

Environmental Audit Committee expresses concern over draft Bill

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Environment analysis: Christopher Badger, barrister at Six Pump Court Chambers, discusses the Environmental Audit Committee's report following its pre-legislative scrutiny of the draft Environment (Governance and Principles) Bill and points out that although the findings are highly significant, whether they will be taken up by the government is another matter entirely.

Original news

MPs concerned over effectiveness of post-Brexit environment Bill, [LNB News 25/04/2019 50](#)

An Environmental Audit Committee report has raised serious concerns with the draft Environment (Governance and Principles) Bill—proposed legislation to ensure the protection of the UK environment after Brexit. MPs concluded they are unable to assess the full implications of the Bill for the environment due to its lack of coherence over the role of government departments and lack of clarity over principles and governance.

What is the background to this report?

Following the decision to leave the EU in 2016, there was a general concern of a potential lack of oversight for environmental policy in the UK, resulting from the loss of jurisdiction of the European Commission, the Court of Justice and the European Environment Agency (EA). The government acknowledged these concerns and committed to consulting on 'setting up a new independent body to hold government to account and a new set of environmental principles to underpin policy making'. The government published this consultation on 10 May 2018, while at the same time provisions were included in the [European Union \(Withdrawal\) Act 2018](#) for the government to publish a draft Bill on environmental principles and governance by December 2018.

On 18 July 2018, Prime Minister Theresa May, announced that the government would introduce a wide-ranging Environment Bill.

The first part of the draft Environment (Principles and Governance) Bill was published on 19 December 2018. It is this draft Bill that is the subject matter of this report as part of the pre-legislative scrutiny process. The Bill sets out how the government will maintain environmental standards in the event of the UK leaving the EU. It also details how the government will build on the vision of the 25-year environment plan, 'A Green Future: Our 25 Year Plan to Improve the Environment'. This includes creating an independent oversight body, the Office for Environmental Protection (OEP) to:

- scrutinise environmental law and the government's environmental improvement plan
- investigate complaints on environmental law
- take enforcement action on environmental law

The second half of the Bill is expected to be introduced during the second session in 2019 and will cover sectoral environmental regulation and standard setting in areas such as:

- air quality
- wildlife and habitats
- better management of resources
- water
- waste

In order to write the report, the Environmental Audit Committee (EAC) received written and oral evidence, with separate hearings of the EAC and the Environment, Food and Rural Affairs Committee in February and March 2019.

What are the key areas of deficiency identified in the report and what recommendations are made to address them?

MPs found that environmental principles, used to guide current EU legislation and policy, have been ‘severely downgraded’ by the proposals in the Bill.

The EAC found that there is no legal requirement for policy or all public bodies to seek to ensure a high level of environmental protection, nor any presumption that environmental protection would not be reduced after leaving the EU. Evidence to the EAC described this absence as ‘striking and surprising’. The government had ignored a call from the EAC for the Bill to require ‘all public bodies to act in accordance with the principles’. The application of the principles is limited to Ministers’ action rather than all public bodies. They are subject to a number of exclusions and to the veto of the Secretary of State. They do not link to the rest of the Bill or other legislation. Due to the weak drafting of the duty, the EAC considered that it could create a great deal of litigation.

To counter these observations, the EAC recommended that an ‘overarching objective’ be adopted in the Bill to ensure a high level of environmental protection is included and to guide environmental policy.

In addition, there is no government agency with responsibility to enforce climate change mitigation measures. MPs considered that enforcement of climate change mitigation has been ‘deliberately excluded’ from the scope of the OEP. This means that the OEP will not have an enforcement function for climate change even though the Committee on Climate Change has no enforcement powers, resulting in a gap in enforcement (which is currently undertaken by the European Commission). The EAC considered that, although to date the governance framework established under the [Climate Change Act 2008](#) has worked well, there has been no need for Parliament to intervene to achieve carbon budgets. But according to the Committee on Climate Change, it is the forthcoming fourth and fifth carbon budgets that are not on track to be achieved, so there is a need for the enforcement of climate change law by the OEP.

The report also identified a lack of environmental accountability for action by government departments. The OEP enforcement powers are limited to administrative compliance rather than achieving environmental standards—a departure from the enforcement procedure of the European Commission. On failures by public authorities to comply with environmental law, the scope for enforcement action was ‘very tightly drawn’ leaving the OEP with ‘little to get its teeth into’. Under these provisions, the threshold for failure would be dominated by questions of procedural lawfulness. The EAC considered that this was at odds with the government’s claim that the Bill places environmental accountability at the heart of government and is not equivalent to the procedure of the European Commission.

Of note is the fact that MPs are also concerned that a policy statement on environmental principles would allow the Secretary of State to exclude policies considered ‘not relevant’ or with ‘no significant environmental benefit’. They also criticise further exclusions to policies relating to:

- the armed forces
- defence or national security
- taxation
- spending or the allocation of resources within government, or
- ‘any other matter specified in regulations made by the Secretary of State’

EA considered such exclusions would mean the principles would cease to have ‘a meaningful influence on the development and application of environmental policy and law after EU Exit’—a conclusion with which the EAC agreed.

The EAC also stated that the enforcement mechanism must go beyond that of traditional judicial review. The EAC considered that the enforcement procedure lacked imagination and that the government must consider alternative mechanisms. Indeed, the EAC put forward a list of areas in which the OEP should be entitled to ‘bring cases against the government’, including matters relating to energy and waste matters. It also wishes to strengthen the role of the OEP, by making it a statutory consultee on changes to environmental law and by providing it with a more hard-edged right to take proceedings, certainly one which is not limited to conventional deferential judicial review principles. The OEP must be able to monitor actual standards and outcomes and not just the processes to achieve those ends. The EAC proposes a new right of challenge in the Upper Tribunal.

Does the Environment, Food and Rural Affairs pre-legislative scrutiny of the Bill concur with the EAC's findings?

The Environment, Food and Rural Affairs Committee (EFRA) published its own finding on 30 April 2019. They too identify that the draft Environment (Principles and Governance) Bill does not provide equivalence to the current environmental protections provided by membership of the EU. In some areas, EFRA identified that there was a significant regression on current standards. Among numerous recommendations, the key five were for the government to:

- set out a clear overarching objective for the UK's future environmental governance and to ensure that environmental principles do not lose the legal status and priority they currently possess in European law
- ensure that Ministers and all relevant public authorities must act in accordance with environmental principles, rather than the weaker duty proposed in the draft Bill that Ministers must 'have regard to' environmental principles
- strengthen the OEP's independence from government by ensuring all decisions relating to the membership of its board require the consent of the EFRA Committee, and by committing to a multi-annual budgetary framework in the Bill
- sharpen the teeth of the OEP's proposed enforcement powers by providing it with further compliance tools beyond review in the courts and empowering it to issue emergency and interim measures in urgent cases of environmental harm
- provide the OEP with the necessary powers to enforce government targets and objectives relating to climate change to ensure there is no governance gap after we leave the EU

These complement the recommendations of the EAC.

Do you think these findings will be significant and do you anticipate there being any changes to the draft Environment Bill as a result?

The findings are highly significant, but whether they will be taken up is another matter entirely. However, there were green shoots during the course of evidence gathering. There was an indication during evidence from Michael Gove that he would agree to a change, from requiring Ministers simply to 'have regard to' the environmental principles to requiring Ministers to 'act in accordance with' the policy statement laying out what the environmental principles are. He agreed to look at the exclusions on a 'case-by-case basis'. He indicated that he wanted the remit of the new OEP to go further than, and improve upon that of, the European Commission. He also said that he was open as to how climate change could be included in the Bill. But on the topic of judicial review, Michael Gove's position was that the government had attempted to replicate what was considered to be an easily understandable process and it was questionable whether the use of, for example, an expanded tribunal system would actually be a more effective means of providing justice.

The bottom line is that both committees gave the government a resoundingly poor score. The EAC also expressed its concern that it has not been able to completely exercise its role of pre-legislative scrutiny by reason of the failure on the part of the government to publish the remainder of the Environment Bill, expected in the next parliamentary session. My personal view is that there will be changes to the Environment Bill as a consequence of these reports. The content is simply too damning.

Christopher Badger has an established practice in commercial regulatory investigations and prosecutions, specialising in environmental enforcement, acting for both corporate and individual defendants and on behalf of EA.

Interviewed by Kate Beaumont.

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