

The Office for Environmental Protection – five tests for the government

28 October 2021

Summary

On 26 October, the House of Lords passed three important [amendments](#) in relation to the Office for Environmental Protection (OEP). Amendment 31C proposed by Lord Krebs safeguards the independence of the OEP and therefore its ability to carry out its role effectively, with related amendment 75C on the OEP's independence in Northern Ireland also passing. Amendment 33B proposed by Lord Anderson of Ipswich restores balance to the new enforcement system and the court's discretion to grant remedies, which would avoid the interests of third parties always being placed above those of the environment. [This analysis](#) from the Bingham Centre for the Rule of Law explains why this matters.

A [written ministerial statement](#) published on 7 September committed "this government" to establishing the OEP as an independent body. Previously, ministers have [said](#) they want the OEP to "give the environment a voice and hold the powerful to account". But experience shows that without a robust legal underpinning, public body independence, and with its impact, can often wane over time.

The independence of the OEP has been a standout issue in parliamentary debates, with consistently strong cross party support for the bill to be strengthened. The OEP's constitution must be able to stand the test of time as EFRA Chair Neil Parish [highlighted](#). It is not enough to rely on the goodwill and sincerity of the current set of Defra ministers.

There is a strong parliamentary desire for the enforcement system to be effective and balanced. OEP Chair Designate and experienced regulator, Dame Glenys Stacey, has [described](#) to MPs the "...standard regulatory approach of a cup of tea together, but a stick is in the cupboard, and everyone knows that stick is there, and it will come out if needs be." If the bill remains unchanged, Dame Glenys will find her cupboard bare when she searches for that stick. In the interests of justice, the court needs full discretion over remedies and the ability to consider the impacts of its judgments on both the environment and on all third parties, not just developers.

The government's response to these important amendments will be a critical test of its pledges for world leading environmental laws.

Test 1 – the OEP should have "complete discretion" to act

The Environment Bill must grant the OEP complete discretion to act.

The Comptroller and Auditor General has [complete discretion](#) in the carrying out of the functions of that office. The Office for Budget Responsibility has [complete discretion](#) in the performance of its duty to examine and report on the sustainability of public finances.

Affording the OEP similar discretion will be vital given the entrenched and vested views it is likely to encounter as it seeks to deliver its [mission](#) to uphold environmental laws over the long term.

Test 2 – greater parliamentary involvement in OEP appointments

The government has opted for a [standard](#) public body appointment process in which ministers hire and fire the OEP's Chair and other board members. Instead, **it should replicate arrangements in place for appointing the board members of comparable oversight bodies** – the Office for Budget Responsibility and the OEP's equivalent body Environmental Standards Scotland – where the respective parliaments play a greater role, ensuring that ministers cannot hire and fire board members at will.

Current ministers support the involvement of the environmental select committees via pre-appointment hearings, but the legislation does not require future ministers to follow this process. In any case, as the [Institute for Government](#) has explained, there are several [cases](#) in which the advice of select committees has been overridden following such hearings and the government's preferred candidates confirmed regardless.

Test 3 – a more targeted guidance power

The bill contains a very wide power for the Secretary of State to issue guidance to the OEP on when, how and why it enforces breaches of environmental law. This extraordinarily wide power allows ministers to guide almost every single aspect of the OEP's enforcement work, including the development and implementation of its enforcement policy, how it prioritises cases and its interpretation of what constitutes a serious breach of environmental law or a serious environmental harm.

We continue to believe that such a wholesale guidance power for ministers is inappropriate for a body which is intended to hold ministers to account when they do not respect environmental laws.

The following safeguards must be built into the bill so that any guidance power:

- Only applies to the development of the OEP's policy (which is a strategic matter) and not to how it implements that policy (which is an operational matter). Allowing the ministers scope to tell the OEP how to hold them to account trespasses on the body's independence and puts the government at risk of micromanaging the OEP.
- Is limited to Clause 22(6)(c) on how the OEP intends to exercise its enforcement functions in a way that respects the integrity of other statutory regimes, including statutory provision for appeals. This would protect the OEP's discretion to prioritise cases and to decide what constitutes serious environmental harm from future political interference.

Test 4 – any guidance should be a last resort

The government [has said](#) that it "would not envisage a need to issue guidance to the OEP as a matter of course, and would instead reserve it as an important safeguard to ensure accountability should the OEP not be focusing on the most serious strategic cases."

The DAERA minister has [confirmed](#) that the power is not intended to be used proactively and that DAERA will not be issuing guidance before the OEP publishes its draft enforcement policy (unless the OEP asks it to do so).

We encourage the Secretary of State to provide a similar clarification in relation to his intended use of this power.

The OEP must first be allowed to develop and test its enforcement policy. Should concerns arise at any point on the OEP's direction of travel, the government can raise these through other mechanisms such as the Tailored Review process and agreement of the Framework Document, as well as in dialogue with the OEP's Chair. Parliament can also monitor progress and register concerns, for example through select committee scrutiny.

Guidance could then be issued as a last resort and not, for example, before the OEP has developed its own thinking and policy. Issuing guidance pre-emptively would be interpreted as a lack of confidence in the OEP and instead seen as an attempt to influence the direction and shape of its enforcement work from the outset.

Test 5 – an enforcement system with teeth

The availability of meaningful and effective remedies to correct unlawfulness is a critical aspect of any successful enforcement mechanism. However, the constraints proposed by the government would significantly restrict the Court's ability to grant remedies following an environmental review, thus undermining the entire enforcement process.

The government has [cited](#) other legislation as examples for the approach it wants to take on considering hardship to third parties. An important omission from the government's narrative is that these ([Section 31\(6\) of the Senior Courts Act 1981](#) and [Sections 16\(4\) and \(5\) of the Tribunals, Courts and Enforcement Act 2007](#)) both retain the discretion of the court. They are phrased as 'the tribunal/court may'.

Lord Anderson's amendment 33B adopts a more balanced approach in line with the approaches in existing and emerging legislation. It would preserve the Court's discretion in granting remedies, while indicating factors to be considered when determining what outcome would be in the interests of justice. We note the amendment is modelled on Clause 1(8) of the government's [Judicial Review and Courts Bill](#), which sets out six factors to which the court must have regard before granting the exceptional remedies provided for by that bill.

The critical matter the government must address is for issues such as impacts on third parties to be listed as considerations for the court rather than fetters.

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