

THE JUSTICE PAPERS

The Bar Council

Saving the Planet

The Environmental Bill: ground-breaking
enviro superhero or not?



The Bar Council

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I feel I must start with a confession...I was always allowed to read comics as a child and perhaps as a result I really love a good superhero story - I have spent a few idle moments looking online (as you do) to see who the weakest and strongest 'supers' are as well as those with the oddest talents and powers ('Arm-Fall-Off Boy' - anyone?!). Every superhero story has its arc and sometimes it is a little disappointing – our hero does not quite live up to the excitement... Batman v Superman (2016) Spider-Man 3(2007) or Catwoman (2004) fall to mind - but sometimes we get Iron Man (2008) or Guardians of the Galaxy (2014) or Black Panther (2018)!

There are two key features about environmental law as we know it in the UK:

The "environment" is unowned – issues therefore are raised by concerned environmental organisations or third parties and whilst public bodies (government departments, local authorities, specialised agencies) have a particular responsibility for environmental protection they often also face conflicting policy priorities and financial constraints.

A huge proportion of existing environmental law and policy in the UK derives from the EU, with its

implementation largely monitored and enforced by EU institutions such as the European Commission.

The Environmental Bill started its life as an exciting potential ground-breaking piece of new legislation for our post Brexit world taking these features into account. Various policy statements including "A Green Future: Our 25 Year Plan to Improve the Environment" (January 2018 updated May 2019) have appeared confirming the Government's longer-term objective for "this, to be the first generation to leave the environment in a better state than that in which we inherited it" and its later manifesto pledge in 2019 to "protect and restore our natural environment after leaving the EU".

In other words the aim is for the Bill to be an Environmental Superhero. Will it be Black Panther though or will it be Catwoman?

Back Story

Back in May 2018 the Government published a consultation document with the snappy title "Environmental Principles and Governance after the United Kingdom leaves the European Union" (the "EP & G").

This proposed amongst other things the setting up of a new independent

body or “watchdog” post Brexit “to hold government to account on the environment¹” as well as proposing a series of Environmental Principles to be reflected in future legislation.

This proposal was then specifically reflected in section 16 of the European Union (Withdrawal) Act 2018 (‘the EUWA’) passed in June 2018. It was unusual not only in that it required the Secretary of State to publish a draft Bill within a set timescale (6 months from the date of the EUWA) but also because it set out what the Bill has to contain, namely:

“(a) a set of environmental principles,

(b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,

(c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),

(d) provisions for the establishment of 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)², and

(e) such other provisions as the Secretary of State considers appropriate.”

The two most novel proposals were the “Environmental Principles” and the new Watchdog.

Principles to guide decisions are more often than not in planning and environment law set out in policies which the law then requires decisions to be based upon as opposed to setting them down in legislation. The thinking was perhaps that giving these principles the ‘force’ of law would make them stronger – Super Principles maybe. The EUWA went further it actually lists what these principles should be based as they are on existing principles derived from:

“(a) the precautionary principle so far as relating to the environment,

(b) the principle of preventative action to avert environmental damage,

(c) the principle that environmental damage should as a priority be rectified at source,

(d) the polluter pays principle,

(e) the principle of sustainable development,

1 [44 of EP&G]

2 Ie the ‘watchdog’

(f)the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities,

(g)public access to environmental information,

(h)public participation in environmental decision-making, and

(i)access to justice in relation to environmental matters.”

As for the Environmental Watchdog which is to be called the Office of Environmental Protection ('OEP') as noted this has been heralded by the Government as a *“long-term, independent body on the environment” which will “provide independent and impartial scrutiny, assessments and advice on environmental legislation” and “offer a strong system of accountability, taking enforcement action where needed to make sure that government is delivering on its obligations under environmental law”.*

Character Development

An earlier draft of the Bill in 2018 referred to Governance and Principles but the final published Bill called simply the Environmental Bill was published in October 2019 and then, following the General Election in December was reintroduced on 30 January 2020 with certain amendments to the previous version.

It receives its second reading in the House of Commons on 26 February when MPs will be able to debate its contents.

What does it look like?

The first part of the Bill deals with the environmental principles and requires the publication of a policy statement setting them out. It also establishes the an OEP and requires the Secretary of States to set future long-term environmental targets in four priority areas of air quality, water, biodiversity and resource efficiency and waste reduction, along with the production of statutory Environmental Improvement Plans (the first being the January 2018 25 Year Environment Plan).

The second part relates to environmental governance in Northern Ireland and the third part addresses waste management and producer responsibilities as well as powers to regulate imports and exports of waste, and amendments to the responsibilities and powers for separating and recycling waste. It also provides a framework for a deposit return scheme.

Part four of the Bill deals specifically with air quality; Part 5 water; and Part 6 of the Bill provides for the creation of a new biodiversity net gain requirement, in England, of 10% for developers though the planning system which will be mandatory and maintained for at least 30

years. Allied with this Part 7 introduces voluntary legally binding conservation covenants between landowners and “responsible bodies” which conserve the natural or heritage features of the land.

Part 8 of the Bill provides powers to the Secretary of State to amend the EU REACH Regulation (registration, evaluation, authorisation and restriction of chemicals) in order to ensure an effective regulatory transfer of the EU REACH Regulation into the UK.

In terms of the amendments brought about in the January 2020 version Clause 19 (in part1) is notable.

This is because it relates to other Bills which may come forward which requires minister in charge to make statement about its content if that Bill contains new “environmental law” before progressing to a second reading. That statement must include a view whether it is environmental law and that it will not have the effect of reducing the level of environmental protection provided for by existing environmental law. If the Minister cannot state the latter he can state the government “nevertheless” wishes to proceed with the legislation anyway.

Clause 20 is new as well but perhaps less notable. This requires the Secretary of

State to issue a report every 2 years on international environmental protection legislation.

Clause 35 is also new and significant. It provides for a new means to enforce environmental law termed “environmental review”.

This is to be wielded by the OEP along with its other enforcement powers under Clauses 28 to 34 which allow it to consider acts of public authorities and receive complaints; investigate and issue decisions ultimately which state whether such an authority has failed to comply with environmental law. It has no formally power to require such an authority to do anything if it has failed to comply but the OEP can ask and the authority can respond.

Clause 35 allows the OEP to commence environmental review proceedings to be conducted on the same principles of judicial review which are to go before the Upper Tribunal. If the OEP is successful the Upper Tribunal can make “a statement of non-compliance” and the authority must publish a statement that sets out the steps it intends to take in light of the review.

Clause 36 which is not new gives the OEP the power to take JR or statutory

review proceedings under other Acts where the conduct is considered to constitute a “serious failure to comply with environmental law”.

The relief or consequence of a successful JR is again is a declaration and the unsuccessful authority is to say how it will make amends.

Black Panther...?

So, there are a lot of important and positive statements within this Bill and the political will to make this an effective and indeed ground-breaking Act should as a starting point be taken at its face.

The problem though is whilst the Bill talks the talk of requirements and keeping environmental protections and targets in

place if not making them better than ever before there is still nothing or rather not enough to show that this must happen. There is no provision to address what happens for example if the Secretary of State does not set a target – there is no real accountability other than perhaps a political one for failures on a government body’s part to comply with environmental law.

Clause 19 unfortunately gives the clear impression that new environmental laws may well detract from existing protections but at least the public will be aware that the Government is willing to pursue such laws.

I am afraid we are sadly it seems in Catwoman territory currently when we could be in Wakanda³...

³ With apologies to Halle Berry.