

## Environment Bill briefing for Lords Committee Days 3/4 Independence of the OEP

25 June 2021

### Summary

This briefing is on behalf of the environmental coalitions [Greener UK](#) and [Wildlife and Countryside Link](#) and covers the **independence of the Office for Environmental Protection (OEP)**.

The OEP will only be effective if it is sufficiently independent from government. There has been strong support in Parliament for the principle of the OEP's independence, including during the [pre-legislative scrutiny](#) of the draft bill and in the Commons second reading [debate](#) in October 2019 on the previous version of the bill. It was also one of the standout issues of the Lords [second reading](#) debate in June.

The EFRA Committee [concluded](#) that it is essential that "every step is taken to ensure the OEP 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".

The independence of the OEP is also anticipated by the provision in the 2018 EU Withdrawal Act (section 16) which required ministers to publish a draft bill addressing the governance gap, when it refers to a public authority with power to take enforcement action against a minister of the crown.

However, just saying that a body will be independent is not enough 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.**

These include providing a greater role for Parliament in the appointment of the Chair and the other board members and giving a legal basis to the commitment on a multi annual budget. The Clause 24 guidance power is a significant fetter on the OEP's independence as it enables future ministers to steer the OEP on how it will hold them to account.

Ultimately though, the OEP's independence is constrained because of its nature as an arm's length body sponsored by Defra, rather than as a more independent entity such as the National Audit Office.

### Amendments we strongly support

#### **Amendment 82: Commissioner for Environmental Protection (Lord Cameron of Dillington)**

**Amendment 82** (along with linked amendments 83, 84, 86, 87 and 88) would help secure the independence of the OEP by making its chief executive a separate office holder appointed by the House of Commons. It is modelled on provisions made for the Comptroller and Auditor General under the Budget Responsibility and National Audit Act 2011.

The government has [raised concerns](#) that establishing the OEP on a similar basis to the National Audit Office (NAO) would be constitutionally inappropriate as it would result in a 'parliamentary body' being given the power to initiate legal enforcement proceedings against the government. This constitutional smoke screen seeks to distract parliamentary attention away from justifiable and appropriate measures to strengthen the OEP's independence.

### **Amendments 85: independence of OEP appointments (Baroness Jones of Whitchurch)**

Despite the government's continued [insistence](#) that the OEP will be independent, the government is proposing, through this bill, 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 appropriateness of an additional degree of independence from government control over the person appointed.

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 befit 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. 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 arm's 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 **strongly support amendment 85** which would require the appointment of the Chair and other non-executive members of the OEP to be made with the consent of the relevant environment 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".

### **Amendment 91: OEP estimate (Lord Cameron of Dillington)**

We welcome **amendment 91** which would allow the OEP to prepare and submit its own Estimate. On [funding](#), the government has agreed that the OEP should have a separate line in Defra's Estimate. A more transparent and effective approach would be to allow the OEP to negotiate and publish its own 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 Estimates.

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

Alternatively, this function could be performed by an existing parliamentary body. The Parliamentary and Health Service Ombudsman (the PHSO) is another example of a body which has its own 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. This then feeds into central government’s main Estimate.

### **Amendment 93: long term funding of the OEP (Baroness Jones of Whitchurch)**

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 on the OEP in Parliament, and we encourage the minister to do this on the floor of the House. In so doing, it would be helpful if the minister could clarify that 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 2020 but, since that time, the government appears to have wavered on the commitment for the long term budget to be for five years, highlighting the hazards of leaving such matters to political rather than legislative commitments.

For example, 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. Similar in October 2020, this [Defra media blog](#) was similarly vague on timescales, as was the stand-in minister Leo Docherty MP during the Public Bill Committee’s [consideration](#) of OEP funding in November 2020.

**For the avoidance of doubt, the minister should be asked to confirm that the government remains committed to providing the OEP with a five year indicative budget.**

However, even if this clarity were to be 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 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 therefore support amendment 93 (and the similar amendment 92) which would require the OEP to be prepare a five year indicative budget, which would be subject to public consultation, 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 arm's 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.

### **Amendment 94 Secretary of State duty on OEP independence (Baroness Jones of Whitchurch)**

Protecting the institutional independence of the OEP will be crucial over the longer term. Paragraph 17 of 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 94** which would make the independence of the OEP an absolute requirement, rather than one that ministers are merely required to have regard to.

In addition, the government's reliance on this duty as a safeguard for independence is questionable, given its interpretation of what "have regard" means in relation to other parts of the bill. For example, it [has said](#) that the OEP "does not have to act strictly in accordance with the guidance" that the Secretary of State may issue it under Clause 24(1), even though it is required to "have regard" to this guidance (see below for broader concerns about this guidance power). Applying the same logic to Paragraph 17, Schedule 1, would mean that the Secretary of State could choose not to act "strictly in accordance" with the duty to have regard to the need to protect the OEP's independence. The amendment would remove this ambiguity and strengthen the OEP's independence.

### **Clause 24: Secretary of State guidance power (Lord Krebs, stand part)**

The OEP is required to prepare a strategy that explains how it intends to exercise its functions. Its strategy must contain an enforcement policy that sets out how it will approach its enforcement role.

Clause 24 provides that the Secretary of State may issue guidance to the OEP its enforcement policy, which will sit within its strategy. The OEP "must" have regard to this guidance in preparing its enforcement policy and in exercising its enforcement functions.

This could cover how the OEP ought to determine whether potential failures to comply with environmental law are “serious” how the OEP ought to determine whether damage to the natural environment or to human health would be “serious” and how the OEP ought to prioritise cases. The OEP “must have regard” to this guidance from the Secretary of State.

There is a serious risk that this broad guidance power will impede the OEP’s ability to perform its role independently. The matters to be included in the OEP’s enforcement policy really matter – they will fundamentally shape the OEP’s remit, work and approach.

**This power should be removed from the bill.**

The government has provided little clarity on why it believes the power is necessary. However, the Secretary of State [told](#) the Today programme on 28 October that the government does not want “unaccountable regulators” who “make it up as they go along”, “change their remit” or “change their approach entirely”, suggesting that the government wanted to shift the balance between executive control and independence for the OEP.

**No matter what the government claims, there can be no doubt such a broadly cast power will undermine the OEP’s independence and render the government’s ambition for a world leading watchdog impossible to achieve.**

The government has said that this is a “normal, standard clause” that applies to other public bodies with independent regulatory roles. While the government does have a similar power in relation to some existing public bodies, **ministers do not have a similar power to issue guidance in relation to bodies charged principally or partly with enforcing potential breaches of the law by other public bodies.** For example, the Equality and Human Rights Commission and the Information Commissioner which enforce breaches of the law on human rights, equality and data protection respectively are not bound by a similar such power in relation to their enforcement functions.

Ministers do have powers to issue guidance to some bodies in the Defra family such as [Natural England](#) and the [Environment Agency](#) as well as other non-departmental public bodies such as the [Office for Budget Responsibility](#). However, none of these are enforcement bodies with the power to take the government to court if there is a suspected breach of law. **That is a critical difference.**

We understand that the government has drawn a comparison with the Committee on Climate Change as the Secretary of State has a [power to issue guidance](#) to that Committee. That comparison is not well made however, as the two bodies perform very distinctive roles. The Committee on Climate Change is an advisory and scrutiny body whose success depends on having a close working relationship with BEIS, whereas the OEP is a supervisory and enforcement body, with the power to take the government and other public authorities to court if necessary.

The Supplementary Delegated Powers [Memorandum](#) on the bill cites the Office for Students as another example of a body that ministers can give guidance to. Again, the role and functions of this body differ markedly to that of the OEP, as while the Office for Students has enforcement powers, these relate to higher education providers and not to the government. Furthermore, the nature of the guidance that ministers give to the Office for Students should give cause for considerable concern if this is what they have in mind for the OEP. The Office for Students receives an [annual guidance letter](#) from the Department for Education which [sets out](#) [its] priorities for the coming year, and tells [them] how much money to distribute to higher education providers”.

We believe that there are more appropriate routes to address what we understand to be the government's policy intention of ensuring accountability and strategic purpose. As a non-departmental public body, the OEP will be subject to a [tailored review](#) every three to five years. Such reviews provide an opportunity for the government to ensure public bodies remain fit for purpose, well governed and properly accountable for what they do.

The government [has said](#) that "any guidance from the Secretary of State will be subject to scrutiny, as it must be laid before Parliament". However, Clause 24 does not require any scrutiny of the guidance prior to it being provided to the OEP or before it is published. There is a difference between publication and scrutiny: the act of laying the guidance in Parliament will ensure that it is published at that point, but the bill does not provide for the guidance to be available for either parliamentary or public scrutiny before it is issued to the OEP, neither is there any requirement for public consultation.

The new power will further constrain the OEP's ability to act independently because the notion of "serious" breach, on which the Secretary of State will give guidance, applies (and therefore potentially constrains) the enforcement powers of the OEP throughout the bill. Furthermore, this will be statutory guidance which typically carries greater weight, or at least is treated in this way by public bodies. The bill would create a duty that public bodies will follow guidance which relates to their functions (the public law concept of legitimate expectation). **This guidance power inverts the intended hierarchy (in which the OEP oversees ministers) and gives ministers the role of overseeing the OEP.**

We welcome **amendments 98 and 99** which offer helpful pointers on how the guidance power might be tightened, although we firmly believe that it has no place in a bill that purports to establish a world leading independent watchdog. There are other potential safeguards that might be considered, such as requiring the guidance to be subject to public consultation or adjusting the terms of the guidance power, so that it could only be exercised in those circumstances where the OEP requested it. It should exclude matters where the Secretary of State is involved, to avoid a potential conflict of interest. The Secretary of State should also be restricted from giving guidance in relation to an individual case.

**We welcome amendment 100** tabled by Baroness McIntosh of Pickering, which also argues for the deletion of this clause and its replacement with the welcome clarification that the OEP is not subject to the direction or control of the Secretary of State or any member of Her Majesty's Government.

## Comments on other amendments

### **Amendment 90: removal on non-executive members (Baroness McIntosh of Pickering)**

We welcome this helpful amendment which would impose a duty on the Secretary of State to consult with the Chair of the OEP prior to giving notice to remove a non-executive member from office. This would be welcome as the current drafting in Paragraph 5(6)(c)(ii) of Schedule 1 gives the Secretary of State wide discretion to remove a board member if it "is, in the opinion of the Secretary of State, unable or unfit to carry out the member's functions." This would help guard against a non-executive member being dismissed for politically motivated reasons, for example in circumstances where they may have been critical of the government's compliance with environmental law or progress on meeting broader environmental goals or targets.

## **Government amendment 95: co-operation with devolved environmental governance bodies (Lord Goldsmith)**

The bill establishes a new oversight body, the Office of Environmental Protection (OEP), that covers England and Northern Ireland, along with reserved matters in Scotland and Wales. The Scottish Continuity Act 2021 has established Environmental Standards Scotland (ESS) to carry out broadly similar oversight functions in Scotland. The Welsh Government [is committed](#) to establish a “Commission for the environment, independent from the Welsh Government .... to oversee the implementation of environmental law in Wales.”

These different approaches all respect, as they should, the different devolution arrangements. However, the OEP, ESS and the new Welsh Commission will also be faced with some issues that will need to be addressed in partnership or collectively. These include matters such as cross-border cases, issues where situations/law are similar in all jurisdictions, and/or matters relating to the interpretation of international law or reporting UK-wide progress to international bodies. To deal with such matters, the various governance bodies will need to co-operate and, as appropriate, to act jointly or collectively.

**Amendment 95** would require the OEP to set out in its strategy “how [it] intends to co-operate with devolved environmental governance bodies.” Devolved environmental governance bodies are defined, in Clause 46, to be those, such as ESS and the proposed Welsh Commission, with similar functions. This is mirrored in the Scottish Continuity Act where ESS is given the power to “collaborate with any other environmental governance body in the United Kingdom, including the Office for Environmental Protection” (s.20(2)(g)). It must be hoped that the legislation for the proposed Welsh Commission will make similar provision.

**We welcome and support amendment 95.** The issue of addressing the need for the OEP and the devolved governance bodies to co-operate and act in partnership or collectively over matters of common interest is one that we have raised previously. We welcome acknowledgement of the issue and that it is being addressed.

However, it is being addressed by empowering the OEP, ESS and the Welsh body to determine, for themselves, what those issues of common interest are, and how they will address them. We, along with our partners in Scotland and Wales, look forward to engaging with the OEP, ESS, the Welsh Commission (when established) and others to ensure that this process is comprehensive.

## **Amendment 103: advice from the OEP to ministers (Baroness Parminter)**

We support **amendment 103** which would ensure that the OEP can offer advice to ministers on matters they consider relevant to their remit.

Clause 29(3) enables the OEP to give advice to ministers about any changes to environmental law proposed by ministers. Amendment 103 would clarify that the OEP is also empowered to give advice to ministers on other natural environment matters.

While Clause 29(1) requires the OEP to give advice to ministers on matters relating to the natural environment, this only applies when the minister requires that advice. Broadening the reach of Clause 29(3) would increase the discretion afforded to the OEP on how it exercises its advisory powers and enable it to advise ministers on a fuller range of matters, improving the evidence gathering and assessment process on important policy decisions.



## Amendment 109: reporting to the OEP (Baroness Jones of Moulsecoomb)

**We welcome amendment 109** which would place an obligation on the Secretary of State to report to the OEP any information that was previously required to be reported to the European Commission relating to environmental law. For example, this could include requirements to report on ambient air quality and pollutant emissions, or requirements to report on the implementation of key fisheries rules, both of which were previously required to be reported to the European Commission but are no longer required under UK law.

The reporting of information relating to environmental law is vital to ensure transparency and accountability in environmental policy making, as well as ensuring that government and stakeholders can identify and address environmental impacts. However, several requirements for the Secretary of State to report information to the European Commission in relation to environmental law have been lost because of the UK's departure from the EU and the subsequent adoption of new statutory instruments. This poses a serious threat to the effective application of environmental law in the UK and the ability for the government to achieve its stated aim of leaving the environment in a better state than that in which it was found.

This amendment seeks to address this threat, by reinstating pre-EU exit requirements to report certain environmental information, no longer to the European Commission but instead to the OEP. Given the OEP's role in implementing long term environmental governance and monitoring and reporting on progress against environmental targets, redirecting pre-existing reporting requirements to the OEP will help it achieve its goal of delivering environmental improvement.

### For more information, please contact:

Ruth Chambers, senior parliamentary affairs associate, Greener UK  
e: [rchambers@green-alliance.org.uk](mailto:rchambers@green-alliance.org.uk)  
t: 020 7630 4524

**On behalf of Greener UK and Wildlife & Countryside Link**

# GREENER UK

---

