

Environment Bill: briefing for Commons Committee

November 2020

The role and independence of the Office for Environmental Protection (amendments 179, 154, 155, 157, 156, NC13, 98, 99, 4)

Introduction

The Environment Bill proposes the creation of an independent statutory body, the Office for Environmental Protection (OEP), to monitor and report on environmental progress and targets, to monitor, report and advise on changes to environmental law and to take enforcement action on potential breaches of environmental law by public authorities. The establishment of this body is very welcome and will be vital to ensuring that implementation of environmental protections and access to environmental justice do not degrade as the government puts in place a new environmental governance system. We also welcome the government's [ambition](#) for the OEP to be a world leading watchdog.

However, the OEP will only be effective if it is sufficiently independent from government. The government has [accepted this](#) and there has been strong support in parliament for the principle of the OEP's independence, including in the second reading [debate](#) in October 2019 on the first version of the bill and during the [pre-legislative scrutiny](#) of the draft bill.

The EFRA Committee [concluded](#) that it is essential that "every step is taken to ensure the Office for Environmental Protection is as independent from the Government as possible, to give the public confidence that the Government will be properly held to account on its duty to protect the environment".

However, just saying that a body will be independent will not necessarily make it so and while the government has included some safeguards in the bill, several further changes are needed to ensure enduring independence for the OEP and to meet the government's aim of a world leading watchdog. **As we highlight below, the OEP will be weaker in certain key respects than existing domestic regulatory bodies.**

Schedule 1 – appointment of the Chair of the OEP (amendment 179)

Despite the government's continued [insistence](#) that the OEP will be independent, the government is proposing for the OEP to have weaker arrangements on appointments than other comparable oversight bodies. Paragraph 2 of Schedule 1 provides for the Secretary of State to appoint the Chair and the other non-executive members. This position differs starkly from the appointment process for several other oversight bodies. For example:

- At the National Audit Office (NAO) the Auditor and Comptroller General (C&AG) is appointed with the consent of the House of Commons on the joint recommendation of the Prime Minister and the Chair of the Committee of Public Accounts (which is by convention a member of the Official Opposition). The non-executive members of the NAO are appointed by the Public Accounts Commission.
- At the Electoral Commission the Electoral Commissioners and Commission Chair are appointed at the recommendation of the Speaker of the House of Commons following consultation with the leadership of the major political parties.

- At the Budget Responsibility Council at the Office for Budget Responsibility (OBR), the Chair and members are appointed by the Chancellor of the Exchequer, but must have the consent of the Treasury Select Committee.

These cases all have a statutory basis for their specific appointment processes and the direct involvement of parliament is a recognition of the fact that an additional degree of independence from government control over the person appointed is appropriate.

Public oversight of the leadership of public bodies spending public money through ministerial responsibility is important. However, this aim can still be achieved in arrangements where ministerial responsibility is shared with parliamentary accountability. The involvement of parliament in the appointment of people to roles that require greater independence than normal non-departmental public bodies provides a public opportunity for scrutiny and airing of potential conflicts, issues and capabilities. It is also a check on ministerial power over the individuals that will be providing oversight of government activity.

Alternative measures to create distance between ministers and public appointees exist already in the key cases referred to above. It is essential that the OEP, with its explicit enforcement and oversight role over government, is treated in the same category as these bodies, and alternative arrangements for these senior appointments are put in place for the appointment of the OEP Chair and non-executive board members. As Committee member Bim Afolami [said](#) during the second reading debate, the OEP is “...a sort of environmental National Audit Office”. Unfortunately, the bill does not yet provide the necessary governance safeguards to benefit such a role.

Instead, the government has [opted](#) for a standard public body appointment process for the OEP in which ministers hire and fire the Chair and other board members, rather than a process along similar lines to the bodies listed above. When [questioned](#) about the appointment process for the Chair on the Today programme on 28 October, the Secretary of State insisted that pre-appointment hearings would be sufficient. While such hearings can be a helpful mechanism, they come at the tail end of the appointment process. We would caution against such hearings being seen as a panacea for independence, especially as in a number of [cases](#) the advice of select committees has been overridden and the government’s preferred candidates confirmed regardless.

As the [Institute for Government](#) and several other witnesses submitted in their evidence during the pre-legislative scrutiny of the draft bill, parliament should play a greater role in the appointments process. This was [accepted](#) by the Environmental Audit Committee following the pre-legislative scrutiny of the draft bill when it recommended:

85. We recommend that Schedule 1 should be amended to reflect Paragraph 1 of Schedule 1 to the Budget Responsibility and National Audit Act 2011 for the appointment of the Office for Environmental Protection’s Members and Chief Executive and paragraph 6(3) of Schedule 1 of the same Act to set out a process to protect Office for Environmental Protection members against dismissal by the Secretary of State. This appointments process would utilise the statutory body of parliamentarians as the appointing Committee.

The government’s view (set out in its May 2018 [written evidence](#) to the Public Administration and Constitutional Affairs Committee’s inquiry into pre-appointment hearings) is that the ultimate decision on public appointments should be made by ministers as they are accountable and responsible for the decisions and actions of their

department and its arms length bodies. The Cabinet Office's insistence that all public bodies should be treated the same ignores the reality that variations already exist in public body appointment processes. It also ignores the fact that the OEP will effectively be replacing the supra-national oversight role currently provided at the EU level and is therefore fully deserving of a more independent and bespoke appointments process.

We therefore support **amendment 179** would require the appointment of the Chair and other non-executive members of the OEP to be made with the consent of the relevant select committees.

We note that the previous Secretary of State appeared to agree with this approach when in an [oral evidence](#) session, she told the EFRA Committee that the model of the Office for Budget Responsibility, in which the appointment of the chair is made with the consent of the Treasury Select Committee, "has much to recommend it". It is not clear therefore why this has not been included within the bill.

Schedule 1 – interim chief executive (amendments 154, 155)

We note that Paragraph 4 of Schedule 1 gives the Secretary of State the power to appoint an interim chief executive for the OEP. We do not object to this power in principle, as it is now clear that an interim appointment will be necessary given that the Environment Bill will not achieve Royal Assent before the end of the Transition Period.

However, we are concerned about the terms of the power, which is broadly cast and could allow ministers to effectively control the development of the OEP at a crucial, formative time.

We strongly object to Paragraph 4(3) which amounts to a power of direction over the OEP. This is of concern because Paragraph 4(2) empowers the interim chief executive to "do other things in the name and on behalf of the OEP". The government is, therefore, effectively giving itself the ability to direct the interim chief executive on a wide range of matters.

This is not commensurate with the government's commitment to independence and transparency. It is also inconsistent with the government's position as set out in its [factsheet](#) on environmental governance that was published on 10 March and updated on 21 October. This clearly states that "Ministers will have no powers of direction over [the OEP's] work programme or decision making".

Paragraph 4(3) should therefore be deleted. We support **Amendment 154** which would prevent the government from giving directions to the interim chief executive of the OEP.

We are also concerned that Paragraph 4(4) would allow a civil servant to be appointed as interim chief executive with no independent oversight or scrutiny of this appointment.

We support **Amendment 155** which requires the Chair's approval for civil servants or other external persons to be appointed as interim chief executive of the OEP.

Given that the appointment of the interim chief executive is now likely to precede the Royal Assent of the bill, **the government should set out a clear process and timetable for its planned interim arrangements**, as the EFRA Committee and the Environmental Audit Committee have [recently requested](#) of the Secretary of State.

Schedule 1 – multi annual funding for the OEP (amendment 157)

The government [has agreed](#) that to ensure its [financial independence](#), the OEP will be provided with a five year indicative budget which is formally ring fenced by HM Treasury within any given Spending Review period. This is comparable with how some other bodies are given long term financial certainty, such as the Office for Budget Responsibility (OBR), for which HM Treasury has made a [similar commitment](#). In its [letter to the OBR](#) setting out a multi annual funding commitment, the Treasury noted 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”.

The government has said that it will make this commitment in parliament and we encourage the minister to do so in Committee. It would also be helpful if the minister could reiterate the government’s position remains as set out in its [response](#) to the EFRA Committee’s pre-legislative scrutiny report which stated:

“In order to ensure its financial independence, the OEP will be provided with a five year indicative budget which is formally ring fenced by HM Treasury within any given Spending Review period”.

This commitment was repeated in the government’s environmental governance [factsheet](#) that was published in March but a subsequent written parliamentary question cast some doubt on the latest position.

On 16 June 2020, in response to a question from Caroline Lucas MP, the minister [confirmed](#) that “Defra will agree with HM Treasury a budget that will be ring-fenced for each spending review period, giving the Office for Environmental Protection greater certainty over its finances. The budget will be announced as soon as possible after the Environment Bill achieves Royal Assent”. This written answer omitted any reference to the timescale over which the budget will be provided.

For the avoidance of doubt, we invite the minister to take this opportunity to confirm that the government remains committed to providing the OEP with a five year indicative budget.

Even if this technical clarity were provided, public and parliamentary pressure aside, there is nothing to stop a future government deciding not to renew this commitment, especially if the OEP has started to make life difficult for ministers or in any new period of austerity or funding cuts. This welcome political commitment should, therefore, be enshrined in the legislation, for example in a similar manner to how the government has provided [long term funding certainty](#) for the NHS. We support **Amendment 157** which would require the OEP to be given a five year indicative budget, and allow it to request in-budget increases.

A binding commitment to provide 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. 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.” If the OEP is to work strategically, it too requires a similar level of security.

Schedule 1 – protecting the independence of the OEP (amendment 156)

Protecting the institutional independence of the OEP will be crucial to guarantee its independence over the longer term. Schedule 1 of the bill requires the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect its independence. This is welcome but should be strengthened by the removal of the words “have regard to”. We support **Amendment 156** which would make the independence of the OEP an absolute requirement, rather than one that ministers are merely required to have regard to.

Public register of correspondence with government (NC13)

The government has [said](#) that it will ensure that the relationship between the OEP and Defra is as transparent as possible and that specific mechanisms which aim to achieve adequate transparency are captured in the supporting Framework Document.

A Framework Document would set out the broad framework within which the OEP operates and cover matters like governance and accountability arrangements but there is little scrutiny or transparency concerning Framework Documents with no consultation, parliamentary scrutiny or stakeholder involvement.

Experience of other Framework Documents is that they often become more constraining over time and can be vehicles for government to seek to exert stricter controls over public bodies, which can undermine their independence. **Transparency mechanisms must therefore be set out in legislation and not left to as yet unwritten Framework Documents.**

Schedule 1 should be amended to provide that all significant communication between the OEP and government ministers is recorded and published by the OEP. This could be achieved by requiring the OEP to maintain and publish a register of significant communications with the government.

We support **NC13** which would require the OEP to keep a public register of correspondence with the government, as this would be an appropriate and proportionate safeguard on independence. This is similar to the [log of substantive contact](#) that the OBR maintains and publishes, which ensures that details of contact between the OBR and ministers, special advisers, private office and opposition MPs is published.

Clause 22 – relationship with the Committee on Climate Change (amendments G30+G66+NC4)

Climate change mitigation is included within the remit of the OEP meaning it can monitor progress against emissions targets and take enforcement action where public authorities are not meeting legal climate related duties. This raises questions about how to maintain the reputation and status of the Committee on Climate Change (CCC) and ensure it works effectively with the OEP and other public authorities. We believe there are clear and distinct roles for the two bodies that they could establish between themselves within the legal framework of the bill as set out in this [briefing note](#).

The government has proposed some amendments (**30, 66 and NC4**) on the OEP's relationship with the CCC which make a memorandum of understanding a statutory requirement and amend the OEP's monitoring and reporting duty.

These amendments appear broadly sensible as sections 34 to 36 of the Climate Change Act 2008 cover advice to government on carbon budgets, advice on treatment of aviation and shipping emissions and reports on progress towards meeting carbon budgets, which sit more naturally within the remit of the CCC. While stipulating a legal requirement for a memorandum of understanding between the two bodies seems overly draconian, we do agree that such a document will be helpful as the working relationship between the two bodies will be of significant public interest. We would though expect the memorandum to be published and stakeholders consulted on its headline content.

Clause 25 – annual progress report (amendment 98)

Clause 25(10) requires that the Secretary of State's response to the OEP's report must specifically address any recommendations made by the OEP as to how progress with the environmental improvement plan and targets could be improved. Paragraph 244 of the [Explanatory Notes](#) to the bill states that this requires the Secretary of State to evidence and justify any decisions whereby the OEP's recommendations will not be taken forward, but it does not require the government to explain what action will be taken to make improvements.

We support **amendment 98** which would require the government's response to the OEP's progress report to set out what action will be taken in response to recommendations for how progress could be improved.

Clause 26 – international environmental law (amendment 99)

Clause 26 requires the OEP to monitor the implementation of environmental law and provides it with a power to issue reports on any matter to do with the implementation of environmental law. We support **amendment 99** which would clarify that the OEP will also monitor the implementation of international environmental law. International environmental law is important as it provides rules and agreements on matters of global concern such as climate change and biodiversity loss and it is sensible for the OEP to monitor how government is adhering to these international commitments.

Clause 27 – advising on changes to environmental law (amendment 4)

Clause 27 sets out the circumstances in which the OEP can give advice to ministers, and how this advice must be published and may be laid before parliament. Subsection (6) provides that the relevant minister may lay the OEP's advice and any response to it before parliament. Paragraph 253 of the [Explanatory Notes](#) to the bill explain that this is a discretionary power to reduce burden on parliament. The Notes cite apolitical advice that has been sought by a minister regarding a specific technical detail as an example of advice that will not be laid in parliament. While that particular example appears to be reasonable, the power is so broadly cast that a minister could choose not to lay any of the OEP's advice before parliament. We support **amendment 4** which would ensure that the OEP's advice and any ministerial response is laid in parliament. Given that the government has [said](#) that it will ensure that the relationship between the OEP and Defra is as transparent as possible, we would hope that this amendment can be accepted.

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On behalf of Greener UK and Wildlife & Countryside Link

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