

Date

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Title

Environmental assessments draft environmental law report

Report Author

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Paper for decision**Paper open in part****Issue**

1. We are updating the Board on our project considering the implementation of certain environmental assessment regimes in England. We set out plans for laying an environmental law report produced under s.29(2) Environment Act, and for prior engagement with DLUHC to maximise potential for influence and ensure a 'no surprises' approach.

Recommendation

2. We recommend the Board:
 - (a) notes the evidence that underpins our report, including via the three supporting reports at Annex B and via engagement with the stakeholders listed at Annex D
 - (b) notes the draft report at Annex A and provides high level feedback, such observations being particularly valuable if directed at:
 - (i) the **headline message** (paras 20 and 21 below)
 - (ii) the tone and clarity of messaging in the **draft executive summary** (paras 22 and 23 below; pages 8 to 14 of Annex A),
 - (iii) the **draft recommendations** (pages 10 to 13 of Annex A), and
 - (iv) the report's **overall tone** and **level of detail**, and
 - (c) *this section has been redacted as its publication would be prejudicial to the effective conduct of public affairs.*

3. The Board should note the proposed laying date of **19 October**, and the communications activity planned around laying (paras 41 to 44).
4. The Board should also note that, on current plans, its next opportunity to consider the report will be as a final version for approval at its meeting on 28 September. The Board should please advise if it wishes to have additional opportunities to review the report before its approval, noting the short window to lay in Parliament (para 40) and to influence DLUHC's work (para 26).

Background

5. The UK Government has stated its intention to replace or modify the Habitats Regulations Assessment (HRA), Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) legislation, including in last year's Nature Recovery Green Paper and via the Levelling-up and Regeneration Bill (LURB). It has not published a clear diagnosis of the problems it sets out to address with such reforms. This limits scope for Parliament and others to scrutinise why Government regards reform as necessary, what it expects to achieve through reform and whether reform would deliver claimed environmental and other improvements.
6. Based on this, the Board has previously approved the project's strategic intent as:
 - (a) improve Parliamentarians' and others' ability to scrutinise new legislative proposals and hold government to account for them
 - (b) influence the coherence and substance of new policy and legislation, through the UK Government's adoption of our conclusions and recommendations, and through any follow-up work we may undertake (e.g. giving advice to DLUHC or evidence to Select Committees)¹
 - (c) build our reputation and establish our authority by producing a high-quality report, thereby strengthening our ability to exercise influence in future matters, and
 - (d) influence the implementation of existing law by public authorities and others.
7. We initiated this project in July 2022. An important project milestone is to lay an environmental law report, under s.29(2) Environment Act. That report is the subject of this paper.
8. In preparing our draft report (Annex A) we have drawn from a range of materials, including a targeted call for evidence and stakeholder interviews, as well as three commissioned reports

¹ We have already undertaken such work in the form of evidence to the LURB Public Bill Committee, evidence to the House of Lords Built Environment Select Committee and responding to DLUHC's high level consultation on environmental outcome report (EOR) regulations. We may undertake further follow-up work but that is beyond the scope of this Board paper.

(Annexes B.1-B.3): a legal literature review (39 Essex chambers); a non-legal literature review and analysis of stakeholder engagement (WSP); and research into international comparators (Land Use Consultants; “LUC”). The current draft report does not reference the LUC work, but we plan to incorporate pertinent references in the next version.

9. The Board considered our initial findings from this evidence-gathering on 17 February. The Board approved a draft report structure, which we are broadly following (subject to adjustments covered below). The Board also approved the following areas of focus, which are reflected in the draft report:
 - (a) **improvements in skills, information (data) and capacity are needed** – data accessibility, skills shortages, capacity limitations, lack of government guidance, and training provision contribute to delays, disproportionate reporting and poor decision making
 - (b) **improvements in monitoring, mitigation and enforcement are needed** – there is weak practice in the use of planning conditions for mitigation, with non-compliance common, and levels of monitoring and enforcement low, and
 - (c) future environmental assessments should have a **widened focus on delivering environmental betterment over solely providing environmental protection.**
10. The previously approved report structure included a chapter on the importance of earlier, more integrated assessment. We no longer propose including this chapter, but to incorporate relevant points elsewhere in the report. Our research strongly points towards issues associated with implementation being more significant obstacles to the effectiveness of environmental assessment regimes. We want the report to be purposeful, focussing on the truly fundamental obstacles to better environmental assessment. A chapter on earlier, integrated assessment therefore detracts from the report’s overall narrative flow and key messages.
11. ExCo has also provided steers to:
 - (a) endorse our emerging over-arching message (discussed at para 20 below)
 - (b) adopt a more confident tone that does not shy away from saying the things that need to be said where we have robust evidence to back this up
 - (c) ensure balance between just stating problems and offering specific solutions
 - (d) draw appropriate connections with the Government’s obligations under Environment Act targets and EIP23, and
 - (e) consider how the report’s messages stand the test of time, so our report may be a future resource for Parliament and others.
12. We have also received feedback from Dan Laffoley, our Board critical friend. This feedback echoes much of the ExCo feedback received. In addition, Dan’s steer has been to ensure the report draws out the wider environmental context (climate and biodiversity crises) and other

context (economic and development pressures), emphasising the importance of environmental assessment in reconciling how society tackles these.

13. We have sought to reflect all this feedback in the present version of the report at Annex A. **The Board should note, however, that the document at Annex A remains a working draft. We recognise that in many places more drafting and editing is required for a final, polished product.**

Analysis

Report content

14. The report is structured around three substantive chapters (chapters 3 to 5), together with introductory material (chapters 1 and 2), an executive summary with recommendations, conclusions (chapter 6) and annexes (covering our methodology and our stakeholder engagement).
15. The first substantive chapter (chapter 3) concerns data accessibility. This is a complex topic. There are many databases and data are collected for many purposes, each evolving in its own way. We have found that there are no agreed data standards and limited data sharing. This results in duplication of effort, wasting resources, delays and frustrations for applicants. Negative environmental impacts can be caused by inadequate assessment and by attempting to defer resolution of harmful environmental effects to the project level when that may be too late.
16. Chapter 4 considers weaknesses in post-decision monitoring. These weaknesses undermine the implementation of mandated mitigation (thus also regulatory and environmental outcomes) and cause opportunities for learning and improvement to be missed. We diagnose that this is due to monitoring being a discretionary activity for public authorities, which is insufficiently valued or resourced. There are therefore links to our findings on skills and expertise (chapter 5). There are also links to data accessibility (chapter 3), for example because monitoring data is not gathered in the first place and because, if data are not accessible or disseminated, the full benefits of monitoring cannot be realised.
17. Chapter 5 describes the issue of lack of skills and expertise, including in terms of resources and capacity. This issue is well recognised across the sector and undermines environmental assessments in numerous ways. It limits scope to secure environmental outcomes and causes wider negative effects (e.g. in terms of inefficiencies, delays and costly additional work/risk for developers). We have identified problems both with the numbers of people with the necessary training in the jobs market, and in retaining those people within the public sector.
18. All three of these issues extend beyond the operation of the environmental assessment regimes. If resolved, they could positively influence delivery of targets and EIP goals, as well as policies such as 30x30, BNG and Local Nature Recovery Strategies. If not resolved, of course, these issues will also inhibit delivery of more than just environmental assessments. Either way, we have sought to make this wider point, drawing a 'golden thread' between this and other OEP work.

19. In developing this report, we have undertaken stakeholder engagement, and have received valuable feedback from Dan Laffoley who has commented on early draft versions of this report. We are concluding our final targeted stakeholder engagement to check more detailed points in our report. We are also engaging with an expert panel on this work (details of the panel members are at Annex C). This is to test that we have correctly identified the key reasons why the issues have not been resolved previously, and that our recommendations (see below) are sufficiently ambitious, yet deliverable.

Headline message

20. Our findings are not wholly aligned with Government's apparent approach - that legislative reform will address the problems with environmental assessment that prevent it being both more environmentally effective and more efficient for developers. In our view – based on our research – root causes stem from wider structural issues within the planning system, not the legislation *per se*. Consequently, our proposed key message is:

Legislative reform alone is unlikely to deliver necessary improvements in how environmental assessments operate: rather Government must also address structural issues within the planning system which affect how these regimes are implemented in practice

21. The Board should note that we are therefore calling for government to widen its thinking beyond legislative reform (which, to be fair to DLUHC, is something it is now doing). We are **not** expressly opposing current reforms *this section has been redacted as its publication would be prejudicial to the effective conduct of public affairs*.

Executive summary and recommendations

22. We aim to summarise the report in a clear and impactful way, so have involved several internal reviewers to help develop the text as much as possible. We would be grateful for any additional comments from Board regarding **whether the right messages come through clearly and if the tone is appropriate**.
23. The executive summary includes **9 recommendations**, developed through our own analysis, as well as consultation with our contractors, Dan Laffoley and our expert panel. Through these recommendations, we seek to offer solutions, whilst not encroaching upon government policy-making. We seek to make realistic recommendations that Government could reasonably adopt. This process has proven challenging, given our evidence base, the depth of analysis it is possible to get to in a reasonable timeframe and the complexity of the issues involved. The Board is invited to consider the draft recommendations and comment on their **content, tone and ambition**.

Window for maximum influence

24. We aim for our report to influence the design of future environmental assessment legislation in England (para 5 above). Near-term opportunities for such influence arise via proposals for environmental outcome report (EOR) regulations and planning data regulations that DLUHC would be empowered to make should LURB become law.
25. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs and it contains information provided in confidence.*

Northern Ireland

26. This project is specifically about England. It was originally planned to include laying in the NI Assembly a second environmental law report, under para 2, Sch 3 Environment Act. However, given our lower than requested funding settlement from DAERA, this work has not been taken forward. Earlier this year we wrote to Northern Ireland stakeholders communicating this decision and it was reported upon in local media.

Finance and Resource

27. We paid for commissioned reports during the last financial year. *This section has been redacted as its publication would be prejudicial to commercial interests.* The work is also taking up a substantial proportion of four staff members' time and will continue doing so until a report is laid.
28. After our report is laid internal resource demands will reduce significantly, although there will be an ongoing need for dissemination work and to consider Government's response. Our business plan does not provide any specific resource for substantive follow-up activity once the report is laid, such as to continue engagement with DLUHC as it develops proposals for consulting further on EOR regulations.

Impact Assessments

Risk Assessment

29. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs.*

Equality Analysis

30. No material equalities impacts have been identified.

Environmental Analysis

31. In undertaking this work we have sought to align our strategic intent with the OEP's principle objective and strategy. We have considered relevant legal duties, including in relation to water, habitats and species, countryside and natural beauty.
32. We have considered the OEP's duties to act objectivity, impartiality and having regard to proportionality and transparency. We have sought to gather stakeholder evidence without

prioritising any particular group. Although we have engaged with DLUHC and will engage with it further (and as far as it permits, with Defra), our decisions have remained our own – taken by the Board. We have considered both the proportionality of this work and of our recommendations (noting that there is no obligation for any to be taken up). We will publish our environmental law report, together with the three supporting contractor reports.

Implementation Timescale

33. The proposed timeline for laying a report is:
- (a) 4 September - Parliament returns from summer recess; LURB resumes report stage in the House of Lords
 - (b) 5 September - Board meeting
 - (c) early September - send draft executive summary and supporting evidence to DLUHC
 - (d) 8 to 13 September - expert panel members to review draft report
 - (e) 19 September to 16 October - Parliament in recess
 - (f) **28 September - Board to be asked to approve final report**
 - (g) early October - Chancellor's autumn statement finalised, taking account of DLUHC work on environmental assessments
 - (h) 9 to 17 October - HH Global to typeset the report ahead of laying
 - (i) **19 October - lay report in Parliament**
 - (j) Date to be confirmed - Parliament prorogued ahead of the King's speech
 - (k) 7 November - the King's speech
 - (l) 19 January - deadline for Government to lay a response to our report
34. The Board will note the Parliamentary recesses in the above timetable, which constrains when we may lay a report. We cannot know far in advance when Parliament will be prorogued for the King's speech, but practice over the last two years suggest that this may be from 25 October.

Communications

35. We are developing a communications plan to ensure that our findings and key messages land effectively with our target audience. That audience includes policy makers within DLUHC and Defra, Parliamentarians who will be debating the Levelling-up and Regeneration Bill, and practitioners within the planning system. The aims of the communications activity will be to influence proposed reforms, ensure Parliamentary scrutiny of proposed reforms to the regimes is informed by our work, and, longer term, provide the evidence and insight to those involved in implementing the regimes to help drive positive change.

36. Communications activity will focus on ensuring the report is well publicised, including through media engagement, social media content and stakeholder engagement. Longer term, we will be looking for engagement opportunities with the professional communities within the planning system, including webinars (which may be OEP led), relevant speaking opportunities and taking advantage of existing communications networks to disseminate our findings.

External Stakeholders

37. Our stakeholder engagement has been extensive with over 130 organisations or individuals. This engagement included stakeholders from: business, professional organisations, local government, government, ALBs, practitioners, academics and researchers, eNGOs and industry groups. The views expressed by these stakeholders and the materials they have produced have informed our work from an early stage. Annexe D contains a list of stakeholders we have engaged with.

Paper to be published	Yes, in part. Publication should not be before we lay and publish the full report and supporting materials.
Publication date (if relevant)	N/A.
If it is proposed not to publish the paper or to not publish in full please outline the reasons why with reference to the exemptions available under the Freedom of Information Act (FOIA) or Environmental Information Regulations (EIR). Please include references to specific paragraphs in your paper	<p>We propose to publish the report in full. However, we are not proposing to publish this paper and its annexes in full for the following reasons:</p> <ul style="list-style-type: none"> • material intended for future publication • publication would harm the effective conduct of public affairs, including the Board's ability to receive candid advice and engage in free and frank discussion and these represent internal discussions (s.36 FOIA / reg. 12(4)(e) EIR).

ANNEXES LIST

Annex A: *This section has been redacted as it contains information for future publication.*

Annexes B.1-B.3: *This section has been redacted as it contains information for future publication.*

Annex C: *This section has been redacted as it includes personal data.*

Annex D: *This section has been redacted as it includes personal data.*

