BINGHAM CENTRE FOR THE RULE OF LAW

Environment Bill - Office for Environmental Protection: A Rule of Law Analysis

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Executive Summary

This Report analyses the provisions of the Environment Bill establishing the Office for Environmental Protection (OEP) from a Rule of Law perspective.

The Rule of Law principle of legality requires there to be an effective mechanism for courts to provide a remedy when there has been a breach of the law.

The Bill establishes a new court procedure for righting breaches of environmental law by a public authority– the environmental review. The default outcome in an environmental review where there has been a breach is the "statement of non-compliance". Crucially this statement does not affect the validity of the unlawful conduct. This reverses the current position that unlawful acts are presumed to be void, but with judicial discretion to validate them. This new default undermines the principle of legality with a presumption that unlawful acts by a public authority are valid.

Further remedies are available under the Bill, but they suffer significant restrictions. A court in an environmental review is not permitted to quash an unlawful action by a public authority if doing so risks causing substantial hardship to, or would substantially prejudice, a third party. This means that a clear unlawful action must be allowed to continue if a third party stands to benefit from it, or would suffer a loss if it does not continue. This approach fails to take account of the other factors such as harm to nature and to people. It would have the net effect of introducing a new "polluter doesn't pay" principle into environmental law.

The Bill provides that damages cannot be granted following an environmental review. There is nothing wrong in principle with prohibiting a court from awarding damages to the OEP. However, in the absence of any ability for the OEP to issue fines for a breach, this restriction tends to further weaken the effective implementation of environmental law.

These provisions on the remedies available in an environmental review undermine the Rule of Law. The default position should be restored so that unlawful acts are presumed void, with judicial discretion to declare them valid. The court should retain its usual discretion to grant the remedy it deems appropriate, without the unnecessary restrictions introduced by the Bill.

The establishment in the Bill of the new OEP is to be welcomed. It has the potential to realise the Government's objective of a strong office to hold the state to account on environmental law. This aligns with the Rule of Law requirement for effective implementation of the law. However, the lack of independence of the OEP runs the risk of undermining this objective.

The OEP is 'impartial' rather than properly 'independent'. The Secretary of State can issue guidance to the OEP on its enforcement policy and on its enforcement functions, and the OEP must have regard to this guidance. The Secretary of State is closely involved in appointing, paying and re-appointing the members of the OEP. These all limit the extent of the OEP's independence. There is the real risk of the Secretary of State having a direct legal route to influencing enforcement action against the Secretary of State.

This lack of independence combined with the weakness of the remedies available following an environmental review compromises the ability of the OEP to pursue effective redress for breaches of environmental law.

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Introduction

The Environment Bill is over 250 pages long and makes detailed provision about many aspects of environmental law.

This Report examines one aspect of that Bill, the newly established Office for Environmental Protection and the process that sits at the culmination of its new enforcement mechanism: the environmental review.

Do these provisions comply with the Rule of Law?

Firstly, if a public authority is found to have breached environmental law, is the principle of legality respected in the remedies available in an environmental review? To put this another way does the environmental review have any teeth?

Secondly, is the duty to implement the law compromised by any lack of independence in the Office for Environmental Protection?

Legislative overview

Office for Environmental Protection

In Part 1 of the Bill, Chapter 2 establishes a new statutory office, known as the Office for Environmental Protection, (the OEP as it is referred to in the Bill). Under clause 22 the principal objective of the OEP is environmental protection and the improvement of the natural environment. The OEP must

> (a) act objectively and impartially, and
>
> (b) have regard to the need to act proportionally and transparently.[1]

The OEP is obliged to prepare a strategy setting out how it intends to exercise its functions.[2] That strategy must set out a number of specific points:

- Its enforcement policy[3]
- How it will determine what are "serious" breaches of environmental law[4]
- How it will determine whether damage to the environment or human health is "serious"[5]
- How it will prioritise cases[6]

The strategy must be laid before Parliament.[7] The Secretary of State may issue guidance to the OEP on its enforcement policy.[8] The OEP "must have regard to the guidance" in preparing its enforcement policy and exercising its enforcement functions.[9]

As part of its scrutiny and advice functions, the OEP must monitor and report on environmental improvement plans[10] and environmental law.[11]

The OEP then has enforcement functions in respect of breach by public authorities of environmental law. The OEP can receive complaints[12] and carry out investigations.[13] If it has reasonable grounds to

[1] Clause 22(2).
[2] Clause 22(3).
[3] Clause 22(6).
[4] Clause 22(6)(a)
[5] Clause 22(6)(b)
[6] Clause 22(6)(e).
[7] Clause 23(1)(a)
[8] Clause 24(1).
[9] Clause 24(2).
[10] Clause 27.
[11] Clause 28.
[12] Clause 31.
[13] Clause 32.

believe a public authority has breached environmental law, it can issue an information notice to that public authority.[14] If it is then satisfied there has been a breach, it can issue a decision notice to that public authority.[15]

Environmental review

Clause 37 sets out a novel enforcement power of the OEP which is called an "environmental review". The OEP can apply to a court for an environmental review if satisfied that a public authority has failed to comply with environmental law AND that that failure is serious.

The environmental review function is designed to be analogous to the long-established judicial review procedure.

> On environmental review, the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.[16]

This function is designed to be exercised at the end of the process, not the start. So an application for environmental review can only be made following the issue of a decision notice, after the decision notice process has concluded, or after the time for launching an actual judicial review (normally 3 months) has expired.[17] In this way, it is a supplementary procedure, rather than an alternative procedure to the other enforcement measures in the Bill.

There are preconditions which must be satisfied before a court can grant a remedy if the court makes a finding that the authority has failed to comply with environmental law on an environmental review. Where it finds unlawfulness, the court must make a "statement of non-compliance".[18] In addition, the court can – in limited circumstances – grant any remedy that would be available in judicial review except damages.[19] In addition to remedies that a court might award, a public authority must also publish a statement setting out what steps it intends to take in light of the environmental review.[20]

There exist separate powers in clause 38 for the OEP to apply for an "ordinary" judicial review.

The principle of legality and remedies for breach of environmental law

The Rule of Law principle of legality

The principle of legality is one element of the Rule of Law. It means there must be a legal basis for Government action and that that action is done in accordance with law. This flows from the long-established Rule of Law principle that we are all subject to the law, and that no-one is entitled to act outside of the law.

The Venice Commission, in its Rule of Law Checklist, has spelt out the questions that should be asked to ascertain whether the principle of legality is being complied with:

- Do public authorities act on the basis of, and in accordance with standing law?
- Are procedures that public authorities have to follow established by law?
- May public authorities operate without a legal basis? Are such cases duly justified?[21]
- What measures are taken to ensure that public authorities effectively implement the law?
- Does the law provide for clear and specific sanctions for non-obedience of the law?[22]

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[14] Clause 34
[15] Clause 35.
[16] Clause 37(5).
[17] Clause 37(3).
[18] Clause 37(6).
[19] Clause 37(8).
[20] Clause 37(10).
[21] Venice Commission on the Rule of Law, Benchmark A2 for these three bullet points.

- Is there effective access to courts?[23]
- Are judicial decisions effective?[24]

These principles are inter-locking. If a public authority does something wrong: (i) there ought to be a way that someone can bring them to court, (ii) the court ought to be able to make a finding of unlawfulness, and (iii) the court ought to provide an effective remedy for it. Like a three legged-stool which balances when all three legs are present, the Rule of Law only works if these three legs are present: right of access to court, ability for court to make a finding, and right to an effective remedy.

In plain English, if a public authority breaks the law, can it be brought to a court, and can the court correct the wrong?

Statement of non-compliance under clause 37(7)

The default outcome where a court finds a failure to comply with environmental law on an environmental review under clause 37 is the statement of non-compliance.

Clause 37 states:

> (6) If the court finds that the authority has failed to comply with environmental law, it must make a statement to that effect (a "statement of non-compliance").
>
> (7) A statement of non-compliance does not affect the validity of the conduct in respect of which it is given.

The justification given for this is the need for legal certainty. As stated in the explanatory notes

> This provision allows third parties reliant on decisions involving the application of environmental law to have confidence that those decisions will not be quashed or other judicial review relief granted outside the normal judicial review time limits[25]

Under the provisions of the Bill, this is the default or starting position where a court determines that a public authority has broken environmental law. Combined with the further restrictions on remedies set out below, it is a default position that substantially undermines the principle of legality. There has been the right of access to a court, which fulfils the Rule of Law. There has been an opportunity for an independent court to hear all the evidence and all the arguments, and reach a decision on the lawfulness of the public authority's action. This also fulfils the Rule of Law. But when it comes to the remedy, the actual corrective action that must be taken to fix an unlawful act, the default is that the unlawful conduct is still valid. Legal certainty is an important component of the Rule of Law, but this does not mean certainty that an unlawful act will be deemed valid.

Example – Culling seabirds in the Ribble estuary

The case of *RSPB v Secretary of State for the Environment* [2015] EWCA Civ 227 concerned the decision of the Secretary of State to grant permission for a cull of seabirds. The Court of Appeal ruled that a direction to cull seabirds was not consistent with the objective of managing their population.

Under this Bill, the statement of non-compliance would declare such a cull to not be in compliance with environmental law, but this would not, in itself, stop the cull. Achieving the new default remedy would be an exercise in futility. The RSPB (and others) take judicial reviews to stop birds being killed, not to obtain a declaration that doing so is unlawful (but may continue nevertheless). A paper remedy is no remedy at all.

[22] Benchmark A7 for these two bullet points.
[23] Benchmark E2(a).
[24] Benchmark E2(d).
[25] Explanatory Notes, paragraph 328.

The existing procedure of judicial review is still open so access to justice is still possible. But the environmental review itself does not appear to offer a feasible route an effective remedy.

This provision does not satisfy the Rule of Law. The third leg of the stool is not present, and without it, there is little point in bringing an environmental review. Even though the act of the public authority was unlawful, it is still valid.

Background: judicial review remedies – declarations or quashing orders

The ordinary judicial review principles, upon which the environmental review is based, have developed a body of law to deal with this third leg of legality – what remedies can a court grant when it finds the law has been broken?

The two main remedies available in this area are declarations and quashing orders.[26] A declaration is simply a formal statement setting out the legal state of affairs. It is non-executory, in the sense that it does not command anyone to do anything, it simply declares what the law is.

A quashing order is different as it is executory, it has legal effect and commands something to be done. A quashing order could rule that a decision was void and therefore has no legal effect. Rather than simply declaring (for example) that a planning decision was unlawful, a quashing order would quash that decision meaning it has no continuing effect.

The long established default position in judicial review cases is that, where unlawfulness has been established (eg because a public authority has acted beyond its powers), mandatory orders, meaning in this instance a quashing order, are to be preferred. This is referred to as the presumption in favour of relief. According to Lord Bingham, speaking in a judicial capacity, under the Rule of Law

> The discretion of the court to do other than quash the relevant order or action where such excessive power is shown is very narrow.[27]

This is eminently sensible, including from the layperson's perspective. If something is unlawful, it ought to be invalid. Professor Jeff King, Legal Adviser to the House of Lords Constitution Committee reiterates this point. He states that a quashing order is the usual remedy for delegated legislation which is outside the powers for its making.[28] As Professor King points out, although this is rightly the default position, there are occasions where the courts may exercise their discretion and not quash something, but instead simply make a declaration. For example, if a quashing order would cause great administrative uncertainty over a range of public authority actions, or if it would cause chaos with many individuals, the court may instead simply make a declaration. Alternatively, it may make a quashing order, but suspend its operation, allowing the public authority some time to 'fix' the legal problem itself.

The "new normal" under clause 37(7) – unlawful acts are valid by default

This default approach of making a quashing order in judicial review proceedings works. And this is the default which already applies in cases where the judicial review covers an area which will in future be covered by the environmental review. As Professor King says

> That is why the pragmatic approach of the courts, occasionally issuing declarations in lieu of quashing orders (with attendant justification), is defensible in principle as well as evident in practice.[29]

This reversal of the default when it comes to an environmental review is implicitly acknowledged by the Government in the explanatory notes to the Bill:

> The statement of non-compliance confirms that the court has found that the public authority in question has failed to comply with environmental law, it does not in itself invalidate the decision of the public authority in question. … This is the case unless the court decides that it is appropriate to impose further remedies such as a quashing order, and the conditions for doing so were met.

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[26] Section 31 Senior Courts Act 1981, other remedies do exist: prohibitions, injunctions and award of damages.
[27] *Berkeley v Secretary of State (No. 1)* [2001] 2 AC 603
[28] J. King, 'Miller/Cherry and Remedies for Ultra Vires Delegated Legislation', U.K. Const. L. Blog (19th Sept. 2019) (available at https://ukconstitutionallaw.org/)
[29] J. King, *ibid*.

It is clear, under the new normal and where the OEP seeks an environmental review, that unlawful acts are valid, unless the court makes an active decision to go further, AND that it is satisfied that the further hurdles to giving a remedy have been overcome.

Example – housing development in Kent

The case of *Dover District Council v CPRE Kent* concerned the grant of permission for a major development in Kent, partly in an Area of Outstanding Natural Beauty. The Supreme Court held that the permission had been granted unlawfully. The Council and the developer both argued that "a mere declaration of the breach was sufficient". However, the Supreme Court held that merely declaring the permission unlawful would not suffice. It held that "this is a case where the defect in reasons goes to the heart of the justification for the permission, and undermines its validity. The only appropriate remedy is to quash the permission".

Under the terms of this Bill, the default position would be that there would be nothing to prevent the development from going ahead, even though it was unlawful.

Full details at [2017] UKSC 79

Clause 37(7) completely reverses the current approach and has as its starting point that an unlawful action of a public authority is valid. Unless the OEP is able to jump one of the further hurdles set out in the rest of clause 37 on remedies, it renders environmental reviews a largely worthless exercise. Even though a court rules a public authority's action unlawful, this ruling with have zero legal effect. What then is the point in an environmental review?

The anomaly of the unlawful law being lawful

There is a particular subset of official action which should be considered here – the making of secondary legislation. Secondary legislation (for example statutory instruments) is made under the power of "parent" legislation. If a court rules that a statutory instrument is outside the power of that parent legislation, by default (and subject to the exercise of judicial discretion set out above), it will be declared void from the outset.

This was what happened in the *UNISON* case which concerned a new fee structure for applications to industrial tribunals.[30] The new fees were imposed under a piece of secondary legislation. The Supreme Court ruled that the secondary legislation was unlawful because it substantially and wrongly restricted access to the courts. Lord Reed stated

> The Fees Order is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful *ab initio*, and must be quashed.

This is a straightforward legal outcome – the Order was unlawful, so the court ruled it void and it therefore ceased to have effect. But under clause 37(7), if an environmental statutory instrument was unlawful, the starting point would be that it remains valid. The unlawful law remains lawful.

Example – Manston Airport Development Consent Order

Permission for use of Manston Airport was given by way of a particular type of statutory instrument called a Development Consent Order (DCO). The DCO was contested and the Secretary of State conceded that it had been made unlawfully. The Planning Court therefore quashed the DCO meaning it had no legal effect.

Under the Bill, notwithstanding that it was unlawful, the DCO would remain valid.

[30] *R (UNISON) v Lord Chancellor* [2017] UKSC 51

As ever, there is nuance, and it is possible that there would be some instances where it would be appropriate for an unlawful statutory instrument to retain its validity in some way. This was the outcome in the *Gallagher* case, where the Supreme Court held that ruling a statutory instrument void would introduce a discrepancy in the statutory scheme.[31] However, this is very much the exception and to turn the exception into the default in the environmental context would radically alter the balance of power in favour of executive action, and against the environment, the courts and the citizen.

Further restrictions on remedies – clause 37(8) – damages

Clause 37(8) goes on to say that the normal judicial remedies are available, but that there are substantial hurdles before these can be awarded. The first restriction is that damages cannot be awarded in an environmental review. In the words of the Bill:

> Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages.

As the applicant in an environmental review will be the OEP, it is hard to see any circumstances when it would be appropriate for the OEP to be awarded damages. In itself, there is no Rule of Law problem with this provision.

However, this does leave an obvious gap in the enforcement regime. It is appropriate that the OEP cannot recover damages from a public authority. But there is no provision for the OEP to issue fines for breach of environmental law. Simply telling a public authority that it has broken the law may not be enough. Sometimes the sanction of a financial penalty is also necessary.

The lack of a remedy in damages combined with the inability of the OEP to impose fines weakens the ability of the OEP to provide effective sanctions for breach of environmental law.

Further restrictions on remedies – clause 37(8)(a) – hardship and prejudice

The second restriction is contained in clause 37(8)(a). It is that a court cannot grant a remedy in an environmental review if it would be

> likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority[33]

This is a rather odd concept to include into the environmental review process. It provides a reason for an unlawful action to continue to have effect, notwithstanding that it is unlawful, merely because someone has acted in reliance upon that unlawful act. Not only that, but it allows a third party to insist on benefiting from the unlawful act of a public authority. This would lead to the perverse outcome of a court acquiescing in the unlawful action of a public authority merely because a third party stands to benefit from that unlawful action.

The counter argument here is around legal certainty, which the Government rightly contends is also a Rule of Law value. Certainty means that individuals can be satisfied that at some point in the process a decision reached is the final one and cannot be overturned. When it comes to the merits of a decision, or reaching a judgement on competing values, the argument for legal certainty is a strong one. If the outcome could legitimately be A or B, then at some point the individual needs to know that outcome A has now been settled and cannot be overturned. But legal certainty in an unlawful outcome does not have the same Rule of Law importance. For example, in the criminal law field, the argument for certainty does not preclude the courts from overturning verdicts where an innocent person was wrongly jailed, even decades later.

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[31] Re *Gallagher's Application for Judicial Review* [2019] UKSC 3
[33] Clause 37(8)(a).

This provision takes as precedent section 31(6) of the Senior Courts Act 1981. S. 31(6) allows the court, in a judicial review case, to refuse relief if there has been undue delay in making the application for judicial review and there would be substantial hardship, prejudice, or detriment to good administration. There are two differences between s. 31(6) and this provision. Firstly, there is no element of fault (eg delay) before a remedy can be refused. Secondly, s. 31(6) merely reiterates that the court has a discretion in awarding a remedy, whereas this provision fetters that discretion in providing that it has no power to award it if the hardship / prejudice condition is met.

Consider a hypothetical example. A developer seeks permission to cut down ancient woodland to build houses. The local authority grants that permission, and in doing so it breaches environmental law. The developer expends money on preparatory work. At a subsequent environmental review, the court makes a statement of non-compliance. But because the developer has already expended money, and has an expectation of making a profit out of the houses, the development must be allowed to continue. Even though the development is breaking environmental law, the court is obliged to do nothing, other than make a declaratory judgement devoid of any actual legal effect.

In the field of environmental law, many actions of public authorities are in terms of allowing permission for a development or operation, which may harm the environment, to be done: building roads, digging mines, opening a coal-fired power station etc. Once that permission has been granted, it is inevitable that the person or business to whom the permission has been granted will expend money on that basis. Following on from this, it is also inevitable that if that permission is quashed, that person will suffer substantial prejudice to their rights. But there can be no expectation that a person can benefit from an unlawful action. However, the practical effect of clause 37(8)(a) is that large scale breaches of environmental law will be judicially sanctioned simply because the person who stands to benefit from them will have spent money on them. Instead of a court righting wrongs, it ends up condoning them.

The other side of this equation is absent from clause 37(8)(a) – environmental damage. The main purpose of environmental law is to prevent damage which may harm the environment and may harm humans. Built into environmental law is the need to balance economic development and environmental protection. But in clause 37(8)(a) the only factor to be considered is the prejudice that would be caused if the remedy was not awarded, not the environmental damage. Taking an extreme example, if a council unlawfully granted permission for a plastic burning factory in the middle of a town, the fact the factory owners spent substantial sums on a plastic burning machine would preclude that permission from being revoked. Under clause 37(8)(a) the plastic must be burnt. In the words of Greener UK, “the remedies and sanctions available through the environmental review process are too weak and the court’s ability to grant them is unjustifiably restrained in an unprecedented fashion”.[34]

There is a long-standing principle of environmental law called the “polluter pays” principle. Rather obviously, it means that the polluter, rather than society as a whole, must pay the cost of that pollution. Under this proposal, this does not apply, and the fact that someone has expended money on something which is in breach of environmental law becomes a justification for that continued breach of environmental law.

Clause 37(8)(a) stops a court from quashing an unlawful action merely because someone has relied on it and / or stands to benefit from that unlawful action continuing. The consequences of environmental damage are to be ignored. This introduces a novel environmental law principle, the “polluter doesn’t pay principle”.

Further restrictions on remedies – clause 37(8)(b) – detrimental to good administration

The third restriction on the award of a remedy by a court in an environmental review is contained in clause 37(8)(b). It is that there can be no award if an award would be

> detrimental to good administration

[34] Greener UK, *Environment Bill: briefing for Commons Committee* 20 November 2020, available at https://greeneruk.org/sites/default/files/download/2020-11/Environment_Bill_new_clauses_briefing_from_Greener_UK_and_Link.pdf

Once again, this rather flips things on their head. Unlawful action by a public authority, by its very nature, is detrimental to good administration. Or to put this the other way around, this restriction only works if a public authority makes the argument in court that it would be conducive to good administration if it can break environmental law.

Conclusion

The provisions in clause 37(7) and (8) on the legal lack of effect of a statement of non-compliance and the restrictions on remedies undermine the Rule of Law principle of legality.

The existing default position is a sensible one, that if a public authority acts unlawfully, that unlawful action should be quashed and have no legal effect. There already exists judicial discretion to depart from that default position, and that discretion is exercised as appropriate.

The environmental review has the potential to be an effective tool and it need not be rejected in its entirety. But some aspects of it do undermine the Rule of Law.

Underlying these provisions seems to be a reluctance on the part of the Government to be properly held to account through the courts, which calls into question the strength of its commitment to the Rule of Law.[35]

These provisions reverse the current default position and establish a new normal that unlawful actions by a public authority remain valid. They place restrictions on the award of a remedy by a court. These restrictions require the court to endorse unlawful actions if quashing them would hurt a person who stands to benefit from an unlawful environmental action. We recommend that these provisions be removed or amended.

Duty to implement the law and the independence of the Office for Environmental Protection

The Rule of Law duty to implement the law

The Rule of Law is not a dusty principle to be left on the shelf. It is meant to have tangible effects, and one of these effects is that there is a duty upon the state to effectively implement the law. According to the Venice Commission on the Rule of Law

> The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced. … Proper implementation of legislation may also be obstructed by the absence of sufficient sanctions, as well as by an insufficient or selective enforcement of the relevant sanctions.[38]

The establishment of the Office for Environmental Protection is to be welcomed from a Rule of Law perspective. This is a very positive first step taken by the Government to ensure that environmental law is properly implemented, including that it is implemented where a public authority has broken the law.

Independence of the OEP – language and legislative structure

According to the Explanatory Notes the Bill creates "a new, statutory and independent environmental body, the Office for Environmental Protection … to hold government to account on environmental law". Under the actual wording of the Bill, the OEP is required to be objective and impartial,[39] and the Secretary of State must "have regard to" the need to protect its independence.[40]

The language of the Bill does not quite reflect the aspiration set out in the explanatory notes. An obligation to be impartial is not the same as enjoying institutional or statutory guarantees of independence. A direction to the Secretary of State to "have regard" to the need to protect

[35] R. Cormacain, 'Unaccountability – The Disease within Government', U.K. Const. L. Blog (17th May 2021) (available at https://ukconstitutionallaw.org/)
[38] Venice Commission, text explaining Benchmark A7.
[39] Clause 22
[40] Schedule 1, paragraph 17.

independence is not the same as a statutory duty upon the OEP to be independent, nor the same as an obligation upon the Secretary of State to respect independence.

There are other legislative models for fully independent statutory bodies. For example, section 2 of the Public Services Ombudsman Act (Northern Ireland) 2016 is entitled "Independence", and clearly states that

> The Ombudsman is not subject to the direction or control of a Minister.

The Children Act 1989 makes provision for the appointment of an "independent reviewing officer" who monitors performance of a local authority in the relation to a child's case.[41] The Mental Capacity Act 2005 makes provision for the appointment of "independent mental capacity advocates".[42] In making provision for self-regulation, the Communications Act 2003 asks "whether those procedures are administered by a person who is sufficiently independent of the persons who may be subjected to the procedure".[43] The Policing and Crime Act 2017 expressly refers to the "Independent Office for Police Conduct",[44] which was formerly the Independent Police Complaints Commission.

Although the substance is more important than the name, names do matter. The new body is named the "Office for Environmental Protection" not the "Independent Office for Environmental Protection".

The OEP does not have an express statutory duty to be independent of the Government or of public authorities, nor does it have institutional guarantees of independence. The language of the Bill indicates the clear policy choice for the OEP to be impartial, but not fully independent.

Independence of the OEP – enforcement strategy and enforcement functions

When it comes to enforcement, there are clear restrictions on the independence of the OEP. Clause 24 states

> (1) The Secretary of State may issue guidance to the OEP on the matters listed in section 22(6) (OEP's enforcement policy).
>
> (2) The OEP must have regard to the guidance in—
>
> (a) preparing its enforcement policy, and
>
> (b) exercising its enforcement functions.

The OEP has a responsibility under clause 22 to prepare a strategy, and that strategy must contain an enforcement policy. In preparing that strategy, it must have regard to any guidance issued by the Secretary of State. When it comes to exercising its enforcement functions, it must have regard to any guidance issued by the Secretary of State.

There is no reason given in the explanatory notes for this power. In the Delegated Powers Memorandum provided by the Department, the justification given for this power is lacking in specifics. That memorandum states that this power is necessary in order "for the Secretary of State to be responsive to issues that may arise in practice in relation to the OEP's enforcement policy. These issues are not foreseeable in advance so cannot be provided for on the face of the Bill".[45] This does not explain at all the reason for the Secretary of State for issuing the guidance.

Notwithstanding that the Delegated Powers Memorandum claims independence will be protected, these provisions undermine the independence of the OEP when it comes to enforcing environmental law. At the strategic level, it is not free to make up its own mind about what is a serious breach of environmental law[46], whether damage to the environment or human health is serious,[47] or how to prioritise cases.[48] Instead it must consider the views of the Secretary of State. Then at the practical

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[41] Children Act 1989, section 25A.
[42] Mental Capacity Act 2005, section 35.
[43] Communications Act 2003, section 6(3).
[44] Policing and Crime Act 2017, chapter 5.
[45] Supplementary Delegated Powers Memorandum, Department for the Environment, Food and Rural Affairs, available at https://publications.parliament.uk/pa/bills/cbill/58-01/0009/DPM_Environment_supplementary_201020.pdf
[46] Clause 22(6)(a).
[47] Clause 22(6)(b).
[48] Clause 22(6)(e).

level of individual cases, it is not free to make up its own mind about when to enforce environmental law, it must first consider the views of the Secretary of State. It cannot be said that this is a robust and independent process for environmental protection and holding the state to account. This runs the real risk of breaching the Rule of Law requirement to have effective and non-selective sanctions for breaches of the law.

Consider a hypothetical case of an application for a new nuclear power station. The Secretary of State could issue guidance that nuclear power is a key component of a carbon neutral energy strategy and that its benefits outweigh the risks of environmental harm and that the OEP's enforcement policy and enforcement functions ought to reflect that. If a complaint is then made to the OEP about that new power station, instead of the simple question "is this compliant with environmental law?", there is a high chance that it will have regard to the guidance and decide to simply not investigate.

This lack of independence fetters the ability of the OEP to provide effective sanctions for breaches of environmental law.

There is an additional aspect of this which goes beyond a lack of independence and opens up the real risk of bias and conflict of interest. What if the complaint made to the OEP concerns the actions of the Secretary of State himself or herself? There is a long standing principle of administrative law that a person should not be a judge in their own cause.[50] If the OEP is investigating the actions of the Secretary of State, can the Secretary of State issue guidance to the OEP on how that complaint should be investigated? Under the terms of this Bill, that would be a lawful course of action. Complaints about Ministers "marking their own homework" have become common. This provision would give legislative force to this kind of abuse of process.

The ability of the Secretary of State to issue guidance on enforcement policy and enforcement functions opens up the real possibility of the Secretary of State issuing guidance on how the Secretary of State is to be investigated. This risk of bias is at odds with sound administrative practice and undermines the Rule of Law.

Independence – appointment and running of the OEP

It is for the Secretary of State to appoint the non-executive members of the OEP.[51]

The non-executive members then appoint the chief executive and other executive members of the OEP.[52] But the Secretary of State must be consulted before the chief executive is appointed.[53]

The Secretary of State may appoint the first chief executive, who is known as the interim chief executive.[54] Where the OEP is not quorate, the interim chief executive may do things, but "must act in accordance with any directions given by the Secretary of State".[55]

For non-executive members, appointment is for a period of up to 5 years[56] and they are eligible for re-appointment.[57] The Secretary of State has the power to remove a non-executive member if the person has not discharged the duties of office or is unfit or unable to carry out functions.[58] It is for the Secretary of State to determine the pay of the non-executive members.[59]

With regards to funding, it is for the Secretary of State to determine how much to pay the OEP, and "The Secretary of State must pay to the OEP such sums as the Secretary of State considers are reasonably sufficient to enable the OEP to carry out its functions."[60]

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[50] It is so longstanding it even has a Latin phrase, *nemo judex in causa sua*.
[51] Schedule 1, paragraph 2.
[52] Schedule 1, paragraph 3.
[53] Schedule 1, paragraph 3
[54] Schedule 1, paragraph 4
[55] Schedule 1, paragraph 4(3).
[56] Schedule 1, paragraph 5(3).
[57] Schedule 1, paragraph 5(5).
[58] Schedule 1, paragraph 5(6).
[59] Schedule 1, paragraph 6.
[60] Schedule 1, paragraph 12.

The House of Commons Environmental Audit Committee reached the following conclusion on appointments which we endorse:

> The appointments process for Members of the Office for Environmental Protection does not provide for enough independence from Government as the balance of power lies with the Secretary of State. Parliament must have a greater role in the appointments process with a Parliamentary Committee having a veto over the appointment of the Office for Environmental Protection's Members and Chief Executive.[61]

Taken together, these provisions tend to undermine the independence of the OEP. The non-executive members are to be appointed by the Secretary of State the chief executive appointment is subject to the consultation of the Secretary of State. How easy will it be for those people to criticise the Secretary of State? If a non-executive member's period of office is coming to an end and they are eligible for re-appointment, how easy will it be for that person to criticise the person in charge of re-appointing them? When it comes to pay, how easy will it be for a non-executive member to criticise in a candid and robust way the person who is paying them?

Conclusion

Although the establishment of the OEP is to be welcomed and although it does have some powers to act of its own accord, it is not sufficiently independent of the Secretary of State.

The language of the Bill grants limited independence, not full independence.

The Secretary of State has indirect control over both the enforcement policy and the exercise of enforcement functions. This allows the state to set the agenda on what types of environmental breaches can be investigated. Even worse, this could lead to the Secretary of State issuing guidance on how the OEP is to investigate the Secretary of State. There is no clear justification for this.

The Secretary of State has too much control over the appointment and pay of members of the OEP for them to be fully independent.

This lack of independence compromises the ability of the OEP to pursue effective remedies for breaches of environmental law.

[61] House of Commons, Environmental Audit Committee, *Scrutiny of the Draft Environment (Principles and Governance) Bill*, 24 April 2019.

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