

Date

02 February 2022

Title

Adoption and progression of legacy complaints

Report by

REDACTED, Principal Complaints Manager

Paper for decision

Open in part

Issue

1. The OEP came into existence on 17 November 2021. Prior to this formation, two legacy organisations existed to prepare the OEP to discharge its functions. Both organisations received complaints, with complainants being advised that their concerns would be transferred to the OEP once operational. This paper proposes the formal adoption of these complaints as well as a potential solution to progress complaints once they have been adopted.

Recommendation

2. The Board is recommended to agree that:
 - a. we should formally adopt all of the complaints that were received by the Interim Environmental Governance Secretariat or Interim Office of Environmental Protection prior to the legal formation of the OEP on 17 November 2021. This includes complaints relating to both Northern Ireland and England.
 - b. we should formally decline to progress further any adopted complaints relating to England that have been determined to not fall within the OEP's remit.
 - c. we should review adopted complaints relating to England that are within scope, with the presumption being that we should refrain from formally investigating or otherwise resolving these cases until the publication of the final post-consultation strategy and enforcement policy, and

- d. that we should defer making any decisions as to adopted Northern Ireland complaints until the OEP receives formal powers to consider complaints from Northern Ireland.

Background

3. The OEP came into legal existence on 17 November 2021 after the passing of the Environment Act 2021 (the Act). This initiated a stage of transition towards functional independence with the OEP expecting to become fully established for England on 24 January 2022 when it receives its full powers (potentially also receiving powers for Northern Ireland by 28 February – subject to Assembly consent).
4. In the period before the OEP's legal formation the organisation existed in the form of the interim OEP which existed between 1 July and 17 November 2021 and the Interim Environmental Governance Secretariat (IEGS) which existed between 1 January and 1 July 2021.
5. During this period, complaints were submitted to both the IEGS and IOEP (the Legacy Organisations), with complainants being advised that the role of the Legacy Organisations was to receive, validate and assess complaints in advance of the OEP becoming operational. Complainants were advised that their concerns would be assessed against the criteria outlined within the Environment Bill to determine the potential validity of their complaints. They were also advised that complaints would be subsequently transferred to the OEP once operational.
6. Between 1 January and 17 November 2021, the Legacy Organisations received a combined total of 25 complaints. Of these complaints 14 did not meet the OEP criteria; 8 met the criteria and 3 are currently being validated to determine whether they meet the complaints criteria outlined in the Act.
7. These complaints were received by our Legacy Organisations before we legally existed. Since 8 January 2021, the complaints and associated materials have been stored on the Jira database. All documents and data held on the Jira database have been transferred to the OEP by virtue of the asset transfer agreement agreed between Defra and the OEP. This includes the complaints submitted to the Legacy Organisations. This means the OEP now owns the relevant information.
8. However, because these complaints were not made directly to the OEP, they are not strictly 'complaints' pursuant to s.32 of the Act.
9. As such, there is value in the OEP now taking a further step to recognise this information and the sources of it (i.e. complainants) before proceeding further.
10. In addition to this, the OEP must also decide how to progress any of the complaints it adopts.
11. The proposals were presented to and considered by SLT on 20 January 2022. Given the nature of the proposals SLT reached the perspective that the matter should be considered and approved by the Board.

Analysis

Issue A: Formal adoption of complaints

12. There is value in the OEP adopting the complaints received by the Legacy Organisations prior to proceeding further with the question of whether to decline or accept these cases for further investigation.
13. In this regard, it will be necessary for the OEP to identify and agree an effective solution to the challenge of recognising in an accessible way the transition of the information submitted by complainants to the Legacy Organisations.
14. This matter is complicated by the fact that the Legacy Organisations, as part of Defra - a public authority, cannot submit complaints to the OEP itself and, as such, complaints will need to either be adopted or resubmitted by the complainant.

Option 1: Contacting complainants to ask them to resubmit complaints

15. A potential solution could be for the OEP to contact the complainants who had submitted complaints to the Legacy Organisations and request that they resubmit their complaints to the OEP.
16. This solution would help to ensure that the complaints have been made in accordance with the Act. By virtue of s.33(1), we can only investigate complaints "made under section 32". As noted above, s.32 sets out that complaints may be made by people to the OEP. This solution is the only way of ensuring that complaints initially submitted to the Legacy Organisations are now submitted to the OEP in accordance with the s.32 requirements meaning they can be properly considered 'complaints' as that word is used in the Act.
17. However, this solution is likely to be time consuming and inefficient from a resource perspective. It would also seem unnecessarily onerous from the perspective of complainants who are likely to question the necessity of resubmission. This could potentially lead to difficulties from a communications perspective, especially if complainants resubmit complaints that are subsequently refused on the basis of them being out of scope. In addition to this, it would not be in line with the message communicated by the Legacy Organisations to complainants, which indicated that complaints would be transferred to the OEP once the organisation became operational.

Option 2: Adopt complaints, with the potential to use the provisions under s.33(2) of the Act should there be necessity for an investigation

18. A further solution could be for the OEP to deem relevant complaints as being adopted.

19. This solution would be beneficial from a resource perspective as it would minimise the amount of time that colleagues would need to spend contacting complainants to request resubmission. It would also be the less onerous solution for complainants with them not having to resubmit their complaints. This would avoid any concerns that could arise from us asking complainants to resubmit complaints that we already know will be ineligible for further consideration.
20. The main complication with this solution is that the adopted 'complaints' would not have been submitted in accordance with the expected complaints procedure outlined at s.33(1) of the Act. In fact, they would not technically be 'complaints' as this term is used in the Act. This could create problems should it be necessary for the OEP to initiate a formal investigation as it could be argued that the complaints have not been properly submitted. However, there is a satisfactory workaround.
21. In such cases, the OEP would have to consider self-initiating an investigation on the basis of s.33(2) of the Act. This provision allows the OEP to carry out an investigation without having directly received a complaint providing it has information that indicates that a public authority may have failed to comply with environmental law, and if it has, the failure is serious.
22. As the OEP owns the Jira database on which the complaint submissions are held, we anticipate that in most such cases we would 'have' the necessary information. Although such matters would not technically have been submitted as 'complaints', we propose to comply with the requirements that would apply were they complaints meaning that we would voluntarily keep complainants informed as if what we were doing was investigating a complaint (s.34 of the Act).
23. A further complication of this solution is associated with the requirement that complaints should be made to the OEP within the time frame specified at s.32(6) of the Act. Having reviewed the complaints received prior to the 17 November 2021, we can confirm that there is one complaint which has been submitted to the Legacy Organisations outside of the specified time limit.
24. However, the Act does provide the OEP with the discretion to waive the time limit in exceptional cases. We would need to document the reasons behind exercising this discretion. It is our view that we could reasonably exercise our discretion to waive the time limit in this instance. The transition from the Interim OEP to the OEP is by its nature an exceptional occurrence and, in the circumstances, the OEP needs to adopt the complaints to consider them further.
25. On a side note, in many cases, the Legacy Organisations considered cases where the evidence suggested that the complainants had not yet exhausted internal complaints procedures. In line with the approach outlined in paragraph 8, the Legacy Organisations contacted these complainants and relevant public authorities to advise them of the necessity of exhausting local resolution prior to submitting a complaint to the OEP.
26. While most of these cases were within specified time limits at the time of consideration, there is the potential for returning cases to now be technically outside of specified time limits. In such cases the OEP would potentially need to make a further determination as to whether to waive the time limit, with the suggested presumption being that the discretion would be exercised if the primary reason for a delay is associated with the complainant awaiting the OEP's formation.

Recommendation

27. After analysis, option two would seem to be the most appropriate solution for adoption. It is less resource intensive from a people perspective and would be easier to coordinate. In addition to this, it reduces the possibility of adverse communication impacts and reputational damage from not adhering to the message the Legacy Organisations communicated to complainants.

Issue B: Complaints relating to Northern Ireland

28. As powers are yet to be confirmed for Northern Ireland, the OEP must consider when it would be appropriate to adopt the complaints submitted to the Legacy Organisations about Northern Ireland. We anticipate that our Northern Ireland remit will be confirmed no later than 15 February 2022. Assuming our remit is confirmed, our functions will commence in Northern Ireland on 28 February 2022 (in line with the appointment of the Northern Ireland Board member). There are currently four relevant Northern Ireland cases, all submitted by a single complainant.

With regard to the Northern Ireland cases, there are two potential options:

Option 1: Adopting complaints relating to Northern Ireland as part of this paper

29. In line with the first option, the OEP would adopt all of the Northern Ireland complaints received by the Legacy Organisations as part of the adoption proposal outlined within this paper. No further action would be taken on Northern Ireland complaints until the OEP receives formal powers to consider complaints from Northern Ireland. If the OEP does not receive powers to consider Northern Ireland complaints, these complaints will be declined for investigation on the basis of being out of remit.
30. The key benefit of this option is that it avoids duplication and ensures a consistency of approach. It would also seem to be the most efficient option given the high probability of the OEP receiving a remit in Northern Ireland – The OEP would be able to take immediate action on the Northern Ireland complaints as soon as the Northern Ireland remit is confirmed. The main risk associated with this option is political in nature, in that it could be argued that it is pre-emptive of the OEP to adopt complaints prior to receiving formal confirmation of the Northern Ireland remit.

Option 2: Postponing adoption of Northern Ireland complaints until such time as the OEP has formal confirmation that it will gain powers to consider Northern Ireland complaints

31. As part of this option, the OEP would not adopt the Northern Ireland complaints at this stage. A further Board paper, mirroring the approach to the English complaints would be prepared and submitted at the stage that the Northern Ireland remit had been confirmed.
32. The main benefit of this option is that it does not pre-empt a decision on Northern Ireland, which could be considered beneficial from a political perspective. However, as mentioned above, this approach is less efficient and does not demonstrate a consistency of approach between Northern Ireland and England.

Recommendation

33. Having weighed up both options, it would seem that the efficiency benefits associated with option one outweigh any political risks. This is especially the case as there is only one relevant complainant who would not be contacted until functions commence in Northern Ireland. It has also been noted that, if we proceed with option two of issue A, we will be adopting a complaint about Scotland which will subsequently be declined as being out of remit. This is a fact that counters the argument outlined in option two about pre-empting the decision as to the Northern Ireland remit.

Issue C: Procedure for going forward with adopted complaints

34. If the OEP adopts the complaints that were submitted prior to 17 November, the next consideration would be for the OEP to determine what action to take with these complaints. Any proposal would have to reflect the OEP's current remit as outlined within the Act. It also ought to take account of the commitment the Legacy Organisations made to transfer complaints to the OEP for further consideration once the organisation became operational.
35. In addition to this, any proposal would have to reflect the fact that, pending the publication of the final post-consultation strategy and enforcement policy, we would not yet be in the best position to be able to determine seriousness, prioritisation and the viability of a formal investigation. *This section has been redacted as it contains legally privileged advice.*

On this basis, the following action is proposed:

Complaints relating to England

36. Subject to approval by the Board, to reconsider the adopted complaints to confirm the validation decisions reached by the Legacy Organisations.
37. On confirmation of the validation decisions, to write to complainants who submitted complaints relating to England to advise them that their complaints had now been adopted by the OEP.
38. In cases where information clearly demonstrates that the complaint is outside of the OEP's remit, to confirm that the OEP is unable to take the matter further citing the appropriate basis.
39. In cases where the complaint is within scope, to explain to the complainant that the OEP will be undertaking further assessment into the cases with an update to be provided in due course. At this stage colleagues would be in a position to commence considering cases further with final decision as to investigation being delayed until the publication of the final post-consultation strategy and enforcement policy.

Complaints relating to Northern Ireland

40. Subject to approval by the Board, we would postpone writing to the complainant who had submitted complaints relating to Northern Ireland until the OEP's Northern Ireland remit had been confirmed.
41. After confirmation to write to the complainant to advise that the complaints had now been adopted by the OEP with a further update being provided in due course. If the OEP does not

receive powers to consider Northern Ireland complaints, these complaints will be declined for investigation on the basis of being out of remit.

Finance and Resource

42. Given the relatively low number of relevant complaints the finance and resource impacts of the proposed action should be minimal. It would be possible to facilitate the proposed action with the resources currently available to the Complaints team.

Impact Assessments

Risk Assessment

43. The main risks have been highlighted in the substance of the analysis.

Equality Analysis

44. N/A

Implementation Timescale

45. Complainants would be contacted in the manner described in the proposal following the OEP's receipt of its formal powers on 24 January 2022. In line with the outlined approach, we would defer the final decision about whether to formally investigate complaints that are within the OEP's remit until the publication of the final post-consultation strategy and enforcement policy.

Communications

46. Relevant complainants would be contacted in the manner described within the proposal analysis. A communications strategy would also be implemented to support the delivery of the proposal. As part of this strategy we would seek to ensure, through the medium of a cascade update, that relevant colleagues are aware of the proposed course of action in anticipation of any external queries. We would also seek to liaise with the communications team to prepare a reactive approach to respond to any media enquiries generated by the proposal.
47. If agreed the proposed actions would be reflected in the upcoming external report.

External Stakeholders

48. As mentioned above.

Internal Stakeholders

49. The Complaints and Investigations Teams have been involved in the development of this proposal. Legal advice and review has been provided by the Legal Team. Advice has also been sought from the Northern Ireland Lead.