

Environmental Audit Committee

Oral evidence: [Government's environmental principles and governance consultation](#), HC 1062

Tuesday 12 June 2018

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Members present: Mary Creagh (Chair); Mr Philip Dunne; Zac Goldsmith; Caroline Lucas; Anna McMorrin; John McNally; Dr Matthew Offord; Joan Ryan.

Questions 1-48

Witnesses

I: Ruth Davis MBE, Deputy Director of Global Programmes, Royal Society for the Protection of Birds; Nick Molho, Executive Director, Aldersgate Group; Ruth Chambers, Senior Parliamentary Affairs Associate, Greener UK; Matthew Farrow, Executive Director, Environmental Industries Commission; and Martin Nesbit, Senior Fellow and Head of Climate and Environmental Governance Programme, Institute for European Environmental Policy.

II: Professor Maria Lee, Professor of Law and Co-director of UCL Centre for Law and the Environment; Professor Susan Owens OBE, Emeritus Professor of Environment and Policy, University of Cambridge; Professor Charlotte Burns, Professional Fellow, University of Sheffield; and Jill Rutter, Programme Director, Institute for Government.

Written evidence from witnesses:

- [RSPB](#)
- [Aldersgate Group](#)
- [Greener UK](#)
- [Professor Maria Lee](#)

Examination of witnesses

Witnesses: Ruth Davis MBE, Nick Molho, Ruth Chambers, Matthew Farrow and Martin Nesbitt.

Q1 Chair: Good morning, ladies and gentlemen. I ask you all to switch your phones to silent. Whatever exciting news may be coming through, we have a job of work to do this morning. I welcome you all to our very first panel on the Government's proposals to put in place a world-class watchdog. We are slightly being overtaken by events but, of course, there will be a technical Bill to give shape to whatever the Government decide later on this year. This is a very live question that the Commons will be debating tomorrow and several of us in the room have amendments down to try to get to where we need to be.

Ms Davis, can I begin with you, please? You said that the starting point for the Government's 25-year plan should not be to go backwards from the protections that already exist. Do you think the Government's proposals in the recent consultation meet your standard?

Ruth Davis: No, categorically no, and I think there is two reasons for that. Let's start with the question of whether or not the minimalist version of governance that is offered in the consultation would leave us in a weaker or a stronger position than we are in currently as members of the European Union. By any objective criteria, if we end up in a situation where it is not possible to apply the law using the sanction of potential fines that is available to us in the European Union now and would not be available in the minimalist version of what is offered in the consultation, environmental protections will be in a worse position now than they would be for us as a member of the European Union. That is an absolutely basic thing for the Government because they have categorically and repeatedly stated their intention of ensuring that the environment is not left in a weaker position as a result of our leaving the European Union.

I think my colleagues will talk in more detail about this but I want to point to the experience of probably everybody in this Committee and all those of us who have worked in the sector of understanding the seriousness with which European law is currently taken by Government and by public bodies as a result of their understanding of the risks of infraction proceedings that lead to the potential risk of fines. It is a source of frustration to me on many occasions that our domestic legislation, which is also extremely important, is not necessarily treated with the same level of respect in adherence to the law as European law, but that simply points to the fact that in order to be able to make a law work in the context of the environment, you need to have significant penalties associated with it.

We know that there is a live debate about that because we know that there is a live debate in Parliament about it, live today in fact. This is an issue where I think we still have a possibility of being able to turn things



around but we can only do so really if we are absolutely categorical about the criteria that we use to judge the proposals that are in today's consultation.

Q2 Chair: What else needs to be included if it is to be world leading? You have mentioned the powers of fines. What else?

Ruth Davis: The second thing is that from my perspective, as mentioned to the Committee in the previous evidence session, if you want to have a world-leading body it should be aimed at having a world-leading environment. That can't be simply about managing the status quo or, in the context of nature and the natural environment, it can't simply be aimed at managing decline. The proposition inside the 25-year plan is that we would set long-term goals, not just for maintaining the status quo but for the recovery of the natural environment. I think it is worth us remembering the base from which we start and I am going to refer to a note here, if that is okay. My understanding is that in the most recent analysis of the state of the natural environment in the UK, we were ranked 189th out of 218 countries for the quality of nature and the natural environment. We are starting from a very low base: 56% of the species in this country are in decline; we are facing the loss of potentially very common things like the hedgehog. I find the idea extraordinary that my nieces and nephews, potentially grand-nieces and nephews, may never see a hedgehog in this country. It is a remarkable state of affairs. We are starting from a very low base.

We have a Government committed to the idea of recovery and yet have a proposal here about a new governance body and principles that does not in any way suggest that there should be a statutory underpinning for the recovery of the natural environment. To go back to our experience, with no statutory underpinning, with only policy promises in place in Government, what tends to happen is that these promises over time stop being observed. It is extremely difficult without a statutory basis for these sorts of things to ensure that all Government Departments work together for their delivery and it is very easy for individual Governments to unpick what need to be multi-parliament, generational, cross-party consensus commitments. We know the value of the Climate Change Act because it is capable of delivering that kind of multi-Parliament generational commitment to change.

That is what we are looking for in the natural environment and I am sorry to say that at the moment there is no sign of it in this consultation despite the fact that I think many Members of Parliament, and possibly some members of the Government, would like to see that happen.

Nick Molho: If I may add a point from a business perspective. When we look at a 25-year environment plan, when our members look at a 25-year environment plan, they approve of the vision, they are heartened by the focus of it, the focus on soil, water quality, air quality and so on, but unless the key goals of the 25-year environment plan are backed up in legislation, from a business perspective the plan is more of a helpful



vision than an actual plan against which they can plan business investment. That goes to the core of why it is so important that the key goals of the 25-year environment plan be reflected in this Bill and that the new body is given scrutiny and advisory powers to help Government formulate evidence-based policy to deliver those goals.

Q3 Chair: The Government have said that they are going to have scrutiny advisory policy, so that is not in question. The issue is about the power to enforce those advisory notices whenever they are given, isn't it?

Nick Molho: It is, but there is also a very open question as to the extent to which the new body would be able to advise Government on the development of policies to deliver the goals set out in the 25-year environment plan. The question is very much left open in the consultation. In fact, in the section that talks about the advisory powers of the new body, there is a suggestion that the Government could commission ad hoc advice from the body, but there needs to be a systemic requirement that will allow the body to provide recommendations to Government to ensure that we can formulate adequate policy to deliver the goals of the 25-year environment plan.

Ruth Chambers: I would like to support everything that has just been said, but in order for these proposals to be truly world leading, which is a very high bar that the Government have set, the gaps in the consultation must be addressed. The gaps have been mentioned a little bit already but to summarise, there is going to be an enforcement gap, because at the moment the watchdog is not intended to have any legal powers. There will be a climate gap, because at the moment climate change is going to be excluded from its remit. The citizens' complaint mechanism is at risk because that is not put forward with any degree of force or certainty in the consultation. Environmental ambition and goals are not going to be enshrined in legislation at the moment. On the nature of the new body, the consultation talks a lot about the need for the new body to be independent but it very much kicks that question into the long grass: how are the Government going to ensure that independence is delivered in practice?

All of those gaps must be addressed, but in addition to that, in order to be world leading, we will need to move much beyond the scope of ministerial wishful thinking so that other jurisdictions across the world look at the new watchdog when it is set up and look at our system of environmental principles and learn from that and want to draw on it. We need a system that we can rightly be proud of in the future. Also in order to be world leading we need this to move beyond being just a DEFRA body with other Government Departments really getting behind this. For example, why can't we see joint proposals on climate from DEFRA and BEIS; on the complaints mechanism is that something that DEFRA and the Ministry of Justice could be putting forward? I think we would need to include proposals that act on a UK-wide basis and not just on a single-nation basis if we are to be truly world leading.



Finally, the missing part of the ingredient for Greener UK is the culture of the new body. It needs to be one that inspires confidence in stakeholders, to have some clout across Whitehall, and that culture is set up in the right way from the start or from the outset.

Matthew Farrow: My interest is in how the Bill, if we get it right, can boost the creation of a world-class environmental technology and services sector. It is those companies that my organisation represents. There is a lot of potential here. At the moment the UK has about 0.6% of the global export market for those sort of technologies and services and we have calculated that if we could increase that share by about a half that would create about 40,000 extra jobs by 2025. I think the Bill can play a crucial part in that and it is for exactly the reasons that colleagues have said. If we can have the key targets in the 25-year plan enshrined in legislation and we can have sanctions, the body would have to make sure those targets are met and it creates long-term stable markets for businesses.

To give one specific example, in the air quality strategy—and I think it is in the 25-year plan as well—there is a target to halve the number of people living in areas where the particulate levels are above WHO guidelines. It is a very sensible target; there is no safe level for those sort of particulates. If members of mine, who are developing technologies for cutting HGV emissions or wood burning stove emissions or whatever, think that is an aspiration—and it is a pretty tough target to meet that will gradually lose focus as Ministers and Governments change—it is going to be hard for them to get the finance together or put a business case together for developing those technologies over years. If they see that sort of goal in the Bill, I think that gives the confidence to make the investment.

Martin Nesbit: I endorse everything that has been said so far but just to add briefly and building on a point that Matthew has just made, essentially you need not just the ability to ensure enforcement but also that legislation is designed in a way that is enforceable. A pattern in European legislation is that there is a tendency to have high-level targets set at some distance in the future but then there is a number of elements towards the delivery of those targets, like making a national implementation plan, interim targets and so forth. There is a risk as we move out of that European governance that legislation is increasingly set in airy commitments to, "It will be nice if in 10 years' time air quality improved to such and such an extent". But as Matthew said, that does not provide the guarantee that industry needs that it should invest and that there is genuine seriousness behind those commitments.

I think it would be useful if the new body also has the opportunity to advise Government and Parliament on how to write the legislation to ensure that it is enforceable, that progress towards the delivery of targets can be monitored and checked and that where problems become apparent, they can be addressed and resolved.



Q4 Caroline Lucas: I want to come in on what Ruth was saying about the ability to levy fines as a way of getting Governments to focus their minds on things. When I have put that to Ministers they have always come back saying it would be very perverse for one part of Government to be fining another part of Government. They have suggested that maybe one of the reasons that they have not been able to deliver, whatever the environmental infraction was, has been a finance-related issue and, therefore, fining is not very practical either. I wanted to get your sense of what are some strong ripostes to that and if there are any precedents outside the EU in other countries of having a body, or indeed another body in this country, that can have this power. I agree with the thrust of it but I want to understand better how you think it could work in practice.

Ruth Davis: I think there are some interesting useful suggestions about directing any fines back into the remediation of whatever problem was there in the first place, which seems like a logical thing to do. It clearly is a different set of circumstances in which we exist with no kind of super-national power outside of Government. But nonetheless there are sensible opportunities to try to think about how you would levy fines against the failure of Departments, bodies, particularly maybe public bodies, to deliver their duties, which could create funds that would ultimately enhance environmental outcomes. I am interested in the suggestion that the failure to deliver is a result of a sense of financial constraint on the part of Departments and I think we should possibly explore some of that.

Some of that is founded on the mistaken notion that there is inevitably an economic cost to the delivery of environmental outcomes. There is a schizophrenia in Government about what looks like at that moment. Michael Gove gave a very robust interview on the "Today" programme where he utterly rejected the idea that there was some kind of inevitable conflict between environmental and economic outcomes. That language has crept back into the consultation. I can imagine where that came from, but in a way it is a challenge to Government to make up their minds on whether or not they think that broadly the underpinning of our economy is indeed the environment, in which case it makes logical sense for there to be financial penalties for failing to deliver your outcomes and for the consequence of those financial penalties to be an investment in an improved environment that ultimately enhances where our economy is going. I think that is the point that Nick has been making about creating a context in which it is possible for there to be investment in a green economy.

I noted with a certain amount of dismay that the Committee has invited Treasury Ministers to come to speak to it about this particular matter and I think there was not anyone available to do that. It remains a fundamental issue in this consultation: do the Government believe or not believe that strong and robust institutions and principles are needed in order to be able to enhance our environment in order to be able to



ensure that our economy prospers. I hope at some point we can put that point.

Nick Molho: From a business perspective, ultimately if you know that policies are backed by clear enforcement powers that gives you much more reliability in the sense of policy direction, that policy will be developed adequately and will be properly enforced. I had discussions recently with manufacturers in the cement, energy and transport sectors and another issue that came out very strongly about the issue of adequate regulatory powers was that of a level playing field. If you do not have strong regulatory powers, you create a situation whereby some businesses comply with the law and others find ways of circumventing the law. That in turn undermines the level playing field, which creates a poor business environment and if you have a poor business environment that damages business investment. The suggestion has been made in the past that strong regulations and a regulator with teeth would stand in the way of competitiveness. One of my key messages today is that the opposite is true. You need consistent enforcement of environmental regulations in order to create a level playing field that supports business investment.

Q5 **Zac Goldsmith:** The main question I was going to ask you has already been comprehensively answered, and that was relating to the ability of this new body to initiate legal action. The Withdrawal Bill will be coming back to Parliament today and tomorrow. We are hearing that DEFRA has won part of its argument with the Treasury in relation to the establishment of this body but we are told that there will be Government backing for an amendment that would ensure that we have a Bill within six months, that the new body has the ability to take Government to court, which was a sticking point in the consultation, as you will have picked up, and that all the European environmental principles underpinning EU law are there as well in primary legislation. If that is true and if DEFRA has won that argument, would you agree that the key outstanding issue relates to the ability of this body to issue fines? Is that the big bit that is missing over and above what I have just recounted to you?

Ruth Chambers: I don't think so. I don't think we should limit our ambitions there. The amendment that hopefully will be passed tomorrow is a good starting point but it really is just that—it is a good starting point. We are very much at the start of a parliamentary journey. Just because this amendment is in the Withdrawal Act, it does not necessarily mean that the final Environmental Principles and Governance Act that comes out of the pipe after parliamentary scrutiny and consultation is going to contain everything that we want. We are absolutely clear at Greening UK that the ability for the body to be a prosecutorial authority is very essential if it is to do its job effectively of holding Government, and hopefully other public authorities, to account on their implementation of environmental law, but it is not the only missing power in the consultation. There is a range of other powers that we believe would be



necessary for the body to be able to do its job effectively. For example, it needs to be able to intervene in legal proceedings brought by other bodies not just initiate legal action in its own right.

Q6 **Zac Goldsmith:** Can I interrupt you for one second? If you look at the consultation that was put out, the thing that was alarming about it was how broad it was. It began life asking for pretty much, I think, what the panel collectively is suggesting it should have but it was broadened to such an extent that on the weaker end of the consultation, if that was the bit that the Government went with, you would have an organisation without any teeth at all. I think the things that you are saying this body should be able to do are all in the consultation. They just happen to be accompanied by the opposite as well. It is a very broad menu.

Ruth Chambers: If I might disagree, I don't think they are really. The consultation talks about the power to issue advisory notices. Advisory notices would be welcome, but that only goes so far. It discusses the prospect of binding notices, but it does not say how those binding notices would work in practice or in what circumstances they would be applied. It still leaves the other tools in this body's toolkit very open.

If I may continue with the other things that we think are missing, as well as the ability to intervene in other people's legal proceedings, I think that the body would considerably benefit from having the power to conduct inquiries where there are systemic failures of the compliance of bodies and authorities with environmental law. A good example where the body could do that would be on systemic failures to apply air quality limits, which is happening in the UK at the moment, to undertake formal investigations. The consultation does not put that forward as a solid option, in our view. The consultation moots the point of issuing binding notices, but how would that work? We think that they would be absolutely essential and they could cover lots of ground. They could ensure that compensation is paid, that licences are revoked, all that kind of thing. Finally, when those sorts of things are not met, having some kind of power of sanction as the ultimate arbiter of this process would also be essential.

If all of those five powers were given to the body we think it would be able to effectively do its job and it would be approaching the world-leading standard status, but if you just have a piecemeal approach or a weak body from the start we are very fearful it is not going to be able to do its job properly.

Q7 **Zac Goldsmith:** Can I go back to Ruth Davis? You talked about the 25-year plan and embedding that somehow within law. How would that work? Before you answer, a follow-up to that question is that given how discursive and broad the 25-year plan is, it is hard to imagine that existing in primary legislation per se. As this new body is formed and its formation would require a Bill—there will be a Bill that produces this new environmental body—would it make sense for that Bill to reference the 25-year plan, put it in primary legislation, but to have that Bill



accompanied by some kind of NPS that would allow you to be much more ruminative, much more discursive than you are able to be in primary legislation? Do you think that would have the same power? It would also allow Parliament to properly shape that NPS and for future Governments to go back to the NPS and build on it and adapt it in a much more fluid manner than you can with primary legislation. Is that correct?

Ruth Davis: As you have rightly pointed, the 25-year plan is a very large document with a lot of different policy initiatives of all kinds of timescales in it. I don't think that the proposal was that whole plan would be picked up lock, stock and barrel and put into primary legislation. I am sure you are absolutely right that that would be an impractical exercise. I think it is right for us to have the aspiration that long-term targets, 25-year targets for some critical elements for, let's say for the sake argument, water, air, soils, nature and potentially access to nature do have some statutory footing. I think what you are exploring is whether or not it would be sensible for such targets to be set and reviewed by an expert body that was given, let's say, an instruction by Parliament or whether it would be more appropriate for those goals to be set and then established in law. It is an interesting and useful debate.

I would make the case that one of the things that is powerful about the Climate Change Act is that it does have an immovable long-term goal that tends to drive action over cycles in that direction. Nick might want to come in about the value of having that long-term signal being pretty fixed and going in only one direction. It is certainly the case that we would want a strong role for the body that we are talking about in advising Government about what targets should be, thinking about milestones, helping them set the appropriate policies to deliver that, but there is a case to be made for there being some really concrete goals in primary legislation that are not subject to the kinds of vagaries that you tend to get in individual Parliaments.

One additional point is that there is also the question of timing and sequencing and how one would set about doing that. If you are going to put those sorts of goals, particularly around the natural environment, in legislation, you clearly want to have spent time thinking about that and establishing those on a footing that is scientifically credible, that has quite a lot of support across a range of different bodies. It may be that we need to think about the sequencing of that process in such a way that one is established initially that enables the request for those targets to be given back to Government.

Q8 Zac Goldsmith: I have one more question and it is not necessarily to you but I will start with you. The difference between this and the Climate Change Act is that the Climate Change Act sets very simple targets. They may be hard or soft, depending on one's view, but they are very simple; it is about carbon. It is much easier to calculate, to quantify, to understand. We are talking about something that is so diverse. You mentioned hedgehogs but you could have mentioned any number of



pollinators or butterflies or, frankly, almost anything that makes up the diversity of our natural environment in the UK. Then you have water; you have flooding, drought and all the other issues associated with that. It goes on and on and on. My concern is that if you try to capture those things in primary legislation targets as opposed to having a more fluid NPS that tells the whole story, you might find that you are putting yourself in such tight boxes that you become blind to the broader issues. Is that not a concern?

Ruth Davis: I think you are raising a legitimate concern. Not just in the UK but in the international community there is a huge struggle to try to work out what kind of targets and indicators you would put in place in order to be able to reverse the decline of global biodiversity. That discussion will take place all up to the big global summit on nature in 2020. But I would push back a little bit and say that the Government have already signed up to a set of targets under the last convention on biological diversity where we have attempted to try to make some pretty clear ideas about things that we could do. For example, there is a very clear target about a commitment to prevent human-driven extinctions. Whether it is being met or not is another matter. It is always a balance between trying to get some level of specificity over the long term that drives action and provokes a kind of law star versus the risk in very complex systems, particularly natural systems, of doing perverse things.

I think my approach to that would be to say the right thing to do is probably look at it from the perspective of the area and condition of our habitats and the diversity and abundance of our wildlife. I would put effort into trying to create some indicators on that that are in themselves world leading and are going to drive that international conversation. But I think the point you are making is that we will need to come back to those and really understand what it is that they are driving on change to the natural environment and be intelligent about that.

Q9 **Zac Goldsmith:** Just a simple yes or no and I will then stop. Apologies, Chair. Is it your position that in the context of the inquiry we are doing now, which is looking at the formation of this environmental body, this regulatory body, that as long as the body, the Bill, the Act that emerges binds the Government to, broadly speaking, the targets of the sort that are reflected in the 25-year plan, it is possible that the description of those targets could exist outside of the Bill? As long as the targets themselves or the requirement to meet the targets is in primary legislation, there is room for flexibility about how those targets are described?

Ruth Davis: I think that that is right initially, because there is going to need to be a conversation about what those targets look like and—sorry to come back to the international target—we are going to have to decide what it is that we want to see in the next big global treaty for nature. That is going to require us to come to a view on some of these things. Do I think that means that indefinitely those things sit in a place where they can be changed as a result of policy decisions in every Parliament? No, I



HOUSE OF COMMONS

don't because I think the consequence of that would be a fundamental erosion of the idea that what it is that we are trying to do is commit to long-term plans delivering outcomes. I think that does come to some of the points that have been made by colleagues about business. I don't want in any way to underplay the complexity of the task of trying to set headline targets that will drive the recovery of nature. I simply do not see an alternative to that to enable us to get to the place where we are making investment decisions that are pro nature and not anti nature.

Nick Molho: There is some important work going on that would make this possible. For example, at the moment DEFRA is developing a wide set of metrics to help measure Government policy progress against the goals of the 25-year environment plan. The challenge is that we need to use those metrics to help flesh out what some of our key goals should be and how we can best measure delivery against them. There are also goals in existing Government policy that could form a good basis for goals that could make their way into the next environment Bill. For example, the Government are committed to at least doubling the UK's resource productivity by 2050. That is good basis to work from to establish a goal on resource efficiency that could be reflected in the Bill.

Martin Nesbit: One of the things the body would need to have a role in relation to is, of course, the enforcement of the corpus of European legislation that will continue to apply within the UK after the UK leaves. That may progressively be replaced by new UK primary legislation but at least for the short term you would expect that that legislation will remain in place and will need to be enforced. There is a fundamental problem with whatever arrangement we end up with, which is that any Parliament can change primary legislation. History is littered with the corpses of environmental watchdogs and sustainable development watchdogs that were set up at one point by Governments, either in the UK or elsewhere, and then killed off subsequently by Administrations. There are examples in Israel and Hungary and, of course, the Sustainable Development Commission in the UK. I think inevitably we are going to be in a situation where you have something that is less robust and less assuredly long term than the arrangements we have at the moment.

Q10 **Dr Matthew Offord:** I wanted to deal with some of the information that we heard earlier about whether DEFRA has won its battle with the Treasury or not. I particularly want to ask Mr Molho and Mr Farrow about how founded you think these fears about competitiveness and inhibiting the economy would be. Is there any legitimacy in that view?

Nick Molho: From the wide range of discussions we have had with businesses within and beyond our membership, we are clear that where environmental regulations are well designed and where they are properly and consistently enforced they can deliver not only environmental benefits but also economic benefits. I think there are two aspects to this. One of them is the role that they play in delivering a level playing field for business, which I touched on earlier. The second aspect is that there is



strong evidence showing that ambitious environmental regulations can deliver greater business investment in innovation, supply chains, the skills of the workforce and can support businesses in delivering better quality products and better quality infrastructure.

A few months ago we commissioned a piece of research from a global engineering consultancy called BuroHappold, which we have referred to in our written evidence. We asked them to study the economic impacts of environmental regulations in the waste sector, the construction sector and the car industry. Specifically, they looked at the impact of the landfill tax, the impact of the London Plan, which requires the design of more energy efficient buildings in London, and the EU passenger car regulations. In all three cases they found that the economic benefits delivered by those regulations outweighed the initial compliance costs because of the benefits of increased business competitiveness, increased market share and job creation. There is a very strong body of evidence supported by a very big section of the business world that would argue that, if properly done, ambitious environmental regulation enhances competitiveness rather than undermines it.

Matthew Farrow: Sometimes there is a short term/long term cost issue. If you take an example like sustainable drainage for new housing developments where the Government have played around ever since the Pitt review about how strongly to enforce that, housing developers will say that if they have sustainable drainage systems in a new housing development they can fit fewer houses on that development and that pushes the cost up. Fair enough, there may be a very short term or short-term cost there but, of course, as climate change is happening, floods are becoming more frequent, the long-term cost of building housing that is not resilient to those weather events is a much more significant cost that may be borne by different people or different sections of society. Sometimes the argument is true in the short term but not in the long term.

The other thing, as Nick said, is that a lot does depend on designing the policy in the right way. If you are designing a policy where you have milestones over time and the technology companies in my organisation, for example, can plan, invest and scale up capacity and you set the policy in a way that encourages innovation outcomes and so on, often you can have very environmental standards at not much extra cost or a cheaper cost to the mainstream economy. On the other hand, if you do nothing, it is kneejerk policy. Suddenly air quality becomes a big issue and restrictions are put in very quickly and the industry can't easily supply the amount of the retrofit kits or whatever, prices go up and again there is a short-term cost. I think the points we have all made about having long-term goals and milestones towards the goals are important.

Q11 Dr Matthew Offord: But introducing increased regulation will have an effect on the bottom line. How would you allay those fears?



HOUSE OF COMMONS

Matthew Farrow: I think it is the same point. In the long term there should not be an effect. If you take something like air quality, if you are shifting vehicle technology to lower emission technologies, you are doing it over time against milestones. Look at renewables and the way that the cost of solar has come down, for example. If policies are put in without any forethought or suddenly industries that are providing those solutions don't have the capacity to deliver them, the price may go up and that can have an impact. But if the policy is well designed I don't think it needs to. The points Nick has made reinforce that from the mainstream business point of view.

Nick Molho: There is ultimately two issues here. The first one is that the business community needs to speak louder about the benefits that they have seen from environmental regulations in the past. As I said, there is a strong body of evidence showing the benefits. We are in the process of sharing that evidence with Treasury. Then there is the separate aspect that is separate from the business investment cycle, the point made by Ruth at the very beginning, which is that we need to move to a better understanding that the wellbeing and the competitiveness of our economy in the long term depends on the sound management of natural resources. Unless we have those goals that are backed up by clear enforcement and advisory powers in legislation, we cannot guarantee that natural resources will be well managed in the long term and that will create a risk to our economy.

Ruth Davis: Could I add one point we have not touched on that is important in the anxieties felt by different parts of Government, which is about the planning system and infrastructure? That does seem like a very important conversation for us to have. Experience over quite a long period of time of Governments trying to find all kinds of different ways to deliver major infrastructure projects and housing is that there is a tendency to try to reach for a deregulatory solution that will somehow sweep away things that you perceive to be a problem and then you can just roll out infrastructure. The consequence of that is usually huge public anxiety, confusion and pushback at a local level that ultimately holds up rather than delivers largescale infrastructure improvement.

There is an alternative to that, which is a much more careful approach to how you plan those projects that right upfront takes into account the potential impacts on the environment—some of them can avoided, some of them can be mitigated—and where you build some of the potential benefits associated, for example, with access to greenspace in housing. In doing so, you try to move from an entirely confrontational relationship with people in the local environment to one where you have a shared project for enhancing our long-term environment and quality of life. That is a discussion that I think needs to be brought forward in the context of proposals for a significant increase in our railway infrastructure or a significant rollout of housing. I don't want to put words in the Committee's mouths but as an area for future investigation, to think how we can do infrastructure planning and housing planning in a way that



HOUSE OF COMMONS

enhances the environment might address where some of the current concerns lie and would be really useful.

- Q12 **Mr Philip Dunne:** I would like to pick up some on the comments that Ruth Chambers was making earlier about boundaries and the ability for concerned citizens to be able to raise issues with the watchdog and lobby them. You mentioned the lack of boundaries between Government bodies, so this is not just a DEFRA issue, and I would recognise also the lack of boundaries between nations, so an environment does not respect manmade boundaries. Do you think that the proposals thus far for the watchdog go far enough in supra-governmental responsibility? Should the devolved Administrations be brought into this?

Ruth Chambers: I think so, absolutely. There are some words in the consultation about DEFRA recognising the need to work with devolved Administrations and sympathetic towards the concept of co-design and co-ownership but they don't go any further than that. We are running out of time to ensure that the governance gaps that will arise upon exit across the UK, not just in England, are met and done in a joined-up and transparent way that stakeholders can fully engage with. We would certainly welcome DEFRA and the devolved Governments working together on a truly collaborative basis to ensure that the co-design and the co-ownership lead to some meaningful proposals that stakeholders can get engaged with. There are many benefits to potentially doing this at a UK level. As you mentioned, the environment and trans-boundary issues don't respect borders, whether it is pollution or migratory species or non-native invasive species and all the rest of it. That would allow those sorts of issues to be done in a more joined-up way. Also it could be more cost effective if things were done on a UK-wide basis.

We know, or we suspect rather, that this is one of those issues that has been very much caught up by the politics, the clause 11 of the Withdrawal Bill debates, the question about whether things are power grabs or not. The environment is too important to fall casualty to those sorts of political issues. We would really commend all of the Governments to get around the discussion table as quickly as possible to co-design solutions that we can all buy into.

- Q13 **Mr Philip Dunne:** Have you had any conversations with devolved Administrations that might give you any hope that they might be interested in doing so?

Ruth Chambers: I think there is definite interest but there has been a reticence to get involved because, as I say, some of the politics has got in the way of this. It is also the case that you either seem to speak to the UK Government or you speak to devolved Governments but you never speak to everybody at the same time. There would definitely be a benefit of having greater transparency and stakeholder involvement in some of those discussions on a round table and a quadrilateral basis, both at the political element with Ministers and with policy officials as well. We know that the Scottish Government and Welsh Government made very



welcome commitments when their respective continuity Bills were discussed in the Assembly and in the Parliament, both pledging in different ways to address the Government gap and to bring forward legislation to enshrine principles.

That is all very welcome but I can't stress highly enough that we are running out of time to get these proposals in place, certainly by exit and definitely by the end of the implementation period. The sooner that we get some concrete proposals emerging from all four Governments, whether that is a shared approach, a joined-up approach or a joint approach, the better from the environment's perspective.

Martin Nesbit: I mentioned earlier the potential fragility of a body set up under primary legislation. Having co-ownership through the four parts of the UK is one way of ensuring that you make it more difficult to get rid of it. You provide greater confidence in its long-term future. I very much agree with Ruth that making this a UK body is genuinely the best solution. It is difficult to imagine how you would get there without the enthusiastic voluntary commitment of the devolved Administrations. One of the elements in this with the devolved Administrations is that it potentially gives them a much greater ability to ensure that there is not backtracking from Ministers in England on environmental commitments in future. Inevitably, because of the greater economic weight of England within the UK, that will have an impact on the delivery of environmental goals in Scotland, Wales and Northern Ireland. There is a lot to be gained from the perspective of devolved Administrations in having a UK institution and it is also very desirable for the stability of the new body.

Matthew Farrow: To add a practical example of benefits in a waste and resources policy, if Scotland has landfill bans and England does not, you are going to start to see waste flowing down to landfills in England. That may or may not be a terrible thing to happen or an okay thing to happen, but I think at least having a combined body would encourage that sort of issue to be thought about early in a way that just does not happen at the moment.

Nick Molho: If I was to sum up very briefly the business benefit of having maximum collaboration between all Administrations, it would be—building on Martin's points—if you have a body and set of principles that are co-designed, that gives you greater longevity. From a business perspective, you have greater reliance on the overall policy direction and it is less likely to be abruptly amended. It also provides you with more of a level playing field, which is Matthew's point, because you have greater consistency across all four countries. Finally, you also incentivise greater business investment because the policy environment is much more certain, it is much more conducive to business investment in environmental services, environmental technologies and so on.

Q14 **Mr Philip Dunne:** We touched on some of this before, but are there any specific proposals that you would like to see introduced to facilitate



HOUSE OF COMMONS

complaints by civil society? Perhaps Ruth Davis you would like to start.

Ruth Davis: I am going to pass it to my colleague, the other Ruth, who I think is an expert on this particular issue.

Ruth Chambers: That is an introduction. We would say that we are probably more disappointed with what the consultation says about complaints than many other aspects. It is one of those issues where I think the consultation really ducks away from what is needed. In order to replicate what we have at the moment, we need a citizens' complaint mechanism and the body needs to be able to administer that. The consultation unfortunately sets an unhelpful tone from the start and it does not ask how that complaints mechanism should be done; it asks whether or not we should have one. We would hope that this Committee would be able to recommend in the strongest terms that one is definitely needed. The existing complaints mechanism may not be perfect but it does work very well and we would want to see the underpinning principles that allow that to happen to be sustained in any new mechanisms. For example, any citizen of the UK would need to be able to have the ability to bring a complaint before the body. That sort of complaint needs to be open to all and it needs to be done in a transparent way.

Something that the consultation does not really talk about is how the body will manage its communication and dialogue with stakeholders. If it is done in an open way, people can be brought into identifying solutions as well as identifying problems. It needs to be able to look at the merits and not just the processes behind these issues. One thing that the consultation does talk about is prominent declarations. For example, if a complaint is brought by a citizen and it is upheld, the body ought to be able to issue what it is calling a prominent declaration to the body that the complaint has been made about. That is welcome but it certainly does not go far enough and it goes back to the earlier discussion we had about the body needing access to legally biting mechanisms otherwise we could get into complaints being dealt with by lots of very polite parliamentary discourse but never actually leading to change on the ground. It does very much link to the need for the body to have a strong and effective enforcement function as well as a good, accessible and—I must stress—free mechanism for any citizen to be able to participate in.

Q15 **Mr Philip Dunne:** It is a cross between an ombudsman system, which is free and requires a remedy, and an enforcement agency like the Environment Agency?

Ruth Chambers: Yes.

Ruth Davis: To add a little bit to that, there is an interesting disjunct, isn't there, between what it is possible to do as a citizen at the moment in relation to European law and what it is possible to do in relation to domestic law. The environment is a very special case in the sense that it does represent to a certain extent a shared common good, but if I find



myself walking down the road and I can see that there is a piece of environmental damage that I would have expected to have been dealt with by a regulator but that regulator is failing to deal with it under domestic law—for some of the reasons that we mentioned previously, because there are very few ways of ensuring the enforcement of domestic law—I wonder what route I have as a citizen to try to ensure that I can insist that that regulator does its job properly. I don't think that that is really a very feasible thing under much domestic legislation as it stands at the moment.

Some people would say it was environmental rights. I might describe it as a fundamental problem in relation to a set of goods held in common, a commonwealth, where it requires citizens to be able to have access to justice through their government and then reflected back in an agency in order for our collective good to be respected in that context. It is not quite the same as being a patient who has been failed by a hospital, if that makes sense.

- Q16 **Chair:** Mr Nesbit, can I pick up on this point with you? In March 2018 the European Council guidelines called for “access to justice and a proper complaints mechanism to be guaranteed for citizens and NGOs with respect to enforcement of environmental standards and reciprocal environmental commitments made in the context of the future EU-UK relationship”. You referred to it a little bit in a previous question, but do you think what is proposed in the paper will address those Council guidelines and be acceptable to the EU?

Martin Nesbit: It is difficult to identify exactly what the balance is going to be between the Council's various objectives for the negotiations with the UK. Certainly the European Parliament has emphasised a number of times the importance of ensuring that there is no undercutting of environmental standards in the future by the UK and it will be quite vigilant on that. My guess is that the more the UK can demonstrate that it is serious about setting up a body that will replicate some of the enforcement rigour that you have as part of the European Union mechanism at present, the easier it will be for the UK to convince the EU 27 that it will not be undercutting European environmental legislation in future.

The question of enforcement of the agreement between the UK and the EU is going to be a very difficult one to resolve and it would help if the UK can provide greater comfort through a genuinely credible enforcement body. I think that involves some of the strengthening that we have talked about of the ideas set out in the consultation paper. It also potentially involves ensuring that there are more robust remedies available through the judicial review mechanism. At the moment it is relatively weak as a way of requiring Government to take action.

- Q17 **Chair:** Going right back to that principle of access to justice, the citizen has to be able to get the state to act and at the moment civil society can do that through petitioning the European Parliament and via the



HOUSE OF COMMONS

European Commission for free, not a £60,000 judicial review. Can you see any way through in how the citizen can petition this body in order to exert their environmental rights?

Martin Nesbit: The ability for the citizen to raise the sorts of environmental issues that Ruth was talking about earlier with this body would help to address some of those access-to-justice challenges. The UK signed up to the Aarhus Convention that requires public participation in environmental decision-making, access to environmental information but also access to environmental justice at a reasonable cost. One of the things that the convention's compliance committee has been very concerned with in relation to the UK is precisely the cost of judicial review and recent changes have been made to try to address that but do not appear to go far enough. At the moment I think you have the situation that the citizen is worried about bringing cases because it is very difficult for them to have visibility over the costs that they might face if they bring the cases.

Chair: That was certainly the concern of this Committee when we audited the Ministry of Justice where the fees have been put up without reference to the convention.

Q18 **Caroline Lucas:** I want to come on to the issue of timing for the creation of this body and to ask Ruth Chambers initially: what are the risks that could arise from the ongoing uncertainty about governance and principles in the event that either there is not a deal with the EU or, from all of the assumptions now, that we are going to have a transition period and, therefore, Government think they have got until the end of December 2020 to get all of this sorted? What are your concerns if we don't have that extra time?

Ruth Chambers: The obvious concern is that the Government will not be able to meet their stated objective of ensuring that the governance gap is closed. If we crash out with no deal, what is the alternative, what contingency planning is being done by Government to ensure that there are temporary or interim governance and principles arrangements? What are they; when can we see them; when can we be consulted on them? That would be the immediate issue if we crash out in that sort of worst case scenario.

Time is running out, as I mentioned earlier. We were told by Dominic Raab, who was then Minister for Courts and Justice, during the debates on the Withdrawal Bill back in November that this consultation that is before the Committee today, "This is not just blue sky thinking. This is coming imminently". It took six months for that consultation to see the light of day and then only because of significant parliamentary pressure from both Houses. We can't afford throughout this process to have similar lapses in timescales otherwise we are not even going to meet the deadline of the end of the implementation period if that is confirmed.



This is within the gift of Government to deliver and there are various things that we would like to see the Government commit to as a minimum to ensure that we do not run out of rope at the end of the Brexit process. One is to ensure that there is adequate and robust pre-legislative scrutiny on the Environmental Principles and Governance Bill and on the draft principles policy statement and robust stakeholder consultation. If that happens, no doubt it will definitely help improve and shape the proposals for the better. The second is to announce the Environmental Principles and Governance Bill as early as they possibly can in the new parliamentary session. That session starts in May. We don't want an announcement in July or September; we want that pretty much to be the first Bill out of the blocks so that it can commence its parliamentary journey well before the summer recess of 2019, otherwise our great fear is that we are going to run out of time. We are under no illusion that these are difficult things to put in place. We are doing something we have not done before as a nation. There are lots of complications and lots of technicalities so the more time that we have to make sure that that Bill goes through Parliament in a robust and scrutinising way the better.

The final thing is on contingency, which I mentioned briefly, to make sure that the Government are contingency planning for either no deal scenarios or the inevitable bumps in the road that we are going to face over the next 12 months. It may be that interim arrangements do need to be set up. For example, nine months before the Committee on Climate Change was set up there was a shadow body in place helping, guiding and preparing the way for that body. There are lots of things that can and should be done and we would like some sort of reassurance from Government that they will be done.

Q19 Caroline Lucas: Does anyone else want to comment on that bit in particular?

Ruth Davis: I just had one different perspective on the timing question. We are having a conversation about the minimum necessary to fill the governance gap in relation to Brexit at the moment, but I return to thinking about the fact that this does also represent an opportunity to try to focus on the recovery of the natural environment and potentially to think about what a world-leading set of institutions would look like. Those institutions and those targets, if they were put in place, could represent a contribution by the UK into an international debate about the recovery of the natural environment that will be taking place in 2018 and 2019. We will miss the opportunity to lead that conversation if we don't get a move on, frankly, and that has quite a lot of significance, not least because one of the areas where we have the greatest potential for reform—and we have not spoken about in the Committee actually—is in trying to drive fundamental change in the way that we run our agriculture or fishery systems at the moment.



Setting these sorts of targets in law with this kind of institutional backing would be the strongest possible signal we could give that we were serious about the reforms of the common agricultural policy as it currently stands. I have an aspiration that those reforms should put us in a position as a country to demonstrate what genuinely nature-friendly, zero carbon or net-negative agriculture and land use would look like. That demonstration is absolutely essential if we want to meet any of the global challenges that we have in the environment. There are reasons for practicality and risk around Brexit. There are reasons in having a forward-looking proposition to take into 2019-20, which I hope would be attractive to a Government that has repeatedly said that this one of the area where they want to lead the world.

Q20 **Caroline Lucas:** That 2019-20 is because of the biodiversity summit?

Ruth Davis: There is a global summit on biodiversity in Beijing in 2020 but those of you, including you, Caroline, who follow the climate debate closely will know that there is also an absolutely critical climate summit in 2020. At that point I think there is going to be one of the moments of global stocktake where we try to appreciate where we are with the state of the environment internationally and make significant and co-operative efforts to try to address that. I think it is quite reasonable that we in the public and civil society would like our countries to be in a position where it was capable of leading that debate, but I cannot see that that is possible in a situation where we have failed to come forward with the kind of legislation that would embed really world-leading institutions into law but also set that target into law.

Nick Molho: I would agree with both points that were made. The CCC is a very useful precedent to look at. When the body was set up in shadow form in early 2008, a careful balance was struck between providing the body with enough expertise so that it could advise on the first three carbon budgets while retaining enough flexibility to make sure that any changes that were being made to the Bill could be reflected in the way in which the official body was set up and resourced. I think a lot of the discussions that took place in the pre-legislative scrutiny stage of the Climate Change Bill provided some really good precedents that we should bear in mind.

Q21 **Caroline Lucas:** If there were to be no deal we would be looking at a shadow body that would have to be up and running, if there is to be no governance gap at all, by March 2019. Are we thinking that is feasible? Maybe I can roll this into my next question, which was about the trade-off between the time to get the body right and the imperative of not having the gap. I guess the shadow body is part of the answer but even if you were working on the basis of a shadow body, do you think it is realistic that you could have something ready to go, if necessary, by March of next year?

Ruth Chambers: I think it is a very demanding timescale. We are told—and again there is not so much transparency on this—that Government is



HOUSE OF COMMONS

doing contingency planning for no deal and other related scenarios. Knowing what the contingency plans are should a no deal arise and should we be facing a governance gap from March next year would be a very thoughtful and probing question that would be good to put to the Secretary of State: what is DEFRA doing on this and when can they share their plans?

Martin Nesbit: I was shaking my head sceptically when you were asking the question about whether it is feasible to set it up by March next year. The weight of administrative challenges the Government will face will mean this is not at the top of the list of things to deliver. What you would need to start reflecting on is how you can set it up in the right way and in a way that is then able to address anything that has gone wrong as a result of the gap in governance between the point at which the UK crashes out and the point in which it comes into existence. Overall, let's just not go there.

Chair: That is not very reassuring.

Q22 **Caroline Lucas:** What do you think realistically we could be asking to be in place, potentially ready to go in March 2019, if we needed it? You seem to be saying that if something dreadful happens post-2019 we need some mechanism to pull it back in. I am not clear on what that looks like.

Martin Nesbit: I have not studied this in detail but I would guess the need for rapid primary legislation on a whole raft of issues would be overwhelming, and it is not obvious that the Government would see the establishment of a new governance mechanism as being very high on their list of priorities in delivering that. You could certainly ask for a robust governance mechanism but I would be surprised if you get it in that triage of the things that need to be done.

Matthew Farrow: I would agree with the general thrust of the comments about we want the best as we can, as quickly as we can; of course we do. The precedent of the CCC is a good one. I would err a little bit towards saying let's get it right. This is a body that we want to be world leading, which will have a huge impact on the 25-year plan. It is a generational thing. If there was a little bit of trade-off between getting the body right, and the way we have all talked about it needing to be right versus rushing something in that is not quite fit for purpose, personally I would err a little bit on the let's get it right. But obviously I want it both ways, as we all do.

Nick Molho: But that is why you need a two-stage approach, recognising that—

Caroline Lucas: Two stage meaning the shadow and then the right?

Nick Molho: Yes.

Ruth Davis: Also to add in, we should remember that we have a regulatory system with competent authorities for the implementation of



HOUSE OF COMMONS

European law in place, as it stands at the moment. What we do not have is a governance body over the top of that that is capable of holding Government to account for the implementation of that law or appropriate access to justice.

I would approach this from the perspective of saying it should be possible with the body of existing environmental law for those regulatory authorities to be able to collect the information as to whether or not that law is being obeyed or disobeyed. It should be possible for a Government, in the establishment of a shadow body, to signal very strongly that the consequence of there being let's call it infraction for the sake of argument of those laws is that there will be some form of retrospective implementation of that law. In that context—Nick can tell me otherwise—I would imagine there is a significant disincentive involved in that situation for disobeying the law because your expectation is that you will be regulated, therefore people will know whether you have disobeyed the law, and the consequences of that over time will be held to your door.

Part of this is about the signal as to the seriousness of how strong that body is going to be a clear timetable for establishing it and an understanding of what the retrospective nature of any conversation might be with the existing regulators on the ground.

While I understand all the challenges of getting things up and running, we should not ignore the fact that with a significant amount of will and the right signals it will be possible in an interim period, to a certain extent, to strengthen the hand in respect of the existing regulators to mean that we do not fall down a cliff.

Ruth Chambers: Ultimately, this does come down to political will and political leadership. If the amendment or an amendment is passed tomorrow on the Withdrawal Bill that will set a six-month timescale for bringing forward draft legislation. That is helpful but beyond that there will be no specific requirements in timing. Keeping up the pressure—certainly through our own stakeholders and through parliamentary scrutiny—will be important to make sure there is not any further slippage.

Q23 Anna McMorris: I wanted to come in briefly, going back on the devolution aspect and picking up on what my colleague was asking you and how a body can be workable across the nations of the UK. We know that Wales, for example—and as a Welsh MP I have had conversations with the Welsh Government on this—can lead the way on things, putting pressure on the UK Government; that is in the past. Historically that has been on carry bags and waste recycling targets.

I would appeal to you to look at how in the round devolution and working across the nations can work together rather than this being one single body. We need this to look at how the demands push that fundamental change that we need to see at UK Government level. We are saying there



HOUSE OF COMMONS

is conflict of UK Government and English Government. I would like to hear your response to that but also to appeal to you to have those conversations as we do—and I am sure my Scottish colleagues do in Scotland—but with the devolved Administrations.

Ruth Davis: That is a good challenge that you have put. The RSPB operates over all four countries of the UK and my Welsh, Scottish and Northern Irish colleagues would and do say to me there is an enormous amount of difference between Governments. Coming together on an understanding of the basis of the devolution settlement to have a conversation about how they can add value to the existing situation and any sense in which there has been a parachuted-in, top-down response that says, “We must do this as a single enterprise”. What we have been trying to do as a responsible set of civil society bodies is encourage co-operation, which is a fundamental principle of how any kind of environmental governance works, for all of the reasons that my colleagues have stated, because of the lack of respect of borders in that context.

What is the extra value of having an institution that can operate to a certain extent at a UK level? That is probably the starting proposition. It absolutely ought not to be effectively a limit to ambition. I do not think that is the intention in having a conversation about co-operation. It would be a ludicrous state of affairs if we created a governance body within the UK that effectively created lowest common denominator. We clearly need to avoid that. On the other hand, there are certain things where we still see there being some essential UK components—transboundary issues being one; efficiency and level playing field being others.

I could also see the great value of the contributions that colleagues from Wales, Scotland, Northern Ireland would make to ensuring that we were doing the right thing under our relationship with the European Union on a trade basis, but also setting the most ambitious possible international goals.

I agree with you. We will put those conversations to each of the four Governments of the UK, definitely try to think about where the dynamism comes from in devolution and not just where the limits are. We would also encourage the four Governments of the UK to recognise the fundamental requirement for co-operation as the essence of delivering strong environmental governance. We cannot get away from that. It is a very basic thing and we would always say we put biogeography before we put any form of human governance system. In the end, we live on islands with common biogeographical problems.

Q24 **Anna McMorris:** On the level playing field issue, that was put to me when trying to implement Welsh Government legislation on carrier bags. That was an argument against on carrier bags, on waste and recycling targets, on environmental targets. The level playing field was an argument coming from England that was put to me when I was in the Welsh Government.



Nick Molho: There are two aspects. First, it plays to the point Ruth was making that collaboration is about setting as ambitious a floor as possible across all four nations, certainly not a ceiling, and devolved Administration should be able to go beyond it. The argument of the level playing field—and we have that at the moment when you look at the product standards that are set on energy efficiency at the EU level—it is about making sure that at the very least you have the same minimum standards across all four nations but going beyond can often be desirable on environmental and economic grounds.

I see collaboration as a way of setting the floor, not the ceiling. But I would also go back to the point I was making previously, which is that from a business perspective the more collaboration you can have across all four nations the more this will translate, not only into a better level playing field but also in reducing the cost of compliance with four completely different regulatory regimes. It can also provide a much clearer long-term sense of policy direction, which is what we want to aspire to.

Ruth Chambers: This is not about constraining ambition at all. Some of the things that the Welsh Government have done, like the wellbeing of future generations, are truly inspirational and that should continue in the future. We would certainly want to work with all four Governments to find a solution that delivers those good environmental outcomes but also works for citizens, wherever those citizens live across the UK.

Chair: Thank you all very much. We appreciate your time to day.

Examination of witnesses

Witnesses: Professor Maria Lee, Professor Susan Owens OBE, Professor Charlotte Burns and Jill Rutter.

Q25 **Chair:** I welcome the second panel. I think I am right in celebrating our first ever all female panel, so we are delighted to have you with us. This is a first for our Committee. For the purposes of *Hansard*, please introduce yourselves from left to right, starting with Professor Lee.

Professor Lee: My name is Maria Lee, and I am Professor of Law at University College, London.

Professor Owens: My name is Susan Owens and I am Emeritus Professor of Environment and Policy at the University of Cambridge.

Professor Burns: My name is Charlotte Burns and I am a Professorial Fellow at the University of Sheffield.

Jill Rutter: I am Jill Rutter. I am not a professor. I am Programme Director for Brexit at the Institute for Government's independent think tank. I was also formerly, but quite some time ago, director of strategy and sustainable development at the Department for Environment, Food and Rural Affairs.



HOUSE OF COMMONS

- Q26 **Chair:** Thank you all very much. There will be another bell in about three minutes, but do not worry, it is just signalling the end of prayers and the start of the working day, which is likely to stretch quite a long way into the evening for us tonight, one way and another.

Professor Lee, can I begin with you? You said the consultation's wording on environmental principles is too weak. Have you seen the wording to the amendments that have been put down for tomorrow?

Professor Lee: I do not have it in front of me but the wording of the amendments is still quite weak. There are two elements that need to be addressed. One is who the principles apply to. The principles should apply to all public bodies, not just central government but to all public bodies. That is exactly what happens at the moment within the European Union. It is a routine part of administrative decision-making at all levels, right down to the street level, to apply the environmental principles. The first thing is the who. The second is the how, and "having regard to" is very weak. Government could have regard to the environmental principles, conclude that they stop Government doing what they want to do and simply not comply.

My preference would be to see legislative language requiring all public bodies to act in accordance with the principles, but we could equally say to comply with the principles to apply the principles. The principles are binding in EU law, so to fail to do that would be a big backward step.

The reason this becomes difficult is because people assume that the principles are going to just make Government do things all the time. Principles rarely provide a single right answer. If there is a single right answer you probably did not need the principles to get there. It was obvious anyway. The principles shape and guide the exercise of discretion by administrative decision-makers. They shape and guide the exercise of the discretion. The legislative language always takes priority and you can look at any of the European Union cases. The principles do not trump the legislative language. The principles guide the application of the legislative language. Those two elements are important: who the principles are applied by and what those bodies have to do with the principles.

- Q27 **Chair:** At the moment it applies to all public bodies in the UK and your concern is under "having regard to" it would not apply to all public bodies; only national government, not local, not the quangos?

Professor Lee: The consultation paper quite explicitly says the principles will apply just at central government and they will not apply to individual decisions. They apply to individual decisions at the moment; it is quite straightforward.

- Q28 **Chair:** Also in your evidence you say there should be a statutory procedure by which the statement is initially established and subsequently amended. Can you talk us through a bit of that?



Professor Lee: First, the principles should be listed in statute rather than just left vague in statute. The national policy statement on principles will be absolutely crucial. That is what the courts will be applying, that is what all our administrative bodies will be applying, that is what the new environmental body will be applying. The language used in the national policy statement is extremely important here. We are sitting here saying there should be a precautionary principle, but until we see the language of the national policy statement we cannot be absolutely sure. The language of the national policy statement should be subject to very wide consultation, and it should also be subject to parliamentary approval. The only way to ensure that is to have those procedural commitments in the Principles and Governance Bill that we are promised.

Q29 **Chair:** Ms Rutter, what are the practicalities for Government if they are to “have regard to”?

Jill Rutter: I am trying to think this through. It is quite interesting, having tried to apply principles. In practising government, it probably will not make huge amounts of difference whether it is “have regard to” or “apply”, particularly with what Professor Lee was saying about it is a legislative language. When I was at DEFRA we had various attempts to impose sustainable development duties on different sorts of bodies with different degrees of impact. One of the problems there with a principle like sustainable development was we found a lot of government was saying, “We are applying the principles for sustainable development, we are just emphasising the economic aspect of sustainable development over the other aspects” so these things become potentially quite elastic.

There is an interesting trade-off that did not come out in the first session between the severity of the duties and penalties you apply on Government and the level of ambition that Government will therefore decide to commit to. The more you stack up the penalty side for non-compliance the more you incentivise governments in a risk-averse environment to be relatively unambitious. That is quite an interesting trade-off to think of about how that would work.

In principle, I would go with “have regard to”, as a former civil servant, rather than “directly apply” but that would be interpreted every way. We have tried to do things where people have to produce impact assessments to show how they are applying principles but those become tick-box exercise and things like that. The interesting thing is what is the degree of political commitment to make these things real rather than what is formally in some language that 10 years on people will forget they signed up to.

Q30 **Chair:** What about the how? Obviously, this is about things being justiciable. Where are you on it applying just to national government, not arm’s length bodies and local government authorities?

Jill Rutter: I was slightly surprised that the Government—not that I am an expert on—was so constraining on this. I thought it would logically



HOUSE OF COMMONS

apply to the public sector, including arm's length bodies and local government, but it is not a thing we particularly focused on. I defer to my more illustrious colleagues on that.

Chair: Do we have any responses to Ms Rutter's approach to "having regard to"?

Professor Owens: I am not sure it is a response but I have some concerns about the concept of principles, as set out in the consultation paper. A principle ought to be rather sparse and it ought to be upheld, even when it is unpopular. One thing that bothers me is the sense of people almost voting for principles in responding to the consultation; a popularity contest for principles does not seem quite the right way of thinking about them.

Clearly, the paper is keen for there to be flexibility about principles so that they might be updated in the light of scientific advances or new legal knowledge or other developments, such as economic developments. It seems to me that if the principles are suitably sparse they should not have to be changed in the light of new scientific knowledge, for example. New science might help you decide when it is appropriate to apply the precautionary principle but it should not change the principle in itself.

I agree with Maria Lee's arguments that the quest for flexibility by not having them set out in statute seems somewhat to misconstrue what a principle ought to be.

Q31 **Chair:** Professor Burns, do you think the right principles are being included?

Professor Burns: There is one obvious one missing, which is the principle of protection, which is included in the EU treaty, that requires the EU to pursue a high level of environmental protection. It seems to me any discussion of the precautionary principle, or the polluter pays principle, should be within a context of the highest level of environmental protection. This comes back to the discussion from the previous session about the relationship across the devolved nations as well. If you want to avoid a race to the bottom, then you should all be aiming for the highest level of environmental protection. I would like to see that principle included.

There are other principles one can include. I saw that the Climate Change Committee suggested in a letter the inclusion of using the best available scientific evidence, which was one that I thought was so obvious it did not need stating, but I suspect on reflection it might need stating and including. For me, those are the two I would like to see included, in addition to the list that is provided in the consultation.

Q32 **Chair:** Any comment on the "have regard to" idea?

Professor Burns: I am not a lawyer or a civil servant. My suspicion would be to go Maria's way—"having regard to" sounds less strong—but if



HOUSE OF COMMONS

Jill has practical experience of it, when it comes down to it, it does not mean that. I do not know. It would be interesting to know if there is any litigation over these differences in wording, and if that makes a difference when it comes to enforcement processes because that is where it will count.

Like Jill, I am slightly surprised at the narrow focus of the consultation document and these principles should be applied to arm's length bodies and local authorities as well because they implement environmental policy. They are the ones at the coalface. It would seem odd if they were not covered by it.

Q33 **Chair:** Professor Lee, would you like to respond?

Professor Lee: Moving to "have regard to" would be a major step back compared to our current membership of the European Union, and that is one of the focuses here. That is one thing to bear in mind.

The second thing that is useful is the House of Lords Select Committee on the Natural Environment and Rural Communities Act took a lot of evidence over the winter on the "have regard to" biodiversity duty in that Act. There was a lot of evidence that suggested that is too weak. There is litigation over the "have regard to", the duty to protect biodiversity. There is a lot of litigation on that. It barely ties decision-makers' hands at all.

Q34 **Chair:** What is the phrase that we are abiding by under EU law through our membership?

Professor Lee: What we are looking at, the treaty simply says that environmental policy and law shall be based on the principles. It is not contained in the treaty or in the legislation. But what happens through many years of judicial interpretation is that when member states implement EU environmental law they do so in accordance with these various principles. The precise wording will vary, depending on the case you are looking at and the exact area of law. But there is no doubt that a member state would be in breach if its local planning authorities fail to apply the precautionary principle when implementing the habitats directive.

Q35 **Chair:** Thank you, that is helpful. What about the policy statement? How could that be developed and scrutinised? Does anybody have any thoughts on that? We have talked about the legislation and said that they should follow on from that this policy statement. Do we have any thoughts on process, apart from Parliament once again being required to look at it?

Professor Lee: My view is there should be a broad, wide consultation, plus parliamentary approval. To go back to the discussion you were having in the first session: this requires joint ownership by the devolved Governments.



Q36 **Anna McMorris:** To ask Professor Burns initially: how far do you believe the Government's proposals on mitigating risks found in their Brexit and environment risk assessment report go? What are your views?

Professor Burns: Not far enough.

Q37 **Anna McMorris:** Would you care to comment on your opinion on that?

Professor Burns: We did quite a sensitive report on risk assessments and there is an ongoing concern that Martin expressed in the last panel that when it comes to environmental issues these will end up being quite far down the pecking order. As Martin also suggested, there is a lack of transparency about how DEFRA and other Government Departments are putting in place contingency planning for the different outcomes. I have some ongoing concerns about the thoroughness and lack of certainty that is available to Government to make a detailed risk assessment.

Q38 **Anna McMorris:** How should the body complement the existing statutory bodies and roles of the courts?

Professor Burns: This is an interesting question. It strikes me that the consultation is trying to strike a balance between not stepping on the toes of existing bodies but in doing so ends up framing what the body will be responsible for far too narrowly by only focusing on Government, and I would like to see it have a wider focus.

Anna McMorris: Potential overlap conflict, would you—

Professor Burns: Are you talking here about the Climate Change Committee, where there is this idea that the Climate Change Committee will sit outside the scope of this body? That seems to me quite a bizarre decision, given that the environment is holistic in their overlap between different policy areas. The Climate Change Committee itself has come forward and said that it does not believe that climate change should be excluded from the remit of this body and there needs to be co-operation across the Climate Change Committee and this new body as it comes forward. That is a very sensible approach and there will be processes and mechanisms that can be put in place. I can feel that Jill has something she wants to add to that point.

Jill Rutter: What is interesting about this body is what is it trying to substitute in what we lose, in oversight and how does it help. It is one of the points that came out from the earlier panel: has it helped form UK environment policy over the long term for the future and it has to do both roles? First, it can never substitute for what you lose by leaving the EU—whether you think that is a good or a bad thing—because we do not have the mechanisms to entrench a body in the way in which the European Union and the Commission are entrenched until we decide to leave the whole set of treaties, and so on.

One of the big problems—and Martin spoke from experience—when I used to sponsor the Sustainable Development Commission, we tried to



HOUSE OF COMMONS

turn it into a watchdog on Government performance. It got itself abolished in 2010. Remember that the Government's Regulatory Reform Act in 2010 contained a long schedule of bodies that the Government wanted to potentially abolish through secondary legislation that was seen often in the House of Lords.

Any body is always vulnerable, if it is a UK body, because we do not have a constitutional way of saying this thing is for ever. That is one of the interesting things about how bodies manage to establish and achieve longevity because a lot of public bodies do not do that. They become so annoying and wearisome to Government that they manage to lose support among their potential stakeholder base and find themselves getting abolished. That is an interesting balance.

One of the reasons why you might want to think twice before you say, "Let's absorb the Climate Change Committee into this" if that was the way you were going, is that does seem to have established itself and survived what you might describe as a difficult second chair; third, fourth, fifth Secretary of State set of issues and seems to be there. If it's not broke don't fix it. They are some of the big challenges for that sort of body.

One of the oddest things in the Government consultation, and the one that I thought was one of the most objectionable, was the Government said they would report themselves, DEFRA would report on progress towards meeting the Government's environmental objectives. We used to do that when I did sustainable development. I discovered loads of my team were spending their life auditing the Government's performance on sustainable development but it all had to be collectively agreed. That meant all it was was a bunch of bland stories from Departments about how wonderfully they were doing on things and completely ignored loads of areas where they were not doing things. If this body does nothing else you would want it to be the owner of progress reporting on: is the Government living up to its environmental commitments, hopefully, as expressed in whatever legislation comes through? That strikes me as a starting point for this body before you get to the other powers that might happen.

Q39 Anna McMorris: Before anybody else comments, I think that is a very interesting point to take forward. What I am trying to get at is where you think there are other mechanisms that may be needed to drive that environmental accountability. For example, going back to my question to the earlier panel, in Wales we have a Future Generations Act where we have a Future Generations Commissioner that is enshrined in law and that is just for public sector bodies, where decision-making has to take account of that law at its very heart. That enshrines sustainability at its heart. There are problems with that, but do you see something like that working across the UK? Do you see other particular things that have been omitted in this consultation document?



Professor Burns: My first response might be, do I see it working across the UK in an ideal world? Yes. If you are thinking about accountability mechanism and we are thinking about this operating across the UK, you would need to have accountability not just to this Parliament but to the devolved Parliaments as well. If they were going to be holding the body accountable for something that had been decided would be the aim for this environmental body, presumably that would need to be agreed by those Parliaments as well. The politics then gets in the way of what the ideal might be in terms of accountability mechanisms.

Jill Rutter: The Sustainable Development Commission used to work on a four-nation basis; we would have commissioners from Scotland, Wales and Northern Ireland. It worked with Cynulliad Cymru in Wales quite effectively and I thought that was a strength for being able to gather data and do some benchmarking of each Government's performance. That is quite a powerful incentive to act. The Committee on Climate Change shows you do not have to have identical approaches to have a body that can report on progress. There are very interesting missings in this on environmental governance, which is what is the links of this body. It talks about being accountable to Parliament but it is an interesting further thing about environmental governance more generally. It says nothing about how members are appointed, what is the role of Parliament in appointing bodies. It talks about making it independent. It does not say anything about how it proposes to make the body more independent, and that is quite a difficult trick to achieve in our system.

There is a really interesting question about the role of this Committee going forward on Government environment policy and the more general ecosystem that we have about holding the Government to account and the environment. When the EAC was established it was intended to be the Public Accounts Committee for the environment, with the resourcing and so on to be able to hold the Government systematically to account. It is very interesting if you are looking at the future landscaping environmental governance, what is the role of the EAC and parliamentary accountability as well as what will be, under those set of proposals, a government quango. It is an interesting set of issues to look at in the round, rather than just focus simply on this body.

Professor Burns: One of the things that we said in our written evidence was it would be great to see EAC reaching out to equivalent Committees in the devolved nations to see if there is capacity to set the agenda a little bit. We had a conversation in the previous panel about the need to bring together members of the different Governments and members of the NGO community in civil society. It would be great to see that happening at a parliamentary level as well, particularly if there is a common interest in holding Government to account and Governments to account for caring for the environment, which, as we have already discussed, is a transboundary issue.

Q40 **Anna McMorris:** As I touched on earlier, there is a difference here and



HOUSE OF COMMONS

there is a danger of mixing UK Government and English Government. That is our problem, which I think you need to address as well as any other stakeholders, as well as parliamentarians holding Government to account.

Thank you for that. Going back to your point, Jill, on sustainable development and sustainable development commissioners and how effectively that worked, we saw that did not work in Wales and that is why we moved on to the Future Generations Act, enshrining future generations and therefore sustainability in law in Wales because it did not work to hold Government to account. It was put aside and was purely a tick box, and that is what we wanted to avoid. I can see in the consultation here that it is just a tick-box exercise. How do you get past that? How do you reach across to ensure that what you want Government to do is enshrined in whatever body that is going to look like and is going to work across those devolved nations but also in England?

Jill Rutter: I think Wales is an interesting position. The Welsh Devolution Act gives the Welsh Government a duty on sustainable government, which is transferred down from the Westminster Parliament to the Welsh Government. It is quite an interesting one that Wales asked for that to be in its Devolution Act and that obviously provides a different context.

One of the things for the devolveds to think about this body is that if the devolveds believe that they are likely to want higher environmental standards than the UK/English Government, I think it is really interesting because it is a similar argument in some ways to the level playing field with the EU. The English economy is quite a big player. You can get away with diverging a bit on something like carrier bags or whatever where people are not going to all go and do their shopping the other side of the border to avoid a 5p charge on carrier bag. It is an interesting challenge to the devolveds about putting floors under environmental performance if you are at all worried and you want some co-governance with where England potentially is going. It is not a one-way street; it is an imposition.

The bit I absolutely agree with the earlier panel on is the idea that you create an England UK body and then say to the devolveds, "This is a body. Do you want to come in and pay and play? We have designed it here" or do you genuinely co-create? This has to be a genuinely co-created four-nation body if it is going to stand a chance of working across that. We will want some glue; we will want data collected on a comparative basis. I think the body would have useful things to say there. They could potentially very usefully highlight where there are genuinely cross-border issues. We will not have huge amounts of expertise and it makes sense to bring that expertise together. It should have a relationship with any bodies and have regard to other bodies that are doing similar tasks in the devolveds. It would be a shame if we set out with this as an England-only body.



Professor Burns: I agree, I think it is really problematic that at the moment it is an England-only body. It is also problematic that it was announced and then the subsequent announcement, "And we will have a conversation with the devolveds" and so one got the sense that there is a slight time delay before the devolveds are getting information about how things are evolving here in London.

The one nation that we have not talked about—there was a discussion in the last panel about four Governments but there are three Governments and Northern Ireland does not have a Government. This could be a real game-changer for Northern Ireland because it does not have an independent environment agency at the moment. Those functions rest within DAERA. This could provide a huge driver for environmental goals within Northern Ireland. Particularly for Northern Ireland, because I accept that Wales and Scotland feel that they have higher environmental standards and ambitions, this could be a real driver potentially and it is a shame we don't have that Northern Irish voice at the table at the minute.

Professor Owens: I agree also and would like to add two points. The first is that the former Royal Commission on Environmental Pollution was also a cross-UK body but I would say it was not always easy to operate in that way and it needed—and needs for the new body—a great deal of thought about how to get the maximum benefit out of that sort of operation. Some other points have been made on that.

The other point I would like to make is that not all overlap in function is completely undesirable. In the past it has often been very powerful when different bodies have pointed in the same direction in environment policy. The reinforcement has been useful. While some overlap would be difficult, overlapping advisory and scrutiny functions can be quite productive.

Q41 **Caroline Lucas:** A potentially quick question about the exclusion of climate change and some of the issues around that. On the one hand, exclusion of climate change means its enforcement is potentially weaker compared to other aspects of environmental law; on the other hand, how can it be incorporated without impacting on the existing law and governance in that area?

Professor Lee: On the scope of the new body, you have the what and the who and they are both quite tightly related obviously. It makes no sense—I haven't heard anyone explain why we would exclude climate change from this body. The letter from the Committee on Climate Change seems to be completely unconcerned about this body operating in the area. The areas are completely entangled. You cannot separate climate change from all other areas of environmental law. The Committee on Climate Change is very specifically concerned with the Climate Change Act, so it advises on carbon budgets and it monitors carbon budgets. What I would imagine is that the two bodies, the Committee on Climate Change and the new body, would choose to be required to work together to be efficient.



Generally, what happens in those circumstances is that the most specialist body does the scrutiny and does the advising. That would be the Committee on Climate Change for the Climate Change Act. It might be the new body if we are concerned with the way planning law affects climate change. The new environmental body crucially will have greater enforcement powers. There are other questions of scope, not just climate change, although that is clearly the largest. The other big area is planning law, which I think sits very centrally within the scope of this body and currently the consultation paper is ambiguous at least on the role of the body in the planning arena.

Q42 Mr Philip Dunne: Again, much of this has been covered in your earlier comments. Trying to think about suitable models for this body, you talked about the Sustainable Development Commission and I don't think we have heard about the Royal Commission on Environmental Pollution that was set up in the 1970s and abolished in 2011. Are there any parallels or lessons from that that could be adapted here?

Professor Owens: Yes, and I would say at the outset that in principle the proposals for this new body are very welcome. It is funny how things come around again. If we look back nearly 50 years we find Harold Wilson announcing in the House of Commons that the Queen had agreed to the appointment of a Royal Commission on Environmental Pollution to act as a watchdog. Lord Kennet, who was very instrumental in the creation of the royal commission, explained in another forum that it would provide the outside focus of inquiry and information and outside stimulus to Government that are needed.

Then, as now, what was being looked for—and this was the late 1960s, a time of environmental revolution so it was a different sort of new circumstances—was an independent environmental watchdog with scrutiny and advisory functions relating to policy and legislation. Also, similarly, the royal commission would lay reports before Parliament and expect an answer. In some senses that is being suggested for the new body.

Of course there are important differences in constitution and remit. There is not any sense in which this new body would be a royal commission. Interestingly, the royal commission had no powers in relation to dealing with complaints or any enforcement powers but its powers of inquiry and advice were rather broader than those being suggested for the new body. For example, in the Royal Warrant, the royal commissioners were given powers to inquire into any matters referred to them by Ministers—I will come back to that in a moment—or any others on which they should “deem it expedient to advise”. They could, for example, propose new policies and they could even propose changes to the policy frame, and both of those things were extremely important over several decades. The royal commission took up those powers with great enthusiasm and it interpreted its remit of environmental pollution broadly. It dealt with a wide range of environmental matters over 41 years and across 33



HOUSE OF COMMONS

substantial reports, only three of which were requested by Ministers. For some reason that power was never very extensively exercised. The commission did its own thing and even when Ministers referred matters to the commission, which they did on three occasions, the commission went way off the remit that they had been given by Ministers usually to produce something much more radical in response.

What is interesting is that the commission, for more or less all of its lifetime and rather widely, was a respected and trusted body. It is interesting to consider why. It was also very influential in environmental policy, not only in the UK but in Europe and beyond. If I may, I would suggest that there were probably five really critical attributes of that body that enabled it to be influential and also seemed to result in it being trusted widely in the environmental policy community. Probably the first and most obvious is authority; the second is autonomy or independence; the third is a capacity for sustained critical reflection; the fourth is connectivity, and by that I mean that in the royal commission's case it was extremely well networked, both into scientific communities broadly defined and into policy communities; and the fifth is some sort of stability and longevity. In the commission's case there was a continuity of form and function over four decades. All of those were important and interrelated attributes.

If I may make a few more comments on some of them in a little more detail. How does a body gain authority, which is going to be essential for the new body? Of course there is the usual way of doing that, by appointing chairs and members with the appropriate credentials. In fact, in the commission's case it was much more interesting. It was widely seen as a scientific body but in practice it was much more heterogeneous. It had a wide range of disciplines represented around the table and it always took great pride in describing itself as a committee of experts not an expert committee. It was not a stakeholder body and it did not operate in a way that was technocratic but rather it was a very reflective and deliberative, argumentative sort of body. I know that from having studied it as well as having sat on it for 10 years. Everybody could ask the idiot question and the practice, which I have called interdisciplinary deliberation, really contributed to the robustness of the commission's report because it had to bottom things out. Everybody around that table would be arguing. For me, a real carry forward lesson from the late and, in some quarters, lamented royal commission is that intellectual diversity makes critical positive contributions to the robustness of any such body's interventions. The more contested the issues, the more vital it is to have that breadth of perspective.

The other thing on authority—because I think it derived greater authority not just from being perceived as a scientific body, which it was not wholly, but from that capacity for interdisciplinary deliberation—are requirements to have time for that deliberation and therefore a body has to meet and come together with sufficient frequency to allow it to do



that. The commission met monthly over two days and that was very important.

It must also have deliberative space, so the commission did do some of its discussions in closed session. Well, it did all of its discussions and took evidence in closed session but it was also very open in publishing its findings in closely argued reports and latterly its minutes and minutes of evidence on the internet.

Just a few more comments on independence because that has come up as a very important issue too. In a sense the royal commission, like the new body, was a creature of Government. Although they were appointed by the monarch, it was nevertheless created by Government. Any body created in that way has an independence that must be circumscribed. It certainly did not have a fiscal independence because it got its money through the administration vote, latterly via DEFRA.

Why was it so widely perceived to be independent and, on that basis, trusted? I think it was because throughout its life it demonstrated, actively demonstrated, and maintained what you might call a functional autonomy. It thought of itself and acted as an independent body. It exhibited a sort of fearlessness in delivering its advice to Government. For example, it mostly chose its own topics, as I said before, and at least some of them were distinctly unwelcome to the Government of the day. It was willing to challenge and criticise, as the late Lord Ashby, its first chair, put it, it was courteously but astringently critical. It always managed to resist bureaucratic or political capture and it never seemed to become dominated around the table by particular interests. The independence that was inevitably circumscribed was nevertheless reinforced by the commission's actual behaviour throughout its lifetime.

I would just note in passing, and it might be something the Committee would want to come back to, that there is an ongoing tension always between autonomy and accountability. Tick-box interpretations of accountability are quite damaging to a body's autonomy.

In the end, of course—and I could say something about the other attributes but I have said enough—the commission was abolished and that is another very complex story. There was a whole set of reasons for that. Something that has to be considered for all such bodies is what you might call Thomas Becket syndrome. To be effective they have to be a thorn in the side of Government but if they are too sharp a thorn they may not survive.

Q43 Mr Philip Dunne: Thank you very much indeed, I think the five attributes you have mentioned have very neatly encapsulated some of the necessary prerequisites for this body. We do have examples—I set one up in a recent post—in the healthcare sector, the Healthcare Safety Investigations body, which is being scrutinised at the moment by a joint parliamentary committee, which has independence. It still has to be sponsored by a Government Department and we cannot get away from



HOUSE OF COMMONS

that if it is publicly funded. I am assuming this body you would expect to be publicly funded and there has been consistency about that. Can you see a role for being part funded by polluter-pay principles, which have been adopted across Government and many regulatory bodies are expected to be funded by those they regulate?

Jill Rutter: The Environment Agency already gets a lot of its money from the people that it regulates. It is interesting because, as envisaged, this is not a sort of direct regulator, other than of Government and Government entities, because it is looking at policy and policy implementation rather than individual offences. It is not going to be like Ofcom that levies the industry.

The funding question is very interesting. You are absolutely right that there is always the danger that if the body becomes too annoying it can either find itself abolished or it can have its budget cut. That is one reason why the Treasury Select Committee, when it did a scrutiny of the Treasury's initial proposals on the Office for Budget Responsibility, which is quite an interesting analogue body, insisted that Treasury showed the budget as a separate line because the budget is incredibly small in relation to the Treasury's overall budget. To make sure that the Treasury did not decide to hobble its capacity, it forced the Treasury to publish the line.

That is what happens in non-ministerial Departments, although I think the Government is rightly sceptical about the extremely murky accountability of non-ministerial Departments, like the Competition and Markets Authority but also bizarrely like HMRC and some others that have been non-ministerial Departments and also simultaneously executive agencies, which is completely strange because an executive agency is just part of a Department. One of the problems we have—and the Institute for Government argued this back in 2010—is that we do not have a very fit for purpose way of classifying public bodies. We argued then that we needed a new classification of things called public interest bodies, which would be the regulators and watchdog bodies. As we see governance gaps emerging after Brexit, it is very interesting whether we need to revisit and do some things that might be some protections against just depending on the statute of the moment—better entrenchment, a different relationship with Parliament—because obviously the other way of getting money is through something like a parliamentary vote. The National Audit Office and the Comptroller and Auditor General is governed by a parliamentary commission and gets its money from Parliament rather than from Government. If you really wanted independence and guarantees against Government, that might be a different route to go for this sort of body.

As I said, those sorts of questions are under-addressed in this consultation document. They also do not address the Parliament's role in appointments. Very interestingly, the Exiting the European Union Committee, in respect of the independent monitoring authority on



citizens' rights and settled status, which the EU and the UK agreed in the joint report in December on Brexit, has proposed that the Home Affairs Committee, I think, or at least a parliamentary committee, should have similar appointment rights over the governance of the independent monitoring authority to the ones the Treasury Select Committee has on the OBR. That is both positive confirmation of the three appointees to the budget responsibility accounts but also that the Treasury cannot dismiss them without getting the consent of the Select Committee. There are some really interesting issues about how you set up the governance of this if you want to bolster it against some of the concerns that Susan mentioned.

The other thing is that for these bodies the RCEP established a long track record. One of the problems is that when you are throwing something into the mix straightaway it does not have the time to establish a track record. Very often bodies derive their authority from their track record over time and build up that authority, which is certainly the case in the RCEP.

Professor Owens: In a way the most interesting thing about the RCEP was not that it was ultimately abolished but that it survived for 41 years. It had been an irritant to Government on many occasions and it had seen, in my analysis, about three serious existential threats but it had never been abolished. It seems to me, in part, that that was because at some level Government recognised the value of disruptive advice. Somehow, towards the end, one of the things that changed, I think, is that Governments had become perhaps a bit less tolerant of criticism from outside as Lord Kennet put it.

Jill Rutter: There is one interesting protection for this body if you want it. The EU Task Force 50 slides on level playing field made it very clear that they were looking at the quality of domestic enforcement as one of the things that they would be looking to in the future free trade agreement. They recognise that they are making level playing field demands of the UK, which are notprecedented. They do not look like the ones they have in the Canada agreement because they are so worried about the risk of undercutting from the UK. It is quite likely that they might, in the final deal, make some references to the UK's domestic oversight and enforcement. This again will go to the UK—and genuinely the UK rather than England only—because there will be interesting enforcement in the rest of the UK. There will be particular sensitivities obviously in Northern Ireland.

It is quite interesting that that may be a way of giving a bit more entrenchment, if that is a treaty commitment, that we have things. They will be interested in the independence and quality of enforcement and quality of powers and independence as a reassurance that the UK will not be—what they call—regressing on current standards that they put in a non-regression clause. It is a very interesting additional dimension to this in the context specifically of Brexit, which does not come out of that but it



HOUSE OF COMMONS

is very clear that what we do here is being watched by Task Force 50 and Monsieur Barnier and his team.

Q44 **Chair:** What you are saying is we could end up guaranteeing our UK environmental standards through an EU treaty post-Brexit?

Jill Rutter: Potentially.

Chair: Perfect. A brave new world we are entering.

Jill Rutter: The alternative would be the ECJ, so they would be saying, depending on the quality—it depends how far we negotiate something on a level playing field. We may just say that, “You are cherry-picking, you do not like our cherry-picking, we do not like your cherry-picking, we do not do it”. But it is an interesting thing that this is not just a UK domestic debate. It is also being watched and is tied up with the future relationship negotiations. It will be very interesting to see where that goes.

Q45 **Chair:** I have a question, before we move on to our final question, for Professor Lee, which we slightly skimmed over before about the scope and remit. The consultation states that the new body should not have any enforcement role in relation to international environmental law. Obviously, we have environmental law on F-gases, which this Committee has looked at, which is we meet our obligations through the Kigali amendment to the Montreal treaty, but also through the European Union. Do you have any thoughts, or do any of the panel have any thoughts, on whether this new body should look at those international treaty obligations because if it is not this body then which body is it?

Professor Lee: My view is that the body should focus very much on implementing environmental law. It is different from the royal commission; it is different from all the other things we are looking at. It scrutinises and then enforces compliance with environmental law. Given how much more important international environmental law will be once we have left the European Union, it seems odd to me that that could be kept out of its remit. However, if international environmental law is not binding on the public bodies that are being scrutinised, I do not see how the more powerful enforcement activities could operate. It would be more by way of advisory notice, or whatever, with respect to international environmental law that has not been implemented in domestic law.

To put it straightforwardly: yes, they should have the monitoring role but if the international environmental law is not part of domestic law their advice should be merely advisory rather than binding.

Chair: This would be retained EU law, which is where we are back to—

Professor Lee: If it is retained EU law it is domestic law; no problem. But as we go into the future and we are agreeing environmental treaties without the protection of EU law, it may or may not be part of domestic legislation.

Chair: Does anyone have any comments on that? We will move to our



final question.

- Q46 **John McNally:** It has been an extremely interesting debate and the benefits to coming last is that most questions have already been covered. It has been refreshingly honest the way in which everything has been answered. I do not know if it is a watchdog or it should be more a guard dog that you are speaking about here, but if you are looking upon this as an impartial observer, we should look at how the same body is going to operate. So far, the papers have said the Government are looking at mostly an England-based policy. How would you propose that the Scottish, the Welsh, and the Northern Irish institutions be included in the development of this overarching, underpinning, robust framework of a policy or the UK-wide guard dog that is going to protect the environmental issues? Perhaps Jill would be the best place to answer that.

Jill Rutter: Ideally, what you would have done is initiate a conversation for three devolved Governments and have a Northern Ireland civil service observer—whatever arrangements we do there—to say if we were designing this what would this body look like, what are the domestic institutional arrangements in Scotland and Wales that we need to have regard to or take account of. As Ms McMorris was talking about, there is a Welsh Future Generations Commissioner, the National Performance Framework in Scotland, the different bits that you would want to have regard to. What would it do in common and on a UK basis? How would it relate to the separate Parliaments, which is clearly a very important issue? The points being made about parliamentary co-operation are interesting.

One of the big challenges of devolution after Brexit report—I have a report here that we produced called “The devolution after Brexit”—is that the initial devolution settlement devolved in two ways. One is where there were genuinely services that could be run independently of each other, like health or education—in Scotland where there is already a very strong tradition of running things very separately—or in areas where they could be run because there was this comforting EU framework that constrained the scope for divergence. That is why we are in a new place with devolution after Brexit, because we are taking away that EU set of frameworks that now it is incumbent on the four nations between them to work—

- Q47 **John McNally:** Not associated, they are more aligned with the EU levels of environment and something else, so there is a dilemma going to happen here immediately.

Jill Rutter: All the countries are, in that sense, aligned. They have all had to take the EU frameworks and implement the EU frameworks. Once you take away the EU framework there is an interesting question about where do you want some positive divergence upwards. That is very interesting. The Secretary of State for the Environment talks about what this can trigger, we can go upwards. Most EU frameworks only ever put



floors under things. There were very few areas where you are constrained and to how much you could exceed the EU framework, as far as I am aware.

It is very interesting but I do think that it is in the interest of the Scottish and Welsh Governments to try to co-create, whether there are legislative frameworks in very few places, whether there are non-legislative frameworks to co-create those, because Scotland could find its environmental capability constrained by what England does with the loss of the EU framework. There is a clear interest in doing this on a much more collaborative basis. But as we say in our report, all our institutions for collaboration that we have done, the JMCs, and so on, are not fit for purpose for this new arrangement.

There is also another very interesting thing, which is trade remains a reserved matter but the way in which the UK Government approaches trade policy after Brexit—assuming we have more discretion on that—will also condition those things. This is a very interesting question about how do the devolveds influence and be involved properly in formulating those initial trade mandates.

Professor Burns: The issue here is one about timing. Ideally, we would have more time and there would have been more time to engage in a proper process of co-design. DEFRA says in this document that it wants to co-design something with the devolved nations but you cannot co-design if you are the first mover, particularly not in the current political context. There is a real issue here about that the current institutions are not fit for purpose and there is a bit of a political stalemate about how we move beyond that. It is the environment that suffers if we do not move beyond that. It requires some very grown-up politics. I do not know which of the nations is going to be grown-up first. Wales seems to be moving into space where it is prepared to take a lead and maybe bring the other parties together. Again, the absence of a Northern Irish voice is potentially problematic here as well given, as somebody said, the importance of the Northern Irish/Irish border question as well.

If I could go back in time, I would do things differently with all the nations around the table when this is being discussed, instead of it being sent to the devolved nations after the fact. That is problematic. The idea would be to have a genuinely co-created policy identifying where it makes sense to work together and where it does not, with everyone being involved in that conversation instead of the UK Government saying, "This is where we think it should be" because that instantly puts the other Governments' backs up.

- Q48 **John McNally:** If we are able to have these difficult conversations sooner rather than later, from what you are describing at the moment it should not be beyond the wit of politicians to get around a table and solve these issues. We obviously have separate legal systems in Scotland to the rest of the UK. How are we going to overcome a problem like that?



HOUSE OF COMMONS

Professor Lee: It has not been a problem so I cannot see what is novel about that as an issue post-Brexit. There is the challenge that at the moment EU legislation on the environment holds us together and that goes, and we have to decide what we want. Do we want minimum standards? Probably, yes. Or maximum standards? I do not think so but that might be something we think about. There are separate legal systems between Scotland, England, and Wales. I do not think there are novel issues there raised by leaving the European Union, save the points that we have already made about losing EU environmental law as a common framework to go into the new language, I suppose.

John McNally: Once you go around the table and you start speaking to each other, probably things start to come out that could be problematic, so the quicker we start the conversation the better. Thank you very much.

Chair: Thank you all very much. We too are out of time but it has been an absolutely fascinating discussion and the interests of the environment will be greatly served by this morning's session. Thank you all very much for your contribution.