

Written Evidence submitted by Professor Eloise Scotford (AQU0068)

1. I am Professor of Environmental Law in the Faculty of Laws, University College London. I have wide-ranging expertise in UK and EU environmental law. I am author of *Environmental Principles and the Evolution of Environmental Law* (Hart 2017) and co-author of *Environmental Law: Text, Cases and Materials* (2nd ed, OUP 2019). In 2017-2018, I conducted a British Academy funded empirical research project on English local authorities and their experience of English air quality regulation.
2. I gave written and oral evidence to the Environmental Audit Committee on the Draft Environment (Principles and Governance) Bill 2018 ([written evidence](#), published 6 February 2019, with supplementary evidence requested by Committee Chair published 27 March 2019; [oral evidence](#) 27 February 2019).
3. I have provided written evidence to the Public Bill Committee Inquiry of the Environment Bill 2019-20, some of which overlaps with and develops further the evidence provided below.

Executive Summary

- The **2019 Air Quality Strategy** was a welcome development in some respects but is insufficiently ambitious, and too weak in its proposed revisions to standards and air quality governance.
- On the **Environment Bill**:
 - The provisions on **environmental targets** are currently weak in terms of standard setting, regression, and accountability. They do not set a clear long-term direction towards environmental improvement and high standards of protection, including for air quality standards.
 - The provisions on **environmental principles** should support the target setting process but are unhelpfully compromised by a proportionality limit, and not directly linked to the Bill's target setting provisions.
 - The Bill's provisions on **enforcing breaches of environmental law** are weakened by having a constrained definition of what constitutes a 'failing to comply with environmental law' and through the reliance on judicial review principles in any environmental review action.
 - On **air quality governance**, the Schedule 11 amendments to the Environment Act 1995 provisions on local air quality management ('LAQM') are welcome in extending legal responsibility for air quality to a wider set of public bodies, but the current drafting maintains an inappropriate level of responsibility on local authorities.
- On **pre-pandemic progress for enforcing legal pollution limits**, government action was motivated by the serial ClientEarth litigation but compromised by an almost singular focus on NO₂ roadside emissions and a continued focus on achieving NO₂ standards at the local level.

Clean Air Strategy 2019

1. The 2019 Air Quality Strategy was a welcome development in some respects – an updated air quality strategy was needed as the UK left the European Union¹ – but overall lacks the policy ambition that its rhetoric suggests should be there.

2. Positive aspects of the strategy include: the commitment to developing better standards for emerging pollutants (notably PM_{2.5} and PM emissions from brakes and tyres in particular); coordination of climate policy and air quality policy (particularly in relation to transport); introducing emissions permitting for non- road mobile machinery and intensive farming sectors; acknowledgement of indoor air pollution as an emerging priority (chapter 6); and recognising the failures of air quality governance (chapter 9).
3. However, the effectiveness of the strategy was undermined by a lack of ambition in key respects. Notably, the pledge to reduce PM_{2.5} concentrations across the UK, so that the number of people living in locations above the WHO guideline level of 10 µg/m³ is reduced by 50% by 2025, potentially leaves many people still living in areas above the WHO guideline level. This is concerning when there is no known level of safe exposure to PM pollution. Other emerging pollutants – notably ultrafine particles – are not addressed.
4. The chapter on indoor air pollution contains few planned regulatory measures, other than prohibiting the sale of the most polluting fuels and regulating combustion devices in the home. There are no definitive measures to ensure that indoor air quality is safe (reviewing Building Regulations on ventilation is welcome in this respect but not a firm regulatory approach), or to restrict the use of materials containing VOCs. This limited approach is reflected in the Environment Bill, which does not address indoor air pollution, despite being a serious air quality problem for many households. The importance of this policy problem is only increasing with increased time spent in the home, in light of working at home and quarantine requirements during the COVID-19 pandemic.
5. In terms of air quality governance, the Strategy seeks to enable ‘strong collaborative action, ensuring that neighbouring local authorities and other relevant bodies work alongside the lead authority, supporting each other in achieving compliance with air quality objectives’.² This reference to coordinating regulatory action across public bodies is a welcome acknowledgement that local authorities do not have all the powers required to meet air quality standards,³ and that other public bodies have control over sources or air quality or behaviour that otherwise drives air pollution. However, the focus of this chapter of the strategy (chapter 9) is on strengthening and simplifying the legislative framework at the local level, when many of the governance challenges arise due to poor coordination between local and national regimes for air quality, and inadequate action at the national level. Thus the strategy focuses on better local air quality governance without tackling some of the key governance challenges that are essential for improving air quality outcomes.

¹ To replace in particular the Clean Air Programme for Europe.

² Clean Air Strategy 2019, 81.

³ I have undertaken an empirical research project investigating the role of local authorities in the UK air quality governance regime and found that limited competence of local authority actors to control local air quality is a major weakness in the UK air quality regime, as currently constructed. See also Barnes et al, ‘Policy disconnect: A critical review of UK air quality policy in relation to EU and LAQM responsibilities over the last 20 years’ (2018) 85 *Environmental Science and Policy* 28-39.

6. Another challenge associated with air quality policy is its complexity. This is to some extent inevitable, since air pollution arises from many different sources in many different contexts (from chemical and combustion pollutants in the home, to ambient air pollution caused by a variety of interacting pollutants from mobile and fixed sources). The Clean Air Strategy is not immune from this complexity and must be read alongside clean air strategies in the devolved administrations, the series of UK-wide plans for roadside NO₂ emissions, and the statutory UK air quality strategy under section 80 Environment Act 1995.⁴ This fragmented policy picture highlights the need for some coordinated national air quality policy, and in this regard the Environment Bill's provisions to require 5 yearly updates of the statutory UK strategy is welcome (and an immediate review within 12 months).
7. The varying policy approaches across the devolved administrations reflect their devolved environmental competence and also varying air quality challenges, however differences between approaches also reveal the limitations of the English Clean Air Strategy in some respects. In particular, Cleaner Air for Scotland sets out a national approach for improving air quality, rather than devolving primary responsibility for achieving air quality standards to local authorities. This is both in terms of policy coordination and in developing a common assessment approach (the Scottish 'National Modelling Framework'). By contrast, in England, the divergence of monitoring and modelling approaches at local and national levels causes implementation challenges and is yet to be addressed.⁵

Environment Bill

Air quality targets

8. Whilst provisions to set new targets for environmental protection are to be welcomed, there are at least three major concerns with the Bill's provisions, concerning standard setting, regression, and accountability. These are all relevant in thinking about the robustness of air quality standards under the Bill.
9. First, the **standard setting process** risks weak targets being set, since there are: no environmental objectives explicitly driving the target setting process (cf Article 191 TFEU); no requirements to *consider and take into account* relevant expertise (including views of other public bodies, such as the OEP) (clause 3(1) is weak in this respect, cf s 7 Climate Change Act 2008); and no obligation to ensure that targets set do not fall below existing or future equivalent EU standards.
10. The provisions on **environmental principles** provide some support to ensure that the target setting process is driven by environmental protection objectives, since the policy statement on environmental principles should inform any setting of air quality targets, according to the duty in clause 18(1) (assuming that the duties to set targets in the Bill are 'making policy'). However, this duty is compromised by a proportionality limit in clause 18(2)(b). The duty does not require action 'in any other way' disproportionate to the environmental benefit, opening up room for potentially

⁴ The UK air quality framework, as outlined in the National Air Pollution Control Programme (2019) pp 7-16, shows out how complex and fragmented this policy landscape is.

⁵ This is addressed in the Clean Air Strategy only through a commitment to make both local and national monitoring data available via a single portal.

difficult and contentious balancing of environmental concerns against other government pressures and priorities, with no clear guidance as to how this is to be done. This kind of balancing exercise is likely to be immune from judicial review and could lead to the most difficult environmental challenges, which require systemic change (such as air quality), being outside the scope of ambitious action based on environmental principles.

11. Furthermore, the obligation to set targets where the Secretary of State ('SoS') is satisfied that the target 'can be met' (clause 3(2)) is not consistent with either setting ambitious long-term targets or with the dynamic nature of ecosystems. Relatedly, the requirement to set a minimum of one standard in each priority area, including air quality (clause 1(3)), risks a de minimis approach to target setting when the full range of relevant standards in each of these areas is extensive.
12. A notable exception to this de minimis approach is the dedicated provision in clause 2 to set a specific, additional target for PM_{2.5}. This reflects the 2019 CAS commitment to set a 'new, ambitious, long-term target to reduce people's exposure to PM_{2.5}'. Notably, in the Bill, the target does not need to be long-term (as defined) and there are no explicit indications of the level of ambition required in setting this target. Again some environmental objectives and relevant considerations to drive the target setting process would assist in this regard.
13. Second, the long-term certainty that targets might otherwise provide risks being undermined by various clauses that allow **regression** from standards once set. The 15-year time span for compliance (clause 1(6)) may itself lead to a weakening of standards if there were any implied repeal of existing EU-derived targets (subject to how the provisions of this Bill interact with s 7 European Union (Withdrawal) Act 2018 ('EUWA')), since retained EU air quality standards are binding now. Notably, clauses 19 and 20 provide no guarantees of non-regression from existing environmental standards. However, the provision for interim targets in clause 10 is some guarantee against long-term targets allowing difficult policy decisions to be postponed, and air quality standards thus being weakened through slow implementation.
14. Furthermore, the Bill allows standards to be weakened (clause 3(3) – note the language of 'lowering' is also ambiguous) if the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits due to changed circumstances. This is a very broad power that gives no clear priority to environmental concerns.
15. Whilst room to lower standards is thus technically possible within the Bill's wording, the Government's stated policy intention indicates that it has no plans to weaken any air quality standards (see the Clean Air Strategy). It also remains bound by international obligations under the Convention on Long-Range Transboundary Air Pollution and its Protocols. However, the concern here is with what the Bill allows or requires – it provides room for policy on air quality standards to change, for better or worse. In any case, whilst the standards themselves might not be weakened, the machinery for enforcing them is not robust.

16. This leads to the third concern – **requirements to account for progress** in meeting standards are also weak. The significant review test (clause 6(3)) is a global test – relating to the cumulative effect of all environmental standards together, in theory. It does not allow for problems of inadequate standards in practice to be addressed, nor will inadequate standards for one particular aspect of the environment (such as air quality) necessarily be sufficient to trigger review and strengthening of those standards. This test is also not a substitute for a strong environmental protection objective framing the target setting process.
17. When the time for meeting standards falls due, again the accountability is weak. If targets are not met, no concrete action is required. The SoS must only set out steps to ensure standard is met ‘as soon as reasonably practicable’ (clause 5(5)). This is a notable divergence from the requirement under retained EU law to develop a plan to achieve air quality standards ‘within the shortest possible time’ where air quality standards are not met (The Air Quality Standards Regulations 2010, regulation 26).
18. Suggested amendments:
- Include overarching environmental protection objectives for the Bill;
 - Amend clause 3(1) to require the SoS to take into account advice that must be sought from the OEP, key environmental regulators (including Natural England and the Environment Agency), the devolved administrations, and other relevant experts;
 - Delete clause 3(2);
 - Delete clause 3(3)(b);
 - Clause 5(5): ‘as soon as reasonably practicable’ should be amended to ‘as soon as possible’;
 - Clause 6(3): the significant improvement test should be disaggregated into discrete tests for different targets.

Enforcement

19. There are four conceptual weaknesses in the draft Bill in relation to enforcement, concerning (1) the scope of ‘environmental law’; (2) what amounts to a breach of environmental law; (3) who can be held to account; and (4) the use of judicial review principles as the basis for environmental review. In addition, remedies available in an environmental review action are weak. Overall, these factors significantly restrict the enforcement of breaches of environmental law. These are general points about the Bill’s enforcement machinery, which will apply to obligations to meet national ambient air quality standards (under the Bill itself and under retained EU law), as well as LAQM obligations under the Environment Act 1995.
20. The definition of ‘environmental law’ in clause 43 covers legislative provisions that are ‘*mainly* concerned with environmental protection’. Considering that environmental problems, and their causes, implicate many areas of regulation (including planning, transport, energy production, public health), unduly restricting this definition may remove key aspects of regulation relating to environmental protection from the scope of Part 1 and its enforcement provisions, undermining efforts to achieve high levels of environmental protection.

21. Clause 28's definition of a 'failure to comply with environmental law' is redundant. There is no need to define what a breach of the law is. This definition unduly restricts the scope of unlawful activity that might subject to enforcement action under the Bill. In particular, it awkwardly defines failure to comply with environmental law as public law breaches that would be judicially reviewable in any case. It leaves out of its scope the very activities usually associated with environmental law compliance and enforcement activity, such as failure to achieve environmental standards.
22. On who can be held to account, the Bill indicates that any public body may be liable for a failure to comply with environmental law (clause 28 et seq). This contrasts with the enforcement mechanism of the European Commission that holds government to account as a whole for breaches of EU environmental law. The latter approach focuses minds and resources at the highest level, which is particularly appropriate for environmental issues with causes that are only adequately addressed by cross-departmental effort and require national strategic direction and/or resources. Even if failure to comply with environmental law is best remedied by action by a specific public body, this can be addressed by central government (whether through statutory direction or applying other levers of government), as was the position under EU environmental law. As the enforcement provisions are currently drafted, there is a distinct risk that public bodies without adequate strategic policy power or resources (such as local authorities) will be found liable for more systemic failures of environmental law.
23. In relation to the environmental review mechanism set out in clause 35, judicial review principles are inappropriate to resolve many breaches of environmental law, which do not necessarily involve unlawful action by a public body but simply a failure to get to grip with a policy issue. As a tool of accountability in public law, judicial review is not designed to enforce the meeting of environmental standards and targets or other environmental requirements, nor to oversee 'effective, proportionate and dissuasive' penalties for failure to comply with environmental law (as much EU environmental law requires).
24. On remedies, sub-clauses 35(6)-(8) deprive the Upper Tribunal of any effective remedies, for the limited enforcement remit it has. A statement of non-compliance does not invalidate unlawful conduct, and remedies cannot cause substantial prejudice or hardship to third parties. This is likely to preclude remedies to prevent unlawful conduct in many routine environmental cases (eg where a permit has been granted unlawfully).
25. Suggested amendments:
- a. Delete 'mainly' in clause 43(1)(a);
 - b. Delete clause 28(2);
 - c. Consider enhancing the responsibilities on the 'relevant Minister' (clause 30(10) and (11) throughout the OEP's enforcement function section of the Bill);
 - d. Delete clause 35(5) and replace with fact-finding and decision-making powers;
 - e. Delete clause 35(7);
 - f. Delete clause 35(8)(a).

Air quality governance (Part 4, Schedule 11)

26. Schedule 11 revises the Environment Act 1995's LAQM regime. Some amending provisions are welcome. In particular, the requirements to review the national air quality strategy regularly (proposed section 80(4A)); the duty on the SoS to report annually on progress in meeting air quality objectives and standards (proposed section 80A); and the efforts to spread responsibility for air quality control to other public bodies (through the duty to have regard to the air quality strategy, and the creation of 'air quality partners': proposed sections 81A and 85A).
27. However, some of the Schedule 11 amending provisions place responsibility on local authorities to achieve air quality outcomes beyond their sphere of competence (such as through enhanced duties on local authorities to 'secure' air quality standards, in proposed section 83A), even with the support of air quality partners.⁶ This concern about misplaced legal responsibility is both because there is scope for air quality partners to avoid air quality obligations (eg proposed section 85B(3)), and because some air quality measures are best taken at the national level (eg investment in new air quality technologies, public communication strategies, common vehicle standards and transport solutions).
28. Furthermore, some clarity over which public bodies should be included within the duty to have regard to the air quality strategy when exercising functions that could affect air quality (proposed section 81A Environment Act 1995) would be helpful. For a robust system of air quality governance, there should be a clearer requirement that those public bodies whose activities in fact affect air quality will be bound by this duty.
29. Through the proposed process of designating local air quality partners, there is a risk of fragmentation of the supporting roles required by key public authorities. Thus, for example, if many local authorities identified Highways England as a local air quality partner (due to a major road giving rise to air quality problems in their particular area), Highways England may need to manage many partnerships with different local authorities, whereas it would be more efficient and arguably more effective to impose a single duty on it as a public authority.
30. Suggested amendments:
 - g. Revise para 4: define an explicit list of public authorities for section 81A(1), rather than leaving them to be designated by regulations – this should include key regulators that have functions that affect air quality (eg Highways England, Planning Inspectors, Public Health England) and be a non-exhaustive list;
 - h. In para 6, replace 'to secure' with 'with the aim of securing' in sub-sections 85A(3), (4), (5) and (6);
 - i. In para 8, delete 'as far as is reasonably practicable' from section 85B(3)(b).
 - j. Consider separate duties on key public bodies responsible for air quality, other than local authorities.

⁶ See above n 3.

Pre-pandemic progress on air quality

31. The Government's progress on enforcing legal pollution limits before the pandemic had been prioritised due to the serial litigation brought by ClientEarth. However, its approach was inherently problematic in seeking technical compliance with EU-derived limit value exceedences only. This meant an almost singular focus on NO₂ roadside emissions with a continued focus on achieving NO₂ standards at the local level. In light of the collective nature of air quality problems, and their diverse sources (many of which are beyond local control eg transport networks and technology choices), this approach was inherently problematic and local authorities have been clear in asserting their limited competence and resources for the task.
32. Moreover, the localisation of solutions to achieve NO₂ standards was revealing problems in the rolling out of Clean Air Zones. With different kinds of CAZs being introduced in different urban areas, this was creating uncertainty and complexity for those travelling between different CAZs and missing the opportunity to incentivise a clear shift to new kinds of transport technology across the country.

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