



House of Commons
Environmental Audit Committee

**Scrutiny of the Draft
Environment (Principles
and Governance) Bill:
Government Response
to the Committee's
Eighteenth Report of
Session 2017–19**

First Special Report of Session 2019

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Environmental Audit Committee

The Environmental Audit Committee is appointed by the House of Commons to consider to what extent the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development; to audit their performance against such targets as may be set for them by Her Majesty's Ministers; and to report thereon to the House.

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First Special Report

The Environmental Audit Committee published its Eighteenth Report of Session 2017–19, *Scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 1951) on 25 April 2019. The Government’s response was received on 15 October 2019 and is appended to this report.

Appendix: Government Response

The government thanks the Environmental Audit Committee (EAC) for their inquiries and the publication of their pre-legislative scrutiny report on the draft Environment (Principles and Governance) Bill.

It is essential that the Environment Bill creates a powerful new legal basis for the protection and recovery of our natural environment in order to help face up to the ecological and climate challenges and to deliver the government’s commitment to passing on the environment in better condition for future generations. With this in mind, we are extremely grateful for the Committees’ constructive report and all the engagement by stakeholders and civil society throughout the pre-legislative scrutiny process. This has been invaluable in shaping the Environment Bill.

The government published the draft Environment (Principles and Governance) Bill in December 2018. This set out how we will maintain and improve our environment as we leave the EU and realise the vision of the 25 Year Environment Plan (25 YEP).

The final Bill will create a new system of domestic environmental governance as we leave the UK. The Bill introduced today commits the government to publish an environmental principles policy statement which will guide future government policy making. The Bill will require this and future governments to set out how they plan to enhance the environment in an Environmental Improvement Plan and set long term legally binding targets on key aspects of the environment (air quality, water, nature and waste and resources) to further drive environmental enhancement. The Bill will set up an independent Office for Environmental Protection (OEP) which will advise and scrutinise government’s environmental policy and achievements, investigate complaints, and take enforcement action to uphold environmental law where necessary in policymaking.

The government is committed to retaining and enhancing environmental protection as we leave the EU. With this in mind, we have agreed with many of the Committee’s recommendations which reinforce the environmental effectiveness of the Bill.

Recognising the Committee’s concerns about the duty associated with the principles, we have strengthened the duty on Ministers of the Crown to have ‘due regard’ to the policy statement on environmental principles to ensure the principles are embedded across government in a balanced but robust manner.

We agree that the OEP should have sufficient independence from government. With this in mind, we have substantially strengthened the safeguards for independence and accountability of the OEP in the Environment Bill. We have introduced a new statutory duty on the Secretary of State, in exercising functions in respect of the OEP, to have regard

to the need to protect the OEP's independence. It will have bespoke enforcement powers – which will include coverage of all legislation concerned with climate change – based on decision notices and provision for reference to a new Environmental Review process in the Upper Tribunal. The Bill sets a principal objective for the OEP to contribute to both the improvement of the natural environment and the protection of the natural environment. In addition, the OEP will be provided with a five year indicative budget to be agreed with HM Treasury (HMT) and it will be able to submit an additional Estimate Memorandum to Parliament alongside the Defra Estimate Memorandum.

The Bill introduces further measures to protect and enhance the environment building on the Committee's recommendations. A flagship element of the Bill is a framework for the setting of far-reaching, legally-binding and long-term environmental targets to be achieved by the Government to drive significant environmental improvement. We will put in place rigorous, transparent and authoritative arrangements to inform those targets, such as seeking independent expert advice. To provide a clear frame of reference for the duties and powers set under the new framework, we have adopted an objective in the Bill to ensure that delivering on the EIPs and meeting the targets will result in a significant improvement of the natural environment.

More broadly than this, the Bill will take direct action to address the biggest environmental priorities of our age: air quality, nature recovery, waste and resource efficiency, and water resource management. We look forward to working with the Committee during passage of the Bill.

Responses to recommendations

Environmental Principles

We recommend that a high level of environmental protection is put on the face of the Bill. This should be inserted at the start of clause 2, as an overarching guiding objective rather than a principle, in the same way as Article 191(2) of the Treaty of the Functioning of the European Union, for example: "Environmental policy shall pursue a high level of protection and it should be based on the principles". (Paragraph 11)

We agree with the EAC's recommendation to include an objective on the use of the environmental principles. However, since domestic legislation works in a different way than International Treaties, the approach taken is focused on the UK context. Therefore, we intend that an objective will apply to the Secretary of State in drafting the policy statement (clause 16(4) of the Bill introduced today) and that this will underpin the interpretation and application of the environmental principles through the policy statement approach.

We recommend that the Bill does not include the three Aarhus convention rights explicitly in the list under clause 2 as this would reduce their current effect by putting them on a qualified basis. The Bill should better secure and give further effect to the Aarhus Convention, for example, by ensuring access to justice in relation to environmental matters by providing an adequate standard of review through its enforcement and complaints mechanisms, in cases within the scope of the Aarhus Convention. (Paragraph 15)

We are grateful for the Committee’s consideration of this matter and agree that the three Aarhus Convention rights should not be included in the list of environmental principles. As such, we have removed them from the list of environmental principles included in the Bill. The UK is still signed up and committed to these rights through our agreement on the Aarhus Convention.

Our proposals promote access to justice beyond existing domestic mechanisms by providing a specific function for the OEP to receive complaints with powers to investigate and enforce adherence to environmental law by public bodies. There will be no charge for an individual to submit a complaint. There is a legal requirement for the OEP to keep complainants informed about the handling of their complaints and to produce public statements when they take enforcement action. There is also a duty imposed on public authorities that have been subject to legal proceedings by the OEP to publish a statement setting out the steps they intend to take in light of the outcome of the proceedings.

We recommend the environmental principles are put on an unqualified legal basis in relation to environmental policy. All public bodies should have a duty to apply the principles as is currently the case under EU law. We welcome the Secretary of State’s consideration of the wording in clause 4(1) and recommend it should be amended so that, “all public authorities will act in accordance with the policy statement and have due regard to the environmental principles in the exercise of their functions”. (Paragraph 24)

We are committed to ensuring that the principles are placed on a clear legal footing which is why the list of principles is included on the face of the Bill. In addition, we have strengthened the statutory duty on Ministers of the Crown to ‘have due regard’ to the environmental principles policy statement. Strengthening the duty in this way means that fuller consideration of the principles by Ministers of the Crown will take place. This change strengthens the duty in line with the ‘Public Sector Equality Duty’ in the Equality Act 2010. We want to make clear that consideration of the principles is more than a process requirement or “tick box” exercise. We expect policymakers to pay proper heed to environmental matters in the policymaking process. We have placed the duty to have due regard to the principles on the policy statement as opposed to directly on the principles, as this will offer greater clarity on the meaning of the principles given the policy statement will be used to explain interpretation and application.

Placing a greatly expanded legal duty on public bodies would go significantly beyond equivalence with EU law and would place a large regulatory burden on public bodies. We therefore intend to continue to focus the duty on policy-making by Ministers. The influence of the principles will flow through to individual decisions by virtue of being included in policy and law. As is the case in the EU currently, we expect that if public bodies need to use the environmental principles in decision-making, the principles should be included in the relevant legislation or guidance and will therefore be used by public bodies in the exercise of their functions.

We have strengthened the current duty in the Bill from ‘have regard’ to ‘have due regard’ with the aim of ensuring that the policy statement is used effectively across departments.

One of the Office for Environmental Protection’s principal duties should include the application and promotion of the principles. This should be included in clause 12(3) on the exercise of its functions. (Paragraph 25)

The OEP is required to provide scrutiny and advice as well as enforce the application of the provisions on environmental principles because they fall under the definition of ‘environmental law’. We do not consider that environmental principles need to be raised in significance within the OEP’s duties as the duty on the principles is as important as all other pieces of environmental law.

Any exclusions to the application of the principles ought to be very narrowly defined. The Bill should specify that the Ministry of Defence as a landowner is not excluded, nor should general taxation or spending be omitted since many environmental measures depend on changes to the tax system. We welcome the commitment that the Secretary of State will look again at the exclusions to the principles and recommend that:

- ***Clause 1(5) should be deleted,***
- ***The exclusions in clause 1 (6) (a) and (b) should be very narrowly defined and an adequate justification given for why they are necessary,***
- ***Clause 1(6)c should be deleted; and***
- ***Clause 4(2) should be deleted.*** (Paragraph 33)

Following the Committee’s recommendation, we have made changes to the list of exemptions. The changes are:

- We have deleted what was clause 1(5) in the draft Bill as we agree that this does not add significant value.
- We have clarified in the explanatory notes that the exemption in clause 18 (3) (b) of the Bill introduced today only applies to decisions around taxation, spending or allocation of resources within government.
- We have removed what was clause 1(6)(c) in the draft Bill that gave the Secretary of State the power to add additional exclusions at a later date as we no longer consider this to be necessary.

Defence has a strong record in Environmental Management and Protection, and the Secretary of State for Defence’s Policy Statement on Health, Safety and Environmental Protection states that where defence has derogations, exemptions, or dis-applications from legislation: “*we maintain Departmental arrangements that produce outcomes that are, so far as reasonably practicable, at least as good as those required by UK legislation*” with an internal Regulator to ensure this is implemented and followed. Moreover, the MOD requires that all new infrastructure programmes, projects, and activities include Sustainability and Environmental Appraisals to drive sustainable design, management and mitigate adverse impacts.

Clause 3 should be amended to require Parliament to approve the policy statement and any subsequent revisions to it. The provisions of the Planning Act 2008 which require public consultation and scrutiny of policy statements by Select Committees should also apply. (Paragraph 36)

We want to ensure that Parliament can provide scrutiny and hold the government to account on the policy statement. The environmental principles policy statement is a

significantly different document to the policy statements proposed under the Planning Act 2008, which focus on specified descriptions of development. Instead the environmental principles policy statement addresses environmental considerations across the full range of government policy. The policy statement will go through a full consultation process.

Environmental Improvement Plans (EIPs)

We recommend Defra urgently completes its indicator framework and takes on board the advice from the Natural Capital Committee to establish a robust baseline from which to measure progress. (Paragraph 50)

We have published our 25 Year Environment Plan indicator framework, which provides comprehensive links to published data sources. While a number of the indicators will require further development, we are currently already investing around £1.8 million specifically for indicator development.

We agree with the Committee's view on the importance of establishing a robust baseline from which to measure progress. We asked the Natural Capital Committee for further advice in this regard, including on developing a cost effective approach to an environmental citizen science project that integrates existing data, including the outcome indicator framework, and increases citizen engagement with the environment. This advice was published on 10 September 2019, and we are now considering it carefully.

We recommend that clause 7 is amended to commit the Government to ensure that UK environmental data and information is collected to at least the same standards as the European Environment Agency for the European Union. The Bill should also require that the data collected under clause 7 is published and that under clause 14, there be a requirement for the Office for Environmental Protection to monitor and publish a commentary on this data. (Paragraph 51)

We note the Committee's view on this issue. As we leave the EU, we will continue to undertake monitoring required under existing legislation of the EU. In principle, we would wish to be able to provide internationally comparable data which is not limited to the European Environment Agency.

It is anticipated that much of the data that will be collected under what was previously clause 7 (now clause 15) is data that is already collected and published as part of existing environmental monitoring processes. The Committee's recommendation to require that this data is published is a helpful way of underlining government's commitment to transparency and we have changed the clause to this effect.

We agree with the Committee's recommendation to require the OEP to scrutinise the data and have amended what was clause 14 (now clause 23) accordingly.

We recommend that in addition to the objective of a high level of protection being included on the face of the Bill, the Bill should also include a framework for targets and interim milestones to be achieved by Government Departments. These should be set following stakeholder consultation and parliamentary scrutiny. Once these targets have been established, the Cabinet Office must issue guidance directing Departments

to explain how their work programmes will achieve the delivery of these targets in their Single Departmental Plans. This will then assist the Office for Environmental Protection in holding Government Departments to account. (Paragraph 53)

We agree with the Committee's recommendation to supplement the statutory cycle of monitoring, planning and reporting with a framework for legally-binding targets. This is in line with our commitment laid out in the policy paper that accompanied the publication of the draft Environment Bill in December 2018.

The Environment Bill introduces a comprehensive new environmental governance framework for England. This incorporates a duty on government to set and achieve a suite of far-reaching, long-term targets across priority areas for environmental improvement, in particular air quality, water, biodiversity, and resource efficiency and waste reduction, and to set out measures to achieve those targets in EIPs. The targets will be set following public and stakeholder consultations, and subject to parliamentary scrutiny through the affirmative procedure.

These targets will complement action being taken to implement the government's statutory EIP and provide a long-term trajectory for helping to deliver the EIP's goals. The long-term targets will be accompanied by 5-yearly interim milestones, allowing for monitoring of progress. The progress towards these targets and milestones will be subject to scrutiny by the OEP.

To ensure a comprehensive suite of targets, with sufficient coverage and ambition, is in place and that the government's EIP is able to deliver these, we have included an objective in the clauses that ensures that meeting the targets, set under this and other legislation, and the measures laid out in the EIP will deliver a significant improvement in the natural environment. This provides a clear frame of reference for the duties and powers in this framework as well as providing long-term certainty to businesses and society.

We note the Committee's recommendation that the Cabinet Office should issue guidance directing government departments to explain how their work programmes will achieve the delivery of these targets. We are committed to cross-departmental action in the delivery of any targets and long-term environmental improvement. The Cabinet Office routinely issues guidance to departments on the production of the Single Departmental Plans, which is the core of the Government's planning and performance framework. Departments set out how they will deliver public commitments, such as to the natural environment, in their plans.

Since the European Commission has a role in advising on target setting, one of the Office for Environmental Protection or the Joint Nature Conservation Committee's principal duties should also be to advise on the establishment of targets. This should be included in clause 12(3) on the exercise of its functions. (Paragraph 54)

We note the Committee's recommendation on seeking advice on target-setting. Stakeholders have echoed this. The government agrees it is important to consult independent specialists from relevant fields for setting targets.

We will set targets following advice from independent specialists, public and stakeholder consultations including on the evidence and options available, and parliamentary scrutiny. The Environment Bill now requires government to seek advice from independent

specialists before setting targets. In addition, both Houses of Parliament will have the opportunity to scrutinise the targets as the Bill requires targets to be set by regulations subject to the affirmative procedure.

We are also considering the role of specialists within the Defra group, including from Natural England, the Environment Agency and the Joint Nature Conservation Committee, in the target-setting process.

We will make sure that a process is in place for robust, independent, transparent and authoritative advice to be given to government about the targets that should be set.

We recommend that the timeframe for reporting is tightened with specific dates for the reporting duties put into the legislation. Clause 8 should be redrafted to reflect the reporting timetable in the Climate Change Act 2008, which is a helpful analogue. (Paragraph 59)

We note both the detail and the intent of the Committee's recommendation for tightening the timeframe for reporting duties. The wording of clause 8 in the Bill introduced today has been drafted to allow government's first statutory annual report to align with the preceding non-statutory annual reporting of the 25 Year Environment Plan. This will then set the period to be covered by subsequent annual reports. As a result, we would not want to put specific dates for reporting on the face of the Environment Bill (in the manner of the Climate Change Act).

We do, however, recognise the potential for reporting on the EIP as a whole to become delayed by over-use of existing flexibilities, as highlighted in evidence to the Committee. We have therefore amended the wording of clause 8 to specify that government's annual reports should be published within four months (or equivalent sitting days of Parliament) of the end of the twelve months period to which the report relates, rather than "as soon as reasonably practicable", as previously worded. Following the publication of the annual report, the OEP will have six months to publish their report in response.

These changes provide a clear and exacting reporting schedule that will open up government progress in environmental improvement to timely public and Parliamentary scrutiny.

Clause 14(3) should include an assessment of how well the Government has met its statutory targets and the effectiveness of its Environmental Improvement Plan. It should also include a requirement for the Government's response to the progress report to explain how it intends to take any action recommended by the Office for Environmental Protection, or why it does not intend to take such action. (Paragraph 60)

We note the Committee's recommendation to include an assessment on how well the government has met its statutory targets in what was clause 14(3). We have included clauses in the Environment Bill that have the same effect. These clauses require the Secretary of State to consider the progress that has been made towards achieving the targets that have been set when preparing its annual report on the EIP. These clauses automatically fall within the remit of the OEP when it carries out its scrutiny functions under clause 23 of the Bill introduced today. The clauses also form part of environmental law and will therefore fall under the overall enforcement functions of the OEP.

The OEP is able to advise as to how progress towards meeting the targets could be improved. Since the clauses do not limit how the OEP could do this, it is already able to comment on the effectiveness of the EIP. We therefore do not believe the recommended amendment is necessary.

We agree with the Committee's recommendation to include a requirement for the government to respond to recommendations made by the OEP. Whilst clause 14(9) in the draft Bill required Defra's Secretary of State to respond to the OEP's progress reports, this did not specifically require the Secretary of State to respond to the recommendations of the OEP. We have therefore amended this, now requiring Defra's Secretary of State to specifically respond to any recommendations made by the OEP (clause 23(10) of the Bill introduced today).

Office for Environmental Protection

We stand by our previous recommendation that the Office for Environmental Protection should report to Parliament and that a statutory body of parliamentarians, modelled on the Public Accounts Commission, should set its budget, scrutinise its performance and oversee its governance. The Bill should be amended to require that this body of parliamentarians be established. Constitutional experts told us there was no impropriety in the OEP being established in this way. (Paragraph 83)

We welcome the views of the EAC in relation to the overall constitution of the OEP and are committed to establishing the OEP as an independent body. We agree that the OEP should report to Parliament and the Bill ensures that the OEP must arrange for its certified statement of accounts, annual report, strategy, annual progress report on EIPs and reports on environmental law to be laid before Parliament.

Establishing the OEP as an emanation of Parliament is not necessary for the OEP to be independent from government to deliver its statutory functions effectively and transparently, but we have made a number of significant changes to the proposals in the Bill to underline the independence of this important new body.

We are establishing the OEP in law as a non-Crown body corporate, with the intention that it will be classified as a Non Departmental Public Body (NDPB). A number of NDPBs hold government to account, such as the Committee on Climate Change and the Equalities and Human Rights Commission. We will give the OEP a number of additional and proven safeguards, drawing on the Committee's recommendations, which will reinforce the OEP's independence from both government and Parliament. With these safeguards Parliament will have sufficient opportunity to oversee and scrutinise the performance of the OEP and its ongoing operational independence from the Government, without altering its legal status in a manner which would raise serious constitutional concerns.

We recommend that Schedule 1 should be amended to reflect Paragraph 1 of Schedule 1 to the Budget Responsibility and National Audit Act 2011 for the appointment of the Office for Environmental Protection's Members and Chief Executive and paragraph 6(3) of Schedule 1 of the same Act to set out a process to protect Office for Environmental Protection members against dismissal by the Secretary of State. This appointments process would utilise the statutory body of parliamentarians as the appointing Committee. (Paragraph 85)

We fully agree that Parliament should have a key role in the process of making significant public appointments to organisations which hold the Government to account. However, the government's view (set out in its May 2018 written evidence to the Public Administration and Constitutional Affairs Committee's inquiry into pre-appointments hearings) is that the ultimate decision on public appointments should be made by Ministers as they are accountable and responsible for the decisions and actions of their department and its arms-length bodies. We also consider that applying the Committee's recommendation to all board appointments could be detrimental to the government's drive to increase the diversity of skills and experience of our public appointees by not appealing to some candidates; and would also cause ongoing procedural burdens for the appointment process of the board.

The OEP's non-executive members will all therefore be appointed by the Secretary of State, as is the case for appointments to the vast majority of NDPBs, including other bodies which hold government to account such as the Equality and Human Rights Commission. The OEP will be added to the schedule of the Public Appointments Order in Council, which offers safeguards through independent regulation by Her Majesty's Commissioner for Public Appointments. The Secretary of State will as a result be required to act in accordance with the Governance Code, including the principles of public appointments which will ensure that members are appointed through a fair and open process. The Chair will be classed as a 'significant appointment', requiring a Senior Independent Panel member approved by the Commissioner to sit on the Advisory Assessment Panel, who can report back to the Commissioner on any breaches of process.

Parliament is involved through pre-appointment scrutiny. Current scrutiny arrangements work well in ensuring the fairness of public appointments, an adequate level of Ministerial accountability and a sufficient level of independence for the board to perform its statutory functions transparently and effectively. We will therefore invite the Environment, Food and Rural Affairs Committee to carry out a pre-appointment hearing with the Secretary of State's preferred candidate for OEP Chair; and the Secretary of State will duly consider the Committee's recommendations. There have been previous occasions where, in the rare event of a Select Committee not agreeing with a Minister's preferred candidate, the Minister has decided not to proceed with the appointment as a result. The Secretary of State will remain responsible for the ultimate decision over appointments and dismissals of the Chair and non-executive board members.

In addition, we have introduced a new statutory obligation on the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect the OEP's independence. With regards to all of the OEP's ministerial appointments, this will ensure that the Secretary of State considers the preferred candidates' ability to act objectively, impartially and independently of government.

We recommend that the Government makes a political commitment to providing the Office for Environmental Protection with a five year budget in line with spending reviews. Precedents for this exist for other non-Departmental public bodies. (Paragraph 86)

We recommend that the Office for Environmental Protection should have its own estimate, to be negotiated directly with HM Treasury, and to be voted on by Parliament

in the yearly Supply and Appropriation (Main Estimates) Bill. Paragraph 15 of Schedule 1 to the Railways and Transport Safety Act 2003 provides a useful precedent. (Paragraph 87)

We welcome and agree with the EAC's recommendation that the government should make a political commitment to provide the OEP with a five year indicative budget, in line with precedents that exist for some other NDPBs such as the Office for Budget Responsibility (OBR).

The Bill provides for the OEP to be established as a non-Crown body corporate funded through grant in aid, giving it flexibility as to how it expends its resources within broad parameters agreed with Defra.

In order to ensure its financial independence, the OEP will be provided with a five year indicative budget which is formally ring-fenced by HM Treasury within any given Spending Review period. This safeguard, which we will commit to in Parliament, will provide the OEP with longer term certainty of resources. It will mitigate risks of Defra restricting funding due to other financial pressures because HMT approval would be required to redistribute any agreed funding away from the OEP.

Funding delivery will follow usual administrative practice and be made public through a separate line in Defra's Estimate, with further detail in the OEP's own annual financial report, enabling Parliamentary scrutiny.

We recognise that during the initial set-up phase additional costs are likely to be incurred. We intend to facilitate adequate funding during this phase. We also intend to review the first five-year indicative budget during the first two years of operation in order help assess what will be a more 'steady-state' annual operational cost of the OEP.

If the OEP were to have its own Estimate separate from Defra, there would be less ministerial accountability. The OEP would become more characteristic of a Non-Ministerial Department (NMD), in the same way as the Office of Rail and Road. Since NMDs are considered part of the Crown in the same way as any other government department, this would greatly complicate the delivery of the OEP's full enforcement functions because it would not make sense for the Crown to initiate legal action against itself. There are also additional overheads associated with the governance of NMDs and additional administrative costs which would not represent value for money of public spending for a small body such as the OEP. Having its own estimate would also remove the flexibility for Defra to provide in-year financial support to the OEP in response to changing circumstances.

To create further transparency around the resources provided to the OEP, we will give the OEP the option of providing the relevant Select Committee with an additional Estimates Memorandum alongside the Defra Estimate. The Memorandum would provide the Select Committee with a clear statement of what is in the Estimate, why funding is being sought, including explanations of what has changed and why.

Given this, and the additional financial commitments we have made, we do not agree that a separate Supply Estimate is needed in order to achieve sufficient financial independence from government. The OEP will be able to provide government and Parliament with additional information related to any changes in funding and how the funding will be

applied, enabling any perceived shortcomings to be highlighted. Parliament may then choose to scrutinise the funding of the OEP further and hold government to account accordingly.

Following common practice, we would also expect Defra to agree to review the funding of the OEP at the point of any formal request from the body which is supported by, for example, a relevant business case. Taking this further – to enshrine this commitment in a public document which is provided to Parliament – we will include in the Framework Document between Defra and the OEP, a commitment for Defra to review the funding of the OEP at the OEP’s request.

We recommend that the funding architecture for the Office for Environmental Protection mirrors that of the National Audit Office. For example, there would be a role for the Environmental Audit Committee to conduct an annual review of the Office for Environmental Protection’s work and progress against its purpose and objectives, including whether it is receiving adequate funding to fulfil its duties. The statutory body of parliamentarians would then scrutinise and review the funding estimate produced by the Office for Environmental Protection. The National Audit Office would audit and certify the Office for Environmental Protection’s annual accounts. (Paragraph 88)

We welcome and agree with the EAC’s recommendation that Parliament should have a role in reviewing the performance and funding of the OEP. The Bill requires the OEP to produce its own forward-looking strategy which sets out how it intends to carry out its functions and a retrospective annual report which sets out how it has exercised its functions during each financial year. These mechanisms will provide Parliament with sufficient means to review the annual performance of the OEP against the objectives set out in its strategy.

The OEP will also need to produce an annual statement of accounts which includes an assessment of whether the OEP has been provided with funds that are sufficient for it to carry out its functions for each financial year. We are confident that these mechanisms, as well as those set out in previous responses, will provide Parliament with sufficient means to scrutinise the adequacy of resources provided to the OEP.

We also agree that the National Audit Office should audit and certify the OEP’s annual accounts which will be provided for in Schedule 1 to the Bill.

Clause 12(1)(a) and 12(3)(a) should have “independent” added to the list of requirements which the Office for Environmental Protection must follow and “have regard to the need to act” should be changed to “must act”. A duty to report interference should be added to Paragraph 10 of the schedule. (Paragraph 89)

We welcome and agree with the EAC’s recommendation that what was clause 12 should be amended to ensure that the OEP’s independence is reinforced. We have therefore provided in clause 20 of the Bill introduced today that the OEP must act objectively and impartially.

We view “objectively” and “impartially” as achieving the same outcome in practice as adding “independent”, and so are not making this addition to the list of requirements. The OEP should have greater independence to interpret the need to act ‘proportionately’, and while the OEP should have regard to the need to act transparently, it cannot be bound

by complete transparency during certain enforcement investigations where disclosure of certain information may prejudice the investigation. We have therefore not strengthened the duty in this area.

To further guarantee the independence of the OEP, we have introduced a new paragraph into Schedule 1 which places a statutory duty on Ministers to uphold the independence of the OEP when carrying out activities related to the OEP. This goes further than the EAC's recommendation for the OEP to have a duty to report interference, as it places a legal duty on Ministers to avoid interfering with the OEP's decision-making or otherwise directing its activities.

We will also ensure that the relationship between the OEP and Defra is as transparent as possible. We will therefore ensure that specific mechanisms which aim to achieve adequate transparency are captured in the supporting Framework Document. Memoranda of Understanding will also be produced to set out how government, other relevant bodies and the OEP will interact in relation to its statutory functions.

The Ministerial Code is clear on the overarching duty on Ministers to comply with the law and to protect the integrity of public life. These changes now also deliver both a strong legal duty on the OEP to act impartially and objectively, and a legal duty on Ministers to uphold the independence of the OEP. Taken together we believe these proposals go further than the Committee's recommendation in ensuring the independence of the OEP from undue interference.

We recommend that the Government provides greater clarity on the definition of environmental law and natural environment, particularly in the explanatory notes to the Bill. The notes should set out that environmental assessments and strategic environmental assessments are within the definition of environmental law. (Paragraph 102)

We agree with the Committee's recommendation to provide greater clarity on the definitions of environmental law and the natural environment in the explanatory notes and have revised the explanatory notes accordingly. We have ensured that these revisions clarify the status of legislation on environmental assessments and strategic environmental assessments, in line with our view that legislative provisions on these topics would be included under the definition of environmental law.

Clause 31(1) (a) on environmental law should be changed from 'is mainly concerned with' to 'relating to'. The Government should consider using existing definitions, such as those in the Natural Environment and Rural Communities Act 2006, the Environmental Protection Act 1990 and the Aarhus Convention. (Paragraph 103)

We believe it is appropriate to focus the OEP's remit on legislative provisions that are mainly concerned with environmental matters. We therefore are not minded to widen the definition in clause 31(1)(a) of the draft Bill (clause 40(1)(a) in the Bill introduced today) as the Committee has proposed, as we consider this would risk diluting the focus of the OEP.

In particular, a wider approach could place legislation that is mainly concerned with something other than the environment under the OEP's remit. For example, some legislation dealing with issues such as road traffic controls or vehicle manufacture, while not specifically aimed at an environmental issue, could nevertheless be said to "relate" to

the environment in some way. We therefore believe it is better to define the OEP's remit by referencing the purpose that legislation was put in place to achieve rather than the question of whether the legislation relates to the environment more generally.

However, we would like to clarify that "legislative provision" includes particular provisions within primary or secondary legislation that are mainly concerned with the environment, even if the focus of the wider Act or Statutory Instrument is not mainly concerned with the environment. So, it would be possible for a particular duty or power to be included in environmental law, even if it is part of a wider law that is not taken to be environmental law as a whole.

As recommended by the Committee, we have considered a number of existing definitions in developing our approach to defining the natural environment and environmental law. However, we have not found any that would be entirely suitable to set as the scope of the OEP without change. For example, while we considered the Aarhus Convention, it does not define the environment or environmental law but rather defines "environmental information". Some elements of this are relevant to the remit of the OEP but others are not. Likewise, the Natural Environment and Rural Communities Act 2006 (NERC Act 2006) contains a definition of "nature conservation" but not of environmental law. The Environmental Protection Act 1990 does contain a definition of environment, which is focused on environmental 'media' (air, water and land) which are captured by our definition but makes no reference to the biotic elements of the natural environment. We therefore produced the definitions set out in clauses 40 and 41 of the Bill introduced today for this specific purpose, taking account of the relevant elements of the Aarhus Convention and other definitions. We recognise the Committee's concern that the definition of environmental law must grant the OEP a sufficiently broad remit to be effective. It for this reason that we have developed the definition we have used.

We recommend that international law is included within the scope of the Office for Environmental Protection's scrutiny and advice functions. Clause 31 should be amended by providing that, in relation to its functions under clauses 15 and 16, environmental law shall also include (a) any area of law with significant environmental implications and (b) international environmental law. (Paragraph 104)

Clauses 15 and 16 of the draft Bill (clauses 24 and 25 of the Bill introduced today) enable the OEP to report on the implementation of environmental law and provide advice on any proposed changes to such laws. International environmental law will therefore be covered by the OEP where it has been given effect through domestic law. In addition, the OEP must monitor progress in improving the natural environment as set out in the current EIP. The Government remains fully committed to implementing within the UK those international agreements to which the UK is a party. This is reflected in the 25 Year Environment Plan. The Bill also provides for the OEP to give advice on matters concerning international law relating to the natural environment, or other laws with significant environmental implications, if requested by Ministers under clause 25(1) of the Bill introduced today.

International laws often have their own robust compliance mechanisms. Where the UK remains a party to international instruments, these mechanisms will remain in force after we leave the European Union. It would therefore be duplicative and confusing, potentially producing inconsistent or contradictory outcomes, to give the OEP an enforcement and compliance role in international environmental law.

Where appropriate, the OEP will be able to identify any issues arising from other laws that may have significant environmental implications through its existing scrutiny functions. For example, if a target were repeatedly missed or one of the goals in the 25 Year Environment Plan were not met and it were the OEP's view that other (non-environmental) laws were linked to these failings, it could state this in its progress report. Under clause 23(6) of the Bill introduced today, the OEP is able to advise how progress could be improved and this could include a recommendation for government to look into any perceived impacts of other laws.

Government will also be required to have due regard to the policy statement on environmental principles when making policy which the OEP will be able to scrutinise. Given the link between policy and law, the combination of the environmental principles policy statement and the OEP's existing scrutiny and advice functions means that it is not necessary to add anything to the existing clauses.

We recommend that the Office for Environmental Protection should have climate change mitigation in its remit and therefore clause 31(3) (a) should be deleted. This would allow the OEP to bring cases against the Government in relation to the implementation of the Energy Efficiency Directive, the Renewable Energy Directive, the Waste Framework Directive and the meeting of carbon budgets. We recognise that this will not resolve the issue that carbon budgets are in the future and therefore effective enforcement could be limited until after carbon budgets are missed. Yet we do not think this is a reason to preclude enforcement on climate change mitigation from the OEP and we recognise that there will still be a significant role for the Committee on Climate Change's advice, and for Parliament to decide whether the Government's plans are adequate to meet carbon budgets. (Paragraph 106)

Climate change and the natural environment are two sides of the same coin and we therefore agree with the committee that climate change should be put on the same footing as the rest of environmental law, while respecting and maintaining the existing role of the Committee on Climate Change under the Climate Change Act. As such, we agree with the recommendations that the OEP should have climate change in the remit of its enforcement functions and have therefore removed the former exclusion at clause 31(3) (a) of the draft Bill. This will allow the OEP to bring cases against the Government in relation to the implementation of climate change legislation. This will also enable the OEP to take action if the Government misses its carbon budgets and fails to make proposals for corrective action as we progress towards our ambitious 2050 'net zero' target.

We also recognise the need to protect the role of the world leading Committee on Climate Change (CCC), ensuring that it is able to continue to provide its vital, independent role in providing advice and scrutiny on our carbon budgets, which the OEP's role will not overlap with. Our intention is therefore that both bodies will work closely together in a complementary way.

We therefore welcome the Committee's recommendation for a duty to consult the CCC when exercising its enforcement function in this area. In response, we have made a requirement for the OEP to inform the CCC prior to issuing an enforcement notice in relation to any climate change legislation. This should ensure that they are informed of each other's activities and can avoid any potential overlaps or conflicts before they arise.

Role and Powers of the Office for Environmental Protection

We recommend that clause 15(2) is changed to read, “The OEP must report on any matter concerned with the implementation of environmental law”. (Paragraph 112)

We agree with those who gave evidence to your inquiry on the usefulness and importance of monitoring and reporting on environmental law. We agree with what we understand to be the intention behind the recommendation – that the OEP’s obligations on monitoring and reporting on environmental law should be equivalent to its obligations on monitoring and reporting on the EIPs (clause 24 of the Bill introduced today). The current wording of these clauses reflects the activities the OEP will carry out. The OEP is required to produce a progress report specifically in response to the publication of the EIP’s annual report. In contrast, the OEP’s ability to monitor the implementation of environmental law is not linked to any existing reporting mechanisms, providing it with the freedom to report as and when it believes necessary. It is therefore expected that if the OEP discovered a significant issue or something requiring action, it would choose to report on this matter. If the recommended amendment were made, this would require the OEP to report on any matter, regardless of its significance. This would be an extremely onerous task for the OEP with limited environmental benefit and would not give the OEP the freedom to choose its own work programme. It would also have significant (unplanned) impacts on funding and staffing levels. Therefore, we have retained the current discretionary wording to provide the OEP with the flexibility to decide what matters relating to the implementation of environmental law it reports on.

Further memoranda of understanding should be considered to avoid duplication of the scrutiny and advice functions of the Office for Environmental Protection and existing bodies such as the Environment Agency and Natural England. These need not be set out on the face of the Bill. (Paragraph 113)

We agree with these recommendations, including that they do not need to be set out on the face of the Bill. We note that the OEP will be working with a range of existing bodies and government departments. We expect this to require Memorandums of Understanding (MOUs) to be developed to set out the practical arrangements and reduce any possible duplication of effort. We have not made provision for the OEP to establish MOUs with bodies such as Natural England on the face of the Bill but instead have expanded the explanatory notes to state that the OEP’s strategy will outline how it will resolve any potential for duplication of effort with relevant bodies. This could be through the use of MOUs.

We recommend that clause 16 should require the Office for Environmental Protection to be consulted on any changes to environmental law, rather than having a duty to give advice. The Office for Environmental Protection’s response on changes to environmental law should be published, with the Secretary of State required to lay before Parliament a response to this advice. (Paragraph 115)

The Bill currently provides that the OEP must provide advice at the request of a Minister or on its own initiative to any changes to environmental law. If this duty were changed for the OEP to be consulted on any changes to environmental law, this would become an onerous task, particularly as some changes will be insignificant. For example, government may propose a small technical change that is apolitical and has limited implications. If

the OEP had a duty to be consulted, and the Secretary of State were required to respond and lay this response before Parliament, it would have impacts on the OEP's resource allocation along with burdening Parliament. We therefore remain of the opinion that the current wording of the clause is appropriate, and it still allows for the OEP to scrutinise government proposals as it sees fit.

As drafted, the definition of failure to comply with environmental law narrows the scope of the Office for Environmental Protection's enforcement powers to look solely at process. It does not achieve equivalence with the European Commission's powers, nor does it reflect the integration principle. (Paragraph 120)

The enforcement mechanism must go beyond that of traditional judicial review and the Wednesbury test to a more proportionate approach involving a structured examination of effectiveness. (Paragraph 121)

We welcome the Committee's views on the OEP's enforcement mechanism. We have made provision for a new mechanism for environmental review in the Upper Tribunal for the OEP to bring legal challenges.

It is our assessment, however, that it is not necessary or appropriate in this context to go beyond the Wednesbury test in relation to the review of discretionary decisions as the Committee has recommended. The Committee raises a number of concerns in the paragraphs that precede these recommendations that appear to have informed its thinking. We therefore also include our thoughts in response to these concerns in order to contextualise our response.

In particular, while the Committee suggests in paragraph 120 that the definition of "failure to comply with environmental law" narrows the scope of the OEP's enforcement powers to looking solely at process, we do not consider it to be limited to matters of process. More specifically, to address the Committee's comments in paragraph 117, achieving environmental standards is not excluded from the remit of the OEP and would fall within the scope of its enforcement action. For example, a failure on the part of a public authority to achieve a statutory environmental quality standard that it had been made responsible for meeting could be challenged under clause now clause 26(2)(b) of the Bill introduced today. We have sought to clarify this point within the explanatory notes. Please also see our response to the Committee's recommendation in paragraph 122, which further addresses the issue of failing to meet environmental standards and targets.

We would also challenge the assertion, in paragraph 120, that the enforcement mechanism of the OEP should go beyond the Wednesbury test. We do not consider this necessary to achieve equivalence with enforcement in the EU, or appropriate in a domestic context on constitutional grounds. In particular, the Court of Justice of the European Union (CJEU) has developed a test of whether there has been a "manifest error of assessment" in considering discretionary decisions, and several UK court judgments have indicated that this test and the Wednesbury approach are broadly equivalent.

We recommend that clause 17 sets out that the Office for Environmental Protection's enforcement functions relate to failure to achieve environmental targets and standards (the framework for which will be established in part two of the Bill), rather than questions of administrative compliance. Government as a whole should be accountable for the achievement of environmental standards and targets, rather than individual public

authorities, as is the case with the European Commission’s infringement procedure. This would require different areas of Government (central Government, local Government and public bodies) to work together cooperatively to address an environment problem. We welcome the Ministers’ acknowledgement that the Office for Environmental Protection will be able to decide which authority is responsible and take enforcement action. (Paragraph 122)

Failing to achieve statutory environmental targets and standards would already fall within the OEP’s enforcement remit under clause 17 of the draft Bill, which we have therefore retained in the Bill introduced today (now clause 26). The OEP will not be concerned solely with matters of “administrative compliance” and we therefore do not see a need to change the clause in relation to this matter. The content of the Bill (once enacted, and including any secondary legislation made under it) on the setting of and compliance with environmental targets and standards will qualify as ‘environmental law’ (as defined in the Bill), and therefore fall under the enforcement powers of the OEP, as will all other relevant legislation.

The element of this recommendation which states that “government as a whole should be accountable for the achievement of environmental standards and targets” relates to the question of how environmental law is drafted and upon whom it places compliance obligations. When it comes to the enforcement action of the OEP, this inevitably has to be framed around the legal powers and duties that are imposed upon government and other public authorities in extant environmental law. We have therefore provided in the Bill for a regime whereby the OEP can take action against a range of different public authorities in order to be able to target those – whether central government or others – that are most appropriate (and legally accountable) in individual cases.

In response to the Committee’s comments on government accountability and having different authorities work together, the Bill already provides mechanisms for the OEP to link cases brought against different authorities, and to inform the relevant Minister in all cases (see clause 32 of the Bill introduced today). In respect of the latter, we are also proposing to add a provision for the OEP to indicate whether it considers the relevant Minister should participate in legal proceedings brought against other authorities, for example as a party to the proceedings. Such participation in appropriate cases could allow the court to be informed by the government’s perspective on, and input to, a case. If, for example, where the actions of the public authority in question may have been affected by issues such as the resources made available to it, a wider policy framework, or other matters under government’s control or influence, then this will be an important consideration.

Serious damage may sometimes take years to become apparent. We cannot understand the justification for a time limit on complaints. This is not used by the European Commission and should be removed. ***Clause 18(6) which specifies time limits to complaints and 18(7) which says that out of time complaints can be considered in exceptional circumstances, should be removed.*** (Paragraph 130)

The one year period specified in the Bill is intended to allow a reasonable time to bring complaints, without this amounting to an open-ended ability to complain long after the event. This is similar to the approaches taken to the handling of complaints by the Local Government and Social Care Ombudsman (LGSCO) and the Parliamentary and Health Service Ombudsman (PHSO). Moreover, the one-year period specified is not absolute.

Rather, the OEP already has discretion in clause 27(7) of the Bill introduced today to waive the time limit if it considers there are exceptional reasons to do so. This could include, as suggested by the Committee, late discovery of environmental damage resulting from a failure to comply with environmental law. In light of the Committee's comments, we have therefore clarified the effect of this provision in an adjustment to the explanatory notes. The practical arrangements for the EU Commission's approach are not specified in law in the EU Treaties so we cannot make a direct comparison.

Clause 19(1) should provide a power for the Office for Environmental Protection to be able to instigate its own investigations and not just those that it receives a complaint on. It should also be able to investigate alleged breaches rather than those that are, in its view, 'serious'. Clause 19(1) should have the following subclause added: "(c) and is consistent with its enforcement policy". (Paragraph 131)

We agree with the majority of the Committee's points in this recommendation.

We have now provided on the face of the Bill for the OEP to initiate investigations on the basis of information from other sources rather than just being able to investigate following a complaint. This will allow the OEP to launch an investigation when it has information (from another source, for example an implementation report by a public authority) that indicates a failure to comply with environmental law.

Whilst we want to give the OEP discretion to exercise its judgement, we do not think it is necessary or proportionate to provide for the OEP to investigate any alleged breach, with no consideration of possible seriousness. This would be inconsistent with the intended focus on high priority cases as provided for in clause 12(4) of the draft Bill (clause 20(7) in the Bill introduced today).

We recognise the potential advantages of the Committee's recommendation regarding the addition of the suggested sub-clause to clause 19(1) of the draft Bill. As we understand it, this is intended to link the matter of the OEP choosing which cases to investigate with its own enforcement policy (clause 20 of the Bill introduced today). We acknowledge the Committee's concerns regarding the OEP being at too much risk of challenge over its own judgements and have looked into whether further provision to the effect suggested by the Committee could guard against this and serve to provide greater transparency in relation to the OEP's approach to the meaning of the term "serious". We consider that it would be beneficial to provide further clarity in this area, and have therefore amended the Bill to provide that the OEP's enforcement policy must set out how it intends to determine whether a failure to comply with environmental law is serious for the purpose of subsequent clauses (clauses 20(6)(a) and (b)).

Clause 12(3) requires that the Office for Environmental Protection must set out how it will avoid any overlap in functions with the Committee on Climate Change and a similar duty should be included to set out how it will avoid any overlap with the Local Government and Social Care Ombudsman and Parliamentary and Health Service Ombudsman complaints-handling functions. The Office for Environmental Protection should also be required to consult on, publish and review its criteria for investigation. (Paragraph 132)

We agree with the Committee's recommendation and have required the OEP to clarify, in its complaints and enforcement strategy, how it intends, when exercising its complaint

handling function, to avoid any overlaps with the functions exercised by the Ombudsmen. Our response to the Committee's recommendation in paragraph 106 sets out how the Bill also requires the OEP to set out how it will avoid overlap with the CCC.

In the draft Bill the OEP already has a duty to consult on, publish and review its strategy which will set out how it intends to exercise all of its functions. This will include the content of the OEP's complaints and enforcement policy (clauses 20 and 21 of the Bill introduced today).

As we have already set out, the Office for Environmental Protection's enforcement procedure does not achieve equivalence with the European Commission's powers as it is limited to administrative compliance rather than achieving environmental standards and outcomes. (Paragraph 147)

We recommend that, following the changes suggested to clause 17 (that the enforcement mechanism must go beyond that of traditional judicial review), the references in clause 25 to judicial review should be deleted and 25(1) should refer to failing to achieve environmental targets and standards set out in section 17. (Paragraph 148)

As noted in our response to Committee's recommendation in paragraph 121, failing to achieve statutory environmental targets and standards (where specified in environmental law as legal responsibilities for public authorities) would already fall within the OEP's enforcement remit. However, we have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges. The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise.

A one-size-fits-all approach to enforcement is not appropriate since the failure to comply with environmental law comes in many different forms. The procedure set out in the Bill is also slow and could preclude other, swifter forms of enforcement and remediation. (Paragraph 149)

We recommend that: The Bill should allow the Office for Environmental Protection to bring a judicial review at the start of the process in rare cases where a delay could cause further environmental harm. The Bill should specify that the Office for Environmental Protection bringing enforcement proceedings does not prevent others who wish to bring a judicial review. The Office for Environmental Protection should be given the power to act as an intervener in environmental judicial reviews undertaken by other parties. Clauses 22 and 23 should be amended to include an obligation on the Office for Environmental Protection to act on responses to information or decision notices, or to explain to the complainant why no further action has been taken. This would provide a ratcheting approach to enforcement. (Paragraph 150)

We agree with the Committee's recommendation that the OEP should be able to bring a judicial review without going through its earlier notice process in those rare cases where it is necessary to prevent serious damage to the environment or human health. We have therefore made provision in the Bill introduced today for the OEP to be able to use this mechanism (clause 34).

We agree with the Committee that OEP enforcement proceedings should not prevent others from bringing a judicial review. OEP enforcement is not intended to replace people's existing rights to bring legal proceedings. However, we are making provision that the OEP will only be able to apply for an environmental review (as opposed to judicial review) after the normal time limit to bring legal proceedings, such as judicial review, has passed, to avoid an environmental review pre-empting existing legal challenge opportunities (clause 33(3)(b) of the Bill introduced today).

Regarding the recommended provision for the OEP to have a power to act as an intervenor in third party judicial reviews, we recognise that it may be beneficial for the OEP to be able to intervene in such cases where appropriate. We have therefore made provision for the OEP to apply to intervene in third party judicial reviews, for confirmation by the court.

We do not believe that the Committee's suggestion of including an express obligation on the OEP to "act on responses to information and decision notices" is required. The OEP will do this anyway, as it will only serve such notices when it considers there is an issue to explore, and will examine the responses in order to determine whether further action is appropriate. Under the Bill as introduced the OEP must also prepare a report when it concludes an investigation (clause 28). Clause 29 also requires the OEP to keep a complainant informed about its handling of the complaint. In addition, we have provided that where the OEP publishes such a report it must provide a copy to the complainant. We think, with this addition, there will be sufficient provisions in the Bill on this point.

We recommend the Government looks further into a bespoke enforcement procedure and an expansion of the role and remit of the General Regulatory Chamber in the First-tier Tribunal. For example, where the Office for Environmental Protection is able to issue notices (at first advisory, then latterly binding) with a range of compliance recommendations, to which the public authority must then comply, or set out proportionate reasons why not. The Office for Environmental Protection would then be able to challenge a decision not to comply with the notice at the tribunal. The tribunal would undertake a substantive review of the authority's decision not to comply with the notice. Any failure to comply with a decision should amount to contempt and be referable to the Upper Tribunal. Section 202 of the Data Protection Act 2018 provides a useful guide as to how this could be achieved in the legislation. (Paragraph 152)

Following the Committee's recommendation to look further into a bespoke enforcement mechanism we have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges.

We do not agree with the proposal that the OEP should be able to serve binding notices as it would undermine regulatory independence if the OEP were to have direct authority to over-rule the decisions of an appointed regulator such as the Environment Agency. The Commission's Reasoned Opinions, which precede references to the CJEU, are also non-binding rather than binding. Our proposal for a decision notice is therefore very similar to this element of the EU framework. We would expect the decision notice to form a core part of the OEP's evidence in its application for review, and as such this would be considered by the court.

We recommend:

Clause 26(1) should have a subsection added: (d) any monitoring and reporting on the implementation of environmental law under section 15.

Clause 27(1) should be amended to cover the Office for Environmental Protection's scrutiny and advice functions set out in clauses 14, 15 and 16 and its function to investigate complaints under clause 19.

Clause 28(2) should be amended to include reference to the provision of information which facilitates coordination between the Local Government and Social Care Ombudsman, the Parliamentary and Health Service Ombudsman and the Office for Environmental Protection. (Paragraph 156)

We agree with the majority of the Committee's recommendations on cooperation and information. We have made appropriate changes to the clauses accordingly.

We have extended the duty to cooperate to the extent that public authorities are required to provide reasonable assistance to the OEP, when requested, in respect of its monitoring and reporting on the implementation of environmental law under clause 26 of the Bill introduced today, and further so that it applies in connection with any of the OEP's scrutiny and advice and enforcement functions.

However, while we believe it would be appropriate to disapply obligations of secrecy that would otherwise prevent the sharing of information needed for the OEP's complaints and enforcement functions, we think a more measured approach is appropriate for the more general scrutiny and advice functions. We therefore do not think it would be appropriate to disapply obligations of secrecy that would protect information relevant to the OEP's scrutiny and advice functions.

We also agree with the recommendation to facilitate the provision of information between the OEP and the Ombudsmen. We will have made provision for this accordingly in clauses 37 and 38 the Bill introduced today.

Collaboration with Devolved Administrations

The Government should set out in response to this report how it intends for the Office for Environmental Protection to work collaboratively and without overlap with its potential equivalent bodies in Wales and Scotland. The response should clearly set out which provisions are within the scope of the Office for Environmental Protection in respect of reserved matters. (Paragraph 171)

We agree with the recommendation that the OEP should work collaboratively and without overlap with any potential equivalent bodies in Wales and Scotland that may be established in the future by the Devolved Administrations. The Bill therefore facilitates this collaboration.

The Bill will ensure that the OEP has the power to share information with any equivalent 'devolved environmental protection body'; that is any public body exercising similar functions to the OEP in the devolved nations. Secondly, the Bill places a duty on the OEP to consult the relevant devolved environmental protection body when exercising any

function that may also be relevant to such a body. We expect that this duty would be triggered in relation to transboundary issues, of relevance outside of England, allowing them to bring relevant issues to the attention of each other and share information which might support their respective investigations or scrutiny. This would also require them to highlight specific complaints / enforcement cases relating to areas of environmental law where their competences may potentially overlap or be legally ambiguous. We expect that these powers and duties would be reciprocated by the Devolved Administrations when establishing their equivalent bodies, creating a UK-wide statutory framework upon which strong, collaborative working relationships will be developed over time.

The executive competence of certain functions can also be transferred between the administrations through transfer orders under the devolution settlements and other legislative instruments, and as such the boundaries between devolved / reserved matters may change over time. The OEP may need to make a legal judgement about whether an alleged breach is a reserved or devolved matter on a case by case basis, and we expect it would do so in collaboration with the relevant equivalent bodies in the devolved nations (as described above). Such legal judgements may often be complex and finely balanced, therefore we do not consider that setting out all reserved matters that the government currently considers to be reserved would be particularly valuable. Indeed it could even be counter-productive as it might limit the OEPs future discretion in those areas.

More widely, there has been extensive and continued collaboration with the Scottish and Welsh Governments and the Northern Ireland Civil Service across the whole Bill. This has enabled us to bring forward a number of measures that we expect to see adopted outside of England, subject to the final decision of the devolved administrations. These joined up measures will help us deal with the environmental challenges we are facing together.

The Government must ensure that there is appropriate representation from Northern Ireland on both the Board and within the staff to ensure it can deal with country specific issues adequately. We are reassured that the Office for Environmental Protection need not be located within London, but thought should be given to whether it will operate effectively in Northern Ireland and should bear in mind the environmental impacts of travel. (Paragraph 172)

We agree with the Committee that the OEP, if requested by the Northern Ireland Executive, must be able to deal with country specific issues adequately. A revised version of the Schedule is now included in the Bill, the commencement of which would be subject to affirmative resolution in a restored Assembly. The revised Schedule makes provision for a joint (Secretary of State / DAERA) appointment process for the Chair. A dedicated non-executive board member with experience of the natural environment in Northern Ireland appointed by DAERA following consultation with the Secretary of State, while other non-executive members would be appointed by the Secretary of State following consultation with DAERA. The OEP would consult both DAERA and the Secretary of State on the appointment of executive members. These measures give Northern Ireland both a strong influence on the appointments process, and a clear representation on the board.

We cannot set out the minimum requirements for the wider staff of the OEP or require it to recruit staff from specific geographical areas. It will be for the board and chief executive

to set its own policies on recruitment and professional development, but we expect that all staff would have the appropriate skills, experience and training to ensure that they can address country specific issues adequately.

The OEP will be based in Bristol. The decision to locate the OEP in Bristol was based on evidence from the Cabinet Office Places for Growth Programme, which encourages the creation of public service jobs outside London to support economic growth.

The Government must ensure that common frameworks are in place by exit day or should explain why they are not time critical. We recommend the Government produces an update to its 2018 analysis on common frameworks in response to this report.
(Paragraph 175)

The government published a revised frameworks analysis on 4 April 2019, setting out a detailed assessment of progress (<https://www.gov.uk/government/publications/frameworks-analysis>). This was the culmination of multilateral policy development in priority framework areas between officials from the UK Government, the Scottish and Welsh Governments, and the Northern Ireland Civil Service. Outline frameworks are under development across policy areas, including those relating to environmental protection. The cooperative approach on common frameworks demonstrates the progress that can be achieved through working collaboratively across UK nations. Frameworks will be implemented depending on the needs of the particular policy area and their timing may vary accordingly.

Wider concerns on the draft Bill

The Government must set out what functions the interim OEP will be undertaking and what retrospective powers it will have as soon as it is established to allow for active scrutiny. We would also welcome clarity on interim arrangements for Northern Ireland.
(Paragraph 190)

Preparations have been made for a no-deal scenario before the OEP is established.

The interim arrangements would include transfer of all complaints to the OEP once operational. Once established, the OEP will have the powers to take any necessary enforcement action in respect of breaches of environmental law from when the jurisdiction of the Court of Justice of the European Union ends. This will ensure there is no period of time during which government actions cannot be held to account.

We have consulted all Devolved Administrations and have agreed that the interim arrangements would not extend to them. DAERA would be best placed to provide clarity on any interim arrangements for Northern Ireland being put in place by their administration. We will continue to work constructively with the Devolved Administrations to ensure environmental protection across the UK.