

Environment, Food and Rural Affairs Committee

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

Wednesday 27 February 2019

Ordered by the House of Commons to be published on 27 February 2019.

[Watch the meeting](#)

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

Questions 184 – 236

Witnesses

[I](#): Andrew Bryce, Consultant, Member and former Co-Chair of the UKELA Brexit Task Force; Professor Richard Macrory QC, Emeritus Professor of Environmental Law, UCL.

Written evidence from witnesses:

- [UKELA](#)
- [Professor Richard Macrory QC](#)

Examination of witnesses

Witnesses: Andrew Bryce and Professor Richard Macrory.

Q184 **Chair:** Welcome, gentlemen. It is nice to have you. We are now getting to the final stages where we are trying to put together exactly how, with this pre-legislative scrutiny, we can improve the Bill, particularly on the OEP. Richard, if you would like to introduce yourself first, and then Andrew, and then we will kick off.

Professor Macrory: I am Richard Macrory. I am emeritus professor of environmental law, occasionally a practising barrister, and I did for a time, some years ago, work in the infringement unit at the Commission, dealing with environmental infringements, so I have an inside feel for how that process works.

Chair: You managed to escape, did you?

Professor Macrory: I was a visiting academic, but I did learn a lot on the inside.

Andrew Bryce: I am now retired, but I was a practising environmental lawyer for many years. I am former chair of the UK Environmental Law Association, now an honorary life member. I have been involved on the Brexit Task Force and the various responses we have been making for about the last two years on various pieces of documentation.

Q185 **Chair:** Thank you, both of you. I shall kick off with the first question. How can we better design the proposed powers for the OEP—the Office for Environmental Protection—to ensure that most environmental cases do not end up in the courts? Can you explain why judicial review is ill suited to informal resolution?

Professor Macrory: We will not go through them now, I am sure, but I have 13 amendments that I would make to improve these clauses. We will touch on some of them, but I can always submit that afterwards. This is how I have approached this, looking at the Bill. First, we do not want to be worse off than we are now with the Commission. Secondly, we do not have to replicate everything about the Commission, in terms of the way it does it, because we can improve. Thirdly, I agree with you that we want a process where we do not end up too much in the courts, with too much litigation, and try to do that.

Of course, that is one of the great advantages of the current Commission procedures. They are formal, in the sense of an infringement notice, a reasoned opinion and court, but 90% of cases are resolved by discussion with the member states to try to resolve it and come to a satisfactory solution, so you try to avoid the court.

You asked quite a big question. Generally, this is a very bold initiative. It is a good initiative. There are a lot of good things in the Bill, but when we get back to the final enforcement stage, it has reverted to a conventional solution, which is judicial review. We can expand on why we think that is



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not really good enough. We could have been more imaginative on that.

To take one point, to avoid too much litigation—and I have heard some of the previous evidence—we have this stage of serving a notice and then a decision notice. They should not be legally binding, because that will immediately start a litigious, defensive attitude by the Government body: “We have to react to that”.

Q186 **Chair:** We will lead on that on the second question. I will bring Andrew in. We will drill down a lot more on this, because, as you say, it is a very big question. We have the sword of Damocles of the legal action above us, but we have to do a lot more before we get there. I do not see any point in fining our own Government and what-have-you, so the European process will not exactly work.

Andrew Bryce: There is a little bit of a tension between seeing this body as dealing with issues that are strategic policy issues that you can deal with over a length of time and dealing with something that is an enforcement matter that requires urgent remedy of some sort. There is a little bit of a tension there, in terms of the perception of what this body will actually do. We can elaborate on that later on.

There is ample time in the current timetable, as it is set out. The explanatory notes talk in terms of six months before you would get to any sort of litigious situation, which gives more than adequate time for discussion of what is hopefully a point of law, effectively, that is going to be discussed. The framework as it is gives ample time within the framework that is put in place, in terms of the notice procedures.

Q187 **Chair:** We did a lot on air quality, so we looked at where ClientEarth had taken the Government to court several times—three times, I think. Each time, the Government have to come back with a solution. I am just wondering how that would happen. Would the OEP have similar powers?

Professor Macrory: If I could get back to the final remedy, which one hopes is not used, or is used as little as possible, it is the JR. One of the arguments that has led the Government lawyers to put this in is, I have heard it said, that the approach of the national courts in judicial review is now exactly the same as the European court when it deals with implementation. I will not go into that; it is in my written evidence. I just do not think that is the case. If it is dealing with a pure interpretation of law, it may be similar, although the European court looks at principles more. If it is dealing with procedure, JR is quite good at saying, “You should have been consulted” etc.

Often, these cases about implementation, like the air quality, are actually dealing with substance, with real problems, and looking at the decision-making of Governments. It is clear the European court is more intensive in its review; it will look more closely. I have to say, and this is speculation, that I suspect one of the reasons it is in there is that—and I think there are hands of other Government Departments here—most Departments are fairly comfortable with JR. They know the limitations



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and the courts will not go too far. If you introduce, which I would advocate and we can discuss later, a dedicated procedure in front of a specialist court or tribunal, what will happen is a bit more unpredictable. That is probably one of the reasons.

The second reason why JR is not suitable is, quite rightly—and this is your point with looking at ClientEarth—that there is emphasis that both the information notice and the decision notice are concerned not just with whether there is a breach of environmental law but with what steps you have to take to get back into compliance. That is very good, but actually when you look at JR, although it has that power, normally they do not get involved in that. That is one of the problems they are having with the air pollution case.

Q188 **Chair:** Putting my previous, many moons ago, local government hat on, JR very often does not query the decision; it usually queries a process.

Professor Macrory: Exactly.

Q189 **Chair:** This will not work with air quality, because you have to get rid of your diesel cars and your petrol cars. You have to put electric in place. You have to perhaps alter people's driving habits. You have to have pedestrianised areas to clean up particular hotspots of air quality. You need a process to be able to go back. We do not want it landing up in the High Court if we can help it.

Professor Macrory: No. The difference is, rather than having an outside NGO challenging the Government and saying, "This is what you must do," you have what we hope is an independent expert body—if you like, a governmental body but independent—which I hope will build up a very good reputation. They will be saying, "This is a breach," which the Government may well accept, "and we think this is what you need to do. Let's discuss this." If eventually they just cannot agree, they think you should spend more money or it should be quicker, yes, sure, they will have to go to, we would say, an expert tribunal, not just with lawyers, to resolve this. I would hope they would not have to, and this will come back to the notices and all that.

Chair: That is right, and how we can strengthen this OEP. Angela, did you want to ask a supplementary?

Q190 **Angela Smith:** I probably got the answer to my question there. I was going to ask about Thames Tideway, which of course was commissioned because of the risk of being taken to the European court and the risk of huge fines. For me, the test as to whether or not this new model will work is whether or not it would deal effectively with really major breaches, such as the pollution in the River Thames.

Andrew Bryce: If you look at what is in the Bill at the moment, my concern is it is a specific review process and the review is of the original conduct by the public body. It is a very narrow basis. Although the courts on JR have a wide range of powers, as Richard say, it is very unusual for



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them to actually use a lot of those powers. They tend to adopt a fairly narrow approach.

The other trouble with the Bill is that it has a provision in it that says that, when the decision of the court has been taken, the public body then has to set out what it intends to do. That seems to me a rather weak way of proceeding, in the sense that it does not necessarily seem to be a really binding process for the remedy that has been proposed. It is suggesting that it goes back to the public body, like quashing a decision in JR, and goes back to the beginning and they then say what they are going to do. It seems to me that going through a six or eight-month process and then having that process at the end of it is really quite weak.

Q191 **Chair:** You would propose a much more binding process, would you?

Andrew Bryce: I was not thinking about binding process as regards the notices. You want a process at the end that comes up with a proposed answer for things that have to be done. At the moment, the review process does not review the decision notice that sets out what should be done. It reviews the original conduct, so it is a bit circular. My view is that it does not get you to an answer.

Professor Macrory: Also, if you look at the present drafting, I suspect in many cases the argument or the tension will not be about whether there is a breach but about what we need to do and how quickly. That is often what is happening at the Commission. If you look at the drafting carefully, it is not even very clear whether that bit can be challenged. There is a problem here.

I look at the Commission process, and I have been there. It is like a one-way ratchet. Yes, the first letter is not binding, but people take them seriously because it can move up a stage. There is a very good African proverb that I rather like, which says, "Talk softly but carry a big stick." It seems to me that, at the end of the day, we need a process where if it is really—

Q192 **Chair:** You are not convinced the stick is big enough yet, are you?

Professor Macrory: I am not convinced that the stick is right—that the judicial review is the right forum. The Administrative Court is a tough court and they have made tough decisions against Government, but for this sort of process they are probably going to get involved in quite difficult factual issues and economic issues. We will come to this. We have a specialised independent tribunal set up, which, it seems to me, would be much more preferable. We will maybe come to that later.

Q193 **Dr Johnson:** You talked about the decision notices and whether or not they are binding. This is part of the "talking softly", I suppose, but how much do you have to listen? Some of the people who have given evidence have suggested that they should be binding. I understand that others think otherwise. What is your view?



Professor Macrory: My view is that they should not be binding, provided it is seen as a one-way ratchet process. There is one bit of my evidence I should clarify. I said I was not quite clear on the Bill, in terms of whether it had to be done sequentially—information, decision notice and judicial review—and I said that I think it should be. I have reread the clauses. It is not very clear, but they are sequential, so it starts from one and moves up.

The trouble is that if you make it immediately binding, what does that mean? If you do not comply with the first notice, are you subject to some penalty or immediately a review? Also, you immediately get the lawyers in, if you like, the internal Government lawyers, to start resisting this and getting defensive. If you are served with a letter from the Commission, the first letter is saying, "All the evidence suggests there is a breach of European law. Can you respond?" They may be convinced there is not a breach or they are taking action. The second stage, which I think is equivalent to the decision notice, is much more serious. The Commission has said, "You have not done anything. If you do not now, this is your final warning". You do not have to make them legally binding in any sense, because you have that backstop of then it will move on to the Court, if that makes sense.

Q194 **Dr Johnson:** It does. You referred there to European law, but under this new system this will not be relating to European law, will it? It will be relating to UK—

Professor Macrory: It will be all environmental law. I am just saying the analogies of the process. I know in Government a letter from the Commission may not be "legally binding", but it is treated extremely seriously, because, at the end of the day, it may well get to the court and there may well be fines, which we can come to later.

Q195 **Dr Johnson:** Why would you argue against them being binding?

Professor Macrory: I am looking for ways of getting constructive solutions without getting into too much legal process and not defensive attitudes, so they can negotiate. I may be wrong, but my feeling is, if you introduce a legally binding notice at the earliest stage, then immediately, if I was the Government body, or the local government—whoever—I would be saying, "Get the lawyers in. We have to resist this," or whatever, rather than engage in an initial constructive dialogue.

Andrew Bryce: When you have notices or where you have an appeal lodged, the tendency is that the whole thing goes into a different mode. People tend to stand back and say, "We will wait for that whole process to finish before we are prepared to negotiate and discuss in any great detail." That is a tendency, in any event, in our system. If you have a decision notice that is binding, you then have to have some framework to deal with an appeal against it, or some forum for arguing about that notice. That may not be the best construct to do that with. It may be better if you are looking at the thing in the round, rather than sticking



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very specifically to the notice, bearing in mind that, as drafted, you do not review the notice. You do not review the notice provisions. You are reviewing the original conduct of the body and not the remedy.

- Q196 **Chair:** Again, the air quality one is a good one. If you take it that you want to reduce the particulates, you might do that by driving electric cars; you might do it for lorries through hydrogen. You do not want something binding that says, "You must produce X number of electric cars." What you actually need is a system where it is flexible enough to say, "You need to improve the air quality and you can do that by either electric cars or hydrogen vehicles."

Andrew Bryce: Bespoke remedies.

- Q197 **Chair:** That is the trouble with the environment. If a financial regulation has gone wrong, you can have a regulation to put that right. You cannot just have a regulation, because you actually have to physically do something to make it different. This is the bit I am trying to get to grips with.

Professor Macrory: What is unusual with the air pollution case is that the EU law specifically requires a remedial plan if you are in breach, so there is a legal duty about a remedial plan. That is not something we generally have in a lot of our environmental laws. Here, in a sense, if the OEP gets involved and says, "We think there is a breach," as it says, they can state what they think you should do, so it may well get focused on that. You are right: for something like air pollution, there are lots of policy responses, because it is a very complex area to deal with.

In this process, provided that certainly the initial stages are conducted in a constructive but quite a friendly, firm manner, but not getting too litigious, you could discuss those issues. The OEP could say, "I think something else." It will get complicated, because I do not think the OEP should be making all the policy choices about, "This is the right thing."

- Q198 **Chair:** They almost need to have an advisory role, with the need to be able to have that legal enforcement afterwards. That appears to be the most difficult thing to achieve in some ways.

Professor Macrory: That is right. It is different from a body such as the Royal Commission on Environmental Pollution, which I was on years ago, which was purely advisory, though it tried to have authority. The fact that OEP can go to some form of court of judicial proceedings gives it the edge, but it may never have to do that.

On the point you were making about these really big issues, I think we will come on to that, but in terms of enforcement action, because it is probably going to be limited staff—it has a lot of other very important functions, probably more important than enforcement—it is going to have to be limited to very big cases. Maybe we could discuss this. I think some of my public lawyer friends are quite anxious. There is a very good argument for saying that, if it is really dealing with the big cases—the



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sorts of cases the Commission now deals with—actually the action should be focused on central Government, whichever part of Government is responsible for it. Otherwise, there is a passing of the buck.

Andrew Bryce: This is the concern.

Chair: A lot of the Bill is actually passing the buck.

Professor Macrory: That is why it would be quite difficult to accommodate that within judicial review. It would be perfectly possible for the OEP, if it eventually gets to some sort of procedure, to say, "You are responsible," with whatever action you take: you might have to provide more resources to local government; you might have to give directions. There are occasional cases where they probably could not intervene, but we are looking for imaginative ways of dealing with big issues.

This is how the Commission acts. It deals with the government of member state. It does not matter which part of the state was responsible - whether it is the agency or local authority that has breached, they do it, but they are focused on central government. If I look at the cases the Commission are currently dealing with, there is blanket burning of bog habitats. They have a pretty disgraceful situation with urban waste water treatment directive, which was agreed over 20 years ago. There are 17 agglomerations—sewage works still not complying. In terms of enforcement of vehicle product standards —this is following the VW scandal—nobody seems to be doing that properly. I actually think central Government should, in that sense, be responsible for saying, "We have to respond to that."

That is quite an attractive model, because it means that this OEP will be focused on the big issues, and we are looking for something different. I have argued this. I keep arguing this, and I am looking behind me. I do not know whether I am getting anywhere.

Andrew Bryce: There may be some political resistance to it.

Professor Macrory: There will be lot of political resistance. Departments would hate it.

Andrew Bryce: The other thing to bear in mind is I think both Richard and I feel the role the body has, in terms of monitoring and seeing problems at an earlier stage, is also part of this trying to head things off at the pass. That function is going to be extremely important, in terms of its ability to watch things as they are happening and try to stop getting to the point where we are into a litigious situation.

Q199 **Angela Smith:** I take the point about the importance of central Government in this. Of course, in the air quality decisions, the Government actually tried to pass the buck to the local authorities, if you remember, Neil, in our inquiry, so I take that point entirely. I am just



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interested in the concept of using the Environment Tribunal as part of the enforcement procedure. Perhaps you could just explain that a little more to us.

Professor Macrory: The Environment Tribunal is an independent judicial body. It has been in existence for about 10 years now. It now deals with appeals in about 44 areas of environmental regulation. It is acquiring more. When companies challenge a decision, they go to the tribunal. What I like about the tribunal, and the Environment Tribunal particularly, is that it has legal members, or a legal judge, if you like, but it also involves other expert members. They could be environmental scientists. They could even be economists if we are talking about costs and stuff. It also has extremely flexible rules on procedure.

In answer to one of the questions you posed to a witness before, I think, alternative dispute resolution is built into the rules. It actually says right up front. In regulation 3, it says the tribunal will encourage the use of alternative dispute resolution and facilitate it for the parties if they wish it. It seems to me it is a very attractive body for dealing with these sorts of issues. Sitting above it, there is an Upper Tribunal, which deals with points of law and has the status of the High Court.

I am normally number two in judicial reviews. I am not in and out of the courts. I have appeared in front of the Upper Tribunal on an appeal and it was a bit of a revelation—no wigs or gowns, making representations just sitting down. It is a bit like this room with a rather sensible, focused discussion, with the judge quite often intervening. I do not want to denigrate JR, but it is a bit theatrical and formal. Here, we should be looking for something more modern.

Q200 **Chair:** You are not saying that lawyers and barristers are sometimes theatrical, are you?

Professor Macrory: No, and I am not denigrating the Administrative Court. They do some wonderful decisions on the interpretation of law and process. Here, we should be looking for a more imaginative way of trying to resolve these issues. My imaginative way would not just be the OEP and its first notices, but going right back to the final stages of handling the issue.

Q201 **Angela Smith:** Yes, absolutely. I was in local government for a few years and I understand entirely why JR is not the right mechanism, maybe. On the issue of the tribunal, as it currently stands, would it need to be adjusted in any way, in terms of its rules of procedure, its powers, the way it works and the people it can include, in order to accommodate this responsibility?

Professor Macrory: I do not think so. My model, which I have said in my written evidence, is that, at the end of the day, if a decision notice is served and still there is a dispute, whether it is about the remedial steps or the actual breach of law, then the OEP would go to the tribunal to have that notice confirmed, rather than the Government appealing. I quite like



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that as a model, because it is eventually the independent judicial body saying, "This is a breach of law." That is quite good.

Again, this a rather technical thing I would propose, and I have put it in my evidence because there is a precedent. If the Government body does not comply with an order of the tribunal, it should be a contempt of court, which is then punishable by all sorts of things. With the tribunal at that level, it is not quite clear whether their orders are contempt of court, and that needs to be put in the statute. There is a precedent I have found for that in the Data Protection Act, which says that a breach of the order of the tribunal is contempt of court, which the Upper Tribunal will deal with. That is quite important, at the end of the day. It is sort of technical, but it is important. If you were going to use the tribunal system, I would introduce that.

Q202 **Angela Smith:** That change to statute would be in the legislation.

Professor Macrory: You would have to put it into the legislation to make it absolutely clear. There is case law on this, and I talked to the president of the General Regulatory Chamber. She felt that, if you were going to use the tribunal system, it would be very helpful to have this.

Andrew Bryce: The other important thing is the tribunal can vary the terms of the decision notice, effectively, so it can play around with what is set out in the decision notice as the appropriate remedial steps. Although you can do a similar thing with JR, with the way that JR is structured in this Bill, I am not sure to what extent all the powers of JR would be appropriate. You would have to apply for those at the outset and the review process looks to me to be very narrow.

Q203 **Angela Smith:** We have gone through how the legislation that enabled the creation of the Environment Tribunal might need to be amended, but how might the Environment Bill itself be amended to incorporate the use of the tribunal?

Professor Macrory: In terms of the section dealing with the review, whichever section it is, I would simply delete that and substitute, "If the decision notice is not complied with, you go straight to the first tier Tribunal." I would drop all of what I call the baggage of JR and start afresh. It may be that the tribunal will be equally deferential to Government, because they just might, but I think it will be a rather different process. Particularly if they have other members involved, like scientists and so on, on the tribunal, they probably will interrogate more closely and do that.

Q204 **Angela Smith:** One would hope so, absolutely. What are the benefits? You have made the case for more direct accountability for the Secretary of State for failures to protect the environment over traditional JR. Can you explain that a little for us?

Professor Macrory: I am picking up the experience from the Commission, where, as I said, the infringement proceedings are focused



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on central Government and they have to respond, whichever part. When you look at these complex, big issues—

Angela Smith: Yes, this is a point you made earlier.

Professor Macrory: Sometimes Government can do more. There may be funding issues. The trouble with the JR is it is all too easy to pass the buck and say, “You are strictly legally responsible. You have to deal with it.” We should get central Government involved with these bigger sorts of issues. Again, you would have to actually amend the Bill to say the decision and the information notice are served on central Government, responsible for any breach of environmental law by whatever part of the public sector.

Q205 **Angela Smith:** In an era of devolution—although devolution is faltering in some parts of the country, including mine—in the long term we will see further devolution in power. Is it your view that actually responsibility by central Government is even more important, or would devolution potentially change the picture on that?

Professor Macrory: On devolution, on my principle, it would probably have to be the Welsh Government that is responsible for all the areas of Government, and Scottish and Northern Irish. That would really cause problems if you said the UK Government—

Q206 **Angela Smith:** What about England?

Andrew Bryce: Most environmental matters are devolved. We will have to wait and see how it ends up being structured, but Scotland is now setting off down a similar road to England, but devolution is a different issue.

Angela Smith: I am just thinking about England, and English devolution—that is my point—not Scotland or Wales. I understand that.

Andrew Bryce: No, I understand.

Chair: The point I was going to make is that at this stage we do not even have to amend the Bill, because we are doing pre-legislative scrutiny. If you have ideas of what you would like to see in the Bill, we do not actually have to draft those clauses. We just go back to the Bill and say, “These are the ideas we have.” All that I am reinforcing is the point that Angela is making there. At the moment, it is not a case of amending it. It is just saying, “If we want a different relationship between the devolved nations or whatever, we should say so.”

Andrew Bryce: Yes.

Q207 **Angela Smith:** That is absolutely it. The point is about English devolution. I am just talking about English devolution and the potential impact of that on this concept of central responsibility. Can we future-proof it?



Professor Macrory: If I look at, again, the examples—air pollution, the 17 examples of agglomerations not complying with sewage, probably the Medway, the habitats, blanket bogs—these are big issues showing some systematic failure in the system. That does not mean central Government have to take over all the decisions, but they have to make it work, and often they have the levers. What you are introducing, if you like, is a political accountability, because clearly Government would be politically accountable, and in this process now a quasi-legal accountability to sort out the situation and handle it better.

Q208 **David Simpson:** I just want to clarify one of the points. You talk about the JRs, judicial reviews. Is it your opinion that these issues can be dealt with in another way, rather than go for JRs? The chain of thought is that judicial reviews can be used sometimes as a delaying tactic from objectors, or whatever the case may be. Do you think this can be dealt with in a different way rather than through judicial reviews?

Andrew Bryce: Yes. We have talked about the time that is available and the structures that can be used to bring things to a head. The tribunal is good in the sense that it will bring out the whole context, rather than looking at a specific issue that somebody has a little hobby horse about that they are taking through the JR process. This will look at the whole picture in a little bit more detail and not just on the basis of written evidence, for instance. It is a more holistic approach.

Professor Macrory: The OEP has these enforcement functions. That is not going to replace JR. That will still exist, and JR is sometimes very useful. You are talking about delays. I could see a case where, if the OEP has already decided to investigate and start a process, and a third party started a JR, the court might well say, "Let us hold back on the JR." That has happened sometimes with Commission infringement proceedings. That is quite useful, but that would be up to the JR court.

Andrew Bryce: Alternatively, the OEP could have the right to intervene, which it does not have at the moment and would need to go into the Bill.

Q209 **Chair:** On the tribunal, you made the point earlier, Richard, that it will be down to the expertise of those on the tribunal. It is very difficult to write into law what sort of expertise you are going to have for each. You could be talking about seas; you could be talking about air quality; you could be talking about land management—you could be talking about anything. These tribunals will work really well if you have some really good experts that can sit down round a table and say, "This is how we solve it. This is what you need to do." This is where I see them having a real role. How can we, to a degree, influence who these people are?

Andrew Bryce: They have panels. The tribunal has panels of experts for specific areas that they deal with. They have the ability to draw on experts to sit with the judge and look at those issues—on very specific issues.



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Professor Macrory: A few years ago, Defra was thinking of transferring all the current waste and water appeals to the Environment Tribunal, which I would have loved. In fact, the Ministry of Justice came to me and said, "What sort of extra expertise do you think we need?" They are handled now by the Planning Inspectorate. I went through 60 cases and could come up with, "These are the sort of areas of expertise you would need." Unfortunately, the Ministry of Justice charges other Departments for using its tribunal system and they were charging too much, so it never happened. You have to look at the sorts of issues that are coming up and have discussions with the General Regulatory Chamber.

Q210 **Chair:** You think as long as these tribunals are set up in a way that they can call upon this expertise—

Professor Macrory: As I understand it, they are quite flexible in appointing new members. If it suddenly turns out that it is all about harbour porpoises—there is another infringement proceeding about that—they may need to do that.

Q211 **Chair:** There would be nothing worse than going to a tribunal where obviously the people there discussing it do not really understand the issue, you do not get anywhere and it is a complete waste of time. We are trying to save court time, really.

Professor Macrory: Yes, absolutely. As I said, you can hear from the way I answer I am quite a fan of this tribunal and the way it is done. It could be very useful in this area and, as you say, take the pressures off the single-judge JR.

Q212 **David Simpson:** This is a question on the powers again. Witnesses have suggested that the OEP's powers are not flexible enough to deal with emergency environmental cases with action that needs to be taken immediately. In your opinion, what might such additional powers look like?

Andrew Bryce: Yes, it is a point I raised in the UKELA evidence we submitted. It is something I have raised before. I think it is going to be pretty rare for this to be used, but I can see circumstances where there may be a blatant breach that is having an impact that requires dealing with urgently. Therefore, you are going to be looking at the right to seek injunctions and, potentially—it would need to be thought through in some detail—the possibility of serving a stop notice or a similar procedure. The tribunal is already experienced in dealing with appeals against stop notices under other regimes.

Q213 **David Simpson:** Could you just explain the injunction part again? What do you mean by that?

Andrew Bryce: If the public body is doing something or about to do something that is considered a blatant breach, an application can be made to court for an injunction to prevent that happening. An order can be made to prevent a certain course of action or conduct. That could deal



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with an emergency situation. There has been discussion on one or two of the technicalities around that, but we will happily submit some information about that, should that be helpful. There could also be a notice procedure requiring something to stop, or the public body to stop doing something, which could then be the subject of appeal or referral to the Environment Tribunal or court, should that be the course.

Q214 David Simpson: Where do you think these additional powers should sit in the Bill?

Andrew Bryce: They would sit within the enforcement section. There would probably be a separate section to deal with circumstances where there is considered to be imminent harm or danger likely to result from the actions of a public body.

Professor Macrory: Such powers would be useful. In practice, they would probably be very rarely used, because if the OEP was sniffing around a local authority would probably refrain from a decision. It would probably be quite useful to have it. As a matter of law, they would have to have those powers in the statute. They would not have them inherently, unless they have started engaging on a JR, by which time it is too late. You want it early on just to hold things until we have investigated more. That would be a useful additional power for the OEP.

David Simpson: That is interesting. Thank you.

Chair: Yes, so they could act earlier if they needed to.

Andrew Bryce: Yes, to short-circuit the process, but it would be unusual.

Professor Macrory: Again, it is one of these examples of the big stick. The fact that they have the power means they may never have to use it because they can just say, "We advise you not to go any further on this because we are investigating it."

Chair: It is like most of life. 90% of people and organisations will comply. You have the 10% that will not, and then out of that you have the 5% that really will not. Those are the ones where we have to have a process. What we want to be able to do is take out the 90% and deal with that in a very diplomatic and gentlemanly way, if you like, for want of a better expression. We need to have the force for those that will not, that decide they are not going to do it. This is where we are trying to get the balance right.

Q215 Mrs Murray: Can I just turn to resourcing and enforcement? What level of resource do you think is needed to ensure the OEP can deliver its enforcement functions?

Professor Macrory: We have not had any very clear indications yet. Looking at existing bodies, the Committee on Climate Change, which of course is advisory, not enforcement, has about 30 to 40 staff. If you look at one of the other models, the Equality and Human Rights Commission—



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which has an enforcement function as well as an advisory one and is dealing with both the public and the private sector, but a rather narrow area of law—that has about 200. I suspect we are going to end up somewhere in the middle.

As we will come to, some of its other functions—monitoring the plans, implementation—are incredibly important and it will have to devote a lot of its resources there. We are going to come down to a fairly small number of people. That means it has to engage in what the Equality and Human Rights Commission calls strategic litigation, which is the really big cases, and not trying to deal with every single breach. At the moment, in terms of infringements, in practice the European Commission has about 10 or 12 cases it is dealing with now, in terms of these big cases.

Q216 Mrs Murray: Before you answer, Mr Bryce, could you just expand on how big you think this body should be, or will need to be, and what type of staff it should have? I know you have just strayed into that, but if you could expand on that as well, it will save me asking you a separate question.

Andrew Bryce: Obviously, it will depend as to what the powers end up being. For instance, I am not very happy about the advice element. We may get on to that later, but I am not very happy about it being an adviser and an enforcer. If we take that out of the equation, that would remove some requirement. It is very difficult to say. I think it is going to have to be 100 people. That is as far as I can really go. It will be a little bit of trying to map out the degree of involvement, but I can see the general monitoring and the monitoring of the improvement plans could be quite a labour-intensive business.

Q217 Mrs Murray: You have actually expressed concern in your written evidence that there will be an inevitable tension between the OEP's two roles as an advisory body and a regulator. What practical impact might that have on resourcing and independence?

Andrew Bryce: My view about it is simply that, if you are going to be advising Government, you may end up having to pursue a case that relates to that topic. Similarly, you may get a complaint in that you should normally have dealt with on a topic where you have offered advice. I see no problem with the OEP being a consultative body, or indeed its ability to volunteer its opinion on particular areas that it considers to be important as part of its monitoring role. If you were to say that this is the legal advice function for the Department for Environment, Food and Rural Affairs, you are getting into a larger cohort of people carrying out a somewhat different function. It would reduce the headcount slightly, I would suggest.

The big thing here is managing the expectation. There is going to be a flood of people writing complaints. Of those, probably a very small percentage are going to be pursued by the OEP. We may find a big function of the OEP is defending itself against judicial review in not



proceeding with certain complaints. I would not rule that out. That aside, in my mind I am thinking of a body of around 100 or 120 people, perhaps, but it is a guestimate.

Professor Macrory: One other factor, again looking at how the Commission handles its current infringement proceedings, is that the actual body of the work is done by lawyers, but often these cases, like air pollution and sewage, involve quite complicated science, and they can draw on the rest of the Commission for their policy and scientific services to help them.

I do not think the OEP should be duplicating all the Government's scientific services, and I hope they will be able to use them where need be. The Committee on Climate Change, which we might come on to, could be one of them, and there are other sources of expertise, and that will do it. I agree that below 90 people it would be getting very stretched on its functions. We might come on to this later. It will have to handle the expectations of the public that it cannot deal with every single case.

When I first worked in the Commission on infringement proceedings, it said, "We will investigate every complaint that is sent to us." It was just overwhelmed. It was firefighting, slightly manipulated by external interests and so on. It now has a very clear policy, which is published, saying, "We want people to send us complaints, but we are only going to investigate cases that show a general practice of non-compliance or some systematic failure." They say, which I think is another nice quote, "Bigger and more ambitious on big things and smaller and more modest on small things."

Q218 **Mrs Murray:** That brings me quite nicely on to my final question. The OEP has the power to investigate and issue information notices where there has been a serious breach of environmental law. However, the explanatory note simplistically defines "serious" as "not trivial". How might this ambiguity be clarified to ensure the OEP is not overstretched?

Andrew Bryce: It is going to have to ensure in its strategy that it makes very clear what its function is and the nature of those cases that it will pursue. It is important that there may be some tinkering required within the Bill wording to link in that very specific and restricted strategy as very much the basis for its action. There has to be a very clear discretion there to ensure it is not endlessly judicially reviewed about its decisions on complaints. That is the way forward. I agree with you. The explanatory notes mention a whole range of types of case and then end up with this rather broad category, so it is quite confusing.

Professor Macrory: For a specific amendment to make this clearer, clause 19 is dealing with complaints from the public, which is going to be important, and it is important for the public. It says the OEP may investigate a complaint where it considers there is a failure of law and it is serious. I think one should add a condition to that: "And is consistent with its enforcement policy." The OEP may say, "We do not think it is



serious," but the local inhabitant may say, "It is serious to me," and they are going to end up just constantly battering each other. It is unfair to members of the public if you do not send that clear signal: "We are not trying to do everything. Send us evidence if you think this has actually got major issues or it is symptomatic of something else." Otherwise, that just upsets everybody.

Q219 **Angela Smith:** For me, the question of resources relates not just to the OEP but to the bodies that the OEP will effectively have powers to take action against. I am sorry for the clumsy way of putting that. I am thinking of the Environment Agency in particular, and the point made in your evidence, Professor Macrory, that formal cautions issued by the EA have dropped by four-fifths.

Professor Macrory: In three years.

Q220 **Angela Smith:** I know how pressed they are, because we had a very bad pollution incident in my constituency about five years ago. It was awful, and the EA was absolutely stretched to its extremes by that one incident. My fear is that the OEP will issue notices against, for instance, the Environment Agency for not tackling pollution effectively, and the response from the Environment Agency will be, quite fairly, "Yes, we recognise this is a problem, but we have limited resource to deal effectively with the issue." This is often an excuse used by central and local government, and non-government public bodies, to wriggle out of decisions or enforcement of decisions made by legal bodies, judicial bodies. I do not think that is done deliberately; of course, it is not.

Andrew Bryce: There is a provision in the Bill, as you will know, saying that the allocation of resources is outside the remit of the OEP.

Angela Smith: Yes, and that is the problem.

Andrew Bryce: My understanding of that is not that you couldn't look at issues of funding going to a particular body necessarily. It is more to do with allocations of resources within Government.

Angela Smith: That is exactly my point.

Andrew Bryce: But the issue still filters down to those bodies that are sponsored by individual Departments.

Professor Macrory: I put that at the beginning of my evidence. As I said, I do not know all the reasons for this decline in cautions and prosecutions. Maybe there is better compliance. I am not going to say the world is dreadful, but I am worried generally. We are getting very excited about creating this new body, and it is imaginative, but if the existing regulators are not enforcing their laws properly because they just have not got the resources, there is not much point in doing this.

To me, your question reinforces the idea that this OEP, when it starts taking enforcement action, should actually be focused on central



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Government and not keep trying to hit the smaller bodies, and then try to resolve this question of resources. The other thing this gets back to is one of its functions being to be able to review the implementation of environmental law, which is incredibly important. It may be, looking at these statistics—and I think you will find something similar from Natural England—that one of the first things it might do is to have a serious review of this and then produce a report. Obviously, your Committee or another body could then pick this up from an authoritative, independent viewpoint, and say, “Is this a real problem, or has it all been taken up by civil sanctions and so on?” I do not think it has. You are right that it is a very important context of this.

- Q221 **Angela Smith:** Absolutely. The phrase often used is, “We will act on this notice or decision when resources allow.” It is the classic get-out clause. I agree that central Government should be where the accountability is for all of this. How effective do you think the OEP could be in tackling this “when resources allow” mechanism, which could effectively allow central Government to escape decisions?

Professor Macrory: This is where you look at the nature of the environmental law duties, because that is what it all comes to. As with the air pollution case, eventually, and if need to be, you get to the tribunal. It says, “Sorry, you cannot keep making this excuse, because the resources are not a defence to this.” They are in some law. You can look at the specifics. It says this. In air pollution law, it is not a defence. You have to actually devote more resources to that. It depends how the environmental law is drafted. At the end of the day, if you have that big stick and you know that it is there and we will test it, that could actually help unlock things.

- Q222 **Chair:** This is the crux of the matter, really. Is the OEP going to be powerful enough? There may be Environment Agency or others with funding problems, but they are also going to have to direct Government, are they not? There is an argument that the OEP is too close in some ways to Defra, the Environment Agency and others. I think what will happen, Angela, is whether the Environment Agency has enough resources or not, the OEP should be able to say, “Government are not doing their job properly, so therefore they should step up to the plate.” Is it going to be able to do that? I rather fear it has its hands slightly tied, but am I wrong?

Professor Macrory: You have heard evidence before about the funding models, and they are quite complicated. One of the issues is that Defra has a rather bad record on this. I can look at the Equality and Human Rights Commission, which I do not think anybody has said is a creature of Government. It has had a case involving Government. The funding there is the Department for Education. It is the same funding model.

The problem with Defra is it had some very bad hits and very bad cutbacks, so it squeezed resources, but it is also doing these sorts of common services—you have heard evidence about this—so, “We will



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provide the press services for these agencies.” They have brought them in. One of the essential things, whatever funding model is chosen, is that the OEP should not have any common services with Defra on anything, and should be physically in a separate building.

Q223 Chair: That is a really interesting point. That is the way you make it separate, is it not? We were talking about Natural England, and Natural England no longer having its own press officer and this sort of thing. I can partly understand why they do it, because of resource implications. I think the OEP will hold local government to account but I am not sure it will hold Government to account. If you look at the way it is written, as far as I can see a lot of it talks about local government all the time. Local government is always a good whipping boy or girl anyway. We want to be sure that, yes, local government needs to be held to account, but so does Government. Do not forget, the Commission, for all its faults, at the moment is separate from Government. If we are not careful, is this OEP going to be too close to Government? Is it independent enough? I suppose that is the direct question to you.

Andrew Bryce: Certainly, I would like the messaging to be totally independent of Government. That is quite key.

Q224 Chair: So we need a separate building and a separate resource structure if we have any chance of it being able to then turn round to the Environment Agency, Defra or whoever it might be, and say, “You have to pull your socks up and do it better.”

Professor Macrory: Yes. As I said, this could be a really important body in the way we look at environmental law, not just enforcement. That is important, but its overall functions could really help things along and actually help Government, but being quite critical if need be. It will depend a lot on the leadership, the chairman and the chief executive. You always have a problem with appointments. They have to be subject to committee appointment scrutiny. They probably would be in this case.

Q225 Chair: At the moment, is it not the Secretary of State that just puts them in place?

Professor Macrory: Yes. Everybody has to watch for that. I have seen this in other areas, and I am sure you have. They will start with an independent chair.

Chair: Then they get a bit of a pain and say, “We will change it”.

Professor Macrory: Yes, and next time you get a slightly more compliant chair. In a way, it is almost impossible. You can put in provisions in the Bill saying that they must be independent of mind or something, but actually, at the end of the day, it is a question of watching the process and what is going on, and making sure it does not get caught up.

Q226 Chair: From our point of view, as a Select Committee, we want



something in the Bill just to give us that opportunity to be able to have a reasonable level of scrutiny as to who he or she might be taking on that role. That is important to have that, in the first instance. Otherwise, we have no chance of really scrutinising it. Yesterday we looked at the new chair of Natural England. Even if we had said we did not like him, we would not be able to change that nomination. I am not saying we should have the right to change it but we should have the right to challenge it. That is quite an interesting place to get to.

Professor Macrory: Would that be unprecedented in legislation? I am not sure.

Q227 **Chair:** I do not think it is completely unprecedented, but it is certainly unusual. It is something that I would like you to give some thought to. We should not have the right to veto everything, because that does not work that way. You would expect the Secretary of State and the Ministers to have the powers, but we also need to have some real, proper scrutiny role, not just, "There, there. We know better. We are going to carry on regardless." I think it was a health appointment the other day where the Health Committee said no and the Secretary of State still carried on anyway. That is where we have to be a bit careful.

Professor Macrory: I agree. I do take my hat off to the current Secretary of State. The previous Secretary of State, on this issue of the Commission and the gap, was just not interested. She just said, "We can do JR. ClientEarth can deal with it all." The current Secretary of State did immediately see the problem and is trying to set up something that is quite novel. Of course, you will be questioning him. Other Departments will be keeping a very careful eye on this.

Chair: That is why we have pre-scrutiny of the Environment Bill. He is using this process to soften up some of the other Departments, but I have no problem with that.

Andrew Bryce: Climate change is jointly funded by a series of Departments. I wonder whether this body maybe should be as well. I am not sure.

Chair: It is an interesting point.

Andrew Bryce: It may alter the view. There may be more varieties and colours of view.

Professor Macrory: I just do not know. It may be that this is Government—

Q228 **Chair:** It means then, if it is funded by a series of ministries, that it is not answerable to just one for its funding. That might make it more independent.

Professor Macrory: There is no doubt that there are other ministries with environmental law responsibilities that which will come within the purview. Looking at BEIS, there is a lot of it.



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Q229 **Chair:** Air quality is another one. In fact, it is a Defra responsibility, but most of the solutions are in transport, local government and across the piece.

Professor Macrory: I am not part of Government. It may be that Defra or the Secretary of States decides, "This is just going to be too complex and I want to get this off the ground quickly. If I say I will fund it, that is the way it will happen." This is outside my expertise.

Andrew Bryce: It is above your pay grade.

Professor Macrory: It is above my pay grade, definitely.

Chair: Yes, we cannot legislate for all possibilities. It is a fair point.

Q230 **Alan Brown:** We have already spoken about enforcement powers, but if we look at the monitoring of environmental law, how clearly does the draft Bill set out the wider functions of the OEP beyond its enforcement powers? How might the functions such as monitoring of environmental law be strengthened further?

Professor Macrory: Are we dealing later with the definition of environmental law?

Alan Brown: Yes, it is a natural follow-on.

Professor Macrory: Can I deal with the two?

Chair: Not really, if you not mind, because David has that one.

Professor Macrory: As I said, the clause, although it is a rather short clause on the monitoring of implementation of environmental law, is actually incredibly important. Most EU environmental legislation has provisions about monitoring their implementation after five years and so on. Reports are sent to the Commission. We have never done this in UK environmental law. We have never had provisions saying, "After five years, let us have a review," not in the legislation. Occasionally a Select Committee picks up the issue, fine. If the OEP starts systematically reviewing how we deal with different areas of environmental law and producing reports, which will go in front of both Parliament and the Department, that is an extremely valuable function.

In terms of one of the ways of strengthening that, there is a duty of co-operation on other public bodies, but it is restricted to the enforcement provisions. Where it has decided to review, for example, what is happening on contaminated land, it will need to send out a questionnaire to local government. The duty of co-operation should extend there, so the local government or agency has to respond. They cannot just put this as another pile of paper. This is quite serious. That is one way of strengthening it. We will come back to definitions, because it should be rather wider, but that is very important.

The secondary thing I would strengthen is actually the inquiries or advice generally. Andrew alluded to that earlier. It should not just respond when



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the Minister asks it too. Actually, if it decides there is an issue it wants to investigate and thinks it is sensible, it should have those powers too.

Andrew Bryce: I really feel, on the independence point alone, the advice issue is undesirable.

Professor Macrory: In fact, I would like to see, in new environmental laws, more and more a provision like the directives: that the implementation of this law shall be reviewed after so many years by the OEP. That is the kind of precedent we might start doing. Indeed, the current Bill might make a good precedent for this. Put it at the end: "These provisions shall be reviewed by the OEP." That is when you bring out the questions.

There was some wonderful New Zealand environmental legislation produced some 30 years ago. It really failed in its implementation because there were not proper training or resources provided for local government. The legislation looks wonderful but a big element was missing. That is the sort of thing: an objective inquiry by this body could bring out these issues. Then it is for the politics to take over and to say, "What are you doing on that?"

Chair: That is the balance between what is political and what the OEP is.

Q231 **Alan Brown:** Earlier on, there was a question about the resources needed for enforcement powers. Obviously, we touched on the importance in terms of monitoring and review, but also possibly training and advising the local authorities. Do you have a view about how much resource would be needed to make that fully functioning and working?

Professor Macrory: As we said, if you went below 90 in staff—you would have to have some lawyers involved, obviously, but also other expertise—then it would be really difficult to do. It is also going to have to define its priorities and strategy very carefully. It will not be able to deal with everything to begin with. It will have to have help. It will also have to pick up issues that Select Committees raise that look like important issues. The leaders of this new body will have to be quite sensitive and quite strategic.

Andrew Bryce: The range of expertise required is enormous, potentially. It will be necessary to farm out certain things where you get into a really specialised area. You cannot expect to have expertise in every single minutia of the environmental canon. It will have to do that from time to time.

Professor Macrory: That needs to be within its budget so that it has enough. Again, the European Commission does that sometimes, if they are looking at very detailed areas of law and what the national law says. They have to fund it. They will commission academics sometimes. I have done it and it is extremely boring work, but it has to be done. That is a way of handling some of those issues, as long as it has those resources.



Q232 **David Simpson:** Is the definition of environmental law, which is clause 31, sufficiently clear? Should areas such as forestry, flooding, and town and country planning be brought into the scope of the OEP?

Professor Macrory: When we are looking at the enforcement powers, there is a bit of a quandary here, because you are potentially imposing liabilities on parties. You have to have a degree of certainty. At one stage, the Government were thinking of listing all of the legislation. That would get out of control.

The definition in there is reasonably okay for enforcement purposes. The explanatory memorandum needs a bit of clarification, because my understanding is that for forestry anything to do with environmental impact assessment is included, and I think it would be on the definition. My understanding for planning is that environmental impact assessments and strategic environmental assessments are meant to be included with the OEP's functions, and it was not intended to be excluded. That should just be made clear. I think it is, if you look at the definitions. I would stand up in court and say, "Of course this is included."

As part of the preparation, I thought, "I will test this definition." I went through 68 environmental judicial reviews reported in the environmental law reports over the last three years. Assuming that environmental impact assessment and strategic environmental assessments are included, all but one would fall within these definitions. The only one with a bit of doubt was about Hampstead Ponds, which is a reservoir under the Reservoirs Act, and whether improvement works could be done under that. That might just fall out of these definitions. I am reasonably happy with those definitions for enforcement purposes.

The problem is that there are many areas of law that are not necessarily called environmental law but that have significant environmental implications. I would argue that for the purposes of looking at implementation, section 15 and section 16, we should have a more generous definition. I will just give you two quick, recent examples.

There is Sheffield tree felling, which is a cause célèbre for local government tree felling. In legal terms, that all turned on the duties of the local authority to maintain highways and what they could do. That should not be in the enforcement powers of the OEP, but if this turns out to be real problem going across the country, in terms of these highway powers, it should be able to inquire on that. It could not at the moment, because that is not an environmental law. You need to have the definition for the inquiries and the implementation, and I would add other areas of law that have significant environmental implications. It is quite simple.

Another good area, which is very recent, is about the powers or indeed the duties of charities and trustees to divest from fossil fuel investments. That is quite a complicated area of trust law, in terms of whether they can do. Again, that is an area of law that could be very useful for the OEP



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to look at—not to enforce but just to look at and say, “There is a real problem here and somebody ought to do something about it”.

The third area I would include, in fact, is international law, which should not be part of enforcement and cannot be, post Brexit. We have signed about 40 treaties. It is an area that is going to be very important. A lot of the way we implement national law is actually being disguised through EU law, and we need to monitor this post Brexit. Again, the OEP could have a very useful function just to monitor and report on that, but you would have to widen the definition of environmental law. Sorry, that was rather extensive.

Chair: You probably need to give us a little bit of written evidence on what you would like to see extended.

Professor Macrory: I will. I have my 13 small points. In legal terms, if you like, it is very straightforward. Policy terms may not be, but it is quite easy in legal terms.

Andrew Bryce: Also, if the OEP is going to have this review power over the 25-year plan, because of the degree of overlap between different areas it is important that the OEP should be able to comment on anything within that plan. Otherwise, it gets into a real mess with bits you can and bits you cannot—and, as Richard said, also on the monitoring side—so that should be a much broader issue.

There are another two issues on the definition. We have mentioned the allocation of resources issue and what that actually means. The other issue is the one about climate change. Our view there is that the Committee on Climate Change does not have enforcement powers, as such. Certain parts of the legislation should fall under the OEP, where enforcement of obligations is required, on the basis that consultation takes place with the CCC on that before any steps are taken.

Professor Macrory: Again, I have mentioned this in my written evidence, and it is quite simple. You simply say that exclusion of climate change does not apply to the OEP’s enforcement powers, provided it first consults the Committee on Climate Change. Otherwise, there is a gap. There is a gap under things like emissions trading regulations, where there are duties for public authorities, such as the Environment Agency, to do. If they failed, the CCC cannot enforce that. It started with the best of intentions, but it has gone too far.

Q233 **Chair:** Yes, this is hopefully the whole role that we can play in scrutinising and doing the pre-legislative scrutiny. It is to try to tighten up on these things. You made an interesting point earlier on in the discussion. You said you have to be careful, because the OEP can look at a real breach and a problem, but it has to take a lot of vexatious complaints. There are people out there that will use every method. I see it sometimes under the Town and Country Planning Act as well. It is fine to object to a certain level, in my view, but people will go completely over



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the top. When they see a new body, if you are not careful they will say, "This is a licence to complain." I do not want to see that. I want to be able to have the proper complaints dealt with really strongly, but we have to be careful. I do not know how we deal with that.

Professor Macrory: Partly it is about slightly tightening up on the complaints in the legislation, but it is incredibly important how the OEP presents itself to the public. Again, I have quoted in the evidence a very interesting example: the New Zealand Commissioner for the Environment, which is more a parliamentary body. It does not do enforcement, but it investigates. It just says very clearly on the website, "We welcome members of the public to send us problems. We are a small body. We cannot investigate everything." You are absolutely right: when the European Commission said, slightly rashly, "We will investigate all complaints," I would often advise clients, "Get the JR started, but send a complaint to the Commission. At least put 'cc: European Commission'. Overload them."

I know that there are some very persistent people—I have probably advised some of them—often quite rightly, because they have a local issue. They will keep going back to the OEP, saying, "This is serious. Why are you not dealing with this? Justify it." We will have to devote some resources to that, but it has to make very clear the sorts of cases it wants evidence on and others that it does not. It may be able to act as a good post box, because we have other bodies such as the ombudsman that sometimes can deal with things to filter those down, to help people without getting overwhelmed and not getting manipulated. It is quite easy to be manipulated.

Chair: All of us as MPs have been there. They are lovely constituents, but they are obsessed by one particular thing. They will drive it and drive it and drive it.

Professor Macrory: You will be doing that now. You will be saying, "It is the OEP." I can see this happening.

Chair: We will. That is part of our role, though, you see.

Andrew Bryce: It is locking it back to the strategy, as we were talking about earlier, trying to get a very clear strategy and making it very clear to the public that that is what the OEP is doing. When it is set up, make it very clear that this is the approach.

Professor Macrory: It got touched on, but another power that has to be put into the statute, which I think is very useful, is one that the Equality and Human Rights Commission has. It can be what is called an intervener in existing JRs. This allows it to take part in the court proceedings. If it has not got the powers in the Act, it will not be allowed to be an intervener, because you otherwise have to have an interest involved.

There was a case last year, with an NGO taking action against the Secretary of State about his climate change duties under the Act, saying,



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"You should amend the 60%." The court asked the Committee on Climate Change to be an intervener. It is like a neutral party; that is very useful. The courts find it very useful. I could see it with JRs. The Equality and Human Rights Commission actually does this.

Q234 **Chair:** When you say an intervener, is it a consultee, or is it a bit more?

Professor Macrory: It is actually a party. It would be represented.

Andrew Bryce: It becomes a party with the right to take part in the proceeding and express a view. In a JR, typically, you will produce your own witness statement, which will be put into the proceedings and taken into account in the centre of proceedings.

Professor Macrory: If you look at it, the Equality and Human Rights Commission has done, last year, four Supreme Court cases. Two were involving the private sector, one the Government and one local government. Its intervention was very useful, because it does not necessarily side with either party. It puts the case in a broader context, to say to the court, "This is why this issue is incredibly important. It is not just these two people." It is wider than that.

As I said, it would have to be given the power to do that. That would be a very useful power. Environmental JRs will continue. They are not going to go out of the window.

Andrew Bryce: It would be important, because the OEP may not wish to use, for instance, its emergency powers because there is already a JR on foot. It may be interested, then, in intervening in those JR proceedings.

Q235 **Chair:** Gentlemen, thank you very much. You have been very good this morning. We are getting to the stage of now putting our ideas together and going back to a committee or the Bill team to say what we believe the pre-legislative scrutiny should look like and what our ideas are. You have given us some really good ideas this morning. You have given us written evidence, but if there is anything else that you think about afterwards, please let us have it. We may also perhaps come back to you, if we need to, to run one or two ideas past you as we put the report together. Pre-legislative scrutiny is different to what we are normally doing, but it is quite a good role, and I hope that we can produce an Environment Bill and an OEP that is better, stronger and has that balance to be able to advise before everything going to court. I do not want to keep you lawyers in the style to which you have become accustomed. You have had it too good for too long. Seriously, we appreciate your evidence very much this morning. If there are other ideas that you have, please let us know.

Professor Macrory: I look forward to hearing what the Secretary of State says. I am sure he will be charming. I think he will actually listen. In my experience, if they are good ideas, he will, I hope, respond.

Q236 **Chair:** As you have said, he has come forward with something. He is



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definitely trying to produce something that will hold Department and Government to account. We just have to make sure that it is not being watered down too much and that there is not too much emphasis on local government and perhaps not enough emphasis on Government. That is where we have to get the balance right. You probably agree with that.

Professor Macrory: Yes.

Andrew Bryce: Yes.

Chair: Thank you very much.