

Environmental Audit Committee

Oral evidence: The Draft Environment (Principles and Governance) Bill, HC 1951

Wednesday 27 February 2019

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Members present: Mary Creagh (Chair); Alex Cunningham; Mr Philip Dunne; Kerry McCarthy; John Mc Nally; Alex Sobel.

Questions 84 - 149

Witnesses

I: Professor Liz Fisher, Professor of Environmental Law, Faculty of Law & Corpus Christi College, University of Oxford, Professor Eloise Scotford, Professor of Environmental Law, UCL Faculty of Laws, University College London, and Tim Buley, Landmark Chambers.

Examination of witnesses

Witnesses: Professor Eloise Scotford, Professor Liz Fisher and Tim Buley.

Q84 **Chair:** Can I welcome our distinguished panel of guests here this morning, and visitors, and ask you to introduce yourselves, starting from my left?

Professor Scotford: I am Eloise Scotford, Professor of Environmental Law at University College London.

Professor Fisher: I am Professor Liz Fisher, Professor of Environmental Law from the Faculty of Law at the University of Oxford.

Tim Buley: I am Tim Buley. I am a barrister at Landmark Chambers, specialising in general public law, including environmental and planning law.

Q85 **Chair:** Great. Thank you all very much indeed for being with us, and thank you for the evidence that you have submitted to our inquiry and for the briefings that I am sure that you have given some or all of us in the background in the past and for your work on this area.

I am going to kick off. Obviously this is a draft piece of work. We have had a chat with the Bill team, we are having this inquiry and we are struggling, I think, with the broad equivalence notion, because clearly there is not broad equivalence, and this is obviously a very highly political debate. I wondered if I could kick off with a question to you, Professor Scotford. To what extent does clause 4.1 in the draft Bill achieve broad equivalence with the application of the principles?

Professor Scotford: In terms of what applies in EU law?

Chair: Yes.

Professor Scotford: I do not think it does achieve much equivalence. The caveat is what you have already said, that it is a different legal structure and it is not going to be the same as the European Union. But what we have at the European Union with the environmental principles, because they have prominent places in the EU treaties, is a constitutionalisation of environmental policy expressed in these principles. Therefore, they have legal prominence and legal priority.

It is interesting as well that it is not just one single group of environmental principles in Article 191(2) that are the basis for environmental policy. You also have Article 11 that sits at the front of the TFEU integrating environmental protection requirements across different areas of environmental policy.

The combination of those treaty provisions is kind of a set of cascading legal implications through EU law. It means that those principles inspire and inform what the equivalent is to primary legislation in environmental



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areas in EU law. They inform legal reasoning by the courts in interpreting that legislation, because they have that headline role in the treaties, and they also inform public law doctrine in reviewing whether the public law decision making within the powers of environmental policy is properly adopted and whether public decision making on the basis of those principles is lawfully done.

It is not that the environmental principles—and this is quite an important point to make—because they sit in the treaties are like a legal right or a legal free-for-all that can challenge anything in EU law. That is not their legal role. What they do is they structure legally the discretion that is exercised on the basis of those principles, as is expressed in law and as decision-makers apply the areas of regulation that bring those principles to life. They have an informing function.

Q86 **Chair:** You said it is about constitutionalisation. Obviously we do not have a written constitution.

Professor Scotford: Exactly.

Q87 **Chair:** What does not having a written constitution mean? You say the Bill has made the principles entirely creatures of policy and of course there are exemptions for these principles. Anything the Secretary of State says no to is just “no”. We have been concerned about things like forestry and planning, which are excluded, which is like, “Really? Forestry and planning, that is exactly where the environmental principles come in”. We think there are already some absurdities in the way that this Bill is drafted. What would you say about the constitutional side and the exemptions, as they currently stand?

Professor Scotford: Because of the way the principles are currently framed in the EU treaties, they are systemic, and they are not qualified. Because of the integration principle in Article 11, they are deemed to have influence across environmental policy but also across other areas of policy, without any kind of qualification where they are relevant. That is the point, that where they are relevant they are going to have a role. The idea of carving out, of restricting scope, of not having any real legal foothold for the principles in the way that we would do that in English law in a piece of legislation, in the primary legislation itself, means that you do not have anything that is approximating equivalence at all.

Q88 **Chair:** Wouldn't the Government say that this piece of legislation puts the principles into our law? Wouldn't that be their counterargument?

Professor Scotford: In a very bare bones fashion, I think. That is the point about equivalence. In a sense we have this weak duty now to take into account a policy statement that dictates the scope of the application of principles. That is very different from saying, “Environmental principles legally are the foundation for environmental policy, and we will have an influence in putting that in primary legislation”.

Q89 **Chair:** If I can be clear, you want these principles on the face of the Bill,



not in a policy statement?

Professor Scotford: It is not particularly what I want. I think legally what has been drafted now is incredibly diminished from what has happened in EU law and other bodies of law, where you get the principles entrenching a vision of environmental protection that then filters through the whole body of environmental law.

It is very telling that the section on principles not only relegates the principles to policymaking, but it is utterly isolated from all other parts of the environmental law. There is no mention of environmental law in the section on environmental principles; it does not connect to the rest of the Bill. Because they are not in primary legislation in any substantive way, it is unlikely they will connect to any other pieces of environmental legislation that we have.

Q90 **Chair:** In order to give the principles the equivalent legal effect, they would need to be in the body on the face of the Bill?

Professor Scotford: On the face of the Bill to begin to approximate some kind of equivalent legal effect, yes.

Q91 **Chair:** In what circumstances might there be a need for the exclusions set out in the Bill under clauses 1 and 4? We have the exemptions for defence.

Professor Scotford: One of your earlier witnesses to your Committee made the point that even the defence exclusion is very broadly drafted. It is very unclear what it would apply to. If there is some military readiness that needs to be in there to say—but I think the problem with this is it is assuming that principles have some kind of legal bindingness. That they are like a rule that might stop a particular decision, but they are not, really. That is not what they are about. They are about expressing a policy vision that will inform how environmental law works. There is less need to have exclusions at all, but if exclusions have to be in there they should be very narrowly and specifically drafted around very vital interests.

The exclusion in clause 4(2) is particularly problematic. What this is doing at the outset is saying, on the face of the Bill, that environmental protection policy is to be traded off against other areas of policy. That is a decision that can be made, that that is what our vision of environmental protection is going to be, but if we want environmental principles to make a strong statement of environmental protection policy, having that kind of trade-off diminishes having a strong statement of environmental protection expressed through the principles.

It is like a defence against some kind of judicial review. High-level policy is relatively immune from any review on the merits, so I am not entirely sure why it is there.

Q92 **Chair:** Yes, too many get-out-of-jail free cards. Do you think the



principles should also apply to decision making?

Professor Scotford: That is a very good question. I think that is where they come to life. In paragraph 40 or 50 of the commentary there is a statement, “Examples of ministerial policies where the principles might apply include housing decisions, transport decisions” so there is even an acknowledgement there that what Ministers might need to have regard to is that the policy statement does involve individual decision making.

These principles are very generally stated. They come to have meanings and they come to have relevance when there are individual decisions around planning permission that might have an impact on a habitat; around authorising antibiotics for animals; around where do questions of liability for environmental damage lie; how much should a polluter be responsible for? This is where they bite. This is where they start to inform the legal norms that might apply in those circumstances.

It is right that they inform part of a policy. That is absolutely right. That is kind of the direction of travel, but to say that they are not relevant to individual decision making is contrary to what has happened in EU law and where you see what environmental principles really mean.

Q93 **Chair:** This exclusion about the armed forces policies, relating to the Navy, Marines, Army and Air Force—I am not clear about these exclusions. Does that mean they are housing, are they management of Salisbury Plain? The Army is the one of the largest landowners in the country, so are we saying that no environmental principles apply to it? What is your understanding of that, as a lawyer?

Professor Scotford: I do not think that can be right. If we think back to legal equivalence, in the way that our EU environmental law applies, there will be certain environmental regimes that apply to those kinds of areas, those tracts of land, and those bodies of environmental law will be informed by environmental principles. Where we are at the moment, with environmental principles—again, they are not the rule, but they animate the rules, the environmental regulation that will apply to all different kinds of land and all different kinds of environmental issues.

Part of the problem with the Bill, is that there is an assumption the environmental problems are easily carved off from everything else in society. Whereas, environmental problems arise because you have to think about nature conservation in the context of house building, in the context of planning, in the context of what the military is doing. This is where environmental issues and their regulation really count.

Q94 **Chair:** Any thoughts or supplementary ideas?

Professor Fisher: Can I build on what Professor Scotford said, all of which I would agree with? First of all, as is obvious, there is no mandate in the legislation about what the principles should look like. Indeed, it is the opposite. What we see both in the making of the policy statements and in Ministers having regard to them, is that they do not have to apply



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them where there is no significant environmental benefit. That is a significant threshold, particularly in the policymaking context, when often you are thinking about something in the future. It seems to me that that is quite a serious limitation on the application of the environmental principles. We see nothing equivalent within EU law.

The second thing I would also highlight in relation to your question about extending to decision making, given what this looks like at the moment, I would be deeply concerned for it to extend to decision making because what you would be effectively doing is that the policy statement would define how principles would apply in all different contexts. At the moment, if we just worked with this, what would probably continue is the way the environmental principles already work within UK law. If we take appropriate assessment under the Habitats Directive and the interpretation of that, that is informed by the precautionary principle.

One would argue that this does not touch that at all, so what would happen if this came into law would be that you would continue to see environmental principles probably working in decision making because of the existing law, while the danger is, if you extended this to decision making, these policy statements would define the full scope of when environmental principles could be used.

Q95 Chair: You are saying it has the reverse effect of what is intended or that which is politically set out by Ministers?

Professor Fisher: Reading the documentation, it is quite difficult to see what the aim is. This Bill on the one hand is meant to be filling the holes left by the fact that we are leaving the European Union. On the other hand, it is also presented as a new model of environmental governance.

Professor Scotford: Can I just add to that? I think Liz's point is absolutely right that, if this version of implementing environmental principles in law were to cover all decision making, the reason why that is potentially alarming is that, if you look at clause 3, there are at least seven ways in which the policy impact of environmental principles is marginalised or reduced. That is the promise. It is the framing. It is not the legal impact being reduced here. It is the policy impact that is being watered down through: they are proportionately applied. How do we take account other considerations? We have to determine the policies in advance to which they apply. We are looking for the significant environmental impact, in the opinion of the Secretary of State.

Chair: Sorry, which clause is this, clause 3?

Professor Scotford: Clause 3. If you work through it—

Chair: The process? That is the bit that says—

Professor Scotford: Sorry, clause 1. It waters down the policy impact of these principles in a very significant way. Liz's point is absolutely right. If we keep it as it is and then expand its scope, you are going to have a



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much more restricted understanding of how environmental principles apply.

Q96 **Chair:** Mr Buley?

Tim Buley: Three quick points, just building on things that have been said, and coming back to your questions. First, you made the point, Chair, that we do not have a written constitution—that is, in the sense of what you would have in the US, where you have something that allows you to strike down primary legislation—and of course that is right.

Obviously, to that extent, you cannot entrench environmental principles without major constitutional change in the UK in the way that we see it now in the EU. It is the case—and there are plenty of examples of this in our current legislation—that you can do something that is only one step away from that by putting the principles into the legislation in a way that gives them a pretty powerful and overarching effect on the way decision making is taken. You can see examples of that in the Human Rights Act, in the Equality Act and I think—although I have not double-checked this—in some of the climate change legislation, and I think there are other examples.

Whereas what you have here—and this is Professor Scotford's point—is not that, nor is it one or two steps away from that. It is many, many steps away from that because of the various ways in which the principles are downgraded. They are to be defined and expanded upon by the Secretary of State. They are only relevant to policy formation and not decision making. They do not apply in any direct way to anything other than central government and so on and so on. I will go through all of them. Therefore, we are not a few steps away. We are an awful number of steps away.

A second point: you asked a question in relation to clause 1(6)(a) about how the exclusion relating to defence policy works and you asked, "How do you, as a lawyer, understand that?" If I am asked that question, the answer I will give is: I do not know the answer. I anticipate an interesting bit of work perhaps in two years' time litigating about it. It is very interesting for me, but it is possibly not the best way to design the legislation.

I don't know if that is intended to apply and I do not think a court or a lawyer will know, without the Court of Appeal telling us, whether that means defence housing is excluded and does not have to comply with these principles or whether it is just about specific defence policies. I do not know what the Government had in mind.

That illustrates that throughout this legislation, and certainly on this part of the legislation, one does see an awful lot of questions. Reading it as a practising lawyer who advises Government, who brings challenges to Government on all this sort of thing, one does have an awful lot of questions about: how would this play out? How would this work? I do not



know the answer. That is inevitable to a point, of course—that is why people like me have work—but I think a lot more could be done to clarify that.

A last very quick point: clause 1(6)(c) enables the Secretary of State to make regulations excluding any other matter. That is very broad. That is an incredibly broad power, subject only to judicial review. Who knows how it would be exercised? No doubt one would expect it to be exercised responsibly, but one doesn't know. There does not seem to be much constraint. It is not clear, for example, that that in turn has to be exercised in accordance with general environmental sustainability principles, so that is a very broad and quite surprising power, it seems to me.

Q97 John Mc Nally: What I have heard so far is absolutely concerning. If I could move you on to my questions on environmental principles. Professor Fisher, what is the impact of not having a higher level of environmental protection enshrined as a principle within the Bill in the first place?

Professor Fisher: Again, I would have two answers to that. There is an important question about a commitment to a higher level of protection should be in legislation. That should be in legislation because that binds the Executive and it binds the courts. It is something that needs to be taken into account.

On the format that we have here, if it was to be included in the list on which policy statements could be made, the virtue of that is that DEFRA could flesh out what is meant by a higher level of protection, but we have no guarantees what that might look like. Again, going back to Professor Scotford's point, there are many caveats here. It has to be proportionate. You always have to show that there is a significant environmental benefit in putting together a policy statement.

Such a policy statement may be fabulous, and it may protect the environment, but it may water down environmental protection, because it will be putting more hurdles up for decision-makers in taking into account decision making. If there were too many hurdles, I would imagine there might be a possible judicial review, but there is a big middle ground there. My advice would be that a high level of protection should go in the legislation.

Professor Scotford: Can I add something that I think is important about principles? Because we talk about them like they are all the same and they are not—and maybe we will come on to that—but if you take something like the preventive principle or the polluter-pays principle, those principles can mean quite different things depending on how they are interpreted. If you take the waste policy, for example, prevention of waste might be different from prevention of environmental harm in waste regulation, but they might both be expressions of the preventive principle. What is important about the high level of protection idea is that



it guides or binds the different environmental principles towards an interpretation that is going to support a high level of protection, where there are many different ways in which you might interpret these principles or in which these principles might be fleshed out. At least it is sending a signal, and to put that in primary legislation that those principles should be fleshed out, applied, interpreted to be geared towards a high level of protection, not to be interpreted in a way that is the minimal level of protection and that is what is quite important.

It is there in Article 191(2). It starts, "Environmental policy shall pursue a high level of protection and it should be based on the principles". Part of the protection is the scaffolding for the principles in the EU treaty.

Q98 John Mc Nally: The Natural Capital Committee said in its 2018 annual report that it wants the environment plan to be driven by three environmental principles and public money for public good, so the polluter-pays principles and net environmental gain. In fact, it said that the temptation reflected in the draft environmental Bill to set out a long list of overarching principles should be resisted. That is quite concerning as well, but I can understand what they are saying.

Then I would like to move on, if I may, Chair. How does this affect the devolved Administrations when you have a different set of principles? From what I have read in this whole thing, the devolved Administrations have to be consulted, but they are not included in the principles, so how does that work?

Professor Fisher: As you probably saw last week, the Scottish Government have just released their discussion paper on environmental principles. What is fascinating is it is a very different framing of the issue. They see this very much as a legal exercise, so their starting point is environmental principles have legal significance in EU law—as Professor Scotford said—and they will have legal significance in Scottish law, so they must be thought about in regards to those other principles of Scottish public law. It is a completely different framing and I think it is contrasting the two here.

Q99 John Mc Nally: I can see this man being very busy in a couple of years' time. That is a genuine concern for everywhere that we go. We were told by the Secretary of State that we would be entitled to raise our own standards to such a level, but then, if you are not included in the standards in the first place, to me it is going to be a never-ending circle of arguments, which is going to be very expensive to everybody and very time-consuming. Meanwhile, nobody knows who is responsible.

Professor Scotford: Another problem with having a different way of envisaging environmental principles legally in the different devolved Administrations is not that that necessarily implies a difference in standards, because standards will be set in different areas with more precise regulation. What that means is that these environmental principles animate and inform those standards in a differential way across



the United Kingdom. That is just another way in which you might get fragmented environmental law, and it would be very difficult for the UK to say what its environmental law is across the United Kingdom if it is trying to account for that to any third country, for example.

Professor Fisher: I just have one other point. I know we are not focusing on the environmental implementation plans, but I do think there is an important question to be asked about the relationship between the policy statements on environmental principles and the environmental implementation plans, because, if you take them together, the Secretary of State is basically defining the norms if the policy statements have environmental principles.

Then, in relation to environmental improvement plans, they are also getting to define, "What are the benchmarks?" and that is being given statutory footing. As this Committee has highlighted, there is not a clear line of sight between those benchmarks and legislative obligations that already exist. That the norms and the benchmarks are in the hands of one entity is also a matter for concern.

Professor Scotford: Can I have one more point? There is a real issue with sequencing in this Bill. If these principles are meant to inform, even in their depleted way, that they are doing all environmental policy and law, they have already missed the 25-year plan, the Clean Growth Strategy, arguably, the Waste Strategy, the Clean Air Strategy, and not to mention all the other pieces of environmental legislation that are going to be contained within part 2 of the Bill.

Those will be due simultaneously with this section, so what bits of environmental law that are coming forward—this high-level policy—are these principles going to apply to? Are we going to go back and revise and think about everything, all this amazing kind of innovation, environmental law and policy that has come in the last 18 months?

Q100 **Kerry McCarthy:** Can I just ask something? At the moment we are under the EU regime, so we would have had a stronger regime in terms of—it is the wrong wording, but I don't quite know what to say. But the EU principles or the process that applied would apply to all those things you mentioned, like the Waste and Resources Strategy and the 25-year plan, so wouldn't they have been formulated with those principles in mind?

Professor Scotford: You can certainly say that a lot of the ambition in those strategies does reflect environmental principles and they are not necessarily problematic, but the 25-year plan, the Waste Strategy, the Clean Air Strategy have been drafted with EU exit in mind. They are not implementing EU obligations for developing environmental policy.

Kerry McCarthy: They would know that come 29 March they would not have to worry about being held to account? Okay.

Q101 **John Mc Nally:** I just want to ask one more question. Do you think there



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is any impediment then to giving the devolved Governments, the Administrations, the statutory right to impose them? Is there an impediment for them to be not included in the Government's decisions on the statutory rights of this Bill? Is there anything existing that prevents them being included? Do I make myself understood?

Tim Buley: I do not know the answer for sure. It may be the reason that they are not included is to respect the division of devolved functions.

Q102 **John Mc Nally:** But there is no impediment why they shouldn't be included? I think that is the question.

Tim Buley: Parliament can do anything it wants in legislation.

Q103 **John Mc Nally:** I think that is the answer I am looking for, yes. There has to be the political will to have that included in the first place.

Tim Buley: I do not know the detail of the Scottish proposals, but it sounds to me, for example, at the moment like the Scottish proposals have more teeth, are rather more forceful, so including the Scottish Administration within this Bill would be like it would downgrade rather than upgrade environmental protection.

Professor Scotford: It is interesting that the consultation that came out from Scotland is not yet a Bill; it is just a set of ideas. It is less ambitious than what was proposed in the Continuity Bill. Even the Scottish consultation looks a bit watered down in light of what is in the draft Bill.

Q104 **Chair:** There is the whole, "Ministers"—not all public bodies—"shall have regard to rather act in accordance with". That is a clear downgrading, isn't it?

Professor Fisher: It is, yes.

Q105 **Chair:** Only Ministers. In a way, what does the Office of Environmental Protection do? The whole focus of the OEP is to take action against public authorities, but the legislation says it is only Ministers that are being naughty—to sort of colloquialise it. Or am I over-simplifying that? I have just been reflecting on that.

Tim Buley: No, it is certainly a downgrading that only Ministers have to have regard. By the way—and I think this is worth emphasising—it is one of the many ways of downgrading. That phrase "have regard" is very important in the sense of downgrading, because you can have regard to something and you can then decide, "I recognise it is generally important in the round but, in this particular case, tough". That is how the courts generally interpret it. You have to show that you have visibly thought about it, but that is about it.

Q106 **Kerry McCarthy:** Can I just ask on that, there is a difference between certain phrasing, like "have due regard" and there are variations, aren't there? What is stronger?

Tim Buley: Yes. I cannot remember off the top of my head—



Kerry McCarthy: Is there one that is stronger that means—

Chair: “Act in accordance with” is the one that is stronger.

Tim Buley: “Act in accordance with” is very different. “Act in accordance with” means you have to obey them. You may have room for manoeuvre to interpret them, but you cannot just say, “I am not going to follow them”. In terms of different phrases like “have regard” and “have due regard” it rather depends on the role they play in the overall drafting, rather than just picking out those two or three words. Probably “have due regard” may give a bit more room for manoeuvre to the Minister because he would say, “Due regard means as much as I think appropriate” but that is kind of implicit anyway. I would not put too much weight on the precise phraseology there.

Q107 **Chair:** What about this Ministers versus public authorities and the OEP?

Tim Buley: That is important. I am not quite sure how it is supposed to work. It may be that the way this is envisaged to work is that the Minister—because this is of course about setting environmental policies—the policies may then be policies that have to be followed by the Environment Agency and local government, and so it comes in that way. Insofar as the Minister has power—I know there is an issue about planning and we may get to that—to set planning policy that local authorities have to have regard to, because of other legal obligations, then the planning policy has to have regard to the environmental principles and, therefore, the local authority is required to have regard to them via that planning policy. Of course, that is very indirect. It is another downgrading. Again, it is not clear how all of that is supposed to work.

Professor Fisher: Just coming back, there is this requirement: they do not have to act if there is no significant environmental benefit, which would effectively act as needing to show that there is a significant environmental benefit.

Q108 **Chair:** It is turning it around. Instead of it being the norm, it is almost like it is exceptionalising it?

Professor Fisher: Absolutely. If you think about—taking your example—a revision of the NPPF and you could think about something to do with environmental principles and housing, the environmental consequences of housing are incremental, with each different project. It would be very easy to say, “Oh, we cannot see any significant environmental benefit in dealing with this” because, at the policy level, trying to get that evidence together would be very difficult. I would highlight there is as much concern about that being both in the making of the policy statements and in having regard to them, although I think “having regard” is of concern.

Q109 **Mr Dunne:** I would like to move us beyond the principles into some of the process and, in particular, how the Office of Environmental Protection will function in exercising its powers. There is a three-step process



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envisaged for enforcement powers. Do you think that that has the same equivalence at the three-step process under the current EU enforcement powers? Perhaps as a practitioner you might—

Tim Buley: Yes. The answer is: I do not think it does. There are sufficient differences between the way that the Commission operates as an enforcement body to mean that I do not think—one can't just pick out one thing. It is a completely different animal, it seems to me. Why? Well, for a couple of reasons. The Commission's remit is to take action against the UK or member states. It is concerned with the way in which policies are being set at that level, whereas this body is operating at a lower level. It looks like a body that is directed against individual public bodies, the Environment Agency, the local authority, and the Minister, when he exercises his planning or environmental permitting or whatever functions, for sure, not against the UK and the overall way in which environmental law is being implemented. They seem like very different creatures to me.

If you look at the way in which—I do not want to say too much about the detail, we can come back to it—the enforcement mechanism works, the first stage of that is this process of making complaints and/or, and I think off its own back as well, the OEP investigating failure to comply with environmental law. That is a process that looks very different to me from what the Commission does, even leaving aside the point I have already made about the target being individual public bodies rather than the UK.

Q110 **Mr Dunne:** That is not necessarily a bad thing, because it is focusing on the miscreant, the body that is not doing its job properly rather than focusing on the policy. If it is UK-wide, if there was a UK-wide failure to clean up beaches, the OEP is now going to be saying, "You are the responsible body for beaches, rather than the British Government being the responsible body, and you have to remedy".

Tim Buley: Yes. I am not necessarily saying it is a bad thing. The question was, "Is there an equivalence?" to which the answer is no.

Q111 **Mr Dunne:** The answer is no, okay. Let's look then at the steps. There is a reliance on "serious" being the threshold of materiality, undefined. Is that adequate in law and does it have meaning in law?

Professor Fisher: Just the threshold, "serious", again that is a word open to interpretation, but it is not just that it is serious. It is also that it "must indicate"—so the complaint must indicate, it is not just an allegation. It must be that the complaint put in indicates that there has been a serious breach of environmental law, which again is quite a significant hurdle.

Q112 **Mr Dunne:** So it is a more significant hurdle than—

Professor Fisher: I would suggest if you compare it to the Human Rights and Equality Commission, which is they can investigate alleged conduct.



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Q113 **Mr Dunne:** As a layman reading it, I felt “serious” was quite a low threshold, but you are suggesting it is a high threshold because it has to have proven—

Professor Fisher: My point is, in reading that word “serious”, I am reading it with the rest of what triggers a complaint, so it is the complaint itself must indicate this.

Q114 **Chair:** What is the bar at the moment if you are bringing a case under the EU law?

Professor Fisher: That, I am afraid to say, I do not know.

Tim Buley: It is fair to say that the Commission would involve itself in pretty serious stuff, possibly more serious. For what it is worth, I am not sure that the serious bar is a particularly high threshold, bearing in mind this is supposed to be a strategic body, it is not dealing with every failure of a local authority.

If I may, one last point is it is a matter for the OEP to interpret. It would be subject to judicial review, where the court will take a fairly hands-off approach. If the OEP decides it is serious enough, the OEP can investigate.

Q115 **Mr Dunne:** Do you think that gives the OEP flexibility—which is desirable in law, is it—to allow them to determine the thresholds that they will apply rather than setting it out for them?

Professor Fisher: There is clear flexibility and discretion there. That does come back to the fact that the OEP is not functionally independent, so there is a question about how that discretion will be exercised.

Professor Scotford: Can I just raise something else that I think is problematic, but is not as obvious as whether the bar of being serious is there already? What needs to be serious is a failure to comply with environmental law.

The example you gave of the beaches not being cleaned up is I think how we all think about enforcement. There is an environmental issue; there is a standard around that that should be enforced. But in clause 17 I think is where the equivalence problem really starts, because it defines failure to comply with environmental law not as failure to achieve environmental standards—it is talking about compliance there as good administration rather than meeting any substantive environmental standards. We think about EU enforcement of substantive environmental law like litigation or cleaning up beaches. All of these things are about substantive outcomes that are required in law.

The way that clause 17 is framed to define failures of environmental law, it does not seem to be necessarily including where there is a breach of a substantive outcome that is required by environmental law. That is where the teeth of the EU infraction proceedings have been, around achieving



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environmental outcomes. I am not sure clause 17 even gets us there in thinking about what is a serious failure, so I think that drafting is problematic.

Also, just on the example of breaches as well, thinking about who is responsible, so it is public authorities. The problem with a lot of environmental problems is they are collective. They have multiple causes and multiple people need to be involved in remedying those breaches of environmental law.

If one public authority is hived off as the one who is pursued to have failed to deal with that problem in environmental law, you are going to get a strange accountability for resolving that environmental problem. The beauty of the EU at the moment is it makes the whole of Government accountable. That means environmental problems, collective problems, have to be dealt with collectively across Government and a Government is forced to work together. This risks parts of Government pushing it on to other authorities as the ones who are responsible for breaches, but all the causes of pollution might be within the control of a lot of other Government Departments. That is—

Q116 **Mr Dunne:** What is the remedy for that?

Professor Scotford: The remedy is maybe making Government responsible for breaches of environmental law generally rather than individual public authorities. It comes back to the Chair's point about there being something slightly weird in the Act about making just Ministers accountable for applying environmental principles and all public bodies subject to the enforcement powers of the OEP. In fact, in EU law it is the other way around at the moment. Environmental principles trickle down to environmental policy as implemented by all public bodies and it is just the Government that is held to account in terms of environmental enforcement. This Act flips that and it creates something different.

I recognise that we are moving down to a domestic level, so things are going to change, but something will be lost in the collective accountability for collective environmental problems.

Tim Buley: I strongly associate myself with that. I agree with all of that. Just two points building on it. The first is that when you look at the first part of the enforcement mechanism, which is the OEP, the complaint, the investigation, so leaving aside the judicial review bit for now.

Mr Dunne: Yes, we will come on to the judicial review.

Tim Buley: The thing that that made me think of when I looked at it was an ombudsman model. I am not knocking ombudsmen, they are very important. I have many ombudsmen as clients, and it is an excellent thing for a certain way of holding public bodies to account. The target of an ombudsman complaint is normally maladministration, which is this sort of open-ended, "Are you conducting yourself competently?" type of investigation. It is not a hard-edged question about compliance with the



law and it does not feel like a very comfortable model and, certainly, it is a very long way from the EU Commission for dealing with failures to comply with the law, which is what this is supposed to be about. I agree with Eloise that you then have this problem that, even in terms of complying with the law, it is more about process and outcomes.

Just to pick up on a point you made to me a moment ago, "Isn't it a good thing?" I am not necessarily expressing a view about whether it is a good thing or otherwise, but in terms of the point that it may be important to look at the way that the system as a whole works, which was Professor Scotford's point, rather than just looking at one particular public body. Of course, what you are going to be concerned with here is how a particular public body complies with the laws and policies—because they can count as law for certain purposes—which are given to it.

But the problem may be at the higher central government level, because the policies are not good enough to ensure environmental protection or because they do not have enough resources to do more than they are doing, so they are operating perfectly lawfully within the resources given to them, but it is not going to achieve outcomes.

I take the point you can only take it so far, because we do now have a single national model rather than an intra-national model. It seems to me that those are the things that are going to fall between the cracks, and I think that rather ties in with Professor Scotford's point.

Q117 Mr Dunne: If we then go to the next question, the final arbiter is judicial review of a complaint. You will have a lot more experience about judicial reviews than I have, but you have both mentioned process versus outcome. By and large, judicial reviews are focused on process not on outcome. As a mechanism, do you think that that is the appropriate means of resolving complaints?

Tim Buley: First of all, that is right; the focus on process rather than outcome, and it is not going to be a way of guaranteeing outcomes. The point that I think is important to understand about the way that JR works in this Bill, which is under clause 25, is that it seems to me that the way that that clause works marries up in a very odd way—or rather fails to marry up—with the previous stage of enforcement because this only comes in after the OEP has conducted its investigation, reached its conclusion, written its report, made its recommendations and so forth.

You may be very aware of this; just be aware of how judicial review normally works, which is that there is a pretty strict limit for judicial review, three months ordinarily, six weeks in some environmental context, for bringing judicial review claims. There is one reason for the time limits but another reason why you expect to see these things happen quickly.

The first is that, if you want to do something about an environmental problem and it is going to have immediate and serious consequences,



you want to bring your judicial review at the outset of the process because otherwise two years down the line the OEP is conducting its investigation and the harm may have already happened. It depends on the nature of the thing you are investigating.

The second thing is it will be very important for legal certainty for Government bodies, and in particular, often, third party commercial operators, to know where they stand. If they are going to be told that the environmental permit or the planning permission, or whatever it is that they have been given that they may off the back of that build their factory or their plant, is not good in law, in all fairness to them, they do need to know that early on.

With that in mind, the oddity then about the way clause 25 works is that it looks like it is an end of the process of the OEP's investigation. But when you look at how it is drafted, it is not that at all because in clause 1—sorry to be a technical lawyer about it—the thing that is the subject of the judicial review application is not something to do with the OEP's investigation, that is the outcome of the investigation. It is not a failure to comply with the recommendations that the OEP may have made, for example, which would be a natural thing to see at the end of all of this. It is the original thing that was the subject of the OEP's investigation.

It seems to be the case that the court has all of the normal remedies it would have if a claim for judicial review had been brought within those three months right at the start of the process. In other words, it can quash the decision to grant the environmental permit or it can declare the policy to be retrospective—retrospective is a dangerous word here but from before the court's decision and, therefore, having legal consequences from before the court's decision. It can declare the policy to be unlawful, in which case all sorts of other dominos may fall.

That is very problematic for third parties, but it is going to leave the court itself in a very odd position when it hears this kind of judicial review because—

Q118 **Chair:** I am not sure that we have followed you. I certainly haven't. Perhaps others have but I am not clear. What is the point that you are making? Is the point you are making about the OEP having a process that is too long and judicial review being tagged on the end of it when it could have been tagged at the beginning?

Tim Buley: Yes, but it is also this: what the judicial review court can do is it can do all sorts of pretty powerful things, like quash an environmental permit or declare a policy to have been unlawful. Those are things that the OEP itself, in its investigation, cannot do. All that the OEP can do is make a recommendation, withdraw your policy prospectively, pay some compensation to someone—that sort of thing. If those recommendations are not complied with, the judicial review court then has a suite of powers that are far more extensive and do not marry up with the powers of the OEP itself.



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Q119 **Chair:** Are you saying then basically if there is an OEP investigation that takes six months, say, or two years, and that the permit is quashed at the end of that or there is no power to quash the permits?

Tim Buley: There is no power to quash.

Q120 **Chair:** Basically they have to go—

Tim Buley: Or to fine or to do anything. There is no power to do—

Q121 **Chair:** Are you saying that the OEP does not have any power, materially, to affect the environmental outcomes or to enforce them?

Tim Buley: It rather depends on what it is investigating because suppose what it is investigating is the grant of an environmental permit, then the answer to your question is: no, it does not have any power. It can recommend that the next time an environmental permit of this kind is granted things should be sorted out in a different way, but the environmental permit that has already been granted will be unaffected.

Suppose on the other hand that the thing it is investigating is a policy that is going to be applied downstream in different decision making. Because it can only make recommendations it still has no binding powers, but on the other hand the expectation of the Bill is that normally people are going to follow these recommendations. Then it may have more substantive or more important practical effects on the thing that was being investigated. I think that reflects that.

It may be appropriate, instead of a one-size-fits-all mechanism for enforcement, to think about at least perhaps two. This is very much off the top of my head and no doubt all sorts of further thinking has to be done on this, but it might be sensible to make explicit—and arguably it is implicit, but it is not clear—that the OEP can itself bring judicial review proceedings, not following its complaint but right at the start of the process when it thinks, “I have a concern about this particular action that has been taken”, whereas the process that you have here is one that may be more suitable for ongoing investigation.

Suppose it is said that there is a systematic problem with the way the beaches are being cleaned up or water abstraction licences have been granted by the Environment Agency or something of that nature. It is not a single decision. Then this process starts to look rather more suitable and maybe you would then want a different end of process enforcement mechanism.

Chair: Okay, thank you.

Q122 **Mr Dunne:** Sorry, we are taking a lot of time over this and I am conscious that we do not have a lot more. I mentioned fines there; there are no powers to fine. Do you think there should be to provide some more flexibility, and this would be the OEP having a mechanism other than judicial review in order to sanction this?



Tim Buley: Yes. I am not sure that fines are particularly—some environmental charities would disagree about this—are a particularly suitable mechanism. You have to remember that you are talking about fining public bodies. You are taking resources away from those public bodies that may be better spent on complying with the substantive recommendations. Fines for commercial entities are a different thing, but that is the remit of the Environment Agency as regulator. I am not sure that fines are the answer.

Perhaps some other powers—you would have to be careful about when it would happen—to issue stop notices or powers of that kind to require the body to behave in a certain way may be appropriate, but fines themselves I don't personally think are a brilliant solution.

Q123 **Chair:** Comments on enforcement briefly from our professors, please.

Professor Fisher: Just going to the judicial review point. Having other accountability mechanisms in Government is usually a good thing. What the discussion has shown is that this is not a world-leading office and it is not going to be a replacement for the Commission's enforcement powers.

The thing I have a concern with is, what is its relationship with normal judicial review? The Statement of Impacts states that there is an expectation that the number of judicial reviews will go down because of this body. I find that odd because, if the body is just meant to be replacing the Commission, it should not affect the number of judicial reviews. It is not clear what the relationship is going to be. What is the hope? Is the idea that people will not bring judicial review actions? My view would be because this is quite an ineffective process the number of judicial reviews will go up, because people will see it as a more effective remedy, but it is very, very unclear.

Professor Scotford: On fines, I agree with Tim on that generally that taking resources away from public authorities that are already stretched is not a good idea. Fining for what? That comes back to my point about clause 17. The implication of that question is that we are fining for failure to comply with environmental law, including environmental law outcomes, and that is not yet in the legislation that there is an obligation for public authorities to comply with environmental law generally. There is an obscure way of talking about compliance that is not about compliance with the corpus of environmental law. Public authorities will do all sorts of things potentially to get in the way of compliance with environmental law and they will not be within the scheme of this Act as currently drafted.

Chair: Thank you for that.

Q124 **Alex Sobel:** To Tim initially. We heard in our last session that an environmental tribunal could be used as an alternative enforcement mechanism. Obviously, we understand how industrial tribunals work. How do you think an environmental tribunal would work, and how would it fit



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into the current enforcement process?

Tim Buley: That goes back to some extent to the point I was making a moment ago. The general answer is: you could fit it in in all sorts of ways. You could create new rights for members of the public to go straight to an environmental tribunal, for example.

Working roughly with what we have here, if it were to be made clear, first of all, that, in the appropriate cases, the OEP would have its own power to bring judicial reviews at the start of the process, for the kind of cases where that is appropriate, where something needs to be done to stop the action in question, so that the investigation process becomes about the more long-term systematic investigations, it seems to me that the way an environmental tribunal could be fitted into that system would be that you then have some sort of right to go to the Environment Tribunal at the end of the OEP's investigation.

That would be a way of doing it, and you could do it either way round. You could either give the OEP greater powers so that its recommendations would have teeth in certain situations but then the public body that was affected by it would have a right to appeal to the tribunal or—and this would fit at least at this level, the current Commission model—the OEP would make its recommendations and, if dissatisfied with the response it got, it could then go to the tribunal. Then you could have a tribunal whose function was in relation to not investigating but making factual findings that would marry up with the OEP's own fact-finding role.

For example, one mystery about how the current judicial review, in clause 25, would work is: it is very unclear whether the court assumes the facts found by the OEP in its investigation, or whether you ignore all those factual findings and you are applying judicial review and the public body's views of the facts is binding. We just don't know. Whereas, an environmental tribunal seems to me to avoid that problem because, in terms of a large-scale investigation of, "Are we doing the right thing to protect our beaches?" or something of that nature, the tribunal can consider the factual findings of the OEP and then make its own findings, disagree with them, extend them, whatever may be appropriate. I could see that working reasonably well as a model.

It is going to be appropriate for those longer term cases, where you want to make a systematic set of findings not for the cases where you need some immediate action.

Q125 **Alex Sobel:** We had a client from WWF point out to us that there were already precedents in UK law to have legal tools. For instance, the Equality and Human Rights Commission and Information Commissioner's Office officers have enforcement powers such as binding notices. Do you think this would be appropriate for the new body?



Tim Buley: There would be scope for that. The Equality and Human Rights Commission has sometimes been mentioned as a model for this body. It seems to me, however, that, when you then look at how the current provisions work, you are quite a long way from an Equality and Human Rights Commission model because the enforcement action powers are, first, very muddled in the way that I have said, but, secondly, they have much less teeth.

Q126 **Alex Sobel:** Seems like a lot of work to do. That is a slight understatement there. Where do you think that the balance ought to lie between the courts taking action, which we have seen under the current model, for instance, with ClientEarth and air quality, and the powers of the Office for Environmental Protection on deciding the nature of remedies where we have breaches?

Tim Buley: You could do it in different ways. You could preserve what you have here, which is that the OEP investigates and recommends or does not—other than in limited circumstances—have power to issue binding notices, but then you need a body, which I think would naturally be an environmental tribunal rather than through judicial review, to enable the OEP to enforce that. That would be one way of doing it.

Another way of doing it would be to say that the OEP can issue a binding decision, but then you would give a right of appeal to the person to whom the notice is issued, and they can go off to the environmental tribunal and say, “This isn’t justified”. I don’t have a strong feeling—

Q127 **Alex Sobel:** The appeal would be at the tribunal rather than at court.

Tim Buley: It seems to me an environmental tribunal or a court or tribunal—it does not matter what label you give it, but it will probably be called a tribunal—with a fact-finding role is a more sensible body to do that than the judicial review court. Judicial review will always have a role here. In the way I suggested the OEP bring its own judicial reviews, and because judicial review can come in at all sorts of other stages, people could JR the OEP itself if they wanted to, but I think there is a role for a court in relation to that sort of investigation.

Q128 **Alex Sobel:** Professors Fisher and Scotford, do you have a view on where this balance might lie?

Professor Fisher: Sorry, it sounds very academic, but it depends how you define tribunal. If we look at the first tier environmental tribunal it has a relatively limited scope, but it is mainly to do with permitting and so on. If we are talking about how scholars often talk about environmental tribunals what they are talking about are environmental courts and tribunals, which are derived from planning inspectorates. I do think that is an interesting question in all of this because a lot of these issues may come up in a planning context. That would be my first comment.



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I would also say that the choice between a tribunal and a court, there is not a choice because, if you go into the tribunal system, ultimately it flows up into the court system as well, and I think your arguments about the merits of the tribunal system are very valuable.

I would also be concerned with any system that said, "Everybody has to go this route". If we look at the numerous disputes about failures to comply with environmental law, all we learn is that they come in many different forms. If we take the ClientEarth air quality litigation, if we take issues to do with nature conservation, and think that one mechanism is going to be able to handle them all we should be very careful.

Professor Scotford: I would just add to that that, even if you had this mechanism perfected, and going through to the tribunal system as the OEP's ultimate teeth in trying to investigate non-compliance with environmental law, in some way you would still have scope to bring judicial review actions. You would still have scope to bring the ClientEarth litigation because it was about a failure to comply with the law on the part of a public body, and that is always going to be the role of judicial review.

What is interesting is that the ClientEarth litigation does not fine the Government for failing to achieve air quality standards. What it does say to the Government is, "You are not doing what is legally required under the body of law that should ultimately get you to comply with air quality standards", and the court in a judicial review held that that was right. Ultimately, what we care about in the background is achieving those air quality standards, and that is the role of the Commission. That threat is always there, and a threat sitting at the back of that ClientEarth litigation as well and we are trying to find a replacement for that.

The ClientEarth litigation is an important part of the mix. It is a certain part of the legal dispute, but it is not an enforcement mechanism. That is what the Commission has currently provided and, if you are looking for that, you are looking for someone to ultimately enforce the failure to comply with air quality standards and, as we leave the EU, we will lose that not doing what is legally required.

Q129 **Alex Sobel:** Yes, it is a question for the Secretary of State then, isn't it? We will hold that one back.

Chair: If we ever see him.

Professor Fisher: An interesting thought experiment is: if the dispute over air quality arose after we left and the OEP handled it, what would happen?

Alex Sobel: Yes. I think we are all concerned about that too.

Chair: We are going to move on to Alex, thank you.

Q130 **Alex Cunningham:** I am going to address specifically clause 15 and perhaps the first question could be directed at Liz first. Professor Maria



Lee says, "The clause potentially allows oversight of and dialogue on the exercise of discretion by public authorities asking whether this is the best, most effective, most ambitious, most efficient way of implementing the law" yet we are told that the whole thing is all very vague and needs to be improved. How can it be improved?

Professor Fisher: In looking at clause 15, we also need to look at clause 14. What we have are two different sets of monitoring obligations and the ones in relation to the Environmental Improvement Plan are far more significant than in relation to monitoring environmental law. I do think that suggests that environmental law, as opposed to the plan, is being put in the back seat. Again, because it is unclear how the plan relates to law that, to me, is a matter of concern.

Q131 **Alex Cunningham:** What is the answer, though? What needs to happen?

Professor Fisher: I would say that it must not be just "They may report". I would say "They must report"—a similar obligation to that you see in clause 14.

Professor Scotford: Coming back to our discussion about principles at the start, this is just another example of the isolation of principles at the front of the Bill not connecting to the rest of the Bill that makes everything quite isolated. If you had a duty on the OEP, or a duty to promote the purpose of the principles, that might give a bit more weight to what the OEP is doing in monitoring and reporting on the implementation of environmental law. To what end? To what purpose? What are they looking for in that exercise?

Professor Fisher: Just a further thing. That monitoring exercise will need significant resources, particularly if you think that a lot of the decision making in environmental law is in the hands of local planning authorities. For example, if you look at reporting on contaminated land it is very sketchy. If we go to the end of the Bill and look at the schedule for setting up the OEP, it is not obvious to me that they are going to have those resources.

Q132 **Chair:** The whole issue around contaminated land is now that there is no remediation money at all. The £20 million fund has now gone. I have an issue in my constituency, so it is a very live issue. It struck me, when I met with the Environment Agency in my offices on Friday, that there was no desire from Government to hear about contaminated land anymore. It is almost like it is just, "We do not want to know about it. If we do not know about it, we do not have to remedy it. If we do not have to remedy it, we do not have to have a £20 million fund."

Professor Fisher: I would say a huge contribution to that was the redrafting of the statutory guidance in 2012, which again, if we go back to this idea of no significant benefit, was very clear that you had to prove that there was something incredibly serious to act under that guidance.



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Professor Scotford: The other thing practically is that contaminated land issues are being dealt with through the planning system, so that comes back to what is excluded from the definition of environmental law. If we are reporting on it we have to have the definition right but to exclude planning in that context is another reason why it is—

Q133 **Chair:** This is about where houses have been built with asbestos potentially on the land, so it is post planning, so there is no—what I am saying is it is problematic.

Professor Scotford: It built structures on the land.

Q134 **Chair:** Yes. Homes on contaminated land.

Professor Scotford: Is that also excluded? I think that might be excluded.

Q135 **Chair:** Then it is like, what is the public authority supposed to do under this? We have found this stuff. We know what the problem is. Who is responsible?

Professor Scotford: That comes back to the point of just pinning all the blame on the local authority. If they do not have the resources this mechanism is not going to produce outcomes.

Q136 **Alex Cunningham:** Perhaps that is why we are being told everything is so vague and confusing. Both Liz and Eloise have used the “implementation” word. You have also used the “environmental law” expression. How should implementation be defined and how do we sort out the confusion around the definition of environmental law within the Bill?

Professor Scotford: Shall we maybe start with the environmental law definition because I think there is where it begins?

Alex Cunningham: Yes.

Professor Scotford: I think you have heard evidence on this previously. There are a number of problems with the definition of environmental law, but what is on the face of the statute does not necessarily seem to be consistent with what is in the commentary. The suggestion that planning is excluded is not obvious, but I think the main mischief is being done by the word “mainly” in clause 31(1)(a), “That environmental law relates to legislation that is ‘mainly’ concerned with an environmental matter”. Most environmental issues will come up in environmental regimes that have a whole host of other issues going on around them. The idea that to restrict it to “mainly” environmental matters might work in some very specific pieces of legislation, but I think it is an unnecessary qualification that potentially limits the scope of the definition because of the nature of environmental problems.

Q137 **Alex Cunningham:** Can you give us a couple of examples of what that means?



Professor Scotford: If you took waste regulation, for example, I think everyone would think that that is environmental legislation, but is it mainly concerned with an environmental matter? It is concerned with an industry. It is concerned with new resources, promoting a circular economy. All of this could be seen as mainly an environmental matter. That is an obvious example, but the town planning example is probably the best one. You can make a very strong argument that town and country planning legislation is where a lot of environmental regulation happens, but it might not be seen as mainly being concerned with an environmental matter. To exclude that from the scope of thinking about the implementation of environmental law just does not make any sense.

Q138 **Alex Cunningham:** What needs to happen? What words need to be in there in order to qualify that?

Professor Scotford: Deleting the word “mainly” would be a start. You could think more than that, but I think that is what is doing the mischief, the word at the moment there. The excluded matters are the other big thing where you get something. The definition of natural environment is fine. I think the general structure is okay but then the excluded matters cause all sorts of problems.

I know you have already heard evidence on this. I am not sure if you want to go through this again. There is the issue of the emission of greenhouse gases and overlap with all that stuff. Disclosure or access to information is particularly problematic because we have the Aarhus Convention, which is all about access to environmental information. I can see the Bill is trying to avoid the application of Aarhus to the OEP in clause 28. I think that is part of why that exclusion is there, but it does not make sense in light of our international commitments.

Taxation, spending allocation; but all of these things are problematic. If that starts to narrow down within the scope of environmental law, that narrows down the scope of clause 15 and the implementation question considerably.

Tim Buley: Can I just add to that? I strongly agree with Eloise about the word “mainly”, but it also marries up with the rest of the clause because it is the legislative provision that has to be mainly concerned. A bit of planning legislation may not be thought of as being mainly about environmental things because it might be all about granting planning permission for housing on brownfield sites in the city centre, or that sort of thing, where there are not very many environmental implications. You could then have a particular decision taken under that legislation where you have already decided the legislation as a whole is not mainly about the environment but, because this particular decision taken under the same legislation is about a new fracking process in Lancashire, that decision is an incredibly important environmental decision. Everyone would agree it is mostly about the environment, but it seems to fall outside of the definition because of where the word “mainly” marries up. It is about the legislation itself and that seems to exclude an awful lot.



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Q139 **Kerry McCarthy:** Can I just ask: are you talking about the legislation as a whole rather than a clause?

Tim Buley: That is how it seems to be. Again it is vague.

Kerry McCarthy: Okay.

Professor Fisher: Can I come in? Environmental law as a definition is doing a number of different things in the Bill, which I think is part of the problem. For example, the OEP is reporting—and it can report on the implementation of environmental law—it can advise on changes, but it is also enforcing it. I think the point you are highlighting is this definition does not work for the enforcement. I can see in terms of reporting on the implementation but, if you are saying, “We want it to be the same report that the Commission puts out on implementation of environmental laws” and we are just looking at the environmental protection laws, that kind of works.

This is also limiting what advice can be given. I think part of the problem comes up that this definition is trying to do lots of different things.

Q140 **Alex Cunningham:** Therefore, it is a case of how it is changed. We would be interested to hear—maybe not now—how it ought to be changed in order to capture what we need capturing.

Professor Fisher: Off the top of my head, in terms of reporting and monitoring implementation of environmental law, it strikes me that you probably want that as a limited monitoring requirement. You could have a schedule saying this is what you are monitoring, and I can see that having an advantage.

In terms of the definition that relates to enforcement, I think you want that to be broad, taking out “mainly”, but you might want it even broader than that. If you look at, for example, the New South Wales Land and Environment Court I think there is no definition of environment. The presumption is if it is environment it goes to them.

Professor Scotford: Back to clause 15—and say we take Professor Fisher’s suggestion of a schedule of environmental laws—it might be that the OEP wants to report on things outside the remit of those laws to explain why those laws are not being implemented. It might want to say, “What is happening here is we are not getting buy-in from other parts of Government so we cannot achieve these”. Something needs to be drafted to allow the OEP to investigate and make recommendations beyond the scope of those environmental laws to think about how they are ultimately going to be implemented.

Back to this point about environmental problems being collective, they are going to require cross-government action in many circumstances.

Q141 **Alex Cunningham:** That may be another specific challenge for the Secretary of State when he sits where you are sitting now. Can I just ask



one final thing? I just heard Eloise use the “international” word, but should the Office for Environmental Protection have a role in monitoring international obligations as well?

Professor Fisher: Again, there is the resources issue. We are a dualist legal system. International treaties are not directly binding but, if we do sign up to them, having someone monitoring our obligations and how we are following through on those obligations has an obvious virtue, not just for making sure that we work towards those obligations but just in terms of a kind of good governance approach.

Q142 **Alex Cunningham:** You have also mentioned that that has resource implications for the whole of the implementation of the Bill, never mind international obligations.

Professor Scotford: Just to echo that, when I read the Bill, and I look at what the OEP is tasked with doing, I feel like it is overwhelmed with tasks and that might mean it has to be very selective or it will do none of them particularly well. That is either a question of resources or it is about prioritising the work that it has to do.

Chair: That is very helpful. Finally, Kerry.

Q143 **Kerry McCarthy:** Hopefully, I will be able to do this one quickly because you have been with us for quite some time. I want to ask about non-regression. It is in the withdrawal agreement in that it is in the backstop. There were concerns about whether the Bill would be sufficient to help the Government meet its professed support for non-regression. What needs to be done? Should it be included as a principle in clause 2, or how else could it be tightened up so that non-regression is very much something that underpins the Bill?

Professor Scotford: There is a short answer to this question. It is impossible to answer without seeing what is in the rest of the Bill because non-regression is about maintaining standards. It certainly would not do any harm by having a principle of non-regression but, again, it would have to have some legal clout so that it could inform the standards that then come more substantively for different areas of environmental protection. It would send a signal that that is the vision of environmental protection the Government is signing up to. If they do have the withdrawal deal and it is in the backstop, they are signing up to it in law and it will then inform the way environmental standards, the discretions and decisions they might involve are implemented by public decision-makers. Again, it would have to be different from this model where principles are in a policy statement and fleshed out in a policy statement. If it is going to do that work to try to send the non-regression message through the corpus of environmental law, you could have something like that.

Q144 **Chair:** Doesn't the non-regression thing and the backstop only apply to the territory of Northern Ireland as well? It is very clear from previous evidence sessions that non-regression means it stops on exit day. Exit



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day we start to diverge. There is no going back from the current standards as they are on exit day, but we do not keep pace. That is full regulatory alignment and that is not what is proposed.

Kerry McCarthy: It is there to facilitate the customs arrangement, isn't it?

Chair: In Northern Ireland only; not here.

Kerry McCarthy: If the backstop is not intended to be permanent the moment the backstop stops but the—

Chair: Basically, we are in full regulatory alignment until exit day and the end of the transition period. If the backstop is required there is a non-regression principle in there, and there is something in the withdrawal agreement that says, "No sliding". But when we have questioned other witnesses and when we have also asked this question in the Chamber—as we did in the chemicals thing on Monday—it is no regression from the end of the transition period. It does not mean non-regression forever and working in parallel. It means regulatory divergence. It is very difficult political and legal territory because words mean different things depending on how you say it.

Kerry McCarthy: Yes, because then you get into if you want to have a UK EU trade agreement you have pretty much have to have non-regression in certain aspects. Other trade agreements you would not.

Professor Fisher: The short answer is with the Bill, as currently drafted, no. Again, what the Bill is effectively doing is taking the 25-year plan and saying, "Okay, here is our benchmark" but that does not say anything about non-regression and we have this problem of, "What are the standards there?"

I would agree some form of it should go into law but there is a complication of, what do we exactly mean? I am sure other witnesses have highlighted this. Are we talking about standards—and we can think of areas of EU environmental law that put in clear standards—or are we thinking about processes? Again, if we think about something like the Habitats Directive appropriate assessment, what does that mean for it to non-regress? I think that is a tricky question.

Q145 **Kerry McCarthy:** It could be like, for example, with the net gain type approach, you could be regressing in one area, but you are gaining somewhere else so therefore if you regress—

Professor Fisher: Yes. Again, if we are particularly going to focus on the natural environment, our metrics are going to be important as the Natural Capital Committee has highlighted and as the National Audit Office has highlighted as well.

Q146 **Kerry McCarthy:** Could it be argued that because you have this concept—I think they are called Environmental Improvement Plans—there is something that is tied into it. In the first instance it is a 25-year plan, so, because you have this concept of constant improvement and trying to



move forward, could that be argued by the Secretary of State that that deals with the non-regression point?

Professor Fisher: The thing is that there is nothing in the Bill that tells us what that should be. It says that it should be about aiming to improve the environment. It is a plan for improving the natural environment. That is the only limitation on it. There is no duty to consult on that plan. It gets laid before Parliament but there is no other—

Q147 **Kerry McCarthy:** There is no enforcement of that?

Professor Fisher: There is no enforcement and, if we look at the 25-year plan, there is a lot of aspiration in there.

Q148 **Kerry McCarthy:** Yes, but there is no binding targets and things like that?

Professor Fisher: There is no target and if we think about the role of the OEP and the role of the court, it may be that such a plan could be open to judicial interpretation and scrutiny. It would be very hard to get anything to bite, particularly on the wording of that plan because it has not been through a legislative process.

Tim Buley: It is what the Government thinks amounts to improvement.

Q149 **Kerry McCarthy:** Yes, nothing. Basically, you could have a non-regression principle. Then it would be subject to all the caveats that you said at the start, about the principles being watered down in seven different ways. That is one way of doing it. Then we would need to look at what is in part 2 of the Bill where perhaps it gets more specific about things. Is there anything else that could be put in the Bill to back up the idea of non-regression?

Professor Scotford: It does come back to the principles themselves and the role that they will have in informing the rest of environmental law. Professor Fisher is right—what does non-regression mean? It certainly means regressing from standards, but is it regression from the way that we administer, apply, make decisions around environmental law and retaining environmental principles in primary legislation in some way is going to maintain the kind of approach that we have had that puts a vision of environmental protection in law to inform the way the rest of the environmental law works? There is a way that that does systemic non-regression work about the administration of environmental law more generally. Yes, you can think about non-regression in those different ways but, certainly, this relegation of principles to a policy statement means you do not get that scaffolding, that architecture of principles to inform the rest of environmental law in the way that we have had in the EU, which does something to promote environmental protection and I think, therefore, is relevant to non-regression as well.

Chair: Thank you. That has been a very interesting tour de raison, yes, a lot for us to get our heads around. Thank you all very much indeed. We



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really appreciate your time and your patience in explaining to us, as lay people, some of the wilder labyrinthine mechanisms of the law. I am sure our report will be out in April, so hopefully you will see your words reflected back. Thank you all very much indeed for coming this morning.