

THE ENVIRONMENT BILL, THE OFFICE FOR ENVIRONMENTAL PROTECTION, AND BREXIT

Tim Buley
Landmark Chambers

THE ENVIRONMENT (PRINCIPLES AND GOVERNANCE) BILL: OVERVIEW



- Critical background to the Bill is Brexit. Bill makes provision for various matters concerning environmental protection created by UK Departure from EU:
 - Enshrines (or gives recognition to) “environmental principles” currently found in EU law
 - Environmental Improvement Plans
 - New Office for Environmental Protection (OEP)
 - Scrutiny and advice functions
 - Enforcement functions
 - Complaints
 - Judicial Review

ENVIRONMENTAL PRINCIPLES: CLAUSES 1-4



Clause 2 defines “environmental principles”, which will be familiar from EU and Aarhus Convention, including:

- “precautionary principle”
- Preventative action to avert environmental damage
- Polluter pays
- Sustainable development
- Integration of environmental protection into policy making
- Access to environmental information
- Public participation in environmental decision making
- Access to Justice

ENVIRONMENTAL PRINCIPLES (2)



Under clause 1, Sec State is required to prepare “policy statement” on environmental principles”

- This will explain how principles are to be “interpreted and proportionately applied” by Ministers in policy making
- May also address how ministers address other issues
- Armed forces, defence or national security are excluded

Process etc for preparation governed by clause 3, includes that policy statement must be laid before Parliament

ENVIRONMENTAL PRINCIPLES (3)



Under clause 4:

A Minister ... must have regard to the policy statement on environmental principles when making, developing or revising policies dealt with by the statement.

ENVIRONMENTAL IMPROVEMENT PLANS



- Under clause 6, Sec State must prepare an “environmental improvement plan”, namely “a plan for improving the natural environment in the period to which the plan relates (not less than 15 years)
- Existing “A green future: our 25 year plan to improve the natural environment” will be treated as first such plan
- Clause 7 relates to monitoring, clause 8 concerns annual reporting, clause 9 concerns reviewing and revising plans, clause 10 concerns renewal

OFFICE FOR ENVIRONMENTAL PROTECTION



- OEP established under clause 11.
- OEP must publish its “strategy” under clause 12.
- Two functions:
 - Scrutiny and advice functions (clauses 14-16)
 - Enforcement functions (clauses 17 on)

OEP: SCRUTINY AND ADVICE



- Clause 14: monitoring and reporting on Sec State Environmental Improvement Plans
- Clause 15: monitoring etc on implementation of environmental law
- Clause 16: advising on changes to environmental law

OEP AND ENFORCEMENT: COMPLAINTS



- Complaints procedure under clause 18. Any person may make a complaint
- Followed by investigation under clause 19, can lead eventually to information notice under clause 22 and ultimately decision notices under clause 23.
- Decision notice may lead to “recommendation” under clause 23(2).

COMPLAINTS (2)

- Recommendation may relate to **remedy** and / or **mitigation** of the breach of environmental law or **a**.
- **NB Gives no power to (let alone obligation on) public body to do anything it could not previously have done.** So e.g. Env Agency cannot be told to revoke Environmental Permit on which it is *functus officio*
- Recommendation not binding *per se*. Government Consultation response says that mirrors position of Commission, which can only *enforce* via infraction proceedings in CJEU.
- No power to issue penalty.
- Query whether recommendation can include some form of compensation or consolation to third parties. Much less focus on this compared with e.g. Ombudsmen recommendations.

1. COMPLAINTS AND CLAUSE 25 JRs (1): The Clause 25 JR



- Under clause 25(1), OEP may make a “review” (i.e. JR) application:
“in relation to conduct described in a decision notice given to a public authority as a failure to comply with environmental law”
- **SO** the subject of the judicial review is the *original conduct* of the public authority which gave rise to the complaint, **NOT** its response to the Decision Notice (e.g. failure to comply with recommendation etc).
- Time for Clause 25 JR is three months from time for response to Decision Notice.
- JR permission rules apply in the normal way, but no requirement that court refuse permission or relief if outcome would be “highly likely” to be the same. Seems to facilitate JRs where primary remedy sought is a declaration. Consultation response envisages that declaration of law will be the most likely remedy.

1. COMPLAINTS AND CLAUSE 25 JRs (2): The Clause 25 JR Remedies



- Major questions on remedy:
 - If JR is of underlying decision, for which statutory time limit is extended (3 months from response to decision notice rather than 3 months from original decision) then can court grant same remedies as in ordinary JR of original decision? EG Quash the original decision. If so major extension of JR powers. Consultation response says that OEP can “apply for the usual suite of remedies ... including ... injunctions, and mandatory / prohibiting / quashing orders”. So at least in principle, appears to be possible to quash a decision years after it was made.
 - If that is right, remedy on Clause 25 JR seems to go much further than what OEP can recommend under clause 23. Consultation response suggests that clause 25 JR would be used where public body does not comply with recommendations. But no limit of that kind in clause 25.

1. COMPLAINTS AND CLAUSE 25 JRs (3):



The Clause 25 JR Remedies (cont)

- What approach should court take to exercise of discretion to refuse relief? Cannot say that the JR is out of time *per se*, but should it be less willing to quash a decision if the JR is brought under clause 25 than if brought under normal JR?
- What about approach to prejudice to third parties e.g. beneficiary of environmental permit or planning permission?
- How do you challenge a refusal to follow a recommendation under clause 23? Not under clause 25. But nothing to stop ordinary JR, either by the OEP or by the original complainant.

2. Ordinary JR by OEP?

- OEP given no express power to bring other forms of judicial review, Government Consultation Response says:

The draft Bill does not make explicit provision for the OEP to intervene in third party judicial review proceedings, however it could apply to intervene in the normal way, and it is not considered necessary in any case given that the OEP has powers to bring its own judicial reviews.

- This is unclear whether it envisages OEP bringing “ordinary” JRs or only clause 25 JRs. Cannot be assumed it has that power absent express power to litigate.
- May have reason to do so:
 - To challenge refusal to follow recommendations
 - To challenge underlying breach of environmental law promptly given previous discussion on remedy.
 - To challenge government decisions not amenable to the complaints procedure.

THE ENVIRONMENT BILL, THE OFFICE FOR ENVIRONMENTAL PROTECTION, AND BREXIT

Tim Buley
Landmark Chambers