

Environment, Food and Rural Affairs Committee

Oral evidence: Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill, HC 1893

Wednesday 30 January 2019

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Members present: Neil Parish (Chair); Kerry McCarthy; Dr Caroline Johnson; Mrs Sheryll Murray; David Simpson; Angela Smith.

Questions 1-70

Witnesses

I: Professor Maria Lee, Professor of Law and Co-Director, Centre for Law and the Environment, UCL; Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel; David Wolfe QC, Matrix Chambers; William Wilson, Barrister and Director, Wyeside Consulting Ltd.

Written evidence from witnesses:

[– Professor Maria Lee](#)

[– Wyeside Consulting Ltd](#)

Examination of witnesses

Witnesses: Maria Lee, Daniel Greenberg, David Wolfe and William Wilson.

Q1 Chair: Good afternoon. Thank you very much to our panel of witnesses for coming. You have a great experience in law and many other aspects, so it is great to have you here, because we are doing the pre-legislative scrutiny of the Environment Bill. What I would like to say to you right from the start is this: what you think is good, say is good; what you think is bad, say is bad; and say what you would like done about it, if at all possible, because that is the whole idea of legislative scrutiny. All of us have a reasonable view on law, but do not forget we are not lawyers, so it is just a gentle reminder that we are laypeople at the end of the day, albeit I suspect we have a reasonable understanding, hopefully, of law. Starting with David, please could you introduce yourselves for the record and then we will get on with it?

David Wolfe: My name is David Wolfe. I have a day job as a barrister and I have been doing that for 25 years, which involves a lot of judicial reviews of environmental decisions by Government and other public bodies. In parallel to that, I have experience on NDBP-type bodies, which is completely parallel and gives me an insight into the questions of independence of those kinds of bodies.

William Wilson: I am William Wilson. I am a barrister and a director of Wyeside Consulting. I am also a senior environmental and regulatory lawyer with Prospect Law Ltd. I have been doing environmental law for about 25 years and used to work in DETR/Defra.

Professor Lee: I am Maria Lee. I am a Professor of Law at University College London. I have been studying EU environmental law for many years, and the implications of leaving the European Union for environmental law for a few years.

Chair: That brings an interesting insight.

Daniel Greenberg: I am Daniel Greenberg, Counsel for Domestic Legislation, House of Commons.

Q2 Chair: Thank you very much and it is great to have you all here. The first question is coming from me. The Committee has recently scrutinised a lot of primary legislation, with the Agriculture Bill and Fishing Bill. Given the level of activity in Defra at the moment, does this Bill read as though a well thought-through piece of legislation. That gives you quite an open goal in the first instance.

Professor Lee: We have all probably been a bit short of time for calm reflection on these matters recently. There are some things that are extremely positive about the Bill. Defra is committed to improving it from where it is at the moment. There are some governance provisions in the



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Bill that could have a very powerful impact on the way we do environmental law. I hope we have time to talk about clause 15, which is the implementation of environmental law. It would be easy to overlook, because it looks like quite an innocuous little clause, but if suitably strengthened it could be very powerful for the way we do things.

The other thing I will say by way of introduction is that the provisions on principles fall very far short of what we were promised and they fall very far short of the situation we currently enjoy in the United Kingdom as members of the European Union. The provisions on environmental principles could easily be improved dramatically from where they stand.

Q3 **Chair:** We have questions directly on the OEP. Basically, you are saying there is good in it, but it needs quite a bit of tightening up.

Professor Lee: Absolutely

Q4 **Chair:** The whole purpose of what we are trying to do now is to feed that back into the Bill team. Daniel, I am going to bring you in next. You are vastly experienced at these things.

Daniel Greenberg: I agree with what you have just said, Chair. A key issue for the Committee will be to explore with the Department what I call the gearing mechanism between these lovely words—we have great words—and the real world. In principle, having a Bill that is all about statements, principles and reporting to this person or reporting to that person is all fine and does not do any harm, or at least it does not necessarily do any harm, but it certainly does not do any good on its own. This is almost the beginning of the Bill in those terms. There is massive scope, and the enforcement provision is one example. How are you going to bring these lovely high-level statements in the policies so that they are going to make a difference to specific environmental sectors on the ground? That is really where you are starting.

Chair: Yes, I am inclined to agree with you.

David Wolfe: I will concentrate my answer, if I may, on the OEP. I know you have another question on that, so I will only give an introductory observation. I welcome the principle of it—I think everybody does—but the proposal is quite an unambitious version. There are real issues about the independence and governance of it. In terms of the enforcement mechanisms, I read in the surrounding materials that the Department thinks this will reduce the need for environmental judicial reviews. I do not see that at all, because this is a time-consuming, bureaucratic and probably quite weak enforcement process that barely matches what the Commission does.

Q5 **Chair:** It probably could increase it, could it?

David Wolfe: It could easily be tweaked to improve it. You have a role in that.

Q6 **Chair:** We will talk more about the OEP in a minute. William, what is your



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view? You are a bit of a poacher turned gamekeeper. Spill the beans, please.

William Wilson: I welcome the fact that there is a framework. I welcome all of the work that has gone into it so far. It is in need of a lot of improvement. It does not yet do what we have been promised, which is that it would bring across the *acquis communautaire*, the body of European environmental law, into English law. It does not yet provide an adequate assurance of really effective enforcement by a properly independent Office for Environmental Protection.

For me, the real test is whether the UK and in this case England is going to have the will, and by this Bill the means, to enforce environmental laws effectively after Brexit. This is one of the most important tests of the quality of our legislation after that. Some question whether we have the will to enforce it fully at the moment, for example, if you think about Volkswagen, air quality and illegal waste sites.

Q7 **Chair:** Yes, in my county we have been very weak on that one. Is that due to the fact that our law is weak, or is it the fact that we have not applied it? Which is it? Even Germany has managed to get money out of its own vehicle manufacturers. We seem to have completely not got it.

William Wilson: It has a lot to do with the will and determination to enforce the law that you have, however you do that. By Brexit, we are certainly going to lose quite a lot. We lose the treaty underpinnings in Article 191. We lose enforcement by the European Commission, enforcement by the Court of Justice, the sanction on member states of fines, the legal requirements to have effective, proportionate and dissuasive penalties, and the rights of individuals to complain. We have a lot to replace in this Bill, however that is done.

Chair: Hence, like I said, you are all here and hence we are doing this. In a minute, when we get to those questions on the OEP and others, I want to run a scenario past you, with the situation over air quality. ClientEarth has taken the Government successfully to court three times. They have been in the European court and have been forced to actually change and put other policies in place. We need to run that scenario past you all, to see whether, under this proposal, the Government could be held to account in the same way. We will deal with that one in a little bit of time.

Q8 **Angela Smith:** I just want to move to the issue or the suggestion that we have a policy statement on the environmental principles in clauses 1 to 4. Do you think that this suggested policy statement will match the legal protections granted by the European Union equivalents?

Professor Lee: No.

Angela Smith: That is a very good, straight answer. It is what I like.

Professor Lee: It is a very simple answer, really. In EU law, as listed in the treaty rather than as listed in the draft Bill, the environmental principles have legal status. They are legally binding. They are legally



binding on all public authorities, not just Ministers, in all of their functions when relevant, so not just on high-level policy. What the Bill does is take that legal provision, that legal settlement, and turn it into a pure policy settlement. It would be completely plausible to have a provision in the Bill that says, "All public authorities shall apply the environmental principles in the exercise of their functions". Then it would have a proper legal underpinning.

Angela Smith: That is all it would take.

Professor Lee: That is all it would take. In any event, even if it stays as a matter of policy, it needs to be underpinned by law. At the moment, the policy is entirely in the Secretary of State's hands; it is too much power for the Secretary of State. What you would need in the legislation, if it does stay as a policy instrument, is something like, "The environmental principles aim at a high level of environmental protection", setting a baseline beneath which they cannot fall. The environmental principles should be interpreted so that they are at least as protective as international standards—a baseline under which they cannot fall.

Q9 **Angela Smith:** It strikes me that policy statements are very vulnerable to being adjusted and changed at very short notice, without reference to Parliament. That is what worries me.

Professor Lee: Absolutely

Daniel Greenberg: Indeed. They are a different animal. You have something that emanates from the Government aimed at themselves, or from another body aimed at the Government, rather than law. Here, clause 4 is something that you are going to want to press on this issue very strongly with the Department. Particularly, have regard to a policy statement. That is the standard duty and it is great when the policy statement is just trying to influence general principles, but that is miles away, as you say, from law.

Q10 **Chair:** When you say, "Have regard to", what should it be replaced with?

Daniel Greenberg: While it is high-level principles you can only say, "Have regard to," because you cannot talk about hard-letter compliance with soft-letter principles. That is not a bad thing. The answer to the question is that that is not the same as what we have at the moment. It is not a bad thing in itself, but you will want to press them on clause 4 generally. Specifically, at a technical level, I would point out that you will want to press very closely on 4(2)(a) and (b), which effectively are the exceptions, because if it is very high level I get quite suspicious that you need exceptions from it. If it is very low level type law, you do need exceptions. On this, you will want to discuss clause 4 with them very carefully.

Q11 **Angela Smith:** Are there any other comments?



William Wilson: Yes, they have discarded rather a lot from the principles section of this. In terms of the whole of the obligation in Article 191, Ministers and public bodies should still be under a legal obligation to contribute to preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level and so on. Policy on the environment should aim at a high level of protection. They are under that obligation now, under Article 191, so why not when it is transposed?

Apart from the rest, I very much agree with what Professor Lee has said about the policy statement being an unsatisfactory way to declare principles. It is a very weak one. It is riddled with very curious exceptions, which, if need be, we can come on and look at.

Q12 **Angela Smith:** My favourite example of a Government being forced to introduce a policy change because of pressure from the European Commission is the Thames Tideway Tunnel. Would the policy statements, if implemented, be as powerful? To give us a concrete example, would it be as powerful in forcing Government to do the right thing on things like sewage pollution overspills and dirty rivers as the set of principles and the EU legislative framework that we have now? In other words, would the Thames Tideway Tunnel happen?

William Wilson: No, I do not think it really would, because the principles do not stand alone in European law. They are underpinned by obligations to comply with. If you are in breach of European law, you are under an obligation to put yourself back in compliance as quickly as possible. That is the sort of thing that contrasts in practice with where you might end up here. You might have a very reluctant public body or a reluctant Minister who says, "I do not want to do this. This is a real pain in the neck". What is going to happen when push comes to shove?

David Wolfe: I want to pick up on the "push comes to shove" point and the point that others have made about reducing the status by making something merely a factor for which you have to have regard. That classically allows other considerations to come into play in a way that would not come into play with things being in the treaty in the way that they are. Questions of cost, inconvenience or whatever they might be come into play in a much more obvious and vigorous way, both in terms of the original decision but also when somebody—the OEP or whoever—then comes to say, "You have not complied with this sufficiently". The answers are much easier: "Yes, we had regard to the high-level principles but we decided in this case that cost," or inconvenience or whatever it might be, "pushed us in the other direction".

Angela Smith: Cost efficiency could get—

David Wolfe: Anything, in a way. That is the basic public law thing: having regard to something means it is merely a factor in your consideration, so everything else is in play too.



- Q13 **Mrs Murray:** I may be completely wrong here and I look to you, Daniel, to ask you this. If you have this set of principles, could you not tighten up the rules with secondary legislation? That would give you more flexibility on tightening up rules in certain areas.

Daniel Greenberg: You could in principle, but that is not what you have in front of you. What we are all saying at this side of the table is that there is a difference in kind between the documents for which the Bill provides and the law—the series of legal obligations—that you have at the moment. I completely agree that one way of producing equivalent legal obligations is to have statutory instrument under powers. That is true.

I would express a little bit of caution about that. I am only talking about the technical structure. My colleagues here are the experts in environmental law, which I am not, but European law is quite often able to combine a hard-letter rule with a degree of flexibility and application that we do not have quite the same in domestic law. I suspect where you might end up is a combination of strategy instruments that impose legal obligations, and some guidance and policies around them that then allow you to soften and finesse the application. That may be the sort of direction you are pushing them towards.

Professor Lee: I agree. What would be more familiar and closer to what we have currently as members of the European Union, would be a legal obligation in statute to apply, act in accordance with or comply with the principles, and then there would be, in addition, statutory guidance, the policy statement, which you would have regard to, but the “have regard to” duty would not sit alone as it does at the moment. It would be underpinned by a statutory obligation to comply with the principles.

- Q14 **Angela Smith:** I want to go to clause 1. Do you think that it grants too much power to the Secretary of State to determine which policy areas environmental principles should apply to? This has been quite a common problem with the legislation we have had on the dreaded Brexit, but it is a common problem. This is a really important question for us, as to whether or not clause 1 is too loosely phrased and put together.

Professor Lee: Yes, it is. There is too much power in the hands of the Secretary of State here. There is no need to predict in advance which policies you want this statement to apply to. The policy statement applies to everything if relevant, and you decide on relevance when you see what your problem is, not when you are trying to imagine what the problems of the future might be. It would apply across the board, as it does at the moment.

- Q15 **Angela Smith:** That makes a lot of sense, because the environmental knowledge increases over time.

Professor Lee: It comes up everywhere as well. Some of the examples in the supporting documents are things like pensions policy, so you think, “Yes, okay”, and then you think, “Maybe this will be relevant to pensions



policy. I honestly do not know”, and nor should we have to predict in advance.

Q16 Angela Smith: The overall impression I am getting is that there is not enough emphasis on principles and far too much emphasis on what any particular Government or any particular Secretary of State might want to see by way of policy.

William Wilson: The exceptions set in before you even start applying the principles, because then you say the principles are not to apply to the armed forces, defence or national security, which I respectfully think is ridiculous, because it is already applied by the Ministry of Defence’s own policies: JSP418, management of environmental protection in defence. That exception is just out of date. The taxation, spending or allocation of resources within Government, or any other matter specified in regulations made by the Secretary of State—you do not need that. You really do not need that. There is nothing that threatening about these principles. You could apply the principles without bringing the business of Government to a halt. It is not a bad thing. They are workable as they are in European Union law; they should not be so threatened by it.

Angela Smith: Daniel is really itching to say something.

Daniel Greenberg: I wanted to come back to your question about the power in clause 1. Again, from a technical perspective, I was going to suggest you may want to discuss with the Department why it is that we have this new Office for Environmental Protection, we have this new body that is going to be in charge of the environment, but we do not hear about it at this point, right at the beginning, when we are setting the ground principles.

Angela Smith: That is really interesting.

Daniel Greenberg: It is at least interesting. I am not suggesting necessarily where the solution should be in terms of the balance of power in setting the high-level principles, but it is interesting. This is underpinning your question: that we start with “Ministers, Ministers, Ministers”, and then, “Oh, and there is an independent body”. Why?

Angela Smith: That is at the heart of everything on this. It really is.

Q17 Chair: Looking at clause 1(6)(c), it gives flexibility to the Secretary of State to choose which policies can be excluded from the policy statement. It does not matter which Secretary of State it is; it could be a future one, so I am not necessarily criticising the one we have, but what worries me is that they will be able to choose exactly what they put in. On air quality, for instance, surely they can say, “We have a little bit of a local difficulty with air quality, so perhaps we do not necessarily put it in the statement or we put it in a different way”. David seems to be encouraged by that one.

David Wolfe: This feels like you are starting from a blank piece of paper and starting to build up from base, rather than trying to match or



arguably better what we have now. It seems to come from the wrong direction. Picking up the text, on the point I was making before about other factors coming into play, clause 1(3) specifically allows the Minister to identify the other factors. You can immediately see cost or whatever coming into that, and immediately you have diluted the whole of your environmental protections at a stroke, which is not where we are now. What is your benchmark?

- Q18 **Chair:** We are trying to get a balance. I should not say this to a group of lawyers, but I do not want everything landing up in the courts, because I do not think everything needs to land up in the courts. On the other hand, there has to be a check and balance at the end of the day. If the Government are plainly getting it wrong and not delivering, they have to either be able to be taken to court or somebody—the OEP or whoever—has to overturn that decision and actually force the Government to do something, like we have had to do with air quality. I suspect successive Governments would have probably been in the same position, but it puts the spotlight on it. We are going to leave the European Union. I do not want to have a debate about that this afternoon. I know that will wind Angela up.

Angela Smith: I have not given up.

Chair: You have not given up, but I think we will. Let me rephrase that. I think we will. We do not want to replicate the European Union, the Court of Justice and all of that, because that is what we argue a lot of the time about, but we have to have a check and balance. What you are saying, from what you have said to us so far this afternoon, is that there is not enough check, but we have to be able to create that without just giving everything to the High Court, for instance. There has to be an issue where it could be taken all of that way, in my view, even if it is, hopefully, very rarely taken. You would have to have that threat, I feel.

Daniel Greenberg: You are coming into it from Clause 1(6). I would emphasise something William Wilson said and relate it to Sheryll Murray's question, which is this: why do you need exceptions from something that is very high level? I would expect to see exceptions for defence and for other things once we come down to the statutory instruments and specific obligation level.

That is also part of the answer to your question, Chair, because, once we come to the statutory obligation and statutory instrument level, the hard-letter law, by and large, enforces itself. It does not completely and there will be cases where you will have to sue, but, on the whole, people want to obey the law. Judicial review is necessary all of the time when you have got highfalutin, very soft-letter, unprecise obligations, because the only way of enforcing them is to go to the courts. All of these things come together, and the same idea is that your high principles are great and, as Professor Lee said, they should inform how you perform your obligations, but your obligations should be tight, self-executing and self-enforced.



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Q19 **Angela Smith:** I am not a lawyer so forgive me for this, but it just seems to me that there is a big difference between using the mechanism of judicial review, as valuable and important as that really is, and using the mechanism currently used by the European Commission. Tell me if I am wrong, but I am not sure if judicial review will deliver the same power as the European Commission has at the moment in relation to the ECJ. Is that right?

David Wolfe: That is right. Can I just slightly jump back to the Chair's question about the court as a last resort or whatever? The difficulty that we are all raising here is not so much in the policing mechanism, whatever that may be. It is in the substantive obligations, because with the framework that we have here, of principles to which you have to have regard at the highest level, but in the context of being able to have regard to other things as well and being able to then carve that out, once the Minister or the Government have set that framework, they will by definition be acting lawfully, providing they act within it, but they have set the game. You will not be able to go to court afterwards and say, "But you have not sufficiently introduced the polluter-pays principle", or whatever, because the pass will have been sold at the point they write their initial statement.

Q20 **Chair:** It cannot be challenged.

David Wolfe: It cannot be challenged. I will not be going to court to challenge them, because I will say to my clients, "They are acting according to the law", but the law has just drawn in from the legal obligations that were there before. With respect to Ms Smith's question, it is not about enforcement mechanisms at this point; it is about the substantive obligations.

Q21 **Angela Smith:** Yes, I understand that. Just on that, how common is it in legislation to see this kind of device used, whereby a Secretary of State or a Government can determine principles or be given the power in an Act of Parliament to determine principles in that way? Is it very common?

Daniel Greenberg: It is becoming more common. In itself, it is not a trend that you should regard as concerning, provided that there is that gearing mechanism between those principles and independent involvement. In this case you have an independent body but it is not being involved in setting the parameters of the law.

Q22 **Angela Smith:** The principles will not be embedded in law, will they? That is the policy.

Daniel Greenberg: Under this model, they will not themselves be hard-letter legal obligations. Your question is about how often the Government set principles. The answer is that they do, and increasingly they do. In itself, that is not an insuperable problem, but there needs to be independent involvement in setting them and independent involvement in enforcing them.



Professor Lee: May I just go back a step? We have been talking and Daniel Greenberg has just been talking about the situation we are presented with in the draft Bill. I just want to emphasise that this is a major step backwards from what we have at the moment. Right now those principles are legally binding and they are not just legally binding at the high policy level. They are legally binding on every relevant decision. They do not dictate a particular answer, so we do not find ourselves in court all the time, because principles do not dictate an answer. They help us to interpret the legislation and the obligations that we are dealing with at the time.

Angela Smith: I understand that entirely.

Chair: Before Sheryll comes in, because we are doing pre-legislative scrutiny, what has to be done to it to make it answerable? Is it a scrapping of it?

Q23 **Mrs Murray:** My question is relevant to that, Chair. Can I just ask Daniel this? We have the EU (Withdrawal) Act, which transfers all of the legislation that is in place on to the statute book. Do we need to start looking at this legislation in conjunction with what is already in the EU (Withdrawal) Act, because there is some confusion sometimes? A lot of European law is based around the treaties and those principles are enshrined in the treaties. We sometimes are seeing "Secretary of State", because actually the Secretary of State is the ultimate person responsible, rather than the Council of Ministers or the European Commission. Am I right or am I wrong?

Daniel Greenberg: A bit of both. Professor Lee touched on this before. Where the Secretary of State is responsible under EU law, the Secretary of State is responsible to the EU bodies, whereas once you come back to a purely domestic piece of legislation—

Mrs Murray: The buck stops with them.

Daniel Greenberg: Exactly. Your point on the retained EU law is where you may want to develop the thought a bit. Again, colleagues here will be able to give you the specifics, but it would be unwise to assume that the mechanism of retained EU law under the withdrawal Bill has made everything fine by bringing it over, for a number of different reasons, which colleagues will probably expand on.

Mrs Murray: Yes. That is where I was confused, because very clearly we do not have the treaties now.

Daniel Greenberg: Exactly so.

David Wolfe: Can I have a stab at answering your question? What the Act brings across already are the hard, specific, practical directives: the environmental impact assessment, the birds directive, the habitats directive, air quality directives, water quality directives—the practical mechanics of all of those sectors. All of those contain discretions to various state actors. The point is that those discretions at the moment



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have to be exercised in accordance with these high-level treaty principles. Likewise, when the courts, domestic or European, come to interpret and apply them, they have to apply these principles. What has not come across so far are those principles. This is trying to fill that.

Mrs Murray: This is filling the principles.

David Wolfe: It is quite unusual in English law to have principles sitting behind, but not completely unknown. The issue now that we are seeing is whether the principles are then implemented domestically as having equivalent status to what they have at the moment in the EU framework. What we are all saying is that they do not.

Q24 **Mrs Murray:** In particular pre 1972, we had completely different environmental principles back then to what we have now, so you cannot really look pre 1972?

David Wolfe: Most environmental law that we have now comes from EU directives. That is the case across all sectors.

Mrs Murray: Thank you for explaining.

Q25 **Chair:** There was much less environmental law, was there not?

David Wolfe: Sometimes it had been grafted on to existing things like our planning law system, which has existed since the 1940s. In terms of the actual environmental law, it is hard to find things. Public nuisance is a rare example of something that survives from common law, but everything else is essentially EU in origin.

Q26 **Kerry McCarthy:** Can I ask about the environmental improvement plans and particularly about the fact that they will not contain legally binding targets? Do you think the legislation could be improved? My concern would be that it sets out perhaps a bit of a wish list but there is very little in the Bill that would enable us to hold the Government to account if they do not match what is in the environmental improvement plans. The first one would be the 25-year plan, as I understand it.

Professor Lee: There is a space for policy. There is a space for policy that is not necessarily composed of legally binding targets. What we have in these provisions on environmental improvement plans is, in principle, a relatively powerful governance framework. We have a system of reporting, revision and review. All of it comes to Parliament. You have the OEP involved and Government involved, with named parties and timed obligations. That sort of framework and that sort of dialogue and debate in public, with you lot, can be quite powerful. It is not a legal form of accountability. You are not taking them to court and suing them and maybe you would want to do that, but it is a powerful political form of accountability.

The thing that worries me more about that governance framework is that because it is a strong governance framework there will always be the temptation to have environmental policy that is not called an



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environmental improvement plan. There is no defined scope for the environmental improvement plan. Steps should be taken within the draft Bill to stop that happening.

Q27 Kerry McCarthy: You mean they might put the easy-to-achieve stuff in the plan and then other things outside.

Professor Lee: I do not think that is what will happen next week or next year, but these plans are looking forward 25 and 15 years. It will, of course, be tempting. Also, we are looking at half a Bill, are we not, which makes it quite tricky? I am not sure whether the other half is going to address some of your questions.

David Wolfe: I will just supplement that slightly. The plans are welcome as far as they go, but they are effectively a political tool, not a legal tool. What is a welcome incremental step, but again only as far as it goes, is the role of the OEP in monitoring the plans, reporting on them and reporting to Parliament, which will make your job easier, because you will have an expert body that will provide a report and tell you how it thinks the Government are doing. You can then respond to that. That is a helpful step, but it is still ultimately a parliamentary account. It is a political process, not a legal process.

Q28 Kerry McCarthy: I have a couple of questions. The first one is this. Even when there are legal obligations, we have seen with air pollution, with the ClientEarth court cases, that it is still quite difficult to get the Government to act, even when they have been found in breach. My concern would be that, if something is very high profile politically, then perhaps you can shame them into acting and making sure they meet the plan, but it is not necessarily the case.

My other concern is that it says that EIPs must be no shorter than 15 years. I appreciate that environmental improvements take quite a long time. You cannot improve soil quality or reverse the decline in biodiversity overnight, but there is a danger, if you have quite a long-term plan, that everything gets shunted towards the end. You have 10 years and then who knows who is in Government. I wondered whether you thought the 15 years was advisable.

Chair: Are there reviews in those 15 years?

Kerry McCarthy: There are annual reports and things like that, but with any target, if you have a target to do something by 2030, it is almost like, "We are on course to do it", when you are nowhere near there.

Chair: Yes, you have to plant 20 million trees. If, 12 years in, you have only planted a million trees, you have an awful lot of trees to plant before you get to the 15 years.

Daniel Greenberg: Yes, in relation to that and looking for other parallels—Angela Smith was asking before whether there are other similar parallels—I remember when we did Best Value for local government.



Angela Smith: I remember that.

Daniel Greenberg: One of the things we did was we put in a ratcheted system of benchmarks along the way for precisely that reason. It was for the precise reasons of both your questions. First, it ensures you have long-term plans with demonstrable steps along the way. It cannot be, "Yes, it is fine because we have 15 years". But the other thing it does is it allows the benchmarks to be focused for enforcement activity. I said to you at the beginning that you need to discuss the gearing mechanism between all these things and the real world. Benchmarks, and enforceable benchmarks, are one component of that.

Q29 **Chair:** Could that be put in to this Bill?

Daniel Greenberg: Of course it could.

David Wolfe: An example, though not necessarily a particularly good example, is the Clean Growth Strategy and the climate change stuff. I know that is controversial in its context, but there you have climate change targets that are stepwise to 2050. That is going in the right direction, but, on the other hand, I should immediately say that is subject to exactly the problem you are describing, which is that it is all being put off until the back end of the timescale, so we can leave it to our children.

Q30 **Kerry McCarthy:** The carbon budgets cover a much—

David Wolfe: They are short-term budgets, yes.

Q31 **Kerry McCarthy:** A carbon budget would be better.

David Wolfe: That would be better.

William Wilson: We have five-year plans for carbon budgets.

Q32 **Chair:** Kerry, that is provided the carbon budget actually delivers something. Sometimes we have lots of targets and—you are right—it is about how we deliver something that is better for the environment, not just having a load of targets that may or may not be hit.

William Wilson: It has to do with the quality of scrutiny and the intensity of the scrutiny. More regular targets are useful. At the time the Climate Change Bill was going forward, I remember the Committee expressing concern as to whether it was actually enforceable. In retrospect it has been found to be quite effective, but that is perhaps because it is subject to regular scrutiny and a regular and predictable form of five-yearly reporting. There is also a place for absolute requirements. It is no good having a target about air quality if you do not meet World Health Organization levels. You are still suffering from the effects.

Q33 **Kerry McCarthy:** It says "no shorter than 15 years", but if the first one is the 25-year plan, which is a year old now, by the time the Bill comes in you have a couple of decades left to run.



William Wilson: That is a good point.

David Wolfe: Can I give you a cautionary experience of those kinds of statutory targets? You might remember the fuel poverty target, which was a very specific and tangible one. It was not met in the timescale. Friends of the Earth went to the High Court to try to enforce the failure to do it—it is a good example of a target and enforcement—and were knocked back because the court said that it must be implied that Parliament had assumed that there would be a cost consideration in it: “We will only do it insofar as there is money available”. If you had gone around the House at the time and asked, I do not think parliamentarians thought that. They thought it was a really meaningful target.

Kerry McCarthy: It is just an aspiration, then.

David Wolfe: It turned into an aspiration. If you are going to introduce targets like that, I would say that you have a sort of “We really mean it” clause. I do not know how Daniel would express it: “When we say we want this to happen, we want it to happen”.

Kerry McCarthy: It would be quite a Bill that says, “This bit we really mean; this bit we might mean”.

Professor Lee: Clause 9 provides the five-yearly review, so if this is your concern, that is the clause that might need beefing up to say that the five-yearly review will report against specific five-yearly targets.

Q34 **Kerry McCarthy:** Other than just publicly giving them a hard time, how can we hold the Government to account if they do not meet any of these targets? There is not really any mechanism to make them do what they have said they are going to do.

David Wolfe: It depends how complicated you want to make it. You could build into the Bill a framework of specific targets that have to be met and then mechanisms for reporting on them and then mechanisms for dealing with the failure to meet them. It depends how far you want to go. Daniel will have more experience than I have.

Professor Lee: That might be part 2. That might be what we are expecting.

Kerry McCarthy: There could be secondary legislation.

Daniel Greenberg: Building in mechanisms where there has been failure is not helpful in itself. What is helpful is to make sure you have mechanisms that address the reasons for the failure to meet the target. This is already something that can be done through judicial review. If you can show the reason why a statutory target has not been met is because of particular thing a Government has done or not done, then you can get a direct remedy against that action or inaction. The problem is making that connection, because it is very difficult, without some kind of statutory gearing within the Act itself, to prove that it is that act or that omission that has led to the failure to meet the target. The longer the



targets and the more general they are, the less easy it is to draw a connection between one act and one omission.

- Q35 **David Simpson:** I have one general point, first of all. Will the OEP be independent enough of Government to hold it to account? If not, how should the Bill be amended? I see Maria shrugging her shoulders.

Professor Lee: I was not shrugging my shoulders. I was pointing myself towards David, who I believe will be best placed to speak to this.

Chair: Come on, David. You have the hot seat. The Secretary of State can propose who the chair is and so on and so forth.

David Wolfe: Yes, he can propose who the chair and the board members are and can control the budget. That is a fairly classic formulation for a non-departmental public body. It is always claimed to be “independent”. Anybody who has been involved in those kinds of organisations knows it does not feel like that when you are there. You always have the soft heat of the civil servants—

Chair: The soft corruption.

David Wolfe: You have the civil servants saying, “The Minister is not happy. The Minister is not going to accept that budget. You are overstressing”. We know. It does not need a lot of explaining. I know it can be different, because I chair a body that is very different to that, which is properly independent, created by royal charter. I know what it is like not to have civil servants breathing down your neck but nonetheless be a public body that is doing an oversight role.

- Q36 **Chair:** I suppose the question for you is whether we can make the OEP work as it is proposed. Can we make it more independent? Is it a dead duck, inasmuch as it is a monitor?

David Wolfe: Let me have a go at that. I know various people in written submissions have suggested that it should be more parliamentary and less accountable to Ministers. That is a way to go. Even if you are saying that it is essentially in this kind of framework, you could introduce various improvements in terms of the mechanisms for appointment, broadening it out from purely being ministerial and having other people involved in that process and making it more open and transparent. You could build in better mechanisms for the financing of it.

- Q37 **Chair:** Can you be absolutely clear? When you say “more transparent”, be quite clear. Do you mean to say the Secretary of State does not appoint the chair and does not appoint the board members? We have to get to grips with what we actually want. I understand what you are saying, but be absolutely clear. If we are going to back in pre-legislative scrutiny, we have to go back five years.

David Wolfe: I have a question, then, which is possibly rhetorical. Why is the Secretary of State appointing at all? This is a body that, at its heart, is supposed to hold Government to account. What is the need to



have a Secretary of State involved in any of the appointments? There are plenty of other ways of appointing people. In any public appointment these days, you have detailed criteria against which you advertise through a Nolan-compliant process. The panel that does the appointing, in the end, does not have to be Government; it could be parliamentarians; it could be an entirely independent panel. There is no need for it to be the Minister. Even if the Minister is to be involved, it could be wider than the Minister; it could be other people involved as well.

It really depends on where you see the pinch point. If it wants to be truly independent, to my mind there should not be more than advisory input from the Government. By all means, have the Minister express a view on the proposed candidates in a transparent kind of way, but do not have them be the person who makes the decision. Again, budgets are really important in terms of who sets them and so on, but, in a way, those are just indicators of the macro power. If you have that macro power with the Minister, there will be behind-the-scenes conversations about your renewal, your knighthood, next year's budget or whatever the soft hints are. If you are looking for practical suggestions, change the appointments process, even if you want to keep it essentially parliamentary.

Also, make all of its communications with Government completely transparent. At the moment, emails between this body and the Government will be subject to exemptions of the Freedom of Information Act. Remove the exemptions. If you want to be really creative, introduce a whistleblowing obligation on the members of the board, which says, "If you feel yourself under pressure from Ministers or civil servants, you have an obligation to report that to the Environmental Audit Committee", or something. There are all sorts of things you can do around the edges to reinforce the independence, even if you want this kind of model. I know people have said there should be more ambitious models. Anyone who has been involved in this kind of organisation, not just environmental but across the NDPB sector, knows this is not an independent model. That is a brave claim.

Q38 David Simpson: Daniel, you have seemed a little perturbed whenever that response has been given when we talked about the Secretary of State appointing the chair. What is your view on that?

Daniel Greenberg: There are two things on that. I am not convinced that is the biggest problem in practice. There can be difficulties in finding alternative methods. There are panels in some contexts, but it is not always easy to find an alternative mechanism for appointments.

You want to analyse this by asking yourself all the different things that independence means for this body. That is not only about who appoints the chair and who sets their budget. Many independent bodies, for example, undertake enforcement casework. Professor Lee mentioned enforcement early on as a key. There are loads of examples of bodies that are appointed by Ministers that have casework responsibilities, and



they have structural mechanisms for ensuring that the casework is not influenced by directions from the Minister.

I very much agree with what was said about the transparency of communications. That is part of that. You in the Department can do a lot in your pre-legislative scrutiny to break down all the different things this body is going to do and ask yourself in relation to each one, "How does independence manifest itself in relation to that function?" That might lead you in the end to come to conclusions about the appointment of the chair and the members, but I do not think that is where you should start because, in itself, that is not determinative of successful independence.

Q39 **David Simpson:** I have another question to both David and Daniel, because I know Daniel has to go. Would it be inappropriate, in constitutional terms, for the OEP to be anything other than an arm's-length body of Defra? Are there any other examples of alternative governance arrangements?

David Wolfe: In terms of constitutional inappropriateness, I suppose we are in new territory, are we not?

David Simpson: Yes, I accept that.

David Wolfe: I would just talk very briefly about the body that I personally chair, which is the Press Recognition Panel, which came out of the Leveson process and was created by royal charter. I know there is a constitutional controversy about that, but that is what Parliament and the Privy Council did in those days. That has completely independent appointment processes and so on, so I was appointed by a panel that did not have anything to do with Government. We meet cordially with civil servants, but there are no mechanisms for influence.

Constitutionally, this ground has been trodden before, but you do not necessarily need to go even that far, as I think we are agreeing, to introduce mechanisms and checks that moderate even what you have now. It depends on your level of ambition. You may not. It depends on your level of ambition.

Daniel Greenberg: Yes, you do not need to go to royal charters. There are statutory commissions that have independent enforcement functions. The Gambling Commission would be a random example, but there are plenty of them. The point was well made early on that you have an enormous range of different kinds of construction of a statutory corporation. When I am drafting legislation, I like to leave the consideration of its form until I know what it is going to do, and then I look at each of its functions and say, "What sort of model do we need to deliver that effectively?"

Q40 **David Simpson:** You are talking about different models, but, in your opinion, what is the best model for delivery? We are talking about examples.



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Daniel Greenberg: It all depends on what Professor Lee said at the beginning: is it going to have an enforcement function of action against the Government.

Chair: It needs to have that.

Daniel Greenberg: I am strictly speaking to the technicalities, which is why I say "if", Chair. If it is going to have a role of enforcement against the Government, the independence needs to be massive. The point about budget and everything then becomes terribly important.

David Simpson: Yes, absolutely. That is right.

David Wolfe: If I could speak about my personal experience of that, I was involved in the Legal Services Commission. It is now an agency of Government. It is now the Legal Aid Agency, but before that it was the Legal Services Commission and it was an NDPB a bit like this. This is going back before 2013. It made individual decisions, not enforcement decisions, about the grant of legal aid, sometimes to people who were bringing cases against the Government. It was not unknown for the chief executive to be summoned to meet the Minister to explain, "Why have you granted legal aid for this case against the Government?" That is very direct personal interference, if you like. "How come you have granted legal aid for the Dale Farm travellers or this case against the MoD?" or whatever it might be. That was the very real experience.

I have sat across the room from two Secretaries of State, one Labour and one Conservative, in that capacity and they did not think we were independent at all; they thought we were doing their bidding. Yet if you read the structures, they were not wildly dissimilar to what is in place here.

Q41 **David Simpson:** William, did you just want to say something?

William Wilson: I just wanted to remind the Committee that the Government themselves identified the importance of this in their response to the May 2018 consultation. They said, "The new body will need to be and be seen to be independent of Government, in that Ministers should not be able to set its programme of activity or improperly influence its decision-making, to be funded in such a way that it is protected from accusations of being influenced by the funding organisation. Subject to the outcome of this consultation, we believe the most appropriate approach may be to create an independent body that will be accountable to Parliament". That was the Government campaigning. What they perhaps wanted to try to avoid was getting the situation you had with something like Nature Conservancy Council, where it gives unpopular advice and is then abolished.

Q42 **Chair:** Is it answerable to Parliament or is it answerable first to the Secretary of State and then to Parliament?



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William Wilson: I am convinced that Daniel Greenberg can come up with clever ways to achieve the result, but a greater measure of independence than is currently offered is absolutely necessary if it is going to have the job of calling the Government to account. If you take air quality as one example, the Government must have known what the air quality legislation said. They had to be taken back and back and back to court in this country and in the EU to try to enforce that.

Q43 **Chair:** It is very expensive to deliver. That is why we have to have somebody to check it.

William Wilson: How is it going to work? It will be taking the Government on and making itself unpopular if it is doing its job at all. It needs a measure of independence.

David Simpson: That is interesting.

Q44 **Angela Smith:** The question I have sort of sits between questions 4 and 5, if you will forgive me. I have huge concerns around the independence of this new body. It seems to me that under a traditional model you have statute and you have legislation. The enforcement of that legislation is in the hands of whoever, but the courts can make judgments on the basis of what we have on our own statute book. Forgive me; I am not a lawyer.

David Wolfe: It is good so far.

Angela Smith: But the key difference—it goes back to the point that Professor Lee made earlier—is that with our membership of the European Union there is a different level of engagement on this, in the sense that we have a treaty that embeds principles, an enforcement body and then we have our own legislative structures. I am struggling to understand something here in terms of the enforcement of really key principles, which at the moment embed everything we do in this country relating to the environment or give us the power to hold Government to account. How are we going to replicate that? I do not see this body doing that. Judicial review is not enough. I have been in local government. Judicial review relates to maladministration. It does not relate to whether or not key environmental principles are being observed. I do feel so strongly about this. I really do.

Professor Lee: There is a lot in that question.

Angela Smith: I know. I am sorry.

Professor Lee: No, it is good. It is a big, complicated Bill. The first thing is that the European Commission is independent in a very special way.

Angela Smith: Yes, that is exactly my point.

Professor Lee: It is independent, because it is funded by 28 member states and its appointment is by 28 member states. Because we are all trying so hard to get this right, we are forgetting that we cannot have something as independent as that. We cannot replicate the Commission.



Angela Smith: That is exactly my worry.

Professor Lee: That is simply a fact. What we have to do, in this imperfect situation, is make it as independent as it can possibly be. We get into a bit of a binary: either it is independent or it is not. Every single step that can be taken, including all of the steps that David mentioned, to enhance independence should be built into the wording of the legislation, not left to discretion.

Daniel Greenberg: It also, as much as possible, should be taken out of principle and put into the law, because then that is independently enforceable in a variety of ways. The question about the independence of the Commission and the earlier question about the extent of the principles are very interdependent. As Sheryll Murray was saying, the more you can get out of broad principle and into hard-letter obligations, the more enforcement does not depend on judicial review, which is a very imprecise mechanism.

Q45 **Chair:** That is right. We need to pick up a lot of things before it gets there, basically. Sheryll wants to come in. You are partly stealing her question in some ways, Angela. David, you answer and then I will let Sheryll come in.

David Wolfe: I will have a go at an issue that is right in the middle of question 4.5. Taking, say, water pollution as an example, one of the problems at the moment is that the bodies that enforce against water pollution struggle with resources, so they prioritise what they are going to take action against. They will not necessarily take action against what they would regard as a relatively modest industrial water pollution incident.

To take another example, when they are consulted about the impact of a proposed development on a site of special scientific interest or whatever, they will not invest a great deal of resource in responding to that consultation. That is lawful for them to do because the courts have accepted that they can spend their limited resources in a way that means they prioritise and they do not have to investigate every pollution incident. A lot of low-level pollution, to extend my example, goes unchallenged.

We are then told in section 12(4) that this OEP body also has to have regard to the prioritisation and focus on the larger incidents. Nobody wants to omit the larger incidents, but this means that even the oversight is not looking at the smaller incidents. You could not enforce against this. It is going to be perfectly lawful. It is going to be perfectly lawful for the OEP to say, "We are not concerned about what Natural England"—or whoever it may be—"is doing with these low-level incidents". They will say, "We are acting lawfully". The courts will not help you in that, whereas the Commission currently might. The Commission currently might say, "You are setting the benchmark of where you act too high". Does that help you with an example?



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Q46 **Angela Smith:** It really helps. Nothing we can get from this, to put it in blunt terms, will be as good as what we have already.

David Wolfe: You could improve it. You are closing the gap, yes.

Q47 **Mrs Murray:** There is another level of scrutiny, which, in my opinion, will have teeth. We see it through local government, because local government have executives and they have scrutiny committees that hold them to account. Surely there will be a bigger role for committees like this Select Committee, because we have to get our head around—I know it is hard—the fact that the lawmakers will be the Department and the Government. It is committees like this that will be holding them to account. Am I correct?

Professor Lee: I entirely agree. The job of the OEP is to assist you in your roles. If you are attempting to scrutinise the Environment Agency, Natural England, Government or local authorities in their implementation of environmental law, you need expert independent judgment and commentary on what is going on. That will help you to do your job. It is important to bear in mind—it has come up a few times—that there are two forms of accountability in this Bill and in the OEP. There is legal accountability, which is limited to a very narrow judicial review provision, which I am sure you will want to come back to, but there is a lot of political accountability in here.

Political accountability does not just happen. Political accountability will work if the structures and processes in the legislation support political accountability. That should not be overlooked. There are lots of little ways in which that can be strengthened throughout the Bill. It would be a mistake to over-rely on the OEP as parliamentarians and to think, “It is fine. The OEP is doing that”. It relies on high-level political engagement with these reports.

Q48 **Mrs Murray:** The teeth of Select Committees will be increased massively.

Professor Lee: Yes, absolutely.

Mrs Murray: Over 40 years we have forgotten that.

Professor Lee: On the earlier point about personal accountability, you really can get people in and ask them what they are doing.

Q49 **Chair:** I am sorry to interrupt. When you talk about teeth, your analogy of the local government scrutiny committee is quite good, but I think I am right in saying that in local government the scrutiny committee has the power to direct the council to change a decision or change policy. Do they have more powers over that council than we as a Select Committee have over Government?

Mrs Murray: No.

Chair: I am not sure. I want a legal answer, please.



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David Wolfe: What scrutiny committees can fundamentally do is refer it back for reconsideration.

Mrs Murray: Yes.

David Wolfe: Classically, in a cabinet-style model, you have a local authority cabinet or executive and a scrutiny committee that shadows it in each function and they can call it in, whatever the decision is, and they can scrutinise the decision and refer it back to the cabinet. There is a kind of cooling-off process and the cabinet can reflect on whether, in the light of the scrutiny report, it still wants to do the same thing. That is the process.

Chair: We cannot do that.

David Wolfe: You cannot do that.

Mrs Murray: However, we can work with bodies like the OEP.

Chair: That is not my argument.

Q50 **Mrs Murray:** That takes me nicely on to enforcement. Should the OEP be given the power to impose fines, in your opinion? Should it be able to make binding decisions? Will the OEP have sufficient teeth in its role as a watchdog?

Professor Lee: I know David is going to want to comment on that. Can I just step back for one second? The OEP has three scrutiny roles. One is the EIPs, which we have talked about. The second is enforcement, which we will talk about. The third is about the implementation of environmental law, clause 15. Enforcement is really narrowly framed around an unlawful failure to comply. An unlawful failure to comply probably needs clear numerical standards. We do not have that many of those in English environmental law, and I suspect we will have fewer after Brexit. There are lots of good reasons for having very broad and open-ended standards. A failure to comply does not engage with broad open-ended standards very often.

Clause 15, reporting and monitoring on implementation of environmental law, allows the OEP, and therefore allows you, to delve into the exercise of discretion around implementation. Rather than saying, very narrowly, "Have you complied? Have you deviated?" you would say, "Have you done the very best we can do to implement this piece of legislation? What do you understand by 'effective, ambitious and efficient enforcement' here? What do you understand by 'best endeavours'? What do you understand by 'reasonable steps'?" You would be asking the Environment Agency or Natural England. Clause 15, which has no teeth, bar the political accountability, has the potential to be quite powerful in that respect, but then your question was not about clause 15. I just wanted to talk about clause 15.

Mrs Murray: It was useful.



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Professor Lee: Your question was specifically about enforcement. I will take my turn, but I will let someone else go first on that.

David Wolfe: Can I have 10 seconds on clause 15? I think I mentioned this before. The monitoring regime of the OEP in relation to the EIPs and the reporting to Parliament—

Mrs Murray: We are going to go on to clause 15 in another question. I would hate to steal my colleague's question.

David Wolfe: Can I talk about the enforcement?

Mrs Murray: You can talk about enforcement. Could you also add whether there you think will be a complaints procedure? There should be a complaints procedure.

David Wolfe: What is proposed for the OEP is better than nothing, because it enables people to go to a body and raise issues about compliance with environmental law by public bodies. So far, so good. It has a number of significant weaknesses in it, though, from my point of view, one of which is the fact that it is quite time-consuming. In other words, there is a multi-stage process, so by the time you get to an answer from the OEP, the damage is done, whatever it may be. It is rather after the event.

The second issue is you raised the question of teeth and enforcement. Its powers so far are not binding. They are effectively powers to make recommendations, so that is fairly weak. That could be strengthened up.

Sitting suspended for a Division in the House.

On resuming—

Q51 **Chair:** Thank you very much for waiting. We had two divisions in the end, and hence we were a bit longer away. I wanted to ask you part of question 5, which is about the power of issuing binding decision notices. Will the OEP have sufficient teeth as a watchdog? We talked quite a lot about that, but will these binding decision notices work? Can they work? What has to be done with them? Does it have to have something different?

David Wolfe: Can I have a quick go at that, if I may? What I was saying to the Committee before you broke was that one of the problems here is that this will come at the end of a long and fairly bureaucratic process, so it may be too late for the environment by the time you get to the binding notice. Linked to that, Chair, the question, then, is whether the recipient of the notice will comply with the notice or not. There is a lot of scepticism about that and about whether judicial review is a sufficient enforcement mechanism to secure compliance. I am personally not a great fan of fines, although some people think they are important.

For me, what would be a more helpful addition would be some personal accountability. Going back to people's experiences of being in local



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government or whatever it may be, there is nothing like putting individuals on the spot to concentrate minds.

Q52 **Chair:** When you say “personally responsible”, would you make the Secretary of State personally responsible? Would you make a senior civil servant responsible? Would you make a Minister responsible? Who would you make responsible?

David Wolfe: For example, if I am involved on a judicial review of a public body—it might be a local-government body, Natural England or whatever it may be—the people who come to court on behalf of that body are normally fairly junior officers and very rarely the people who actually made the decision. The people who hear the heat of the judge’s questions or whatever it is are not the people who are responsible for making the decision in the first place, right or wrong. Whether it is Select Committee accountability or whatever it may be, the public bodies could be made more accountable in that way.

One of the other big structural issues here—this is quite a legal point—is that the OEP’s power to make binding notices, such as it is, only works where the receiving body can change its mind. If, for example, they have made a fairly weak air quality plan and they could make a stronger one, the OEP can say, “Make a stronger one”. However, a lot of environmental litigation is in situations where the decision-maker has done something they cannot undo: granted a planning permission, granted an Environment Agency licence or something like that. This body does not help in those cases, because it cannot order them to undo that.

Chair: No, it cannot be retrospective.

David Wolfe: Exactly. It cannot be undone. For example, to take an example of where a planning permission is granted in breach of environmental law, this body will have no role in relation to that, because it can say until it is blue in the face to the Secretary of State, the planning inspector or the local council who granted the permission, “That was unlawful”, and they will just say, “Whether it was or not, we cannot do anything about that”. They cannot undo it.

If I were advising a resident or an NGO, I would say, “You still have to go to court. You still have to go to court on the first day. You cannot wait for the OEP to act. You will have to act independently at the beginning”. One of the points in the impact statement is that it suggests there will be a reduction in judicial reviews in this area. I asked myself, “Will this do me out of a job as an environmental judicial review practitioner?” No, not one bit.

Q53 **Chair:** That is obviously our role in life: to put you out of work.

David Wolfe: Please put me out of work.

Q54 **Chair:** But you do not see this doing that.



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David Wolfe: I do not see this doing it, because this is very much long-stop, strategic and after the event. None of those are bad things in and of themselves, but it is not going to fix the illegality at the front end. As I say, none of that is unwelcome, but its value is not to be overstated.

- Q55 **Chair:** Going back to ClientEarth and air quality, imagine that you had a case now where Government have not improved air quality in some certain parts of the country, in some 40 hotspots, and it does not really have enough policies in place to put electric cars in and to change people's habits through pedestrianisation. This could be across local government as well as Government. The air quality one is a good one, because it is cross-departmental across Government but it is also across local government. If we had this OEP in existence and we had a problem with air quality like we have at the moment—the Government have a policy to do it, but it is not delivering on air quality in those areas—would this system bring about an accountability that would force the Government to take action? Could they just prevaricate and carry on? Who wants to have a go at that one?

William Wilson: I am quite happy to have a go at that one. There is a lot of scope for prevarication and a bit of a lack of urgency. At the moment, as I say, if the UK is in breach of EU environmental law, it is under a strict legal obligation to put itself back into compliance as quickly as possible. That is underpinned by Article 260.1 of the Treaty on European Union.

- Q56 **Chair:** The European Court and the Commission can give a member state a certain amount of time, but it has to comply eventually, does it not?

William Wilson: Yes, it does. You are under quite a lot of strong pressure to comply as quickly as possible. The treaty says that if the Court of Justice finds that a member state has failed to fulfil an obligation under the treaties, the state shall be required to take the necessary measures to comply with the judgment of the court. That is a very beefy sanction. My concern about these causes is that there is too much time for pottering about with not enough urgency to ensure compliance and to require it from public bodies where they may be reluctant. It is not right to suspend the whole of environmental law enforcement while a public body is still working its way through its complaints procedures or for all public bodies to have two months to reply to an information notice or a decision notice.

- Q57 **Chair:** How do we tighten it up? Can we tighten it up? Do we want something else? This is what we want from you guys.

David Wolfe: Can I have a go on the ClientEarth one? ClientEarth effectively wrote to the Government and said, "We think you are acting unlawfully. Please change your mind". The Government said, "We think we are acting lawfully. Take us to court". They took them to court. It went backwards and forward, backwards and forwards, however many times. For ClientEarth, cross out "ClientEarth" and write "OEP". They will



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have exactly the same problem with these powers, because all they will be able to do is take the Government to court. If the Government says at each stage, “We think we are acting lawfully”, then it will still end up in the courts. All this is doing is substituting the OEP for, in that particular case, a particularly energetic and vigorous NGO; it is not actually changing the game.

Q58 **Chair:** The OEP becomes part of the process of taking the Government to court; it is not answerable.

David Wolfe: It is not a substitute.

Q59 **Chair:** What I want is to get to a stage where you have something that is similar to the European Court judgment, which then puts back the onus on the Government to do something about it. Can the OEP do that or not?

David Wolfe: No, it cannot do that at the moment, but it could have additional powers, to take my example.

Q60 **Chair:** What additional powers does it need?

David Wolfe: If it had the power not just to take the Government to court for failing to produce an air quality plan, as ClientEarth did, but actually to direct the Government to produce an air quality plan, that would shift the onus. You would need mechanics to do that; that is detail. But you could fundamentally give it the power to issue a binding requirement on not just Government but local authorities and all the other players in this. It is not just about Government; it is about all public authorities. It would shift. This body would have teeth rather than just, as it is now, being in effect another litigator.

Q61 **Dr Johnson:** I just have a question comparing the situation as is now in the European Commission, where the European Commission come up with a decision and we then have to follow it, with the post-Brexit situation, when we will be making our own decisions. My understanding of the Bill—and I am not a lawyer—is that it is a framework Bill. If we want to set a binding target on such a thing as emissions or otherwise, we will do that through a statutory instrument and then it will become law through secondary legislation.

Realistically, if the OEP or another body decides that they do not think the Government are putting in adequate plans to meet that target and the Government are not putting in plans to meet that target, then surely they can avoid successful litigation by using further secondary legislation to move that target. Effectively, the target becomes a statement of current intent rather than a binding law that they must follow. In that case, any pressure that can be put upon the Government will be entirely political and not legal.

Professor Lee: The legal obligations are found all over the place. The legal obligations are not found in here. They may be found in part 2; some of them will be, but we do not know yet because none of us have



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seen part 2 yet. The legal obligations are found everywhere. They are found in air quality law, water quality law, environmental impact assessments and nature conservation legislation.

Q62 Dr Johnson: But the point I am making is that they will become UK law, which the Government can change, whereas they cannot just change European law.

Professor Lee: Absolutely, yes. That is one of the differences after Brexit: environmental law will be subject to change by Parliament here and, very often, Government will have a bigger majority in Parliament than we have become used to recently. The law will change, and that is one of the reasons why we need the principles to direct the way in which law changes. That is one of the reasons we need this governance process around environmental improvement plans, so that we can keep an eye on direction of travel, policy and intentions. Yes, the law might be undermined and reduced. That would be a very bad thing.

Q63 Dr Johnson: I do not mean it would be undermined and reduced. I mean more that, if you are setting a target, you have a choice between setting a target that you know you can achieve and one that is ambitious and stretching. If you know you are going to be held to account for that and potentially sued for that, then the temptation presumably is to set an easy target that you know you can achieve but does not really improve things greatly. If you, on the other hand, know you can change that target largely at will—because secondary legislation can largely be changed at will by the Government—then you can set a more stretching target but you do not have to achieve it.

Professor Lee: It is classic dilemma that harder enforcement might mean less ambitious targets. However, my instinct when I hear that is that I do not want Government of any colour, type or time to get a cheap political win by saying, "We are going to have this massive environmental target", knowing that they are never going to have to comply. I would rather they set the less ambitious target and everyone gets to fight about it. This is about transparency. Doing what they say they will do is inherently more politically accountable than saying they will do something that no one has any intention of ever doing.

Q64 Dr Johnson: My point was that the accountability is surely political in the future and not legal. If the target is not being met, putting a statutory instrument before Parliament, passing it in a Committee and changing that target so that you are now meeting the target you have now set is entirely achievable. The only thing is that it will be up to the media and voters to make decisions based on what they have seen.

Professor Lee: It would be a really cynical Government.

David Wolfe: There are several stages to your question, if I may. First, if the targets end up in secondary legislation, it makes the target easy to change. That is part of what lies behind your question. The Minister can



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just introduce a new statutory instrument at the stroke of a pen, very quickly. That is a particular downgrading of the notion of targets.

It may have been before you came in, but I talked a little bit about targets in primary legislation. An example of that historically is the fuel poverty target, which was in primary legislation so therefore harder to tweak, but it was still not met. When litigated, when Friends of the Earth, as it happens, went to court about it, the way the courts interpreted that was to say, "We know it says that you should achieve X by year Y"—I cannot remember the specific details—"but that must have been subject to a resources consideration". You did not see that anywhere in the legislation, but nonetheless that is how the courts interpreted it.

So it really comes down to where you frame your targets—primary legislation is more secure than secondary—and how you frame them. It would then be up to Parliament, in legislating, to set targets that were both at an appropriate level of ambition, to pick up Professor Lee's point, but also framed in ways that made them much harder to wiggle out of later, if that is what you are trying to achieve.

Q65 Dr Johnson: What I was also trying to say is that if targets can be changed then the law has changed. How can you hold somebody legally accountable?

David Wolfe: You cannot.

Q66 Dr Johnson: You cannot. The accountability becomes political.

David Wolfe: Exactly, yes.

William Wilson: I very much agree that legal accountability is not the only form of effective accountability. To pick up on what Sheryll Murray was saying earlier on, there is a real force in calling the senior people to account before a Committee like this. Particularly where a public body is not taking action promptly to deal with something like a decision notice, whether or not that decision notice is endorsed by a tribunal, which might be a halfway house before judicial review, at that stage, for you to—

Q67 Chair: Are there any proposals for tribunal in this?

Professor Lee: Not in here, no.

William Wilson: No, not yet, but some other commentators have suggested that a tribunal is—

Q68 Chair: Is that a point you would raise here this afternoon?

William Wilson: Yes, a tribunal is sometimes better equipped to be familiar with environmental law and used to dealing with it than judicial review. In any event I would not underestimate this kind of power. For example, you have the power to summon the Minister and the Permanent Secretary or, if you like, the chairman and the chief executive of a public body and ask them to come and explain in public and on the record why their body remains in breach of environmental law. That does not have



the constitutional ramification of having fines, but, my goodness, it is effective, in the same way as it is when a Minister has to go and answer questions in Parliament or a Permanent Secretary has to go and answer before the Public Accounts Committee. It concentrates the mind quite wonderfully.

Q69 Dr Johnson: Presumably fining itself is recycling money. In some respects, the political accountability could be stronger than the legal accountability, which would be costly and not necessarily achieve anything.

William Wilson: Indeed, yes.

David Wolfe: The only thing about the legal accountability is, if you get to the hard-edged point of a judicial review and a public body is found to be acting unlawfully and that results in the court making a mandatory order, non-compliance with a mandatory order is contempt of court. In theory, somebody could go to prison for that, but that is, in a sense, such a blunt stick that it is often rather theoretical, rather than real.

Q70 Angela Smith: Just quickly, to go back to what David said about the OEP substituting for ClientEarth, as it works at the moment, as I understand it, for instance, in relation to the River Thames, way back, an environmental group had taken the Government to court over the sewage and the levels of pollution in the river, effectively in the end that could have resulted in action by the Commission and the European Court of Justice. As it happened, there was a threat of fines anyway. There was a commitment of £4.3 billion in the end—was it £3.4 billion or £4.3 billion?—to build a new tunnel. Would it be possible, under the terms of this Bill and the OEP, for an NGO to trigger that kind of procedure, once we have left the EU? I am really concerned that NGOs will lose the ability to take effective action.

Professor Lee: One of the things we are doing in this conversation, which is kind of how it has to be, is imagining that enforcement is completely independent of the legislative standards, which is the same as the point we were just talking about before. Whether they enforce that sort of action really depends on the way the legislative standard is framed. If the legislative standard is framed in a really hard-edged way, such as, “You shall comply with this numerical limit”, then in principle yes, but legislation is generally not framed in that very hard-edged way, which means you would get a much less hard-edged result.

Chair: I am sorry about the bell. It is a Division, is it? It is a division.

Kerry McCarthy: I do not know whether we will be able to come back.

Chair: We are not realistically going to come back, are we? No. Can I ask for the other questions here to be presented in writing, please, particularly the ones on clause 15? We did talk a bit about that. We want an answer to that. We also have the one on environmental law in clause 31. Is it sufficiently clear? It does not cover areas such as forestry, flooding and town and country planning. Does it need to be brought into



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the scope of the OEP? Both William and Professor Lee have presented written evidence. David, we would like some from you. Could all three of you deal with those?

I am sorry it was so bitty this afternoon. I hate it when this happens, but it is democracy, and every now and again we have to go and vote. It is one of these unfortunate things. It upsets our routine. I thank you very much for your evidence. It has been really good evidence. I am sorry it has been so bitty. Perhaps we might ask you back in a private capacity at some stage if we want to finish some things off, if that is okay with you all. I do not want to keep you waiting, because getting the members back again would be almost impossible. Thank you very much.