

# PARLIAMENTARY DEBATES

HOUSE OF COMMONS  
OFFICIAL REPORT  
GENERAL COMMITTEES

Public Bill Committee

## ENVIRONMENT BILL

*Tenth Sitting*

*Thursday 5 November 2020*

*(Morning)*

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SCHEDULE 1 agreed to.

CLAUSES 22 AND 23 agreed to, one with amendments.

Adjourned till this day at Two o'clock.

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor’s Room, House of Commons,

**not later than**

**Monday 9 November 2020**

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**The Committee consisted of the following Members:**

*Chairs:* JAMES GRAY, † SIR GEORGE HOWARTH

- |   |  |
|---|--|
| † Afolami, Bim ( <i>Hitchin and Harpenden</i> ) (Con)                   | † Longhi, Marco ( <i>Dudley North</i> ) (Con)  |
| † Anderson, Fleur ( <i>Putney</i> ) (Lab)                               | † Mackrory, Cherilyn ( <i>Truro and Falmouth</i> ) (Con)   |
| † Bhatti, Saqib ( <i>Meriden</i> ) (Con)                                | † Moore, Robbie ( <i>Keighley</i> ) (Con)  |
| † Brock, Deidre ( <i>Edinburgh North and Leith</i> ) (SNP)              | Pow, Rebecca ( <i>Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs</i> ) |
| † Browne, Anthony ( <i>South Cambridgeshire</i> ) (Con)                 | Thomson, Richard ( <i>Gordon</i> ) (SNP)   |
| † Docherty, Leo ( <i>Aldershot</i> ) (Con)                              | † Whitehead, Dr Alan ( <i>Southampton, Test</i> ) (Lab)  |
| † Furniss, Gill ( <i>Sheffield, Brightside and Hillsborough</i> ) (Lab) | † Zeichner, Daniel ( <i>Cambridge</i> ) (Lab)  |
| † Graham, Richard ( <i>Gloucester</i> ) (Con)                           | Anwen Rees, Sarah Ioannou, <i>Committee Clerks</i>   |
| † Jones, Fay ( <i>Brecon and Radnorshire</i> ) (Con)                    |  |
| † Jones, Ruth ( <i>Newport West</i> ) (Lab)                             | † <b>attended the Committee</b>  |

# Public Bill Committee

Thursday 5 November 2020

(Morning)

[SIR GEORGE HOWARTH *in the Chair*]

## Environment Bill

11.30 am

**The Chair:** Before we begin, I remind Members about social distancing. Spaces available to Members are clearly marked. *Hansard* colleagues would be grateful if you could send any speaking notes to [hansardnotes@parliament.uk](mailto:hansardnotes@parliament.uk). I also remind Members to switch electronic devices to silent, please. Tea and coffee are not allowed during sittings.

We will continue line-by-line consideration of the Bill. The selection list for today's sitting is available in the room, and shows how the selected amendments have been grouped together for debate. Amendments grouped together are generally on the same, or a similar, issue. Please note that decisions on amendments do not take place in the order they are debated but in the order they appear on the amendment paper. The selection list shows the order of debate. Decisions on each amendment are taken when we come to the clause to which the amendment relates.

We now continue our consideration of schedule 1. I call Dr Alan Whitehead to move amendment 157.

### Schedule 1

#### THE OFFICE FOR ENVIRONMENTAL PROTECTION

**Dr Alan Whitehead** (Southampton, Test) (Lab): I beg to move amendment 157, in schedule 1, page 124, line 40, at end insert—

“12A (1) At the start of each five-year period, the Secretary of State must publish and lay before Parliament an indicative five-year budget for the OEP.

(2) In sub-paragraph (1) ‘five-year period’ means—

(a) the period of five financial years beginning with the financial year that begins after the commencement of this Schedule, and

(b) each subsequent period of five financial years.

12B If the OEP requests additional funding, due to a change in the nature or extent of its functions, the Secretary of State must publish and lay before Parliament a statement responding to the request.”

*This amendment requires the OEP to be given a five-year indicative budget, and allows it to request in-budget increases.*

It is a pleasure to serve under your chairmanship, Mr Howarth. Before we start, I note the Minister's absence this morning. I understand that she is unwell. I hope to convey the wishes of us all, and particularly of the Opposition, for her speedy recovery and return to her full powers, which are considerable, in the business of guiding the Committee. [HON. MEMBERS: “Hear, hear!”] I appreciate that her absence has meant that we have had to slightly rearrange how we proceed today. The

Opposition fully support those changes, and hope that we can get through today in a useful and amicable way and be out in good time this afternoon. That is certainly our intention.

We tabled amendment 157 on the basis of the need to underpin the independence of the Office for Environmental Protection as far as its financing is concerned. The Bill effectively states that the Minister can provide funds for the OEP from time to time, as he or she directs. I do not have the exact wording in front of me, but that is essentially what it states. That is not good enough; independent bodies associated with Departments need a clear line of sight of the money that they will receive for their activities.

In the case of another departmentally associated independent body, the Environment Agency, the combination of the Government hugging it closer, in terms of the agency's activities, and substantially reducing its funding has created a real problem with its activities. We therefore suggest that the procedure for funding the OEP should be that, at the start of each five-year period, the Secretary of State publishes and lays before Parliament an indicative five-year budget, which we anticipate would be maintained for the life of the Parliament. We suggest that that be done not just for the first five-year period, but for each subsequent five-year period, so that at the beginning of each period the OEP has a clear remit in front of it, knows what its budget is and what it can and cannot do, and cuts its cloth accordingly, with a clear line of sight as far as financing is concerned.

That would mean, among other things, that in each Parliament the OEP has guaranteed independence for its activities. I reflect, in parallel, on the experience of Select Committees, which we were talking about in Tuesday's proceedings. Following changes made a little while ago, Select Committee members are selected at the beginning of each Parliament, and their membership continues independently of the wishes or interference of bodies such as the Government Whips Office—heaven forbid that it would ever do such a thing—or of suggestions that people ought or ought not be on Select Committees because of their views about supporting the Government. Select Committees are proof that that works. Not only are their memberships selected and agreed at the beginning of each parliamentary Session, but their budgets come from a parliamentary vote, not from Government sources.

We are trying to set up a procedure that is reasonably close to that, in that the budget is set. It would not be limitless, but it would be known and secure for a five-year period—the lifetime of a Government. It would not be possible for it to be diluted, diverted or whatever during that period. We think that is an important principle in setting up the OEP, and we hope that the Minister for the time being—I am not sure how to refer to him—will come at least some way towards meeting that principle, perhaps by accepting this amendment. I hope he will at least indicate that he will think seriously about it. If we are not able to get that very clear assurance, we will seek to divide the Committee to put that principle on the record.

**Ruth Jones** (Newport West) (Lab): My hon. Friend is making a powerful speech about the funding. Let us be honest: if we do not have the correct funding in place, how can the OEP be impartial and carry out its job

effectively? Does he agree that it would be a concern if the OEP did not have separate estimates from those of the Department for Environment, Food and Rural Affairs? How else will it maintain its impartiality?

**Dr Whitehead:** That is absolutely right. We need to make sure, as we go through each element of the OEP's formation and operation, that it is not only thought to be independent, but seen to be so in its activities. This is an important part of the OEP being seen to be independent. I await the Minister's thoughts on how we might proceed.

**Leo Docherty (Aldershot) (Con):** I am grateful to the shadow Minister for his kind remarks in wishing my hon. Friend the Member for Taunton Deane a speedy recovery, and for the amicable tone in which he is seeking to work today. I thank him for the amendment. It highlights the unusual commitment this Government have already made to giving the OEP an indicative multi-annual budget, in response to Parliament's scrutiny of the draft Bill. This budget will be formally ring-fenced in any given spending review period; that will provide the OEP with more longer-term financial certainty than afforded to most arm's length bodies.

However, it would be unnecessary and unhelpful to include this commitment in the Bill. Other bodies with multi-annual funding commitments, such as the Office for Budget Responsibility, do not have it set out in legislation. In this Bill we have already included mechanisms to ensure that the OEP will remain adequately funded under this and future Governments.

The Bill imposes a statutory duty on the Secretary of State to provide the OEP with enough funding to undertake its statutory functions. There is also a duty on the OEP, in its annual statement of accounts, to provide an assessment of whether it was provided with sufficient funding by the Secretary of State during that year. The OEP's statement of accounts will be laid before Parliament.

That brings me to the second part of the amendment. Parliament will have ample opportunity to scrutinise the funding of the OEP further, and to hold Government to account accordingly. The OEP's funding will be made public through a separate line in DEFRA's estimate, with further detail in the OEP's own annual financial report. We will give the OEP the option of providing the relevant Select Committee with an additional estimates memorandum alongside the DEFRA estimate. The memorandum would provide the Select Committee with a clear statement of what is in the estimate, and why any additional funding is being sought.

The OEP will therefore be able to provide Government and Parliament with additional information relating to any changes in funding and how the funding will be applied, enabling any perceived shortcomings to be highlighted. In that spirit, I ask the hon. Gentleman to withdraw the amendment.

**Fleur Anderson (Putney) (Lab):** I echo the remarks made by the shadow Minister, my hon. Friend the Member for Southampton, Test, about sending our best wishes to the Minister, the hon. Member for Taunton Deane. I wish her a speedy recovery.

I will add to the shadow Minister's remarks about strengthening the multi-annual budget provision and putting it in the legislation. I am grateful to the Minister

for saying that there will be some indication of the multi-annual budget, but I ask for it to be stronger. I draw the Committee's attention to what the Select Cttee on Environment, Food and Rural Affairs said on the funding of the OEP in April 2019. The Bill has been in progress for a long time, so we may not all remember what the Committee said then—some, like me, may not even have been an MP then. It said:

“A history of sustained budget cuts to DEFRA's arm's length bodies does not fill us with confidence that the current funding provisions for the Office for Environmental Protection in the draft Bill are sufficient. Given the importance of the OEP's independence from Government”—

that independence is the reason why it is important that we discuss this matter alongside amendment 156—

“it should have additional budgetary protections than is customary for Non-Departmental Public Bodies.

The Government should commit to providing a multi-annual budgetary framework for the Office for Environmental Protection in the Bill. This commitment would help to ensure the Office for Environmental Protection's independence from Government and is consistent with best practice as seen with the Office for Budgetary Responsibility. Rather than grant-in-aid, the Office for Environmental Protection should also have its own estimate which should be negotiated directly with HM Treasury, and voted on by Parliament in the yearly Supply and Appropriation (Main Estimates) Bill.”

The Select Committee argues that the requirement for multi-annual provision should be fundamentally written into the Bill, not subject to whims or dependent on good intentions in the future. That is very important for the next topic of our conversation about the independence of the OEP.

11.45 am

**Daniel Zeichner (Cambridge) (Lab):** It is a pleasure to serve under your chairmanship, Sir George. I also send my good wishes to the hon. Member for Taunton Deane and wish her a speedy recovery.

Much of the discussion on Tuesday was about—as it will be today—the independence of the OEP. Of course, organisations cannot be truly independent if they are heavily dependent on another organisation for their funding and resourcing. I echo many of the comments made by my hon. Friend the Member for Putney and the shadow Minister. This might seem a slightly arcane discussion about how the funding is separated and arrived at, but a point that I have already made, and will, I suspect, continue to make, is that the organisation is so important that it has to be independent, and be seen to be independent, and has to have public confidence, because it replaces a very strong regime.

Sadly, we saw on Tuesday, and will, I fear, see as we go through further clauses today, that the sense of independence is being eroded. That is important, because when we look at other organisations that are involved in environmental protection, we see that the record, particularly under this Government, is absolutely atrocious.

The Lords Select Committee in 2018 described the cuts made to many of these organisations as having a “profound negative impact” on England's biodiversity. The funding cuts to Natural England under this Government have been absolutely astonishing—there was a cut of some £265 million in 2008-09, and of a mere £85.6 million in 2019-20. This matters because we are being asked to trust the Government to resource the organisation properly. I am sure many of us are regular watchers of “Countryfile”; just a few weeks ago, it had

[Daniel Zeichner]

a feature based on Unchecked UK's report, "The UK's Enforcement Gap", which looked at the impact of funding cuts on these organisations. Natural England had a 72% cut between 2009 and 2019, and the Food Standards Agency a 51% cut. The report concluded:

"The implications of these cuts are significant, with declines in almost every metric of regulatory activity—including food safety checks, water pollution sampling", and many others. That is the evidence before us regarding past promises from the Government.

Talking of environmental issues and the cuts to Natural England, staggeringly, the monitoring of sites of special scientific interest has declined by 62% between 2010 and 2019. There are many other damaging statistics that one could cite, but it all leads one to conclude that the new organisation—the key organisation for protecting our environment—must be properly resourced to do the job. All the evidence suggests the Government cannot be trusted.

**The Chair:** I should apologise to the Committee; I should have brought in other speakers before the Minister. That is what I will do in future. I am sorry if that has caused any confusion, but seven months' absence has made me a little too rusty.

**Dr Whitehead:** Thank you, Mr Howarth, for that note of concern about Committee proceedings. I am sure that in no way tripped us up or stopped us achieving our purpose, but thank you for clarifying matters.

I hear what the Minister says about ring-fencing efforts that might be made on the funding process by the Government, but that does not remotely meet the need to fix and set out a budget at the beginning of the period, so that the funding is not just ring-fenced, but clearly separated out from the daily business in the period after that budget has been set. Given the comments of my hon. Friend the Member for Cambridge, I am afraid that we will have to divide the Committee to set down a clear marker about what we want to happen. We hope that the Government will think seriously about the issue as the Bill goes through the House.

*Question put, That the amendment be made.*

*The Committee divided: Ayes 5, Noes 9.*

#### Division No. 12]

#### AYES

Anderson, Fleur	Whitehead, Dr Alan
Furniss, Gill	
Jones, Ruth	Zeichner, Daniel

#### NOES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Browne, Anthony	Mackrory, Cherilyn
Docherty, Leo	Moore, Robbie
Graham, Richard	

*Question accordingly negatived.*

**Richard Graham** (Gloucester) (Con): On a point of order, Sir George. In the Committee's discussions on Tuesday, I noted that the shadow Minister, the hon. Member for Southampton, Test, raised on a couple of

occasions—in columns 285 and 287 of the *Official Report*—the appointment of non-executive directors to the future Office for Environmental Protection. He intimated strongly that it would be a good idea for such directors to be appointed with the consent of the two relevant Select Committees. He later said that perhaps the Select Committees would decide that they would not want to be involved in the appointment of non-executive members of the board.

I have been in contact with the Chair of the Environmental Audit Committee, my right hon. Friend the Member for Ludlow (Philip Dunne), who confirmed that there has never been an approach from Labour Front-Bench Members or any member of his Committee with that suggestion. He does not recall a suggestion for pre-appointment hearings for NEDs—apart from the chair—by any member of his Committee during its inquiry into the draft Environment Bill last year, either. In his view, it is an impractical suggestion, which had never been raised before. May I therefore invite the shadow Minister to withdraw some of his comments about the appointment of non-executive directors from Tuesday's discussions?

**The Chair:** It is the tradition of this House that, for good reasons, the Chair does not take responsibility for the content of right hon. and hon. Members' speeches. The hon. Member was perfectly entitled to raise his concern, and it is now on the record. I am sure that the shadow Minister will respond if he wants to do so.

**Dr Alan Whitehead:** I beg to move amendment 156, in schedule 1, page 126, line 2, leave out 'have regard to the need to'.

*This amendment makes the independence of the OEP an absolute requirement.*

I apologise for de-knighting you earlier, Sir George; I will continue in the right vein. I will respond briefly to the point of order by the hon. Member for Gloucester. My intention on Tuesday was to draw attention to the principal architecture of various issues and how they might work relative to Select Committees. It was not to impugn the actions of anyone on a Select Committee or any proceedings of Select Committees. If the hon. Member for Gloucester felt that I was doing that in any way, I hope I can set the record straight this morning. As to the remarks that I made about how, in principle, Select Committees work and might have a hand in the appointments, and about the difference between those Committees having a hand in the appointments and the Government—in principle, but not necessarily in practice—not referring to them, I fully stand by those remarks for the future. I hope that that clarifies things for the hon. Gentleman.

**Richard Graham:** I am grateful for the shadow Minister's comments. The key thing is that there is an important separation between the responsibilities of Select Committees and what a Government choose to do in a Bill. The implication of what he said on Tuesday was that those ideas had been well discussed, and raised previously, and that it was perfectly normal for the two relevant environmental Select Committees effectively to have hearings for non-executive directors, as well as for the chair. I thought it would be helpful to put the record straight and to say that that had never been discussed in

the Environmental Audit Committee and that the Chairman had never been approached about it by anyone from any party.

**The Chair:** Order. I have made the point that the Chair is not responsible for the content of any right hon. or hon. Member's speech. Mr Graham has raised his concern in a point of order. Dr Whitehead has responded, and I propose that we now stick rigidly to the amendment at hand and continue with consideration of it.

**Dr Whitehead:** Thank you, Sir George. We can perhaps talk about this offline, so to speak. I am happy to stand by what I said previously, but I would welcome discussing it further with the hon. Gentleman if he would like to.

The amendment is fairly straightforward. On Tuesday, the hon. Member for Truro and Falmouth made a point about paragraph 17 of schedule 1, which reads:

"In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence."

In her intervention, she emphasised the words "protect its independence". However, we would rather emphasise the fact that the wording

"have regard to the need to protect its independence"

would not actually protect the OEP's independence. We suggest deleting the words

"have regard to the need to"

so that the passage would read, "In exercising functions in respect of the OEP, the Secretary of State must protect its independence." That is simpler and more straightforward, and makes the duty of the Secretary of State clear. I hope that the Minister will respond positively.

**Fleur Anderson:** I also want to speak about the independence of the Office for Environmental Protection. The former Secretary of State, the right hon. Member for Surrey Heath (Michael Gove), promised us a new, "world-leading", independent environmental watchdog. However, what is in the Bill is not good enough. The current wording is:

"In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence."

The amendment would change that so that the Secretary of State "must protect its independence". We have had previous amendments that were short but important, and this is another one. Instead of giving a nod to something, hoping it will happen or wishing for the best, we will actually write this proposal into the Bill. That is important in relation to our earlier conversations about the appointment of the chair and the OEP's independence.

12 noon

It was promised that family reunion would be in the original Brexit legislation, but it was not there, and it was promised that it would be in the Immigration Bill, which was discussed only yesterday in the House of Commons, but it was not there. We cannot trust the Government to deliver in the legislation promised, and they have once again moved the goalposts with the Office for Environmental Protection.

I welcome the concept of the Office for Environmental Protection and share the ambition for it, but what the Bill delivers cannot in all seriousness be called independent.

The problem is compounded by the Minister's new clause 24, which further dilutes any appearance or practice of independence. That is really disappointing, and it is why we deem it necessary, unfortunately, to table this short but important amendment. It is not too late to rescue what was originally a really positive idea.

On Tuesday, the Committee discussed the chair. I am disappointed that our amendment was rejected, as it would have gone some way to restoring a semblance of independence and precedence. As the Institute for Government noted:

"This was one of the moves the Treasury made back in 2010 to establish the Office for Budget Responsibility as an independent credible actor. Indeed, the Treasury went even further: the chancellor can only remove the chair and the other two members of the Budget Responsibility Council with the consent of the Treasury Select Committee."

It is written right there in the procedures.

Overseas examples demonstrate the importance of an independent chair, whose role can be written in and make the whole body more independent. In Canada, the equivalent body, the Commissioner of the Environment and Sustainable Development, which audits the environmental policies of the Government, is appointed by the Auditor General in Canada, who is in turn appointed by the Canadian Parliament.

In its evidence sessions, the Committee had many organisations lining up to share their concerns about the independence of the OEP. Industry-orientated bodies, such as the Aldersgate Group, whose members include companies such as Associated British Ports, IKEA and Thames Water, as well as environmental non-governmental organisations, say that the failure to give MPs a say on who leads the OEP is a mistake. That is why this associated amendment is needed.

I am deeply worried by the further changes to the OEP proposed by the Government, particularly those giving the Secretary of State powers to issue enforcement guidance on matters that must be included in the OEP's enforcement policy—new clause 24. To quote Greener UK, that gives the Government a

"get out of jail free"

card, to direct the watchdog away from awkward or inconvenient cases.

The Government's justifications for that simply do not stand up to scrutiny. The Secretary of State has said that this is a normal, standard clause that applies to other public bodies with independent regulatory laws, and I am sure we will hear that again. Although the Government do have a similar power in relation to some existing public bodies, the critical fact is that Ministers do not have a similar power to issue guidance in relation to bodies charged principally or partly with enforcement in relation to potential breaches of the law by other public bodies. For example, the Equality and Human Rights Commission and the Information Commissioner's Office, which carry out enforcement in relation to breaches of the law on human rights, equality and data protection legislation, are not bound by similar power in relation to their enforcement functions.

Ministers have the power to issue guidance to some bodies in the DEFRA ecosystem, such as Natural England and the Environment Agency, as well as other non-departmental public bodies, such as the Office for Budget Responsibility. However, none of those are enforcement

bodies with the power to take the Government to court if there is a suspected breach of law. That is a critical difference.

The Government have also claimed that the new power does not grant the Secretary of State any ability to intervene in decision making about specific or individual cases and that the OEP does not have to act strictly in accordance with the guidance where it has clear reasons not to do so. Although that is technically correct, and I hope it remains so, when considered in the context of all the other changes the Government hope to make to the OEP, that power will clearly have the effect of allocating Ministers an essential role in shaping the basic principles of the watchdog. That will have a severely constraining effect on the OEP's ability to act independently.

The legislation makes the good intentions law—that is the point—but it would change the whole power dynamic in the room. When the OEP chair is there with the Minister, who has the most power? As Greener UK put it:

“This guidance power inverts the intended hierarchy (in which the OEP oversees ministers) and gives ministers the role of overseeing the OEP.”

That has consequences for the rest of the Bill. No matter what the Government claim, there is no doubt that such a broadly cast power will undermine the OEP's independence and render the Government's ambition for a world-leading watchdog unachievable. The Government's proposals would also limit to only urgent cases the OEP's powers to bring review proceedings against public policies, which is something that we will be looking at in future.

Let us not make these mistakes with the OEP, which, if set up correctly from the start and left to do its job without interference, has the potential to transform our environment and be a crucial partner to the Government in achieving their aims and policy statements. I hope that the Committee will support amendment 156.

**Daniel Zeichner:** My hon. Friends have made a powerful case, to which I will not add much more. Looking at what we are losing through leaving the European Union, I was very struck by the Library briefing, which states:

“EU law is monitored and enforced by the European Commission under Article 258...as the ‘Guardian of the Treaties’. It is overseen by the Court of Justice of the European Union... which can levy fines on Member States that are found to be in breach of EU law.”

That is an incredibly powerful position. Although we had only a certain amount of influence over that arrangement as a member state, it could be used to considerable effect.

I was very struck by the evidence to the Committee from ClientEarth, which has obviously used that arrangement to good effect on behalf of the citizens of the UK in challenging the Government's record on air quality. Even back in March, before the amendments before us and others were tabled, ClientEarth was very clear:

“Despite the Government's words about the independence of the OEP, 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.”

Those at ClientEarth are concerned because they know that, in the past, they could intervene and act on behalf of UK citizens, but under this system, they will not be

able to. That key change weakens our protections, and it is why it is so important that amendments such as this are pursued, although I suspect they will not be successful. However, I think that these provisions in the Bill will be torn to shreds in the other place, quite frankly.

**Leo Docherty:** I agree with Opposition Members who have spoken about the need to protect the independence of the OEP. That is why we have introduced a new duty on the Secretary of State to have regard to the need to protect the OEP's independence, and placed a duty on the OEP to act objectively, impartially and transparently. Unlike with most public bodies, the Bill gives Ministers no power to set the OEP's programme of activity or to direct the exercise of its functions. Parliament can scrutinise the actions of the Secretary of State in exercising functions in relation to the OEP to ensure that the Government are not interfering in the delivery of the OEP's statutory functions.

The operational independence of the OEP, however, which we wholeheartedly support, should not impede the Secretary of State in exercising appropriate scrutiny and oversight of the OEP. That is important because the Secretary of State, as an elected representative of the Government, is accountable to Parliament and the public for the overall performance of the body and for the use of public money. Requiring the Secretary of State to actively protect the OEP's independence at all times would be incompatible with that ministerial accountability, which is one of the Government's key principles of good corporate governance.

The amendment would prevent DEFRA, the OEP's parent Department, from exercising appropriate oversight, including accounting officer responsibilities. I therefore ask the hon. Member for Southampton, Test to withdraw his amendment.

**Dr Whitehead:** My hon. Friends have made powerful contributions on the overall independence of the OEP and the circumstances under which that independence can be enhanced or undermined. In terms of our general discussions this morning, hon. Members will see that the importance of the OEP—its crucial role in holding other bodies to account and possibly taking them to court—puts the OEP into a reasonably unique category as far as such bodies are concerned. Comparisons with some of those other bodies fall rather short in terms of making a distinction between the importance of the OEP and, indeed, the importance originally attached to it by previous Secretaries of State in introducing the Bill in the first place.

That, essentially, is a theme that we will be pursuing today, and amendment 156 is part of that. While I hear what the Minister says about the Department's ability to guide and control part of the OEP's actions, it is not good enough, in the context of the formulation before us, to say that the independence of the OEP can be compromised for the purposes set out. We do not intend to pursue the point to a Division this morning, but in terms of the corpus of our contributions on this clause, I want to place on record that the same goes for the debate later today, and we hope that those comments will be heard. I beg to ask leave to withdraw the amendment.

*Amendment, by leave, withdrawn.*

*Schedule 1 agreed to.*

## Clause 22

### PRINCIPAL OBJECTIVES OF THE OEP AND EXERCISE OF ITS FUNCTIONS

**Deidre Brock** (Edinburgh North and Leith) (SNP): I beg to move amendment 189, in clause 22, page 13, line 16, leave out subsection (5).

*This amendment removes the restriction on the OEP overlapping with the Committee on Climate Change.*

**The Chair:** With this it will be convenient to discuss the following:

Government amendments 30 and 66.

Government new clause 4—*Memorandum of understanding.*

**Deidre Brock:** May I send my best wishes to the Minister, and wish her a speedy recovery? I look forward to seeing her back in her place next week.

I say from the outset that amendment 189 is really a probing amendment. I am trying to gain a better understanding of what the Government were seeing to achieve in the clause by excluding areas of climate change committee activity from OEP oversight. However, I note the Government's in new clause 4, and I look forward to hearing what the hon. Member for Aldershot has to say in that regard.

12.15 pm

**Leo Docherty:** I thank the hon. Member for Edinburgh North and Leith for her warm wishes, which I will convey to the Minister, and for tabling amendment 189, which gives me the opportunity to explain how the Bill will ensure that there will be clarity over the respective remits of the OEP and the Committee on Climate Change. Government amendments 30 and 66 and new clause 4 will ensure that the OEP does not duplicate the work of the Committee on Climate Change, as well as requiring the two bodies to prepare a memorandum of understanding. I will come on to those in more detail in a moment.

Amendment 189 would remove clause 22(5), which would weaken the overall provision of the Bill to clarify the respective roles of the two bodies. That provision requires the OEP to set out in its strategy how it intends to avoid any overlap with the Committee on Climate Change when exercising its functions. That ensures that the avoidance of such an overlap would run through the OEP's entire operation. That would be difficult to achieve simply through a memorandum of understanding. I therefore ask the hon. Member to withdraw amendment 189 to ensure that the Office for Environmental Protection and the Committee on Climate Change can work together seamlessly.

Government amendments 30 and 66 and new clause 4 are part of a package of measures, including statutory requirements already set out in the Bill, that help to clarify the distinct roles of the two bodies to ensure that they develop an effective working relationship. Government amendment 30 will ensure that the OEP does not duplicate the work of the Committee on Climate Change by providing that the OEP will not monitor or report on specific matters already within the statutory remit of the Committee on Climate Change. Government amendment 66 ensures the same effect in Northern Ireland should the Northern Ireland Assembly choose to extend the OEP to Northern Ireland.

The OEP has an important role to play alongside and in collaboration with the Committee on Climate Change in ensuring that the UK continues to drive forward ambitious action on climate change. That role is not being called into question by the amendments. Indeed, Greener UK has welcomed the amendments and their addition to the existing provisions, which

“ensure that there is no duplication and overlap”.—[*Official Report, Environment Public Bill Committee*, 10 March 2020; c. 74, Q116.]

The Committee on Climate Change is also supportive of both the existing measures and the Government amendments. I therefore commend Government amendments 30 and 66 and new clause 4 to the Committee, and graciously urge the hon. Member to withdraw amendment 189.

**Deidre Brock:** I thank the Minister for that brief but adequate explanation.

**Dr Whitehead:** I think we can claim a little collective win on this. We have been concerned about the possible clash between the remit of the Committee on Climate Change and that of the OEP, almost since the publication of the Bill. I think the matter was raised in proceedings before they were suspended earlier in the year. To avoid duplication and a possible treading on each other's toes, it is really important that there is not a mix-up between what the OEP does on elements of the climate change and environmental remit, and what the Committee on Climate Change is doing.

The amendments that the Government tabled to clarify and codify that distinction, which also refer to Northern Ireland, seem a positive step forward in how we decide what we are going to do. In a moment, we will come to an amendment that tries to clarify that for another Government body. I welcome these amendments.

**Daniel Zeichner:** I, too, welcome the amendments, but does my hon. Friend agree that they demonstrate that the overall architecture of the whole system has been flawed from the outset? I am thinking of the relationship with other organisations and, for instance, the interaction with the Agriculture Bill and the Fisheries Bill, which we have long argued were done in the wrong order.

**Dr Whitehead:** Yes, indeed. My hon. Friend is absolutely right. It indicates that the thinking when the Bill was constructed in the first instance did not take account of those distinctions. We may need to go further in deciding who has what brief, as far as these issues are concerned.

On this particular issue, the Minister's clarification is welcome. Obviously, the Opposition have not won many amendments so far, so being on the right side of a new amendment can be the cause of some rejoicing. We do not wish to oppose the amendments; on the contrary, we support them.

**The Chair:** Government amendments 30 and 66 and Government new clause 4 will be determined later in the proceedings.

**Deidre Brock:** I beg to ask leave to withdraw the amendment.

*Amendment, by leave, withdrawn.*

**Dr Whitehead:** I beg to move amendment 105, in clause 22, page 13, line 18, at end insert—

(5A) The Energy Act 2013 is amended in accordance with subsections (5B) and (5C).

(5B) In section 131(1), for “may” substitute “must”.

(5C) In section 131(2), after subsection (c), insert—

“(d) the duty of the Authority in assisting the delivery of greenhouse gas emissions targets as set out in the Climate Change Act 2008.”

(5D) This section comes into force at the end of the period of three months beginning with the day on which this Act is passed.”

*This amendment is intended to facilitate co-operation between the OEP and the Energy Authority.*

This amendment follows on from our previous debate about clarifying which of various bodies does what. As my hon. Friend the Member for Cambridge said, there are a number of other issues relating to which body does what—how that works in the overall scheme of things as far as environmental protection is concerned, and how that relates to climate change issues.

One body that has a very substantial hand in the process and is very involved in the consequences of environmental protection, the use and deployment of energy, and decisions about where energy comes from—particularly as far as climate change and net zero considerations are concerned—is Ofgem: the body responsible for those considerations in the energy sphere.

The amendment would align Ofgem’s responsibilities and remit with the other bodies that we have discussed this morning. Ministers have argued that Ofgem’s remit includes concerns about the environment and climate change, but in practice, its written remit does not. Its remit at the moment is simply to secure good value for customers; it does not go into the areas that we have been talking about today. However, from the Energy Act 2013 onwards, the Government have had the ability to put that right. In part 5 of the Act, there is provision for the Government to put forward a strategy and policy statement, which would produce the remit for that body.

I have now been concerned for a long time that while part 5 of the Act would have been simple for the Government to implement—it is there on the statute book, with detailed guidance on how to do it—it has been curtailed merely because it is up to the Minister to trigger the provision. There is no start date for its implementation—we may come later to similar points about this Bill—and the Government have decided not to implement it. They have therefore resiled from the idea of producing a strategy and policy statement.

The amendment seeks to do two things. First, it would amend part 5 of the Energy Act 2013 to ensure that a remit for the policy and strategy statement is written into the Act. Secondly, it would ensure the implementation of that part of the Act by setting a timescale. Ministers would therefore need to pay attention to the insertion of Ofgem’s climate and environmental brief and do something about it by bringing that part of the Act into force within a set period of time.

It is a simple amendment. I appreciate that it would amend another Act of Parliament so we might have to go through a Marx Brothers tootsie-frootsie ice cream sketch form-guide discussion to get to a thorough understanding of how the 2013 Act relates to the Bill, but I hope hon. Members are assured that the Opposition

tried hard to draft the amendment so that it would properly give effect to what we want it to do. If hon. Members do not take our word for it, a copy of the Energy Act 2013 is freely available on my desk for them to peruse at their leisure.

**Leo Docherty:** The hon. Member’s amendment raises a question about the making of a strategy and policy statement for Ofgem. As he will be aware, the Government intend to publish an energy White Paper ahead of COP26, and it would make sense to draft a strategy and policy statement in the light of the policies and priorities set out in the White Paper. It would be inappropriate to give a specific timeline on publishing the strategy and policy statement at this stage.

Ofgem already has various powers and duties in relation to its important role in the transition to net zero. Its duty is to protect existing and future consumers and, as is already set out in legislation, that includes their interest in the reduction of targeted greenhouse gas emissions. At the start of the year, we welcomed Ofgem’s new decarbonisation action plan, which contains important proposals, including enhancing flexibility in the electricity system and decarbonising heat, which will help us to meet our vital commitment to eliminate our contribution to global warming by 2050.

Given the existing decarbonisation duties on Ofgem, the work it is already undertaking in that area and the close and productive working relationship at all levels between Ofgem and central Government, it is not necessary to place any new duties on Ofgem in relation to the delivery of greenhouse gas emissions targets. I therefore ask the hon. Member to withdraw the amendment.

**Dr Whitehead:** I thank the Minister for the interesting reply that—he will have to forgive me for saying this—he read out from the piece of paper put in front of him. Nevertheless, that piece of paper is quite interesting, because it appears to say two slightly different things. First, it says, “Don’t worry about putting something in the Bill today, because the energy White Paper is shortly to appear.” There may well be a proposal in the White Paper to implement part 5 of the Energy Act 2013—finally, after seven years. That White Paper has been imminently expected for two years, but is so very imminently expected now that it might appear before Christmas. That statement appears to say that that is what the Government are going to do and that a proposal to unlock part 5 of the Energy Act 2013 will be in the White Paper. If that is the case, that is an interesting development.

12.30 pm

However, the second part of the statement says that it is not necessary to do that, because Ofgem has all it needs to undertake a climate and environment brief. Indeed, Ofgem has pushed the boat out a little, on its own freelance account, in terms of a climate and energy brief. It is also the case that the outgoing chief executive officer of Ofgem bewailed the fact that Ofgem did not have that particular brief in its locker, and felt that constrained what Ofgem could do in that area.

That statement is both interesting and curious, as it appears to face both ways. Is it something that the Government intend to do in the energy White Paper, and therefore implement? Alternatively, is it something that is not necessary, and therefore the Government do not intend to bring forward something in the energy

White Paper to influence part 5 of the 2013 Act? I have put the Minister on the spot. He may not be able to give me a response today, but I would be interested to see his response in writing in the near future about what exactly that paragraph means.

If the statement means what I think it might mean, that is encouraging. If it means what the second part appears to say, then that is not encouraging at all. I thought the statement might say something slightly less encouraging and that we might have to divide the Committee, but under the circumstances I will await some written information.

**Leo Docherty:** I will be pleased to write to the hon. Member.

**Dr Whitehead:** I have effectively concluded my comments, Sir George. I hope the Minister will write to me shortly to give a clear indication about what that package means, and we can go from there. I beg to ask leave to withdraw the amendment.

*Amendment, by leave, withdrawn.*

**Leo Docherty** (Aldershot) (Con): I beg to move amendment 203, in clause 22, page 13, line 22, after “33(1)(b)” insert “,35(1)(b)”.

*This amendment is consequential on Amendment 208. It requires the OEP’s enforcement policy to set out how the OEP will determine whether a failure to comply with environmental law is serious for the purposes of clause 35(1)(b), which is inserted by Amendment 208.*

**The Chair:** With this it will be convenient to discuss Government amendments 208 and 209.

**Leo Docherty:** This group of amendments clarifies the circumstances in which the OEP may bring an environmental review, in order to ensure there is no doubt about its thresholds for action. Government amendment 203 ensures that the OEP’s enforcement policy will set out a consistent approach in determining whether a serious failure has occurred throughout its enforcement process, and is consequential on amendment 208.

**Dr Whitehead:** We are in an interesting set of circumstances regarding these amendments, and some others that are still to come. Essentially, the Government are amending their own Bill, so on several occasions—both today and in the not-too-distant future—the Opposition may be in the position of stoutly defending the Government’s Bill while, I suspect, Government Members will stoutly defend the amendments that the Government have tabled.

We are potentially in an odd position, in that we actually do not think that the Bill is very good as it stands, particularly in terms of the protection of the independence of the OEP, but we are certainly prepared to defend it from further erosion by what we consider to be a systematic series of Government amendments that, taken together, seriously undermine the OEP’s independence of action over its life.

These amendments are the first part of that action, which took place, to our dismay, over the period the Bill was suspended. Clearly, at some stage somebody decided that the Bill was too kind to the OEP and that further restrictions should be placed on its activities and freedom of action in relation to a series of things, such as notices, environmental improvement plans, and whether

the OEP can bring about a review if a subject continues to do what it was doing after a notice has been given. Previously, the Bill enabled the OEP to do that; following the amendments, it no longer can. It has had a substantial element of its freedom to act, and to act appropriately, removed by the amendments.

The other important element in this group of amendments, which will recur in a number of other areas, is, as we have raised in Committee before, the use of the word “serious”. The amendments have curtailed systematically throughout the Bill the remit of the OEP to undertake various actions on the basis of what it thinks is best in a particular set of circumstances, to the extent that before the OEP can act it has to pass a test of whether the action is regarded as serious. We have discussed how a series of differences can flow from one word. The problem with the introduction of the word “serious” in these areas of the Bill and others is that there is no definition in the Bill of what “serious” means. Let us have a guess: who can determine what “serious” means through guidance? Does anyone have any thoughts?

**Richard Graham:** The OEP.

**Dr Whitehead:** No. The Secretary of State can decide by guidance how “serious” is to be interpreted regarding the OEP’s actions.

**Fleur Anderson:** It is a fact that environmental protection and action that breaches air pollution limits, for example, will happen slowly and incrementally. Does my hon. Friend agree that it is hard to determine the point at which that becomes serious?

For example, Putney High Street in my constituency is one of the most polluted high streets in the country. That has happened slowly over many years; it would be hard to say when it became serious. When will the Office for Environmental Protection be enabled to step in and say, “This is an issue”? That goes for rivers and all the other issues we will discuss.

The nature of environmental action is that it will happen slowly. The measure of saying something is “serious” will limit the term to so few large-scale events that the Office for Environmental Protection will be rendered so weak in its action.

**The Chair:** Order. This is no criticism of the hon. Lady, but her contribution could have been a speech rather than an intervention, which should be brief. I am sure the Committee appreciated it, whether it was a speech or an intervention, but I hope interventions will be kept brief in future.

**Dr Whitehead:** Thank you, Sir George. I am sure that all Committee members will abide by your guidance in the remaining sessions. My hon. Friend the Member for Putney has hit the nail on the head regarding the discussion of seriousness.

**Richard Graham:** The explanatory statement to Government amendment 208 lays out clearly that “the OEP may only bring an environmental review against a public authority if it is satisfied on the balance of probabilities that the authority has failed to comply with environmental law”. The explanatory statement to Government amendment 209 adds:

“The OEP may only bring an environmental review after it has given a decision notice.”

[Richard Graham]

The steps are clearly laid out. Surely, we should all have confidence in the OEP doing its job as defined by the Bill.

**Dr Whitehead:** I am not sure whether the hon. Member has addressed himself to the totality of these issues. I will raise a question concerning the explanatory notes and the notes on the purport of the amendments in a subsequent debate.

The steps that the OEP must take in providing a notice are perfectly reasonable and should be undertaken; the big difference is the additional test, after those steps have been taken, as to whether the whole thing is serious or not. As my hon. Friend the Member for Putney rightly said, in many instances one cannot set a point at which something becomes serious or not.

**Richard Graham:** We have to be serious about this. If the borough council is not cleaning a particular street in Putney properly, that is not an issue that the OEP should immediately jump at on the evidence of one photograph from one constituent. It should not say, "Right—we must take the authority to court!" There have to be some boundaries, so the insertion of the word "serious" is surely sensible and appropriate.

12.45 pm

**Dr Whitehead:** The central point is that it ought to be within the remit of the OEP to decide what constitutes a cumulation, to the point that something becomes serious. The amendments take that decision out of the hands of the OEP so that a serious test threshold would have to be passed before it could take action in the case of a cumulative serious problem. The hon. Gentleman can read what the amendment paper indicates about whether the OEP considers that that test has been passed.

**Richard Graham:** I fear that the shadow Minister has not read the explanatory statement clearly. It begins:

"This amendment provides that the OEP"

and refers to whether it is satisfied, and whether

"it...considers that the failure...would be serious."

The emphasis is on the OEP. Does he not accept that?

**Dr Whitehead:** Yes. Of course the emphasis is on the OEP, but the test of what is serious is outwith the remit of the OEP. The hon. Gentleman can look at other explanatory notes in this regard. There is no definition of "serious" in the Bill. The guidance on the test of seriousness that has to be achieved is inevitably outside the Bill: it is within the remit of the Minister to decide.

As to the decision on whether something is serious enough to proceed—and I suggest to the hon. Gentleman that we are now talking about two different versions of "serious"—if the agency itself, in its work, thinks something is serious, I would have thought that it should be able to proceed. However, the question whether something is serious in terms of the test that must now be passed by the agencies concerned is outside the consideration of whether the agency itself thinks that something may or may not be cumulatively serious. That is a central concern that we have in this area, and other areas.

If the issue were as straightforward as the hon. Gentleman suggests, why on earth would the Government amendments have been tabled in the first place? They have not been put in for a laugh—there is a serious purpose behind them, which is to put "serious" on the face of the Bill and take the definition outside the legislation, so that control of the word "serious" is outside the OEP's remit.

Frankly, as with the old fable of the frog that does not get out of the saucepan before it boils because at no stage does it decide it is too hot for it to stay, the OEP would have no ability to pull the frog out of the saucepan at any stage. It would simply have to stand by while the frog boiled, and then refer the boiled frog to the Minister and say, "Is that serious enough and should we perhaps have done something about it beforehand?" That seems to me to be a bit of a concern about how the OEP works in the long term.

We do not intend to divide the Committee on the amendment, because we are making a general point about seriousness as part of the corpus of Government amendments that have been tabled. However, when we debate clause 23 we certainly intend to divide the Committee, for reasons that I shall set out.

*Amendment 203 agreed to.*

**Leo Docherty:** I beg to move amendment 204, in clause 22, page 13, line 22, after "36(1)" insert "and (6A)"

**The Chair:** With this it will be convenient to discuss Government amendment 220.

**Leo Docherty:** We have sought to ensure that the OEP focuses its enforcement function on the most significant and serious breaches of environmental law. Unlike the European Commission, which can only take action against member state Governments, the new Office for Environmental Protection will enforce the delivery of environmental law by all levels of public authority, from local authorities and arm's length bodies to central Government. On that basis, it is important that the OEP should have the ability to focus on the most significant or serious breaches of environmental law.

Clause 36 allows the OEP to apply to intervene in a judicial review relating to an alleged failure to comply with environmental law. However, the clause as currently drafted does not require the OEP to focus such interventions on serious cases when initiating its own enforcement actions. Amendments 204 and 220 will therefore improve the clause by increasing consistency across the OEP's application of its enforcement function.

**Dr Whitehead** *rose*—

**The Chair:** The hon. Gentleman had not indicated that he wished to speak. I call Dr Alan Whitehead.

**Dr Whitehead:** I put my pen up, Sir George, but that is probably more appropriate for the auction room than the Bill Committee. I will try to raise my pen higher or make some other sign in future.

**The Chair:** In future, I will assume that the hon. Gentleman wants to take part, rather than assuming that he does not.

**Dr Whitehead:** That is kind of you, Sir George; thank you. These amendments follow on from the debate that we had on the last series of amendments. As the Minister said, they would make proceedings consistent across the Bill, but that is precisely the point that we have been making. This series of amendments consistently seeks to introduce different levels of judgment necessary for the OEP to carry out a range of things, including, in the case of amendment 220, applications

“to intervene in a judicial or statutory review relating to an alleged failure by a public authority to comply with environmental law”.

The amendment states that the OEP may apply to intervene in proceedings

“only if it considers that the failure, if it occurred, would be serious”.

As there is no definition of “serious”, the OEP is left in the dark about whether it may intervene or not if it considers a failure to be serious—its definition may not be in line with the Government’s. It is really curious that the explanatory statement to amendment 220 states:

“This amendment provides that the OEP may apply to intervene in a judicial or statutory review relating to an alleged failure by a public authority to comply with environmental law only if it considers that the failure, if it occurred, would be serious”

but that

“If that test is satisfied, it may apply to intervene”.

What test? Who can satisfy it? There is no test in the Bill or, apparently, in the remit of the OEP, yet the explanatory statement refers to a test being satisfied. I can draw no other conclusion: the only way to reconcile the amendment and its explanatory statement is for the Government to provide guidance—separately from the OEP—on how that test can be satisfied. That is one of the fundamental problems that we are grappling with here. Although I accept that the amendments are consequent to the central idea of seriousness, unless we bottom out what seriousness is and how the test can be satisfied, we will not have made any further progress on amendments that sort things out in the Bill.

**Daniel Zeichner:** My hon. Friend is explaining quite a complicated situation really well. What I find baffling about this discussion is that earlier this morning Government Members asserted the independence of the OEP, and here they are introducing an amendment that restricts its independence and makes a judgment as to where to intervene. Does he share my puzzlement?

**Dr Whitehead:** I do share my hon. Friend’s puzzlement because we appear to be having things in different ways. If the question of seriousness were so straightforward,

we would not have to worry about putting these things in the Bill in the first place; the previous formulations would be perfectly adequate.

There is a purpose behind the Government amendments, and that purpose has to be, as I have explained, to take the definition outside the work of the OEP. For that reason, we really have to divide on amendment 220 to establish clearly what we think about this particular activity taking place.

*Question put,* That the amendment be made.

*The Committee divided:* Ayes 9, Noes 5.

### Division No. 13]

#### AYES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Browne, Anthony	Mackrory, Cherilyn
Docherty, Leo	Moore, Robbie
Graham, Richard	

#### NOES

Anderson, Fleur	Whitehead, Dr Alan
Furniss, Gill	
Jones, Ruth	Zeichner, Daniel

*Question accordingly agreed to.*

*Amendment 204 agreed to.*

**Dr Whitehead:** On a point of order, Sir George. Hon. Members will have noticed that amendment 204 is consequential. We had to vote on it because of the inclusion of the two amendments in this part of the Bill. However, we wanted to vote on amendment 220. Perhaps we could have it on the record that that is what we wanted to do, but procedurally we were required not to.

**The Chair:** We can have a Division on that when we come to it.

*Clause 22, as amended, ordered to stand part of the Bill.*

*Clause 23 ordered to stand part of the Bill.*

*Ordered,* That further consideration be now adjourned.—(Fay Jones.)

1.1 pm

*Adjourned till this day at Two o’clock.*





