

# Environmental Audit Committee

## Oral evidence: Pre-legislative scrutiny of the draft Environment (Principles and Governance) Bill, HC 1951

Wednesday 6 February 2019

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Members present: Mary Creagh (Chair); Mr Philip Dunne; Zac Goldsmith; Mr Robert Goodwill; Caroline Lucas; Kerry McCarthy; John McNally; Alex Sobel.

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### Witnesses

I: Daniel Greenberg, Counsel for Domestic Legislation, House of Commons, Raphael Hogarth, Associate, Institute for Government, and Chris Stark, Chief Executive, Committee on Climate Change.

II: Ruth Chambers, Senior Parliamentary Affairs Associate, Greener UK, Georgina Holmes-Skelton, Head of Government Affairs, National Trust, and Professor Andrew Jordan, Professor of Environmental Sciences, University of East Anglia, and Co-Chair, Brexit and Environment Network.

## Examination of witnesses

Witnesses: Daniel Greenberg, Raphael Hogarth and Chris Stark.

**Q1 Chair:** I call the Committee to order and welcome our witnesses and guests to this, our first hearing on the draft Environment (Principles and Governance) Bill. This is only half a Bill, so we will all be back here doing it all again in six months' time. We are delighted to have some legal and constitutional experts here with us today as well as Chris Stark, Chief Executive of the Committee on Climate Change. I think this is your second appearance with us. Can I ask you to begin introducing yourselves from my left, please, starting with Chris?

**Chris Stark:** Hello, I am Chris Stark. I am the Chief Executive of the Committee on Climate Change, the watchdog for climate change here in the UK.

**Raphael Hogarth:** I am Raphael Hogarth, an associate at the Institute for Government, which is a think tank that works to make Government more effective.

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

**Q2 Chair:** You are all very welcome. Let me begin on this Committee's report. We have spent a lot of time thinking about this new Office for Environmental Protection and we were very keen that it should report to Parliament rather than to Government. We thought that the Government had more experience putting down watchdogs than setting them up. Do you think that reporting to Parliament is appropriate for what the Government are trying to achieve?

**Daniel Greenberg:** At a technical level, the office has essentially two strands of function. It has a scrutiny and advisory function and it has an enforcement function. The enforcement function will be in relation to public bodies and it is yet, I think, to be clarified—but this is one of the things that you and other Committees will want to clarify with the Government—to what extent the office is expected to be enforcing directly against the Government.

So far as the first strand of activity goes—reporting, monitoring and advising—frankly, it does not matter very much who the reports get to first because they are going to get to you and to the Government at pretty much the same point, whoever they are technically made to.

When it comes to the enforcement function, it obviously matters a great deal to whom the office owes its allegiance, so to speak. If I may say so, Chair, you need to see that as part of a wider governance issue about who controls. It starts with appointment, but it goes through who controls, if there are directions from the Government, what sort of directions, and you will be interested in that, whether it is reporting to you or to the Government on the enforcement functions, in any event.



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You will want to look at what relationship there is between the office and the Government.

On the one strand it does not matter very much; on the other strand it matters a great deal, but it depends on factors that have yet to be worked through.

**Raphael Hogarth:** I agree. It is worth being clear about what it means for the body to report to Parliament. In some weak senses, the body, as in the draft Bill, does report to Parliament, at least insofar as it has to lay an annual report before Parliament, but in two key respects its relationship with Parliament is weak, and those two respects are appointment structures and funding structures.

As far as appointments are concerned, the chair and other non-exec members are appointed by the Secretary of State and there is no statutory involvement for Parliament in the Bill as it is currently drafted. There are ways that that could be changed and there are some interesting precedents to draw on for that. One of them is the OBR, when a conversation along very similar lines went on about trying to create a robustly independent body in 2010. There was dialogue between the Treasury and the Treasury Select Committee about how best to do that. The appointment of the chair of the OBR is subject to confirmation by the Treasury Select Committee, so that is one way of increasing involvement.

You could go a step further than that, which is to mimic the appointments process for the Comptroller and Auditor General and say that there has to be a Humble Address and a vote on the appointments. Or you could go a step further still and mimic the appointment structures for say the Electoral Commission and say not only does the appointment have to be approved by a vote, but the name has to be proposed by a parliamentarian. That is a sort of ladder of potential increases in parliamentary involvement for appointments.

The other key respect in which the body's relationship with Parliament is currently weak is on funding. I think that the provision of the schedule at present is that the Secretary of State must make such funds available as he considers appropriate or something like that. Again, the OBR is an interesting precedent in that respect. There was a similar dialogue around whether the Secretary of State could effectively neuter the OBR by the back door by slashing the funding available to it if he was in that much control. In any event, funding relationships are going to be, to some extent, hammered out in Whitehall. The question is how you increase the visibility of that so that parliamentarians can get involved, comment and make their views known. For the OBR, the way that that is done is by giving the OBR its own budget line carved out from the Treasury's budget line. You could go further still and do what has been done for non-ministerial departments and parliamentary bodies and give it its own estimate to be voted on by Parliament. That is another way of increasing parliamentary involvement.



In terms of its relationship to Parliament, those are two key avenues for making that reporting relationship stronger.

**Q3 Chair:** We were very clear in our report that we wanted an analogy, a direct read-across from the National Audit Office, because we envisaged this as the environmental audit office. You see what we did there. The scrutiny was about auditing the environment, so it needed a parallel footing and a parallel status rather than ending up like the Sustainable Development Commission and the Royal Commission on Environmental Pollution, which were scrapped in the Public Bodies Act 2011. We were very keen that it should be funded by and report to Parliament.

Can I come back to Mr Greenberg? Can you explain whether a parliamentary accountable entity could have enforcement powers over Government? Yes, you think you could.

**Daniel Greenberg:** The answer is that anything is possible. Of course it could. There is, I think, a potential source of confusion in some of the discussions with Government here, where they talk about a parliamentary entity: "It would be inappropriate for a parliamentary entity to do this or that or the other." It is true that a Select Committee of Parliament, for all sorts of reasons, is not likely to be bringing judicial reviews of the Government or anybody else for all sorts of obvious reasons, but a number of hybrids have already been mentioned. The NAO is one, the budget authority is another. There are lots of offices and bodies that have very strong parliamentary links and that was the point that Raphael Hogarth drew attention to.

I think that it is more about the links than it is about the model, if you like. There is no reason why you should not have a body that reports in lots of different ways to Parliament, where Parliament takes a direct interest in its funding and its spending in exactly the same way as the NAO, which has a function of bringing reviews against public authorities, including the Government. There is no constitutional impossibility or impropriety in that. There are all sorts of issues.

The funding is very difficult to pursue. It is all very well saying it is not good enough for it to say in the Act that the Secretary of State must pay the OEP as much as the Secretary of State thinks is right, but what are you going to say instead? You cannot give it a blank cheque any more than any public authority has, so how do you get that right? I think that is something you will want to explore with the Government. How can they give you assurances on the funding, as they do in relation to other bodies?

If I can pick up something I said to the EFRA Committee that was looking at this, part of this is about benchmarking in an objective way what this office is actually going to do. If you have benchmarked the functions and what the outcomes of those functions are objectively, it becomes easier to budget for them. It becomes easier to estimate how much it is going to cost in a given year, to see that you got value for money, and it becomes



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easier to say to the Secretary of State, "By refusing to give this amount of money that relates to this estimate in our estimated budget, you are preventing us from performing this activity, which the Minister assured us was one of the things that the office was going to do".

It is useful not to wholly focus on the model in an abstract way, but to focus on the individual things we want this thing to do, and get assurances from the Government that make you satisfied that it will be resourced and funded to enable it to deliver.

Q4 **Chair:** Do you think that it could be set up within the transition period, whatever that is going to end up being?

**Daniel Greenberg:** It is the "whatever" that gives me slight difficulty. Could it be done in two days? No, it couldn't.

Q5 **Chair:** Two years, three years? Easy.

**Daniel Greenberg:** Clearly.

Q6 **Chair:** I guess it depends on when the legislation comes forward as well.

**Daniel Greenberg:** Yes.

Q7 **Chair:** Mr Hogarth, can I come back to you? If the Northern Ireland protocol, the backstop, were to come into force, could there be implications for the set-up of the OEP?

**Raphael Hogarth:** Definitely.

Q8 **Chair:** What are they?

**Raphael Hogarth:** The backstop contains an environmental non-regression clause, as I am sure members of the Committee know, which stipulates that essentially the United Kingdom's level of environmental protection may not be reduced from where it was at the end of the transition period. Exactly the way in which that clause operates is not entirely clear so far, but I think that there are a couple of questions for the OEP.

The first issue—and this may be something that becomes clearer when we see the rest of the Bill—is what the OEP's role is in respect of treaty commitments in general. At the moment, this Bill sets up the OEP to enforce and advise on a domestic framework and there is no mention of treaty commitments. One question for the Government is, if and when the United Kingdom does have environmental treaty commitments, either under the backstop or under the future relationship treaty, if a future relationship treaty is negotiated that imposes different environmental obligations, does the OEP then have any role in supervising those commitments and does it need to have regard to those commitments?

Getting a bit more specific, supposing the OEP's focus is on a domestic framework, then the way in which the environmental non-regression clause interacts with Article 4 of the Withdrawal Agreement becomes



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quite a constitutionally testing issue for the OEP. Article 4 of the Withdrawal Agreement gives both the Withdrawal Agreement and rules of EU law within the Withdrawal Agreement supremacy over domestic law, and it also provides that any rules that would have direct effect—so be enforceable before domestic courts—in the EU also have direct effect, or something like it, in the UK after Brexit.

In that respect, Article 4 of the Withdrawal Agreement sucks EU law and Withdrawal Agreement obligations into the domestic legal system. It is not entirely clear to me from the drafting of the agreement whether that includes all of the environmental obligations that wheedle their way in via the non-regression clause, because the non-regression clause does not give us a list of rules of Union law and environmental commitments that are henceforth enforceable in the UK.

This may be a question to which nobody in either the UK Government or the European Commission yet has an answer and it may be a question to which we will not have an answer until a reference is made to the European Court of Justice on it post-Brexit. It would certainly be useful to know what the Government think the answer is about whether those environmental obligations will be incorporated into UK law because if they will, then on the face of this Bill, the OEP is going to need to enforce them.

That presents quite serious challenges for the OEP just in terms of interpreting the obligation. This idea of maintaining a level of environmental protection is not, as far as I understand, a carefully and thoroughly legally-defined notion. It is something that is going to involve significant exercise of judgment by whoever is in charge of enforcement. That is one challenge to be aware of. At the same time, if the OEP is going to have an explicit role in enforcing treaty commitments against the Government, then it is still more important to make sure that the OEP is robustly independent of Government because the OEP essentially has an EU-facing role.

One final thing that I would say about the interaction between the OEP and treaty obligations concerns the future relationship. If the non-regression clause is imported in the way that I have described, then it has to be somebody's job—maybe the OEP's, maybe somebody else's—to say, "The UK needs to not legislate so as to row back on its environmental commitments. It needs to not regress". The environmental commitments in the eventual future relationship might go further than that. Indeed, I think that there has been some discussion in the House of Commons about whether the UK might want its environmental commitments to go further than that, which is to say maybe the UK will be under obligations dynamically to align to EU environmental law.

If that is the case, then somebody has an extra job, which is not to make sure that Parliament is not doing something, but to make sure that Parliament is doing something. In a sense, that is an even constitutionally



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weightier role insofar as it involves browbeating parliamentarians into looking at things and taking action. That is something where you would be quite nervous about an executive body—an executive-minded body, an executively-structured body—taking that on and pushing parliamentarians around in that way.

Q9 **Chair:** Thank you, that is helpful. Just to clarify on the non-regression clause in the backstop, are you saying that it is from the end of the transition period—it does not provide for full regulatory alignment on the island of Ireland post the transition? It does?

**Daniel Greenberg:** No.

**Chair:** It does not?

**Raphael Hogarth:** No, it is a UK-wide commitment to non-regression. That is my understanding and recollection of it.

**Daniel Greenberg:** Yes.

**Chair:** That is helpful. Thank you.

Q10 **Alex Sobel:** Chris, the Committee on Climate Change has not been immune to budget cuts. How do you think a watchdog can maintain its bite without risking cuts to its funding?

**Chris Stark:** It is worth just quickly going over some of the issues we have already discussed. The Committee on Climate Change is often cited as a model that could be looked at for the OEP. Of course we are not an enforcement body, so that is a really important distinction to make. We are a scrutiny body first and foremost, although we do have this relationship with Government and with Parliament, which is distinct. Once a year we report to Parliament on progress on climate change and it is principally through that route that we expect influence over Government to be exercised. That is another model that is worth discussing.

Of course we are fiercely independent as a body, but we do have this umbilical link to Government. It manifests in two ways: first in the appointments process. The appointments to the committee itself—we are a committee—are ministerial appointments. After that, there is no further link, but the appointment is a ministerial appointment, as is the chief executive.

The other link though is funding. This has occasionally been cited as a weakness of the Climate Change Act, that we do not have that funding independence. We do not have, for example, some of the models that have already been discussed here for funding. It has not been a problem for the Committee on Climate Change thus far. We have always had sufficient funding for the statutory functions that are laid out in the Climate Change Act. That is not to say that that will be the case forever, and there is always that pressure upon us. When funding cuts are made across Government and when Treasury makes it clear that funding must be borne down upon, we feel that pressure too. We have the ability to



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return to Parliament to say our funding is insufficient and that is not a facility we have yet used. I suppose that is our primary protection against the question that we might in future be underfunded. I will just say one more time that that has not happened yet. We have always had a positive, constructive relationship, certainly at funding level, with Government that has allowed us to do the things that the Act requires of us.

**Q11 Alex Sobel:** You have not experienced it yet, so you cannot elaborate on that aspect?

**Chris Stark:** No.

**Q12 Alex Sobel:** This is more for Daniel in terms of our internal procedures. Does clause 12(1) have any practical effect on the independence of the OEP? Where else are there opportunities to improve the OEP's independence within the Bill? Where can we promote this idea of independence surrounding appointments et cetera?

**Daniel Greenberg:** So that I do not forget the point, before I answer that question, may I pick up a very small point from—

**Alex Sobel:** Sure. I can always repeat the question.

**Daniel Greenberg:** No, I have that question. I do not want to forget this point. It is very important, I think, in the schedule that the chief executive is appointed by the chair in this case and is not a ministerial appointment. That is quite significant because members will know—and I am sure Chris Stark will confirm—that in terms of a robust independence within an organisation, the chief executive is a key figure.

Coming back to your question on 12(1)—and I am trying to be polite—I think that 12(1) is of questionable efficacy.

**Chair:** Don't be polite. What would you want to say?

**Daniel Greenberg:** It is a load of old nonsense, because all public bodies have to act objectively, impartially, proportionately and transparently, so to say they have to have regard to that adds nothing. It is a nullity. Again, as I said to the EFRA Committee, rather than thinking about the abstract grandstanding here, we have to look function by function: what does independence mean? Let me give you two examples, one from each strand of the office's work.

When it comes to monitoring and advising on progress on environmental protection, independence there means much more than membership of the committee. It means who do we go to, which academics do we go to, which groups, which non-governmental organisations do we involve? Because they are not going to do the work themselves. Do we have a way of showing that we have gone to people who have a track record of independence? That you could put in. You could put that on the face of the Bill: in choosing the advice that they get in exercising their monitoring function, they must have regard to the importance of



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choosing people who have a track record of independence. That is something that means something in the academic world, in the NGO world, and that takes this on a bit.

Let me give you another example in relation to the other track of the office's work: enforcement. Enforcement will work through case workers and the case workers' system will be set up. Again, there is a resourcing issue, as Raphael Hogarth mentioned. There is a resourcing issue there, but there is much more a Carltona structure issue there. Can we show that in setting up the Carltona rules, the responsibility and oversight rules within the organisation, that the case workers are recruited to be independent and are allowed to be independent? Again, you could put that on the face of the Bill in one form or another. Rather than regard the need to act impartially, that shows how you are acting impartially, "When we set up our case workers we tell them, 'We want you to report on the basis of your objective knowledge of what is happening. We don't want you to take decisions on the basis of party politics in either direction'".

Q13 **Chair:** You are basically saying show, don't tell, on the face of the Bill?

**Daniel Greenberg:** Exactly so. Does that answer it?

**Alex Sobel:** Yes, it is very helpful.

**Daniel Greenberg:** I think that 12(1) just does not begin to get you off the ground because it just mirrors what is already the law, but there are ways you could beef it up and give it some guts.

Q14 **Alex Sobel:** Are there any other clauses where we could also improve the OEP's independence?

**Daniel Greenberg:** Yes.

**Alex Sobel:** Would you like to suggest where?

**Chair:** I am sure it will emerge in our questioning.

**Alex Sobel:** It will emerge, okay.

**Chair:** Let's move along to Robert.

Q15 **Mr Robert Goodwill:** I would like to ask Mr Stark how the work of his Committee on Climate Change and the OEP can work collaboratively and how they can dovetail together. I am well aware that one man's collaborative working is another man's unnecessary duplication. The Committee on Climate Change has previously warned about overlap between itself and the OEP. How would you like to see the Committee on Climate Change and the Office for Environmental Protection complementing each other?

**Chris Stark:** The first thing to say is we very much welcome the existence of this thing, this new watchdog. It does fill a hole that we see, which indeed we flagged with DEFRA in various consultations last year, but there is this question of overlap.



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I might just briefly explain that we have several functions in the Committee on Climate Change. They are best described in the two camps of what we do. We look at, first, climate change mitigation, which is effectively emissions reduction, and we also look at climate change adaptation. It is really in the adaptation field, where we look at the impacts of climate change particularly on the natural environment, that you see this big overlap potentially with the new OEP.

It is very important though to distinguish those two things. We have quite a tight, if I can put it that way, governance regime around the mitigation question. We have a UK-wide Climate Change Act that mandates something against basically a single metric—that is the reduction of greenhouse gases—and a very clear role for us as scrutineer and as adviser to Government and, indeed, to Parliament.

**Q16 Mr Robert Goodwill:** I think that fluorinated gases is within the OEP and the rest is you, is that correct?

**Chris Stark:** There is an overlap there too. The principal overlap that I see as requiring some thought at least is on the adaptation side. Here we do not have such a clean UK-wide framework. There is a set of plans for how the UK will adapt to climate change that will vary, of course, and a great deal of devolved responsibility for that. There is not full clarity at least about how the OEP will manage some of those devolved and UK-wide questions.

We see this overlap. We will advise on things like habitats and species and how we might use water resources in the future. In our assessment of the national adaptation plan that we have in the UK, or at least for England, you see a very large overlap with the objectives that are laid out in the 25-year environment plan. I do not necessarily think that is a problem. What is clear, however, is that we need to be clear on how that will be managed. We have a very clear role to do the scrutiny of those issues.

**Q17 Mr Robert Goodwill:** Are you worried that they are going to park their tanks on your lawn?

**Chris Stark:** No, I am not worried. In fact, far from it. At this stage I think that it is very clear that we can establish a memorandum of understanding that could clearly set this out. There is a question of whether the legislation itself would need to reflect that. That is something I cannot quite opine on because I have not seen the second part of the Bill. We do not know what targets, for example, are in there.

What I can see is a world where we offer our scrutiny of those issues where there is an overlap from the perspective of climate change adaptation as is set out in the Climate Change Act, but we offer that to the OEP in the future. There may be others who are doing similarly independent roles scrutinising some of the areas of overlap, and it is for



the OEP then to gather those things up and to imagine how it might then choose to enforce against the principles for the OEP.

**Q18 Mr Robert Goodwill:** It is their role to enforce and take action against—I do not know—airlines that are not complying with their carbon trading or what have you? Will you be the whistleblower and they will be the enforcement agency?

**Chris Stark:** Again, I will make this distinction. Let's use a real example. If we are talking about a climate change impact that might have some impact on species in the UK, and that is very clearly something that the OEP should care about, we might offer our assessment from the very clear and narrow perspective of climate change adaptation about what is happening there and what needs to be done about that. The OEP can gather that information from an independent body like the CCC. There may be other bodies that look at issues, for example, of biodiversity that are offering that kind of assessment. The question of what they then enforce is for them to manage.

That is distinct, however, from the challenge that we have on the mitigation side, which is about emissions reduction, where it is much, much clearer what the governance arrangement is. I do not think it is necessary at all for the OEP to have a role on that side where we have, for example, the carbon budgets, the targets for reducing emissions and a plan very clearly where Government are in charge of that and we are the independent authority on how well they are doing it.

**Q19 Mr Robert Goodwill:** Do you think it is possible that this can be fully covered in statute or will it be down to the personalities of the people at the top of these two organisations at any one time how that works?

**Chris Stark:** I would much prefer it if it did not fall to personality because it is something that must endure for several decades at least just to look at the challenge on climate change. It is not an issue I am expecting to go away any time soon. It is very important that it is laid out either in the legislation or through some kind of memorandum of understanding that explains how my organisation and the new OEP will operate. I have to say that I do not have a preference for one or the other, although if it is possible to lay out that arrangement in legislation I always think that is a more sustainable answer.

**Q20 Mr Robert Goodwill:** Mr Greenberg, do you want to comment on that?

**Daniel Greenberg:** I think that the answer is you have to have both in the end. A memorandum of understanding that does not have any kind of statutory authority is very difficult and is quite difficult for the bodies involved because it does not have that authority. Trying to get the relationship right entirely on the face of the statute will also necessarily go wrong and will make it more likely that it comes down to personalities as to how they interpret different bits from time to time.



What you would probably want to see eventually—I agree with Chris Stark that you cannot do this until you see the rest of the Bill—is something that says, “This body, in exercising its functions, has to have regard to the desirability of not getting in the way of this body on these aspects”, vice versa, and, “The two bodies must agree a memorandum”. Although I am always nervous of statutory duties telling people to agree, because what if they do not? Here, if you have two publicly-funded bodies, you can risk saying they must agree because there are mechanisms for achieving that. They must agree a memorandum of understanding as to how they have achieved that statutory purpose. That gives them the statutory clout.

**Mr Robert Goodwill:** That is very helpful. Thank you.

**Chair:** That is great. Thank you very much. We are making great progress here.

Q21 **Caroline Lucas:** I want to come back to Mr Greenberg first. This is on the statement on the principles. Is it appropriate to exclude Government fiscal or spending decisions from the scope of the policy statement on principles, do you suppose?

**Daniel Greenberg:** I would not comment on that for a moment. That would be well outside my remit. What I will tell you at a technical level is that you will definitely wish to explore with the Government what the effect is of that exclusion. It does look at a technical level as though that could be pretty all-embracing. I think that the implication of your question is what that would leave us.

**Caroline Lucas:** Indeed.

**Daniel Greenberg:** Trying to be helpful, but still keeping to a technical remit because you do not want me to express an opinion on the policy—

**Caroline Lucas:** God forbid.

**Daniel Greenberg:** What I think you need to do is to say to the Government, “What are you getting at? In clause 1(6)(b) what are you actually worried about? Clearly you cannot be saying that the principles cannot address anything that has a resource implication because everything has a resource implication, so you cannot mean that. Tell us a bit more what it is that you are frightened of these principles encroaching on and then, once we have refined that, let’s get that put into the statute.”

I do not think this is unreasonable because this is a draft Bill. I have drafted legislation for many years and very often you do exactly this. You come up with an initial policy statement that goes a little bit further than you perhaps meant and then the drafter, or in this case the Committee, will come back and say, “Hold on, you do not need that, so explain what is underneath it and then let’s try to refine it and put it down in a more specific form.” There must be something they are worried about that is reasonable. You need to get from them what that real worry is and



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express that in clearer, more specific terms. As it is, I can see why the implication of your question is that this is so broad that it nullifies what went before. Does that help?

Q22 **Caroline Lucas:** Yes. Presumably you would say something similar, would you, around paragraph (c), which is this other catch-all that any other matters specified—

**Daniel Greenberg:** No, that is very different. If I may say so, that is a very different matter. That takes us right back to the question about the relationship between the Government and the bodies that are set up under this Bill and other related bodies to look at these principles. What worries me about clause 1(6)(c), or what I would expect to worry you, is not simply the vagueness of it, though obviously it is—because they will not be able to give you the same answer. They will not be able to say, “We have put that in for this specific reason.” Under paragraph (b) I want to know exactly what they are thinking about. For paragraph (c) they will not be able to tell you that. They have put in a catch-all because they do not know.

What I am worried about there is what implications that has for their ability to effectively, if they do not like what the OEP is doing, say, “We are not going to control you, we are not going to cut your budget. We are just going to massacre the Bill so as to take that whole range away from your terms of reference.” That is back to the direction and control issue.

Q23 **Caroline Lucas:** Did you want to say anything on either of those two things?

**Raphael Hogarth:** I would like to say something about a related section of the Bill. I don’t know if we are going to come on to it.

**Caroline Lucas:** We are about to come on to the bit about clause 4(2), the proportionality test. Is that the bit?

**Raphael Hogarth:** No, I was going to say something about clause 8(1).

**Caroline Lucas:** Remind me what clause 8(1) is.

**Raphael Hogarth:** Annual reports and environmental improvement plans.

**Caroline Lucas:** I do not think we have that anywhere else, have we?

**Chair:** I think that our second panel is going to talk about that.

Q24 **Caroline Lucas:** Give us two sentences just as an appetite whetter.

**Raphael Hogarth:** One thing that is worth pointing out about that process when considering the relationship between the Government and the OEP is the languid timetable for the interaction between the two that is set up by interlocking provisions of the Bill. The Secretary of State has a year-long period on which to report. The OEP then has six months to get back to him. The Secretary of State then has a year to get back after



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that. You could be looking at two and a half years from a piece of bad implementation to the Secretary of State having to account for it, and most Secretaries of State do not even last for that long. Only two Secretaries of State ever have. Just on the scrutiny and advice functions, that is another thing worth having a look at.

**Q25 Caroline Lucas:** Yes. I like the word “languid”. It is very polite. Lastly, if I could come back to Mr Greenberg again on the proportionality test in clause 4(2), could you say what impact you think that might have?

**Daniel Greenberg:** I agree again. This is something you need to ask. The questions you are going to want to ask the Government on this are that surely proportionality is going to be built inherently into the principles. It seems very strange that the premise of this is that we could have principles that somehow do not reflect proportionality, because proportionality is at the heart of environmental protection. That is question number one for the Government on that.

The second question comes back to your questions on clause 1(6)(b) and (c). It is a similar point here. It is an emasculation issue. What guarantees can the Government give you that this provision will not be used to render the principles nugatory? The answer to that is that they cannot, so it is back to what I said before. You need to know more about what clause 4(2) is getting at. What are they worried about? This is what I suspect may be underlying it. The principles are principles. They are high-level principles and they are not intended to transfer into justiciable judicial review mechanisms to force a Department to do a thing.

If that is what they are on about, first, it would be nice to hear them say that, so you will ask them. If that is what they are on about, I do not think there is a risk of that in any event in relation to high-level principles, and that is what you will want to test with them. What are they specifically worried about and does it need to be said? It probably does not need to be—

**Q26 Caroline Lucas:** Just say why you do not think that is a risk.

**Daniel Greenberg:** Because high-level principles are high-level principles.

**Q27 Caroline Lucas:** We had the DEFRA team in last week or the week before. Essentially, when we asked them that question it did seem that their concern was that somehow these high-level principles could be used to be brought to bear on things that were not directly relevant, that were trivial and so forth.

**Daniel Greenberg:** They have to get the principles right. If they get them wrong—if they put something specific in the principles, this will not help them anyway. If they descend to a level of detail in the principles—it is inconceivable, but if they were to do that—and if the principles demand a hard-letter result, then having a proportionality get-out will not help you anyway. The question is about getting the relationship between the



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principles that are soft-letter law and statutory instruments and other legislation in this area, which is hard-letter law. Their nervousness appears to be about the principles descending into becoming hard-letter law. The answer to that is to draft the principles right.

**Q28 Caroline Lucas:** You do not think it is a helpful thing to bark up the tree of trying to get the Government to define what they mean by “no significant environmental benefit”?

**Daniel Greenberg:** I think that this is one of those areas where the more words you throw at the paper, I sense more jobs for lawyers and no other benefit.

**Q29 Chair:** The principles are already drafted. This is a transposition of environmental principles from the EU, so it is not like the Government are making up new ones.

**Daniel Greenberg:** If I may say so, I am not sure that is quite right, although my colleagues here know more about this than I do, and they will bear this out. The principles at the moment are part of EU law, so at the moment they are a different thing. Raphael Hogarth mentioned before the change that happens when you domesticate EU law. In the process of becoming principles under a domestic statute, they change their nature considerably. That is why you should not assume that language that has worked effectively in the EU principle context will necessarily work in the same way in the domestic law context.

**Q30 Chair:** What you are saying is they have gone from an abstract high-level concept to something that is tangible and real and actionable in—

**Daniel Greenberg:** That is what they are worried about, isn't it? That is clause 4(2) for you.

**Q31 Chair:** That is why they have this get-out clause?

**Daniel Greenberg:** That is why they are worried. I am saying that I think if they get the principles right and they manage that transposition correctly into domestic high-level principles, they may find they do not need clause 4(2).

**Q32 Mr Robert Goodwill:** Will that vary between a directive and a regulation? Currently a regulation drops in our statute book, but we have to transpose a directive.

**Daniel Greenberg:** Correct, exactly so.

**Mr Robert Goodwill:** That gives a lot of scope for nuance.

**Daniel Greenberg:** Exactly so. To an extent, the difference between a directive and an EU regulation is in part the same as the difference between soft-letter guidance, quasi-legislation principles and so on in domestic law and hard-letter Acts and subordinate legislation. I say to an extent because of course directives are justiciable. They are actionable at



state level in a way that is similar to a hard-letter obligation. The analogy is sound, but it is not complete.

**Q33 Chair:** Can I take us back to Chris Stark on the enforcement around climate budgets? You do not have that written in the Climate Change Act. Several of our witnesses that have come forward say that that is a glaring anomaly because obviously the budgets are going to become harder to achieve and people are saying it should become part of the enforcement functions of the OEP.

**Chris Stark:** Again, just to make the distinction between adaptation for climate change and mitigation—

**Chair:** I am talking about mitigation now, yes.

**Chris Stark:** For mitigation, it is important to think about what we are trying to achieve here. The targets determine that we have to reduce emissions overall by a certain date and we choose through that legislative framework that is the Climate Change Act to do that by having a long 2050 target and then every five years having a carbon budget, as we know it, to take us there. Parliament enforces those things, Government are expected to make a plan to meet them and we are the independent adviser on all that. There is this lingering threat through all of it of a public challenge through a judicial review, which could come from somewhere outside of that framework.

That framework of Parliament, Government and committee works very well, and I just want to briefly explain that. At the moment, we offer our assessment of how likely it is that the fourth and the fifth carbon budget, for example, will be met, and we have offered our assessment at the moment that we do not think that the Government are on track with their policy programme to meet that.

Of course we offer that assessment to Government, but what we are saying to is Parliament, "Be aware that this thing that has not yet happened looks at risk. The achievement of these carbon budgets looks now at risk." At some point, it is for Parliament to decide whether it might require Government to make a better plan, and we will of course offer our independent assessment of that plan when it is required.

I suppose the point I would make is that the toughest sanction that you might require, through whatever legal route, is a better plan and the best authority to make sure that that happens is Parliament itself. We need to be clear that that would require Parliament to, through whatever means, require Government to improve the plan. I think we have a very good governance arrangement in place already where it is very clear what the various roles are. The question of whether the OEP might step in in some sense to become an enforcement body there to my mind just loosens that arrangement.

There are a couple of points I might make about that. The first is that I think that it would be required of the OEP in that enforcement role to



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make its own independent assessment of how likely it is that, in this case, the carbon budgets were to be met, which—

Q34 **Chair:** No. Why would they be required to do that? If you are the body that says it is not going to be met, then the OEP could step in or people could take action under the OEP.

**Chris Stark:** We would technically have to make an independent judgment of whether that was the appropriate moment to enforce at that point. I think the key point is these carbon budgets are in the future. It is different to, for example—and I am going to use a related issue—air quality now, so when you breach an air quality target, an air quality limit now, there is a requirement there to enforce something to make that better. We are talking about something that is happening in the future and we offered our best appraisal of that in the committee. It is a judgment call therefore whether you then launch an enforcement proceeding in that circumstance which requires the OEP to make some form of judgment or whether our assessment is enough to see a successful enforcement proceeding.

The other thing that you do is that you change the nature of the kind of advice that we offer. The beauty, to my mind at least, of the way the Climate Change Act works is that we are able at present to say to Government, "You are off track. That is for you to decide". One of the challenges that is often levelled at us is that we should come out against, for example, the third runway at Heathrow and there are very good reasons to think that is something we should indeed say something about, but the key point in the Climate Change Act is that if Government choose to support the expansion of airport capacity in the UK, then it has to be that if you want to make the climate change targets there must be an equivalent action somewhere else. That is the freedom that is afforded to Government. We offer that appraisal of the implication of that decision.

Q35 **Chair:** We understand all that and we understand the budget setting and we have had you in several times and your predecessor. In July, I think when Lord Deben was in front of us, he said he did think that he saw a need for climate change mitigation, but he did mention the Energy Efficiency Directive, the Renewable Energy Directive and the Waste Framework Directive, which are not covered by the Climate Change Act, which would need to cover some climate policy in its enforcement role.

**Chris Stark:** I think that is a gap remaining. I would say we very clearly have the appropriate governance arrangement in place for the mitigation targets and the carbon budgets already and I appreciate others say that, but there is this gap remaining in enforcement terms around the Energy Efficiency Directive and the Renewable Energy Directive and some others too. I think that is a more legitimate space, frankly, for the OEP to operate in and we would support that.

Q36 **Chair:** I take your point about air pollution now and carbon budgets in the future, but we heard yesterday that carbon budgets are going to be



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harder to meet, loads of them are predicated on as yet unproven—uninvented, let alone unproven—technologies, so given that this is going to be harder to meet in the future, why should citizens not have the right to sue the Government for failing to meet their carbon budget? What is the loss?

**Chris Stark:** They do have that right already, of course.

Q37 **Chair:** What is the route to sue on a carbon budget?

**Chris Stark:** This is precisely the point. You could say already that there is a possibility of a public challenge to the achievement of existing carbon budgets on the basis of the assessments we have already made. We are saying right now, for example, that we are not on track and that could happen now.

Q38 **Chair:** They would have to do that through fundraising £100,000 for a judicial review. If that already exists, what is wrong with it going to the OEP and them making a decision and that burden of finance and access to environmental justice being lifted from citizens?

**Chris Stark:** This is an entirely legitimate point. I suppose my main point is that I can foresee a point where the existence of a fourth party in that three-part governance arrangement I referred to earlier loosens the overall arrangement, but that is a matter of judgment. All the points you have made are entirely right. If you were to raise a public challenge at the moment you would have to fundraise and you would have to do all the things that we know are necessary to make a judicial review.

Q39 **Zac Goldsmith:** If that were to happen now and people were to raise money and challenge the Government, would it be on the basis of a target not having been met or could it be on the basis of the likelihood that a target will not be met?

**Chris Stark:** That is a key point. We have not had the circumstance where a target has not been met in terms of emissions reduction. Far from it, in fact. All the targets that have been set so far have been very comfortably met. If this is about targets that have not yet been met—and I might just add that introduces the ability for mischief—it would not be difficult for Government to put in place a plan for a strategy to meet that target but not to implement it. Take, for example, one of the more controversial technologies like carbon capture and storage. Government would simply have to commit to something and then we would make an appraisal of that and say, "That would indeed meet the carbon budget." At the moment they do not do that because we do not have that kind of hard enforcement arrangement that you described, Chair.

**Chair:** We heard yesterday that we have had soft targets that are easily met and that we are coming into the hard phases now and some of the hard decisions and the hard questions are looming rapidly into view.

Q40 **Zac Goldsmith:** Given that the evidence we heard yesterday was that the assumptions or the hopes are based on as yet unknown technologies,



I do not see how you would avoid legal action in the scenario you have just described. Government cannot say, "We are going to invent a new technology in five years, and everything is going to be okay," because that would not presumably pass your test and it would not pass the test in court.

**Chris Stark:** That is right. I would only add that we would certainly be more cautious in our assessment if we knew this was a trigger point for the OEP. We are quite free to offer very blunt advice to the Government at the moment with that threat of public challenge that is out there already.

I will add just one more thing, if I can, in defence of the current arrangement, which is that the OEP's geographical coverage matters here. Of course, at the moment Westminster has a UK-wide remit and we are speaking directly about a matter that is fully UK. It is not clear to me, from the basis of the draft clauses at least, that the OEP would have that same geographical remit, and therefore this question of enforcement is a difficult one. What if we hand that body, which may be England-only when it comes to the geographical coverage, an issue that is fundamentally UK-wide?

Q41 **John McNally:** Can I have your view on the ambition and constitutional powers in the Bill? Many witnesses have expressed that the Bill has several clauses that give discretionary powers to Ministers and/or the Secretary of State. The Institute for Government said that the OEP could be established only to be subsumed into the larger supervisory architecture that will be required post-Brexit.

To Daniel, we have also heard from previous witnesses—following on from what Chris has just said—that in Scotland we have good powers, and we were advised to bank these powers as much as we possibly could. That is going to be extremely difficult to do. Could you start off by telling us, compared to the other legislation, whether the constitutional balance of the draft Bill is appropriate?

**Daniel Greenberg:** In terms of the breadth of powers, all the powers on the face of the Bill are necessarily going to be expressed in fairly vague terms to begin with, because they are not about specific things. What you want to do is to get on the face of the Bill, in discussion with Government, constraints on the exercise of those powers that give justiciable parameters to the exercise of those powers. You cannot guess in advance everything: "You can do this; you cannot do that." These powers are not like that, but you can say, "We are concerned," and I think particularly in relation to the interaction with devolved legislation and devolved powers, you can say, "We are concerned that this power should not be used in a way that impacts on the full exercise of a specific environmental power in relation to the devolved legislatures." That could be expressed on the face of the Bill.



I do not think constitutionally you can be surprised that these are very wide powers, but in terms of parliamentary reaction to the breadth of the powers, in 2016 there was a case of *R (on the application of The Public Law Project) v Lord Chancellor* that looked at that. It was specifically about Henry VIII powers, but the concept was very broad powers. The courts have said, "Look, we will apply some parameters, some constraints to very broad powers. We will provide a constitutional backstop, if you like, to the Secretary of State doing whatever they like. However, we cannot do it without some guidance from Parliament." Therefore, you must make sure that you get some constraining factors and some specifics as this Committee and Parliament refine this Bill in the draft stage.

When it comes back as a real Bill, you must be able to look at these powers and say, "They are broad, but there are specific parameters put on the face of the Bill that give us the confidence that we need that they are not going to be used in the ways that we worry about." I cannot be more specific than that about this half of the Bill, and this is a point that colleagues have already made.

**Q42 John McNally:** I get that, but we have key competencies in Scotland, and they are critical to Scotland's future wellbeing. We have put these down, they are reserved matters. It looks like—and maybe Chris could come in—they could be reserved and put back to a quango. You called it a watchdog, but as I have said before, I think it needs to be a guard dog. That is what we feel like in Scotland—we need to protect these environmental policies at all costs. I am really concerned and what I have heard so far fills me with more trepidation that we could lose these powers. What you were saying earlier on is that a quango can make recommendations, but there is very little else it can do.

**Daniel Greenberg:** Your remedy for that is to make sure that the specific functions that you are identifying in relation to Scotland and in relation to the other devolved powers are expressly saved. It comes back a little bit to the memorandum of understanding point we had before. On the face of the Bill you can say, "Nothing in this Bill prevents or indeed is designed to obstruct this organisation exercising its devolved powers in relation to Scotland," and that is the sort of guarantee I would expect you to look for as the remedy to the concern that you have.

**Raphael Hogarth:** Two quick points. First, I think it is worth slightly clarifying the point that the IFG made that you mentioned earlier on, which is the idea that the OEP could end up being subsumed into a wider supervisory architecture. We were not necessarily saying that was a bad thing, but what we were saying is that the Government and Parliament need to be aware that the OEP is only the bit of the post-Brexit supervisory architecture that people have started thinking about. It is not the only bit of the architecture.

We published some research last year in a paper called "Who's afraid of the ECJ?", which contained data analysis of the various interactions



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between the UK and the EU institutions. What that showed was that the UK most often ends up before the ECJ and most often loses on environmental issues, but it is getting formal notices, reasoned opinions and indeed some ECJ cases on a much wider range of issues—transport, tax, health and consumers, energy, Euratom—and I think it is something the Government need to be pressed on. We have plans for the OEP, but is it going to be the case that somewhere down the line there is a plan for an office of health protection, an office of tax protection—a series of other offices? If so, how do these link together and interrelate or should the Government be thinking about a wider architecture? I know that is not necessarily a question for this Committee, but I think it does bear on the sustainability of the OEP model.

The other remark that I wanted to make is that the IFG has said that in any event, the OEP should not be an England-only body. It should be a body with a UK-wide remit, I suppose for two reasons. One reason is that that will enhance its status and independence insofar as it makes it more difficult for a Minister to just abolish it at a whim. The other reason is linked to what I was talking about earlier, which is that if the domestic environmental framework to some extent flows down from a treaty then those commitments are likely to be UK-wide. If there are level playing field commitments on the environment those are likely to be UK-wide and so it makes more sense for the OEP to have that remit. If it does, then obviously the DAs need to be closely involved in its design and need to be brought on board from the very beginning by the Government.

**Q43 John McNally:** I understand that, and I think that is one of the problems, because the Secretary of State is going to end up appointing possibly who he wants to be in these roles, and that is of great concern.

Can I move on to Chris? You have a background between the two and maybe you can see the architecture and how it would work better than anybody else.

**Chris Stark:** I saw a quite different role when I worked in the civil service in Scotland as the Director of Energy and Climate Change. I do think this issue of geographical coverage is important. I have to say I am not entirely clear how it would work on the strength of the draft clauses and that might be a failing of mine, but I would like to understand better how this watchdog can have that UK-wide approach. That might make me feel better about some of the earlier questioning, for example, about how it would act in an enforcement role for some of the fundamental concerns from my committee, but I do not feel I have that quite yet on the basis of what I read. It matters immensely.

**Q44 John McNally:** I think you have been very gathered in what you are saying.

**Daniel Greenberg:** Very briefly, there is no reference at the moment in relation to the appointments of members being specifically appointed with a view to having care for the devolved Administrations, knowledge of



Scotland, knowledge of Wales, knowledge of Northern Ireland. I am not saying you will necessarily want to do that, but that is certainly something that in relation to your last concern you will want to explore with the Government. If, as Raphael Hogarth says, it is inevitable that the office is going to take over bits of concern for the devolved Administrations, then perhaps it is inevitable that the membership needs to statutorily reflect those concerns. I put that thought out.

Q45 **Chair:** This Committee recommended that it should be UK-wide and implicit in the backstop is that there is a body against which citizens can sue public authorities in order to guarantee those non-regression principles that are in the Northern Ireland backstop. It is explicitly at the moment England and Wales, but it is not matching up to other things that are around in the legislative ether at the moment as well.

**Zac Goldsmith:** It may be inappropriate, but is it your understanding that as it is currently drafted this Bill would go through Parliament on the basis of EVEL or not? Would colleagues be able to scrutinise it and vote on it?

**Daniel Greenberg:** For the moment it is not only England and Wales, is it?

Q46 **Zac Goldsmith:** No, but it leaves a door open for it to go beyond England and Wales, but it is not currently beyond England and Wales.

**Daniel Greenberg:** I could not tell you now that there is no provision that I will advise the Speaker to certify, but what I can tell you is that this is not an EVEL-only Bill.

Q47 **Chair:** There are Scottish provisions in the Bill.

**Daniel Greenberg:** Indeed. There might be provisions that get certified. I could not tell you on the basis now, but it is not an EVEL-only Bill.

**Chair:** Thank you very much indeed. We will close our panel there and we will move swiftly on. Thank you all very much indeed.

## Examination of witnesses

Witnesses: Ruth Chambers, Georgina Holmes-Skelton and Professor Andrew Jordan.

Q48 **Chair:** I welcome to our second panel, who I believe have been sitting patiently through the first panel, some old friends to this Committee and a new friend as well. You are all very welcome. For those of you who are a bit hot, ladies or gentlemen, feel free to remove your jackets or any other appropriate item of clothing as you see fit if you are getting a bit warm in this Committee, because we are all suffering a bit from the overheating here. I would like you to introduce yourselves, starting with Andy.



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**Professor Jordan:** My name is Professor Andrew Jordan. I work at the University of East Anglia in Norwich and I am also the co-chair of an academic network called Brexit and Environment.

**Ruth Chambers:** Good afternoon. I am Ruth Chambers and I am here representing Greener UK, which is a coalition of 14 major environmental NGOs.

**Georgina Holmes-Skelton:** Hello. I am Georgie Holmes-Skelton. I am Head of Government Affairs for the National Trust and I am also a former House of Commons Clerk.

**Chair:** Very good. You are all very welcome and we are going to kick off with a question from Zac.

Q49 **Zac Goldsmith:** Thank you very much. I am going to ask Ruth initially, if that is all right. The Government have said that their aim is to create a world-leading body and that is a starting point. Do you think the Government have sufficiently considered other governance models for a body with this task?

**Ruth Chambers:** First of all, I would like to say that we very much welcome that commitment that the Government have made, that they want to create in law a world-leading body. That is a great starting point. However, I think I will answer the question with "not yet" because what we have on the table and on offer in the draft Bill is a fairly standard non-departmental public body. It is really quite unimaginative, as we heard from the previous panel, in terms of how it is going to be funded and where its members will come from. In order to be world-leading it really needs to look like something we have not seen before.

There are very good examples, and again the previous panel alluded to some of these, within our own constitution and within our own governance framework of where there are bodies that would be more akin to those lines. We had examples of the National Audit Office, for example, an NDPB called the Office for Budget Responsibility, which has a greater degree of independence, but also bodies like the Press Recognition Panel, which is set up by Royal Charter and has a much greater degree of independence from Government and a much more independent appointments process. There are lots of examples from around the world as well, in Hungary and New Zealand and elsewhere in Europe. I think there are plenty of places the Government can and should be looking, but it is not apparent that they have done that with the draft clauses that they have produced.

Q50 **Zac Goldsmith:** Can I ask you to be more specific? Which do you think is the best model, the closest model in terms of what exists in the UK of an organisation that is sufficiently independent, sufficiently funded, sufficiently robust, with sufficiently sharp teeth and capable of holding Government to account on a broad range of issues, which is what this body would have to deal with? What is the closest you think we have got



to it in this country so far?

**Ruth Chambers:** I think the closest is the National Audit Office. Probably what we would be looking to do is to set up something that is fairly unique and bespoke to achieve the task in hand. For example, we have never had a body within our constitutional framework that combines scrutiny, advisory and enforcement functions. That is going to be new and novel. What we have said to Government is that we are wedded to the underlying principles that govern the NAO's governance and independence, but not necessarily the model itself. So as long as those principles whereby the funding is guaranteed to be more independent, its membership is appointed on a more independent basis, it is free from direction and is able to exercise its operations and functions independently, it does not really matter what the model is, but the NAO is the closest that we have found.

Q51 **Zac Goldsmith:** Unless anyone wants to add anything to that general question I am going to move on. Does anyone want to add in terms of other models and other examples that you think we should be looking at? I am going to ask Georgina. In your evidence you raised concerns about political appointees, so what recommendations would you make in terms of the appointments process throughout this organisation, from the top through the body of the organisation, to avoid the problems that you have highlighted?

**Georgina Holmes-Skelton:** We have a range, as we have said, of bodies that exist in our existing framework of public bodies. The way that appointments are handled throughout those different bodies varies in different places and there are different models that we can look at. As Ruth said, what we have in the draft Bill at the moment is the fairly standard approach. You have Secretary of State appointments, and of course the trouble I would suggest with us looking very long term is that if you are appointing the head of the organisation and you are also appointing the majority of members of the board as well, potentially that does give quite a lot of scope for influence over the direction of the body long-term.

Particularly with a body like this, we would hope it would have a fairly decent amount of discretion over how it uses its powers, how it chooses to pursue complaints and so forth. That has a potentially quite significant impact on how that body will function and how effective it would be.

Q52 **Zac Goldsmith:** What would you propose as an alternative to that?

**Georgina Holmes-Skelton:** We have existing approaches that could be worth looking at and the process for appointing the Comptroller and Auditor General for the NAO is a good one, when we are thinking about the chair of the organisation. In that case it requires a motion before Parliament, it is a Letters Patent appointment, and it requires, by the involvement of the chair of the Public Accounts Committee, some direct involvement of the Opposition, so you need a certain amount of cross-



party support for that appointment. Of course that means that even if the proposal for the candidate is coming from Government it is at least requiring a degree of cross-party agreement for that. It then means that that is an individual who has a certain amount of power, knowing that they have a mandate that is from across Parliament as well.

- Q53 **Zac Goldsmith:** There have been suggestions that an alternative, possibly a hybrid, would be to have some kind of Joint Committee system, so that this Committee combined with EFRA and other relevant Committees would go through a confirmation process, but one where the decision was either binding or, if it was turned down by Government, as has happened in the past on a number of occasions, it would have to be approved by the House. Is that a system that you have looked at and is that a system that you would approve of?

**Georgina Holmes-Skelton:** Certainly that would increase the involvement of Parliament and by the nature of Committees having that cross-party representation on them, it would introduce again that element of giving the individuals a mandate to say that they had some support across Parliament. Of course if you look at the OBR, that requires the involvement of the Treasury Select Committee in terms of those appointments. If you look at other parliamentary bodies that exist, Electoral Commissioners are appointed, at least in part, by the involvement of the Speaker's Committee on the Electoral Commission. There are these other approaches. I am not necessarily in a position where I am recommending one over another, but I think these are all options that we would like the Government to be considering as existing processes and precedents for gaining that cross-party agreement for these appointments that can set so much direction in terms of this body and how it will operate.

- Q54 **Zac Goldsmith:** Is your principal concern about the chairman, as opposed to the rest of the organisation?

**Georgina Holmes-Skelton:** Certainly the chairman is important, and the leadership of an organisation sets a lot of that direction. We are also concerned about the balance on the board more broadly, and as the Bill is currently drafted the Secretary of State will also have appointment powers for other non-executive board members and that will constitute a majority of the board. It gives quite a large amount of power to the Secretary of State in terms of who they are choosing and what that might mean for the direction of the board.

- Q55 **Zac Goldsmith:** But that is more fiddly from a parliamentary point of view. You could find a system for getting the right chair: it could be us, it could be a Joint Committee, it could be Parliament. There are a number of ways of doing that, but it would not, I imagine, be realistic to start appointing people to the board beneath the chair through the same mechanism. What would your solution to that be? Is it about giving more power to the chair and shifting the balance so that the Secretary of State cannot dominate the board? What is the solution?



**Georgina Holmes-Skelton:** As I said, in terms of Electoral Commissioners that is done through a parliamentary body; it is not just the chair in that case. There are precedents for that. You could look at shortlists. There could be ways of having Committees at least express a view, perhaps not necessarily for the final candidate, but for a shortlist. If you are thinking about appointment panels, for example, who is going to be on those panels? Could you perhaps introduce the Chair of this Committee or another Committee and have some involvement in that process, even if it is not in terms of that formal process?

**Chair:** This Committee's report said it should be analogous to the Public Accounts Commission, so we would have a sub-committee of this Committee that would appoint. The Public Accounts Committee has its Commission, which is chaired by a different party, and then they approve it. Obviously that is the appointment of the Comptroller and Auditor General, which is currently live in Parliament, who is appointed for 10 years and so cannot be winkled out at a Secretary of State's discretion. I still think that is an excellent model.

Q56 **Zac Goldsmith:** Does anyone want to either build on the answer I have had or respond to the Chair on that?

**Ruth Chambers:** Can I add two things briefly? I agree with everything that Georgie has said. One of the most important safeguards or ways to ensure independence is through transparency, and a lot of the things that we have just been talking about would ensure a greater degree of transparency. One of the most common ways in which I think Ministers try to introduce a degree of independence into appointments is through pre-appointment hearings. While welcome to a degree, we would like to suggest that we do not see them as a panacea for independence and they are not enough in and of themselves. Say the Government were thinking, "If we just introduce the process of pre-appointment hearings for the chair we will have ticked the independence box." I think we need to go much more fundamentally into the structure of the Bill than that.

The second point is a timing point. Again, on a previous panel we talked about when is the OEP going to be ready by, when is it going to be set up? This Bill is on a pretty fast track as Bills go at the moment. We expect it to be introduced in Parliament early in the second Session, but it still is not likely to get Royal Assent until around about spring 2020. If the OEP is going to be set up by the end of 2021, assuming that we have a transition period of that sort of length, the process for establishing that body has to start now, quite frankly, and therefore the process of deciding how the membership structure and system and appointments work will happen before the Bill has Royal Assent and alongside that parliamentary passage. I suggest that it would be entirely appropriate for the Committee to ask the Secretary of State about that when he appears before you—to ask what role he might envisage for this Committee in helping to support and scrutinise the Government's appointment before the final Bill has Royal Assent.



**Professor Jordan:** Could I come in there as well? The first point I would like to make is that the OEP as it is currently envisaged is significantly less independent than the European Commission and the Court of Justice of the EU. I think there are two ways of thinking about independence. The first is how the body is constituted, how will it be funded, things like that.

The second way of thinking about independence is, what will it do? The broader question that should be in the minds of parliamentarians is, "Is this going to be a muscular, independent organisation that is well-resourced and that has the confidence to challenge Government or is it going to be a more timid organisation that finds itself corralled into an environmental silo?"

Let me give you three examples of different clauses in the Bill where you can see that tension coming through. The first one is in relation to clause 12, where it talks about the OEP preparing a strategy. That seems to be about restricting, as it is drafted at the moment, the new body's ability to step on the toes of the Committee on Climate Change and/or to do too much enforcement activity. It could be rewritten in a way that encourages the new body to have a strategic view on these improvement programmes: what will they contain, what ambition level will they have? Similarly, it could have a strategic view on the kind of data that it wants to receive. Data is really important in policymaking. It is often seen as slightly mundane and boring, but it is the lifeblood of policymaking. Is it essentially just going to be the data that DEFRA hands over to it or is it going to draw data from other places?

Q57 **Zac Goldsmith:** Sorry to interrupt, but is there anything in the Bill, in the proposals, that would prevent that from happening—in other words, that would prevent them accessing data?

**Professor Jordan:** No, but I think additional wording would need to be introduced. For example, there is all of this EU legislation currently in place that provides a requirement to collect data and feed it through to the European Environment Agency. Additional wording could ensure that that data is not just published and forgotten about, but is brought together, condensed and fed through to this new body. Without this, how will it know what is happening, not so much in the environmental sphere in terms of the quality of the environment, but also in the legal sphere? What is happening to all this legislation?

Q58 **Zac Goldsmith:** One of the issues that you have raised relates to the fear that if Government finds this organisation to be a nuisance as currently drafted, it is within their power to restrict the funding, which is the most obvious way of cutting this thing off. How do you think, if we were improving this Bill, we would do it in such a way as to prevent that from happening? What should be the process that guarantees this organisation the funds that it needs to do its job?



**Professor Jordan:** Funding is part of it, but it is also about some of the other things that were raised in the previous session: that it is co-owned by the different devolved organisations; that it is embedded fully in this process of developing, scrutinising and assessing these improvement plans; that it is connected fully to the principles and to the high-level aims of the Bill, which of course we have not seen yet because those will come in in part 2.

Q59 **Zac Goldsmith:** I am going to interrupt again, not wanting to be rude, but I know other colleagues are going to be asking you as a panel questions relating to all the points you have just raised. Our job is to try to help knock this thing into shape and plug the gaps and it seems to me that the funding one may be only one of the issues, but it is a big issue. As currently drafted, a different Secretary of State could easily turn the taps off and I guess the Treasury every year is going to want to do that, no matter who the Chancellor is. The question is what change needs to be brought in to the funding process to ensure that cannot happen? Who should set the funding?

**Ruth Chambers:** I have three suggestions and again we can follow this up in writing if it would be of interest to the Committee. The first is a visible political commitment to multi-annual budgets for the OEP. That is not guaranteed. You probably could not write it on to the face of the Bill, although it would be interesting to explore if you could, but such commitments are not without precedent. For example, the OBR has one, the Chancellor does that in a visible letter, so Government can be held to account on doing something on a year-on-year basis. That would set the context.

The mechanism by which the OEP then receives its funding is important. At the moment, if it carries on the track of being a standard NDPB, it would just get lost as a budget line in many millions of budget lines that are set out in the annual estimate that goes before Parliament for approval. There is no reason, as the previous panel suggested, why this body could not prepare its own estimate. That would give it a lot more visibility so then people and stakeholders and parliamentarians would be able to look up, "The OEP has this much money this year. Last year it only had this much. Is that appropriate? Could we make a representation to Parliament? Should we ask the Government about that?" So that would be a really visible and welcome improvement.

Finally, there should be something about the OEP having the right and the independence to say how much money it thinks it needs. Of course Parliament and other bodies would need to scrutinise that, but putting that responsibility over to the OEP I think would be very important.

There is a very welcome funding transparency safeguard in the schedule, which is in paragraph 11(4). Every year when the OEP publishes its annual accounts it will be able to say to Parliament, "By the way, Parliament, if we have not had enough money we are now highlighting that in our annual accounts and therefore you might be able to help us do



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something about that". That is really welcome. That is reasonably unusual for public bodies, but it comes at the tail end of the process and to be effective the safeguards need to be at the front end, not just at the tail end.

**Chair:** Leave it there. We have to move on.

**Zac Goldsmith:** Apologies. Thank you.

Q60 **Mr Philip Dunne:** I would like to touch on some of the enforcement powers. Professor Jordan, you just said that this body would be less independent than the current arrangements. What is your view about the complaints and enforcement powers compared to the present arrangements?

**Professor Jordan:** On the face of it, the process through which these enforcement powers will be implemented looks quite similar to the ones that currently reside at EU level, with the publication of these information notices and decision notices gradually escalating upwards over time. What is still missing though, and this is the thing that is mentioned in the backstop to the Withdrawal Agreement, is the really strong powers or, as it is termed in the backstop, powers that have real deterrent effect. The powers that the EU has found have the most significant deterrent effect are of course fines.

A little bit of background about fines. Fines did not just emerge right at the beginning of the EU environmental policy. They emerged after about 20 or 25 years. It became apparent that it is very difficult to implement legislation just by using exhortation and soft power, and that is why the EU developed the power to fine, very much encouraged, I have to say, by the UK Government and particularly the DTI. Fines are something that the UK was very keen on when they were first introduced in the Maastricht Treaty. As I think Raphael was saying though, as the UK has faced more action in front of the court, the views obviously have changed. Remember that despite all of the court cases that have been brought before the UK—there were around 35 in total—not one of them has ended up with fines, so the UK has never been fined by the EU.

Q61 **Mr Philip Dunne:** I do not think that is quite right, is it? There was a big DEFRA fine, about £300 million, for being slow in paying payments.

**Chair:** That is why I lost my flood protection for Wakefield, but then we received it the next year. It was 2009.

**Professor Jordan:** I am talking about environmental, not agricultural. Fines are very much something that emerged as being the most powerful tool. The question then is what is going to happen if we do not have fines? At the moment I think the decision notices lack bite. The equivalent in the EU of decision notices do have bite because they have the ultimate power of fines there as a shadow of hierarchy behind.

Two points about fines though. First of all, if Ministers are serious about adopting legislation and implementing it they should not fear fines,



because fines should only be used in extremis and they have never been used in the UK. Secondly, if there are not going to be fines—if the best and brightest brains in Whitehall turned their attention to fines, I am sure they could find a creative and innovative way to use them—then what is going to be used? The EU has tried other models and they have not worked.

**Q62 Mr Philip Dunne:** Clause 25 proposes judicial review as the means by which the OEP would hold a public body to account. What is your view about the effectiveness of that?

**Professor Jordan:** Judicial review, yes, it is a tried and tested approach. It takes a long time. There are cost implications. It is very much process-focused though. It does not necessarily lead to a particular environmental outcome, unlike EU legislation, which is very outcome-focused. Again, if decision notices are not going to have legal bite and if judicial review does not provide that legal bite, then the question is what will? I know some people in the session that we attended this morning in the House of Lords were thinking about the Environment Tribunal. I do not know whether Ruth wants to say something about that as a potential model.

**Ruth Chambers:** There seems to be among the legal and the NGO community a growing common ground of the three areas where if Government are going to improve the way in which the enforcement function is going to bite, as Andy said, attention may be given. The first is in relation to the decision notices. At the moment they are not binding enough, so we could look at how they could be applied to Government Departments and public authorities to require particular actions to be undertaken to bring the issue of non-compliance into compliance.

Secondly, rather than judicial review that is limited in scope and has many different failings, we could look at a more bespoke judicial system that could end up in the Environment Tribunal and that would probably deliver better outcomes both for the environment and for stakeholders.

Finally, to return to the issue of, "If not fines, what remedies will the body have access to?", there are all sorts of things that could be on the table that are not in the draft Bill at the moment. They range from reputational remedies—for example, the ability to require a chair or a chief executive of a public body to appear before the OEP to explain a non-compliance issue—to injunctive remedies, and even to things like special powers, which organisations like the Care Quality Commission have. There are plenty of remedies to choose from, but the Government does need to be more specific and introduce them.

**Georgina Holmes-Skelton:** Perhaps I could make a couple of points as well on this issue. I think first, one of the things that you look for with an enforcement mechanism is not just how you can right the wrong afterwards, but also to have a certain amount of deterrent effect. One of the challenges with what we have here in this quite long-running process: you have the information notice and then the decision notice, and then



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you may have JR. Will that have a sufficient deterrent effect when a decision is being made by a public body that may later encounter it? I am not sure at the moment that this would worry them enough to stop a decision that may otherwise not be made.

The other thing is when you are thinking about the environment, ideally you do not want that decision made in the first place. The environment is a fragile thing and once some damage has been done, the longer it goes on without a specific action being taken to remedy that or to put it back, if it can be done at all, the worse that damage is going to be. At the present time in this process, although the OEP can make specific recommendations for remedies or actions that might mitigate any damage that has been caused, there is nothing that compels a public body to follow that advice. They could just continue to put the process off, first from an information notice through to a decision notice and then eventually through to a judicial review outcome. Even if that process does spark an outcome at the end of it, it may be by that time too late to properly mitigate or remedy that decision.

There is something important about ensuring that action can be enforced at some point in this process that is timely and that is not delaying too much, but that ideally also creates enough of a deterrent to prevent these sorts of decisions being taken.

**Q63 Mr Philip Dunne:** Do you think fines would be effective in that respect?

**Georgina Holmes-Skelton:** I think they certainly have been more effective in that sphere from what we have seen in terms of the EU regulation. I am not sure they are the only option that would increase the deterrent effect in this way, and again some of the potential remedies that a tribunal might offer might also provide some of those. I think they are important, absolutely. There could be other options as well. As you said, if not fines, then what?

**Q64 Mr Philip Dunne:** It is one branch of taxpayer paying another branch of the taxpayer, so should the fines be used for a particular purpose?

**Georgina Holmes-Skelton:** I admit that is a complexity. What do you do with the money that you are fining? If you were using a process like that, we would like to see that money being spent on putting it right, if something has been damaged, or taking some other action that would mitigate that damage in some way. That makes sense and feels like a fair approach.

**Q65 Kerry McCarthy:** Can we return to the issue about whether climate change ought to be covered by the OEP? If I could ask Ruth initially, does that leave us in a situation where the enforcement of certain climate change breaches, if you want to call them that, or failures to act upon it would be weaker compared to other aspects of environmental law?

**Ruth Chambers:** Yes, I think it would and I think Greener UK as a whole is very supportive of climate change mitigation being included within the



remit of the OEP. The real problem is climate change is excluded from the definition of environmental law in the Bill and therefore, by definition or by extension, it is excluded from the OEP's remit. That, to any ordinary person on the street or the majority of stakeholders, would seem quite strange. You are trying to define environmental law, but you are excluding climate change from that. Why would you do that when clearly climate change is a central part of environmental law?

What that would mean, because it is not in that definition, is if you are a member of the public and you wanted to make a complaint about a non-compliance issue with environmental law, you could not do that on climate change mitigation because you would not have a root because it is excluded from clause 18 and the complaints mechanism.

It is not just about ensuring that the OEP has a last-resort power to take enforcement action at such future times when carbon budgets, the Climate Change Act or the directives that the Chair mentioned earlier may be at the risk of being enforced; this is about ensuring that the public have a voice in relation to climate change. At the moment, there is a risk in the way the Bill has been drafted that they would not.

**Q66 Kerry McCarthy:** The Committee on Climate Change last year said that they thought it should come under this Bill and then they seemed to row back on that. How easy would it be to bring it within the scope of this Bill by removing the exclusion? Would that damage the work of the Committee on Climate Change or could you quite easily have one body doing an advisory/scrutiny role and the OEP doing enforcement?

**Ruth Chambers:** We do not see this as an issue that would stop that from happening. As Mr Stark pointed out earlier, the Committee is very active in the space of climate change adaptation, for example, so it is clear that the two bodies will need to work together very closely to ensure that they do so in a complementary way, they do not fall over each other, and they do not end up inadvertently criticising or duplicating what they do.

That can be achieved either by a simple construction on the face of the Bill or through the memorandum of understanding that was suggested. Also the Committee on Climate Change is not the only body that the OEP is going to be co-operating with. It is a very crowded policy and delivery landscape out there. Climate change is of crucial importance but there are plenty of other advisory and scrutiny bodies that the OEP will need to work with. In that sense, it will need to be very clear about how it is going to conduct its work very broadly across the piece and not just on climate change. We do not see any reason why the two bodies could not sit down together with BEIS and DEFRA as the sponsoring Departments and work out how this could work in an acceptable way.

**Q67 Kerry McCarthy:** At the moment, obviously one Government Department covers climate change mitigation and DEFRA covers adaptation. Is that an easy distinction? Is it quite a neat divide or are



there complications caused by the fact there are two Departments? Would that be reflected in the role if you were trying to separate them out at enforcement level as well?

**Ruth Chambers:** I will let colleagues come in in a moment, but I personally do not think so because the reach of the OEP is going to extend well beyond DEFRA in many areas because it is meant to be looking at environmental law in its widest application, regardless of which part of Government is responsible for that application.

For example, if the Department for Transport ended up being in breach of environmental law because of an airports or ports decision, the OEP would go and look at that. In a sense, it does not matter that adaptation and mitigation are split. That is probably the reason why there has been so much difficulty getting agreement on this point—because it has ended up becoming a political rather than a policy issue.

Q68 **Kerry McCarthy:** Currently at European level in terms of regulation there is not a departmental divide—it is like one body that you would take a concern to.

**Ruth Chambers:** The public does not see it in that way—climate change adaptation or mitigation. We all care about the climate and if you think about the record number of responses that the public made to the DEFRA consultation over the summer, there were three things overridingly that the public called for: an OEP that was independent, an OEP that had teeth and an OEP that was active in the climate space.

**Professor Jordan:** Could I also emphasise a point that Chris Stark made as well? As the difficulty of achieving particularly the fourth and fifth budgets becomes more apparent, more emission reductions will be expected from sectors of life and sectors of the economy that have until now not really been touched by climate legislation—things like farming, diet and transport. These are generally covered not by climate legislation but by environmental legislation. As we move forward in time, the need to get these different policy areas working together is going to become much more significant.

Q69 **Kerry McCarthy:** There is an overlap in some cases. If you are looking at carbon sequestration, the conversion of land or not converting land for certain purposes, there becomes quite an overlap, as opposed to just not using fossil fuels. You also said, Professor Jordan, that the exclusion of planning law was unhelpful. Can you say a little bit more about that? Would that be in situations like fracking or something—big infrastructure projects?

**Professor Jordan:** Yes, so the definition of environmental law in clause 31 does not exclude it, but when you turn to paragraph 212 of the explanatory notes, it is excluded. I am not entirely sure whether it is or not or whether that was just a drafting error.



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These two areas, planning and environmental law, have co-evolved significantly since the war. In many respects, planning legislation and policy helps to deliver on environmental directives and regulations. Similarly, environmental regulations provide a hard edge to planning decisions where very often environment is traded off against growth and other objectives. I could imagine the OEP becoming involved in two types of things.

The first is in specific cases of non-compliance with environmental legislation. At the moment around 20% of the court cases relating to non-implementation of EU legislation in the UK have related to the Environmental Impact Assessment Directive. This potential friction between planning and environmental law is an area where the court has been required to make a decision. I would imagine that the OEP will also be perhaps brought into that as well.

Secondly, it is very likely or very possible that the OEP could also be asked to have things to say about more broader systemic questions. Some of those were raised in the previous session: the development of new transport infrastructure, the development of new airport capacity and development of new roads—for example, the one between Cambridge and Oxford. There are more systemic issues that the OEP could—if the Bill is perhaps rewritten slightly—be asked to have a view on rather than responding incrementally to individual complaints from members of the public.

**Q70 Kerry McCarthy:** Is there anything else missing from the scope of the OEP that you would like to see in there?

**Georgina Holmes-Skelton:** I would like to make a general point, and this is both in relation to the OEP but also in relation to some of the wider content of the Bill, looking at environmental improvement planning, for example, as well. The current definition that is provided of the natural environment in the Bill explicitly excludes built structures and man-made structures. From the trust's point of view, that clearly tends to exclude the historic environment. By that I am talking about man-made structures, things like scheduled ancient monuments but also things like farm buildings that have an actual interaction with the natural environment.

If you look at the natural environment in isolation from the historic environment, it may lead you to make decisions or recommendations about how to care for the environment that could be detrimental to some of those historic assets. When you look at the landscape as a whole, those historic assets sit alongside the natural assets in a way that has worked together.

There is quite a live example. You might have seen a couple of days ago the trust made an announcement that we are doing a lot of work around some hill forts in Wessex. They are a great example of where the natural environment and the historic environment are integrated in a way that



supports both. The chalk grassland that Hambledon Hill sits on is not only a habitat that is full of biodiversity, but it is also one that is quite interrelated to the ancient earthworks that are part of the hill fort.

You can look at these two together as being in harmony, so working to support the habitat and wildlife that exists on that site. If you do that in a way that also supports the safeguarding of the historic assets, work together for the benefit of both, but to take them separately—

**Kerry McCarthy:** Avalon Marshes is another example where they have restored the old walkways.

**Georgina Holmes-Skelton:** There are loads of examples when you think of peatlands and field systems, hedgerows. Things like stone walls, for example, have an impact on the biodiversity of those locations. Our concern is that if you exclude the historic environment from things like environmental planning it is going against the Government's own policy in the sense that the 25-year plan quite specifically talked about both together. It is also contrary to some existing definitions or understandings of the environment in law. If you think about things like the purpose of Natural England, that specifically includes reference to cultural heritage, for example. The Agriculture Bill that is going through at the moment also talks about cultural heritage and supporting that as an environmental matter.

Q71 **Kerry McCarthy:** How clear is the distinction between man-made and natural? If you had a canal versus a river or a reservoir versus a lake, the former are obviously man-made, but you do get reservoirs where there is a huge amount of biodiversity and natural life and so on.

**Georgina Holmes-Skelton:** Absolutely. If you look at many landscapes in the UK, it is almost artificial to call them natural because the interaction between what man has done in those landscapes and the natural environment that we see now cannot be distinguished. If you think about plenty of upland areas, the stone walls, the field systems have all been created by human interaction with the environment. But obviously the natural element of that is important as well.

But the definition that we have, which talks about "land, water and air (except buildings or other structures...)" does seem to completely eliminate that historic element from this. A very specific change that we would like to see is to bring that within that meaning of natural environment to ensure that that holistic approach is taken going forward.

**Kerry McCarthy:** I suppose structure is quite vague, but it sounds like it means building.

**Chair:** We have the point.

Q72 **Mr Robert Goodwill:** Professor Dieter Helm's Natural Capital Committee that advises on forests, rivers, land, oceans and minerals and so on said that the 25-year plan must be placed on a "meaningful statutory basis" or



be at risk of being just another plan on the shelf. To what extent are the environmental improvement plans legally binding?

**Georgina Holmes-Skelton:** Certainly there is provision there that requires them to be created and laid before Parliament and revised and reviewed. What it does feel to us is missing is the actual delivery of that. It requires a plan, but at least with what we have at the moment there is not anything there that compels actual action to deliver those improvements. That is what we will be looking for from the wider Bill that is published later this year.

**Ruth Chambers:** If the OEP could be empowered to review not just the fact that a plan exists but the effectiveness of that plan, that would be helpful for a start. Also Government Departments and other public bodies could be linked into the delivery of that plan much more explicitly, either by producing an action plan saying how they have had regard to environmental principles, which we may get time to discuss later, but also how they have helped the Government achieve the objectives of the environmental improvement plans.

Those reports could be laid in Parliament, the OEP could scrutinise them and then you start to complete a better circle of accountability, whereas at the moment, like many parts, inevitably when you are missing part of a draft Bill they are being developed in a little bit of a vacuum and in isolation from each other. We cannot stress enough the urgency of seeing the complete package, the full Bill, the overarching objective that is going to deliver the Government's aim to leave the environment in a better state than it inherited it. Whatever targets and metrics are going to be enshrined in law, it is a complete system of governance and the OEP is going to be the beating heart of that system. Until we can see it all together and decide how it all works together, it is very hard to answer questions about effectiveness.

Q73 **Mr Philip Dunne:** Can I follow up on that? What level of detail or granularity do you envisage? You said earlier that this goes well beyond DEFRA and advice on airports to DFT, but would it go right down to the level of air miles and school meals, hospital buildings, sustainability? Is it going to be all permeating or are we just going to be looking at some big-ticket items in isolation possibly?

**Professor Jordan:** As I understand it, yesterday Michael Gove committed to enshrining the 10 headline objectives in law. There is an opportunity in clause 6, where the Secretary of State has to prepare an environmental improvement plan—rather than that just being a plan to “improve the environment”, it should be a plan to achieve those headline objectives. So I think clause 6 could be amended to that extent.

With clause 8 as well, where it commits the Secretary of State to prepare an annual report on the implementation of the improvement plan, there is an opportunity to, for example, require the Secretary of State to explain why he or she has or has not taken on board the comments of



the OEP on the previous improvement plan. It is part of this broad framework, which all fits together and leads generally in the same sort of direction.

**Q74 Mr Robert Goodwill:** If these directions are not seen by the OEP as being in the right direction, do they have the right scrutiny and advice functions, do you believe? Or are there any other mechanisms or powers that it could usefully have in terms of working with or directing Government?

**Ruth Chambers:** We alluded to some of those in our responses on the enforcement question. At the moment with the decision notice, it is difficult to see how that would be complied with. If that, for example, were to include a series of action plans or undertakings, that would be one way to encourage a Government Department or a public body to take note and take heed of what the OEP would be recommending.

There are other missing powers in its toolkit, which other comparable regulators, both domestically and overseas, have—for example, the power to undertake systemic inquiries. Often it might come across a particular breach and think, in and of itself, it is not significant enough to either investigate or to enforce against, but if it is a repeated pattern of behaviour across a particular part of Government or public authorities then it might want to look at some of the underlying reasons for that. It is not easy to see within the current draft Bill that the body will be empowered to do that.

Another is the power to require information, if that information is not always going to be forthcoming. There are other things as well, but I will stop there.

**Professor Jordan:** Just building on the point made by Georgina and Ruth, yes, it is important that this body is involved in reactive enforcement, but it is also important that it takes a proactive approach as well. There is a potentially quite powerful role in clause 15, where it talks about the OEP monitoring environmental law. It does not say though when it should report and on what it should report. Perhaps the way it could function here is a bit like the European Commission, which produces on a regular basis a report on each country. It is not just about how it has implemented each and every single directive, but it tries to identify patterns and to identify systemic strengths and perhaps systemic failings. By doing that you can hopefully move from a reactive approach to a more proactive approach, which eventually could feed through into the drafting of new legislation, which avoids some of the problems with the legislation that is not being fully adhered to.

**Q75 Mr Robert Goodwill:** Can you see the OEP drawing up league tables, comparing the UK's performance with other countries around Europe or globally? Would that be part of their role or would they just focus in on what is happening here?



**Professor Jordan:** It could do that, and it could also refer to the way in which the UK implements international environmental agreements. But two points: first, it is going to require the resource to do this. This is not simple and easy work. There are 500 people in the European Commission DG environment that do this sort of work.

Secondly, it is going to require the data and the information. I made that point before about information being fed to the OEP rather than just being published and being left on a shelf somewhere.

Thirdly, the obvious way to get into benchmarking and transparent comparison with other countries, rather than boasting about being the best in class is—

**Mr Robert Goodwill:** It is the greenest Government ever, I think.

**Professor Jordan:** Greenest Government ever or the new environmental super power—choose your example. But the best way to do that, the most authoritative way to do that, is to remain a member of the European Environment Agency because it collects data, it does comparisons, and it is a trusted collector and disseminator of information. That level of transparency and honesty about performance is something that could allay the fears of those in Brussels that think Brexit is all about a race to the bottom, undercutting other countries. It might be a way to persuade them to negotiate—

**Mr Robert Goodwill:** A mechanism for associate membership of the—

**Professor Jordan:** Yes, it already has associate members. It has the 28 member states plus another five. That is open to the UK if it wishes to remain a member of the European Environment Agency.

Just to finish my earlier point: it could reassure our trading partners that we do not want to get into a race at the bottom. They, in turn, might be more willing to negotiate a deep and important and potentially mutually acceptable free trade agreement in the future.

Q76 **John McNally:** The National Trust pointed out that the OEP is given the power to do anything it considers appropriate in accordance with its functions, but it is not given a specific power of investigation. Can you quickly say what the implications are of that lack of an investigation power?

**Ruth Chambers:** As Andy just said, there is a need for the body to be able to operate proactively as well as reactively. A lot of its work will be investigating complaints that come to it from the public, but in its scrutiny of environmental law and policy undoubtedly it will spot things of significant interest or patterns of behaviour. If it is not then able to conduct rather more systemic or strategic inquiries into those, it might miss some of the underlying reasons. That is why we think that would be important.



**John McNally:** Thanks for clearing that up.

Q77 **Caroline Lucas:** I wanted to go back to the issue of the policy statement and so forth. Georgie, do you think the draft on the process of preparing the policy statement allow for adequate scrutiny?

**Georgina Holmes-Skelton:** We heard a bit about the principles earlier today and I would echo much of what was said. In terms of the provision that we have, quite a lot of weight is placed on this policy statement in terms of the way the principles are being upheld and moved into domestic law, because there is no duty to adhere to or apply the principles, but rather the policy statement specifically. Much of the important detail on how those principles will be interpreted going forward will be in that policy statement. With the way that the provision is drafted, the most important thing is to just understand that it puts a lot of weight on to that policy statement.

Clause 3 outlines the process for the Secretary of State to prepare and implement that policy statement. It requires the Secretary of State to lay a draft before Parliament and creates a timeframe for either House of Parliament or a Committee of those Houses to pass a resolution or to make some recommendations in a report, for example. What it does not require is active approval of Parliament for that policy statement.

You have a policy statement that has a huge amount of weight in terms of how these principles will, going forward, be interpreted and applied but you are not requiring Parliament to give its assent to that policy statement. It also means that the Secretary of State could amend that policy statement later down the line. Again, they would have to lay it before Parliament and allow that process to take place, but it again does not require active approval. That is something that we are concerned about, particularly given the weight that it has in the provision as drafted.

Q78 **Caroline Lucas:** To Ruth, we were talking in the earlier session about the exclusions to the application of the principles and I wondered if you could say a little bit about which ones of those are potentially your greatest concern.

**Ruth Chambers:** All of them.

Q79 **Caroline Lucas:** Were you persuaded by the response that we had from Daniel Greenberg?

**Ruth Chambers:** Yes, I totally understand that it would be legitimate to say to Government, "By the way, what are you concerned about here? What are you trying to avoid happening?" But until we get that clarity it is hard to know what they are trying to avoid happening. The sum total of the clauses on principles at the moment risks severely downgrading their effect over time. Certainly we do not see it as a very faithful attempt to domesticate how the principles apply at the moment.



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If we just run through the exclusions quickly, the first one in clause 1(6)(a) is in relation to the armed forces, defence or national security. We understand from DEFRA that that is quite understandably relating to military decisions that might require a degree of urgency that could relate to the importance of maintaining our armed forces in a state of operational readiness. Nobody of course could quibble with that. But the way it is drafted is very wide and obviously the Ministry of Defence and the Defence Infrastructure Organisation have many military training areas across England in which they do undertake training activities that potentially could have environmental impacts. Are they excluded? Are they included? It is just not clear.

Similarly, the next one under paragraph (b) relates to spending and the allocation of resources. That seems very sweeping and there are many financial mechanisms and levies and taxes that do relate to the environment. Are they in or are they out? Again some further clarity on that would be needed.

Under paragraph (c), I think Danny and I were in agreement. That seems to be very sweeping and as you, Caroline, said at the time of the publication of the Bill, it would give Ministers a significant get out of jail card. That is how we see that as well.

**Q80 Caroline Lucas:** Would you want to delete that one completely? I did not fully follow what Daniel was saying because he was saying, "If you have the principles that were sufficiently top level you would never get into a situation where they could be applied in an inappropriate way". That seemed to me to be quite a big leap of faith.

**Ruth Chambers:** I would agree with that. At the end of the day, the principles are high-level principles. There is one thing that is missing from the draft Bill that might help give Government and others some degree of comfort. At the moment the principles exist in isolation. The principles at the EU level all aim at a high level of environmental protection. That high-level overarching objective may or may not be in the wider Bill. We just do not know, because none of us have seen that. But that wider Bill needs that high-level, overarching environmental objective, however it is framed, not only to deliver the Government's commitment to leaving the environment in a better state, but also to give that overarching guidance to how the principles will be applied. If that is given, then I am sure some of the misgivings or the worries that parts of Government may have about the principles might go away.

The policy statement, as Georgie has said, is also very important because that will give meaning to and advice to Government and other stakeholders on how the principles are to be applied in practice. Therefore, it is of great import, but it worries us greatly that we may not see the draft of that until the Bill has had Royal Assent. Again, the timescale on which Parliament will get to see a draft could be something to explore with the Secretary of State, because otherwise you will be asked to sign off on something that does not yet exist.



**Professor Jordan:** Can I just say something else about the statement? The Government's understanding of an attempt to implement the non-regression principle would be a lot more convincing if that was included in the statement. For example, under what conditions would the country want to regress, or would it want to progress? How does that then interact with its commitment to precaution, to prevention and so on? It would be just intellectually more convincing if it was fully explained there, rather than just the one line written into the Bill in a desperate attempt to satisfy the EU.

Q81 **Caroline Lucas:** The Government have proposed that the principles apply only to Ministers of the Crown and not to other public bodies. I wonder if you have any specific areas where you think that could cause particular problems.

**Ruth Chambers:** That is just not how they work at the moment. If, for example, you were to invite representatives of Natural England or the Environment Agency in and say, "Do you routinely apply the environmental principles in your policy and decision-making?", the answer to that question would be yes. If they routinely apply them, why should public authorities not be within the scope of the application of principles in the Bill? It just seems to us again to be an attempt to keep the principles in a very narrow space at the heart of Government. Government will argue in its defence that that is because it needs to trickle down through Ministers, which is certainly one possible way, but it would be much clearer if they had direct effect on public authorities, which is how many public authorities think that they apply now in any case.

**Georgina Holmes-Skelton:** It is perhaps quite useful to think about these principles and this point in the context of specific major infrastructure projects that are ongoing at the moment, such as the Oxford-Cambridge development arc or HS2. If you think about the public bodies that are involved in decision making in relation to those projects, obviously central Government have a role but there are many other bodies that have a role in those projects. How they choose to interpret the application of the principles to those decisions is important.

Obviously, DEFRA and the Secretary of State have huge ambition, particularly for things like Oxford-Cambridge, to create greening and mitigation and to enhance the environment to a certain extent alongside some of that work. I would have some concern about whether that is achievable, where you have public bodies who perhaps may row back from their understanding of their obligations in connection with some of these principles, if the proposal stands as drafted in this Bill.

Q82 **Chair:** Ruth, can I just come back on the territorial extent of the draft clauses? Could that have an impact on the UK, including the devolved nations, achieving non-regression?



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**Ruth Chambers:** Definitely, and at the moment the Bill is conceived on an England-only basis—well, England plus reserve matters. We do not yet know how Wales and Scotland are proposing to address these issues. We know that consultations are on their way, but they have been on their way for some time. I wanted to mention Northern Ireland briefly, because we are tremendously concerned about the governance gap in Northern Ireland. Historically, environmental governance has been weaker there than in the other nations. There is no commitment even to consult in Northern Ireland, so they are further behind than our counterparts in Wales and Scotland. Obviously, there is no Executive to implement any proposals should they come forward anyway.

However the Bill ends up in terms of its territorial extent—this will definitely help with non-regression—I think it is definitely worth exploring the possibility of including some powers within the draft Bill that a Northern Ireland Executive could choose to implement at a future date, at such time that there is an Executive. If this Committee had time—I know you have a tremendously busy schedule—to explore these issues with some Northern Ireland stakeholders, I do think that they merit special attention.

Q83 **Chair:** What do you think needs to be included in part 2 of the Bill to make it the home of the boldest environmental policies?

**Ruth Chambers:** The ambition is all there. The words leap out at us from the papers that the Government published before Christmas. Everyone that meets the Secretary of State cannot fail to be convinced by the enthusiasm and the ambition he espouses. At the moment, that is not written into the draft Bill, either part 1 or part 2. An ambition needs to drive the whole Bill.

As we have talked about, there needs to be some kind of overarching objective to achieve a high level of environmental protection if we are to address the decline in nature's recovery, with a statutory basis for targets and metrics. Again, Mr Gove has been making announcements on this in recent times, which is encouraging, but they need to be embedded in the Bill in a robust way in legislation.

Nature recovery networks were absent from the Government's policy paper that was published before Christmas. Again, unless there is a spatial element to the Bill, we do not see that pioneering green governance system being realised in practice. Also, there needs to be clarity on what is going to happen across all four countries of the UK. If this remains an England-only Bill and there is not progress in the other countries, we will all be the poorer for it.

**Chair:** Is there anything else to add?

**Professor Jordan:** On devolution or on anything?

**Chair:** Just on part 2.



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**Professor Jordan:** Ruth is right that unless you have those high-level aims and objectives on the face of the Bill, there is a real danger that the improvement plans just end up going round in circles. There is a risk that all the body does is engage in firefighting, responding to public and/or private complaints about poor enforcement, and the principles do not have anything new to bite on and the whole thing just slows down.

**Chair:** Thank you very much. We will leave it there.