

Environment Bill Public Bill Committee

ClientEarth written evidence

1. ClientEarth is a charity that uses the power of the law to protect people and the planet. We are international lawyers finding practical solutions for the world's biggest environmental challenges. From our offices in London, Brussels, Warsaw, Berlin and Beijing, we work on laws throughout their lifetime, from the earliest stages to implementation and enforcement.

Executive summary

2. The Environment Bill is a landmark constitutional bill. It provides a unique opportunity to overhaul the legal framework for environmental protection in the UK. The need to get it right is therefore paramount.
3. However, in many areas, the Bill fails to provide the level of detail, accountability or rigour that is needed. In particular, we recommend the following improvements to the Bill:
 - a. The Office for Environmental Protection (OEP) must be made **more independent from Government** – culturally, institutionally and financially. It should be able to design its own strategy and pursue its own priorities without interference. It must also be **adequately resourced and provided with meaningful powers**.
 - b. The OEP must have recourse to a bespoke enforcement procedure that **ensures accountability and actually results in better environmental outcomes**. Key improvements needed include:
 - giving OEP notices and recommendations greater legal force;
 - improving and cohering the roles and functions of the OEP and the Upper Tribunal so they work more effectively in conjunction;
 - allowing the Upper Tribunal to grant meaningful remedies and sanctions; and
 - ensuring that civil society has proper access to justice in environmental matters, as required by the Aarhus Convention.
 - c. The Bill must include a **meaningful non-regression provision** that prevents any weakening of environmental protections.
 - d. The Bill should include a commitment to achieving **World Health Organization guideline levels** for fine particulate matter (PM_{2.5}) air pollution by 2030 at the very latest.

- e. The Bill needs to ensure that air quality targets are set with the overarching aim of minimising the harmful impact of air pollution on people's health. There must be **better assurances that legal air quality protections will not be weakened**.
- f. **Expert advice must play a more thorough role** in the setting and review of environmental targets. In the event that targets are not set in accordance with the advice obtained, the Secretary of State should have to explain why.
- g. The environmental improvement plans leave space for a "too-little-too-late" approach to achieving long term targets. The Bill should require government **to deliver plans that include timetabled, impact-assessed measures**, which ensure targets are likely to be met.
- h. The Bill's treatment of the environmental principles leaves much to be desired. They need **firmer footing in our legal framework**, with duties to apply the principles and act in accordance with the policy statement.
- i. Tackling the UK's global footprint and reducing the impact of businesses on the environment should also be a priority for this Government. The Bill should set in train a process for **creating a new due diligence regime** that requires companies to undertake detailed documentation and subsequent mitigation/prevention of environmental harms in their activities and supply chain.

Enforcement of environmental law

The Office for Environmental Protection

- 4. The OEP may prove to be the lynchpin in the effective running of the UK's new system for environmental protection. It must command respect as an institution and be able to marshal its resources wisely. Given this, serious consideration must be given to its design, functions, powers, resourcing and culture. The current provisions raise some concerns.
- 5. Despite the Government's words about the independence of the OEP,¹ the funding structure envisaged in the Bill places the OEP too close to Defra and too much discretion is given to the Secretary of State in the appointment of the OEP's members. Amendments 154, 155, 156 and 157 would help to remedy these issues.
- 6. The OEP's core role will be ensuring and improving compliance with environmental law. To this end, its powers of inquiry and investigation should be strengthened. In particular, it should be specifically empowered to conduct broad thematic inquiries that seek to identify and prevent systemic breaches of the law.
- 7. The OEP needs bite. It should be able to issue guidance and recommendations off the back of its inquiries and investigations. Public bodies should be under a duty to normally comply with these (and indeed similar changes should be made for OEP notices).

¹ See Defra, 'Policy paper: Environmental governance factsheet (parts 1 and 2)' (10 March 2020)
<https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-environmental-governance-factsheet-parts-1-and-2>

8. In addition, the Bill should require the Upper Tribunal to treat OEP notices as authoritative (see amendment 120). Whilst the notices would not bind the Upper Tribunal, they would be significantly strengthened by serving as a starting point for the Tribunal's review.

Definition of environmental law

9. The OEP's remit is limited to issues related to 'environmental law'. We are concerned that the Bill's narrow definition of 'environmental law' will exclude some laws that have the potential to influence the environment.² The position would be improved by amendment 127.

Environmental review: process

10. 'Environmental review' is a new mechanism for the enforcement of environmental law that will sit within the Upper Tribunal. By housing this here, there is a possibility for technical expert adjudicators to sit on the tribunal alongside legal judges, which is welcome.
11. However, the provisions establishing the environmental review process fail to do enough to improve on the existing judicial review process. Clause 35(5) provides that the Upper Tribunal must apply the usual judicial review principles. However, this approach risks restricting the Tribunal's ability to consider factual issues with the level of detail and rigour required in order to improve environmental decision-making. This provision should be deleted.
12. To clarify the intended purpose of environmental review as a new tool in improving compliance with environmental law, the Bill should include an holistic provision setting out the purpose of the new mechanism and the Tribunal's review scope when conducting environmental review – such as in amendment 119.
13. Interaction between the OEP and the Upper Tribunal must be improved. Both may have some ability to reach their own findings of fact relating to matters before them, but it is not clear how these findings will fit together. Nor is it clear how their remedies will fit together, with both hampered in their ability to put right environmental wrongs. This could be improved by amending the Bill to bolster the powers of the OEP (see amendment 118); enhancing the status of OEP notices (see amendment 120) and improving the position on remedies and sanctions (discussed below).

Environmental review: remedies

14. Effective enforcement requires meaningful and dissuasive sanctions and remedies. Even if only used sparingly, and as a matter of last resort, they are key to reinforcing the other stages in an enforcement process. The impact of fines within the EU system is a well-known deterrent.
15. However, environmental review does not allow the Tribunal to grant the meaningful remedies required to prevent and mitigate environmental harm. In particular, the Tribunal is prevented

² See, for instance, the Environment Bill Explanatory Notes which note that "most... areas of planning legislation [other than provisions dealing with environmental impact assessment and strategic environmental assessment] are not mainly concerned with environmental protection, and therefore will not fall within the definition" [366] <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf>

from issuing remedies that may prejudice the rights of third parties (see clause 35(8)). These unjustified restrictions, and the lack of a bespoke remedies and sanctions regime, undermine the force of the environmental review process and, indeed, the OEP.

16. The Upper Tribunal must instead be empowered to grant meaningful, dissuasive and effective remedies at its own discretion including, where appropriate, fines – just as the CJEU is currently able to do. In this regard, we support amendments 121, 122, 180 and 184 and the intent of NC10.
17. The OEP too may be limited in the remedies it can offer through its notices, since it may be unable to require a public body to remake a decision in many circumstances due to the *functus officio* convention. Amendment 118 would help to improve this position.

Access to justice for civil society

18. There is currently no route for civil society to launch environmental review proceedings. But access to justice works best when civil society are able to play a key role: as recognised by the Supreme Court, in order for the judiciary to ensure that the Government carries out its functions lawfully, people must in principle have unimpeded access to it.³
19. The important role that civil society plays in ensuring compliance with environmental law should be recognised by providing access to an improved mechanism for reviewing compliance with environmental law.
20. As a minimum, where the OEP has decided not to commence environmental review proceedings after issuing a decision notice, access should be opened up (see amendment 123). In addition, complainants should be able to join proceedings as interested parties and others should have right to apply to intervene (see amendment 124).
21. The Aarhus Convention sets out important international standards that should be clearly secured through domestic law and legal processes. This Bill provides an opportunity to do this, allowing the government to demonstrate its commitment to these standards. In this regard, we support amendments 95, 97 and 99.

Setting meaningful targets and securing their delivery

Set an overarching objective

22. The Environment Bill is a long, technical and, in some respects, disparate piece of legislation. The Bill would be united and animated by a clear, overarching objective that gives it clarity, purpose and direction. This should be broad and ambitious, such as: “to ensure an environment that is healthy, resilient, diverse and improving in quality, supporting healthy lives across the country”.

³ *R (oao Unison) v Lord Chancellor* [2017] UKSC 51 at [68]

23. A progressive objective like this will provide much-needed focus for the Bill and secure it from the risk of misuse by ministers now and in the future. In this regard, see amendments 1, NC1 and NC6.
24. The existing Bill provisions do not require human health considerations to inform the way in which environmental targets are set or reviewed. As it stands, the Bill opens the door to the weakening of legal air quality protections, with no assurance that new targets will better protect people's health. The Bill needs to ensure that air quality targets are set with the overarching aim of minimising the harmful impact of air pollution on people's health. In this regard, we support amendment 25.

Achieving World Health Organization (“WHO”) guidelines for PM_{2.5} air pollution by 2030

25. Existing legal limits for the level of fine particulate matter (known as “PM_{2.5}”) pollution are not strong enough to protect people's health. They are over two times higher than current WHO guidelines recommend. It is positive that the Bill commits the Secretary of State to setting a new target for PM_{2.5} pollution. However, as it stands, it does not provide any suggestion of whether or how that target will improve upon existing legal limits.
26. The Bill also delays the need for any substantial decisions to tackle this harmful pollutant for another two and a half years. When we know the harm that this pollutant is doing to people's health, now, stalling on ambition to act cannot be right.
27. To show the UK as a world leader that is serious about protecting people's health, the Bill should ensure that the PM_{2.5} target will be at least as strict as the current WHO guideline, with an attainment deadline of 2030 at the latest. It should commit to setting the target itself in secondary legislation by December 2020 at the very latest.
28. There is widespread support for adopting a binding target to meet WHO guidelines from air pollution and health experts, as well as from across the political parties. Michael Gove, in his role as Environment Secretary last July, said that the Bill should introduce ‘a legally binding commitment on particulate matter so that no part of the country exceeds the levels recommended by the WHO’. Defra has also published a technical analysis by two leading British universities that concluded that achieving WHO guidelines across the country is technically feasible. It was also one of the key recommendations made in the 2018 Joint Select Committee report, “Improving Air Quality”, published by the Efra, EAC, Health and Transport Select Committees.

A stronger role for expert advice

29. Our natural environment is a beautiful but complicated thing. Independent expert advice with the latest relevant best available evidence will be key to ensuring government does what is needed to best protect and improve it in the long term. However, the existing provisions of the Bill provide for an opaque process in which such advice could be cherry picked, hidden and ignored.
30. The Bill should be amended to ensure that expert advice plays a more independent, transparent and meaningful role in the setting and review of environmental targets. The advice received should be independent, of sufficient scope and publically available. In the

event that targets are not set in accordance with it, the Secretary of State should have to explain why to the public and Parliament. In light of this, we support amendments 81 and 181.

Robust plans that require action and set a clear path

31. To ensure that far-reaching targets to improve our natural environment and clean up the air we breathe are achieved in practice, the Bill should secure a clear path towards their delivery. As it stands, the environmental improvement plans required by the Bill fall far short of achieving this. They instead risk a “too-little-too-late” approach.
32. Worryingly, the Bill does not require measures included in environmental improvement plans to be sufficient to ensure targets are achieved. This risks ministers setting down long-term ambition, without putting in place the policies that are needed, now, to ensure progress is delivered on time.
33. To provide a true plan for action to clean up the air and improve our natural environment, the Bill should require government to produce and implement plans that include timetabled, impact-assessed measures, which ensure targets are likely to be met. We support amendment 88.
34. Alongside steps to improve the natural environment, it is essential that plans include measures to protect and improve people’s health. Given that the predominant negative impact of air pollution is upon human health, action to deliver air quality targets must be focused on human health and protecting those most vulnerable to the impacts of pollution. Yet, the provisions of the Bill are silent in this respect.
35. While targets are there to be met, the Bill must also set out effective remedial action in the event that they are missed. As it stands, the requirements set out in the Bill are too weak to provides assurance that urgent action will be taken to remedy such failures. We therefore support amendments 83 and 84, which aim to strengthen these provisions.

Ensuring all public bodies play their part

36. Too often we see a lack of joined-up thinking across government departments and public bodies failing to take environmental concerns seriously. For example, Highways England has continuously delayed taking action to tackle illegal levels of pollution that persist along its roads, despite having been allocated £100m between 2015-2021 for this purpose. The law should not allow for such continued failure to act.
37. To ensure that all of government is working together towards the achievement of the long term ambition established under the Bill, we need a clear duty on all public bodies to act compatibly with the targets set and the environmental improvement plans to secure their delivery. We therefore support amendment NC18.

Non-regression

38. The ecological and climate crises demand that our environmental standards must get stronger and more effective. The concept of non-regression provides a solid yet simple way of expressing this.⁴ Including a clear and binding non-regression provision in the Bill would demonstrate robust commitment to the government's pledge to deliver "the most ambitious environmental programme of any country on earth".⁵
39. However, despite the Government's repeated assurances that leaving the EU and striking new trade deals will not result in lower environmental standards, the Bill disappointingly fails to lock this commitment into law. The Bill should include a binding legal provision that prevents regression of environmental standards.
40. It is important to recognise that clause 19 is not a non-regression provision. It requires ministers in charge of a new environmental law to make a statement about its content before the new bill's second reading in Parliament. It does not prevent regression of environmental standards. Where a minister cannot make a statement that the effect of the new law would not be to reduce the level of environmental protection, they simply have to state this. There are a number of ways in which clause 19 could (and indeed should) be improved, but it cannot be a substitute for a meaningful provision preventing the lowering of environmental standards.

Final remarks

41. The Environment Bill provides a unique opportunity to establish a framework for setting meaningful ambition to improve our natural environment and protect people's health. It also offers the chance to create and embed effective processes and institutions in our domestic system.
42. But time and again, this Bill falls short: eroding accountability and undermining ambition. Unless the opportunity to improve this Bill is firmly grasped, the trajectory of environmental decline risks being continued under this new framework.

For more information, please contact:
Tom West, twest@clientearth.org
Katie Nield, knield@clientearth.org

⁴ Greener UK, 'Briefing on non-regression in the Environment Bill' (4 October 2018) https://greeneruk.org/sites/default/files/download/2019-01/Greener_UK_briefing_on_non-regression_in_the_Environment_Bill.pdf

⁵ Defra, 'Environment Bill 2020 policy statement' (30 January 2020) <https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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Brussels

Rue du Trône 60
5ème étage
1050 Bruxelles
Belgique

London

274 Richmond Road
London
E8 3QW
UK

Warsaw

ul. Żurawia 45
00-680 Warszawa
Polska

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