

The funding of the Office for Environmental Protection

5 March 2019

1. Introduction

On 19 December 2018, Defra published its draft Environment (Principles and Governance) Bill (the draft bill). The draft bill establishes a new environmental body, the Office for Environmental Protection (the OEP).

The OEP will perform important environmental governance functions. It will provide advice on the implementation of environmental law; it will oversee and scrutinise that implementation; and it will enforce environmental law, ensuring that ministers and public bodies fully comply. The bulk of the OEP's costs will be associated with its initial establishment. The ongoing work of the OEP is unlikely to require the extent of funding needed by other environmental public bodies which incur, unlike the OEP will, grant and capital expenditure. The government envisages that the OEP's remit will extend across the UK in relation to reserved matters and be limited to England in respect of devolved matters. In order to perform its functions adequately, and to ensure that the OEP can pursue its own strategy in fulfilling its functions, it must be free from the influence of government. A crucial element of this independence rests on the source and structure of the OEP's funding. However, the funding model envisaged in the draft bill falls short.

In section 2, this paper provides a brief overview of the structure proposed in the draft bill. Section 3 sets out the key characteristics of a funding model which would ensure a greater level of independence.

2. Funding under the draft bill

The draft bill provides that the OEP's funding will be supplied by the Secretary of State. The amount of funding will be "such sums as the Secretary of State considers are reasonably sufficient to enable the OEP to carry out its functions".¹ As noted in the Explanatory Notes, "[f]unding will be provided to the OEP in the form of grant-in-aid, which will be set out as a separate line in the overall estimate of [Defra] to ensure adequate transparency."²

The OEP is required to keep proper accounts and proper records in relation to them.³ It must prepare a statement of accounts for each financial year.⁴ This statement must include an assessment by the OEP of whether the Secretary of State has provided it with sufficient funding in order to carry out its functions during the relevant financial year.⁵

3. Recommendations

3.1 Source: the OEP must be funded by Parliament

Under the draft bill, the OEP's funding will be provided by the Secretary of State. This is deeply unsatisfactory. In order to ensure that the OEP is not beholden to the particular priorities and concerns of government, its budget must be provided by Parliament rather than carved out of Defra's pot.

The source of the OEP's funding will inevitably affect the work it pursues. Funding provided by government will allow Defra to influence the scope and substance of the new body's work.

The case of Natural England provides a valuable example. Since its establishment, Natural England has been subject to significant and sustained funding cuts. Its baseline budget has been slashed by more than 50%. In evidence to the Environment, Food and Rural Affairs Committee, Andrew Sells – then chair of Natural England – provided a telling and concerning account of the impact that Natural England's funding source has had on its ability to deliver its priorities:

The difficulty is that all our money effectively comes from Defra... There is an inherent contradiction in there. They want us to deliver their priorities. We say, "We have 500 statutory duties and responsibilities. We want to deliver those". On one particular instance, I was having a conversation, a very amiable conversation, with a civil servant about why we were not doing more in certain areas of what we might call landscape generically. I was told there was no interest among Ministers to do it, so there was no budget for it.

The problem is that you do not have a parliamentary precept of money just coming in and telling you to get on with it. We have lost the control. Five years ago, we could determine, very largely, what we did with our money and how we made the announcements. Now, we cannot (emphasis added).⁶

By contrast, funding from an independent source, such as Parliament, will help to preserve the OEP's independence, enabling it to set its own strategic direction. The National Audit Office (the NAO) is funded in this way. In evidence to the Environmental Audit Committee (the EAC), Comptroller and Auditor General of the NAO, Sir Amyas Morse, emphasised that this is one of the 'key things' which enables the NAO to maintain its independence: "we are funded directly by Parliament, not by a Department, so [the Department] cannot cut our money based on whatever considerations there may be. We are not directed by them as to what we should do."⁷ It is crucial that the OEP also receives its funding from Parliament.

3.2 Amount: the OEP must determine 'sufficient' funding

The draft bill gives the Secretary of State absolute discretion to determine the level of funding the OEP should receive. This arrangement – which gives government significant influence over the resources the new body will have to perform its functions – further undermines the independence of the OEP. The draft bill requires the OEP to assess whether the funding it has received is sufficient for it to carry out its functions⁸ – this is welcome. However, this does not go far enough. In addition, the OEP should indicate at the outset of each budget period the level of funding it needs. As the bill is drafted, the OEP is not precluded from including this forecast in its annual assessment, but there is no obligation for the Secretary of State to take this into account when determining future funding.

A better approach would be for the OEP to produce (in negotiation with HM Treasury) and present to Parliament its own Supply Estimate setting out the money it needs. A Supply Estimate is the means through which government departments and certain parliamentary bodies gain parliamentary approval to access public money to fund their operations. Each of the NAO, the Electoral Commission and the Independent Parliamentary Standards Authority currently submit independent Supply Estimates.

There is no legal or constitutional barrier to this, although it may require the creation of a new parliamentary body to oversee the Estimate (as the Public Accounts Commission currently does for the NAO).

The bill could therefore require that a new 'Environmental Audit Commission' is established to examine the OEP's annual spending proposals as set out in its Supply Estimate and to lay it before the House of Commons. The bill should provide that in doing so, the Commission should have regard to advice given by the EAC. The chair of the EAC should be an ex-officio member of the Commission or Committee that scrutinises the OEP's proposals. This link will facilitate valuable consistency and alignment in understanding of the purpose and functions of the OEP. There should also be a requirement for the Secretary of State to report annually to Parliament on forecasts of likely need and/or future budget plans.

Alternatively, this function could be performed by an existing parliamentary body. The Parliamentary and Health Service Ombudsman (the PHSO) is another parliamentary body which has its own Supply Estimate. Its work is scrutinised by the Public Administration and Constitutional Affairs Committee (PACAC) – which was not established solely to scrutinise the PHSO's work. The PHSO submits annual memorandums in which it reports on its performance including against its multi-annual strategy and sets out its estimate to PACAC.⁹ This then feeds into central government's Main Supply Estimate.¹⁰

3.3 Scrutiny: the Supply Estimates scrutiny procedure should be reinforced

Parliament considers Supply Estimates as part of its Supply procedure. This procedure is unsatisfactory and the scrutiny afforded to Supply Estimates is insufficient. Estimates generally pass 'on the nod'. Commons Estimates Day debates on individual Estimates tend to focus on the work and priorities – including recent reports – of the relevant department or body as opposed to the actual expenditure anticipated.¹¹ Motions for approving the resolutions which contain the Estimates are effectively unamendable. Crucially, there is no mechanism for MPs to increase Estimate amounts – only the Crown has the prerogative to do this.¹² This does not achieve adequate public awareness of, or participation in, the consideration of Estimates.

To improve scrutiny of the OEP's work and funding, the NAO, the EAC and the proposed Environmental Audit Commission or other existing body should each have a role in scrutinising the OEP. The NAO could – as it does with other parliamentary bodies – audit and certify the OEP's annual accounts. Similar to the Public Accounts Committee's reviews of the NAO's work, the EAC could conduct an annual review of the OEP's work and progress against its purpose and objectives, including whether it is receiving adequate funding to fulfil its duties. The Environmental Audit Commission would, as discussed above, scrutinise the OEP's funding estimates for the forthcoming year. We note that the NAO's Supply Estimate is considered by the Public Accounts Committee before it is reviewed by the Public Accounts Commissions.¹³ Given the inadequacy of scrutiny within the existing Supply procedure, this approach – which provides greater transparency over the NAO's Estimate and spending than any other individual Departmental Estimate through additional public due diligence – is to be welcomed.

3.4 Structure: the OEP should be funded on a multi-annual basis

There are several examples of existing public bodies or agencies that receive multi-annual budgets, including Highways England, the Environment Agency and the Office for Budget Responsibility (the OBR). In its letter to the OBR setting out a multi-annual funding commitment the Treasury noted that that this approach "supports the OBR's independence and ability to manage its resources effectively in the medium term. This approach for independent fiscal institutions is consistent with international best practice, strengthening institutional independence through delegated budgetary autonomy". A similar commitment is necessary for the OEP. This commitment should be reinforced by a provision in the draft bill confirming that the OEP will be funded on a multi-annual basis.

A multi-annual budget would help to avoid the slow but significant funding decline that many of Defra's arms-length bodies have suffered over recent years and provide certainty in relation to ongoing funding levels. These arrangements are generally popular. In a technical consultation on the 2018-19 Local Government Finance Settlement, 93% of respondents indicated that they supported the

Government in continuing to maintain certainty provided by the existing multi-year settlement offer.¹⁴

In June 2018, the Government recognised the value of multi-annual budgets. In announcing a 5-year settlement for the NHS, the Government emphasised that “This long-term funding commitment means the NHS has the financial security to develop a 10-year plan.”¹⁵ If the OEP is to work strategically, it too requires a similar level of security.

4. Conclusion

The Government has repeatedly committed to establishing an ‘independent’ body to hold decision-makers accountable in relation to environmental law. The reality and meaningfulness of this independence depends on several aspects of the new body’s constitution, including its funding source and model. If the OEP’s funding is provided and determined by the Secretary of State (as the draft bill currently envisages) its ability to act independently will be fatally undermined.

For more information, contact:

Hatti Owens, UK Environment Lawyer, ClientEarth

e: howens@clientearth.org

Georgina Holmes-Skelton, Head of Government Affairs, National Trust

e: Georgina.holmesskelton@nationaltrust.org.uk

Endnotes

¹ Draft Environment (Principles and Governance) Bill, sch, para 9(1).

² Draft Environment (Principles and Governance) Bill Explanatory Notes, para 244. This is similar to the funding structure of the Information Commissioner's Office which receives an annual grant-in-aid from the Department for Culture, Media and Sport.

³ Draft Environment (Principles and Governance) Bill, sch, para 11(1).

⁴ Draft Environment (Principles and Governance) Bill, sch, para 11(2).

⁵ Draft Environment (Principles and Governance) Bill, sch, para 11(3).

⁶ Environment, Food and Rural Affairs Committee, Oral Evidence: Chair of Natural England, HC 1728, Q14. (21 November 2018) available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/chair-of-natural-england/oral/92782.pdf>.

⁷ EAC, Oral evidence: Government's environmental principles and governance consultation, HC 1062 (19 June 2018), Q61 available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/environmental-principles-and-governance-consultation/oral/85727.html>.

⁸ Draft Environment (Principles and Governance) Bill, sch, para 11(3).

⁹ See, for instance, PHSO, 'Memorandum for the House of Commons PACAC – PHSO Main Supply Estimate for 2017-18' available at <https://www.parliament.uk/documents/commons-committees/public-administration/Estimates%20Memoranda/PHSO-Main-Supply-Estimate-2017-18.pdf>.

¹⁰ Central Government Supply Estimates 2017-18, Main Supply Estimates (April 2017) at p 552 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609174/Main-Supply-Estimates-2017-2018-web.pdf.

¹¹ See, for instance, House of Commons Order Paper for 2 July 2018 (OP No. 160 Part 1) and related Hansard debate on the Main Estimate for the Department of Health and Social Care and the Ministry of Housing, Communities and Local Government (<https://publications.parliament.uk/pa/cm201719/cmagenda/OP180702v3.pdf>). The content of the debate is largely unconcerned with the specifics of the Supply Estimate. (<https://hansard.parliament.uk/Commons/2018-07-02/debates/D5FD6CAF-590A-4152-9520-CE548CF2324D/DepartmentOfHealthAndSocialCareAndMinistryOfHousingCommunitiesAndLocalGovernment>).

¹² HM Treasury, 'Supply Estimates: a guidance manual' (July 2011) p 9 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/220744/estimates_manual_july2011.pdf.

¹³ Cf., for instance, the Public Accounts Committee's examination of the NAO's Supply Estimate on 12 March 2018 in which the Chair explained that the Committee would "look at the National Audit Office's Main Estimate...and after this we then write a letter to the Public Accounts Commission giving our support or not or any concerns we have to that body which ultimately decides on behalf of Parliament whether and how much the National Audit Office should be funded by."

¹⁴ Department for Communities and Local Government, 'The 2018-19 Local Government Finance Settlement Summary of responses to the Technical Consultation', Question 1 available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669543/Summary_of_Responses_to_the_Technical_Consultation_2018-19.pdf.

¹⁵ Press release, 'Prime Minister sets out 5-year NHS funding plan' (18 June 2018) available at <https://www.gov.uk/government/news/prime-minister-sets-out-5-year-nhs-funding-plan>.

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