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A New Nature and Environment Commission

Speaking up for nature and holding the powerful to account

Thank you

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Summary

The UK government has announced plans for a new world-leading environmental watchdog. The establishment of such an institution is needed if the UK is to improve its environmental record and start enhancing the state of the natural world. Leaving the EU heightens the need for new governance mechanisms because over the past decades EU institutions have performed many roles that are essential to the proper functioning of environmental law. Brexit thus opens up a 'governance gap' in environmental law, but also provides a moment to build new and improved institutions and mechanisms for environmental governance.

This report sets out the case for the establishment of a new Nature and Environment Commission, tasked with improving and ensuring the effectiveness of environmental law. A major role in this is improving compliance with environmental obligations by public authorities, for which the Commission will need a combination of technical expertise, political credibility and a powerful legal toolbox. This toolbox must include a range of investigation and enforcement powers, both general and specific. It must also include the ability to take public authorities to court, with the courts empowered to back up the words of the Commission by issuing mandatory injunctions that require the carrying out of specific steps the Commission considers will achieve compliance with the law.

The Commission should function as a voice for people and nature – with a statutory purpose to act on their behalf, and an organisational culture that keeps it close to local communities. Its processes should be transparent, dialogical and deliberative. The Commission should also be kept independent from government, free to speak out and unafraid of dissolution for political reasons.

While leaving the EU opens up governance gaps in a number of areas, there is value in focussing the remit of the Commission on compliance and enforcement. Environmental law will not function effectively without a strong and independent enforcement body as otherwise it will be too easy for public authorities to ignore their legal obligations. As well as creating a new Nature and Environment Commission, the governments of the UK must establish new mechanisms that fully close the governance gap in other areas, replacing and improving on EU practices.

If designed and executed well, there is an opportunity here for the UK to create a truly world-leading institution that transforms environmental matters from inconvenient side-constraints to central concerns of government. But if done badly, environmental law may languish as it continues to be breached with impunity.

This report identifies the legal powers and the design features that will be conducive to increasing the effectiveness of environmental law. Many of these issues are complex and interlinked – while perfect solutions may not exist, this does not mean that all options have equal merit. This report highlights ClientEarth's preferred approach by making eleven key recommendations:

Key recommendations for the Nature and Environment Commission

Recommendation 1	The Commission should be given a broad purpose to act on behalf of nature and ecosystems, recognising that humans form an integral component of natural systems.
Recommendation 2	The Commission should conduct thematic inquiries that assess systemic problems behind poor compliance with environmental law by public authorities. Based on these inquiries, the Commission should be able to produce guidance and recommendations that public authorities must normally follow.
Recommendation 3	The Commission must be able to conduct formal investigations into (potential) breaches of environmental law by public authorities. These investigations must look into the merits of decisions made, with public authorities under an obligation to co-operate with the Commission during these investigations. The Commission should be able to enter into action plans or issue binding notices on the authority under investigation that set out the steps required to achieve compliance.
Recommendation 4	Notices issued by the Commission through the formal investigation process should be enforceable before the courts. If necessary, courts should be empowered to issue specific mandatory injunctions requiring a public authority to comply with Commission action plans and/or guidance.

Key recommendations for the Nature and Environment Commission

Recommendation 5	The Commission must respond to complaints made by public and civil society. The process for doing this should be free, accessible and straightforward. The Commission should continuously and iteratively engage and work with relevant stakeholders to identify, analyse and develop solutions to problems under its consideration.
Recommendation 6	The Commission should be free to engage in public forums of all kinds to represent and fight for the interests of people and nature.
Recommendation 7	The Commission should review and respond to government reports regarding the state of the environment and fulfilment of environmental obligations. The Commission's reviews should be sent to and debated in parliaments and responded to by governments in a timely fashion. Existing reporting obligations on governments should be retained.
Recommendation 8	Regular reviews should be conducted that identify past, present and future trends in environmental law. The Commission may be able to conduct some of these, but others (in particular ones making recommendations for future law reform) may be best done by a separate entity.
Recommendation 9	The Commission should be UK wide: it must be co-designed and co-owned by the four nations of the UK. Each government should be held accountable to the standards and duties it establishes with respect to the environment. National offices should be established to both improve connections with local communities and to cater to specific laws, needs and priorities in different parts of the UK.
Recommendation 10	The Commission's key relationships should be with parliaments and not governments. It should be funded by and accountable to parliaments and appointment of key personnel should be subject to parliamentary approval. The Commission should have good institutional links to relevant and influential bodies.
Recommendation 11	The Commission should have ample and ring-fenced funding and be composed of a wide range of well-respected experts.

1 Introduction

1.1 A new environmental enforcer

This report demonstrates that a new institution is needed to improve the effectiveness of environmental law. This new institution should be responsible for monitoring and improving legal compliance by public authorities, working with local communities and public authorities to identify and solve problems and engender better practice across government actors. It must have sharp and meaningful legal powers, but also genuine and valuable relationships with people and local communities. It must be a conduit between those who are affected by environmental harm and those who have the power to do something about it.

While Brexit has brought this issue into sharp and unavoidable focus,¹ there is a longstanding and pre-existing need to improve the effectiveness of environmental law in general. The ambition, remit and functions of this new institution should therefore not be limited to mimicking EU enforcement mechanisms (which are far from perfect in any case). Instead, the UK should grasp the chance to establish a pioneering legal voice for people and nature that is loud, authoritative, powerful, influential and long-lasting. This can contribute to an emphatic improvement in the health and well-being of people and ecosystems in the UK (and potentially further afield).

This new institution must not be hampered in its ability to ensure and improve the effectiveness of environmental law. As well as the right combination of legal powers and public support, this will need political respect, expert and technical resourcing, functional independence, adequate ring-fenced funding, and a comprehensive and autonomously defined remit. To be avoided are feeble and uncertain budgets, operational meddling from uneasy ministers, legal lip-services and a muzzle that prevents speaking truth to power. The design of this new institution is therefore crucial: the details, as always, matter.

This report identifies some of the key design features and legal powers that will be needed for a new environmental enforcer – a Nature and Environment Commission – to be effective. Following an explanation as to why an environmental enforcer is needed, in section 2 the report surveys some existing institutions with comparable remits or functions in order to discern best practices and potential pitfalls.

Section 3 then identifies the key legal tools that should be made available to the Nature and Environment Commission and section 4 considers some of the broader design features. The report makes 11 key recommendations that emerge from this analysis.

1.2 Environmental law and the governance gap: why we need an environmental enforcer

To be effective, law must be enforced. Laws are written to guide and alter human and institutional behaviour – but the mere act of passing a law does not in itself achieve this. To make any difference, a law must not merely live on paper but also have practical force. When a law is bent and broken, those harmed by such transgressions must have recourse to complain about this injustice and seek reparation for it.

The turning of legal fictions into legal realities requires courts and other institutions. The Supreme Court has recently emphasised that if laws are not properly applied and enforced, then they are “liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade”.² The Court went on to point out that “[p]eople and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them”.³

Environmental law is different from other branches of law in this regard. This is because environmental law works in nature’s interest and in the public interest: whose rights are these to enforce? This situation is exacerbated by the fact that those dependent on and affected by environmental law cannot always sing its praises or condemn its injustices. It defends the habitats of birds and trees, it ensures the resilience of forests, rivers and wetlands, and it protects the health of our children’s lungs. The beneficiaries of environmental law are multiple, diverse and frequently, from a legal perspective, voiceless.

A key challenge then is determining who can complain to whom when environmental rules are violated (or when its mechanisms prove inadequate). Those who are harmed – both directly and indirectly – by such failures are seldom well-defined legal actors.⁴

¹ Greener UK, ‘The governance gap: why Brexit could weaken environmental protections’ (August 2017) available at http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf. Note too that the European Commission has indicated that the “level playing field” referred to in para 20 of the European Council Guidelines (April 2017) would likely require an independent public enforcement body for the environment and recourse before domestic courts (Commission to EU27, Internal EU27 preparatory discussions on the framework for the future relationship: “Level Playing Field”, TF50 (2018) 27, 31 January 2018, 11).

² *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [68].

³ *ibid* [71].

⁴ Consider the requirement of ‘direct and individual concern’ in Article 263 TFEU.

It is not trivial to identify who exactly is wronged by the high concentration of diesel vehicles in our cities, the construction of a new coal-fired power plant, or the release of pollutants into a nature reserve.⁵

The risk is that nature's voice is muted and our environment becomes ever more degraded. This central tenet of environmental law has also been recognised by the Supreme Court:

“Environmental law ... proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of [initiating a challenge] on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf”.⁶

Strong institutional governance mechanisms are needed to properly oversee, implement and enforce environmental law. Enforcement here is crucial, and will be the focus of this report. But there are other governance functions that breathe life into paper laws: expert bodies that set directions, provide advice and keep track of matters on the ground. Agencies, regulators, watchdogs and public interest groups are all needed to make sure that environmental law is effective, rather than unenforceable, unmonitored and meaningless.

For the past 40 years, more and more of these governance roles in the UK have been conducted by EU institutions. The European Commission has been a “green voice within the EU”:⁷ setting environmental agendas through ‘Environment Action Programmes’, supervising the implementation of environmental law and advocating for the integration of environmental concerns into other policy areas.⁸ Importantly, through its role as ‘guardian of the treaties’, it has also sought to enforce environmental law, being able to investigate accusations of non-compliance and initiate proceedings in the Court of Justice of the European Union (CJEU) when necessary. To date, the CJEU has delivered more than 700 judgments on environmental matters.⁹

Technical bodies such as the European Environment Agency, the European Chemicals Agency and the Scientific, Technical and Economic Committee for Fisheries have also played a significant role in developing and deploying EU environmental policy.¹⁰ They have been responsible for collecting, analysing and interpreting data that fundamentally underpins action taken to protect and improve the environment.¹¹

On leaving the EU, the UK will lose access to these functions and mechanisms. A broad ‘governance gap’ will emerge, which threatens to undermine environmental law. To prevent a hollowing out of environmental obligations and a diminution in environmental standards, these functions must be replaced (and indeed improved, added to and complemented) as part of the Brexit process. New legislation will be needed to properly transfer existing functions to domestic bodies and retain key components of the European acquis.

It may be possible for some of these functions to be assigned to existing UK agencies: data collection duties could go to the Environment Agency or Natural Resources Wales, for example.

However, existing delivery agencies such as these cannot entirely pick up the slack. While part of their remit is to oversee compliance with the law by private actors (such as individuals and businesses), a crucial function currently provided by EU institutions is oversight of the Government and public bodies themselves (such as the Environment Agency and Natural Resources Wales).

The compliance of public authorities with environmental law is thus a crucial aspect of the governance gap. This report focusses on this aspect and provides recommendations for the creation of a new environmental watchdog, empowered to enforce environmental law and designed to amplify the voices of people and nature. This signposts the direction the UK¹² should take in responding to two age old legal questions with respect to post-Brexit environmental law: who is to enforce the laws we have,¹³ and who is to watch the watchmen themselves?¹⁴

The concept under discussion is not a new one. There are already a number of institutions both within the UK and from around the world that have powers and responsibilities in the oversight of (environmental) law. But the idea has particular meaning, force and value within environmental law because environmental law needs bespoke institutional mechanisms to give a voice to the voiceless. As a preliminary step to consider the appropriate design for this new institution, a selection of these comparable bodies from the UK and beyond will be surveyed. This will give a flavour of the sort of functions and powers that could be usefully deployed and identify lessons of good and bad practice from existing institutions.

⁵ Environmental law does not have a specific group of people to stand up and complain when their interests have been harmed. Compare employment law, which is designed to protect employees and employers: when it is breached, there will be specific employees or employers who will seek redress.

⁶ *Walton v Scottish Ministers* [2012] UKSC 44 [152], cited in Lord Carnwath CVO, ‘Judges and the Common Laws of the Environment – At Home and Abroad’ (2014) 26 *Journal of Environmental Law* 177, 182.

⁷ Emmanuelle Schön-Quinlivan, ‘The European Commission’ in Andrew Jordan and Camilla Adelle (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (3rd edn, Earthscan 2013) 95, 106.

⁸ *ibid*; Ludwig Krämer, *EU Environmental Law* (7th edn, Sweet & Maxwell 2012) 31-45. Though this has been far from perfect: see Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart 2014) 67-69.

⁹ Ludwig Krämer, ‘The European Court of Justice’ in Jordan and Adelle (n 7) 113, 116.

¹⁰ For a summary of the range and function of EU Agencies, see Lee (n 8) 44-47; Vaughne Miller, ‘EU Agencies and post-Brexit options’ (House of Commons Library Briefing Paper, Number 7957, 28 April 2017).

¹¹ Lee *ibid*.

¹² Bearing in mind the devolution agreements – see *infra* section 4.2.

¹³ *Le legge son: ma chi pon mano ad esse?* Dante, *Purgatorio* (Canto 16, 97).

¹⁴ *Quis custodiet ipsos custodes?* Juvenal, *Satires* (Satire VI, 347-48).

2 Looking backwards: functions of existing regulators

This section introduces the main features of some existing comparable watchdogs and oversight institutions. It considers first a range of UK bodies, both environmental and otherwise, before taking sight of some overseas institutions.

2.1 UK institutions

2.1.1 Committee on Climate Change

The Committee on Climate Change (CCC) forms an integral part of the UK's climate policy. Established under the Climate Change Act 2008, it advises government on matters relating to that Act, including by participating in the cyclical 'carbon budget' setting process. It is a statutory body that is independent from government and composed of relevant experts capable of analysing complex technical issues that arise in the implementation of climate law and policy.

The CCC produces annual reports on the progress made, and needed, towards meeting carbon budgets and comments on whether those budgets are likely to be met.¹⁵ These reports are laid before Parliament, and the Government must respond to them.¹⁶ In addition, the Government must seek and take into account the CCC's advice on a range of matters and processes that are integral to the Act such as the setting of the 5 yearly carbon budgets.¹⁷

The CCC's advice and recommendations carry legal, political and technical weight. At times, the Government must seek the Committee's advice before acting and must give reasons if it wishes to act contrary to that advice.¹⁸ This integrates the Committee's expert advice into the Government's legal obligations under the Act. The independence of the Committee is crucial, though inevitably hard to maintain for a statutory body – the CCC achieves some measure of independence through being jointly funded by BEIS, Defra and the devolved administrations.¹⁹

The Committee is an advisory body and does not have a legal enforcement role with respect to the Act. On the one hand, this limits the ability of the Committee to escalate matters when there is a clear risk of non-compliance with the Act's duties. On the other hand, it potentially emboldens the CCC's approach to criticising Government (in)action as the Committee is less threatening than if it did have such enforcement powers.

This division of powers between technical advice on policy formation and legal enforcement of existing legislation allows the CCC to fill a certain niche in UK environmental governance.

Though its effectiveness could be improved through the provision of more detailed and granular advice and enhancing the legal status of that advice, it plays a valuable role in the UK's attempts to reduce GHG emissions. However, its inability to flex legal muscles is telling of its limitations and any new enforcement body for UK environmental law would be complementary to the distinctive role played by the Committee.

2.1.2 Future Generations Commissioner, Wales

Another UK environmental governance body was established in Wales more recently under the Well-being of Future Generations (Wales) Act 2015 (WFGA). The Future Generations Commissioner (FGC) has a general duty to promote the sustainable development principle, as defined by that Act.²⁰ The Commissioner also has a role as guardian of future generations' ability to meet their needs – the FGC must encourage public bodies to take greater account of the long-term impacts of their actions and must monitor and assess the 'well-being objectives'.²¹

Like the CCC, the FGC has no enforcement role. Instead, it conducts reviews²² and provides advice and assistance to public bodies (including the Welsh Ministers).²³ In undertaking these functions, the FGC may make recommendations, which public bodies must normally take all reasonable steps to follow (and publish reasons if they wish to depart from the Commissioner's recommendations).²⁴ The FGC must also produce a 'Future Generations Report' once per parliamentary cycle:²⁵ public bodies must take these reports into account when meeting certain duties under the Act.²⁶

¹⁵ Climate Change Act 2008 s 36.

¹⁶ *ibid* s 37.

¹⁷ *ibid* ss 7(1), 9(1), 22(1) (for example).

¹⁸ *ibid* ss 7(6), 9(4), 22(7) (for example).

¹⁹ See Select Committee on the Natural Environment and Rural Communities Act 2006, 'The countryside at a crossroads' (Report of Session 2017-19, HL Paper 99, 22 March 2018) [65]-[68].

²⁰ WFGA s 18.

²¹ *ibid* s 18(b). For more on these duties, see Haydn Davies, 'The Well-being of Future Generations (Wales) Act 2015 – A Step Change in the Legal Protection of the Interests of Future Generations?' (2017) 29 *Journal of Environmental Law* 165, 168-71.

²² WFGA s 20.

²³ *ibid* s 19.

²⁴ *ibid* s 22.

²⁵ *ibid* s 23.

²⁶ *ibid* ss 8(8) and 9(7).

Haydn Davies notes that the role of the FGC will be particularly important given the exhortatory rather than mandatory nature of the duties in the Act.²⁷ That is, since “a great deal of judicial deference will be accorded to public bodies in the interpretation of ‘take account of’ requirements and what amount to ‘reasonable steps’”,²⁸ judicial review of these duties will be difficult. The ability of the FGC to compel public bodies to integrate sustainable development and the well-being objectives into their work in practice will thus be telling.

The FGC is still in its infancy, meaning it is too early to comment on its effectiveness – though its lack of enforcement powers means that, like the CCC, it will be dependent on developing and securing enough political sway and relevance. The FGC’s access to a wide range of expertise and information will help give weight to its recommendations.²⁹ Concern has also been raised over its independence since the Commissioner is appointed by the Ministers, rather than by the Assembly.³⁰ The impact of the FGC’s early interventions in issues such as the M4 relief road project³¹ may reveal more information about the Commissioner’s de facto power to influence decision-making by the public sector.

2.1.3 Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) was established under the Equality Act 2006 in order to promote and encourage understanding and good practice relating to equality, diversity and human rights and to monitor and report on the effectiveness of the law.³² Its core functions are (i) as an expert body on equality and human rights issues and (ii) as a strategic enforcer of the Equality Act 2010 and the Human Rights Act 1998.³³ It thus combines a broader range of roles than the CCC and the FGC, in particular being endowed with enforcement powers.

In order to fulfil its purpose, the EHRC can undertake a wide range of different functions. For example, it can conduct general inquiries into matters relevant to its remit,³⁴ make recommendations about improvements to the law,³⁵ identify relevant outcomes and indicators relating to equality and human rights,³⁶ or provide education and training.³⁷

These general powers are accompanied by legal powers to investigate and remedy non-compliance with the law. The EHRC can conduct formal investigations³⁸ and assessments³⁹ into particular actors where it has reason to believe that they may be in breach of a duty. As a result of these activities, the EHRC can agree an action plan with the entity under investigation,⁴⁰ or issue binding notices requiring authorities to comply with their duties.⁴¹ An example of this enforcement role in action is given on page 8.

Where public authorities still fail to comply with their legal duties, the EHRC can apply to the courts for orders requiring compliance.⁴² The EHRC can also initiate and intervene in legal proceedings relating to equalities and human rights law: while it has used the former power sparingly, it has intervened in a number of cases.⁴³

The EHRC also undertakes (at times confidential) ‘pre-enforcement’ action to resolve compliance issues through co-operation and dialogue. Undertaking such ‘pre-enforcement’ work represents the EHRC’s preferred approach to securing legal compliance. While the EHRC has a role overseeing compliance by individuals and private businesses, it also has an enforcement role over public authorities, including with respect to the public sector equality duty.⁴⁴

Finally, the EHRC also has a specific role in enforcing the Human Rights Act 1998 – it is empowered to bring judicial reviews based on a failure of a public authority to act in accordance with human rights.⁴⁵ It can thus act on behalf of those whose rights are threatened by government behaviour.

While the EHRC clearly has a greater range of powers than the two environmental bodies discussed above, there are drawbacks to this, as noted by Judith Squires:

“One structural problem for the [EHRC] here is that it has a range of duties, which include enforcement and proactive tasks ... To date, the commission has been widely held to be more concerned with the “soft” promotional tasks than with controversial enforcement work, especially enforcing anti-discrimination controls against private sector employers. It is for precisely these reasons that other European states have opted to draw a clearer division between enforcement and proactive tasks”.⁴⁶

²⁷ Davies (n 21).

²⁸ *ibid* 171.

²⁹ *ibid* 174.

³⁰ WFGA s 17(2); Davies (n 21) 171n36.

³¹ See ‘Commissioner challenges plans for £1.1bn M4 relief road’ (22/2/17), available at <https://futuregenerations.wales/news/commissioner-challenges-1bn-m4-road/> and FGC, ‘Annual Report and Accounts for the period 1 February 2016 to 31 March 2017’ 7-8.

³² Equality Act 2006 (EqA 2006) ss 3, 8-9, 11-12.

³³ ‘Comprehensive Budget Review of the Equality and Human Rights Commission’ (GEO January 2013) 3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/86430/Comprehensive_Budget_Review_of_the_EHRC_.pdf

³⁴ EqA 2006 s 16.

³⁵ *ibid* s 11(2)(b).

³⁶ *ibid* s 12.

³⁷ *ibid* s 13(1)(c).

³⁸ *ibid* s 20.

³⁹ *ibid* s 31.

⁴⁰ *ibid* ss 22, 23, 32(2)(b).

⁴¹ *ibid* ss 21, 32.

⁴² *ibid* s 22(6).

⁴³ See <https://www.equalityhumanrights.com/en/legal-case-work/legal-cases>

⁴⁴ See Equality Act 2010 ss 149, 153, 154.

⁴⁵ EqA 2006 s 30(3).

⁴⁶ Judith Squires, ‘Is the EHRC working?’ (*The Guardian*, 21 July 2009)

<https://www.theguardian.com/commentisfree/libertycentral/2009/jul/21/equality-human-rights-commission>

Investigation into the Metropolitan Police Service

Prompted by the Central London Employment Tribunal's findings in the case of *Carol Howard v Metropolitan Police Service*, the EHRC used its statutory powers to conduct a formal investigation into the unlawful discrimination, harassment and victimisation in the treatment of Metropolitan Police Service (MPS) personnel, in particular, of black and minority ethnic, female and gay officers.

The Commission's powers

Under section 20 of the Equality Act 2006, the EHRC has the power to investigate compliance with equality legislation when it suspects that an unlawful act may have been committed. These statutory powers enabled the EHRC to compel relevant individuals and organisations to provide evidence and carry out an in-depth examination of that evidence. This included documents regarding individual cases provided by the MPS, interviews with individuals, formal oral evidence sessions, relevant reports from other organisations, statistical analysis of MPS data, the MPS's Standard Operating Procedures (SOPs), roundtable discussions with stakeholders and workshops with MPS Outcomes.

Outcomes

The EHRC found that a widespread fear of victimisation existed among officers and staff and subsequently published a report⁴⁷ where it made a number of recommendations.

The MPS committed to take action as a result of the EHRC's investigation (and a report commissioned by the MPS^{47a}). The MPS agreed an Outcome Achievement Plan with the EHRC and to report back on its progress every six months.

Since the EHRC investigation was initiated, the MPS has delivered a significant number of improvements. This has included introducing new policies, creating dedicated teams of specialists, such as the MPS Discrimination Investigation Unit (DIU) to respond to internal complaints of discrimination, launching a telephone helpline for staff and managers, and training locally based mediators and grievance resolution champions.

Like the FGC, the head of the EHRC is appointed by government ministers. The Government also has some degree of control over its spending: this is problematic with, for example, a "spending decision to hire a lawyer to directly challenge government policy [being] signed off by that same government".⁴⁸ In addition, its finances are subject to a high level of scrutiny, in part due to financial mismanagement and difficulties in leadership in the past.⁴⁹ This lack of financial independence threatens the operational independence of the EHRC, demonstrating the difficulties of tasking and structuring a statutory body (which must be accountable to the public) with holding the Government to account.

2.1.4 Information Commissioner's Office

The Information Commissioner's Office (ICO) is an independent body set up to uphold information rights (freedom of information and protection of personal data) in the UK.

Established under the Data Protection Act 1998 (DPA), the Commissioner is appointed by the Crown following approval by the Culture, Media and Sports Select Committee.⁵⁰ It is accountable to Parliament.

The ICO promotes good practice (including through the production of guidance),⁵¹ collates similar information on relevant issues,⁵² lays annual reports before Parliament,⁵³ and monitors how public authorities are complying with their duties.⁵⁴ The ICO also investigates compliance with

⁴⁷ "EHRC, 'Section 20 investigation into the Metropolitan Police Service' (September 2016), available at <https://www.equalityhumanrights.com/en/publication-download/section-20-investigation-metropolitan-police-service>

^{47a} Roy Lewis, 'Review of Fairness at Work: Report' (ACAS 2015), available via <http://news.met.police.uk/documents/a-copy-of-the-report-by-professor-roy-lewis-of-acas-51330>

⁴⁸ Katherine Tonkiss, 'Contesting Human Rights through Institutional Reform: The Case of the UK Equality and Human Rights Commission' (2016) 20 *The International Journal of Human Rights* 491.

⁴⁹ *ibid.* Early reform of the EHRC also accompanied the coalition government's priorities: see Joint Committee on Human Rights, 'Appointment of the Chair of the EHRC' (Third Report of Session 2012-13, HL Paper 48, HC 634, 18 October 2012) [5].

⁵⁰ See <https://www.gov.uk/government/news/uks-new-information-commissioner-formally-appointed>

⁵¹ DPA s 51; <https://ico.org.uk/for-organisations/guidance-index/>

⁵² <https://ico.org.uk/about-the-ico/what-we-do/how-we-handle-concerns/>

⁵³ DPA s 52.

⁵⁴ <https://ico.org.uk/action-weve-taken/monitoring-compliance/>

the law, including by looking into concerns raised by the public.⁵⁵ It can issue binding information, assessment and enforcement notices⁵⁶ and prosecute for offences under the Act.⁵⁷ Under section 47 of the Act, failure to comply with an enforcement or information notice is an offence.

The ICO thus has a clear enforcement role with respect to the Data Protection Act, as with the EHRC. However, a key difference between the ICO and the EHRC is in the ICO's ability (indeed, obligation) to determine complaints they receive in-house: failure to comply with an enforcement notice is an offence. In contrast, the EHRC must apply to courts for an order before an offence can be committed. ICO decisions can be appealed before the First Tier (Information Rights) Tribunal.⁵⁸

The ICO can also issue monetary penalties for "serious contraventions of the DPA"⁵⁹ on "all data controllers in the private, public and voluntary sectors including ... Government Departments".⁶⁰ While this function is relatively constrained (as befits the role of the ICO in general), and connected to obligations under EU law, it demonstrates the possibility of establishing an independent institution capable of fining public authorities.

2.1.5 Special measures

Finally, there are two UK regulators that are capable of putting the bodies they regulate into so-called 'special measures'. These are Ofsted, with respect to educational institutions, and the Care Quality Commission, with respect to health institutions. Institutions can be put into special measures as a result of an inspection by the relevant regulator: this indicates that their performance is below what is deemed acceptable.⁶¹

Once placed in special measures, an institution must develop an action plan to improve performance.⁶² They may be supported in this, or subject to interventions by external parties. For example, with respect to NHS trusts, special measures may mean the appointment of "one or more appropriate partner organisations to provide support in improvement... The nature and amount of support from the partner will be tailored to the trust's requirements but will focus on addressing quality issues identified in the trust's action plan".⁶³ Special measures thus provides a way for a regulator to force changes in the operation of a public body.

2.2 Overseas

2.2.1 New Zealand Parliamentary Commissioner for the Environment

The New Zealand Parliamentary Commissioner for the Environment (NZPCE) has broad powers to investigate environmental concerns and is entirely independent from the government of the day. The NZPCE reports directly to Parliament, and was established under the New Zealand Environment Act 1986. Commissioners are appointed for five year terms and have a small office of staff with a range of relevant qualifications supporting their work.⁶⁴

The NZPCE's powers and functions are focused on investigating and reporting on environmental matters to Parliament, with the objective of maintaining and improving the quality of the environment.⁶⁵ The Commissioner audits policy formulation and implementation, reviews the systems of agencies and processes, investigates the effectiveness of environmental planning and management systems, reports and makes recommendations to Parliament.⁶⁶ However, the NZPCE is not an enforcement body: there is no requirement for the NZPCE's recommendations to be followed or implemented.

In performing their functions, the NZPCE must have regard to various matters set out in statute, such as the maintenance and restoration of important ecosystems, areas of particular value, matters of significance to Maori, the effects of proposals or policies on communities, and all reasonably foreseeable effects of a proposal, policy or other matter on the environment.⁶⁷

To date, the NZPCE has produced a number of rigorous reports and recommendations, particularly relating to climate change and conservation matters.⁶⁸ However, the NZPCE's impact on policy or decision-making is difficult to measure.⁶⁹

⁵⁵ DPA s 42.

⁵⁶ *ibid* ss 40, 41A, 43.

⁵⁷ *ibid* s 60.

⁵⁸ *ibid* s 48.

⁵⁹ ICO Guidance p9 <https://ico.org.uk/media/for-organisations/documents/1043720/ico-guidance-on-monetary-penalties.pdf>

⁶⁰ *ibid*

⁶¹ See Education Act 2005 ss 13, 44.

⁶² *ibid* s 15(2).

⁶³ 'Special measures for quality reasons: guidance for trusts' (Care Quality Commission and NHS Improvement, December 2017) 5, available at <https://improvement.nhs.uk/resources/special-measures-guide-nhs-trusts-and-foundation-trusts/>

⁶⁴ NZPCE, 'About Us: The Commissioner' available at <http://www.pce.parliament.nz/about-us/the-commissioner>.

⁶⁵ Environment Act 1986 (NZ) s 16.

⁶⁶ *Ibid*. See also Environmental Reporting Act 2015 (NZ) s 18.

⁶⁷ Environment Act 1986 (NZ) s 17.

⁶⁸ NZPCE, 'Publications' available at <http://www.pce.parliament.nz/publications>.

⁶⁹ The latest annual report notes that 59% of the Commissioner's recommendations were adopted by the NZ Government in 2016 and 2017. However, it also acknowledged that this was a somewhat crude measure of success – a high percentage of uptake could indicate a lack of ambitious recommendations, and a low percentage could indicate a lack of pragmatism rather than Parliamentary resistance. NZPCE, 'Annual Report for the year ended 30 June 2017' available at <http://www.pce.parliament.nz/media/1726/annual-report-for-the-year-ended-30-june-2017-final-draft-web.pdf>, 28.

2.2.2 Hungarian Office of the Ombudsman for Future Generations

The Hungarian Office of the Ombudsman for Future Generations was established in 2008, charged with protecting people's constitutional right to a healthy environment.⁷⁰ The Office was significantly downgraded in 2012.⁷¹ The Ombudsman engaged with the public to identify and respond to environmental issues from around the country, receiving around 200 substantive complaints a year (in a country with a population of around 10 million). It had a number of identifiable successes, such as preventing the construction of a shopping mall on the Dunakeszi peat bog and halting the privatisation of public water utilities.⁷²

From 1 February 2012, the post was closed and replaced by an Office of the Commissioner for Fundamental Rights, which has fewer resources and less power.⁷³ Importantly, the reforms removed the power to halt administrative decisions without applying to a court.⁷⁴ The existence (rather than necessarily the exercise) of this legal power drove many of the pre-2012 successes.

The pre-2012 Ombudsman took its role as intermediary between the people, the parliament and the powerful seriously – it sought to always involve the public in its processes, while also being technically knowledgeable about how to communicate with decision-makers. To facilitate this, it was composed of experts from different disciplines, including law, science, philosophy and spatial planning.

The possibility of the Ombudsman taking legal measures augmented its ability to influence government behaviour. A cohort of loud, emphatic and visible experts criticising the government's plans on behalf of public complaints proved difficult to ignore.

The Ombudsman was also able to review legislation: it could give opinions on draft statutory instruments,⁷⁵ recommend the amendment, repeal or creation of statutory instruments and other 'legal means of government control'.⁷⁶ The Ombudsman could also ask the Constitutional Court to review statutory instruments.⁷⁷

Finally, the Ombudsman had a 'think-tank' style role, undertaking strategic research and investigating long-term issues relevant to the environment, society, culture, infrastructure and so on. Through this function, it was able to develop models for sustainable local communities and alternative indicators of development.

The successes of the position (before it was abolished) can be put down to a number of factors. These include: the possession of meaningful legal powers; its independence (it was appointed by Parliament); the benefits of interdisciplinarity and systems-based thinking; its meaningful engagement with the public, aided by having a recognisable figurehead; and its astute balancing of co-operative and confrontational strategies.

2.2.3 Others

Other comparable institutions have been constructed elsewhere in the world, though normally without the kind of legal powers that are necessary in order to fill the post-EU governance gap.

For example, the German Advisory Council on the Environment (SRU)⁷⁸ appraises environmental matters and makes recommendations to government, and the (now abolished) Israeli Commission for Future Generations⁷⁹ played a role in law formation in the Israeli Knesset.

In the UK, the Royal Commission for Environmental Pollution (RCEP) produced more than 30 reports on a range of topics during a 41 year history advising the government of the day.⁸⁰ The interdisciplinarity, broad remit and "unusually long-term view"⁸¹ of the RCEP was particularly valuable in its engagement on complex problems such as climate change. However, a more formally cross-departmental position may have allowed it to maintain a greater degree of relevance and independence. Before its disassembly in 2011, the RCEP was able to be influential thanks to its composition of well-respected experts and good links to political actors.⁸²

⁷⁰ Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights (Ombudsman) (Hungary) ss 27A- 27H. See generally M. Nesbit and A. Illés, *Establishing an EU 'Guardian for Future Generations'. Report and recommendations for the World Future Council* (IEEP 2015) 4-6; Michael Rose, 'Constitutions, Democratic Self-Determination and the Institutional Empowerment of Future Generations: Mitigating an Aporia' [2016: 2] *Intergenerational Justice Review* 56, 63-64.

⁷¹ In large part due to the election of a populist government in Hungary.

⁷² Sándor Fülöp, ex Ombudsman, personal communication.

⁷³ See The Fundamental Law of Hungary (25 April 2011) Article 30.

⁷⁴ Act LIX (n 70) s 27B(3)(a).

⁷⁵ *ibid* s27B(3)(e).

⁷⁶ *ibid* s 25.

⁷⁷ *ibid* s 22.

⁷⁸ <https://www.bmub.bund.de/en/ministry/tasks-and-structure/independent-advisory-bodies/sru/>

⁷⁹ See <http://www.fdsd.org/ideas/knesset-commission-future-generations/>

⁸⁰ For an account of the work of the RCEP, see Susan Owens, *Knowledge, Policy, and Expertise: The UK Royal Commission on Environmental Pollution 1970-2011* (OUP 2015).

⁸¹ Susan Owens, 'Experts and the Environment – The UK Royal Commission on Environmental Pollution 1970-2011' (2012) 24 *Journal of Environmental Law* 1, 5.

⁸² Or "some conjunction of authoritative counsel with external circumstances and political will" *ibid* 11 and "its positioning within a range of significant networks" *ibid* 14, 18.

2.3 Lessons

A number of threads can be drawn from the above:

Firstly, there is a meaningful distinction between advisory roles and enforcement functions. Many bodies (eg the CCC, the FGC) have an advisory role, with no specific ability to enforce obligations on government bodies. Others are more focussed on enforcement (such as the Hungarian Ombudsman), and some have such roles combined (consider the EHRC). While having as many powers as possible may seem attractive, a more precise remit allows for greater focus in a body's activities and a more effective and dedicated workload.

Secondly, the possession of enforcement powers in a statutory body requires a careful political balancing act to be played: too much interference and hindrance of government action (no matter how illegal) may motivate the government of the day to reduce its powers and limit its activities. One can consider the downgrade in status of the Hungarian Ombudsman as an unpropitious symptom of its success.

Thirdly, it is clear that as well as legal weight, an effective oversight body must also have political clout. The provision of adequate levels of technical expertise within the body will help with this, and can be assured by appointment of appropriate staff and provision of sufficient funding. However, political weight will also be dependent on more nuanced matters.

Owens refers to the “good old boys”⁸³ who could be relied on to enhance the influence of the RCEP – such a system should not be endorsed or repeated, but rather replaced by strong and transparent institutional links with relevant and influential institutions.

Continued relevance to both stakeholders and public authorities is also key to political weight, as is a constant ‘tightrope-walking’ between engaging and critiquing government actors. The Hungarian Office provides good examples of both of these: it saw itself as having a ‘double constituency’ of both Parliament and the public, and it was careful to use its legal powers wisely.⁸⁴

Fourthly is the need to secure independence. Appointment by and accountability to parliaments rather than governments is a good first step here. However, there is also a need to consider ongoing operational and financial independence: Tonkiss describes an ‘independence-accountability tension’⁸⁵ here. Independence is crucial in order to be effective, but it is also essential for the activities of public bodies purporting to represent the marginalised to be accountable. The idea of accountability is clearly a complicated idea,⁸⁶ and possibilities such as ring-fenced funding and greater independence of other accountability mechanisms (such as the National Audit Office) demonstrate the systemic and cyclical nature of the independence-accountability tension.



⁸³ *ibid* 18.

⁸⁴ Personal communication with Dr Sándor Fülöp.

⁸⁵ Tonkiss (n 48)

⁸⁶ See Maria Lee, ‘Environmental Accountability of Government After Brexit’ (UCL European Institute Working Paper, 2017) 2-3, 11.

3 Looking forwards: functions of a Nature and Environment Commission

As seen above, there is a wide range of functions that could be exercised by a Nature and Environment Commission. This section will outline those legal powers that would be of most value in closing the governance gap, improving the effectiveness of environmental law by assuring compliance by public authorities.

Consideration will primarily be given to functions that can replace and improve on the existing enforcement powers of the European Commission and CJEU before considering other potentially useful roles. The section therefore comes in three parts: 3.1 looks at enforcement powers, 3.2 at access to justice and public engagement and 3.3 at more general governance functions, such as reviewing and advising on government delivery plans and contributions to the future development of law and policy.

It is important to note that it may not be appropriate for all the below functions to be housed in the same body. The focus of this report is on the creation of a new body with a focused remit on compliance and enforcement. Although governments should also look more widely at how to improve environmental governance mechanisms in the light of Brexit through new environmental legislation, an enforcement body is an essential piece of this jigsaw.

3.1 Environmental enforcer

The most pressing task for post-EU governance structures is improving and ensuring compliance with existing environmental law by public actors. Environmental laws are notorious for their poor implementation and enforcement,⁸⁷ in part because their fulfilment often depends on sustained government action (rather than one-off omission). Environmental laws frequently require public bodies to actively bring about change, rather than simply refraining from prohibited behaviour. The economic and political implications of, for example, establishing clean air zones in urban areas, mean that (i) government can be slow to act and (ii) courts can be reluctant to challenge balancing decisions taken by government.⁸⁸

This subsection considers two main courses – one general, one specific – that the Commission should be able to pursue in order to improve compliance with environmental law. Both of these options should be legally meaningful, with the appropriate level of legal weighting and enforceability attached to the Commission's words.

Firstly, the Commission should be able to conduct broad thematic inquiries into areas where compliance is generally and systemically poor, producing guidance and recommendations based on best practices from across the UK and beyond. This guidance must carry political and legal weight and function as a constructive way to improve environmental performance.

Secondly, it will at times be necessary to take more focussed action for compliance resolution when a particular public authority is in clear breach of the law. While the Commission should initially seek to remedy such situations through dialogue and collaboration, recourse to legal action must be available for when such measures prove ineffective. Under the current system, matters can ultimately result in the CJEU issuing fines for non-compliance, and similarly dissuasive and effective sanctions and remedies must remain available at national level.

Environmental law often bestows a considerable amount of discretion on government actors in the fulfilment of their duties. This discretion, while sometimes justifiable, at times undermines the enforcement of environmental law in the courts⁸⁹ since general judicial review can normally assess only the legality of a decision rather than engage in the technical merits of one.⁹⁰ The former standard is more limited, since it will normally only encompass matters of procedural impropriety or manifest irrationality when statutory duties place discretion on decision-makers, as environmental law often does.

The functioning of the Commission should seek to address and improve on this shortcoming by incorporating a form of merits review (in an initially non-judicial setting, though backed up by enforceability before the courts).⁹¹ This will allow for the quality of environmental decision-making to be properly assessed and environmental matters to be given proper weighting rather than being seen as box-ticking exercises.

⁸⁷ See eg Andrew Jordan and Jale Tosun, 'Policy implementation' in Jordan and Adelle (n 7) 247; Thomas Greiber (ed), *Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty* (IUCN 2006).

⁸⁸ See Maria Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' [2018] *Journal of Energy & Natural Resources Law: Commentary* 1, 6-7.

⁸⁹ Lee (n 86) 7; Richard Macrory 'Consistency and Effectiveness – Strengthening the new Environment Tribunal' (Centre for Law and the Environment, UCL, January 2011) [26].

⁹⁰ For an overview of the problems in the UK, see Communication to the Aarhus Convention Compliance Committee ACCC/C/2017/56 United Kingdom (13 February 2015), available at https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Communication_UK_RSPB_07.12.2017.pdf

⁹¹ As Richard Macrory notes, "as a matter of principle and good practice a merits appeal to an independent tribunal should generally be made available". Macrory (n 89) [19].

An enhanced role for courts in making specific mandatory injunctions based on the work of the Commission would provide a highly valuable addition here. As an expert and specialist body, the Commission would be complementary to the courts, enabling them to play a more effective role in assuring environmental compliance.

3.1.1 The General: Thematic Inquiries and Guidance

At times, failure to comply with an environmental law may be systemic and widespread. Authorities across the UK may be in breach of standards, or decision-making may frequently fail to give the proper weight to relevant environmental considerations. In such circumstances, it will be useful for the Commission to be empowered to conduct broad **Thematic Inquiries**. The purpose of such inquiries is to raise the political profile of an issue and improve practice by producing guidance, sharing best practices and building capacity amongst those responsible for compliance.

Thematic Inquiries would not be targeted at particular named actors or concerned with specific instances of a breach. Rather they would serve as general surveys of relevant activities, barriers to compliance, and levels of understanding. They will look for, compile and analyse patterns and themes behind poor compliance, and identify how compliance can be improved.

While Thematic Inquiries may be focussed on a particular legal duty, their scope could be broader – potentially also encompassing policy commitments at both national and international levels. For example, an Inquiry could be conducted into the application of the precautionary principle in housing decision-making; meeting air quality standards in urban areas; or achieving targets regarding the use of ‘green prescriptions’ to improve peoples’ mental health through contact with nature.

As well as substantive obligations, the Commission may also need to inquire into compliance with ongoing reporting and planning obligations that are core to the implementation of environmental law.⁹² Government and public authority reporting, and the Commission’s responses, will help identify and inform Thematic Inquiries. The Commission should use its expert vantage point to identify those areas where compliance is generally poor or knowledge among stakeholders lacking in order to prioritise which topics to look at.

Outputs from Thematic Inquiries should include **Commission Guidance** directed at those actors responsible for complying with environmental duties. Guidance should be detailed,⁹³ identifying steps that public authorities can take in order to comply with their duties, while being aware that the precise actions and omissions required will vary according to the remit of public authorities and differences in ecological and geographical contexts.

Commission Guidance must also be given a meaningful legal status that is befitting of an independent expert body. This requires placing duties on relevant authorities with respect to that guidance. There are a number of options here,⁹⁴ but the strongest would be something comparable to recommendations made by the FGC: a public body must “take all reasonable steps” to follow its recommendations or give reasons for not doing so.⁹⁵ While some residue of governmental discretion remains here, this is necessary: failure to follow the guidance of an unelected Commission cannot immediately imply a breach of the underlying duty by the elected government, though such failure must be heavily unadvisable.⁹⁶

To ensure this, courts should give significant material weight to Commission guidance and recommendations in any relevant judgment. In this regard, Davies notes that this is “fairly routine in public administration in the UK and such recommendations are, in practice, usually observed by public bodies”.⁹⁷ The same must hold true of the Nature and Environment Commission’s recommendations. In addition to a befitting legal status of Commission Inquiries and Guidance, the political status given to them is also important: this has implications for both the resources made available to comply with duties, and their visibility to decision-makers.⁹⁸

A Thematic Inquiry may also need to determine and signpost when poor systemic compliance is a function of failures elsewhere in government. Delivery agencies may be under-resourced, or counter-productive incentives may arise from other areas of government policy. In such cases, the Commission should advocate *on behalf of* environmental agencies to government departments (including the Cabinet Office) to make the case for systemic changes to advance nature’s interests and prevent illegal behaviour by other branches of government. This again should include the possibility of making specific recommendations with significant and material legal and political weight.

⁹² See below subsection 3.3.

⁹³ More detailed than existing guidance on the NERC Act biodiversity duty, for example. See <https://www.gov.uk/guidance/biodiversity-duty-public-authority-duty-to-have-regard-to-conserving-biodiversity>

⁹⁴ cf s 29(2) and s 31 of the Counter-Terrorism and Security Act 2015 (See *Butt v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin)). See also *Bracking v Secretary of State for Work and Pensions* [2013] ECA Civ 1345 [26]; *Meany, Glynn & Sanders v Harlow District Council* [2009] EWHC 559

(Admin) [50ff]; House of Lords Select Committee on the Equality Act 2010 and Disability “The Equality Act 2010: the impact on disabled people” HL Paper 117, Report of the Session 2015-16, 24 March 2016 [346].

⁹⁵ Wellbeing of Future Generations (Wales) Act s 22(1). See also Data Protection Act 1998, s 55C(6).

⁹⁶ See *R (Bradley and others) v Secretary of State for Work and Pensions* [2009] QB 114 [43]; *Re the application by JR55 for Judicial Review* (Northern Ireland) [2016] UKSC 22.

⁹⁷ Davies (n 21) 172.

⁹⁸ For discussion on this, see NERC Committee (n 19) [182-210].

During the conduct of an Inquiry, the Commission may become aware of a specific instance of a breach that it considers warrants closer attention. In such cases, it will be possible for the Commission to enter into a Compliance Resolution process with that authority in order to prevent continued breach of obligation.

3.1.2 The Specific: Compliance Resolution and Action Plans

In contrast to the general outlook of an Inquiry, it may also be necessary for the Commission to investigate the compliance of particular authorities with specific statutory duties. A process should be created whereby the merits of decisions can be assessed in an expert forum. This process should be linked to the courts so that legal backing can be given to such assessments.

When the Commission has reason to believe that an authority is in breach of a duty (or likely to be in breach), then it should be empowered to enter into a **Compliance Resolution** process. This process should be dialogical and co-operative, involving relevant stakeholders with the ultimate goal being to improve compliance, rather than punish non-compliance.

The Commission, the authority in question, and others should work together to identify the barriers to compliance and the steps needed to meet legal requirements. This may rely on the technical expertise available to the Commission – for example where local authorities do not have access to in-house ecological experts. While government bodies such as the Environment Agency may have their own in-house expertise, the outside perspective provided by the Commission should be both valuable and respected. The process should also involve continual and iterative engagement with stakeholders, which the Commission ought to be well-placed to broker.

The outputs of the process will include reports that identify any illegal activities, the barriers to compliance and steps required to improve performance. When there is a risk of continued non-compliance, the Commission will seek to develop and agree an **Action Plan** in collaboration with the authority involved. This Action Plan will set out steps required in order to achieve compliance and the time frames for doing so. This process is comparable to the EHRC's investigation into the Metropolitan Police Service outlined above. Failure to meet the terms of an Action Plan, or to agree to an Action Plan in the first place, should result in escalation to more formal and biting legal proceedings.

3.1.3 Formal Notices and enforcement before the courts

While improving compliance through conciliatory approaches should be the Commission's preferred method, recourse to more formal legal proceedings may at times be necessary. At the very least, the ability to threaten an increase in pressure will add weight to the Commission's words through the deterrent effect it will create.

The Commission should be able to issue a **Formal Notice** that requires certain acts (or omissions) from the authority in question. This may include the performance of steps set out in an Action Plan, the sharing of relevant information,⁹⁹ or refraining from an act that may be in breach of the law. A Formal Notice will require a written response from the authority within a specified timeframe.¹⁰⁰ In contrast to an Action Plan, they can be issued unilaterally by the Commission.

It must be possible for Formal Notices to be enforceable: they should have legal effect with courts empowered to issue orders requiring authorities to act in accordance with them.¹⁰¹ The specificity of these orders (and their relation to existing Action Plans or Commission Guidance) is considered below. Sanctions must also be available for failure to comply with a court order, with the Commission able to make recommendations in this regard.

In exercising its legal powers, the Commission will need to 'walk the tightrope', making sure that it is both sufficiently critical of and collaborative with government actors. The Commission should be seen as a 'critical friend' of environmental departments and agencies: while working to improve their performance, it can also increase their status within intra-governmental negotiations for resources and political priority.

3.1.4 Remedies and sanctions

The political and legal pressure accruing from Commission Inquiries and Investigations, Action Plans and Formal Notices to comply may still not be enough to secure compliance with environmental law. The Commission needs to be backed up by the courts where necessary. When breaches of the law are repeated or serious, courts must be able to back up the words of the Commission with effective and dissuasive sanctions and remedies. If laws are not properly enforced, then the behaviour they seek to prohibit is, in effect, permitted.

⁹⁹ In exceptional circumstances, it may not be appropriate for environmental information to be shared publicly for reasons such as public security. In such cases, the information should be provided to the Commission, but not released publicly.

¹⁰⁰ Compare the notices that can be issued by the ICO and EHRC, subsection 2.1 above.

¹⁰¹ This enforcement process is comparable to the pathway available to the EHRC: under s 22(6) of the Equality Act 2006, the EHRC may apply to the courts for orders relating to agreed action plans. Under s22(9) of that Act, failure to comply with such an order is an offence.

The value of sanctions can be seen by considering the fines procedure within EU law under Article 260 TFEU.¹⁰² The CJEU, on application by the European Commission, can fine Member States for failure to comply with EU law. The impact of this ultimate backstop is clearly visible, as recognised by the House of Lords EU Select Committee:

“The evidence we have heard suggests the effectiveness of the EU regulatory regime is thanks in part to the deterrent effect of the power of EU institutions to hold Member States to account and to levy fines upon them for non-compliance”.¹⁰³

The basic point is that it must not be possible to break the law with impunity. Domestic courts, based on recommendations from the Nature and Environment Commission, must be able to impose appropriate sanctions and remedies on those that repeatedly endanger the health of people and nature by breaking the law. The right to an effective remedy is crucial, and legislation establishing the Nature and Environment Commission should enshrine it. A number of options are available to give the Commission (through the courts) a bite that backs up its bark. These are considered below.

3.1.5 Specific structural injunctions

Orders and injunctions typically provided by UK courts are either prohibiting orders or mandatory orders. While mandatory orders require a public authority to take action, much discretion is still left in the hands of the executive (and the courts as to whether to impose an order). This is why ClientEarth have had to continue taking the UK Government back to court for failure to comply with its air quality duties: the plans the Government keeps producing in response to court orders are inadequate and illegal.

However, it is possible to improve this approach. The courts can take greater responsibility for the crafting of effective remedies through the use of more specific and detailed injunctions. In the United States, ‘structural injunctions’ have become commonplace in the civil rights arena: these orders “direct the legislative and executive branches of government to bring about reforms defined in terms of their constitutional obligations ... the court retains a supervisory jurisdiction to ensure the implementation of those reforms”.¹⁰⁴

India also has a history of courts requiring specific environmental actions by the executive, including “the famous case in 1998 in which the Indian Supreme Court took drastic action to address the problems of air pollution, by ordering that all buses in the city must be converted from diesel fuel to compressed natural gas”.¹⁰⁵ While such injunctions are no panacea,¹⁰⁶ they can serve as an important means to increase the effectiveness of environmental law.

In Colombia too, the Supreme Court of Justice has recently issued an order requiring the government to draw up plans (with the involvement of affected communities and expert groups) to reduce deforestation to zero and mitigate greenhouse gas emissions.¹⁰⁷ This order was based on a case filed on behalf of 25 children, complaining of threats to their rights to a healthy environment, to life, health, food and water.

While UK courts are traditionally reticent to substitute their own decisions for those of the executive due to the separation of powers, the expert and specialist role of the Commission provides a route to compel improved environmental decisions through the judiciary. Where the court is minded that an Action Plan proposed by the Commission would bring about compliance with the duty in question, it should simply point to that Action Plan and place a **Specific Mandatory Order** requiring those steps to be taken.

The Compliance Resolution process, backed up by the courts, thus allows for the ingress of merits review from an initially non-judicial setting to a legally binding remedy. The Commission can clearly indicate and recommend what it believes to be the best legal approach for public authorities, and set this out in an Action Plan, which can then be the subject of a court order.

Getting the level of specificity of an injunction right is key to properly balancing environmental and democratic interests. In this regard, the courts could operate according to the following principle: the specificity of an injunction should be directly proportional to the recalcitrance of the government actor. The more the government has failed (or even refused) to fulfil its statutory duty, the greater the need for the court to enjoin specific remedial steps.

¹⁰² Note that this does not equate with the EU’s obligations under Article 9(4) of the Aarhus Convention, since it does not permit citizens and NGOs to access its courts.

¹⁰³ House of Lords European Union Committee, ‘Brexit: environment and climate change’ (12th Report of Session, HL Paper 109, 14 February 2017) [71]. The same observation was made by the UK High Court in *ClientEarth 2*, noting that: “a principal driving factor in [Defra] selecting 2020 [as a target compliance date] was not the obligation to remedy the problem as soon as possible but to remedy it in time to avoid EU infringement proceedings”. While such reasoning contributed to “the department err[ing] in law in selecting too distant a date”, the force of hard legal sanctions is clear: *ClientEarth (No.2) v Secretary of State for the Environment, Food and Rural Affairs and others* [2016] EWHC 2740 (Admin) [66], [69].

¹⁰⁴ Danielle Elyce Hirsch, ‘A Defense of Structural Injunctive Remedies in South African Law’ (2007) 9 *Or. Rev. Int’l L.* 1, 16.

¹⁰⁵ Lord Carnwath (n 6) 178, citing *MC Mehta v Union of India* [1998] 6 SC 63.

¹⁰⁶ *ibid* 180-81.

¹⁰⁷ Dejusticia, ‘In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation’ (5 April 2018) <https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concedetutela-de-cambio-climatico-y-generaciones-futuras/>

Alongside specific injunctions, there may also be times where it is possible and desirable to rectify environmental damage caused as a result of a breach by a public authority (eg damage to a protected site as a result of an unlawful licence being granted). In such instances, it should be possible for the courts to require cleanup activity, with costs incurred by the body responsible for the illegal activity. A legal regime similar to that found in Part 3 of the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 can be used. Where remediation is not possible, or where the precise damage caused is not obvious, more creative techniques such as those employed by the UN Compensation Commission¹⁰⁷⁸ could also be used to determine financial costs. Again, this should involve the expertise of the Commission.

3.1.6 Fines

As noted above, the EU fines system is a well-known deterrent for government infraction within the EU legal system. The European Commission has produced detailed guidance on calculating the penalty payments it proposes to the CJEU, which take into account the seriousness of the infringement, its duration and the likely deterrent effect of the fine.¹⁰⁹ But the CJEU has ultimate discretion in setting the fines, taking all of the relevant circumstances of the case into account,¹¹⁰ including the ability of the government in question to pay¹¹² and proportionality.¹¹²

Although it is not straightforward to transfer such a system of fines into a domestic setting, it may be possible to do so with appropriate structures and safeguards, learning lessons from the EU guidance and experience. Fines should be used wisely and strategically as it is not readily apparent that a fine will always be the most effective way of improving compliance by already underfunded public agencies.

The ICO provides an example of a domestic enforcement agency with the power to fine actors who break the law. This includes public bodies: “the power to impose monetary penalties applies to all data controllers in the private, public and voluntary sectors including ... Government Departments”.¹¹³ Looking elsewhere, the Bavarian environment minister has been fined three times by the administrative courts for failure to comply with air pollution laws.¹¹⁴ Thus it is plausible that fines could be made available as a sanction for failure to comply with environmental law. The UK Government has previously endorsed the value of fines in ensuring compliance with (EU) law and indeed was a “vocal advocate of introducing penalty payments in the Maastricht Treaty”.¹¹⁵

An important point to consider is where the money will go. It seems obvious that any funds raised should not directly support the key functions of the Commission, as this would too readily expose the Commission to the charge that their motivation for pursuing fines is distorted. Nor would it be appropriate for the money to be plugged into existing government spending programmes (such as the new land management policy that will replace the EU’s Common Agricultural Policy). Funding for nature must not be dependent on others damaging it.

Instead, the proceeds of any fines could go into a ring-fenced trust fund, managed by an independent Panel of the Commission. This Panel would distribute the funds to projects that further charitable objectives that are relevant to the Commission’s purpose. Projects funded in this way must pass an additionality test: the funds must not be used to allow public or private bodies to meet their statutory duties, but rather must help deliver activities that otherwise would not have received public funding.

The second important point to consider is whether fining will be an effective motivator or a counter-productive distraction. It is possible that in some instances an authority is failing to comply with legislation due to under-resourcing. Fining such an entity hardly seems likely to further promote environmental interests. Through its earlier work, the Commission should be in a position to recommend a sanction that is most likely to be effective at improving environmental conditions: fines should be one option here, but not necessarily the default.

¹⁰⁸ The UN Compensation Commission was set up to process claims and pay compensation for damages suffered as a result of Iraq’s invasion of Kuwait, as per UN Security Council Resolution 687 (1991), which stated that Iraq was liable for, inter alia, “any direct loss, damage, including environmental damage and the depletion of natural resources” [16]. Payments were made for claims relating to long-term public health impacts and revegetation of damaged terrestrial ecosystems – see UNCC, ‘Post-Conflict Environmental Restoration: The UNCC Follow-up Programme for Environmental Awards’ (2012-13) 24, https://www.uncc.ch/sites/default/files/attachments/Publication_Final%20-%201523671_E_Web.pdf.

¹⁰⁹ http://ec.europa.eu/atwork/applying-eu-law/docs/sec_2005_1658_en.pdf

¹¹⁰ Case C-121/07 *Commission v France*.

¹¹¹ Case C-407/09 *Commission v Greece*.

¹¹² Case C-533/11 *Commission v Belgium*.

¹¹³ Information Commissioner’s Office, ‘Information Commissioner’s guidance about the issue of monetary penalties prepared and issued under section 55C(1) of the Data Protection Act 1998’ (December 2015) [14].

¹¹⁴ ClientEarth, ‘Munich air pollution case: further failure may mean prison sentence for minister’ (29 January 2018), available at <https://www.clientearth.org/munich-air-pollution-case-minister-failure-may-mean-prison-sentence/>

¹¹⁵ Raphael Hogarth and Lewis Lloyd, ‘Who’s afraid of the ECJ?: Charting the UK’s relationship with the European Court’ (Institute for Government, December 2017) 10-11.

3.1.7 Relocation of powers and other sanctions

In some cases, a more effective sanction may be to remove relevant powers and duties from the public authority in question and pass them to a suitable alternative. Such a sanction may be attractive when the Commission believes that failure to comply is a result of a failure to prioritise the issue, reluctance to commit adequate resources to the matter, or other operational failings.

There are similarities between this idea and the 'special measures' procedure available to Ofsted and the Care Quality Commission. The degree of freedom that the Commission should have in recommending where responsibilities should be transferred would be subject to political sensitivities, especially with regards devolution.

Other available sanctions could include suspending senior members of staff within an organisation responsible for delivery, or even criminal sentences for contempt of court. This latter approach was argued for by German NGO DUH in a case before the German Federal Administrative Court, with the Court holding that a jail sentence is, in principle, an available sanction.¹¹⁶ In Colombia, public officials have been handed prison sentences for failure to comply with court orders.¹¹⁷

3.1.8 Other legal proceedings

The Commission should also have the power to initiate proceedings for general matters that are relevant to its functions and purpose. Such a power cannot replace the bespoke Compliance Resolution process because of the general limitations of existing judicial review as outlined above,¹¹⁸ but may still be useful. However, standing to initiate and participate in judicial reviews may allow the Commission to effectively carry out its functions in the form it considers most appropriate.

The Commission should also be able to intervene as a third party in legal proceedings that are relevant to its functions and purpose. Its role in such interventions should be to provide expertise and advice, while looking to protect and promote the interests of nature and the environment. Alternatively, the Commission may wish to assist individuals or groups involved in legal proceedings relevant to its purpose.

The enforcement of environmental law is essential to turning aspirational laws into actual improvements in the health of nature and people. This requires concerted action by a number of actors: first and foremost those public authorities who have a duty to protect and enhance our environment, but also the courts tasked with forcing the government's arm. A Nature and Environment Commission, as an environmental enforcer, can help bring these together.

3.2 A voice for people and nature

A key role of the Nature and Environment Commission is to represent and fight for the interests of nature and people. It must take this role seriously by working closely with local communities and other public interest groups in open, accessible and iterative processes. This is not only crucial to the Commission's functioning (the knowledge of local people will be essential in setting its strategic direction), but also to its longevity: an organisation treasured by the electorate will be much harder for government to dismantle. The value of rich social ties is evidenced in lessons from Hungary and New Zealand (see box below)

Lessons from Hungary and New Zealand

"The [Hungarian] Commissioner's role in civil society is widely accepted due to ... the frequent exchanges of information with citizens. Careful interdisciplinary analyses support cases in which local or professional groups seek to protect the environment. The form of engagement, also followed by the New Zealand Commissioner, is known as 'reiterative procedure': there is a site visit, conversations with local people and officials who actually work on the case, and before a legal opinion is finalised, a draft statement is sent to the parties concerned. This methodology has proven to be effective in raising credibility of the office and support for the procedures. Sandor Fülöp, points out that this method (some may call it crowd sourcing) allows for them to detect "system flaws": if the number of cases brought to them is very high on a particular issue or in a particular region, this indicates that governance is not serving the population in a satisfactory manner."¹¹⁹

¹¹⁶ ClientEarth (n 114).

¹¹⁷ Javid Martínez, 'Ordenan dos días de cárcel para alcalde (e) de Cartagena Sergio Londoño Zurek' (El Heraldo, Bolívar, 9 June 2017), <https://www.elheraldo.co/bolivar/ordenan-dos-dias-de-carcel-para-alcalde-de-cartagena-sergio-londono-zurek-370553>

¹¹⁸ *supra* ns 89-91 and text accompanying.

¹¹⁹ Maja Göpel, 'Ombudspersons for Future Generations as Sustainability Implementation Units' (Stakeholder Forum 2012) 11.

The Commission's work in general should involve processes that are iterative, open, deliberative and consultative. Interested parties should be involved and consulted with in its priority setting, including through consideration of the complaints received. Regular open sessions to discuss matters on the Commission's agenda and consultation on proposed topics for review or inquiry would contribute to this.

Outlined below are two key ways in which the Commission can make sure that it is properly fulfilling its remit. However, these compartmentalised functions alone will not be enough: the Commission must ensure that its working culture, practices, language and methodologies keep it close to and alongside those whose interests it seeks to represent. The Commission should not be a faceless bureaucracy but instead approachable, with identifiable and familiar contact points. It must be owned by society, not by government.

3.2.1 Complaints

Citizens and civil society organisations can make free complaints to the European Commission about failures to comply with EU environmental law.¹²⁰ This is an important and valuable (though imperfect) option that improves accountability and access to justice in environmental matters.

The Nature and Environment Commission must replace (and improve on) this by receiving and reviewing complaints and petitions from individuals and interested groups. The Commission should respond to these complaints and petitions, and take appropriate action in response to them. This might include clarifying the facts or the law relating to a complaint, providing or requesting further information on the matter, entering into further dialogue with the complainant and other parties, or initiating a Compliance Resolution procedure.

The empowerment, advice and information sharing aspect of this is important: the Commission should raise peoples' awareness of their rights and of what problem-solving tools are available (including through the Commission's own procedures). The Commission should guide and encourage complainants to use the most appropriate tool, including those from international law, and continue to provide legal support throughout this process.

The complaints process should not function as a closed 'black box' where, once a complaint has been submitted, there is no further exchange of information. Instead, the views and knowledge of the complainant(s) should be continually and iteratively sought throughout any follow-up via Compliance Resolution procedures or otherwise. People should feel, and be, a part of the process of identifying solutions. As well as the direct value of this, there will be knock-on benefits too, helping enrich people's sense of belonging with their local environments and improving the perception of environmental law as a public good. Furthermore, a Commission that is known, respected and liked by the electorate will be harder for future governments to weaken or dismantle.

While a complaints model based on notions of openness and deliberative justice would improve the participation of the public in the enforcement of environmental law in the UK, it is crucial to note that it cannot replace providing proper access to justice to citizens and civil society. The Commission can complement, but not replace, improved measures by the UK to comply with the Aarhus Convention.

Finally, while the complaints process should be open to all to maintain democratic credibility, the Commission must ensure that the work it undertakes is aligned with its remit to protect and enhance nature and the environment. Thus while legitimate legal complaints may arrive from a number of angles, the work of the Commission is not undirected.

¹²⁰ Complaints can be made online via https://ec.europa.eu/assets/sg/report-abreach/complaints_en/index.html

3.2.2 Advocating on nature's behalf

In addition to responding to public complaints and so representing the interests of people, the Commission should also seek to represent the interests of nature in a wide variety of public forums. The need to speak up for the voiceless is one well known to environmentalists and environmental law: the need to do this in law is key, and part of the justification for the establishment of a Nature and Environment Commission. However, nature's voice must also be heard in other places too, since by the time one reaches a courtroom, it is often too late to avert environmental damage.

The Commission should therefore be free to engage widely in public forums to represent the interests of nature and the environment. This role should not be demarcated or delimited: the Commission should have complete freedom of speech in this regard. Recent legislation in New Zealand has established two bodies – the office of Te Pou Tupua¹²¹ and the Te Urewera Board¹²² – who are to act on behalf of the Whanganui River¹²³ and the National Park of Te Urewera respectively, both of which are declared to be legal persons by their respective Acts.

The experiences of these bodies can help the UK develop pioneering approaches to representing nature's interests. By providing nature with a mouthpiece in forums such as Parliamentary Committee Inquiries, televised political debates, local planning meetings, national infrastructure decisions and relevant legal proceedings, the environment will no longer die in silence, and nature will no longer have no voice.

This representative advocacy role potentially breaks new ground for the Commission to tread on. While stopping short of bestowing legal guardianship on the Commission, it does provide the Commission with a specific role and responsibility to represent nature in order to protect and promote its interests. Determining what exactly nature's interests are will in some instances not be straightforward (though in many cases it will be).

Expertise from a range of backgrounds will be needed to make informed and effective strategic and operational decisions. This includes incorporating knowledge from ecological science, philosophy and law, and interweaving experience from local communities, historical contexts and relevant examples from other jurisdictions.

3.3 Review and evaluation

A third set of functions required to help close the governance gap relate to the need for continuous planning – and review and update of those plans – in order to effectively implement environmental law.¹²⁴ These plans must also be reported on, reviewed and progress against them monitored. These roles are worth considering even though they are distinguishable from enforcement powers because effective reporting and reviewing provide an essential link to determining areas of potential non-compliance.

The starting point for this is clear and precise obligations on government departments and responsible delivery agencies to produce regular plans detailing how they intend to meet their obligations and to report against progress. The UK must ensure that its statute book does not lose any of these obligations as it exits the EU, in particular as the European Union (Withdrawal) Bill may fail to retain aspects of EU Directives that have neither been transposed into UK law nor been the subject of a pre-exit day court case.¹²⁵ Obligations from EU law to report against progress must also be retained, with reports submitted first to parliaments and in due course to the appropriate specialist body.

There are a number of review and evaluation functions that would benefit environmental law. It is worth noting that it may not be appropriate for all of these functions to be performed by the same body. In particular, functions relating to the design and formulation of new law may be better exercised by a different entity than that responsible for ensuring compliance with existing law. Thus, the establishment of more than one new body may be necessary for the UK to develop a truly world-leading environmental governance system.

¹²¹ Te Awa Tupua Whanganui River Claims Settlement Act 2017 (Te Awa Tupua Act) Part 2, Subpart 3.

¹²² Te Urewera Act 2014, Part 2.

¹²³ More accurately to be the face of and act on behalf of Te Awa Tupua, which is "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" – s 12 Te Awa Tupua Act.

¹²⁴ See Lee (n 8) 90-92 for both the value, and the difficulties, of reviewing and reporting within EU environmental law.

¹²⁵ Consider clause 4(2)(b) of the Bill as introduced.

3.3.1 Annual Progress Reviews

Regular reporting on progress against government plans is crucial to properly implementing environmental law. Publishing data on actual performance improves accountability and provides the public with the tools it needs to stay informed of government successes, failures, omissions and aspirations. Such reports are valuable because they help democratise environmental information and are the first stepping stone to holding the Government to account. If produced in a comprehensive, timely, detailed and accessible manner, they can improve transparency and build political pressure to comply with environmental laws.

However, reports produced by government are themselves not enough. It is also crucial that these reports are analysed, evaluated and critiqued: this is a job that could be performed by the Commission, producing annual **Progress Reviews** for Parliament(s) that review and analyse government performance with respect to environmental obligations and commitments.¹²⁶ This should include, but not be limited to, review of the UK Government's annual 25 Year Plan (25YP) reports¹²⁷ and the likelihood of achieving compliance with targets that will be set under the 25YP.

Progress Reviews should consider government action across different sectors and departments, identify systemic reasons behind successes and failures and criticise government policy that is damaging the environment or impeding nature's recovery. This would provide an early stage at which the Commission can assess and review government policy, seeking to identify and correct any potential problems before they occur.

In contrast to the descriptive character of government reports, Progress Reviews should be analytical: they will critically assess the measures taken (or not taken) by public authorities and the implications these have had for environmental conditions. They will identify which measures have been effective and which have not. Government reports will consider *what* state the environment is in; Progress Reviews will look at *why* the environment is in that state, and *how* to improve it.

Progress Reviews must have some weight behind them. To help achieve this, Parliament should have time scheduled to debate reports such as the annual 25YP report together with the corresponding Review. Furthermore, the Government should be placed under a duty to respond to Progress Reviews, in particular responding to any recommendations made and explaining the reasons behind any failure to follow those recommendations.

3.3.2 Prospect Reviews for Parliaments

Environmental problems are complex, global, interconnected and long-lasting: as well as looking backwards, we must also look forwards at emerging problems, and solutions to those problems.

Tasking an expert, independent and interdisciplinary body with advising each new Parliament on their role as stewards of the natural world for present and future generations would be a valuable component of this. The production of a **Prospect Review** once per Parliamentary cycle¹²⁸ would allow the future of environmental law to be charted, anticipated and designed proactively.

Keeping an eye on the future means tracking relevant changes and trends in both scientific understanding of environmental processes and societal behaviour and attitudes that affect the state of nature. Since nature does not follow political boundaries, this work must be local, national and global in character. It must also draw from a range of forms of knowledge – good science is needed to help us understand what is happening to the environment and what the causes of those changes are, but it cannot inform or question what matters, nor paint complete pictures of our values and relationships with nature. Collaboration with and learning from other disciplines, cultures and jurisdictions will be crucial.

This function is similar to that of a think-tank.¹²⁹ It will rely on both internal and external expertise in scoping problems to focus on, conducting research into those problems, and making recommendations to the Government as to how best to respond. Such recommendations may include proposals for legislative change. They may also identify ways to improve public engagement and education, or identify priority international threats and opportunities for the UK.

¹²⁶ See NAO reports produced on request of EAC – <https://www.nao.org.uk/wpcontent/uploads/2014/06/Environmental-Protection-briefing.pdf>

¹²⁷ The 25YP promises "regular and transparent reporting of progress against our new metrics, including to Parliament. [The Government proposes] to report annually on the plan itself. Reports will cover the progress against performance measures and an analysis of recent outcome indicator monitoring". The 25YP also promises "comprehensive assessments" similar to the UK National Ecosystem Assessment roughly every 10 years: 'A Green Future: Our 25 Year Plan to Improve the Environment' (HM Government 2018) 138-39.

¹²⁸ Akin to the Welsh FGC's 'Future Generations reports' under s 23 WFGA.

¹²⁹ Compare the Royal Commission on Environmental Pollution, the Hungarian Ombudsman and the German SRU.

The longer term aspect provides a method to escape the short-termism of political thinking and provides space for issues which are not so politically urgent, such as soil deterioration and the nitrogen cycle, to remain on the agenda.

Prospect Reviews should be laid before Parliament during the first year of each new Parliament. The new Government must respond, specifically to any recommendations, with reasons given if the Government does not plan to follow the recommendations given. While Prospect Reviews will not be able to dictate policy to the Government, they can help replace the agenda setting function of the European Commission, in part exercised through the EU's Environmental Action Programmes,¹³⁰ which identify the course for EU policy.

3.3.3 Evaluation of laws

An additional reporting and evaluation duty that could be placed on the Commission or an alternative body is the review of new laws and changes to existing laws that will alter environmental policy or that may affect the Government's ability to meet its environmental ambitions. This review would check whether proposed legislation is compatible with existing domestic law and/or the UK's international commitments. This necessarily includes reviewing new environmental legislation, but will also include laws from other policy areas such as transport, energy, housing and education.

Government departments should engage with the Commission at the earliest possible stage when considering new legislation, and the Commission should also submit evidence to relevant Parliamentary Committees as new laws pass through Parliament. This evidence will provide the Commission's advice to MPs and Peers on the likely effects of proposed legislation, and should highlight where the Commission believes that a new law is incompatible with existing commitments.

As well as improving the effectiveness of (environmental) law, the aim of this evaluation is to normalise consideration of the environmental (legal) implications of new laws. The Commission can raise environmental concerns, increasing their political traction and improving their treatment as an integral component of policy-formation, rather than as bolted-on afterthoughts. The integration principle must be taken more seriously than it has been by the EU to date.¹³¹

In addition, there are currently obligations on government under EU law to conduct regular reviews of the implementation and effectiveness of existing environmental laws.¹³² These review functions should be retained, with the production of clear and consistently conducted evaluations of the sufficiency of existing environmental laws. These evaluations will necessarily feed into Prospect Reviews, identifying where legislative changes are needed.

3.3.4 Ad hoc reports, opinions and advice

The Commission may also need to produce ad hoc reports, opinions and advice.¹³³ This will include on specific matters, such as authorising exemptions, delays and derogations – roles currently undertaken in the main by the European Commission. For example, exemptions from the provisions of the Habitats Regulations may be granted due to 'considerations of overriding public interest'. However, such exemptions will at times require an opinion to be obtained from the European Commission.¹³⁴ This part of the legal regime established by the Habitats Directive should be maintained by ensuring that such opinions must be sought from the new Nature and Environment Commission. Similarly, the designation of Special Areas of Conservation (SACs) under regulation 11 of the Habitats Regulations 2010 requires the involvement of the European Commission.¹³⁵ This role should be passed to the new Commission to maintain the current legal architecture as far as possible.

Other legislation may request opinions or recommendations from other existing EU institutions, and these roles should be transferred to the new Commission to prevent the governance gap widening further.¹³⁶ The Commission's opinions in these regards should be given significant weight: public authorities must give reasons if they choose not to follow the opinion, and the Commission may decide to pursue matters further if it believes that a failure to follow its opinion constitutes a breach of duty.

¹³⁰ Schön-Quinlivan (n 7) 100-101, 104-106.

¹³¹ Maria Lee (n 8) 67-69, see also ClientEarth, 'Environmental principles in UK law after Brexit' (forthcoming May 2018) available via <https://www.documents.clientearth.org/library/download-info/environmental-principles-in-us-law-after-brexit/>

¹³² See Krämer (n 8) 398-402.

¹³³ For comparison, DG ENV produced 36 reports and proposals in 2017 – available via <https://ec.europa.eu/transparency/regdoc/>

¹³⁴ An authority must obtain (and have due regard to) the opinion of the European Commission when a plan or project will affect a priority species or habitat type and the authority is seeking an exemption for reasons other than human health, public safety or environmental benefits. See s 62(2) and 103(3) The Conservation of Habitats and Species Regulations 2010.

¹³⁵ via Article 4(2) of the Habitats Directive.

¹³⁶ Unless a suitable domestic alternative exists (such as the Health and Safety Executive), or ties with that EU institution can be maintained.

4 Building a Nature and Environment Commission

The above functions provide the skeleton on which a new Nature and Environment Commission should be based. It should have powers to review, assess, improve and enforce legal compliance, and duties to bring the public's complaints into the spotlight and stand up for nature's interests. Additional roles to review and evaluate the adequacy of new and existing laws may also be valuable, but potentially best housed in a distinct institution.

How these bare bones are dressed up is important: there are a number of variables to consider here – some less tangible than others. The administrative and operational organisation of the Commission matters, but so too do the institutional culture and attitude. Below, six important variables are outlined, all of which must be carefully considered if the Commission is to be effective and long-lived. Many of these concern the body's independence, robustness and jurisdiction – three interrelated issues.

Putting the Commission on the right cultural trajectory cannot be done by clever legal design alone. However, to help guide the actions, strategy and culture of the Commission, it should be given an overarching statutory purpose. This purpose should be to act on behalf of nature and ecosystems, recognising that humans form an integral component of natural systems. This language incorporates the ecosystem-based approach that underpins international legal agreements such as the Convention on Biological Diversity,¹³⁷ allowing the UK to better domesticate this important outlook. Such a purpose would direct the Commission's work and allow it to both complement and critique the functioning of existing environmental bodies with comparable purposes, such as Natural England.¹³⁸

Other matters will require constant consideration as the Commission develops and its role unfolds and matures. How it communicates with the public, what relationships it has with existing institutions such as the EAC and Defra, and what areas of work it prioritises remain to be seen and cannot be pre-determined. However, they can be helped by getting the setup right in the first place, which the following will all be important to.

4.1 Scope

'Environmental law' is a broad and imprecisely defined category, and views may reasonably differ on where exactly its boundaries lie. However, some clarity over the duties the Commission is to oversee and the public authorities it is to have power over can be achieved.¹³⁹ A broad definition is preferable here, so that the Commission can decide what areas most require its attention. This could be achieved by using a definition similar to that of 'environmental information' in s 2(1) of the Environmental Information Regulations 2004, which would cover any legislation affecting (or likely to affect) a wide variety of environmental factors.

The work of the Commission also needs to be cross-departmental, in accordance with the integration principle. It should hold all government departments and public authorities to account. While the Commission may be more closely involved with the work of environmental agencies and departments, it is not only they who have responsibilities towards the natural world.¹⁴⁰ Better understanding of environmental duties across government is necessary if environmental concerns are to be taken more seriously. There is plenty of room to improve here: government departments are currently failing to take even the broad Sustainable Development Goals into account.¹⁴¹ As such, the effectiveness of the Commission should not be curtailed by limiting the public authorities over which it has supervisory and enforcement powers.

¹³⁷ See, for example, Convention on Biological Diversity COP 5 Decision V/6 (15-26 May 2000).

¹³⁸ Whose purpose is "to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development" – Natural Environment and Rural Communities Act 2006 s 2(1). For criticism of Natural England's performance, see NERC Committee (n 19) 30-50.

¹³⁹ Consider s 11(3)(c) Equality Act 2006 which specifies the remit of the EHRC.

¹⁴⁰ For example, the EU currently lists 13 policy areas in which environmental concerns should be integrated: Agriculture, Cohesion Policy, Development, Economic Recovery Plan, Economic and Financial Affairs, Employment, Energy, Enterprise, Fisheries, Internal Market, Research, Trade and External Relations, and Transport - see <http://ec.europa.eu/environment/integration/integration.htm>

¹⁴¹ Environmental Audit Committee, 'Sustainable Development Goals in the UK' (Ninth Report of Session 2016-17, HC 596, 26 April 2017).

4.2 Devolution

The environment is a devolved matter in the UK, and there is an imperative to respond to the governance gap across the entirety of the UK. These two facts are not easy to reconcile. While it would be possible for four distinct mechanisms to be developed across the four nations, a UK-wide entity has ecological, legal and operational advantages.

It has ecological advantages because natural processes cross political borders. Dealing with environmental problems at the appropriate scale will often require cross-border co-operation. Migratory species management, reduction in waterborne pollutants and waste management are all examples of problems that must be tackled in collaboration with others.

It has legal advantages because it helps provide a clear and consistent legal landscape. It also provides a mechanism for the four UK governments to hold each other to account, making sure that none is undercutting the others.

It has operational advantages because a body established by, accountable to, and funded by four parliaments has greater longevity, robustness and independence. No one government could entirely undermine its effectiveness or alter its powers. As the Institute for Government has noted:

“Creating a UK-wide watchdog, established in legislation, scrutinised and passed by all four parliaments, and jointly owned by all four governments, would make it harder for the UK government to abolish or weaken it in the future. Standards could not easily be undercut, and the institution would speak with greater authority”.¹⁴²

The establishment of a UK-wide entity requires a carefully managed process of co-ordination, co-operation and negotiation among the four nations. It must genuinely be the result of a four-nation approach, co-designed and co-owned. Currently, procedures for such an establishment are sorely and manifestly lacking within the UK.

One body need not imply that one uniform set of standards applies across the whole of the UK. The Commission should hold each government to account for the standards and duties they have established. Reserved matters, such as customs issues relating to the trade in endangered species, should be treated at a UK level, but the existence of a UK-wide body does not preclude the possibility of some devolved functions being exercised predominantly at national (or other non-UK) level. This may be particularly appropriate for overseeing laws unique to a particular nation (eg the Well-being of Future Generations (Wales) Act).

The functioning of the EHRC and Scottish Human Rights Commission; the Joint Nature Conservation Committee; the Climate Change Committee; the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL); and the British-Irish Council all provide options to be considered.

The Commission should be accountable to the relevant parliament when dealing with devolved matters, and local branding of the organisation may help it connect better with local communities.

The (quasi-)federal nature of the UK may help establish a sensible fines system that is comparable to the EU's. On standards and duties that have been agreed across the four jurisdictions of the UK, a centralised fines system may be deemed expedient in the four nations holding each other to account.

¹⁴² Maddy Thimont Jack, Joe Owen, Akash Paun, Jack Kellam, 'Devolution after Brexit: Managing the environment, agriculture and fisheries' (Institute for Government, April 2018) 32.

4.3 Independence

The independence of a watchdog is essential if it is to function freely and faithfully. Building adequate independence into a statutory body is not straightforward. The ‘independence-accountability tension’¹⁴³ means that some strings must remain attached – who watches those who watch the watchmen?¹⁴⁴ However, the tension does not prevent there being better and worse options available – and sensible design can help. (Though the actual independence of the Commission will also be dependent on cultural practices that emerge).

To improve the Commission’s independence, it should have its key ties with parliament(s) rather than government(s) in three main areas. Senior members of staff should be appointed by parliament(s); the Commission should report to and be accountable to parliament(s); and it should be funded by parliament(s). As evidenced above, links to parliament(s) will improve the ability of the Commission to act based on its own priorities, rather than those of the government of the day.

Tying the Commission to parliament(s) will make it harder for government(s) to pursue the “familiar tactic [of] abolishing bodies and changing objectives ... when they get too difficult”.¹⁴⁵ Proper independence fundamentally underpins the very functioning of the Commission. The level of independence and security that it has will inevitably affect strategic choices since “the risk of an organisation being disbanded if it becomes unpopular with the government of the day is arguably likely to lead to its advice being expressed in ways which avoid controversy, even in cases where robust argumentation may be necessary”.¹⁴⁶ The Commission will no doubt have to constantly reassess its balance, contemplating whether it wishes to grasp the horn of tempered argumentation or the heightened risk of closure.

4.4 Funding

How the body is funded is also crucial. The size of its budget will obviously affect the work it can undertake. Although it is unlikely to require a hefty sum (much less than the Environment Agency’s budget of £1.3bn in 2016–17), it would be a missed opportunity if the Commission’s workplan was severely hampered by a limited budget.¹⁴⁷

For more realistic comparisons, consider the box below. Clearly, the amount required for watchdogs and oversight bodies is relatively small, and considering that the cost to the economy of poor air quality alone is £20bn,¹⁴⁸ a well-designed Commission can represent extremely good value for money. As well as the overall amount of funding, its source is also important. As noted above, reliance on government funding threatens the Commission’s independence. Concerns such as these are evident in the EHRC’s 2015 Strategy Litigation Policy:

“The [EHRC] is a strategic regulator and both the nature of this role and its limited resources (and the need to use public funding in the most effective way possible) will inform the exercise of its discretion in relation to the use of its powers”.¹⁴⁹

Annual Budgets of UK watchdog type bodies

Climate Change Committee (2015-16)

£3.8 million

Equality and Human Rights Commission (2016-17)

£18 million

Information Commissioners Office (2016-17)

£25 million

National Audit Office (2016-17)

£63.1 million

¹⁴³ *supra* n 85.

¹⁴⁴ And so on, ad infinitum.

¹⁴⁵ Jill Rutter, ‘Gove’s post-Brexit environment watchdog’ (Institute for Government Comment, 15 November 2017), available at <https://www.instituteforgovernment.org.uk/blog/gove-post-brexit-environment-watchdog>

¹⁴⁶ Nesbit and Illés (n 70) 12-13.

¹⁴⁷ For similar concerns about the Welsh FGC, see Davies (n 21) 175.

¹⁴⁸ Natural Capital Committee, 3rd Report, available via <https://www.gov.uk/government/publications/natural-capital-committees-third-state-of-natural-capital-report>

¹⁴⁹ The Equality and Human Rights Commission’s Strategic Litigation Policy (March 2015), available at https://www.equalityhumanrights.com/sites/default/files/strategic_litigation_policy_100315.pdf [1.3.1]. This is hardly a problem unique to the EHRC: consider, for example, the Home Office’s funding of the IPCC – <https://www.theguardian.com/commentisfree/2016/mar/10/office-for-police-conduct-watchdog>



Other funding sources are possible. While an over-reliance on funding through fines would not be appropriate as it would likely skew the Commission's purpose, it could be funded directly by parliament. The National Audit Office is currently funded this way (via the Public Accounts Commission), and the Institute for Government suggests that this model would provide for a more robust watchdog.¹⁵⁰ Even greater independence and security would be offered by the four parliaments of the UK together funding the Commission, which is the preferred funding model. If the Commission is to be funded by government departments, then this should be spread over more than one department to improve independence.

4.5 Composition and appointments

Again, and as noted above, key personnel in the Commission should be appointed by parliament (or a parliamentary committee) rather than government. If the Commission is to have offices in the four nations, then the head of each should be appointed by the relevant legislature. Ideally this appointment will be based on statutory guidelines on the experience required and done in consultation with stakeholders.

The Commission as a whole should be composed of a range of experts who are able to provide insightful analysis of environmental and legal matters. This will of course require a number of lawyers, but expertise from technical disciplines such as ecology and planning will also be necessary, as will incorporation of knowledge that speaks to our values and priorities such as philosophy and sociology. An interdisciplinary methodology that respects different forms of power and knowledge will improve the Commission's ability to be insightful and ground-breaking.

4.6 Legal basis

While Parliament remains sovereign in the UK, it will always be possible for a statutory body such as the Commission to be dismantled. However, this can be guarded against through the use of an appropriate legal form. Establishment through primary legislation is essential in this regard, as witnessed in the 2010 'bonfire of the quangos': those bodies established under primary legislation, such as the Climate Change Committee¹⁵¹ and the Health and Safety Executive came out unscathed.

A cross-UK body, supported by four distinct but interlocking pieces of legislation, would also add security to the Commission's existence. Even if one nation were to erase or weaken the Commission, it would still stand in the other nations. It would also provide some cross balance to the organisation in terms of priority setting.

¹⁵⁰ Thimont Jack et al (n 142) 33.

¹⁵¹ Rutter (n 145).

5 Conclusion and recommendations

A new institution is needed in the UK both to close the governance gap that will emerge through leaving the EU and to improve the effectiveness of environmental law by ensuring that it is fully and properly enforced. There is an opportunity here for the UK to design new mechanisms that represent global best practice in environmental governance and access to environmental justice.

Ultimately, these will contribute towards improvement in the quality of the natural world and our relationships with it.

A new independent body of experts should be established – a Nature and Environment Commission – with the aim of improving compliance with environmental law, the remit to act on behalf of people and nature, and the legal powers to truly make a difference.

The development of practices and cultures that support and enhance its work will be key, but so will be the basic legal framework from which it operates. By actively engaging with people and communities and by providing a forum for merits review with legal teeth, the Commission can become a valuable and respected institution that speaks for nature and effects positive changes in environmental attitudes, behaviours and results.

Michael Gove has said the Government will consult on a ‘world-leading’ institution.¹⁵² To do this, it must consider examples from around the world – from Colombian courts to Hungarian Ombudsmen to New Zealand Commissioners – and learn from these. The UK has its own legal and environmental culture and traditions, but these must be developed and built on if we are to reverse the environmentally damaging trends of the twentieth century.

This report has identified some of the key legal functions and design features that this new world-leading body must have in order to achieve its goals. These key recommendations for the Nature and Environment Commission are set out below:

Key recommendations for the Nature and Environment Commission

Recommendation 1	The Commission should be given a broad purpose to act on behalf of nature and ecosystems, recognising that humans form an integral component of natural systems.
Recommendation 2	The Commission should conduct thematic inquiries that assess systemic problems behind poor compliance with environmental law by public authorities. Based on these inquiries, the Commission should be able to produce guidance and recommendations that public authorities must normally follow.
Recommendation 3	The Commission must be able to conduct formal investigations into (potential) breaches of environmental law by public authorities. These investigations must look into the merits of decisions made, with public authorities under an obligation to co-operate with the Commission during these investigations. The Commission should be able to enter into action plans or issue binding notices on the authority under investigation that set out the steps required to achieve compliance.
Recommendation 4	Notices issued by the Commission through the formal investigation process should be enforceable before the courts. If necessary, courts should be empowered to issue specific mandatory injunctions requiring a public authority to comply with Commission action plans and/or guidance.

¹⁵² Michael Gove, ‘Environment secretary sets out plans to enhance environmental standards’ (13 November 2017) available at <https://www.gov.uk/government/speeches/environment-secretary-sets-out-plans-to-enhance-environmental-standards>

Key recommendations for the Nature and Environment Commission

Recommendation 5	The Commission must respond to complaints made by public and civil society. The process for doing this should be free, accessible and straightforward. The Commission should continuously and iteratively engage and work with relevant stakeholders to identify, analyse and develop solutions to problems under its consideration.
Recommendation 6	The Commission should be free to engage in public forums of all kinds to represent and fight for the interests of people and nature.
Recommendation 7	The Commission should review and respond to government reports regarding the state of the environment and fulfilment of environmental obligations. The Commission's reviews should be sent to and debated in parliaments and responded to by governments in a timely fashion. Existing reporting obligations on governments should be retained.
Recommendation 8	Regular reviews should be conducted that identify past, present and future trends in environmental law. The Commission may be able to conduct some of these, but others (in particular ones making recommendations for future law reform) may be best done by a separate entity.
Recommendation 9	The Commission should be UK wide: it must be co-designed and co-owned by the four nations of the UK. Each government should be held accountable to the standards and duties it establishes with respect to the environment. National offices should be established to both improve connections with local communities and to cater to specific laws, needs and priorities in different parts of the UK.
Recommendation 10	The Commission's key relationships should be with parliaments and not governments. It should be funded by and accountable to parliaments and appointment of key personnel should be subject to parliamentary approval. The Commission should have good institutional links to relevant and influential bodies.
Recommendation 11	The Commission should have ample and ring-fenced funding and be composed of a wide range of well-respected experts.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw.

We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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