PRE-LEGISLATIVE SCRUTINY of the DRAFT ENVIRONMENT (PRINCIPLES AND GOVERNANCE) BILL

Submission by Professor Richard Macrory

1. I am Emeritus Professor of Environmental Law at University College London and a door-tenant at Brick Court Chambers. I was co-chair of the UK Environmental Law Association's Brexit Working Party 2017-2018, and was a board member of the Environment Agency 1999-2004. This submission is made in my personal capacity, and is focused on the provisions in the Bill concerning the Office of Environmental Protection (OEP)

2. In general, the OEP is a valuable initiative. The UKELA 2017 report, *Brexit and Environmental Law: Enforcement and Political Accountability Issues,* identified that once the European Commission ceases to have a role in monitoring the duties of Member States there would be potential gap in accountability arrangements. While ordinary judicial review remains an important long-stop, UKELA did not think it could replicate the more systematic enforcement role hitherto conducted by the European Commission. So I welcome the fact that the current Secretary of State recognized that this is a genuine problem and has made the present proposals. Even if the UK eventually remains within the EU or becomes an EFTA member (where the EFTA Supervisory Authority performs a similar enforcement role to the Commission), OEP would still be a valuable addition to our institutional arrangements for environmental law.

3. But there is little point in creating such a body if existing environmental regulators and local authorities are inadequately resourced for their enforcement functions. Recent figures published on the decline in enforcement actions by bodies such as Natural England and the Environment Agency are striking: for example, formal cautions issued by the Environment Agency have dropped by four-fifths in the last three years, and prosecutions dropped from 515 in 2011 to 113 in 2017.[1] I do not believe that this decline has been wholly filled by greater use of civil sanctions. Maybe it is due to greatly increased compliance by the regulated community but I have concerns.

   Monitoring and reporting on environmental law

4. One of the functions of OEP will be to monitor the implementation of environmental law (Cl 15). This is to be welcomed. Nearly all EU environmental laws contain provisions for the European Commission to review the actual implementation of the law in question after a specified period. Reports are based on questionnaires prepared by the Commission and sent to Member States, and can provide invaluable information on what is actually happening on the ground. We have never included as a matter of general practice such provisions in our national environmental laws[2]. Generally only if there has been some scandal or a Parliamentary Select Committee takes up the issue is the issue of implementation fully investigated by an external body. The provisions in Clause 15 are drafted in very broad terms, and I would welcome a commitment to more systematic reviews. To set a precedent, the new

[1] ENDS Report January 2019 *Is the Environment Agency leaving crimes unpunished?* p 8-9

[2] An exception is the duty on the Secretary of State under reg 2 Greenhouse Gas Emissions Trading Scheme Regulations 2012/3028 to review and report on the regulations "from time to time" but with the first report to be published within five years, and subsequently at intervals not exceeding five years.

Environment Bill should include a provision that its implementation will be reviewed by OEP after specified periods (say a minimum of five year intervals). Clause 26 provides a duty of co-operation by public bodies with the OEP, but only in respect of its enforcement functions. This duty should be extended to the OEP's functions in respect of its Cl 15 monitoring functions, making clear that if the OEP seeks information about implementation from public bodies there is a duty to respond.

Enforcement Priorities

5. There has been little indication of the proposed resources and staffing levels planned for the OEP but the body has been given substantial tasks over and above enforcement (annual monitoring of improvement plans, advice on changes to environmental law, and monitoring of environmental law). It cannot be expected to deal with every breach of environmental law duties by all public bodies, but needs to focus on strategic enforcement. The provisions on prioritisation for its enforcement policy in Cl 12(4) reflect this need. In the investigation of complaints concerning breaches of EU environmental law by Member States, DG Environment used to try to investigate all complaints. Since 2007 there has a clearer prioritizing strategy, now reflected in the 2017 Communication of the European Commission. While it continues to welcome complaints from members of the public, cases alleging particular instances of incorrect application are unlikely to be handled by the Commission unless they raised issues of wider principle, evidence of a general practice of non-compliance, or a systematic failure to comply with EU law. [3] OEP will need to adopt a similar approach, neatly summarized by the European Commission as "*bigger and more ambitious on big things, and smaller and more modest on small things"*.

Public complaints

6. Public complaints will be an important source of information for OEP. But it will be important to send clear signals as to the sort of complaints it is likely to investigate in order to manage public expectations and avoid undue overload. For example, the web-site of New Zealand Parliamentary Commissioner for the Environment (which carries out investigations but does not have direct enforcement powers) states *"Whether or not an environmental investigation results from a matter of public concern is at the discretion of the Commissioner. The office is only small and though we will not be able to act on or investigate all complaints, we still take note of all the concerns raised and value all community input."* Cl 19 states that OEP may investigate a complaint where it considers the complaint indicates a failure to comply with environmental law that is 'serious'. I think connection with its enforcement policy should be made more explicit to minimize continual disputes between complainants and OEP as to what is or is not serious – e.g. by adding "(c) and is consistent with its enforcement policy" or wording to that effect.

Enforcement powers

7. One would hope that the OEP will be able to resolve many problem areas without the need for formal enforcement action in much the same way as European Commission does in infringement proceedings. This is one of the advantages over Judicial Review where procedures are ill-suited to such informal resolution. The formal powers of the OEP are essentially three: Informationl Notices (Cl 22), Decision Notices (Cl 23) and a review action

[3] Communication from the European Commission *EU Law: Better Results through Better Application* 2017 C 18/02) para 3.

before the courts (Cl 25). These can be seen as roughly equivalent as the three-stage infringement procedure of the European Commission – a formal letter of infringement, a Reasoned Opinion, and application to the European Court of Justice (CJEU). The Commission procedure is a sequential process with most cases resolved before Reasoned Opinion Stage. It is not clear on the current drafting whether the OEP's powers are intended to be exercised sequentially – e.g. if no satisfactory response to an Information Notice it moves on to the Decision Notice stage, and so on. I think this procedure should be adopted – the 'ratchet' process encourages informal resolution without the need to go to court.* For the same reason I do not think that the information and decision notices should be made legally binding, or subject to appeal rights or even fines imposed by the OEP. This could simply encourage an over-litigious approach in the early stages of the procedure when more constructive dialogue should be encouraged.

8. The final enforcement power is by way of ordinary judicial review and it is here I have the most concern. I understand that one of the arguments within government legal circles is that the approach of the national courts in JR is now equivalent to that of the Court of Justice of the European Union (CJEU). This may be the case where the courts are concerned solely with the interpretation of law, though the CJEU has often been more willing than national courts to invoke the EU environmental principles to assist it in interpretation. But environmental cases often involve complex issues of fact and examining the decisions made by government and other public bodies. In such cases, the approach of the UK courts in JR has been largely based on the *Wednesbury* irrationality principle – was the decision so unreasonable that no reasonable person could have made it? In contrast, the CJEU has tended to be less deferential, adopting a proportionality test involving a more structured examination of the balancing interest involved. The position is made a little more complex because in cases involving human rights and some EU law the British courts have in recent years been using the proportionality test, and in other cases, depending on the issue in hand, have applied the *Wednesbury* test with different degrees of intensity. Nevertheless, despite some academic arguments, it seems clear the two approaches are not exactly the equivalent. Lord Reed in the Supreme Court noted recently, "*That is not to say that the Wednesbury test, even when applied with 'heightened' or 'anxious' scrutiny, is identical to the principle of proportionality as understood in EU law, or as it has been explained in cases decided under the Human Rights Act 1998"*[4]

9. I therefore have concerns that reliance on JR before the Administrative Court will not bring the same degree of review as currently adopted by the CJEU in infringement proceedings. In many infringement cases, the CJEU is prepared to engage in quite complex evidential issues.[5]

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[4] *Pham v Secretary of State for the Home Department* [2015] UKSC 1. In another recent Supreme Court case, *Keyu v Secretary of State for Foreign Affairs* ([2015] UKSC 69, Lord Neuberger noted, *"The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue".*

[5] Examples include *Commission v France* C 3/96 [2000] ECR I-10779 (Court uses Birdlife IBA scientific guidance to determine that a site should have designated a Special Protection Area), Commission *v Bilbaina* C/691 15P (labelling classification), *Commission v Poland* C-441/17 (Habitats Directive, forest plans – court uses satellite evidence), *Commission v France C-258/00* (designation of nitrate zones).

• Correction (made orally) Although the drafting is not as clear as it should be, closer reading of the text indicates that the process has to be sequential.

As Wenneras concluded in a major study on EU environmental enforcement,[6] "I*f one looks at the intensity of review which the ECJ has applied in infringement cases it quickly becomes obvious that it has not been deferential in its approach, but in fact applied a quite stringent review of legality".* Furthermore, more recent case-law of the CJEU indicates that while the burden of proving an infringement initially rests with the Commission, this can shift to Member States once a prima facie case is established.[7] It is by no means clear that this approach would be adopted in ordinary JR proceedings.

A Different Model

10. Rather than relying on conventional JR in the Administrative Court as the final enforcement mechanism, I would propose a different procedure involving the First-Tier (Environment) Tribunal. The Environment Tribunal is an independent judicial body that has been in existence since 2010, and now handles appeals in some 44 areas of environmental legislation from civil sanctions to emissions trading. It brings specialist expertise in environmental law, can involve non-legal members with relevant expertise (such as environmental science) where appropriate, and has very flexible rules of procedure. On this model, if the OEP is dissatisfied with the response to a Decision Notice, it could seek to have the Notice confirmed by the Environment Tribunal. The Tribunal would then decide whether there has been a breach of environmental law (if that is in issue) or whether the steps proposed to deal with the situation are adequate or reasonable.

11. But I would go further. When the European Commission brings infringement proceedings, they can be in respect of breaches by any public body with responsibilities under EU environmental law, but proceedings are directed against Government. Government cannot duck its responsibilities by arguing that the legal powers exist with other bodies within the country. A similar approach should be adopted here. The OEP enforcement powers should be directly solely against the Secretary of State but could be in respect of both breaches by government *or any other public body with environmental responsibilities.* This is an extended notion of responsibility in public law, but if one accepts that the OEP should be focused on cases of wide environmental concern or revealing systematic problems, then it is not unreasonable that in such cases it is the Secretary of State who should be obliged to respond to the situation. This might take the form of increased resources to local authorities if that is the real issue, improved guidance, or powers of direction to bodies such as the Environment Agency or Natural England.[8] This notion of extended responsibility would be difficult to accommodate within ordinary JR principles, and reinforces the case for thinking afresh with a new dedicated procedure. We should be looking to novel ways of resolving difficult issues concerning the implementation of environmental law duties by government and public bodies.

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[6] Wenneras *The Enforcement of EC Environmental Law* (OUP 2007) p 23. Ludwig Kramer (formerly in charge of infringement proceedings in DG Environment) considers that in infringement proceedings "the ECJ is very intense in its judgments" (pers. com. 8/10/18)

[7] see C-365/97 *Commission v Italy* [1999] ECR-I-1993

[8] There may be some instances such as the failure of a local authority to apply environmental assessment requirements to an individual planning application where central government currently does not have the power to intervene after the decision has been taken. These cases would still be a subject to review by the courts by action taken by individuals, NGOs, or industry. I do not think the OEP should become involved in such local individual cases, but if there is some evidence of more widespread failure at local level, then it is reasonable that the S of S takes on the responsibility for dealing with the issue.

12. Environmental law is often complex and OEP may be faced with real problems as to the exact meaning of a law in question. Under s 325 Charities Act 2011 the Charities Commission has the power to refer to the Tribunal system any question relating to its functions or the meaning of charity law. Other parties such as trustees of charities may, with the consent of the Tribunal, become parties to the proceedings. This is a valuable mechanism for having the law clarified without becoming engaged in enforcement proceedings. I would recommend a similar power for the OEP with reference to the Environment Tribunal.

Conclusion

13. The proposal for the OEP is a bold initiative designed to contribute to the more effective implementation of environmental law in this country. But when it comes to enforcement and the role of the courts, the current proposals have reverted back to conventional solutions when a rather more imaginative approach would have been preferable.

Answers to Specific Questions

Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

Unless there is clear commitment to ring-fencing, funding solely from DEFRA (Schedule, para 9) could be problematical. The appointment of the Chair and Chief-Executive should be subject to Select Committee pre-appointment hearings.

Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action'?

No. See my concerns about Judicial Review in paras 8-9 above. Instead of JR, there should be a dedicated procedure before the First-Tier Environment Tribunal as suggested in paras 11 and 12.

Are there any conflicts of interest or overlap with existing government bodies?

The exclusion of emissions of greenhouse house gases from the meaning of environmental law (Cl 31(3)) has presumably been included because of sensitivity over the role of the Climate Change Committee. It is sensible to avoid duplication of functions (Clause 12 (3)(b)) requires the OEP's strategy to address this issue) but the Climate Change Committee has no direct enforcement powers. This means that there will be a gap in the supervisory powers in respect of duties of government or other public bodies in legislation dealing with greenhouse gas emissions, such as the Emission Trading Regulations 2012 or indeed the duties under the Climate Change Act 2008. This exclusion should be deleted in respect of the enforcement functions of the OEP (including information and decision notices), but with a proviso that before exercising such functions it must consult the Climate Change Committee.

Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

As discussed I doubt whether Judicial Review by the courts will provide the same level of scrutiny applied by the Court of Justice of the European Union in environmental infringement proceedings.

On the other hand, while the CJEU has the power to impose financial penalties on a Member State which fails to comply with a judgment, I do not think such powers are needed here. The CJEU powers are equivalent to a contempt of court, and in JR proceedings the courts have inherent powers to penalize for contempt of court where an order is not complied with: "*Failure to comply with a mandatory or prohibiting order or injunction, or an undertaking given to the court, is punishable as contempt of court. In theory, all the normal sanctions are at the disposal of the court – imprisonment, sequestration, fine."* (De Smith *Judicial Review* (2018 edition) para 18-045). If my proposal for a dedicated procedure before the Environment Tribunal were implemented, it would be sensible to include an explicit provision that failure to comply with a decision of the Tribunal could amount to contempt and be referable to the Upper Tribunal – for a precedent see s 202 Data Protection Act 2011.

Richard Macrory
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