

Date: 17 June 2021

Location: Virtual meeting  
on Zoom

## APPG on the Rule of Law

### Remedying Environmental Review and the Independence of the Office for Environmental Protection: The Environment Bill and the Rule of Law

#### Parliamentarians in Attendance

**Attending:** Lord Anderson of Ipswich KCB QC; Joanna Cherry QC MP; Lord Pannick QC; Lord Hope of Craighead; Lord Thomas of Cwmgiedd; Lord Woolf; Lord Dubs; The Duke of Wellington; Baroness Young of Old Scone; Lord Whitty; the Earl of Devon; Lord Krebs; Lord Duncan of Springbank.

**Apologies:** Baroness Lister of Burtersett CBE; Lord Garnier QC; the Lord Bishop of Leeds; Lord Lisvane; Lord Tyler; Lord Rooker; Lord Puttnam; Lord Blencathra; the Earl of Caithness

#### Meeting Aims

To provide a briefing for Parliamentarians on the Rule of Law concerns raised about the Environment Bill

To provide further information on:

- lack of independence for the Office for Environmental Protection; and
- concerns about the effectiveness of the new court-based enforcement process called environmental review

To consider whether amendments could address the problems identified, and how best to constructively approach the Committee Stage debate in the House of Lords

#### Report

Lord Anderson, Lords Co-Chair of the APPG on the Rule of Law introduced the main rule of law topics for discussion in this briefing on the Environment Bill. Chiefly the expert panel would address the independence of the Office for Environmental Protection (OEP) and the effectiveness of environmental review as a court process. Lord Anderson noted the level of interest in the Bill, which had seen 300 amendments tabled in the Lords at the time of the briefing.

Ruth Chambers of Greener UK spoke primarily about the importance of the OEP being an independent body, as it will have responsibility for overseeing government and public authorities and has investigative capabilities to enforce breaches of environmental law by government and public authorities. The operational and cultural independence were important, and the constitutional independence of this body should be



protected in legislation. The Bill should set out a framework for the independence of the OEP, which must be durable to ensure that Ministers cannot easily undermine the independence of the OEP in the future, especially once the body had instigated action against government.

The positives on the operational side, the OEP will have its own website and communications functions. Further positives would be guaranteeing the OEP control over its own procurement. Political commitments to multi-year funding of the OEP should be put into legislation to guarantee their binding nature, through **amendments 92 and 93**. Culturally, from the 1st July an interim board chaired by Dame Glenys Stacey will oversee the OEP, meaning it has operational and cultural independence from the outset.

The OEP is expected to take the form of a non-departmental public body, an arm's length body. This is outside the scope of the Bill but could be debated under amendments 82 and 91. Ruth Chambers suggested that the National Audit Office provided a model that would be more suitable for the OEP.

The two key aspects of independence are who and how the budget and board members are decided. The OEP is established with a very standard appointments process for the chair and board members which involves DEFRA Ministers making decisions about who is on the board and when they should be replaced. Ruth Chambers suggested that the Office for Budget Responsibility provided a better appointments model, where the Treasury Select Committee has to consent to the appointments of Treasury Ministers. Amendment 85 would allow peers to debate requiring the consent of the Parliamentary environment committees to approve Ministerial appointments to the OEP.

Ruth explained Clause 24 of the Bill gave the Secretary of State the power to give guidance to the OEP on how it prepares its enforcement policy which the OEP must have regard to. This has the potential to create conflicts of interest where the OEP brings an action against the Secretary of State. Lords Krebs' stand part amendment would give peers the opportunity to debate this.

**Professor Eloise Scotford, Professor of Environmental Law, UCL Faculty of Laws**, followed with an explanation of how the new environmental review court procedure would work and why this was important for upholding the rule of law in environment law cases.

The OEP has the power to enforce environmental law through the environmental review procedure which largely replaces the EU commission procedures for enforcement post Brexit.

Effectively there are three kinds of enforcement in environmental law: Statutory targets e.g. Government air quality or water quality targets enshrined in law; duties e.g. Secretary of State (SOS) must do this by law; and processes: e.g.. SOS must follow this process when making a decision/making an appointment by law

The environmental review procedure is a catch all for reviewing failures to comply with environmental law. It is not the primary enforcement for private duties of environmental law - that is the responsibility of DEFRA, Environment Agency, local authorities, Natural England etc.

There is a specific requirement that public bodies should act lawfully within the Bill. Clause 30 defines the failure to comply with environmental law, which must be triggered before any enforcement process. This is different from the previous EU Commission process. Now failure to comply is specifically and restrictively defined. There is a question over whether for example, air quality standard targets would be caught within this definition.

Under clause 37 on environmental review outcomes, if a court finds a failure to comply with environmental law it must issue a statement of non-compliance (SNC). The legislation is specific that the statement of non-compliance does not affect the validity of the conduct for which it was given. That is challenging, it poses the question: what effect does the SNC have?

Sub clause 37(8) is a restriction on remedies in environmental review cases. If there is hardship caused to a third party then remedies cannot be granted by the court. Environmental Review is designed to look at lawfulness of actions in a restrictive way and heavily limits access to remedies.

An important point is that the OEP is not the primary enforcer of environmental law, but is the only body that could enforce direct targets the Secretary of State is committed to achieve in legislation.

**David Wolfe QC of Matrix Chambers** introduced his experience of serving on public bodies and how the way they were set up influenced their relationship with Ministers. Public bodies he had served on with a similar foundation to the OEP, the Legal Services Commission and the Legal Services Board had very close relationships with Ministers and very little real independence. It tended to be the case that the Minister got what the Minister wanted with such bodies.

On the other hand, the Press Recognition Panel, set up by Royal Charter, has proper independence. The Royal Charter makes it much harder to change the operation of the body and the relationship with ministers is entirely different.

The OEP will bring cases using environmental review. The first and overarching question is: what is the relationship with judicial review? One of the rules of judicial review is that if the claimant has an alternative remedy then review is denied. There is a real worry that judicial review could be denied because environmental review is viewed as an alternative remedy. That would be a serious, fundamental problem.

Turning to clause 37(8) and 37(9), usually in environmental judicial review cases the concern is whether the proper licence or permit is held for activity being undertaken. The OEP process will take several months, which means the activity may have been going on for some time.

Clause 37(8) restricting remedies makes environmental review a complete waste of time. The nature of these cases mean it is inevitable that a third party (a company, a developer) would intervene and a remedy would be denied based on the hardship test here. It is almost inconceivable a claimant would ever get a remedy.

This position is a total reversal of the normal process for judicial review. Section 31(6) of the Senior Courts Act 1981 states that a court *can* withhold a remedy, under clause 37(8) of the Environment Bill the court *must* withhold the remedy [Emphasis added]. It is the difference between a power and a requirement. In judicial review it is conditional on undue delay as well, making this a significant difference. The environmental review restriction arises in all cases.

31(2a) of the Senior Courts Act requires judicial review court to refuse relief where the result would not be substantially different for the claimant. Judicial Review remedies are discretionary, and the exercise of that discretion has been developed by courts over many years.

The OEP will only be as effective as the 'big stick' it wields, and if environmental review is that big stick is as toothless as this then the OEP will struggle to achieve results and make a difference.

**Lord Anderson** noted that in his discussions with the Minister and the Bill team, he had emphasized the importance of environmental review not being used to close off judicial review to NGOs and members of the public. The Minister had given an assurance in an All Peers' Letter which for what it may be worth he would probably be prepared to repeat in Parliament.

**Dr Ronan Cormacain from the Bingham Centre for the Rule of Law** set out some of the amendments tabled in the Lords Committee Stage debate and why they might be of interest in light of the previous speakers' contributions. He said the Bill could be a positive force with some minor constructive changes.

**Amendment 105** in the name of Lord Krebs and Lord Anderson of Ipswich amends Clause 105 to allow the OEP to roll a number of linked concerns together into one Environmental Review case if there are similar breaches of environmental law that link them together, with safeguards to ensure that if it would be better to hear them separately this is possible. This is a technical and non-controversial change that would likely improve the efficiency of the environmental review process.

**Amendment 106** would solve one of the difficulties identified by speakers, creating a presumption that a statement of non-compliance voids the unlawful conduct for which it is given. This is the default position in judicial review processes, the court would have a discretion to allow the unlawful conduct to continue as valid if there was sufficient justification.

**Amendment 107** would make other remedies available in environmental review cases. This is a substantive amendment. This removes the

objectionable parts on remedies, giving the court full powers on remedies from declaratory judgment to quashing order, injunction etc. This restores the power to grant an effective remedy, which is currently unduly constrained by clause 37(8).

**Amendment 108** in the name of Lords Krebs, Anderson of Ipswich, Thomas of Cwmgiedd and Duncan of Springbank, removing criteria that OEP can only apply for judicial review in urgency.

**Amendment 104** - in the name of Baroness Jones of Moulsecoomb, seeks to introduce a power for the OEP to issue penalty notices, a step further, a greater power for OEP to issue fines. Dr Cormacain posed the question of whether this is strictly necessary, as OEP is not a primary regulator.

Amendments on the independence of the OEP - **Amendment 82 onwards**

Lord Cameron and Baroness Boycott's amendments put forward a sensible suggestion of a 10 year fixed term for the head of the OEP to reduce the influence of Ministers.

**Clause 24** is the provision which gives SOS power to issue guidance to OEP and then OEP must have regard to the guidance. Removing this would be worthwhile. **Amendments 98 and 100** are variations on this reducing the regard the OEP must have to SOS guidance, both sensible amendments.

### Discussion and Questions

**Lord Pannick QC** asked whether there was any published analysis by the Government that would justify the restrictions on remedies. Have they identified a particular mischief to be addressed?

**Ronan Cormacain** said the mischief the Government identified was legal certainty for those who had permits to operate. The legal certainty for those in breach of the law does not hold up against the principle that the law should be upheld.

**Eloise Scotford** identified a clash between tort and environmental law, a permit to operate is not a permission to cause a nuisance.

**Lord Anderson** said that in discussion, the Bill team said that it did not envisage clause 37(8) being used very often, and would not expect the OEP to be involved in enforcement in a lot of planning-type cases. Part of the justification for restriction on remedies was the policy agenda to cut down on red tape and increase the amount of housing development. The proposals however seemed to prefigure broader proposals being consulted on by MoJ following Lord Faulks's review of administrative law, e.g. in relation to prospective-only remedies.

**The Duke of Wellington** raised concerns that the Environment Agency does not always appear to be enforcing its powers in relation to sewage discharge into rivers by water companies. Would the OEP be able to reinforce or direct the Environment Agency to use its powers, or have direct enforcement responsibility in this area?

**Eloise Scotford** said the OEP is well placed to pressure a regulator that was not doing its job. It would have to show the Environment Agency was unlawfully failing to exercise a function it had. This would be hard to prove, possibly a *Wednesbury* unreasonableness test from judicial review would be used.

**David Wolfe** said frontline regulators generally have a power to enforce with a discretion on taking enforcement action. It is a bit like the police or CPS deciding to prosecute people. The issues around sufficiency of resources for frontline regulators persist too.

**Baroness Young** former chair of Natural England and other independent bodies said that in her experience of regulating social care was fine because it was all local authorities, but regulating the NHS was going against the Minister and Whitehall and they made that difficult. Most important for OEP is holding government and public bodies to account on water or air quality targets. There is a concern about the power to sack the OEP board, which will discourage them from pushing Ministers too hard. She noted that the lever of fines is a useful one, the Thames Super Sewer was agreed to in part because of the £85,000 a day EU Commission fine for polluting the Thames.

**Lord Anderson** pointed out that the guidance envisaged in clause 24 relates not only to policy but enforcement. For example, while clauses 38(1)(a) and 38(7) allow the OEP to decide whether a failure to comply with environmental law is serious, clauses 22(6)(a) and 24(1) allow DEFRA to provide guidance on how the OEP should approach that decision. The OEP should be able to decide how it exercises its own statutory functions.

**Eloise Scotford** one of the big points is the collective outcome requirements on Government on air/water quality standards. Clause 30 potentially excludes those big environmental obligations on Government from scrutiny. The Scottish Continuity Act has broader construction that would be preferable.

**Lord Hope of Craighead** asked whether there was enough in the amendments to cover the issues identified at the meeting. It was agreed to look further at the clause 30 issue identified by Eloise Scotford, and at the adequacy or otherwise of assurances that pending OEP investigations or environmental review would not preclude recourse to judicial review by NGOs or individuals.

**Lord Krebs** spoke of his experience as the first chairman of the Food Standards Agency, in 2010 the coalition government unilaterally stripped out FSA powers, his concern being that if the Bill is amended to enhance the powers of the OEP then a future SOS could subsequently change that.

**Lord Krebs** continued: Suppose the OEP succeeded in bringing a successful review against a Minister, what would be the consequence? Government says it would be deeply embarrassing for a Minister to breach the ministerial code and there would be political consequences, but that does not seem to happen a lot at the moment.

**David Wolfe:** There have been cases of contempt against Ministers, not recently, chiefly in deportation cases. Less likely to happen. ClientEarth litigation went to the European Court requiring the Government to produce an air quality plan.

**Eloise Scotford** said the ClientEarth litigation is a good example. New air quality standards targets under retained EU law. OEP enforcement is contingent on how tight the requirements for achieving targets are. This process is designed so that remedies can be brought against the minister or a public authority, but is structured so that the remedies are unlikely to have any effect.

**Ruth Chambers:** on Lord Krebs' point about independence of the OEP, once the OEP exists then Parliament would have to make changes to the structure of the OEP through legislation.

**Ronan:** if there are provisions safeguarding OEP independence in the Bill then it is harder to strip them out. Assurances have less value than statute. Normally in law for private individuals, there is a duty and sanction for failure to comply. Normally there is not an explicit sanction for public and state duties because it is assumed public authorities will act lawfully.

**Rosie Sutherland from RSPB** raised substantial hardship arising in other areas than planning and concerns about it arising regularly and undermining the OEP's ability to enforce environmental law.

**Lord Anderson** posed the question: if there was an unlawful act in relation to air quality and produce a quashing order, would it be enough if one taxi driver objected on hardship grounds it appears from 37(8) that the court would not have a discretion to strike a balance?

**Lord Duncan** a brief point, has the Bill team given indication where they might give movement or are they being circumspect?

**Lord Anderson** no informed discussion with the bill team on amendments yet. They did say they were happy to look at A105 on multiple applications and have a think about why detrimental to good administration tipped the balance on remedies. Largely they are keeping their counsel.

### Further Reading

- James Tobin, Nicola Newson, *Environment Bill: Briefing for Lords Stages*, House of Lords Library, 03<sup>rd</sup> June 2021, [available to download here](#)
- Dr Ronan Cormacain, *Environment Bill – Office for Environmental Protection: A Rule of Law Analysis*, The Bingham Centre, 4<sup>th</sup> June 2021, [available to download here](#)
- Ruth Chambers, *Environment Bill: briefing for Lords second reading*, Greener UK, June 2021, [available here](#)
- Professor Eloise Scotford, *Written Evidence, Submission to Public Bill Committee Inquiry on the Environment Bill 2019-20*, Public Bill

- Committee, Environment Bill, House of Commons, May 2020, prepared 3<sup>rd</sup> November 2020, [available here](#)
- David Wolfe QC, *Written Evidence [on the Draft Environment Bill]*, Environment, Food and Rural Affairs Committee, House of Commons, 22<sup>nd</sup> February 2019, [available here](#)
  - Tom Bingham, *The Rule of Law*, Penguin 2011