the funding to pursue criminals from even more levies and charges on our industry.

(b) Different Deterrents Work for Different People

21. There is a great difference between a criminal who, with reckless disregard for the environment and human health, deliberately chooses to evade the legal requirement to manage waste in regulated facilities on the one hand and responsible regulated companies providing a public service but who, in the difficult trading conditions created by the Government, occasionally and inadvertently err (sometimes as a result of criminal damage inflicted on their facilities by third parties) from total compliance at all times with the strict liability to which they are subject.

22. The potential criminal is deterred by knowledge of a sufficiently high chance of being detected, convicted and receiving a sufficiently unattractive sentence. For a reputable trading company, which in the case of ESA’s larger members will typically run a range of utilities in various countries and whose securities will typically be listed, adverse publicity can itself be a harsh punishment.

3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

23. In our view, both the Magistrates’ and Crown Courts enjoy a sufficiently wide range of powers.

4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

24. Costing the Earth is thorough guidance produced by the Magistrates’ Association and, through a series of cases, similar principles have been applied by the Court of Appeal to environmental offences. The Sentencing Advisory Panel also made a useful contribution to the development of policy. We broadly endorse this approach as recently followed by the Court of Appeal and in the Magistrates’ Association’s guidance.

25. However, we do have reservations about the weight given to expecting larger companies to pay larger fines (and indeed to an unweighted reference to the number of convictions regardless of the size of a company) as this could produce environmentally perverse outcomes.
26. In a context where strict liability often applies and where it is not necessary, therefore, to prove fault on the part of a regulated operator, it is easier to prosecute reputable regulated companies for technical breaches of licence conditions (which could arise from the damage to our members’ regulated facilities inflicted by criminals with no connection with our members) than to pursue “professional” criminals who may be causing much more serious environmental damage.

27. For large operators, as above stated, reputational risk is itself a formidable sanction and to impose high damages on a large and essentially well run company but smaller damages for a similar or worse offence for a less well run smaller company does not help the Government to secure the UK’s compliance with relevant EU laws.

28. There is considerable discussion in recent cases about whether it is appropriate to introduce a tariff for environmental offences. We welcome consistency but we understand the Courts’ perception that environmental cases, and particularly more complex cases, can widely vary. We suggest in the following paragraphs a half way house between current practice and a formal tariff.

29. The Environment Agency, particularly in its early days, indulged in populist—and in some respects, seriously misleading—propaganda with the “Hall of Shame” on its website. Even now, the Agency’s Spotlight on Business Performance and ongoing maintenance of press statements relating to individual corporate prosecutions provide inevitably selective and subjective snapshots.

30. It would be a more useful public service were the Environment Agency instead to maintain as a public database a brief factual summary of each prosecution resulting in conviction, together with a report of the sentence and a reproduction of the prosecution’s statement of aggravating features and the defence’s statement of mitigating features (or a combined statement where these are agreed between the parties). There is support for this type of approach in the Court of Appeal’s judgment in R v Friskies Petcare (UK) Ltd23 and for the Agency to publish such data in a manner the Court requires for its own procedure would, in our view, achieve much more meaningful transparency.

31. As well as assisting Courts, a further benefit of such a database would be that the format we have recommended would underline the approach the Courts have evolved from the Howe principles24 and the Magistrates Association’s Guidance as, to be relevant, the parties’ statement of aggravating and mitigating features would need to relate to this approach.

5. Are magistrates’ and other courts following any guidance available?

(a) Magistrates’ Courts

32. The Committee will be aware of research carried out for DEFRA by ERM which reported that at one magistrates’ court in the South East of England, less than a quarter of the 32 magistrates surveyed appeared “reasonably aware” of the guidance and more than one third were unaware of its existence.

33. To the extent that instances arise where the magistrates’ clerk or the Bench hear cases while unaware of the guidance, this further corroborates our suggestion above that the quality of prosecution is not always acceptable: the prosecuting officer should always ensure at the outset that the guidance is known to the Court.

(b) Crown Courts

34. The Committee will be aware that ERM’s research reported that the Crown Courts appear to be imposing more lenient sentences than a few years ago. ERM appears unable to explain this trend with any degree of certainty and the data is not reported in sufficient detail for us to be able to assess whether there is an underlying trend of whether there was distortion caused by a number of very severe cases falling in a particular year analysed by ERM.

35. Again, as suggested above, there would be greater understanding of the way in which the available guidance has been applied in practice if the Environment Agency maintained a sentencing database of the type we have recommended. This could be of particular relevance in the Crown Court where, because environmental cases generally are relatively rare (let alone cases concerning contraventions of similar provisions or having similar facts), it is particularly difficult for the instant court to acquire any “feel” for the appropriate sentence, or to fill that gap by looking at the basis upon which the available guidance has been applied in similar cases.

23 [2000] 2 Cr App R (S) 401.
24 R v F Howe & Son (Engineers) Ltd[1999] 2 Cr App R (S) 37.
36. Environmental crimes are still a relatively novel phenomenon for magistrates and the more difficult environmental offences can be at least as complex as fraud trials: we understand, for example, that the recent prosecution of Cleansing Services Group at Gloucester Crown Court involved more than 7,500 pages of exhibits and 155 prosecution witnesses. We see merit in a considered assessment of the benefits a specialised environmental court might offer.

6. To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

37. On the basis of our assumption that this question is seeking to establish the weight given by magistrates to the environmental parameters defined in Costing the Earth and by the higher Courts in cases such as R v Milford Haven Port Authority25 and R v Anglian Water Services Ltd26, we are not in a position to offer a substantive answer going beyond the face of the reported judgments in such cases where the Court did note the scale and character of environmental damage.

January 2004

APPENDIX 6

Memorandum from the Law Society

The following comments are submitted on behalf of the Law Society, the professional body representing and regulating 110,000 solicitors in England and Wales. Comments have been produced with assistance from several of the Society’s specialist Committees covering criminal, housing and planning and environmental law. The members of those Committees are drawn from a variety of practice backgrounds—private practice and employed solicitors, defence and prosecution, representatives of industrial operators and regulators, and organisations concerned with the representation of members of the public.

The Law Society welcomes the initiative of the Environmental Audit Committee in appointing a Sub-Committee to examine how the Government and judiciary are helping to secure access to environmental justice in England and Wales. The inquiry comes at an apposite moment in that there are a number of relevant developments within both the UK and the European Union. The Department for Environment, Food and Rural Affairs has commissioned a series of research reports which address issues relevant to the Sub-Committee inquiry into environment crime. The Society would recommend that the Sub-Committee’s attention should be drawn to the following reports:

— the Environmental Justice Project being undertaken by the Environmental Law Foundation, the World Wildlife Fund and Leigh Day & Co solicitors due to report in March 2004;
— the ERM Report on fines imposed for environmental offences;
— the report of the Centre for Law and the Environment at University College London on civil penalties for environmental offences;
— the University College London report on the proposal for an Environmental Tribunal; and
— the report on the Environmental Court model produced for the DETR in 2000 by Professor Malcolm Grant.

Within the EU the Sub-Committee should be aware of the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through the criminal law (OJL 29 5.2.2003 p55) which was adopted by the Council of Ministers in the face of the opposition of the European Commission and the European Parliament, both of which would have referred a proposed Directive (COM(2001)139 OJC 180 26.6.2001 p238).

At the outset the Sub-Committee should be made aware of the range of issues covered by the general subject of environmental crime. The following is a list of statutes, by no means exhaustive, which prescribe environmental crimes:

- Game Act 1831
- Game Act 1970
- Control of Pollution Act 1974
- Health and Safety at Work Act 1974
- Wildlife and Countryside Act 1981
- Control of Pollution (Amendment) Act 1989
- Environmental Protection Act 1990

26 [2003] EWCA Crim 2243.
Environmental crime stretches from injuring wildlife and the theft of birds’ eggs to the pollution of the soil, water and the air to the fly-tipping of waste, the protection of water quality and fisheries. The Subcommittee needs to bear in mind that in most instances proceedings relating to environmental crimes are brought by non-Government agencies such as local authorities, the Environment Agency, English Nature, the Health and Safety Executive, the Royal Society for the Protection of Birds rather than the police and that there is also a civil dimension in that ordinary members of the public are able to pursue proceedings against parties responsible for impairing their quality of life, health or home. In that respect UK citizens now have the right to bring proceedings under Article 8 and Article 1 of the First Protocol of the European Convention on Human Rights.

The Law Society would be pleased to assist further in both this inquiry and any subsequent inquiries relating to the issue of environmental crime. Turning to the specific questions identified in the press release announcing the launch of the inquiry:

1. **Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?**

   Popular concern over environmental conditions has never been greater. That concern is matched by disappointment that the law does not provide adequate remedies against those who commit environmental offences. The reduction in the fines imposed for the oil spillage off the Pembrokeshire coast in 1996 from the Sea Empress has lodged in the popular mind as evidence that the legal system is failing to exact appropriate penalties on those who are guilty of environmental offences. There is a similar conception that the individuals responsible for environmental offences all too often escape personal penalties while companies face fines which are rarely sufficient to penalise operators. Indeed, some companies seem to treat such fines as an incidental expense of their operations rather than a deterrent. The shame list published each year by the Environment Agency of the worst environmental polluters may ironically be serving as a greater deterrent than the sentences being handed down by the courts.

   In fact the UK has a relatively sophisticated set of laws prescribing environmental offences and penalties—see the selective list of statutes above. In most instances an individual convicted of an offence can expect a fine of up to a specified maximum (frequently £20,000) and could face a term in jail. Indeed, about 2% of convictions result in custodial sentences, although they tend to relate to damage to wildlife and smaller scale operators, often connected with waste disposal, rather than the directors of major public companies. In our view the scale and nature of environmental crimes are reflected reasonably adequately in the legislation. Corporate manslaughter aside, there does not appear to be any great pressure on the Government to increase the penalties, although there is evidence of bodies such as the Environment Agency lacking sufficient powers to proceed effectively against offenders. The problem lies elsewhere. In our view, the underlying issues that need to be addressed are the number of cases that are actually brought to court and then the sentences being handed down by the courts.

2. **Are sentences appropriately set to act as a deterrent?**

   It is difficult to generalise. Current thinking amongst criminologists is that the creation of criminal offences alone does not act as an adequate deterrent. In part this is due to a lack of awareness that a particular act may constitute a criminal offence. On the other hand where there is a broader view in society that particular behaviour is unacceptable, social pressure in conjunction with criminal penalties can act as a deterrent. Social attitudes towards the acceptability of certain acts can be transformed relatively quickly provided that a national lead is given by the Government and the relevant authorities. In just over a decade the attitude towards domestic violence has been transformed from regarding it as a private matter in which the police should not intrude into something which is wholly unacceptable. That transition has been effected by a strong lead from national Government and commitment from the police and other authorities to eradicate such behaviour. Rather than reviewing the actual penalties prescribed by statute, the priority should perhaps be to achieve a similar transformation in social attitudes so that, for example, the dumping
of supermarket trolleys in rivers, the dumping of end of life electrical equipment and fly tipping generally, the depredation of the environment by industrial operators come to be regarded as unacceptable and unnecessary, rendering perpetrators social pariahs.

Another key factor in deterrence is the ability of the enforcement agencies to commit the resources to catching and prosecuting perpetrators. Few police authorities regard wildlife offences as a priority. The Environment Agency is expected to absorb enforcement duties associated with ever increasing legislative responsibilities and to undertake the prosecution of offenders. English Nature has similar powers to bring prosecutions in relation to offences involving wildlife. There is a real issue of resources if, as a nation, we are committed to tackling environmental crime.

In the area of environmental crime penalties for individuals responsible for damaging wildlife, and the attendant press coverage, may go some way to act as a deterrent. However, as suggested above, the level of sentences for other environmental crimes does not always appear to be sufficient to act as a deterrent, especially when the courts elect to impose penalties less than the statutory maxima. Companies appear to be more vulnerable to harm to their reputations consequent upon conviction for environmental offences than from the fines themselves. The rarity of penalties being imposed on individuals, as opposed to companies, undermines the deterrence for company directors and officers. There is certainly a strong case for the prosecuting authorities to be more rigorous in prosecuting directors in order to concentrate the minds of others. If it is difficult to identify a “directing mind” in a large company, why not prosecute the whole board? However, in the longer term investors are likely to have regard to a company’s environmental record and, if investors start to withdraw, banks are likely to take a similar stance in regard to loan finance. The increasing expectation from investors, the UK Government and the European Union for companies to adopt good corporate social responsibility practices is likely to provide as strong a deterrent as the sentences being handed down by the courts for environmental crime.

3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

Environmental legislation does provide a degree of flexibility, in most instances specifying maximum penalties, so that the courts have the facility to consider the nature of the offence and other circumstances in setting fines. However, this may not necessarily be beneficial. The ERM Report prepared for DEFRA cited above revealed not only striking differences between average fines imposed in different areas of the country but also a decrease in the average level of fine per offence in the Crown Courts from around £8,500 in 1999 and 2000 to £4,500–£5,000 in 2001 and 2002. The number of custodial sentences has also fallen sharply after a peak in 2000. We question whether the degree of flexibility allowed to judges and Magistrates justifies the significant variation in fines imposed as between parts of the country and different types of environmental offence.

4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

The Magistrates’ Association published guidance in 2001, Fining of Companies for Environmental and Health and Safety Offences. The Association has also published Information for Sentencers in association with the Environmental Law Foundation. That guidance does appear to have had a salutary affect in the Magistrates’ Courts where fines have risen from an average per offence in 1999 of £1,979 to £2,730 in 2002. Average fines for pollution offences have risen from about £2,400 to almost £3,000 over a similar period. However, those figures need to be set against the £20,000 maximum available for most offences.

Given the beneficial effect of the guidance issued to Magistrates, the Law Society would recommend that greater efforts should be taken to alert Judges in the higher courts to the significance of environmental offences and to the need to impose appropriate sentences. There is surely a role for the Judicial Studies Board to raise awareness of these issues amongst the judiciary.

5. Are magistrates’ and other courts following any guidance available?

As suggested above, the Magistrates’ Courts do appear to have regard to the guidance provided to them by the Magistrates’ Association. We strongly recommend that similar guidance, and indeed training, should be extended to the judiciary.

6. To what extent are courts sentencing on the basis of broader environmental principles, including the principle of sustainable development?

As far as we are aware the courts are dealing with environmental crime solely on the basis of the statutory offences and are not giving heed to broader environmental principles such as sustainable development. The Magistrates’ Courts are the primary forum for environmental cases and our impression is that Magistrates are not trained adequately to deal with the underlying technical issues. We understand that a Magistrate
can expect to deal with an environmental case only once in seven years. To encourage a better appreciation of the nature of those offences, consideration could be given to creating panels of Magistrates whose expertise would enable them to deal better with environmental cases.

OTHER COMMENTS

There are several other aspects of the issue of environmental sentencing which the Sub-Committee needs to bear in mind. At present there is no consideration given to the principle of restorative justice. By that we have in mind imposing fines at a level which would enable environmental remediation to be undertaken. This would represent a significant innovation as the standard practice is to allocate fines to public funds. If accepted, however, it would have the side effect of increasing the level of fines being imposed by the courts.

There is the separate question of compensation for injured parties affected by environmental crime. In most instances environmental crimes are pursued by public authorities with the fines relating solely to those offences. Compensation for those affected by poor environmental condition is only likely to be awarded in the event of a civil case being brought against a perpetrator by the parties affected, for which public funding is rarely available. Given the relationship between environmental offences and human health and living conditions, it might be appropriate for consideration to be given to providing some mechanism whereby indirect compensation can be awarded to those who have suffered the injury. Better judicial awareness of the seriousness of environmental crime plus compensation for individuals or some form of compensation to the community affected together might have a greater deterrent effect.

For the members of the public pursuing a civil action, most commonly for personal injury, there is another problem. It frequently takes some time for an environmental crime to be brought before the court and for any appeals to be completed. Until a case has been concluded, an individual cannot obtain the documents relating to the case to assist with their civil action. On occasions the length of time for the criminal case can bring the limitation period for a personal injury claim into play. That is clearly unacceptable. There are also difficulties in recovering costs from those convicted of environmental crimes.

In relation to individual members of the public, we strongly recommend that the Sub-Committee should give consideration, either in this inquiry or a subsequent inquiry, to the broader question of access to justice in relation to environmental matters. In theory legal aid is still available from the Legal Services Commission for individuals pursuing civil cases. In practice funds are rarely provided and almost invariably not for the judicial review of the decision of a public authority. In practice this means that unless an individual has private means or can find an organisation willing to represent them on a pro bono basis, most members of the public have no legal remedy in relation to environmental crimes unless a public authority can be persuaded to pursue a criminal offence. In our view this means that the UK does not comply with the Aarhus Convention (the UN Convention on access to environmental information, public participation in decision making and access to justice in environmental matters) which the UK has signed but has yet to ratify.

Finally, we would wish to draw the Sub-Committee’s attention to the wide use to which the statutory nuisance provisions of the Environmental Protection Act 1990 are put. For example, it is an offence to allow premises to be in such a condition as to create a statutory nuisance, that is where conditions are such that they are or are likely to be prejudicial to health. This offence is often employed in a housing context. Proceedings under this heading are, in effect, a private prosecution and the Magistrates’ Court can order works, costs and compensation. The statutory nuisance offence is likewise used to tackle noisy and unpleasant neighbours. However, use of the statutory nuisance provisions is limited for many members of the public by the fact that legal aid is not available for such actions.

We hope that the above comments are of assistance to the Sub-Committee and would welcome an opportunity to participate in any further inquiries on the issue of environmental crime.

January 2004

APPENDIX 7

Memorandum from Leeds City Council

Leeds City Council welcomes the opportunity to submit evidence to the Sub Committee on Environmental Crime as the quality of the local environment is of increasing concern to both the Council and the people of Leeds.

The Council is currently undertaking a review of its primary environmental enforcement activities and has identified a number of concerns. Wherever possible, I have sought to direct our response to the questions specified by you but there are a number of general points that I would like to make first.
THE MAIN ISSUES FROM THE COUNCIL’S PERSPECTIVE

Leeds City Council regards environmental crime as a very serious issue with high environmental, social and economic costs to the city, its residents and businesses.

Local residents consider that nuisances such as abandoned vehicles, litter, fly-posting, fly-tipping and noise seriously impair their quality of life and feeling of safety. The Council has yet to assess the direct costs to the Council of dealing with, and trying to prevent, environmental crime but believes them to be substantial. It would be very difficult to assess all the hidden costs to the city.

The city council only prosecutes serious offenders once all other avenues have failed. Elected Members have expressed concern over the levels of fines imposed and compensation awarded by the Magistrates Courts: sentences often appear to ignore the “Polluter Pays” principle and do not act as a sufficient deterrent. Indeed, the levels of fines only act as a deterrent to officers as many feel there is little to be gained from prosecuting offenders given the large amount of time, effort and cost involved in bringing a successful prosecution.

Officers are in dialogue with clerks at Leeds Magistrates Courts to see if training can be given to Magistrates and clerks to increase their awareness of the seriousness of the offences brought to them and of the need to impose fines that will deter further offences. However, the Magistrates’ Court has emphasised the high demands already placed on Magistrates time and have indicated that any training could only be given as part of a training event which covered a much wider range of issues. Would it be possible to have specific specialist environmental courts, so a smaller group of magistrates could gain more experience in hearing cases of environmental crime?

The Council accepts it has a role to play in raising awareness amongst the general public of the social and economic costs of environmental crime such as increased health risks, costs of clean up, reduced feelings of safety etc.

With respect to the specific question posed we would comment as follows:

1. Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

   Given that fines of up to £20,000 can be set by Magistrates Courts and unlimited fines by the Crown Court and that legislation often provides for maximum sentences to be up to four times higher than standard sentencing levels, it is felt that the sentencing powers available for environmental crimes are commensurate with the seriousness of the crimes themselves.

2. Are sentences appropriately set to act as a deterrent?

   If sentencing guidelines were followed then sentences could be a useful deterrent, however it is often cheaper for offenders to commit crimes and be fined than comply with the law. The levels of fines are normally set at the very lowest level of the range available and do not act as a deterrent.

   In addition, while most lay people would agree that fines should be set in accordance with individual’s or businesses’ income, it is difficult to understand why magistrates courts do not require proof of offenders’ income when setting fines, compensation and costs and, if proof is not forthcoming, simply set them at the maximum level available.

3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

   Given the upper limit of fines and the community and custodial sentences available to the court, sentencing does appear to be sufficiently flexible. The council would often prefer offenders to be given community sentences to help clear up the damage they and other offenders have caused than be given small fines.

4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

   The Guidance for sentencers by the Magistrates’ Association, “Costing the Earth”, is good, whether Magistrates are generally aware of its existence and applying it is another matter.
5. Are magistrates’ and other courts following any guidance available?

How aware most magistrates are of the above guidance is arguable. Recent cases in Leeds would suggest they are either unaware or simply not following it.

6. To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

Our experience would suggest that the courts are not sentencing on the basis of these principles.

January 2004

APPENDIX 8

Memorandum from Northgate Information Solutions

SUMMARY
— Northgate welcomes the Environmental Audit Committee investigation into environmental crime and sentencing.
— Northgate believes that the Committee should examine the extended use of penalty notices for tackling minor environmental crime, and that government should carry out a comprehensive review of the applicability of penalty notices to environmental crime.
— Northgate highlights some examples of international practice in relation to environmental crime and occupational safety.
— Northgate believes that any systemic extension of penalty notices must take place as part of a clear education and enforcement programme, with clear standards for the quality of enforcement.

NORTHGATE AND COMMUNITY JUSTICE

1. Northgate welcomes the Environmental Audit Committee’s enquiry into environmental crime. As a leading provider of technology services and enforcement systems to the police, local authorities and emergency services, our particular interest focuses on citizen based service and community justice.

2. For Northgate, community justice encompasses both help and punishment. A safe and secure community promotes social cohesion, economic progress and environmental improvement as the guarantors of sustainable success.

3. If communities are to enjoy a sense of well-being, individual citizens need to be able to access their rights and shape public services according to their needs; healthy communities must educate and inform individuals and organisations about their rights and their responsibilities; and where crimes and misdemeanours are committed the civil and criminal justice systems must enforce the law in a proportionate and equitable fashion.

4. We all of us have a responsibility to protect future generations from environmental harm. Yet all too often “minor” environmental offences go unheeded and unpunished. Every time this happens we undermine the serious issue of environmental stewardship and jeopardise the future safety of our nation and its children’s children.

PENALTY NOTICES AND ENVIRONMENTAL CRIME

5. Northgate believes that the committee should consider the extended use of penalty notices as:
— a proportionate means of tackling minor environmental crime carried out by individuals and corporates—which currently goes unchallenged;
— a tool to support public education programmes which stress the importance of citizens understanding and abiding by their environmental responsibilities; and
— a means by which pressure on the courts could be reduced.

6. Northgate proposes that any extension of the use of penalty notices to tackle environmental crime should be carried out in a comprehensive and consistent fashion to guarantee parity between individuals and organisations; to protect citizens from arbitrary action by public authorities and to enable flexible environmental sentencing to ensure that individual offenders are punished appropriately. We outline some issues relating to best practice below.
Penalty Notices—The Current Position in English Law

7. Fixed penalty notices or penalty charges are used increasingly in a wide range of minor criminal and civil matters in English law. Penalty notices can be grouped into four main areas: public disorder offences; minor “environmental” offences such as litter and dog fouling; traffic and parking offences; and those linked with public administration.

8. The Anti-social Behaviour Act has extended the range of environmental offences that can be dealt with through penalty notices. It gives local authorities the power to issue penalty notices for graffiti and fly-posting, other than when the offence is motivated by racial or religious hostility. The power to issue penalty notices for noise nuisance at night will be granted automatically to all local authorities, and the bill removes the onerous duty to supply the full 11 pm to 7 am service.

Why Use Them?

9. Community well-being is founded on trust between local citizens and public authorities. Where there is perceived inactivity by public authorities to act on citizens’ day to day concerns, local citizens are less likely to trust their ability to deliver fair and efficient public services.

10. Used appropriately, penalty notices can be an effective way of dealing with high-volume low-level crime, environmental and social nuisance and other forms of minor civil infringements of the law which are currently either processed through the courts or where no action is currently undertaken. They give authorities with limited resources an additional means of dealing efficiently with minor offences.

11. A proactive approach to promoting environmental responsibilities backed up by a system of penalty notice administration could help to enhance public trust and improve service delivery. Penalty notices can have a “ripple” effect. Once imposed for particular offences or targeted in particular areas, word of mouth can quickly leads to others improving their performance to avoid paying of similar fines. By integrating them into the educative process, they may assist in changing attitudes, at least, in the short term.

Learning from International Experience

12. As penalty notices do not lead to a criminal record, they are a useful tool for dealing with persistent low-level environmental nuisance. In other countries such as New Zealand, Canada and Australia, they have been widely used as a tool to strengthen law enforcement, for example in health and safety law and under Australian environmental legislation where breaches of the law are minor; where the facts are apparently indisputable; where there is one-off breach and where a penalty notice could act as a deterrent. In Australia a report carried out by the Law Reform Commission in 1992 found that the stigma of court appearances and the misery caused by having a criminal conviction seemed out of proportion to the original offence, particularly for migrant communities. Table A below highlights the use of expiation notices (similar to penalty notices) for environmental offences in South Australia. It demonstrates their widescale use and the fact that a victim levy is imposed on every environmental offence.

Table A

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Offences</th>
<th>Penalty amounts</th>
<th>Victim of crime levy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environment protection act</td>
<td>Numerous covering contravention of policy, failure to maintain records, contravention of ozone, air quality, burning regulations, machine noise regulations, waste management regulations</td>
<td>$100–$300</td>
<td>Yes</td>
</tr>
<tr>
<td>Fisheries Act</td>
<td>Numerous including: failure to carry licence, selling exotic fish, engaging in a fishing activity of a prescribed class, failure to keep records, lodge statistical returns</td>
<td>$50–$300</td>
<td>Yes</td>
</tr>
<tr>
<td>Forestry Act</td>
<td>Numerous including: lighting fires, depositing rubbish, failure to comply with instructions of a forest warden, using abusive behaviour against warden</td>
<td>$105–$200</td>
<td>Yes</td>
</tr>
<tr>
<td>Harbours and navigation regulations</td>
<td>Numerous including: swimming or skiing in restricted area, parking, speeding, failure to carry safety equipment, failure to report accident</td>
<td>$55–$400</td>
<td>Yes</td>
</tr>
</tbody>
</table>
serious crime breaking. Safety could, if used as an overall programme of education and enforcement, act as a deterrent to more a wide range of o

In Queensland, the State Penalties Enforcement Act 1999 provides for infringement notices for slow-breeding in relation to the administrative law, but it is arguable that much more could be done in o

An infringement notice does not result in a criminal record, but infringement notices may be taken into account in future d

Companies can decide whether to accept and pay the infringement notice or to go through the courts. An infringement notice does not result in a criminal record, but infringement notices may be taken into account in future execution, or after a warning when an infringement has occurred.

Currently the Health & Safety Executive and environmental health officers with health and safety duties have no powers to issue penalty notices for low-level o

Fines of between $100 and $3,000 may be imposed for any breach of the Act, except for a failure to maintain a hazard identification system where the fine range is higher—between $800 and $4,000. Companies can decide whether to accept and pay the infringement notice or to go through the courts. An infringement notice does not result in a criminal record, but infringement notices may be taken into account in future prosecutions.

Similarly, in Australia infringement notices are a recognized part of the enforcement mechanism in most states. In Queensland, the State Penalties Enforcement Act 1999 provides for infringement notices for a wide range of offences, covering nominated laws, local laws and by-laws. These include health and safety offences. In New South Wales, certain offences have attracted penalty notices for over twenty years. Originally basing its health and safety system on the UK nineteenth century system, the Australian system has focused on regional systems of enforcement including both reactive and proactive inspections based on targeted programmes.

Canada adopted the Contraventions Act in 1992. This Act created simplified procedures for dealing with selected federal offences, as an alternative to the summary conviction procedure set out in the Criminal Code. Under the Act, offences can be designated as “contraventions” by regulations.

One of the original goals of the Act was to distinguish between more serious criminal o

Canada adopted the Contraventions Act in 1992. This Act created simplified procedures for dealing with selected federal offences, as an alternative to the summary conviction procedure set out in the Criminal Code. Under the Act, offences can be designated as “contraventions” by regulations.

1. Consideration should be given to extending fixed penalty notices to health and safety, as in Australia and other countries. Currently the Health & Safety Executive and environmental health officers with health and safety duties have no powers to issue penalty notices for low-level o

2. If we are to prevent minor environmental offences in the UK, there has to be a clearly defined education programme which outlines citizens’ responsibilities. Penalty notices should be seen as part of the education continuum. If people know what they do is wrong, but continue to do it, enforcement mechanisms should be introduced.

3. In England, the use of penalty notice systems to enforce minor o

<table>
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<th>Offences</th>
<th>Penalty amounts</th>
<th>Victim of crime levy</th>
</tr>
</thead>
<tbody>
<tr>
<td>National parks and wildlife act</td>
<td>Numerous including: exporting plants and animals without permission, hunting without permit, failure to pay national parks fees, disorderly behaviour in a reserve, failure to abide by wildlife regulations, kangaroo tag regulations</td>
<td>$30–$315</td>
<td>Yes</td>
</tr>
<tr>
<td>Waterworks Act</td>
<td>Remain on land without being authorized, failure to comply with authorized conditions</td>
<td>$315</td>
<td>Yes</td>
</tr>
</tbody>
</table>

13. Consideration should be given to extending fixed penalty notices to health and safety, as in Australia and other countries. Currently the Health & Safety Executive and environmental health officers with health and safety duties have no powers to issue penalty notices for low-level o

14. In New Zealand, health and safety at work legislation provides for a system of “infringement notices”. An infringement is any failure to comply with the requirements of the Health and Safety in Employment Act. An inspector may issue an infringement notice if they have reasonable grounds to conclude that a person has failed to comply with the provisions of the Act and the person has had prior warning of the offence. Notices are issued where the inspector considers that prosecution is not warranted. Fines of between $100 and $3,000 may be imposed for any breach of the Act, except for a failure to maintain a hazard identification system where the fine range is higher—between $800 and $4,000. Companies can decide whether to accept and pay the infringement notice or to go through the courts. An infringement notice does not result in a criminal record, but infringement notices may be taken into account in future prosecutions.

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16. Canada adopted the Contraventions Act in 1992. This Act created simplified procedures for dealing with selected federal offences, as an alternative to the summary conviction procedure set out in the Criminal Code. Under the Act, offences can be designated as “contraventions” by regulations.

17. One of the original goals of the Act was to distinguish between more serious criminal o

18. Offences that have been designated as contraventions are in relation to the following acts: the Canada Marine Act; the Canada National Parks Act; the Canada Shipping Act; the Canada Wildlife Act; the Canadian Environmental Protection Act, 1999; the Department of Transport Act; the Government Property Traffic Act; the Migratory Birds Convention Act, 1994; the National Capital Act; the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act; the National Defence Act; the Non-Smokers’ Health Act; the Radiocommunication Act; the Railway Safety Act; the Motor Vehicle Transport Act, 1987; the Navigable Waters Protection Act; and the Tobacco Act.

19. It is arguable that government should conduct a comprehensive and consistent review of existing criminal o

HOW TO USE THEM

20. If we are to prevent minor environmental offences in the UK, there has to be a clearly defined education programme which outlines citizens’ responsibilities. Penalty notices should be seen as part of the education continuum. If people know what they do is wrong, but continue to do it, enforcement mechanisms should be introduced.

21. In England, the use of penalty notice systems to enforce minor o

Using penalty notices to target minor o

Using penalty notices to target minor o

Using penalty notices to target minor o

Using penalty notices to target minor o

Using penalty notices to target minor o
22. Whilst penalty notices may provide an efficient and cost-effective means of dealing with minor offences, the penalty notice system is only as fair as it is operated. Enforcement systems must be responsive, transparent, accountable, equitable and audited. Enforcement staff must use proportionate methods in issuing penalty notices, so that they issue advice or an informal caution where appropriate. This means that particular attention should be paid to the training and resources of staff who will operate the system—from front line staff who issue the tickets to enforcement managers. Staff should be adequately equipped to understand how human rights and diversity issues impact on service delivery and be able to deal with the public in a courteous, fair, equitable, respectful and consistent fashion.

PREPARING THE PUBLIC AND PREVENTING UNNECESSARY BURDENS ON THE COURTS

23. In the UK the use of penalty notices, for example to tackle minor disorder, has attracted some controversy. It is therefore essential that any introduction of penalty notices in new areas of law should be clearly communicated to the public. The public should be prepared for new changes in law so that they understand the implications of continuing their actions. In the Australian state of Queensland a moratorium of two months preceded the introduction of penalty notices for new offences relating to environmental nuisance, giving the public a chance to understand the new system and make any modifications to their behaviour.

ABILITY TO PAY

24. Unlike court fines, penalty notices are not related to the ability to pay. This means that problems can occur if individuals are allowed to accrue large amounts of unpaid fine. Enforcement systems should monitor their use to avoid cases of multiple issuing to individuals or families.

25. Where penalty notices are not paid, this may lead to the application of fine enforcement measures through the courts. If local authorities are given further powers to issue penalty notices in respect of environmental nuisance, it is advisable that central government consider providing them with additional powers to prevent individuals who clearly are not in a position to pay from appearing before the courts. In addition, local authorities should consider providing time to pay arrangements, particularly where ability to pay is under question, as this will help to increase compliance. Care must be taken to ensure that individuals are not allowed to build up huge debts which act as an incentive to re-offending.

26. We believe that there are strong arguments for minimising the use of the courts to pursue unpaid penalty notice payments and of developing mechanisms for clearly distinguishing between those who can’t and those who won’t pay.

27. There are two precedents which are worth considering. Firstly, under the Dog Fouling (Scotland) Act 2003 local authorities and the police are able to issue fixed penalties to people who fail to clear up after a dog. Scottish local authorities retain all money received in respect of payment of fixed penalties. Where a fixed penalty is not paid a local authority can recover the amount through civil diligence without applying to the courts. This, in effect, provides civil remedies for tackling criminal penalties. It allows Scottish authorities to pursue action for debt recovery without incurring the additional cost of going to court.

28. In addition, Schedule 5 of the Courts Act 2003 states that an offender with a criminal fine may apply for the payment terms to be varied, or volunteer for an attachment of earnings order or deduction from benefit. Schedule 6 allows an offender to discharge their fine by unpaid work. Consideration could be given to setting up a similar system for unpaid penalty notices, ensuring that those who genuinely can’t pay are distinguished between those who can but won’t.

CONCLUSION

29. As the Committee undertakes this important investigation into environmental crime we urge it to consider how best to tackle minor offences. Where minor environmental crime goes unchecked it constitutes a serious issue; yet resources need to be targeted at tackling serious environmental crime. The introduction of penalty notice enforcement systems based on clear principles and guidance could provide a cost effective method of tackling minor environmental offences committed by individuals and corporate bodies. Any systemic extension of penalty notices must take place as part of a clear education and enforcement programme, with clear standards for the quality of enforcement. We would be delighted to share our views further with the Committee.

January 2004
APPENDIX 9

Memorandum from the Police Federation of England and Wales

ENVIRONMENTAL CRIME: A POLICING PERSPECTIVE

BACKGROUND

1. The Police Federation of England and Wales is the representative body for over 133,000 members of the police service below the rank of superintendent.

2. For reasons of brevity, we have chosen to comment only upon environmental crime issues with which we have expertise or experience.

INTRODUCTION

3. Environmental crime takes many forms and has many victims. Police officers are at the frontline in the fight against environmental crime, and are witness to both effective and ineffective attempts to combat it.

4. In addition to commenting briefly upon environmental crime sentencing, this paper also seeks to highlight the limitations of environmental crime strategies unless they form part of far broader holistic solutions.

SENTENCING

5. We would like to see a rebalancing of the criminal justice system, with victims placed at its heart. This should apply to environmental crime sentencing just as with any other form of criminality. Justice for the victims of crime should therefore be a paramount consideration when determining sentence scale and nature.

6. Although there can be no doubt that calculating appropriate sentence scale and nature is essential in order to act as an effective deterrent for committing crime, this should not be the totality of an investigation into environmental crime. We believe it would be beneficial to consider sentencing in the context of broader crime reduction strategies.

COURTS’ SENTENCING RECORDS

7. A consequence of the increase in sentence flexibility has at times appeared to be an increase in sentence inconsistency. It is essential courts are mindful of the specifics of each and every possible sentence at their disposal in order to find the most equitable and effective outcome. For this reason, grounds could exist to investigate the extent to which sentence disparity exists between different courts, and how these compare to relative reconviction rates.

HOLISTIC SOLUTIONS

8. From a policing perspective, officers deal directly with a wide range of environmental offences ranging from illegal tipping to anti-social behaviour. Many of the problems associated with tackling environmental crime reflect problems experienced across the police service as a whole.

9. Anti-social behaviour in the context of environmental crime includes many problems such as graffiti and litter. Although these have an environmental consequence they frequently have social causes. Drug addicts, for example, may discard needles and create unwanted litter. As a result if addicts are arrested for acquisitive crimes this often also results in a reduction in anti-social behaviour within a given area.

10. Unfortunately short-term solutions do not always translate into longer-term successes. An addict’s propensity to obtain drugs is likely to exceed the deterrent in a form of a sentence. Therefore unless drug addicts are afforded proper rehabilitation programmes or are subject to effective drug treatment orders it is highly likely that they will return to their previous behavioural patterns, including, inter alia, littering and burglary. The Street Crime Initiative (SCI) underlined the urgent need for an increase in the nation’s drug rehabilitation capacity.

11. Sentencing can therefore only ever be part of a broader solution to crime. Convictions should mark not only the beginning of a custodial sentence, but also the start of a rehabilitation programme. If such programmes are not in place it is likely that individuals will recidivate. The fight against environmental crime, as with any form of criminality, must therefore take place on several fronts—sentencing, policing, rehabilitation, treatment and social and environmental renewal.
ENVIRONMENTAL CRIME SPIRAL

12. Environmental crimes such as anti-social behaviour have the potential to breed more environmental crime. Litter and graffiti contribute to an unlawful and intimidating community atmosphere, which in turn may contribute to more serious infringements of the law.

13. If one supports this notion—that anti-social behaviour can contribute to additional anti-social behaviour—it is logical to support robust measures to tackle all forms of anti-social behaviour. Action plans and community schemes are a vital part of this process, but so to should be the aim to increase the time in which police spend out of the police station (currently standing at approximately 40% of their time on duty).

CONCLUSION

14. Anti-social behaviour orders, acceptable behaviour contract and fixed penalty tickets can be part of a successful flexible approach to environmental protection provided they are part of a broader strategy. Deterrent alone is not a solution in itself. Sentences will be of limited success unless they are coupled with other holistically based measures. For example, just as sentencing should be commensurate with the seriousness of the crime committed, rehabilitation programmes should be commensurate with the seriousness of an individual’s addiction. Tackling anti-social behaviour can be resource intensive, but left unchecked it can be self-catalysing and it is therefore prudent to police it accordingly.

January 2004

APPENDIX 10

Memorandum from the Ramblers’ Association

INTRODUCTION

1. The Ramblers’ Association (RA) is a registered charity and voluntary organisation founded in 1935. It campaigns to protect and promote the interests of walkers, to defend rights of way and the beauty of the countryside, and to secure access to open country. It has over 140,000 individual members.

2. The RA wishes to submit this memorandum for the following reason. Walking is the most popular UK sporting activity with 44.5% of all adults saying that they had gone for a walk of two or more miles in the previous four weeks. Walking is recognised as a valid form of transport in its own right, and has a minimal environmental impact. Encouraging physical exercise is a key element of current Government policy, with walking acknowledged as a form of exercise available free of charge to almost everyone.

3. Despite these well-known facts, the most recent Countryside Agency survey of the state of the rights of way network revealed an average of 7.7 problems on each 10km stretch of the rights of way network. The problems included obstructions such as walls, fences, locked gates, buildings, crops planted on the line of paths, and paths unrestored after ploughing. One of the remedies open to both local authorities and members of the public to deal with such problems is to seek to bring a private prosecution for obstruction of the highway under section 137 of the Highways Act 1980, or one of the related sections (see paragraph 4 below). We believe that obstruction of the rights of way network falls under the heading of an environmental crime, and that as such it should be considered by the Committee as part of the present inquiry.

OFFENCES UNDER THE HIGHWAYS ACT 1980

4. Anyone alleged to have committed a statutory offence in relation to a right of way (eg obstruction or ploughing) will have his case heard in a magistrates’ court. Action may be taken by any individual or organisation in the magistrates’ court under the following provisions:

(i) willful obstruction of the free passage along the highway (section 137 of the Highways Act 1980);
(ii) failure to comply within the prescribed period with the duty to make good the surface of a footpath or bridleway after lawful disturbance to not less than its minimum width so as to make it reasonably convenient for the exercise of the public right of way (section 134(3)(a) of the Highways Act 1980);
(iii) failure to comply within the prescribed period with the duty to indicate the line of a footpath or bridleway after lawful disturbance to not less than its minimum width so that it is apparent to members of the public wishing to use it (section 134(3)(b) of the Highways Act 1980);

(iv) failure to comply with the duty to keep a path clearly defined to its minimum width through crops (section 137A(1)(a) of the Highways Act 1980); and

(v) failure to comply with the duty to keep a path convenient to use to its minimum width through crops (section 137A(1)(b) of the Highways Act 1980).

5. A highway authority, non-metropolitan district council, or parish or community council may also take action in a magistrates’ court against a person who, without lawful authority, disturbs the surface or a footpath, bridleway or carriageway other than a made-up carriageway (section 131A of the Highways Act 1980).

6. The penalty for a person found guilty of one these offences (the occupier of the land in question in the case of ploughing and cropping offences, and the person responsible for the willful obstruction or disturbance of the highway in the case of sections 137 and 131A) is liable to a fine not exceeding £1,000 (level 3 on the standard scale).

7. Under amendments introduced by the Countryside and Rights of Way Act 2000 (new section 137ZA in the 1980 Act, inserted by section 64 of the 2000 Act as from 31 January 2001) a court has power to order anyone convicted of an offence under section 137 to remove the offending obstruction. Failure to comply with such an order is a second offence punishable by a fine of up to £5,000 (level 5 on the standard scale). If the obstruction is not removed following conviction for the second offence a third offence is committed, punishable by a fine of up to £250 per day.

USE OF THESE PROVISIONS IN PRACTICE

8. The Committee asks:

(a) Are the scale and nature of the sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

(b) Are sentences appropriately set to act as a deterrent?

(c) Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?

It is our view that the maximum levels of fine set out in the legislation are commensurate with the nature of the offences we have set out above. The problem is that in our experience, and that of many local authorities, magistrates do not impose fines even approaching the maximum levels set out in the provisions and thus the fines imposed do not act as a deterrent. Because the fines do not act as a deterrent, local authorities are largely unwilling to commit their scarce legal resources to bringing action in these cases. We do not have comprehensive records of all actions brought under these provisions but we do report them in Footpath Worker, our specialist bulletin for those engaged in rights of way work, whenever we obtain details. Our records suggest that since 1995 out of the 136 highway authorities in England only 13 have sought to bring legal action for any of these offences. The level of sentence varied from an unconditional discharge to £500 for a single offence. The average sentence was a fine of just under £200 (ie less than one-fifth of the maximum set down in the legislation).

The variation in the level of fines, ranging from unconditional discharge upwards to £500, suggests that magistrates do have sufficient flexibility within this legislation to ensure that offenders, whatever their means, are punished appropriately.

9. The Committee asks:

(d) Is the guidance currently available to magistrates and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

(e) Are magistrates’ and other courts following any guidance currently available?

(f) To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

We understand that for the majority of offences tried in magistrates courts there are sentencing guidelines which are always referred to in formulating the sentence. The guidelines provide an “entry point” eg fine, custody, community penalty and the bench then consider aggravating and mitigating factors which are also listed in the guidelines eg aggravating might be that a personal injury was caused. Mitigating factors might be that the level of damage was low or that there was an accidental oversight of the law. Finally, mitigating and aggravating factors in relation to the offender are considered eg genuine remorse or bad record in respect of previous similar offences. However, there are no sentencing guidelines in respect of the rights of way offences we have described. We are in little doubt that this means there is great variation amongst courts in the sentencing process due to the attitudes and prejudices of particular benches. If sentencing guidelines were available for rights of way offences we believe that local authorities would be far more willing to bring these cases to court. Their legal teams would be able to address the court in the terms of the guidelines and would be far more confident of a truly deterrent sentence, taking into account all of the relevant mitigating and aggravating factors. We urge the committee to recommend that sentencing guidelines be introduced for rights of way offences.
We do not believe that, when imposing sentences for rights of way offences, magistrates give any consideration to the importance of walking and of the relevance of the rights of way network as an environmentally sustainable part of the transport infrastructure. We hope that any sentencing guidelines in respect of rights of way offences would set these out.

January 2004

APPENDIX 11

Memorandum from the Royal Society for the Protection of Birds (RSPB)

EXECUTIVE SUMMARY

— Illegal persecution of birds of prey continues despite their protected status. A particular problem for them is the misuse of pesticides as poisons.
— Egg collecting has threatened a range of bird species. However, there is evidence that the introduction of custodial sentences for these offences is having some deterrent effect.
— The commercial trade in wild birds threatens some species with extinction, and is a particular problem for members of the parrot family.
— Penalties for offences under Part I of the Wildlife and Countryside Act—including imprisonment and fines—are not insubstantial, but they must be applied consistently.
— Penalties for damage to Sites of Special Scientific Interest are also not insubstantial, although it is incongruous that offences against internationally important wildlife sites (Special Protection Areas and Special Areas of Conservation) attract lesser penalties.
— Financial penalties on their own do not always act as a deterrent to committing offences such as killing of birds of prey. We recommend that courts consider the imposition of higher fines or alternative penalties for such offences.
— Wildlife offences must be recorded centrally to evaluate the scale of wildlife crime and allow sufficient police resources to be allocated to fighting it.
— Many offences involving wild birds are committed during the breeding season, and penalties that restrict the activities of convicted persons specifically during that time period would be appropriate.
— Magistrates should be given better guidance on dealing with wildlife offences.
— The statutory enforcement agencies must make adequate resources available to address wildlife crime. Shortfalls in resources are at least as big a problem as the way courts handle such offences.
— Regulations under the Wildlife and Countryside Act, such as the requirement to register possession of certain bird species, are a good enforcement tool and should be retained.
— The detection of offences and enforcement of existing protection measures for Sites of Special Scientific Interest must improve, and this means English Nature and the Countryside Council for Wales making full use of their considerably enhanced powers under the 2000 Countryside and Rights of Way Act to deter crime.

INTRODUCTION

1. The RSPB is Europe’s largest wildlife conservation charity. With the support of more than one million members, we conserve and enhance the populations of wild birds, other wildlife and the habitats in which they live. We focus on priority species, habitats and sites and set clear conservation objectives and actions. These include owning and managing land as nature reserves and influencing land-use practices and government policies to benefit wildlife and the wider countryside.

2. The RSPB has a small Investigations Section whose main function is to support the statutory authorities by providing advice, expert witness and investigative help on investigations into offences involving wild birds. This Section works very closely with Police Wildlife Crime Officers, the Crown Prosecution Service, Procurators Fiscal and HM Customs and Excise.
OFFENCES AGAINST WILD BIRD LEGISLATION

3. The RSPB receives reports of around 600 offences involving wild birds each year, and assists the Police with approximately 50 prosecutions annually. In 2002, 590 offences were recorded, which compares favourably to the five-year average of 682 between 1997 and 2001. Classes of incidents reported were as follows (figures for 2001 in brackets):

(a) shooting and destruction of birds of prey 141 (118)
(b) shooting and destruction of other bird species 120 (130)
(c) poisoning incidents 102 (79)
(d) egg collecting 68 (68)
(e) taking, possession or sale of birds of prey 38 (33)
(f) taking, possession or sale of other bird species 30 (46)
(g) import and export of birds 4 (3)
(h) other 87

4. Offences of particular conservation concern include the killing of birds of prey, including the deliberate abuse of pesticides, offences involving rare breeding birds and offences involving trade in wild birds.

THE PERSECUTION OF BIRDS OF PREY

5. The populations of many birds of prey are still recovering from serious declines during the 20th century. Although killing of birds of prey has been illegal since the Protection of Birds Act 1954, and earlier across much of the country, illegal persecution has continued. The use of pesticides approved for agricultural uses to deliberately poison wildlife is the most indiscriminate form of persecution. It continues to pose a threat not just to birds of prey, but also to other wildlife, pets and people. The Government’s “Campaign Against Illegal Wildlife Poisoning” — launched in 1991 — raised the profile of illegal poisoning and encouraged reporting by the public, but the number of birds of prey killed annually by poison has increased. The UK Raptor Working Group's report to Ministers, chaired by the then Department of the Environment, Transport and the Regions and the Joint Nature Conservation Committee and published in 2000, highlighted the ongoing problem of bird of prey persecution.

THE TAKING OF WILD BIRDS' EGGS

6. Throughout much of the last 100 years, the activities of egg collectors have caused concern to those involved with protecting some of Britain's rarest breeding birds, including red kite, osprey and, latterly, the white-tailed eagle. Despite numerous successful prosecutions, it is only recently that the courts have been able to issue custodial sentences. Since 2000, seven collectors have been imprisoned, leading to a significant reduction in related offences.

7. Fewer incidents were reported in the UK during 2002, but there is growing evidence that collectors are now travelling elsewhere in Europe.

THE COMMERCIAL TRADE IN WILD BIRDS

8. At global level, one in eight, or about 12%, of all bird species are at real risk of becoming extinct in the next 100 years according to the latest World Conservation Union (IUCN) red list published by BirdLife International in 2000. Of these 1,186 species, 113 are directly threatened by exploitation for the cage bird trade. Some bird families are particularly affected, with 57% of threatened parrot species trapped for the trade. These include the South American blue macaws, including Spix's macaw, which has recently become extinct in the wild, Lear's macaw, which has been reduced to around 260 birds, and the hyacinth macaw, which has declined to around 5,000 in the wild. Amongst the non-parrot species in this list is the Bali starling, of which now only six remain in the wild.

9. Despite regulation at international and national level illegal trade in wildlife including wild birds is extensive.

OFFENCES RELATING TO PROTECTED SITES

10. We are unaware of any co-ordinated recording of offences relating to damage to Sites of Special Scientific Interest (SSSIs) in England and Wales. Few cases have been brought to court, and it is currently not possible to determine the precise scale and nature of illegal damage to protected wildlife sites.

OFFENCES INVOLVING OTHER WILD ANIMALS AND PLANTS

11. The RSPB has on occasion sought to assist the police and others with the investigation of offences involving taxa other than wild birds, for example protected bats, butterflies and moths. This has resulted in a small number of successful prosecutions. We believe that enforcement of legislation protecting other wildlife is an area that requires further attention from the enforcement authorities.
CURRENT LEGISLATION


PROSECUTIONS

14. Thirty-three prosecutions involving wild birds were recorded by the RSPB in 2002, compared with 52 in 2001 and 50 in 2000.

15. The majority of summonses or charges were issued under Sections 1(1) and 1(2) of the Wildlife and Countryside Act 1981, and involved the taking or possession of birds and their eggs. A significant number were also issued under Section 18(2)—possession of items for the purpose of committing an offence.

16. Despite the high number of incidents of bird of prey persecution and the misuse of poison, few successful prosecutions were brought in 2002 due to the difficulty of proving the identity of the offender in such cases. Three offenders were convicted under Section 5 of the Wildlife and Countryside Act for setting in position traps or poisons for the purpose of taking or killing wild birds.

17. Three prosecutions were brought under COTES involving the trade in live and dead wild birds.

18. The majority of wild bird offences brought before the courts result in conviction on at least one of the charges being answered. In 2002, for example, of 153 charges answered, only five failed to result in conviction. Penalties ranged from conditional discharges to five months imprisonment.

SENTENCES AND WILDLIFE OFFENCES

Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

19. The RSPB believes that penalties available for offences under Part I of the Wildlife and Countryside Act (as amended by the Countryside and Rights of Way Act 2000) are not insubstantial. A person guilty of an offence under sections 1 to 13 (the majority of offences affecting species) shall be liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or to both. Where the offence committed relates to more than one bird, nest, egg, animal or plant the courts are empowered to treat each specimen as a separate offence with respect to the awarding of penalties.

20. The Control of Trade in Endangered Species (Enforcement) Regulations 1997 provide for penalties on summary conviction of a fine not exceeding level 5 on the standard scale or a term of imprisonment not exceeding three months, or both, and on conviction on indictment, for a term of imprisonment not exceeding two years or a fine, or both. A recent clause contained in the Criminal Justice Act 2003 has provided the framework whereby the maximum penalty for offences under COTES can be increased to five years' imprisonment. Defra has indicated its intention to amend COTES accordingly, a move the RSPB fully supports.

21. We are, however, concerned that the penalties above are not applied consistently by the courts. For example, magistrates seem willing to issue high fines for collection of the eggs of common bird species, but are more reluctant to do so for the killing or trapping of rare birds of prey.

22. We believe that the range of penalties available to the courts for offences involving wild birds is commensurate with the seriousness of crimes committed. However, inconsistency by the courts in applying these penalties must be addressed. It is important that courts take into consideration the conservation significance of the offences being tried.

23. Penalties available for offences under Section 28 of the Wildlife & Countryside Act 1981 relating to SSSIs are also not insubstantial. A person guilty of an offence may be fined up to £20,000 on summary conviction. On indictment, they may be subject to an unlimited fine. In addition, a court may order the person to restore any damage caused. However, these penalties apply only to SSSIs. Penalties relating to offences committed in European Wildlife Sites (Special Protection Areas (SPAs) designated under the Birds Directive and Special Areas of Conservation (SACs) designated under the Habitats Directive) are limited by the European Communities Act 1972 to a maximum fine of £5,000, as protection afforded to these sites.
is delivered through secondary legislation. Whilst most SPAs and SACs on land are also SSSIs, it seems incongruous that penalties relating to offences committed against internationally important wildlife sites are much lower than those for nationally important sites.

**Are Sentences appropriately set to act as a deterrent?**

24. There is no provision for wildlife offences to be recorded centrally by government or by individual police forces. The RSPB maintains its own database of reported incidents and prosecutions, and we depend on police officers and members of the public forwarding information to us. We are also unaware of offences in relation to protected sites being recorded centrally. Unlike for bird related crime, we do not maintain our own database of such crimes.

25. It is difficult to evaluate the deterrent effect of sentences to potential future offenders, but figures maintained by the RSPB indicate that egg collecting offences have declined recently while bird of prey persecution and trade-related offences have shown no such reduction. The number of incidents involving the activities of egg collectors has declined significantly since the introduction and use of custodial sentences in 2001. Seven custodial sentences have been awarded, in most cases to repeat offenders, of up to five months duration. Over the same time period, the number of recorded nest robberies fell from 231 in 1999 to only 25 in 2002.

26. Bird of prey persecution offences are extremely difficult to bring before the courts. In 2002 only four individuals were prosecuted from 243 reported incidents. The penalties awarded are insufficient to deter others. For example, in 2002, a Norfolk gamekeeper was fined £350 for illegal pesticide storage following the finding of a dead buzzard, two pigeon fanciers from West Glamorgan were each fined £240 for using poisoned bait in an attempt to kill peregrines, and a Cumbrian man was fined £250 for using a Larsen trap baited with a pigeon that subsequently caught a sparrowhawk.

27. The illegal killing of birds of prey on shooting estates is undertaken to reduce predation on game birds and to maximise income from shooting. Although it is claimed that few, if any, shooting estates make a significant profit, there is often considerable investment involved in owning and managing a shoot. The comparatively small fines awarded on conviction for the killing of birds of prey are probably not significant when measured against such investment.

28. We conclude that for certain offences, such as the collecting of birds’ eggs, where custodial sentences have been awarded, a significant deterrent effect has been demonstrated. For other offences driven by financial gain, such as the killing of birds of prey, and where financial penalties alone have been issued, no such deterrent effect exists. This is also due, in part, to the low chance of being apprehended. We therefore recommend that courts consider the imposition of higher fines or alternative penalties for such offences.

29. The RSPB is unable to readily ascertain the number, nature and scale of offences relating to protected wildlife sites such as SSSIs.

30. It is essential that wildlife offences, both in relation to birds and protected sites, are recorded centrally to evaluate the scale of wildlife crime and allow sufficient police resources to be allocated to fighting the problem.

**Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?**

31. The introduction of custodial sentences for offences committed under Part I of the Wildlife and Countryside Act 1981 by the Countryside and Rights of Way Act 2000 has provided courts with a wide range of penalties that now seem appropriate for offenders of a range of means. Similar penalties exist under COTES 1997.

32. Financial penalties remain the most favoured penalty issued, but probation and community service orders including tagging, and also custodial sentences, have been used. In addition, the courts have used their powers of confiscation to good effect, retaining expensive pieces of equipment such as cameras and optical equipment and, in one case in Norfolk, a vehicle used during the commission of an offence. Many offences involving wild birds are committed during the breeding season (approximately April to July) and penalties that restrict the activities of convicted persons specifically during that time period would be appropriate.

33. There is considerable flexibility on the level of fines relating to offences resulting in damage to SSSIs, reflecting the nature of the offence. The ability of courts to order the restoration of damage caused (which may prove costly and difficult) is, we believe, a particularly important deterrent.

34. The RSPB believes there is sufficient flexibility available to the courts to deal appropriately with offenders, but that more imaginative use could be made of some of the options available to restrict the activities of offenders during high risk periods.
Is the guidance currently available to magistrates' and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

35. Guidance material must be available to the courts when hearing wildlife offences. With only a small number of cases coming before the courts each year, many magistrates have no previous experience of dealing with such matters. We believe this presents magistrates' courts with a problem they are ill-equipped to overcome.

36. Sentencing guidelines for wildlife trade and conservation offences have recently been published (November 2002) and distributed to magistrates, and we hope this will improve the consistency of penalties awarded. However, magistrates will still have difficulty identifying the appropriate level of sentence due to lack of experience and the availability of comparative material. The RSPB publishes a quarterly newsletter detailing the outcome of recent cases involving wild birds and this is distributed to local magistrates' associations. We are unaware of any similar publications detailing wildlife offences to this level.

37. The relative infrequency with which most magistrates encounter wildlife offences will always present difficulties for courts when setting penalties. We would encourage the production and distribution of regular information material and guidance for magistrates.

To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development?

38. Many offences involving wild birds involve the killing of individuals or their removal from the wild. The damage created by such actions is selfish and absolute and courts have frequently commented on the damage caused to the natural heritage of the country. The RSPB always takes steps to ensure that the conservation importance of the species concerned is outlined to the court, and this principle is included in the sentencing guidelines referred to above. Factors taken into account include status of the species concerned at local, national and international level. It is difficult to apply environmental principles and concepts of sustainability to criminal acts involving individual specimens.

39. We would encourage courts to take notice of the status of bird species involved in offences and the overall effect such offences may have for the avifauna of the United Kingdom if committed on a wide scale.

40. In relation to SSSIs, courts should have regard to the rarity and importance of any habitats damaged or destroyed, the scale of the impact and the permanence of the damage caused. Designated sites must be protected in the national public interest.

Additional problems facing the enforcement of wildlife protection legislation

The statutory enforcement authority response to wildlife crime

41. Most if not all UK Police Forces now have at least one if not more designated Wildlife Crime Officers. A small number of forces have appointed a full time officer to this role, but this is the exception, the majority preferring to designate volunteers who are expected to conduct this work in their spare time. HM Customs and Excise has a dedicated team of wildlife specialists at Heathrow, but the resource available elsewhere in the country is largely based upon the interest of individual officers. Few Police Forces attach a high priority to the enforcement of wildlife crime and, if it were not for the activity of a number of NGOs including the RSPB, few significant wildlife offences would come before the courts.

42. It is essential that the statutory enforcement agencies make adequate resources available to address current levels of wildlife crime. The failure to address the shortfall in resource allocated to combating wildlife offences is at least as important as the manner in which courts handle such cases, if not more so.

Deregulation of prohibited activities

43. The Wildlife and Countryside Act includes powers for the Secretary of State to make regulations to control activities such as the keeping and sale of birds in captivity. These regulations were originally put in place when the Act came into force, and have proved their worth in preventing offences and providing a useful enforcement tool for the authorities investigating illegal activities. In recent years, there has been a trend for deregulation by government with respect to the keeping and trading of birds held in captivity. Of current concern is the proposed removal of species from the bird registration scheme which requires listed specimens (on Wildlife and Countryside Act Schedule 4) held in captivity to be registered with Defra and ringed with unique department-issued rings. This establishes an audit trail which can easily be checked and used in conjunction with DNA analysis where offences are suspected (ie that the bird might have been taken illegally from the wild). For high value species, such as peregrine or goshawk, this is a valuable enforcement tool. These two species are involved in more offences each year than any others listed on Schedule 4.
44. The RSPB believes that the regulations currently in place under the Wildlife and Countryside Act, such as the bird registration scheme, provide a valuable enforcement tool and should be retained. We also believe that certain species such as peregrine and goshawk should remain subject to such controls while they continue to be subject to offences.

*Damage to protected sites*

45. As already mentioned, the Wildlife and Countryside Act 1981 enables the notification of SSSIs, which are protected from damaging activities by owners and third parties. The Countryside and Rights of Way Act 2000 gave a wider range of enforcement powers to English Nature and the Countryside Council for Wales to bring legal action where sites are damaged by either landowners or third parties. We are aware that English Nature has previously brought a small number of prosecutions, but a more strategic approach is now required.

46. The detection of offences and enforcement of existing protection measures for SSSIs must improve. English Nature and the Countryside Council for Wales (CCW) have been given considerably enhanced tools (such as new powers to enter land in order to detect crime) as well as greater penalties to deter crime. However, there is only limited evidence that these tools are being comprehensively used. For example, the RSPB is unaware of a single occasion where a Management Order has been issued in order to enforce management of a SSSI. Yet 42% of SSSIs are in unfavourable condition. Both monitoring and enforcement must improve significantly, including increased use of police officers to support enforcement. Under the SSSI statutory code of guidance, English Nature is expected to “develop and publicise a strategy for enforcement, including action to address issues relating to use of land by persons other than owners and occupiers. The strategy should clarify the circumstances in which it will expect to take action, and describe the steps it will take”. CCW is also required to develop such a strategy. We are unaware of any such strategy having been produced.

*APPENDIX 12*

**Memorandum from the Tarka Foundation**

1. **The Tarka Foundation** is a company limited by guarantee as a social enterprise to support the natural, social and economic environment.

2. **Urban Mines** is a not-for-profit environmental body committed to finding practical, innovative solutions for resource management in a manner which values people and which respects the planet. Working with the public and private sectors the aim of Urban Mines is to provide information, advice, support, direction and financial solutions to problems.

3. In response to the Environmental Audit Committee’s request for memoranda from interested organisations relating to the above matter we submit as an annex details of a proposal made early in 2002 for pilot investigations that include some of the issues raised. We have submitted details of the proposal in order that the Environmental Audit Committee may be aware of our interest, the scope of the suggested pilot project and that social enterprises, working with statutory and other bodies, are potentially in a strong position to offer support in the Government’s fight against anti-social behaviour in general and in this instance, environmental crime in particular.

4. It should be expressly noted that our submission is not in any way a criticism of the Minister, his officials or other public bodies to whom it was submitted or of the way in which the proposal was treated by the Minister, his officials or others to whom it was submitted.

*January 2004*

**ENVIRONMENTAL CRIME PROPOSAL**

1. **Rationale**

2. On 5 February 2002 the Associate Parliamentary Sustainable Waste Group, organised a half-day forum entitled: Environmental Crime Britain’s Next Threat? Speakers, including The Rt Hon Michael Meacher MP Minister for the Environment and Baroness Young, Chief Executive of the Environment Agency, expressed concerns regarding the increased incidence of environmental crimes and the costs in environmental, social and financial terms.

3. Following the Forum, Representatives from The Tarka Foundation, Urban Mines and Birmingham City Council met to discuss the formation of a working partnership to carry out three pilots to investigate key issues as they relate to:

   (a) Rural areas including some of the Indices of Deprivation’s worse wards.

   (b) Northern urban/city areas with high levels of deprivation and.

   (c) A central city area with a rising and vibrant culture.
4. From the meetings and subsequent discussions with the police and other interested parties with experience of different types of behaviours and circumstances that may be partly responsible for creating a range of environmental crimes, a number of key questions were raised:

(a) What is the definition of environmental crime? Is it moral, legal or a mixture of both?
(b) How widespread is environmental crime?
(c) Is there sufficient public or judiciary understanding about environmental crime and its implications?
(d) Do those who commit environmental crimes see themselves as criminals?
(e) Are there links between environmental crime and other forms of anti-social behaviour?
(f) What measures need to be taken to address the problem?

5. Growth of environmental crime and other forms of anti-social behaviour have a number of common denominators which are not always directly related to financial gain or benefits to the perpetrators, in some instances being more closely linked to a lack of care. In some cases serious damage can result for a basic lack of understanding, this is particularly so when those committing environmental crimes are outside their usual environment. (As an example, a study among 13–18 year old city dwellers indicated that less than 1% had an understanding or in some cases any care of the implications of litter to rural areas).

6. A proposal was submitted to the office of the then Minister for the Environment requesting funds for the three pilot programmes to be carried out to measure the scale of the problem as well as to provide the basis for practical and achievable implementation of ideas and reduction schemes. This implementation of recommended strategies phase was seen as integral to the proposal in order to measure the usefulness of potential responses to the growing problem of environmental crime. This phase would also provide robust recommendations that can then be utilised by those involved with land management generally.

7. Regrettably the request for funding, without which the proposal could not proceed, was not successful and with no financial support forthcoming none of the organisations were able to commit more of their limited budgets to continuing discussions or undertaking the project.

8. A summary of the original proposal is given below.

9. **Proposal**

10. **Phase 1:**

11. **Definition and Classification of environmental crime**

12. This Phase will seek to define and classify environmental crimes and their implications to the natural, social and economic environment. Phase 1: to determine the shape of subsequent phases and be based upon consultations with relevant stakeholders and a review of available information. Definition and classification of environmental crime will allow a more precise analysis and a differentiation of practical options.

13. **Phase 2:**

**Case Studies**

14. This continues from Phase 1 and would initially define the research scope to include:

15. Continuing literature review.

16. Survey work of the case study areas based on best practices utilising mapping to show the incidence of environmental crime spatially and temporally in relation to current land-use patterns.

17. Analysis of best practice in the UK and overseas (including, where possible, a cost benefit analysis of deterrent systems).

18. A secondary consultation phase with offenders (both individuals and corporate) and victims including land owners, National Park officers, local residents and visitors.

19. An examination of institutional and other barriers currently restricting the efficient control/reduction of environmental crime.

20. This part of Phase 2 to also look at strategies for combating environmental crime and draw up the plans for the practical implementation of recommended practices to reduce environmental crime and its effects.
21. **Phase 3:**

22. Cost benefits analysis of the recommended practices implemented and a final report with recommendations as to the most effective control measures to deal with environmental crime.

23. The low costs for the work are because two of the organisations are social enterprises with broad environmental interests and as such are able to undertake this type of work without the need for a profit factor.

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**APPENDIX 13**

**Memorandum from University College London (UCL), Professor Richard Macrory**

1. I am Professor of Environmental Law at University College, London where I direct the Centre for Law and the Environment. This memorandum largely derives from two recent research projects carried out by myself and commissioned by the Department of Environment, Food and Rural Affairs. I am a board member of the Environment Agency and last year retired from membership of the Royal Commission on Environmental Pollution.

**Do we need a specialized environmental court to deal with environmental crime?**

2. For over a decade there has been discussion in the United Kingdom over the possibility of some form of specialist environmental court or tribunal. Some of the models that have been proposed argued for such a court to handle criminal as well as civil matters on the grounds that due to their complexity and technical nature environmental law offences required special treatment which could not be provided by the ordinary criminal courts.

3. In its 2002 Report on Environmental Planning, the Royal Commission on Environmental Pollution argued that environmental crimes (because of their distinctive rules of procedure, penal sanctions, etc.) were best handled by the criminal courts, though improved training and sentencing practice could be provided. I was a member of the RCEP at the time and agree with this view. However, I think that they may also be a case for environmental cases to be handled by designated magistrates’ courts in local areas (see now s 30 Courts Act 2003 for the powers of the Lord Chancellor to make directions for cases to be heard at “a place where other cases raising similar are heard . . .

4. Following on from a further recommendation from the Royal Commission on Environmental Pollution, I recently carried out research for DEFRA looking in more detail at the case for a specialized environmental tribunal. The report argued that the key problem at present was an incoherent system for dealing with “regulatory appeals”. Essentially these are provisions in environmental law which allow an applicant for a licence or permit to appeal against its refusal and/or for someone served with a notice such as a nuisance abatement notice to appeal against it. These are not criminal proceedings as such but allow a full appeal to be made against the initial decision. However, looking across the range of environmental laws, the appeal bodies are currently haphazard and incoherent—they include, for example, the planning inspectorate, the Secretary of State, country courts, and magistrates courts.

The Report argued that there was a good case to have most such appeals consolidated before a single environmental tribunal (operating rather similarly to the Lands Tribunal). This would give more coherence to the system, more authority to decisions, and would provide a much more secure base for dealing with future developments in environmental law. The analysis in the report has been endorsed by a wide range of bodies and is currently being considered by Government.

5. The proposed Environment Tribunal would not be dealing directly with environmental prosecutions. But its existence would promote the better handling of environmental offences. There are very few ‘stand alone’ environmental criminal offences in contemporary law—nearly all are based on non-compliance with a licence/permit or the requirements of a notice. The existence of an authoritative legal body handling appeals concerning such permits and notices would give a more secure basis to the subsequent handling of cases concerning contravention. We were informed during our research, for example, that some local

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authorities are very reluctant to service notices under the new contaminated land regime because they had no confidence in the appeals regime that would apply (in that case, the local magistrates' court). Without the initial service of a notice, there can, of course, be no subsequent prosecution for its non-compliance.

Is there a case for the use of civil penalties in environmental law?

6. The sanction for breach of an environmental regulatory requirement in this country is generally a criminal offence, drafted in strict liability terms (ie no intention or recklessness is required to prove the offence). The second project conducted for DEFRA concerned the possible use of civil penalties within environmental law, and was published in December.30 under (also attached).

7. The Report notes that in many jurisdictions such as Germany, Australia and the United States, there is extensive use of civil penalties as a means of enforcing environmental law and of ensuring that the companies pay the full economic costs of avoiding compliance. They do not replace criminal environmental offences, but these are generally reserved for intentional or reckless conduct.

8. The problem in this country is that there is no dedicated sanction for dealing with non-intentional or non-reckless breach of regulatory requirements. In effect criminal law is made to work too hard for too wide a spectrum of conduct. This can need to a trivialization of criminal proceedings and difficulties in sentencing practice which is bound to have some regard to keep in step with sanctions imposed for “true” criminal conduct. As we noted in the Report, the wholesale use of strict liability offences can lead to indignation on the part of businesses which are found “guilty” of offences, or an inclination to treat such offences as akin to a business overhead because guilty is applied automatically.

9. The Report argues that there is a good case for introducing civil penalties in connection with, say, the requirements to comply with environmental licence conditions, and other detailed aspects of environmental regulation. This would give an additional sanction to environmental regulators, and allow criminal prosecution to be reserved for truly intentional or reckless conduct. We already use civil penalties in fields such as Competition and Customs and Excise Law, and it clear that penalties can truly reflect the economic gains to be made by non-compliance. Appeals against the imposition of penalties could be made either to the proposed new Environmental Tribunal or to a body such as VAT and Duties Tribunal.

10. By introducing such a system of environmental penalties, it would mean that the criminal courts would be preserved for more truly criminal conduct in the environmental field. This will not in itself resolve all the issues such as those concerning sentencing practice and burdens of proof in the criminal courts. But it would mean that at least the courts were focussed on what would more generally be accepted as criminal conduct rather than having to deal as now with such a wide range of form of non-compliance.

January 2004

APPENDIX 14

Memorandum from the UK Environmental Law Association

1. The UK Environmental Law Association (UKELA) is the UK forum which aims to make the law work for a better environment and to improve understanding and awareness of environmental law.

2. UKELA’s members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non lawyers and has a broad and growing membership. UKELA is the network for those interested in environmental law in the UK and key issues including GMOs/biotechnology, insurance and liability, climate change, IPPC, environmental impact assessment, waste, contaminated land, water and planning. It includes a working party on Environmental Law in Scotland and is particularly concerned that all countries within the UK have the best quality environmental legislation and adequate resources for implementation. UKELA was formed in 1987 and has around 1,000 members. They include both corporate and individual members, based mainly in the UK but also overseas.

3. This submission has been prepared on behalf of UKELA by the chairman, Andrew Wiseman, with the assistance of James Kennedy, convenor of the practice and procedure working party, Andrew Baker, convenor of the nature conservation working party and Martha Grekos, member of UKELA’s council. UKELA wishes to note from the outset that due to the very short time period provided for submitting evidence to this part of the inquiry (which also largely coincided with the Christmas/New Year period) the opportunity to canvass its membership and respond more fully has been limited (particularly in respect of some of the more specific questions, such as question 6).

OVERVIEW

4. UKELA welcomes the Environmental Audit Committee’s inquiry into environmental crime, which it sees in the wider context of governmental efforts to improve access to environmental justice and deliver better environmental protection through the law. UKELA notes that this inquiry is part of a series of inquiries by an EAC sub-committee into access to environmental justice. This would further the research commissioned by DEFRA in 2003 which covered many aspects of access to environmental justice, including two reports focusing on environmental crime and sentencing. UKELA believes that clear goals should now be set for the publication of how the government responds to the recommendations in these reports and how and when priority actions should be taken forward. In particular the key areas for further discussion, and those which would merit further investigation by the sub-committee include:

— Increasing access to environmental justice by addressing the issue of cost (this could be by the adoption of the principle of wider use of no-cost orders). (Environmental Justice? A draft report by the Environmental Justice Project: ELF; WWF; Leigh Day & Co 2003 and Using the Law: Barriers and Opportunities for Environmental Justice, Maria Adebowale 2003).


— Introduction of civil penalties in appropriate environmental cases (Environmental Civil Penalties, a more proportionate response to regulatory breach, Michael Woods and Richard Macrory, UCL 2003).

— Establishment of a more consistent system for gathering data on environmental sentences (Trends in Environmental Sentencing: Claire Dupont and Dr Paul Zakkour, Environmental Resources Management Ltd, Defra 2003).

— Increased powers for regulatory bodies (Environmental Justice Project draft report as above).

5. Those issues which are pertinent to the current inquiry are discussed in more detail below.

6. UKELA, with others, is also persuaded of the urgent need to set up an environmental tribunal to consider certain environmental appeals (a tribunal of this kind has received support over the last 15 years or so from those with expertise in environmental law, most recently in “Modernising Environmental Justice: regulation and the role of an environmental tribunal”, Richard Macrory and Michael Woods, UCL 2003). This issue has been thoroughly researched and discussed and the outstanding issue of the cost of running such a tribunal, alongside its benefits, is now a matter for DEFRA/the Department of Constitutional Affairs to establish. UKELA would hope that a decision would be made on this before the end of 2004 in the interests of putting a more transparent, consistent and well informed system into place and to establish “the environment as firmly in our legal structures as it is now in our laws” (Lord Justice Carnwath, commenting on the environmental tribunal proposal).

ENVIRONMENTAL CRIME

7. The two reports mentioned above dealing with environmental sentencing, together with the Environmental Justice Project draft report which discusses related issues, have been of great assistance in identifying some of the issues and potential solutions concerning environmental crime. Many of the findings of those reports are discussed by UKELA in its responses to the questions below.

QUESTIONS ASKED BY THE EAC

Q1. Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?

8. The data on environmental sentences is insufficient to answer this question fully as there is no centralised data and it is not gathered in a systematic way. The ERM report on Trends in Environmental Sentencing in England and Wales found that data were inconsistent, contained discrepancies and varied with geography and the sentencing authority. UKELA supports ERM’s recommendation that a consistent system for gathering data should be established and trend monitoring carried out for a further period of time.

9. However ERM found that in general the level of fines were much lower than the maximums set down (averaging £2,730 in magistrates’ courts in 2002 with the maximum fine generally permitted being around £20,000), although the trend is towards slightly increasing fines. This would indicate that insufficient discretion is being used in imposing deterrent fines which could lead to greater environmental protection. There have been some exceptional cases. For instance, a fine of £4 million against the Milford Haven Port Authority for oil spillage from the “Sea Empress”, though this was reduced to £750,000 on appeal.
10. However, a reason why the scale and nature of the crimes do not always correspond to the seriousness of the crime, is that environmental crime is not regarded as a “real” crime or the legislation in place does not legislate for its seriousness. For example, the dredging of a river, which has enormous environmental consequences is only enforced through Land Drainage Byelaws, which is a summary offence only. There is therefore a need to elevate further the status of environmental protection and to understand the seriousness of environmental degradation.

11. In addition, a severe problem that the Environment Agency faces is that many individuals as well as commercial companies plead impecuniosity before Magistrates. Therefore even if the Magistrates can fine heavily for the environmental crime, they have to reduce the fine substantially as a result of the plea which means that many defendants can end up paying a minimal weekly/monthly fine (eg £10). A solution would be to break the nexus of fining and Community Service. As local authorities carry out various environmental projects, fly-tippers (for example) could be asked to assist in the cleaning up if they are unable to pay.

12. On the issue of wildlife crime specifically UKELA does not believe that this is taken seriously enough within the court system. For example, although a limited number of bat related crimes (brought under The Conservation (Natural Habitats &c) Regulations 1994 (Habitats Regulations) and the Countryside and Rights of Way Act 2000) get to court sentencing is often seen to be too lenient with fines not sufficient to discourage recidivism. Better education of the Judiciary on wildlife issues is seen as essential. Many appear to trivialise the crimes and are not willing to use maximum sentences even for repeat offenders. There is a general feeling within the ecological profession that while wildlife laws are quite powerful and are taken seriously by the police (many forces have wildlife officers) the system fails once it gets into the court system.

Q2. Are sentences appropriately set to act as a deterrent?

13. The answer to this is set out above, but it is not just the issuing of low fines that results in a failure to deter environmental offenders: the failure to prosecute at all is a problem. For example, ERM looked at the issue of fly tipping in some detail. ERM pointed out that this is a major issue for the government and for local authorities. However local authorities rarely prosecute mainly because of confusion about who should proceed with prosecutions and lack of sufficient evidence and/or resources to gather it. ERM concludes: “This situation is symptomatic of the existing confusion as to who is responsible for prosecuting fly-tipping incidents. The fact that some local authorities are more active than others leads to inconsistency between different regions, with the subsequent risk that fly-tipping activities will be transferred to areas where the enforcement of legislation is less stringent”.

14. ERM concluded that while more resources would be needed to determine the level of repeat offending, in any event out of 73 local authorities surveyed by ERM 70% had not prosecuted any fly-tipping case over five years. Of the 19 which had prosecuted fly-tipping cases, five indicated that they considered the fines too low.

15. Problems also exist because regulatory activity is subject to institutional and functional limitations: such as lack of time, lack of money and not enough manpower.

16. The UCL civil penalties report argued that that some environmental offences did not sit well with the usual justifications for criminal prosecution and therefore made courts “more reluctant to impose a sentence or fine commensurate with the environmental damage caused”. They suggested the introduction of civil penalties for appropriate cases could be a way of addressing some of the issues related to failures to bring cases forward. This is discussed further below.

17. The draft Environmental Justice Project report also came to broadly the same conclusions. It found: “the most significant problem in the criminal justice system seems to be that the penalties routinely imposed vary, and do not provide a deterrent to corporate and persistent offenders”.

18. One step forward on the road to deterrence has been the Environment Agency’s policy of “naming and shaming” companies that have proved to be the worst polluters (in the Annual Spotlight on Business Performance Report). Also since 2002 the Environment Agency, the biggest prosecutor of environmental crime, has increased enforcement and prosecution.

19. There can be little doubt that not only the low sentences, but also failure to prosecute at all, mean that for some environmental crimes there is little or no deterrence effect in the current system.

Q3. Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately.

20. This question is central to the UCL report, “Environmental Civil Penalties” prepared by Woods and Mack. It concludes: “Criminal prosecution is too rigid an approach to be used for all but the most serious offences. It focuses on achieving punishment rather than prevention, and requires more stringent procedural safeguards, which undermine regulatory efficiency . . . this is leading to systemic problems involving the trivialisation of environmental offences and the imposition of inadequate fines, and may also give rise to reluctance on the part of regulatory agencies to pursue more difficult cases”.

21. No doubt it is also important to tackle the issue of fly tipping. The recent draft National Parks and Access to the Countryside Bill would restrict the use of fly tipping as a means of getting rid of waste and brings into the ambit of the law some forms of derelict fly tipping with which local authorities have long been unable to deal. It is important that there should be a suitable range of penalties to deal with this offence which is an increasing problem affecting our countryside and towns. It will be important that any such legislation should be properly enforced and the courts should not be afraid to impose adequate penalties in appropriate cases.”
21. UKELA would commend the consideration of introducing civil penalties for appropriate environmental crimes to the EAC, given the increased regulatory flexibility these can provide, though more research needs to be carried out. The benefits are that civil penalties make a direct financial link to the level of environmental damage caused in accordance with the polluter pays principle, reduces the administrative and evidential burden of having to demonstrate the criminal standard of proof in less serious cases, and could lead to higher penalties (a more effective deterrent—as in certain EC Member States and Australia, as well as by other regulatory agencies in the UK, such as the OFT). Use of civil penalties would also minimise the attachment of moral condemnation (from criminal prosecution) in inappropriate cases. As a result of all of these things civil penalties may better meet the needs of regulators, the regulated and the wider public interest. However there are questions that merit further inquiry including: which offences civil penalties would apply to, how civil penalties would interact with the existing criminal system, the discretion of regulators, and how public opinion would view what is currently a crime becoming a civil offence. The UCL civil penalties report recommends that further work should be carried out on how a civil penalties system might be introduced and implemented and UKELA supports this approach.

22. The draft Environmental Justice Project report also urges Magistrates and judges to apply the full range of sentencing options available to them (including greater use of custodial sentences, fining or imprisonment of individual company directors, disqualification and the imposition of Community Service Orders). Using a special form of local authority supervision for fly-tipping offences has already been given as an example above. Alternative approaches should be well publicised to provide greater awareness of the possible outcomes of environment crime.

23. In conclusion, UKELA is of the view that the sentencing system is currently not flexible enough for the reasons set out above. A civil penalties system merits further consideration and awareness should be raised on the full extent of sentencing possibilities currently available.

Q4. Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?

24. It is clear from the answers to 2 and 3 that the guidance is still at its “teething” stage so has not yet made a significant impact on sentencing, though some changes are being noted. As Magistrates only sit so many times a year, and some Magistrates might not have come across environmental crimes as often as they do other crimes or applications (such as theft, bail applications etc), a better understanding of environmental law cases will take more time.

25. The ERM report in its case study on one magistrates’ court, found that themagistrates themselves claimed a good understanding of the environmental cases before them. Ninety per cent of those surveyed claimed they had sufficient information from the prosecution on the relevant legislation and environmental issues.

26. The draft Environmental Justice Project report makes a number of recommendations on guidance, which UKELA considers worthy of consideration.

27. These include:

(a) Magistrates courts being urged to apply the ‘Magistrates’ Association Guidelines on Sentencing’ and monitoring of the effectiveness of this tool;

(b) Expanding the Guidelines to include environmental offences currently not covered and to be applied to all individuals and not just companies;

(c) Adapting the use of the Guidelines for Crown Courts and other UK jurisdictions.

Q5. Are magistrates’ and other courts following any guidance available?

28. Since their publication in May 2001, some Magistrates became aware, and therefore used, the Magistrates’ Association on sentencing guidelines for environmental and health and safety offences. Health and Safety and Environmental prosecutors have since then brought these guidelines to the attention of even more Magistrates. These sentencing guidelines have been helpful and a strong message has been sent out as its usage has increased since 2001. Training for Magistrates has been instigated since the issuing of the Magistrates’ Association toolkit on sentencing. “Costing the Earth 2002”, which should hopefully assist in a greater understanding of the sentences and the seriousness of environmental crime. In the introduction to “Costing the Earth” the Magistrates Association recognised some of the issues identified above: “there has been some concern that the level of fines and sentences given in environmental cases are not high enough. This has led to situations where, for some unscrupulous companies and individuals, it is cheaper to commit an offence and continue to pay the fines rather than to comply with the law and pay the real cost, including the environmental and social cost, of polluting”.

29. The Court of Appeal in R v Anglian Water Services Ltd [2003] EWCA Crim 2243 has recently endorsed the use of guidelines on sentencing, which is a step forward. It found that a fine of £200,000, imposed by Basildon Crown Court, in a case involving a serious local case of water pollution (that was caused by the discharge of sewage effluent into a river) was manifestly excessive. The Court of Appeal
accordingly reduced the fine to £60,000. The Court of Appeal has, of course, its own set of guidelines on environmental offences from the Sentencing Advisory Panel (2000). In January 2002, Roy Hart brought a private prosecution against Anglian Water Services (AWS) when he discovered sewage in the River Crouch. Despite alerting AWS, it took four hours for them to shut off the flow from the works. In the meantime, over two kilometres of the river had become polluted and caused serious damage to fish and wildlife. The Court of Appeal found that, in the circumstances, a fail-safe system should have been in place to deal with such polluting events. However, in reducing the fine, the Court of Appeal took into account the prompt remedial action by AWS, their guilty plea and the steps taken by AWS to prevent recurrence of such an incident. The Court of Appeal confirmed that the number of AWS's prior convictions (65, including 64 for sewage discharge) was not of great significance in light of the scale of AWS's operation. The Environment Agency asked the Court of Appeal to establish a sentencing tariff system based on the Environment Agency's common incident classification system for prosecuting pollution offences. The Court of Appeal did endorse the use of the guidelines on sentencing. Despite reducing the level of the fine in this particular case, they specifically referred to the guideline which calls for Magistrates to accustom themselves, in appropriate cases, to imposing far greater penalties than have generally been imposed in the past.

Q6. To what extent are courts sentencing on the basis of broad environmental principles, including the principle of sustainable development.

30. Criminal courts do not sentence on the basis of broad environmental principles, including the principle of sustainable development. These are principles the planning regime takes into account as it focuses on “land use” and are often material considerations in planning decisions.

IN CONCLUSION:

— Sentences for environmental crimes are generally too low to be a deterrent and some crimes are in any event not prosecuted at all.
— Sentencing is too inflexible (the possible introduction of civil penalties and more creative use of current available penalties are options for how this problem can be addressed).
— Sentencing does not relate to the environmental damage caused in a way that would see the “polluter pays principle” being implemented.
— The effect of training and guidance for Magistrates will take time but changes are slowly being seen, with a discernible (if largely anecdotal) trend of courts treating sentencing in environmental cases more seriously.
— The Guidance is not always applied and is not comprehensive enough.
— Greater publicity of environmental cases would raise awareness about sentences and the Environment Agency’s “name and shame” programme is a good example.
— Better data on sentences is needed and further monitoring should be carried out.

January 2004

APPENDIX 15

Memorandum from the Department for Food and Rural Affairs (DEFRA)

This memorandum sets out Defra’s response to questions posed by the committee concerning sentencing for environmental offences:
— Are the scale and nature of sentences for environmental crimes commensurate with the seriousness of the crimes themselves?
— Are sentences appropriately set to act as a deterrent?
— Is environmental sentencing sufficiently flexible to ensure that offenders, whatever their means, are punished appropriately?
— Is the guidance currently available to magistrates’ and other courts appropriate and sufficient to ensure that sentences for environmental crimes are set at a level which properly reflects the damage caused by the crimes and the need to deter future crimes?
The Countryside and Rights of Right Way Act 2000 (CROW) increased the penalties for certain native species offences under the Wildlife and Countryside Act 1981, introducing prison sentences of up to six months. CROW also introduced penalties relating to offences committed on Sites of Special Scientific Interest (SSSIs). CROW provided:

- Increased penalties of up to £20,000 in magistrates’ courts and unlimited fines in the Crown Court where deliberate damage to an SSSI is proved;
- New powers for the courts to order the restoration of the special interest of the SSSI that has been damaged, where this is practicable; and
- A general offence of knowingly causing intentional/reckless damage to an SSSI.

The Criminal Justice Act 2003 made provision for new offences involving the illegal internal trade in species protected by the Convention on International Trade in Endangered Species to attract prison sentences of up to five years.

These increases are relatively recent, and reflect concerns about the seriousness of wildlife crime.

We agree with the Home Office view that deterrence is not the only purpose of sentencing. However, the incidence of nest-robbing (an offence under the Wildlife and Countryside Act 1981) for example has reduced by over 50%, as a result of both more targeted police activity in this area, and the possibility of a custodial sentence for the person found guilty. Moreover, since the CROW Act came into effect, English Nature have taken forward three successful prosecutions, and we are of the view that the new powers provide sufficient tools to enable SSSIs to be protected.

We would add to the Home Office comments that the “Costing the Earth” information pack/toolkit for magistrates published in 2002 was accompanied by informal sentencing guidelines on environmental cases. These guidelines emphasised the importance of considering the principles of sustainable development when deciding sentences, focussing particularly on making the polluter pay for environmental damage and on making penalties proportionate to the crime. They also set out *inter alia* the implications of wildlife crime for species conservation; the financial gains to be made from wildlife crime; and the links between wildlife crimes and other serious offences.

In addition, following the publication of the magistrates’ guidance, Defra funded a programme of research looking at environmental justice in the UK. The first report from this programme, published in June 2003, looked at the case for establishing environmental tribunals, for civil cases. A conference convened by University College London (UCL) in November 2003 considered further research commissioned by Defra in to access to environmental justice. This comprised a report entitled “Using the Law: Barriers and Opportunities for Environmental Justice”, research into “Environmental Civil Penalties: A More Proportionate Response To Regulatory Breach”, and research on “Trends in Environmental Sentencing in England & Wales”, and a draft report entitled “Environmental Justice?”, to be published on 24 March this year.

Informed by these varying strands of research, Defra is working closely with the Department for Constitutional Affairs, the Environment Agency, and other stakeholders and experts including among others the UK Environmental Law Association and the Environmental Law Foundation, to explore the possibilities of developing an holistic approach to improving access to justice in environmental matters in England and Wales. This will concentrate to a much greater extent on civil law than on criminal, where research commissioned by Defra suggests there is less to be addressed. Defra officials aim to have completed a report listing the conclusions and recommendations of all the research by the end of April 2004. Defra will then explore the options in a seminar to be held later in the year, which meantime will allow for some internal consultation across Whitehall, given that the issues involved are matters also for ODPM, the Home Office and DCA.

March 2004

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**APPENDIX 16**

**Additional Supplementary Memorandum from the Home Office**

As you know, I was required to give evidence in public to the Environmental Crime Sub-Committee on 12 February 2004. At the meeting the Chairman asked for examples of large fines imposed for environmental crimes and I mentioned that there were examples of that in relation to the fisheries industry. I undertook to provide a note with details of some cases, together with explanations as to why enforcement was difficult.

The table at Annex A provides details of outstanding cases from 2002 to date in Dyfed Powys Magistrates Courts Committee area alone. The problems are by no means unique to Dyfed Powys.

The number of cases received by Dyfed Powys is about five per year amounting to an average total amount imposed of some £1 million. Offences revolve around failing to provide correct (or any) entries on catches and undersized fish or illegal species. The range of fine imposed is between £500 and £900,000. The majority of cases are Anglo-Spanish. The total imposed in the cases detailed at Annex A is £3,065,852.
In general problems arise when a prosecution is in respect of a vessel registered in the UK by a UK registered company. When trying to enforce warrants, the registered office generally proves to be an empty office. The UK registered company will be owned or connected to a Spanish registered company, which processes the majority of catches. The company is therefore run from Spain.

At one time, to retain British registration, vessels were required to dock at a UK port approximately four times per year and stay for about eight hours. Now they only have to land a certain amount of catches, which can be at any time of the day, any time of the year, and at any port. Ships leave before enforcement staff have a chance to enforce warrants.

When contacted the defence solicitors for offenders often just say that they are no longer instructed.

It is understood that a bond is put into place to cover a Spanish registered vessel. This would cover the majority of any expected impositions. No such bond is required however of a British registered vessel. There are currently no arrangements in place that allows enforcement of UK imposed penalties in Spain.

Annex A

FINANCIAL PENALTIES IMPOSED IN FISHERY CASES AND COLLECTABLE BY DYFED POWYS MCC

<table>
<thead>
<tr>
<th>Date of Hearing</th>
<th>Offence(s)</th>
<th>Penalty Imposed</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>11 Jan 2002</td>
<td>Failure to record quantity of species of fish, land undersized fish and fail to keep drawing of storage room (five offences).</td>
<td>Fine and costs totalling £118,869 within seven days.</td>
<td>Anglo Spanish—registered address given is an empty office.</td>
</tr>
<tr>
<td>18 June 2002</td>
<td>Under recording or concealing of fish, not recording landings and undersized fish.</td>
<td>Fine and costs totalling £10,989 within 56 days.</td>
<td>Anglo Spanish—registered address given is an empty office.</td>
</tr>
<tr>
<td>28 Feb 2003</td>
<td>Offences relate to failing to record in log book, recklessly furnishing false information, not recording landings (18 offences).</td>
<td>Fine and costs totalling £216,293—two years to pay.</td>
<td>Anglo Spanish—registered address given is an empty office.</td>
</tr>
<tr>
<td>3 April 2003</td>
<td>Altering of log book, making false reports (16 offences).</td>
<td>Fine of £260,000 Costs of £37,354—two years to pay.</td>
<td>The address for this company is an empty office.</td>
</tr>
<tr>
<td></td>
<td>Knowingly and recklessly making alterations to log books (eight offences).</td>
<td>Skipper 1 £2,500 Skipper 2 £5,000—two years to pay.</td>
<td></td>
</tr>
<tr>
<td>3 April 2003</td>
<td>Failing to record in log book, recklessly furnishing false information, not recording landings.</td>
<td>Fine and costs totalling £517,819—costs to be paid within one month, then £150,000 by 1 June 2004, same 2005, 2006 and the rest in 2006.</td>
<td>Anglo Spanish. The address given for this company is c/o an accountancy company. The company has applied to appeal the case as the defence solicitor at the trial submitted items as detailed by the Spanish, which were later identified as incorrect. There are a number of other problems with the appeal so at present the case has been adjourned with no date set.</td>
</tr>
<tr>
<td>6 Feb 2004</td>
<td>Company 1—false log books and landing declarations (62 offences).</td>
<td>Fined £10,000 Skipper 1 fined £12,243, Skipper 2 fined £6,043 total fines and costs—one year to pay.</td>
<td></td>
</tr>
<tr>
<td>4 April 2003</td>
<td>Company 1—false log books and landing declarations (62 offences).</td>
<td>To pay £900,000 forthwith.</td>
<td>Anglo Spanish—both companies placed inliquidation before date of imposition.</td>
</tr>
<tr>
<td>Date of Hearing</td>
<td>Offence(s)</td>
<td>Penalty Imposed</td>
<td>Comments</td>
</tr>
<tr>
<td>-----------------</td>
<td>---------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>4 April 2003</td>
<td>Company 2—recklessly furnishing information, namely logbooks and not recording landings (63 offences).</td>
<td>Fine and costs totalling £302,652 forthwith.</td>
<td>The only assets available are the fishing licences valued at approx £200,000 and the quotas valued at approx £300,000 to £350,000. Efforts being made to recover a compensation payment of £470,000 made to one of the companies in 2001, which may have already been dispersed to shareholders. The only payment received on these accounts is £12,409, which were the proceeds of the catch seized. Further enquirers revealed that at the time of the trial, company 2 had not published any company accounts. A company search revealed the management of both companies were the same and two of the shareholders were also share holders of both companies.</td>
</tr>
<tr>
<td>August 2003</td>
<td>Failing to record in log book and not recording landings of certain species of fish.</td>
<td>£30,000 fine £38,018 costs—two years to pay. Fined £500—seven days to pay.</td>
<td>The address is for a UK agent. The agent can be used as a “go between” but the general reply is that we can’t help we are only the agent.</td>
</tr>
<tr>
<td>3 Oct 2003</td>
<td>Failing to correctly record (three offences).</td>
<td>£24,000 fine £21,900 costs—three months to pay.</td>
<td>The address for this company is an empty office.</td>
</tr>
<tr>
<td>31 Oct 2003</td>
<td>First offender—recording false information on log book (71 Offences).</td>
<td>Fine and costs £78,049 (first offender) and £54,049 (second offender)—two months to pay.</td>
<td>Spanish vessel, Spanish registered. Address given is an empty office. Both defendants’ home addresses obtained are in Spain.</td>
</tr>
<tr>
<td>27 Nov 2003</td>
<td>Failing to record in log book, recklessly furnishing false information, not recording landings.</td>
<td>Fine £380,000, costs £39,574—one year to pay £217,000 held in a client account from sale of licence to be paid within one week.</td>
<td>The address that was given for this company is an empty office. The company now has no assets whatsoever apart from the quota which is worth about £300,000.</td>
</tr>
<tr>
<td>Skipper 1</td>
<td>Fined £8,000—two years to pay.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Skipper 2</td>
<td>Fined £2,000—one year to pay.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>