The Bar Council

Environment Bill
Briefing for Peers – Committee Stage

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Background

The Bar Council's Law Reform Committee has previously commented on the emerging provisions of the Environment Bill particularly in relation to concerns about the powers, independence and efficacy of the proposed new Environmental Watchdog (now the Office of Environmental Protection) in its response[1] to DEFRA's Consultation on "*Environmental Principles and Governance after the United Kingdom leaves the European Union"* [May - August 2018][2] ('the EP& G'). As highlighted in the media briefly[3] the Government at the time sought to allay and/or dismiss those concerns.

This briefing considers Part 1 of the draft Environment Bill (as it currently stands and following amendments introduced at the end of 2019) following Second Reading in the House of Lords on 7 June 2021. Part 1, Clauses 1 to 46 of the Bill deals with Environmental Governance. We do not propose to refer to any of the other draft provisions which merit response from more specialist environmental law organisations.

Summary

The Bar Council recommends:

- Clause 3 appears to provide no power to *increase* targets and should be clarified.
- The exercise of 'due regard' in Clause 18 should be a stronger requirement, perhaps 'compliance'.
- Clause 37 must be amended to allow for financial penalties to be imposed.
- Clause 37(7) should be removed in its entirety as unjustified.
- Clause 37(8) should be amended to remove reference to the qualifications on the court's powers.
- The current definition of environmental law in Clause 45 should be amended to incorporate reference to the Aarhus Convention provisions.

[1] https://www.barcouncil.org.uk/uploads/assets/e5fa8a0e-f719-4aed-aeaf908f9f32f87a/defraenvirobrexitresponse.pdf
[2] https://consult.defra.gov.uk/eu/environmental-principles-and-governance/
[3] https://www.theguardian.com/environment/2018/aug/07/lawyers-say-gove-proposals-for-brexit-environmental-watchdog-are-useless

The Bill

Part 1, Chapter 1 – Improving the Natural Environment

Clause 1 to 6 sets out the framework for the setting of long-term environmental[4] targets through regulations. The Bar Council notes that the Queen's Speech in October 2019 referred to the Bill as being one that would *"… protect and improve the environment for future generations [which] will enshrine in law environmental principles and legally binding targets, including for air quality".*

The draft Bill sets no targets which are left to later and to secondary legislation. The provisions are a mixture of those that compel ('must') and those that provide the Secretary of State with the power so to act ('may'). The only target which specifically must be set is in respect of air quality particulate matter (PM2.5 AQ) (see Clause 2) and which can be long or shorter term.

With regards to any other environmental matter, the provisions appear only to require a long-term target to be set in respect of at least one matter "*within each priority area"* identified in Clause 1(3) of which there are 4 (air quality, water, biodiversity, and resource efficiency and waste reduction). There is potential however for Clause 1(2) to be read as leaving the setting of any targets as optional but that *if* the power is exercised *at all* then the requirement, bites as to setting a long-term target in respect of only one of the four priority areas.

The required nature of any target is clear, namely that it must specify an objectively measurable standard and a deadline. However, the nature of the duty imposed upon the Secretary of State to set such targets would (as noted above), benefit from further clarity. For example, Clause 3(1) requires the Secretary of State to *seek* independent expert advice, but it is not clear if any consequence would follow if the Secretary of State chooses *not to take* such advice.

Clause 3 also provides the Secretary of State with powers to revoke or lower existing targets based on certain cost benefit bases. Whilst there is reference to powers under Clause 1 and 2 to "*set or amend"* in Clause 3(2), that is not how Clauses 1 and 2 read (they refer only to setting targets). In addition, Clause 3 appears to provide no power to increase targets. This also needs to be clarified.

The Bar Council has no comment to make about the provisions in respect of environmental monitoring (Clause 15); the policy statement on environmental principles (Clauses 16 to 18), statements and reports as well as new environmental law on environmental protection and international environmental protection legislation (Clauses 19 and 20) save to note two matters in respect of Clause 18.

The first matter is the publication of the draft policy statement on environmental principles (EPPS) which has now been the subject of public consultation and the second, is the requirement in Clause 18 that when making Government policy "*due regard*" must be had to the EPPS and the environment principles. The decision has seemingly therefore been made by the Government that a stronger requirement of 'compliance' with the EPPS and the principles is not required. The Bar Council notes the concerns in this respect voiced by environmental interest groups such as Greener UK and Wildlife and Countryside Link.

[4] Defined in Clause 1(1) as "*any matter which relates to (a) the natural environment*" or "(*b)people's enjoyment of it"*.

The courts have given guidance on the exercise of 'due regard' by decision makers in respect of other legislation and decisions of public bodies, for example in the context of equality legislation[5]. What is required was described by Lord Dyson in R(Baker) v Sec of State for Communities and Local Government [2008] LGR 239 [31] as *"...regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority"*. The Bar Council would note however that this concept of 'due regard' as part of a decision-making process is clearly different to the exercise of a public authority's powers to make policy which is the context here. To that end it may be suggested in future if left unclarified that the requirement to have 'due regard' in the Bill to the EPPS and the environmental principles when making policy is different to 'due regard' when making decisions. The Bar Council would therefore suggest that this may be a matter upon which guidance be given within the final EPPS or at least be recognised as a potential issue at this stage of the Bill.

The Bar Council notes references throughout this part of the Bill to duties and/or requirements imposed upon the Secretary of State and Ministers of the Crown i.e. to set targets (Clauses 1 and 2); duty to ensure targets are met (Clause 4) and to review (Clause 6) as well as the subsequent requirement to prepare environmental improvement plans and report on their implementation as well as the requirement in Clause 18 to have due regard to the EPPS above.

There is however no provision or power within the Bill which sets out the consequence of any failure on the part of the Secretary of State/Government to comply with these duties. In the absence of any specific provision, it would appear that the Bill therefore leaves such matters, including the making of Government policy, open to challenge by way of judicial review in the event that there has been an alleged failure.

Part 1, Chapter 2 – The Office of Environmental Protection (OEP)

Clauses 21 to 42 encapsulate the creation of the OEP and its powers (upon which the rest of this briefing focuses) which was described in the above referenced consultation in 2018.

The term "*environmental law"* is central to Chapter 2 and the OEP's powers and functions (as reflected in the rest of Chapter 2) but also, in the Bar Council's view, to the rest of the Bill. The term is defined at Clause 45 as follows:

"any legislative provision to the extent that it

(a) is mainly concerned with environmental protection, and

(b) is not concerned with an excluded matter."

Excluded matters are "*(a) disclosure of or access to information; (b) the armed forces or national security; (c) taxation, spending or the allocation of resources within government."* To that end, 'environmental law' under the Bill arguably does not encompass the Aarhus Convention which relates specifically to *"Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters".* This is an important international treaty to which the UK is a signatory. The issue of the UK's compliance was the subject of criticism by the European Commission in 2014 (see Case C-530/11 *Commission v UK*) and led to a ruling that the UK courts costs regime when applied to environmental claims (principally judicial review) did not comply with the convention as it was "not prohibitively expensive". This led to specific amendments to the Civil

[5] i.e. the Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000; the Sex Discrimination Act 1975 (as amended by the Equality Act 2006) and the Disability Discrimination Act 1995

Procedure Rules (CPR) to allow costs protection for environmental judicial reviews (see CPR Part 45).

It is the Bar Council's understanding that under the so-called dualist system applicable in the UK, any rights under international conventions such as the Aarhus Convention that have not been transposed into national law cannot be invoked before the national courts**.** Given the clear relevance and importance of the rights under the Aarhus Convention in respect of environmental matters including rights of access to environmental information and public participation in environmental decision making (as well as access to environmental justice) and that the current definition as noted does not incorporate the convention, there does appear to be an important gap in the Bill. The Bar Council recommends that the Bill be amended to incorporate reference to the convention's provisions.

The term as defined will also not encompass legislation by way of any regulations brought forward by the Secretary of State under Clause 45(6) which will determine whether a specific piece of legislation *"is not, within the definition of "environmental law"* equally such regulations may also determine what is within the definition. In the Bar Council's view, it would be clearly better for discrepancies not to arise in the first place and for the definition to be wider or clearer.

In terms of the OEP's functions, the Bar Council would draw specific attention to s.16 of the Withdrawal Act (WA) 2018 (now repealed) which not only made provision for the future Environment Bill[6] to be brought forward within 6 months of the date of the WA 2018 but also that the Bill should, inter alia, establish *"a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill)".* We note that at the same time as the passing of the WA 2018 the "*Environmental Principles and Governance after the United Kingdom leaves the European Union"*[7] (EP&G) DEFRA consultation in May 2018 (referred to above) proposed the OEP which was described as an independent body or "*watchdog*" post Brexit which would "*hold national government directly to account"* on the environment [see Q10 and [44] of EP&G].

Clause 22 states that the OEP's *"principal objective… in exercising its functions is to contribute to (a) environmental protection, and (b) the improvement of the natural environment".* Thereafter the Bill sets out that the OEP must devise a strategy which is to guide its functions, and which "*must"* inter alia *"contain an enforcement policy"* (Clause 22(6)) and also confirm that the OEP's "*"enforcement functions" are its functions under sections 31 to 40".*

The Bar Council does not have any comments in respect of Clause 23 to 29 other than to suggest that the consultation proposed Clause 23(5) prior to any preparation or review of the OEP strategy and should not be limited only to such persons as the OEP "*considers appropriate"* but that mechanisms for consulting the wider public be part of this process.

With regard to the OEP's enforcement functions, it is clear from the provisions that the functions relate to failures to comply with 'environmental law' as defined by the Bill where any such failures are 'serious'. As to the latter, it is not the Bill, but the OEP strategy which is to set out

[6] Then described as the 'Environment and Governance Bill'

[7] https://consult.defra.gov.uk/eu/environmental-principles-and-governance/

"*how the OEP intends to determine whether failures to comply with environmental law are serious*". In addition, Clause 24 gives the Secretary of State the power to issue guidance to the OEP on the OEP's enforcement policy to which the OEP must have regard in "(*a) preparing its enforcement policy, and (b) exercising its enforcement functions*".

These provisions therefore both give the OEP its ability to hold the Government and public authorities to account for wide ranging breaches of environmental law with one hand and take it away/limit that ability with the other. The Bar Council again notes the concerns raised in this regard by environmental interest groups such as Greener UK and Wildlife and Countryside Link and also agrees with the Law Society' suggestion that the clause be removed in its entirety in order to ensure the OEPs independence from Government influence.

The Bar Council considers the most significant provision within this chapter is Clause 37 which as described in the current explanatory notes seeks to provide *"a bespoke form of legal proceedings which applies solely to cases brought by the OEP*" and which are "*based on the normal standards and principles of judicial review*" (namely 'environmental review'). The Bar Council has specific concerns about the consequences which follow and the proposed powers of the court to provide a remedy following a finding that an authority *"has failed to comply with environmental law*".

Clause 37(7) notably suggests that a "*statement of non-compliance"* by a court following such a finding "*does not affect the validity of the conduct in respect of which it is given*". It echoes the Government's proposal in its response to the Independent Review of Administrative Law (IRAL) report on judicial review which raised the issue of treating public acts as 'void' or 'voidable' in the context of the potential introduction of prospective and/or suspended quashing order.

Clause 37(8) goes on however to allow the court, notwithstanding the impotence of a statement of compliance as a consequence of the Clause 37(7), to "*grant any remedy that could be granted by it on a judicial review other than damages*". The clause then proceeds to qualify that power by limiting it solely to circumstances where the court is *"satisfied that granting the remedy would not (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration."*

This is clearly different to the court's innate discretion in respect of judicial review whether to grant relief or not following a finding of unlawfulness (and also appears to contradict Clause 37(7)) but it is not clear why that innate discretion should be changed or added to under an environmental review. In the Bar Council's view, it is unnecessary, adds complexity and the likelihood of increased future debate before the court on this one aspect.

The OEP's principal objective is to contribute to environmental protection and to improve the natural environment, as well as to act as a watchdog and hold public authorities and the Government to account by, in effect, stepping into the role of the European Commission following the UK's departure from the EU. It is therefore surprising that Clause 37 excludes the potential for damages, or a financial sanction or penalty being ordered by the court.

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