IN THE COURT OF APPEAL **COURT OF APPEAL REF: CA-2024-001754**
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (ADMINISTRATIVE COURT)
BEFORE MRS JUSTICE LIEVEN DBE

BETWEEN:

Claim No: AC-2024-LON-000621

R (RIGHTS: COMMUNITY: ACTION LTD)

Appellant

-and-

SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT

Respondent

-and-

(1) THE OFFICE FOR ENVIRONMENTAL PROTECTION
(2) GREEN ALLIANCE

Interveners

THE OFFICE FOR ENVIRONMENTAL PROTECTION'S

REPLACEMENT SKELETON ARGUMENT

References in the format: **[CAB/Tab/Page or SAB/Tab/Page]** are to the Core or Supplemental and **[AB/Tab/Page]** are to the Authorities Bundle.

A referenced replacement skeleton argument with cross-references to the bundles will be filed in due course in accordance with the timetable in PD 52C.

INTRODUCTION

1. This appeal raises important issues relating to the duty under section 19(1) of the Environment Act 2021 (the "**Act**") to have *"due regard"* to the Environmental Principles Policy Statement ("**EPPS**"). Section 19(1) provides: *"A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect."* The appeal raises important questions of general principle which will have wide impact for policymakers applying section 19(1) of the Act in potentially many and varied policy contexts, not confined to policies in the field of the environment.

2. This skeleton argument is submitted on behalf of the Office for Environmental Protection ("**OEP**"). The OEP is an independent non-departmental public body established under section 22 of the Act and sponsored by the Department for Environment, Food and Rural Affairs. The OEP's principal objective is to contribute to environmental protection and the improvement of the natural environment.[1] It is this objective which formed the basis for the OEP's application to intervene in this appeal.

3. The OEP submits that the decision of the lower court could have an adverse effect on environmentally sound policy making – with consequences for the objectives of environmental protection and the improvement of the natural environment. Section 19 of the Act has a central and important role in securing these objectives.

4. The OEP emphasises at the outset that it is not its remit to argue for one side or the other being correct in this appeal on the facts. Further, the OEP's intervention is not concerned with the substance and specific content of the Ministerial Statement[2] in this case. The OEP's submissions are focused on the underlying principles in respect of applying section 19(1) of the Act.

5. The Appellant's skeleton argument dated 26 November 2024 goes into some detail on sections 17 to 19 of the Act and the environmental principles (at [14] to [28] of the Appellant's skeleton argument) **[CAB/1/8-12]**. That overview is likely to be of assistance to the court and is not repeated in this skeleton argument. Instead, this

[1] Section 23 Environment Act 2021.
[2] The Written Ministerial Statement and titled 'Planning – Local Energy Efficiency Standards Update'.

skeleton argument focuses on ground 1 of this appeal concerning the correct approach to section 19 of the Act.

SECTION 19 IN CONTEXT

6. The EPPS is one of the four cornerstones of environmental governance in England introduced by the Act – the others being legally-binding environmental targets,[3] the Environmental Improvement Plan ("**EIP**")[4] and the OEP itself. In addition to these four elements working together[5] – the section 19 duty goes further. It is a process to ensure that environmental effects are considered in all Ministerial policy making, whether or not there is an explicit link to an environmental target. The introduction to the EPPS makes clear that at **[SAB/1/6]**:

> *"The 5 principles in this statement play an important role to support Environmental Improvement Plans and to delivering on our net zero commitment to tackle climate change. It is not prescriptive in dictating the outcome of any application of the environmental principles. Instead, it aims to provide ministers, and those developing policy on their behalf, with the space to use the principles to enable and encourage innovation. This approach will ensure that nature and the environment are proactively designed into the policymaking process."* (emphasis added)

7. The section 19 duty was intended to have a different – and higher – status from other considerations relevant to making policy. The Explanatory Notes to the Act reflect this different and higher status at [20]:[6]

> *"The Act legislates for environmental principles to protect and enhance the environment by making environmental considerations central to the policy development process across government. The principles work together to legally oblige Ministers of the Crown to ensure nature and the environment are proactively considered in the policy-making process."*[7] (emphasis added)

[3] Section 1 of the Act.
[4] Section 8 of the Act.
[5] Namely (i) legally-binding environmental targets; (ii) the EIP; (iii) the section 19 duty; and (iv) the duties and powers of the OEP.
[6] As cited at [19] of the Appellant's skeleton argument (26 November 2024). See **[CAB/1/9]**.
[7] Explanatory Notes, Environment Act 2021, page 16 at [20].

8. The five environmental principles in the EPPS are internationally recognised. They influence EU policy making and legislation and following Brexit they underpin 'assimilated law' in the UK. In respect of these environmental principles, it is clear from the above that the section 19 duty requires Ministers to ensure that nature and the environment are *"proactively considered"* in the policy-making process and that the intention is that these environmental principles are *"central"* considerations to policy development.

9. In light of the above it is clear that the section 19 duty was intended as *"a serious innovation in how the Government make policy"* (as put by Lord Goldsmith in the House of Lords).[8]

10. The aim was to ensure that the principles were applied with consistency and clarity. In the Impact Assessment for the Environment Bill it was said at **[SAB/38/254]**:

> *"Environmental principles (see Annex 2) will be <u>embedded into domestic law</u>, ensuring they are taken into account in policy-making. The environmental principles are currently enshrined in EU law and act as a basis for all EU environmental policy-making. They are also important to avoid market failures related to the environment. The principles are already considered in policy-making but <u>including them in primary legislation should ensure that they are applied more consistently and with greater clarity, which should improve the effectiveness of policy-making as well as help to protect the environment</u>."*[9]
> (emphasis added)

11. The choice of the words 'due regard' is highly significant. In the Act there is only one context in which *"due regard"* is used (rather than simply to 'have regard' to)[10] – that is the section 19 duty.[11] This was a notable and deliberate strengthening of the duty to have *"due regard"* to the EPPS pursuant to section 19 of the Act.

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[8] Hansard, HL Deb 7 June 2021, vol 812, col 1198.
The OEP does not submit that section 19(1) is sufficiently ambiguous, or unclear, such that extensive reference to statements by Ministers in Parliament should be made pursuant to *Pepper v Hart* [1993] AC 593. However, in construing section 19 the court will undertake both a literal and purposive approach to interpretation and Lord Goldsmith's description is illuminating in that context.
[9] Impact Assessment, 3 December 2019, page 9. See **[SAB/38/254]**.
[10] There are 39 references to 'have regard' in different sections and sub-sections across the Act.
[11] The same wording appears in the Act for the equivalent provisions for Northern Ireland.

WORDING OF SECTION 19 AND THE ANALOGY OF PSED

The wording of section 19

12. The word *"due"* is intended to stress the importance of the duty and of the EPPS – more than simply to *"have regard"* to. The Government's response to the Environmental Audit Committee's pre-legislative scrutiny report on the Environment Bill recognised that *"due regard"* is intended to be a stronger duty than *"regard"*, requiring *"fuller consideration of the principles by Ministers of the Crown"*.[12] Further, that Government response said in respect of the section 19 duty, it is *"more than a process requirement or 'tick box' exercise"* but a requirement for *"policymakers to pay proper heed to environmental matters in the policymaking process."*[13]

Possible analogy with the public sector equality duty

13. At [26] to [27] of Lieven J's judgment at first instance she summarised that:
    a. The Claimant submitted that the duty to have *"due regard"* in section 19 of the Act should be interpreted analogously to the duty to have *"due regard"* in section 149 of the Equality Act 2010 (the public sector equality duty ("**PSED**")) and that the caselaw on PSED should be applied to section 19 of the Act.[14]
    b. The Defendant submitted that considerable caution needed to be applied in adopting case law on section 149 to the wholly different statutory context of section 19 of the Act.[15]

14. The OEP submits that it would be wrong to seek to define the section 19 duty solely by reference to cases arising in an entirely different legislative context. Nonetheless, those PSED cases can provide helpful analysis of the judicial approach to the issues arising under section 19. However, the OEP would emphasise that section 19 is an important new duty created by the Act and requires its own principles to be defined by the court. Below, at [15] onwards, the OEP summarises the principles that it suggests emerge from the PSED case law that are of assistance in this context. At [50] onwards the OEP

[12] Defra, 'Response to the Environmental Audit Committee Eighteenth Report of Session 2017–19, Scrutiny of the Draft Environment (Principles and Governance) Bill' (HC 1951) (2019). This statement is made as a response under the section concerning paragraph 24. See **[SAB/37/251]**.
[13] Defra, 'Response to the Environmental Audit Committee Eighteenth Report of Session 2017–19, Scrutiny of the Draft Environment (Principles and Governance) Bill' (HC 1951) (2019). Similarly in response to the paragraph 24 recommendation. See **[SAB/37/251]**.
[14] [2024] EWHC 1693 (Admin) at [26]. See **[CAB/9/133]**.
[15] [2024] EWHC 1693 (Admin) at [27]. See **[CAB/9/133]**.

suggests possible principles to be applied in the approach to the section 19 duty specifically.

PSED case law

15. In *R (Greenwich Community Law Centre) v Greenwich BC* [2012] EWCA Civ 496 at [29] Elias LJ cited Cranston J in the court below as follows:

> *"… Paying due regard is an essential preliminary to any decision: R (BAPIO) v Secretary of State for the Home Department [2007] EWCA Civ 1139, [3]. While the circumstances may point strongly in favour of undertaking a formal equality impact assessment, that is not a statutory requirement: R (Brown) v Work and Pensions Secretary [2008] EWHC 3158 (Admin); [2009] PTSR 1506, [89]. In that case the Divisional Court identified a number of helpful principles that demonstrate how a public authority should fulfil its due regard duty: [90]-[96]. These included that the due regard duty must be fulfilled before and at the time that a particular policy which might affect relevant persons is being considered; the duty has to be integrated within the discharge of the public functions of the authority; and the duty is a continuing one. Clearly the duty applies not only to the formulation of policies, but also to the application of those policies in individual cases: Pieretti v Enfield LBC [2010] EWCA Civ 1104; [2011] HLR 3."* (emphasis added)

16. It is clear from the above that the duty to have due regard must be fulfilled *"before and at the time"* that a particular policy is being considered.

17. In *R (Greenwich Community Law Centre) v Greenwich BC* Elias LJ repeated the phrase which has also been used in the context of the section 19 duty, see [12] above, that this is not a 'tick box exercise'. As Elias LJ stated at [30] there is "*the need for the court to ask whether as a matter of substance there has been compliance; it is not a tick box exercise. At the same time the courts must ensure that they do not micro-manage the exercise."*

18. Similarly in *R (Williams) v Surrey CC* [2012] EWHC 867, at [16] of the judgment Wilkie J noted there had been considerable judicial consideration of the PSED. Wilkie J said there was little dispute between the parties as to the approach that should be taken

in considering *"due regard"* in the context of the PSED. The approach to due regard in this context was conveniently summarised as follows:[16]

a. Paying due regard requires *"more than simply giving consideration to the issue"*, see [16(i)].
b. It is the regard that *"is appropriate, in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority"*, see [16(ii)].
c. To satisfy the duty, steps need to be taken *"to gather all the relevant information"*, see [16(iii)].
d. The due regard duty *"must be fulfilled before and at the time"* that a particular policy, is being considered by the public authority. It involves *"a conscious approach and state of mind. It must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes"*, see [16(v)].
e. If records are not kept it may make it more difficult evidentially for a public authority to persuade a Court that it has fulfilled the duty imposed, see [16(viii)].
f. The clear purpose of the due regard duty (in the context of section 149), is to require public bodies *"to give advance consideration"*, in that case to the issue of race discrimination, *"before making any policy decisions that may be effected by such an issue"*. It had to be seen *"as an integral part"* of ensuring the aims of the legislation were met, see [16(x)].
g. Importantly due regard *"must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision"*, see [16(xi)].
h. Consideration of the duties *"must be an integral part of the proposed policy not justification for its adoption"*, see [16(xii)].
i. The duty must be kept in mind by decision makers *"throughout the decision making process"*. It should be embedded in the process but can have no fixed content bearing in mind the range of potential factors and situations, see [16(xiii)].

[16] This was based on several authorities: *R (Elias) v SS for Defence* [2006] EWCA Civ 1293; *R (Bapio Action Ltd) v SSHD* [2007] EWCA Civ 1139; *R (Chavda) v LB Harrow* [2007] EWHC 3064 (Admin); *R (Kaur and Others) v London Borough of Ealing* [2008] EWHC 2062 (Admin); *R (Baker) v SS Communities and Local Government* [2008] LGR 239; *R (Brown) v SS Work and Pensions* [2008] EWHC 3158 (Admin); *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin); and *R (Bailey) v LB Brent* [2011] EWCA Civ 1586.

19. Further, at [20] of *R (Williams) v Surrey CC* Elias LJ added that the *"question whether there has been "due regard" is a matter for the Court to determine. By way of contrast, once there has been due regard, the question whether the decision ultimately taken is lawful, having regard to the weight to be given to that factor as well as to any countervailing factors, is a matter which can only be determined by the Court applying the "Wednesbury" principles."*

20. Elias LJ also cited at [23] in *R (Williams) v Surrey CC* the decision of *R (Hurley & Moore) v SS for Business Innovation and Skills* [2012] EWHC 201 (Admin) where Elias LJ (King J agreeing) stated at [78]: *"The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker."*

21. There are other contexts in which the PSED has also been considered. In *R (on the application of Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 the Claimants applied for judicial review of the third National Adaptation Programme published by the defendant Secretary of State under the Climate Change Act 2008, section 59. At [24] to [25] of that judgment, Chamberlain J sets out a convenient summary of the principles on PSED. This included at [132] Chamberlain J summarising that the relevant duty in the context of the PSED is upon the decision-maker personally and is non-delegable; it *"must be satisfied at the time when the relevant function is exercised"*; the duty must be exercised in substance, with rigour and with an open mind; and that *"general regard"* to the duty is not enough.

22. Finally, a further important recent authority is *CAO v Secretary of State for the Home Department* [2024] UKSC 32. At [79] the Supreme Court stated: *"The authorities on these similar "have regard" duties show that, in accordance with Parliament's intention in enacting them, what is important in terms of compliance is that the decision-maker does indeed have regard to the substance of the matters to which the duty refers."* Further, at [75] that: *"…it is obvious that the quality of regard required is that which is appropriate or due to be given in the circumstances of the particular case"*.

23. 'Circumstances' are, on any view, important in interpreting the approach to 'due regard'. The PSED in section 149 sets out the duty more extensively than the duty in section 19, at least insofar as the wording of the section provides that in the exercise of its functions, a public authority must have due regard to the need to achieve certain listed objectives, which are clearly defined. It is therefore not confined to policy making but covers any of the manifold functions of public authorities and not, as with section 19, simply Ministers making policy. In theory, because of those listed criteria, the PSED duty could appear to be more susceptible to an approach whereby a proposed exercise of functions is checked against the criteria. The PSED is perhaps the most important example of another statute that uses the wording of *"due regard"* in terms of judicial consideration. However, as the EPPS itself notes the "*duty to 'have due regard' is commonly used in legislation."*[17] Consequently, it is not the only example and therefore it would not be appropriate to simply transfer all of the principles behind the PSED and apply them directly to the section 19 duty.

24. The OEP submits that although the analogy to the PSED and its associated caselaw is of assistance, the case law on PSED should not simply be imported without developing the specific approach that is to be taken in respect of section 19. The only common factor with the EPPS is the duty of *"due regard"*. It appears that the legislative intention was that the status of the duty would be similar. However, the OEP submits that the level of inquiry needed to identify potential environmental effects is quite different from the PSED and militates against retrospective application being effective.

The meaning of section 19

25. The importance of the section 19 duty can be understood by reference to the EPPS itself. The stated purpose of the EPPS in section 17(4) of the Act:

> *"The Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to—*
> *(a) the improvement of environmental protection, and*
> *(b) sustainable development."*

[17] EPPS – section "What is the role of the policy statement?". See **[SAB/1/8]**.

26. The EPPS (in the section titled *"What is the role of the policy statement?"*) at **[SAB/1/7]** repeats that:

> *"the Secretary of State is satisfied that this policy statement will contribute to the improvement of environmental protection and sustainable development. Application of the environmental principles to policymaking will enhance environmental protection and promote sustainable development."*

27. It further states that at **[SAB/1/8]**:

> *"This policy statement sets out how ministers should interpret and proportionately apply the principles, so that they are used effectively to shape policy to protect the environment. It aims to empower ministers and those working on their behalf to think creatively and use environmental principles in an innovative and forward-thinking way. It does not seek to dictate a set formula for how environmental principles should be applied to policymaking."* (emphasis added)

28. The section on 'Proportionality' in the EPPS states that at **[SAB/1/11]**: *"Environmental effects will be different for each policy. These will need to be assessed on a case-by-case basis relative to the likelihood and or significance of the potential effect on the environment. In cases where the potential effect is limited, this allows policymakers to apply the policy statement in a lighter touch way. In other cases, additional research or analysis may be helpful to inform better decision making"*. (emphasis added)

29. It is clear that the duty is directed to a process and not an outcome, in that it does not require a particular result in any individual case where it applies. However, the duty is plainly intended to achieve something, by the use of the principles *"effectively to shape policy to protect the environment"*.[18] Further, the principles are intended to be used in a *"forward-thinking way"*.[19] This is antithetical to a retrospective exercise.

30. In the EPPS under the heading 'General application options', at **[SAB/1/12]**, it is explained that many actions can be taken based on applying the principles. Possible

[18] See **[SAB/1/8]**.
[19] See **[SAB/1/8]**.

actions that could be taken as a result of having considered the principles are given as examples and include:

a. Amending policy options or including an additional policy option in the initial design of a policy. Therefore in some cases, considering a principle may introduce a new option as a different solution to the policy problem.
b. In some cases, the policy design may need to be amended to ensure that a specific principle is applied. This could include the framing of the problem, the detail of how the policy option may work, or how it may be implemented.
c. A principle may also be embedded in law or guidance. If policymakers want the principles to be used in decision-making or the implementation of a policy, this approach may be appropriate. This could be relevant where proposed legislation might include associated powers, duties or obligations that may have a significant effect on the environment.
d. A further impact of section 19 might be postponing a policy until further evidence is gained. The EPPS makes clear that if a policymaker is unsure on whether action is appropriate, they should gather further evidence. Or, where the risk is serious, they may amend, postpone or discontinue the policy in rare cases.

31. If retrospective consideration is given to a policy already made there will surely be limited ability, if any in some cases, to change the policy or take the possible actions outlined in the EPPS.

32. Further, in the section of the EPPS *"Applying the principles – understanding environmental effects and opportunities"* at **[SAB/1/10]** it states:

> *"The environmental principles listed in this policy statement operate as a set of overarching principles to guide the development of all relevant policy. Policymakers should take a holistic, common sense approach when thinking through the potential environmental effects of a policy option, which could be positive or negative. <u>They should consider how adjusting the design in the early stages of policy development could result in greater environmental protection and regularly review opportunities to shape the policy. This might involve considering whether the policy can prevent environmental harm, promote environmental enhancement, or do both</u>."* (emphasis added)

33. Again, there is an emphasis on early and iterative due regard being given to the principles in the *"early stages"* of policy development to *"shape"* policy.

Other examples of "due regard"

34. At Annex 1 to this skeleton argument some examples of the wording of *"due regard"* in other statutory contexts are provided. These are not cited so that each might be considered in detail, nor the case law pursuant to them. The examples illustrate that the wording *"due regard"* features widely from areas of the law as diverse as food standards (the Food Standards Act 1999 (section 23)) to counter-terrorism (the Counter-Terrorism and Security Act 2015 (section 26)).

35. The purpose of citing these examples is to demonstrate that the wording *"due regard"* is found in a variety of different contexts. Therefore, while general principles can be derived from the case law that exists on *"due regard"* in other contexts, fundamentally *"due regard"* has to be interpreted here in its particular context of environmental law.

36. One of the examples cited at Annex 1 is section 71 of the Race Relations Act 1976 which also used the wording of *"due regard"*. In *R (Equality and Human Rights Commission)* [2010] EWHC 147 (Admin) Wyn Williams J said whether due regard was had was question of fact. At [45] he held:

> *"The Relevant Legal Principles*
>
> *45. These are largely uncontroversial and are taken from recent decisions of the Court of Appeal and this court. The duty to have due regard is a duty which is mandatory; it is also an important duty and one which must be fulfilled prior to the adoption or implementation of the decision, function or policy in question. The duty requires the decision maker to embark upon a sufficient and proper decision making process so as to discharge the duty with an open mind."*
> (emphasis added)

37. Again, it is clear – even in this different context – that the duty is to be fulfilled *"prior"* to the decision or policy being made, not retrospectively.

38. This is also reflected in other areas of the law, for example the obligation under section 14 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. Section 14 provides for *"Ministers' duties to have due regard to the guiding principles"*. Section 14(1) provides that: *"The Scottish Ministers must, in making policies (including proposals for legislation), have due regard to the guiding principles on the environment."* At [85] of the Explanatory Notes it is said that: *"…A Minister of the Crown would be required to consider the guiding environmental principles or to have them in view when developing policy for Scotland…"* (emphasis added) In that context it is clearly envisaged that the environmental principles will be in *"view"* when *"developing"* policy. It is difficult to see how, in that context, retrospective performance of the duty could be sufficient.

39. The EPPS duty is one of several other considerations for policymaking to ensure that it is coherent with other government objectives, and balances environmental, social and economic needs such as the PSED. However, compared to some considerations it has added significance in that it is a legal duty and applies (with limited exceptions) across all government departments. This is reflective of the importance of policymaking in supporting government to achieve its environmental commitments.

40. As stated above, it would be a mistake to seek to define the section 19 duty solely by reference to cases on an entirely different legislative context, though those cases can provide helpful analysis of the issues. Section 19 is so important as to require its own principles to be defined by the court. This is particularly so as environmental issues are complex and multifaceted relative to questions under PSED. Indeed Lieven J acknowledged this at [42]: *"The two duties are very different, both in terms of the statutory provisions (save for the broad words "have due regard") and the aims to be achieved. Whereas the impact on those with protected characteristics may generally be relatively straightforward to set out, the environmental issues as set out in the EPPS will often be very multifaceted and complex".*[20]

41. The strength of the EPPS duty may therefore be similar to the strong requirements of the PSED. However, they are not identical and the duties arise in quite different contexts.

[20] See **[CAB/9/138]**.

RETROSPECTIVE CONSIDERATION

42. The EPPS itself provides under the heading 'Proportionality' at **[SAB/1/11]** that:

> *"Environmental effects will be different for each policy. These will need to be assessed on a case-by-case basis relative to the likelihood and or significance of the potential effect on the environment. In cases where the potential effect is limited, this allows policymakers to apply the policy statement in a lighter touch way. In other cases, additional research or analysis may be helpful to inform better decision making."* (emphasis added)

43. If an assessment is carried out retrospectively it will not be possible to have meaningful due regard to: (i) whether the environmental effects will be different to other areas of policy so they can be considered, or (ii) carry out additional research or analysis to inform better decision making, which is the purpose of the EPPS.

44. As per [33] above, Ministers should consider how adjusting the design in the *"early stages of policy development"* could result in greater environmental protection. Further, the EPPS provides that policymakers should consider and use the principles *"iteratively from the outset"* and during *"subsequent stages"* in policy development. That approach is inconsistent with one in which a retrospective application would suffice. The purpose of having due regard to the EPPS in making policy is to identify potential environmental effects (including indirect or secondary effects). This is likely to require a detailed assessment (subject to the requirement of proportionality). Applying the duty retrospectively to past decisions, or at the final moment when a decision is about to be made, risks not achieving the intention behind the EPPS duty. In these moments, policymakers may miss opportunities to fully explore policy options that could lead to better outcomes for the environment.[21]

[21] Indeed this is reflected by the final version of the EPPS presented to Parliament in May 2022. In the Government's 'Consultation outcome: Summary of responses and government response' (updated 12 May 2022) the Government's response to Question 5 included: *"We have strengthened the overview section by emphasising the importance of embedding the principles right from the outset"*. See **[SAB/39/257]**.
Further, the Government's response to Question 10 provided: *"Based on the consultation response, we have replaced the 3-step process with an iterative process as we had intended. The importance of considering the principles from the very outset and during all subsequent stages of policy development has been made clear"* (emphasis added). See **[SAB/39/258]**.

45. At [45] of Lieven J's judgment at first instance, at **[CAB/9/139]**, she held that her interpretation of section 19 was reinforced by section 47 of the Act which defines the *"making"* of the policy as including the *"reviewing"* of the policy.[22] The OEP submits that to use this reference to 'revision' to justify retrospective application is misguided. Section 47 is a generally applied interpretative provision and is intended to ensure that duties and legal provisions that apply to the making of policy equally apply to cases when one could suggest it is a mere revision.[23] The essential point is to ensure that duties are not avoided by the decision-maker claiming they are not making policy but merely revising policy. This is, however, not the same as a conflation of the distinction between revision and retrospective application of the due regard duty. The inaccurate use of the word *"reviewing"* by Lieven J at [45] is significant. *"Reviewing"* could be read as simply giving reconsideration to an existing policy, the outcome of which may be to leave it unchanged. *"Revising"* necessarily implies a change in a policy which has already been *"made"*. The term *"when making policy"* in section 19(1) on its clear language suggests regard must be had <u>during</u> the policy making process. Reading sections 19(1) and 47 together means that if policy is revised then the Minister must *"when revising policy, have due regard …"* This regard again must be had <u>during</u> the policy revision process and does not make good a breach of the duty occurring during the making of the policy.

46. Therefore to argue that the inclusion of *"revision"* as part of policy-making justifies a retrospective process as meeting the original duty is putting too broad an interpretation on section 47. There are effectively three scenarios in respect of the section 19 duty:

    a. A policy is made before the section 19 duty came into effect (Policy A). Policy A is subject to revision after the section 19 duty comes into effect. In these circumstances the section 19 duty would apply to the revision process.
    b. A policy is made after the section 19 duty comes into effect (Policy B). Policy B is subject to revision at a later date. The section 19 duty would apply to both stages i.e. when Policy B was originally formulated and when it was revised.

[22] The use of *"reviewing"* by Lieven J is incorrect, as section 47 provides: *"'making' policy includes developing, adopting <u>or revising</u> policy"*.
[23] There are examples in the Act of revising policy. Section 10 provides for a duty on the Secretary of State in respect of "Reviewing and revising environmental improvement plans"; and section 11 provides for a duty on the Secretary of State for "Reviewing and revising plans: interim targets". There are other examples in the Act including those at section 16 (environmental monitoring) and section 18(11) (revising the EPPS).

c. A policy is made after the section 19 duty comes into effect (Policy C). The section 19 duty is not applied. Policy C is later revised. The section 19 duty applies to the revision of Policy C but it cannot 'cure' the failure to apply the duty to the original development of the policy.

47. The wording of section 19, read with section 47, suggests that the section is aimed at the formation of policy, in that the EPPS should have an important role in influencing the content of policy. That is quite different from an approach where policy is formulated and then checked against certain criteria. To be effective, the due regard must be had before the policy is formulated and adopted.

48. In light of the above, the OEP submits that the conclusion Lieven J reached at [44], at **[CAB/9/139]**, was incorrect, namely at that: *"It is not appropriate to make a declaration of unlawfulness simply because the assessment was done after the adoption of the policy."* The OEP submits that this is wrong in law on the basis of: (i) the whole intention of the EPPS and the section 19 duty, and their significance in the environmental context; and (ii) in any event in light of case law in other statutes where *"due regard"* applies, including in the context of PSED and the Race Relations Act 1976 referred to at [36] above.

49. As to the question of remedies, the court will have considerable leeway and consider the actual facts and implications. A policy may be made, and the principles applied only afterwards but in good faith, perhaps even leading to some change. In these circumstances a court would be entitled to find that, despite the unlawfulness, no remedy need be granted. Similarly, one might have a policy made without the principles being applied; later the policy is formally revised and the principles applied at the time of the revision. In those circumstances, again a court would be entitled to say the Secretary of State acted illegally during the first stage of policy making, but given the revision it is not appropriate to grant a remedy. However, the discretion as to remedies is quite different from saying that it is legitimate to carry out a principles assessment after the policy is made.

SUGGESTED PRINCIPLES IN APPROACHING THE SECTION 19 DUTY

50. Principles for implementing a duty to have *"due regard"* have emerged from caselaw in other areas of the law. These include the need for decision makers to exercise the

duty with substance, rigour and an open mind and that they must exercise the duty before making a decision, not as a rear-guard action. However, the OEP submits that the Court of Appeal should use this opportunity to provide principles as to the approach under section 19 of the Act given its importance and application to very many areas of policy making, including by Ministers and civil servants unfamiliar with environmental law.

51. The OEP suggests the following principles in respect of the approach to the section 19 duty:

    a. Whether due regard has been had is a question of fact for the court.

    b. Due regard is more than simply having regard to. It must reflect the importance of the relevant issues from the EPPS for the policy being made. This does not depend on the policy being of an "environmental" nature: policies in many disparate areas of Ministerial responsibility may have important implications in terms of the EPPS.

    c. Section 19(2) exempts a Minister from being required to do something, or refrain from doing it, if it would have no significant benefit, or would be disproportionate to the benefit. This indicates that the effect of section 19(1) may be <u>to require acts or omissions which do have a significant benefit and would not be disproportionate</u>. The duty is about maximising benefit and minimising harm to the environment subject to proportionality. This is important when considering retrospective *"due regard"* (see below).

    d. The EPPS explains how the principles should be interpreted and proportionately applied. The first step required under section 19 is for a policymaker to have due regard to the EPPS. This step must be carried out before a policymaker can rely on the exemption in section 19(2). The section on 'Proportionality' in the EPPS referred to above at [28] makes clear that the intention is for policymakers to assess the potential environmental effects, decide whether more information is needed and apply the principles. It is only after working through this process (of having due regard to the EPPS) that a policymaker could be satisfied in an

appropriate case that there was *"no need to do or refrain from doing anything"*. In other words, section 19(2) does not provide a short cut bypassing the EPPS, to reach a decision that it would be disproportionate to make any adjustments to a policy. The only situation where it is not necessary to have due regard to the EPPS is where section 19(3) applies[24] and the policy is out of scope of the duty.

e. Inevitably, discharging the duty is likely to involve a process of gathering information on the environmental downsides and upsides of the policy. Prior to section 19 coming into force, policymakers were already balancing the associated costs and benefits to society of the policy's primary objectives, as well as the financial and economic costs and benefits.[25] The effect of the duty under section 19 is to place the consideration of environmental effects on a different footing, through the focus on individual principles and on the basis of the appropriate level of information. As the EPPS states – the environmental effects will be different for each policy and these will need to be assessed on a case-by-case basis relative to the likelihood and/or significance of the potential effect on the environment. This means that if the policy has no potential environmental effects, or the environmental effects are negligible (that is, so small or unimportant that it would be insignificant), policymakers do not need to take action.[26] Pursuant to section 19 policymakers, having due regard to the EPPS: carry out additional research or analysis to inform better decision making;[27] use the principles to inform and influence the design of the policy;[28] and as appropriate adjust the policy.[29]

[24] As per section 19(1) the duty under section 19 does not apply to policy so far as it relates to: (i) the armed forces, defence or national security; (ii) taxation, spending or the allocation of resources within Government; or (iii) Wales.
[25] See the EPPS under the heading 'Proportionality'. Footnote 4 references the 'Government Finance Function and HM Treasury, Guidance: The Green Book' (2022) which provides guidance on how to appraise policies. (Chapter 6 addresses costs and benefits.) See **[SAB/1/11]**.
[26] As per the EPPS under the heading 'Proportionality'. With the caveat that policymakers should be mindful of cumulative effects which may only become substantial when considered together, as per the EPPS. See **[SAB/1/11]**.
[27] As per the EPPS under the heading 'Proportionality'. See **[SAB/1/11]**.
[28] As per the EPPS under the heading 'What are environmental principles?'. See **[SAB/1/7]**.
[29] As stated in the EPPS under the heading 'Applying the principles – understanding environmental effects and opportunities', policymakers: *"should consider how adjusting the design in the early stages of policy development could result in greater environmental protection and regularly review opportunities to shape the policy"*. See **[SAB/1/10]**.

f. The nature of policy making is that there will be an iterative process between formulation of the policy, the principles, and the positive and negative effects. The EPPS itself makes this clear at **[SAB/1/7]**: *"Policymakers should consider and use the principles iteratively from the outset and during subsequent stages in policy development. They should identify the potential environmental effects (positive or negative) and use the principles to inform and influence the design of the policy."* It also talks about *"shaping policy"*: *"This policy statement sets out how ministers should interpret and proportionately apply the principles, so that they are used effectively to shape policy to protect the environment."* (emphasis added).

g. What is contemplated by section 19 and the EPPS is a very different process to formulating a policy and later assessing consistency with the principles. The approach of later assessing consistency with the principles does not demonstrate that the policy would not have been different if the principles had been considered with rigour and an open mind at the formative stage. This is reflected by the wording of the EPPS, at **[SAB/1/10]**:

> *"The environmental principles listed in this policy statement operate as a set of overarching principles to guide the development of all relevant policy. Policymakers should take a holistic, common sense approach when thinking through the potential environmental effects of a policy option, which could be positive or negative. They should consider how adjusting the design in the early stages of policy development could result in greater environmental protection and regularly review opportunities to shape the policy."* (emphasis added)

h. Retrospective assessment after the terms of a policy have been set therefore does not meet the section 19 duty to have *"due regard"* to the EPPS *"when making policy"*. Consideration after a policy has been promulgated cannot be consideration when making the policy. This is a different formulation to the wording in the PSED which applies *"in the exercise of its functions"*.

i. The correct way to address retrospective assessment is as per *R (Friends of the Earth) v SSEFRA* [2024] EWHC 2707 (at [134] to [136]) by the court's duties

under section 31(2A) and (3C) of the Senior Courts Act 1981 – namely whether it appears highly likely that the result would not have been substantially different if the conduct complained of had not occurred.[30] This will be a case specific question. However, the OEP observes that in the context of making policy this may be difficult for a defendant to make out since, as discussed above, reviewing an existing policy in the light of the EPPS does not necessarily mean that the policy would not have been different if the EPPS had been given due regard at the formative stage of the policy.

j. Section 19 is silent on how having *"due regard"* is to be evidenced. There is no statutory obligation to state reasons for a policy in the light of the EPPS, nor does the EPPS itself require this.[31] Nonetheless the public importance of the EPPS is such that it is good practice at the time of promulgation of the policy to record how the duty has been complied with:[32]

    i. A lack of consistency with respect to transparency in government's publications risks the EPPS duty becoming part of policymaking that is closed off to scrutiny and wider public understanding. This undermines transparency and accountability, core principles of environmental governance.

[30] The OEP also draws to the Court's attention to two further authorities on the exercise of section 31(2A) and (3C) of the Senior Courts Act 1981 handed down since skeleton arguments were originally filed with the Court. On 16 April 2025 the Court of Appeal handed down two judgments on the operation of section 31(2A). They are *Bradbury v Brecon Beacons National Park Authority* [2025] EWCA Civ 489 ("***Bradbury***") and *R (Greenfields (IOW) Limited) v Isle of Wight Council* [2025] EWCA Civ 488 ("***Greenfields***"). As per [71] of *Bradbury*, *"It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decision-maker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of section 31(2A) are unlikely to be satisfied."* In *Greenfields* the court emphasised at [55] that the court first considers the unlawfulness or invalidity and then considers whether a remedy should be refused pursuant to section 31(2A) of the 1981 Act or as a matter of discretion on the part of the court. However, "*The two questions are analytically distinct and should be considered separately."*

[31] The EPPS does provide: *"[M]inisters may decide that the public interest is best served by taking forward a policy option that includes associated negative environmental effects. In these cases, the issues should be recorded."* See **[SAB/1/11-12]**.

[32] See: (i) *CAO v SSHD* [2024] UKSC 32, at [82]: *"it is right to conclude this section by pointing out that the authorities indicate that where a "have regard" duty applies, it is good practice for the decision-maker to refer to the duty and the matters to which it calls attention in terms, in order to demonstrate that the duty has indeed been complied with and put the question beyond doubt"*. (ii) This is similarly reflected at [18] above in the context of *R (Williams) v Surrey CC* [2012] EWHC 867 in which Wilkie J said that where records are not kept it may make it more difficult evidentially for a public authority to persuade a Court that it has fulfilled the duty imposed.

ii. It is in the public interest that government publishes evidence of its compliance with legal duties and demonstrates the positive effect this is having on its policymaking and delivery of its objectives.

iii. It is also in the public interest that government publishes sufficient detail about how due regard to the EPPS has been taken.

iv. Government departments should therefore publish their EPPS assessments, showing how they have implemented the EPPS duty in respect of their policymaking decisions.

CONCLUSION

52. The EPPS describes the process expected to be followed by policymakers for taking environmental principles into account. It does not require a particular outcome but is intended to ensure that nature and the environment are proactively designed into the policymaking process. It was a serious innovation in how government makes policy – to ensure consistency and clarity.

53. Policymakers should consider and use the principles iteratively from the outset and during subsequent stages in policy development. They should identify the potential environmental effects (positive or negative) and use the principles to inform and influence the design of their policy. This accords with both the express language of section 19, and how the EPPS requires the environmental principles to be applied so as to shape policy effectively.

54. For the foregoing reasons, the Court of Appeal is respectfully invited to consider the principles suggested at [51] above and to hold that Lieven J's approach was incorrect.

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EXAMPLES OF "DUE REGARD" WORDING IN OTHER STATUTES

1. As per [34] above, these examples of the wording of *"due regard"* are not cited so that each might be considered in detail. The point is that the wording *"due regard"* is found in a variety of different contexts. Therefore, while general principles can be derived from the case law that has considered due regard in other contexts, fundamentally *"due regard"* has to be interpreted in its particular context of environmental law.

2. Some examples of the wording of *"due regard"* are provided below on an illustrative rather than exhaustive basis. The point of illustrating these diverse examples is to demonstrate that the requirement of *"due regard"* must be considered in its specific statutory context – respecting the literal and purposive approach to statutory interpretation.

Statute	**Wording**
Section 71 of the Race Relations Act 1976 (Act now repealed)	*"Specified authorities: general statutory duty.* *(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –* *a) to eliminate unlawful racial discrimination; and* *b) to promote equality of opportunity and good relations between persons of different racial groups."* (emphasis added)
Section 49A of the Disability Discrimination Act 1995	*"General duty* *(1) Every public authority shall in carrying out its functions have due regard to—* *(a) the need to promote positive attitudes towards disabled persons; and* *(b) the need to encourage participation by disabled persons in public life."* (emphasis added)

Section 23 of the Food Standards Act 1999	*"Consideration of objectives, risks, costs and benefits, etc.* *(1) In carrying out its functions the Agency shall pay due regard to the statement of objectives and practices under section 22."* (emphasis added)
Section 26 of the Counter-Terrorism and Security Act 2015	*"General duty on specified authorities* *(1) A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism."* (emphasis added)
Section 14 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 asp 4 (Scottish Act)	*"Ministers' duties to have due regard to the guiding principles* *(1) The Scottish Ministers must, in making policies (including proposals for legislation), have due regard to the guiding principles on the environment."* (emphasis added)
Section 23 of the Climate Change Act (Northern Ireland) 2022	*"Carbon budgets* *...* *(3) When seeking advice on setting the carbon budget, or on other environmental issues, the Department is to give due regard to the expertise and advice of the following bodies—* *(a) the Republic of Ireland Climate Change Advisory Council; and* *(b) the Intergovernmental Panel on Climate Change."* (emphasis added)
Section 30 of the Climate Change Act (Northern Ireland) 2022	*"Requirements for proposals and policies under section 29* *(1) ...each Northern Ireland department must –* *...* *(d) give due regard to the special economic and social role of agriculture, including the distinct characteristics of biogenic methane."* (emphasis added)
Section 1 of the Identity and Language (Northern Ireland) Act 2022	*"National and cultural identity*

	(1) A public authority must in carrying out functions relating to Northern Ireland have due regard to the national and cultural identity principles." (emphasis added) Section 2 which concerns the Irish language also uses the wording of *"due regard"*.
Section 1 of the Down Syndrome Act 2022	*"Guidance on meeting the needs of persons with Down syndrome* *...* *(2) Relevant authorities must have due regard to the guidance in the exercise of their relevant functions."* (emphasis added)
Section 2 of the Children (Care and Justice) (Scotland) Act 2024 asp 5 (Scottish Act) (Not yet in force)	*"Children's hearing: duty to have due regard to effects of trauma on child* *...* *(2) The children's hearing must, in carrying out its functions, have due regard to the need to treat the child to whom the hearing relates in a way that—* *(a) takes account of the effects of trauma which the child may have experienced, and* *(b) seeks to avoid, or minimise the risk of, exposing the child to—* *(i) any recurrence of past trauma, or* *(ii) further trauma.* *(3) The National Convener must, so far as practicable, ensure that the children's hearing, in carrying out its functions, has due regard to that need."* (emphasis added)