

Impact case study (REF3b)

Institution: University College London
Unit of Assessment: 20 – Law
Title of case study: Creating a new system of environmental regulation, enforcement and sanctions
1. Summary of the impact (indicative maximum 100 words)

Research by the UCL Centre for Law and the Environment has directly influenced government policy and practice on environmental regulations, enforcement and sanctions. It has:

- Led to the enactment of government legislation;
- Influenced the creation of a new sanctions policy between the UK Environment Agency and private companies;
- Benefited environmental charities and local communities;
- Led to the establishment of a new Environment Tribunal in England and Wales;
- Established new regulatory sanctions principles adopted by other regulatory agencies;
- Influenced environmental sanctions policies in other jurisdictions.

2. Underpinning research (indicative maximum 500 words)
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Professor Richard Macrory joined UCL in 1999 and established the Faculty's Centre for Law and the Environment (CLE), with the express purpose of creating a new research base in the field of environmental regulation. In 2003, he was commissioned by the UK Department for Environment, Food and Rural Affairs (Defra) to investigate the possible role of a new environmental tribunal. He:

- examined over 50 different appeal provisions in environmental legislation, and found the system incoherent;
- considered environmental judicial review proceedings and found that judicial review applications concerning environmental decisions were brought as much by industry as by members of the public or environmental organisations.

His 2003 report, *Modernising Environmental Justice, Regulation and the Role of an Environmental Tribunal* [a], recommended an integrated appeals system based on a specialised environmental tribunal. His study argued this would bring heightened legal authority and coherence to environmental regulation and significantly improve confidence in the regulated industry, regulatory authorities and the general public.

Defra then commissioned Macrory to examine the issue of environmental civil penalties. His 2003 Report [b] recommended that such penalties could play a significant role in achieving more effective regulatory enforcement. This report provided the intellectual foundations for his subsequent work on civil penalties for the Cabinet Office. For both 2003 reports, Macrory was assisted by UCL Laws Research Assistant Michael Woods.

Macrory was then invited to give evidence about his research on penalties to the 2005 Hampton Review on Business and Regulation, and as a result he was appointed by the Cabinet Office to lead a review on regulatory sanctions more generally. The *Macrory Review* [c] looked at the main reasons businesses failed to comply with regulations, and what could be done to address the situation. The *Macrory Review*:

- considered the work of 56 national regulators and 468 local authorities covering almost every area of business regulation;
- included contributions from government departments, regulators, judiciary, academics, victims and consumer groups, businesses and trade associations.

A report of the Review was published in 2006 by the Cabinet Office: *Regulatory Justice – Making Sanctions Effective* (the *Macrory Report*) [c]. The Macrory Report proposed six core *principles* that should underlie the design of a modern sanctioning system, plus a number of *characteristics* that all regulators should follow. Its core recommendations included:

- designing sanctions in line with these core principles and characteristics;
- introducing new civil financial penalties as an alternative to criminal sanctions;
- introducing a new type of sanction, “enforceable undertakings”, negotiated between the regulator and the regulated body;

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- setting up pilot schemes to gain restorative justice for regulatory non-compliance;
- making available alternative sentencing options in criminal courts;
- introducing new measures to improve transparency and accountability.

In 2010 after a new First Tier (Environment) Tribunal had been created in line with Macrory's recommendations, the then Senior President of Tribunals (Lord Justice Carnwath) requested that Macrory investigate extending the jurisdiction of the new Environment Tribunal to other sorts of environmental appeals. His study examined the provisions for environmental appeals in over sixty pieces of legislation and conducted research with the judiciary and practitioners. It found that the system continued to be incoherent and confusing. The study was published in Macrory's 2011 report, *Consistency and Effectiveness – Strengthening the New Environment Tribunal* [d]. This proposed a more coherent process with future appeals handled by the Environment Tribunal.

3. References to the research (indicative maximum of six references)

- [a] Richard Macrory with Michael Woods, *Modernising Environmental Justice, Regulation and the Role of an Environmental Tribunal* (2003) <http://bit.ly/17GCAkK>
- [b] Michael Woods and Richard Macrory, *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (2003). Available on request.
- [c] Richard Macrory, *Regulatory Justice – Making Sanctions Effective* (2006) <http://www.berr.gov.uk/files/file44593.pdf>
- [d] Richard Macrory, *Consistency and Effectiveness – Strengthening the New Environment Tribunal* (2011) http://www.ucl.ac.uk/laws/environment/content/Consistency&Effectiveness_webfinal.pdf

Research grants

Grant Holder: Professor Richard Macrory; **Grant Title:** Modernising Environmental Justice; **Sponsor:** Department for Environment, Food and Rural Affairs (Defra); **Period of grant:** 2003; **Value of grant:** £60,000. Led to outputs [a] and [c].

4. Details of the impact (indicative maximum 750 words)

Macrory's research has led directly to new laws, regulations and a new Environment Tribunal.

Legislative change: The Government accepted the core recommendations in Macrory's 2006 Report [c], and legislated in the Regulatory Enforcement and Sanctions Act 2008 [1] for fixed monetary penalties and discretionary requirements including:

- variable monetary penalties;
- compliance notices;
- restoration notices;
- variable monetary penalties with voluntary undertakings;
- stop notices;
- enforcement undertakings.

The published guidance to the Act explicitly refers to the Macrory Report and the fact that the Act directly implements Macrory's recommendations [2, pp.6, 17, 28, 43].

Creation of a new Environment Tribunal: Macrory's 2003 Report [a] was the first to advocate a specific model for an environmental tribunal, and it has been extensively referred to in discussions and literature since then. His 2006 Report [c] then advocated a regulatory appeals tribunal where civil sanctions were introduced.

- Following the introduction of sanctions in the environmental field in 2010, the First Tier (Environment) Tribunal was set up in line with Macrory's recommendations and was the first such specialist environmental court of its kind in the United Kingdom. [17]
- The core recommendations of Macrory's 2011 Report [d] – that more environmental appeals be transferred to the Tribunal and that there be a more coherent approach – have also been accepted in principle by the UK Government. [15]

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- Many more environmental appeals have now been transferred to the Tribunal, including nitrate and emissions trading in 2012, the first appeal was handled by the new tribunal in 2012 and proposals to transfer further appeals were announced in 2013. [15]

Defra Legal Advisor, explained that “*Before Macrory wrote Consistency and Effectiveness [d] few here had had the opportunity to step back and consider the most effective way to use the First Tier (Environment) Tribunal for environmental appeals. The work prompted us to consider the issue in the round, and has influenced thinking in government. As and when the opportunity arises, appeals are being transferred if appropriate to the new tribunal in line with Macrory’s recommendation*” [15].

Creating a civil sanctions regime for environmental offences: For a range of environmental offences committed after 2009, the UK Environmental Agency has acquired civil sanction powers in Part III of the Regulatory Enforcement & Sanctions Act 2008 [2], the legislation implementing Macrory’s recommendations [b, c]. In its most recent published Enforcement and Sanctions Policy (4/1/2011) the Agency states that “*when considering the appropriate course of action to address offending and to ensure compliance, we aim to follow the penalty principles set out in the Macrory Review*” [3, p. 4]. In 2011, a proposal by Oliver Letwin, Minister of State at the Cabinet Office, to scrap the civil sanctions regime sparked debate amongst legal and environmental professionals [17]. The Minister’s main concern was the possible impact on small businesses [11]. Opposition from Letwin and others led to a cross-government review. This decided to keep the sanctions regime recommended by Macrory in place: in future civil sanctions would generally only be available in respect of companies with 250 plus employees, but offender Enforceable Undertakings (EUs) would be available for everyone [18].

Impact on industry, NGOs and communities: The impact of civil sanctions on industry, non-governmental organisations (NGOs) and communities has been direct and far-reaching:

- The Environment Agency reports that, in the period from January 2012 - July 2013, 67 offender Enforcement Undertakings (EUs) were accepted by the Agency [4].
- Under previous regimes, these industries would have been prosecuted even where no intention to breach regulations was involved. The significance for industry now is that no formal admission of criminal guilt is required (which can be a crucial factor for industry in terms of reputation and insurability).
- The Agency reports that approximately a third of breaches of regulations are now self-reported by industry. Compliant industries appreciate that no competitive gain is made since any economic gains made by non-compliance, even inadvertently, are taken away in the form of donations to third party charities.
- The EUs also benefit charities and local communities. Over £500,000 has been donated to charities under EUs since January 2012. This includes large groups such as the World Wildlife Fund (WWF), but also many local environmental groups such as Cheshire Wildlife Trust and Young People’s Trust for the Environment. Sums range from hundreds to tens of thousands of pounds, and for some smaller charities these are substantial and crucial to their survival [4,5].

Impact beyond the environment field: As an indication of the reach of the impact of Macrory’s work in this area, the terms **Macrory principles** and **Macrory characteristics** have become embedded in much of the contemporary institutional language of regulatory sanctions, and are used by other regulatory institutions such as the Food Standards Agency [6], Office of Fair Trading [7, 1.2, 2.8], Office of Water Regulation [8 pp.1, 3, 4, 10] and Civil Aviation Authority [9, Annex C, para. 3, 5, 11]. The National Audit Office, for instance, states that “*The purpose of this programme of ‘Hampton Implementation Reviews’ is to provide regulators with a structured check on performance against the Hampton principles and the Macrory characteristics.*” [10, p.1]

Impact beyond England and Wales: While the 2006 *Macrory Report* and proposals were focused on England and Wales, many of the underlying principles and ideas have influenced policy development in other parts of the UK where devolved governments have been considering the introduction of civil sanctions. The Scottish Executive’s 2012 *Consultation Document on Integrated Framework for Environmental Regulation* relies on the Macrory Report in its proposals for enforcement. It proposes to create “*a range of flexible and proportionate enforcement options for SEPA [Scottish Environmental Protection Agency]*” and supported this recommendation by stating

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that Macrory's "research suggests that a flexible, proportionate, risk-based approach which utilises a range of direct measures by SEPA is the most effective way of enforcing legislation" [12 at 3.5.3]. In August 2012 Professor Macrory led a special seminar on policy development for SEPA and senior Scottish government officials. The Regulatory Reform (Scotland) Bill, introduced to the Scottish Parliament on 27 March 2013, proposes a new integrated regulatory framework and a broader range of enforcement based on the Macrory approach [19].

Similarly in Northern Ireland (NI), the Department of the Environment published a White Paper in 2011, *Environmental Better Regulation*, proposing new administrative penalties and a reform of criminal sanctions. It concluded, "The proposed changes are also in keeping with the Hampton recommendations on risk-based inspection and the Macrory review's recommendations on flexible penalties" [13 p. 23]. In 2012 Professor Macrory was invited to discuss his proposals with the Minister for the Environment and key legal officials in Northern Ireland. In 2013 the NI Department of the Environment announced Government proposals for new Environmental Offences primary legislation that will include the introduction of administrative penalties [14 at para. 90]. In 2011 Professor Macrory was also invited by the Israeli Ministry of Justice to lead on his report [c] at a seminar to discuss developing a system of administrative penalties for business regulation in Israel. The Ministry's Senior Director of Criminal Law explained the influence of the Macrory Report saying: "For many of the legal arrangements reached by us we relied on your report, which served as an important basic document for these arrangements" [16].

5. Sources to corroborate the impact (indicative maximum of 10 references)

- 1) Regulatory Enforcement & Sanctions Act 2008: <http://bit.ly/1ji5JYT>
- 2) Guidance to the Regulatory Enforcement & Sanctions Act 2008: <http://bit.ly/HWiaxL>
- 3) Guidance to Environmental Agency's Sanctions Policy:
http://www.environmentagency.gov.uk/static/documents/Business/Enforcement_and_Sanctions_Guidance.pdf
- 4) Details of enforcement undertakings accepted by the Environment Agency (EA) between January – July 2012, May - October 2012, February – July 2013" available on request and downloadable from the EA website: <http://www.environment-agency.gov.uk/business/regulation/116844.aspx>
- 5) Impact on charities and local communities:
http://www.edp24.co.uk/news/environment/nature_charities_benefit_from_environment_agency_civil_sanctions_1_1209759
- 6) Food Standards Agency, Macrory Sanctions Report (FSA 10/10/05): <http://bit.ly/17GBk0Z>
- 7) Office of Fair Trading: <http://bit.ly/184XLD9>
- 8) Office of Water Regulation: <http://bit.ly/19BJt6Q>
- 9) Civil Aviation Authority: <http://bit.ly/1dQPqtr>
- 10) National Audit Office: http://www.nao.org.uk/wp-content/uploads/2008/03/HIR_Guidance.pdf
- 11) Oliver Letwin proposals and public debate on civil sanctions policy: <http://bit.ly/1b4SM5o>
- 12) Scottish Executive's Consultation on Proposals for an Integrated Framework of Environmental Regulation (May 2012) <http://bit.ly/1aCNT0o>
- 13) Northern Ireland, Environmental Better Regulation White Paper (March 2011) <http://bit.ly/1dKijJ>
- 14) Department of Environment (Northern Ireland) Consultation Paper on Proposals for an Environmental Better Regulation Bill (May 2013) <http://bit.ly/1ji5l7b>
- 15) Statement provided by the Deputy Director, International, EU and Knowledge Transfer Team, Department of the Environment, Food and Rural Affairs (Defra) Legal Advisors.
- 16) Statement provided by the Senior Director (Criminal Law), Counseling and Legislation Department, Israeli Ministry of Justice.
- 17) UK Human Rights Blog: <http://ukhumanrightsblog.com/2011/06/06/what-can-an-environmental-tribunal-do-john-jolliffe/>
- 18) Government Press Release on use of civil sanctions: <http://news.bis.gov.uk/Press-Releases/Use-of-Civil-Sanctions-Powers-Contained-in-the-Regulatory-Enforcement-and-Sanctions-Act-2008-682e6.aspx>
- 19) Regulatory Reform (Scotland) Bill: <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/BetterRegulationBillConsultation>