Northern Ireland
Assembly

COMMITTEE FOR THE ENVIRONMENT

OFFICIAL REPORT (Hansard)

Waste and Contaminated Land (Amendment) Bill

10 June 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Cathal Boylan (Chairperson)
Mr Patsy McGlone (Deputy Chairperson)
Mr Roy Beggs
Mr John Dallat
Mr Danny Kinahan
Mr Ian McCrea
Mr Patsy McGlone
Mr Alastair Ross
Mr Peter Weir
Mr Brian Wilson

Witnesses:

Mr Karl Beattie	)	
Ms Jennifer McCay	)	Department of the Environment
Mr Denis McMahon	)	
Mr Donald Starritt	)	
Mr Ricky Burnett	)	Arc21
Mr John Quinn	)	

The Chairperson (Mr Boylan):

I refer members to the departmental briefing on the Waste and Contaminated Land (Amendment) Bill. I remind members that they asked the Examiner of Statutory Rules to comment on the

delegated powers in the Bill. His response has been tabled for members' information. In it, he indicated that the level of Assembly scrutiny assigned to the regulation-making powers in the Bill seems to be appropriate. However, he feels that the order-making powers in schedule 1 should be subject to draft affirmative procedure. That information will be added to the Bill master file, and a summary will be incorporated into the clause-by-clause analysis table.

Departmental officials will now brief the Committee on the Waste and Contaminated Land (Amendment) Bill. I welcome Mr Denis McMahon, the director of the climate and waste division, and Mr Donald Starritt, Mr Karl Beatttie and Ms Jennifer McCay from the environmental policy division.

Mr Denis McMahon (Department of the Environment):

Thank you for affording us the opportunity to speak about the proposed Bill. You mentioned the overview, the importance of which is worth mentioning. We are making efforts to move waste management up the waste hierarchy, moving away from landfill towards recycling and preventing waste in the first place. In doing so, there is a danger that more and more waste is managed in ways that may be illegal and are not compatible with good environmental practice. Addressing those concerns is a key part of the programme that we are trying to put in place.

I will not talk in detail about clauses. Suffice to say that some of them speak for themselves on subjects such as fixed penalties and the retention of seized properties. If you wish, Chairperson, we are happy to talk through each clause. Would you like my colleagues to say a few words about each one in turn, after which you may ask questions?

The Chairperson:

Please go through the clauses, after which I will open the floor to members for questions.

Ms Jennifer McCay (Department of the Environment):

I shall address clauses 1 to 4. The main reason for including clause 1, "Fixed penalty notices for offences under Article 4", is to allow for the more proportionate and cost-effective enforcement of illegal waste offences. The Waste and Contaminated Land (Northern Ireland) Order 1997 already allows fixed penalties to be issued for various offences. Clause 1 merely extends their use to offences under article 4, which covers the:

"unauthorised or harmful deposit, treatment or disposal, etc., of waste"

At present, however, under article 4 of the 1997 Order, there is no alternative to prosecution through the courts for any of those offences. Prosecutions can be time consuming and costly, and could be considered disproportionate for the smaller scale offences. We believe that the use of fixed penalties is more appropriate and cost effective.

There are a few main points to note about the details of clause 1. The Department and councils can issue fixed penalties under this legislation. That is in the interest of harmonising the powers of those bodies, which we will deal with throughout the Bill. Given that clause 1 is intended to tackle less serious waste offences, we anticipate that councils will make most use of the powers in the Bill. Individual councils will have complete discretion in the use of the powers; they will always have the option of prosecuting any particular offence through the courts, as well as the option not to use fixed penalties at all if they do not think that they are appropriate.

The Bill sets the amount of a fixed penalty at between £100 and £200. Councils can offer a discount to encourage early payment, which will allow for discretion over the amount of the fine. Councils can retain the receipts from any fixed-penalty notices.

Mr Beggs:

I declare an interest as a Carrickfergus councillor.

Mr Weir:

I declare an interest as a North Down councillor.

Mr I McCrea:

I declare an interest as a Cookstown councillor.

Mr Dallat:

Is it appropriate to reward people who have been disposing of waste illegally by giving them discounts? Given the past history of councils and the huge variation in how they conduct themselves in relation to the law at present, is there not a danger that that will be replicated, in that some will do it and others will not? How do you define a less serious instance of illegal dumping?

Mr Donald Starritt (Department of the Environment):

Although clause 1 introduces the option of a fixed penalty, it is entirely up to councils whether they choose to go down that route or opt for prosecution. That decision will hinge on whether the offence is viewed as a serious one or a repeat offence. It is entirely up to councils whether to offer a discount on the fixed penalty. In the past, generally, some councils felt that offering a discount made it easier to bring in the money in the first place. The decision to levy the whole amount, or, indeed, not to levy a fixed penalty at all and go for a more serious prosecution, is for councils to make. That will vary from council to council.

Mr Dallat:

Even in this economic depression, £100 is not a lot of money. Surely there is an incentive for people to do whatever they like, because being caught a few times will be a lot less costly than going through the proper channels to dispose of waste in the proper way?

Mr Starritt:

The feeling was that prosecutions were not being brought because offences were deemed too

minor. It is also possible that the Department did not have the resources to bring prosecutions in every instance. We believe that it will be the same for councils; it will be a resource issue. We are giving them an extra tool or an extra option.

Mr McMahon:

You have made a key point. The wording in the Bill means that councils will be relied upon to take those decisions. That, to some extent, runs through the Bill. It is reasonable to ask how well the powers in the Bill will work. That depends on the ability and willingness of councils to operate it. That is a very valid question. As it is worded, however, it very much relies on the ability of the councils to use it effectively as another tool in their armoury over and above those that they have already.

Ms J McCay:

You mentioned inconsistency of approach. Given that the powers are discretionary, which we think is appropriate, we are reluctant to impose a uniform framework. We have imposed upper and lower limits to try to ensure that inconsistency does not occur too much. If councils feel that that is becoming a problem, they could decide to work together, perhaps through the Northern Ireland Local Government Association (NILGA), to ensure that that does not happen. Some councils could decide to not issue fixed penalties at all because they feel that it is inappropriate to be too prescriptive.

The Chairperson:

For clarification, the powers are discretionary, so it us up to councils to —

Ms J McCay:

Within the limits.

The Chairperson:

Obviously, there are set limits and guidelines because we do not want a situation in which one council area charges a certain amount and others not charging for the same act.

Mr Beggs:

I concur with the view that this is enabling legislation. Councils can take the decision of whether to give a discount. Certainly, I am aware that a number of other fixed penalty notices encourage early settlements. I am open to that as a useful mechanism.

The upper limit is set at a maximum of £200. How did you come to that figure, particularly if councils wanted to offer some sort of discount? The legislation my need to state that there is a maximum fine of £100, or else the full court system will be brought to bear. How did you pick that as a maximum figure and how easy would it be to change that in the future if, for instance, there was a period of inflation and that became not as significant a sum? What is the process for changing, and do we need a built-in process to enable agreed change?

Mr Starritt:

In respect of how we arrived at the amount, we were looking at a step up from a litter offence. The fixed penalty for litter is £50. We felt that we needed to step it up a bit from that. However, given that it is a fixed penalty, we felt that the amount should not be too high. Obviously, we are happy to look at any other proposals for the range. The reason for setting the range from £100 to £200 was, to pick up on the point that the Chairperson made, to ensure that there was not too much inconsistency across local government.

As regards the future changing of the amounts, the Order provides for it to be done by subordinate legislation. Changes could be made to deal with inflationary changes in the future.

Mr Beggs:

That is fine.

Mr Weir:

The cap of £200 is a little bit low. We need to increase that a little bit to £300 or £400. Obviously, there is discretion as to whether councils use the power. I presume that there is also discretion, therefore, in individual cases, so that if they are regarded as being not particularly serious in relation to a fixed penalty but are regarded as being above the threshold, there can be a prosecution. The big problem with any deterrent is the extent to which it is ultimately enforced because anybody who looks to dump will make a decision about whether they are likely to get caught. It is not a question of somebody dumping and taking a £100 fine; they could do it not in the knowledge of getting a particular fine, but in the knowledge of getting a fixed penalty or being taken to court, so there is a degree of deterrent.

In respect of the language that we use, perhaps it is about looking at the issue differently. Instead of talking about a penalty and a discount, we could talk about a penalty if the person pays it within a certain time and an enhanced penalty if they fail to pay. That is the way in which a fixed penalty works. Any of us who have been given a parking ticket will know that if it is paid within a certain period of time, it is a certain rate, and, if that is not paid, the rate goes up. That is the nature of fixed penalties. It may just be that the word "discount" is the wrong word to use.

Mr Beggs:

My understanding is that fixed penalties are £60, but, if people pay them early, they have to pay only £30. It is not an enhanced payment. People are hit with a big payment, and if they pay —

Mr Weir:

The point that I am making, Roy, is that, presumably, we can use whatever language we want. It is a question of inverting the mind and looking at the matter in a different way. The norm is that the penalty increases if it is not paid within a certain period. Therefore, it is a question of the

language that we want to use. I understand people's feeling resentment if they see the word "discount". However, it is not a discount; it is less of a penalty. It is not the same as people looking for a bargain in the January sales.

Ms J McCay:

It is important to make the point that we recommend that councils do not issue fixed penalties unless they are prepared to take the person to court and they have the evidence to do so. Otherwise, the whole system will be undermined.

The Chairperson:

It is important to get matters right with enforcement.

Mr Dallat:

I am not sure whether the Department has asked councils how many millions of pounds they spend every year on recovering waste. I suspect that the area that I live in is no different to other places, in that parts of the rural environment have been absolutely destroyed. The farmers have shown most energy by picking up bottles and so on from their fields. Many roads that are used by those who launder diesel and so forth have a lot of litter.

We could, for example, consider a fine of £100 or £200 with a discount and relate that to the problem, or we could even take a wee trip over on the ferry, drive down through Scotland and contrast how the environment is treated there with how it is treated here. I do not want to deride the legislation in any way or the work that has been put into it — I have no problem with that. However, those fines are like the opposite of using a sledgehammer to crack a nut, because they are not even beginning to tackle the problem.

Mr Starritt:

We are happy to look at any increase in the fixed penalty amount. However, we do not see clause

1 as being relevant to the more serious offences, because those should go to court.

The Chairperson:

The fine should fit the crime.

Mr Dallat:

Leaving it to the discretion of the councils and not monitoring what they do or not asking them to provide statistics on how many fixed penalties they issue makes the whole matter not relevant. Everyone knows in their heart of hearts that if Joe Bloggs who lives down the road is caught, he will go to his local council, have a yarn with the people there and be given the easiest option. That is what has happened in the past.

The Chairperson:

That shows the need for the legislation, Mr Dallat. The scale in ordinary littering and serious offences is quite broad, and we definitely need to look at that.

I do not think that there are any other points to discuss before we move on to discuss clauses 2, 3 and 4.

Ms J McCay:

Clause 2 concerns detention of seized property, and that refers mostly to seized vehicles. It builds on the existing powers that are available to departmental enforcement officers. At the moment, they have powers to seize vehicles, without any warning or a warrant in certain circumstances, that are suspected of being involved in illegal waste activity. We sought legal advice on the extent of those powers in existing primary legislation. We were advised that the existing legislation would not permit what I will term extended retention. That means that a vehicle can be seized but has to be returned to its owner quite quickly once the necessary forensic and other investigations have been carried out. The Environment Agency's enforcement officers made representation for stronger powers to allow them to detain vehicles in some cases. I will outline

the situations in which we perceive those powers being most useful.

In some cases, the Environment Agency's officers would like to retain the vehicles until the date of the relevant court case. The reason is to allow them to continue to gather evidence and stop those returned vehicles being used in waste crimes in other places. Therefore, a deterrent factor would probably be likely to be created. The Department's powers under the Bill are not unlimited. Clause 2 empowers its enforcement officers to retain a vehicle and seize property for a limited period. Once that time is up, the Department would have to apply to a magistrate for permission to retain the property in question for a further period, and a case for doing so would have to be made. In that case, the vehicle's owner would have to be given the chance to make a case to have their vehicle returned.

From a human rights perspective, we recognise that those powers are quite significant, which is why we introduced the magisterial independence element to the decision-making process. It is also important to note that the powers are not intended to tackle small misdemeanours. Vehicles would be retained only in suspected serious waste crime cases, and guidance to that effect would be produced for enforcement officers conducting such operations.

The Chairperson:

Councils currently put an order on cars that have been abandoned on housing estates instructing the owner to have it removed, either by themselves or by someone else. Does that cut across clause 2, which applies only to waste offences? Abandoned cars are also a problem, but councils currently have powers to deal with them.

Mr Starritt:

The Pollution Control and Local Government (Northern Ireland) Order 1978 provides powers to deal with abandoned vehicles.

Mr Kinahan:

That is also addressed in the draft Clean Neighbourhoods and Environment Bill.

The Chairperson:

Yes.

Mr B Wilson:

I strongly support clause 2, because we need a suitable deterrent. I am concerned about what happens if the Department applies to retain a vehicle beyond a prescribed period. What is meant by a prescribed period?

Ms J McCay:

That will not be in this legislation. We will have to introduce subordinate legislation that will include regulations governing how we deal with seized property. The Department would not be allowed to wait months before going before a magistrate. At present, we are thinking about a period of a possible 14 days, but we have not fully decided. Those regulations will be subject to a full public consultation and a human rights assessment, which the Committee would be involved in. Therefore, the prescribed period will not be in the powers in this Bill, which will introduce primary powers.

Mr B Wilson:

Is 14 days a suitable deterrent? Are you saying that, unless the Department makes a strong case, the vehicle will be returned after 14 days?

Ms J McCay:

The Department would have to present its case to a magistrate, and the vehicle owner would have the right to go before the magistrate. Ultimately, it would be for the Department to make the strongest case that it can, and it would be for the magistrate to decide in any given set of

circumstances.

The Chairperson:

If there are no further comments on that clause, we will move to clause 3.

Ms J McCay:

Clause 3 deals with the offence of failing to pay charges for the subsistence of a licence, and it relates to the licensing of waste management facilities. As you know, the Department's system requires waste management facility operators to be licensed by the Northern Ireland Environment Agency. As well as paying the licence fee, all licensees must pay an annual subsistence fee to cover agency expenses, such as those for inspections of the facilities, which must be carried out to check that they are operating safely and within the terms of their licence.

The existing sanction for non-payment of subsistence fees is set out in article 15(6) of the Waste and Contaminated Land (Northern Ireland) Order 1997, which empowers the Department to revoke a licence if those subsistence fees are not paid. The problem with that is that, even if the Department revokes the licence, it continues to incur costs, because staff must continue to inspect those sites to check that they are not presenting risks to the environment.

Therefore, clause 3 is an attempt to encourage both compliance and the payment of subsistence fees by making non-payment a criminal offence. It would introduce a penalty for the offence, with a further, daily penalty for continued non-payment. It is hoped that the threat of court action will encourage payment of the fees without having to issue proceedings, but the threat to do so will remain. The maximum fine for non-payment will be level 5 on the standard scale, which is £5,000. Any additional fine would not exceed one tenth of level 5 for each day on which the offence continues to be committed. That could seem to be quite high, but the cost of the licences and the subsistence fees can run to thousands of pounds. Therefore, we thought that the fine had to be proportionate to the offence.

Mr Dallat:

Believe you me, a fine of £5,000 for someone who has not paid for their licence is chicken feed compared with the millions of pounds that they make. One such person, who I will not name here again, was the subject of 46 complaints. Indeed, people from Belfast came down to try to persuade that person to put their house in order. Such activity is liquid gold to people who are in the business. The fact that legislation has to be devised to get people to pay for the licence is shocking in itself, but at the same time, there is a worry that the fine should not be too high. Again, I do not wish to criticise the Bill, but the proposal totally underestimates what is going on. I cannot believe that some people who are lucky enough to get a licence that allows them to make millions do not pay for it. I am lost that legislation needs to be written to compel those people to pay and that fines of only £5,000 are being suggested.

Mr Starritt:

It is important to note that clause 3 deals with waste management licence facilities that, in the past, have applied for and successfully obtained a licence. A couple of the Bill's later clauses deal with the power to prosecute for serious offences, to which more serious fines and custodial sentences apply. Clause 3 is a response to a bookkeeping problem in that the Environment Agency is incurring costs in inspecting sites but is not able to recover the cost of the licence. The Bill gives councils the power to prosecute if illegal waste activity is going on, and we will talk about that later. The Department already has the power to take illegal operators to court, and significant fines are available. We will discuss that when we come to discuss clause 5.

Ms J McCay:

Clause 4 proposes powers to require the removal of waste that has been unlawfully deposited. The clause looks quite complicated, but it simply replaces and changes articles 28 and 28A of the 1997 Order. Article 28 of the 1997 Order gave powers to councils to require occupiers of land to tackle illegal waste on their land. In certain circumstances where an occupier refused to do that, council officials could enter the land and remove the waste or take remedial action to recover costs from the occupier. The Waste (Amendment) (Northern Ireland) Order 2007 extended those powers so that councils could require similar action from landowners in circumstances where, for example, there was no occupier or where an occupier refused to take action.

Clause 4 builds on those powers in two main ways. First, it gives the Department the same powers that were granted to councils under articles 28 and 28A. We have talked about fixed penalties, and Donald will talk about that when we come to discuss clause 5. The provision is in the interests of harmonising throughout the Bill the powers to tackle waste offences between the councils and the Department and giving the same broad enforcement powers to both parties. It legislates for a partnership approach in tackling illegal waste activity.

Secondly, clause 4 will enable a notice to be served on a person who is believed to have illegally deposited waste, rather than on only the landowner or the occupier. That makes more sense in cases where the enforcing authority, whether that is the Department or the council, is confident that it knows who is responsible. The enforcing authority is currently unable to issue a notice on the person who has illegally deposited waste, and the Bill changes that.

Mr Kinahan:

As a councillor, I was always concerned about those times that we could not identify who owned a piece of land and who was responsible for it, because that was always the land on which people dumped everything. Can the Bill include provision for councils to clear land even if they cannot establish who owns it or who is responsible for it? This will all work nicely as long as the council knows who owns the land. However, if the council does not know, there is a still a problem. Is there any way of writing the Bill that so that, if a council cannot establish who owns the land, it has the power to go on to it?

Mr Starritt:

My understanding of that clause is that councils have the power to go on to land to clean up waste and to take remedial action. The difficulty is with the recovery of the costs that are incurred in taking such action. However, the power to carry out a clean-up exists already. We are trying to maximise the chances of councils' being reimbursed by enabling them to go after the landowner, the occupier or the offender, if they can be traced after an inspection of the waste.

Mr Kinahan:

Do you see my point, though? Councils often hold back because of the insurance and legal elements of the issue, and certain areas can become sites for illegal dumping from that point on.

Mr I McCrea:

My point is on the same issue. I know that councils have held back on removing waste, because they find it difficult to get reimbursed. There is an ongoing debate about who is responsible for the removal of waste. Councils believe that it is the Department's responsibility, whereas the Department says that it is councils' responsibility. I have been writing to the Minister to get some clarity on the issue. One piece of legislation says that it is the Department's responsibility, and another part of the same legislation says that it is the district council's responsibility. The problem is that it can sometimes cost a council more than £100,000 to clear waste from land, and if nobody owns that land, the council has no one from whom it can seek reimbursement. I know about the case of an alcoholic who knew nothing about the waste that had been dumped on his land.

Mr Weir:

Was that waste empty bottles?

Mr I McCrea:

I wish that it had been only bottles.

That is the difficulty. He had no knowledge of all the stuff that had been dumped on his property, because he never went out of his house, yet the council was supposed to be going after him. Councils should go after the people who actually dump the waste. However, the biggest difficulty is in proving the identity of such people.

Mr McMahon:

There are two issues in that. First, the fact that the clause allows the Department to go after the offender rather than the landowner will help it to address the problem of recovering costs. Secondly, I agree that we need to sort out the issue of responsibility. On foot of this legislation, we will have to put in place an agreed protocol between local government and the Department that makes it clear that both will have crossover powers in those circumstances. It is important that there be a clear protocol to ensure that we know who is doing what and when and that cases do not fall through the gap between the Department and local government. We will have to work on that, but we will come back to it.

Mr I McCrea:

It is important that that be done in the early stages. At present, the system is as clear as mud, and the buck is being passed back and forth between the Department and councils. That must be dealt with at the earliest opportunity. If it is not, the situation will continue and nothing will be done.

Mr McMahon:

I agree.

The Chairperson:

Following on from that point, clear guidelines must come out of the legislation. As a ratepayer, I know that Armagh City and District Council has had to clear waste on many occasions. Ratepayers do not really understand that councils do that until it happens. I have written to various Ministers seeking reimbursement for councils that have had to take care of such problems. It is important that councils be given guidelines and that they then let the ratepayers know exactly what those guidelines are all about.

Mr Starritt:

Clause 5 covers councils' powers to enforce articles 4 and 5 of the 1997 Order. As Jennifer said, those articles deal with the illegal deposit and treatment of waste and with the duty of care to apply due diligence in waste management. Under articles 4 and 5 of the 1997 Order, the

Department has the powers to investigate and prosecute, and those powers are used for serious waste offences. Clause 5 will extend those powers to councils. Therefore, as Denis said, councils and the Department will have exactly the same powers. We have recognised that clause 5 will give everybody those powers, but we need a protocol to establish what the councils and the Department will do. The protocol will be important in establishing the cut-off point so that it is clear to the public who does what.

The Chairperson:

Clause 5 is one of the important clauses of the Bill. Councils will have to have the necessary resources, regardless of whether they are required for the full cost of recovery or something else. Enforcement is the key part of all this. You are saying that clause 5 sets out clear guidelines as to how that will be achieved.

Mr Starritt:

It is possibly worth saying that, although the articles in question are in the 1997 Order, they were updated three years ago by the Waste (Amendment) (Northern Ireland) Order 2007. One thing that that Order did was to increase the level of fines and custodial sentences. I think that I am right in saying that the Bill will provide for an unlimited fine and up to five years' imprisonment for serious offences. Those are the maximum fines, and those powers, which are with the Department now, will be extended to councils.

The Chairperson:

How will the gap in NIEA's work with local councils be closed? That will be important with these provisions.

Mr Starritt:

That is correct. The fly-tipping protocol that we are talking about is an attempt to close that gap and to make sure that there is no limbo between what councils do and what the Department deals with. The protocol will be important. We intended not to commence these clauses until the protocol was in place, because to do otherwise would merely add to the confusion.

Mr Weir:

You mentioned the extension of power, particularly in cases in which there is an unlimited fine or a five-year imprisonment. Since the transfer of justice powers, have there been discussions with your colleagues in the Department of Justice? There are concerns that it is often the case that somebody is pursued, taken to court and, after a lot of work, found guilty. However, the individual might receive what in many ways is regarded as a slap on the wrists. I am sure that that is frustrating for you as well. There is a feeling that the courts do not take some environmental crimes seriously and that that is reflected in the sanctions. From your point of view, or, in this case, from the council's point of view, there is not a lack of willingness to take action, but the problem is the result when the councils impose sanctions. Is there any intention to have discussions with Department of Justice officials to see whether anything can be done, by way of guidelines or proactive action, to ensure that sanctions can be ratcheted up?

Mr Starritt:

From discussions that we have had with our colleagues in the NIEA, we know that they feel that the punishments handed out did not fit the crime. However, there is a feeling that, as with more recent cases, the issue is being viewed more seriously and that sentences are higher than they were.

Mr McMahon:

We must take into account that there may be a whole range of associated problems. Whenever you get one form of criminality, you very often get a number of others. We need to tackle all those matters in a focused way so that we can identify offenders who commit a number of crimes.

Mr Kinahan:

My point links to the protocol that you talked about. Who ends up getting the money if the council is not getting anything when you fine people? That money drips away, and the councils are not getting anything from it.

Mr Starritt:

The courts have powers to award the council or the Department any costs that the agency or the council incur in an investigation and in any clean-up that is needed.

Mr Weir:

There is a case that my council has been involved with that Brian and I know fairly well. It does not relate to contaminated land; it is on the notorious issue of the enforcement of the legislation on smoking. I understand that the courts have the power to award the clean-up cost, but there is also the recovery of legal costs to consider. If the defendant gets legal aid, the Department or the council could be left with a reasonable level of costs. Normal practice is that if someone receives legal aid, the opposing side's costs do not get awarded against them. Therefore, you could be left with a situation in which the council or the Department is left with a legal bill that it cannot recover.

I do not know whether that can be looked into. As I said, in North Down Borough Council we had a very unfortunate experience of a case on the enforcement of the smoking ban, and the person involved saw himself as a smoking campaigner and, therefore, saw himself as having been deliberately provoked. I do not think that, in saying that, I am saying anything controversial, because the person would say that himself. He took legal aid, but the council had no other option but to continue with the prosecution, and the case ended up costing ratepayers over £10,000. Therefore, that is an example of such an issue.

Mr Dallat:

Denis, I would like to encourage you to say a bit more than I think that you were going to say. It is not just individuals who commit crime; it is now real, big business. It involves money laundering, revamped paramilitaries, gangsters operating on a big scale and corruption that, I think, is probably unlimited. It also involves an increasing amount of the Police Service's time. Is this legislation adequate to deal with that, or is more legislation coming?

Mr McMahon:

The point that I was trying to make is that it is about more than just the legislation. We need to ensure that the agency and the Department of Justice are working closely together, and we need to make sure that we are managing all this with a risk-based approach. If people are committing a range of offences involving not just waste but other areas, that all needs to be taken into account. I was trying to say that the Bill is just one part of an armoury of tools that can be used to address those issues. Therefore, as we talked about earlier, if some of the clauses are seen in isolation, they may not capture the full breadth of what it is possible to do within the legislative programme. However, although the legislation is an important element, there must be close working between NIEA, councils and other enforcement agencies to get the best out of this and other legislation.

Mr Dallat:

That is most helpful. It is important that we understand that there is a bigger picture and that the issue will have to be confronted sooner rather than later. It is not just about the problems that are being created; the people who are involved in waste disposal and so on have become the victims of all kinds of tricks, and sometimes the wrong people are going to court. It is a vicious problem, and I just hope that the Environment Agency fully appreciates that it is now taking responsibility for an issue that is as big a one as we may ever have to face, given the money that can be available to those who do not dispose of waste correctly.

The Chairperson:

Following on from your point, Donald, co-operation between the Department, Land Registry and the councils is key to getting everything right; there is no point in putting it on paper unless people understand it. Illegal dumping is a serious issue, particularly in my own area; it is ridiculous the amount of money that people have to pay. We now move on to consider clause 6.

Mr Starritt:

Clause 6 deals with the right of entry with heavy equipment or to domestic premises. At present, when enforcement officers investigate allegations of illegal activity, they are required to give 24 hours' notice before they can enter residential premises or bring heavy machinery onto premises.

The feedback that the Department has received from officers is that sometimes after 24 hours' notice has been given, there is nothing to investigate when they arrive; clause 6 will remove the requirement to give notice. However, the safeguarding mechanism in the form of a court warrant, which officials will need to obtain from a court before entering premises, remains. Those powers will be available to both the Department and the councils.

The Chairperson:

Such powers seem to be common sense. The owners of dumps that have operated for some years now find it more difficult to obtain licences because of the new EU regulations. Indeed, some have had to close as a result. Have all the issues on identified sites been sorted out, or will the Bill address them? I am aware of things mysteriously being moved from sites overnight before investigators gained access.

Mr McMahon:

In compliance with EU regulations, some sites will close, and the Department is working with councils on sites that will require additional work to ensure compliance. That will happen more and more, because, as we move towards more recycling and preventing waste in the first place, there is a danger that illegal dumping will increase or that waste will be dealt with inappropriately. That is why it is important to get it right.

The Chairperson:

OK. We will move on to clause 7.

Mr Beattie:

Clauses 7 to 9 relate to part 3 of the Waste and Contaminated Land (Northern Ireland) Order 1997. Clause 7 has two separate but related components: first, the removal of underground strata above the saturation zone from the definition of "contaminated land" in the Order; and the addition of a test of significance to the pollution of waterways and underground strata.

To understand the effect of those provisions it may be helpful to consider the provision in article 49 of the 1997 Order. Contaminated land is defined in that Order as:

"any land which appears to a district council in whose district it is situated to be in such a condition, by reason of substances in, on or under the land, that—

(a) significant harm is being caused or there is a significant possibility of such harm being caused; or

(b) pollution of waterways or underground strata is being, or is likely to be, caused".

In order to determine whether land is contaminated, a district council must first establish that a pollutant linkage exists, and that must consist of a contaminant, a pathway and a receptor. Receptors can include people, livestock, domestic animals, ecosystems, surface water, ground water, and even buildings.

Removing the underground strata above the saturation zone from the definition of contaminated land in no way reduces the environmental protection afforded by the legislation; rather, it corrects an anomaly in the 1997 Order, which, in effect, categorised the underground strata above the saturation zone as a receptor rather than a pathway.

Pollution of ground water, which is essentially underground strata within the saturation zone and which is quite properly regarded as a receptor, would still be covered. Pollution in transit through the unsaturated zone would be covered in cases where it would be likely to reach the ground water, where significant harm was being caused or where there was a significant possibility of such harm being caused to other receptors.

As a by-product of that amendment, there will be a clarification of the demarcation of responsibilities between district councils and the Department, because the current provisions could create a situation in which both regulators could be regarded as being responsible for dealing with pollution in that area.

The addition of a test of significance to the pollution of waterways and underground strata

adds consistency to the regime, allows a similar approach to be taken to all types of contamination and enhances the workability of the regime. The current definition of contaminated land means that pollution on the surface must be significant for there to be any possibility of the land being regarded as contaminated in the legal sense. However, any pollution below the surface, however minor, would be sufficient to satisfy the definition of contaminated land. The costs associated with applying the regime under those provisions could be prohibitive for both regulator and regulated alike.

Clause 8 provides for a single appellate body to hear appeals against remediation notices, where they have been issued by a district council or the Department. The existing legislation has appeals against notices issued by district councils heard by a court of summary jurisdiction, while the Planning Appeals Commission (PAC) hears appeals against notices issued by the Department. In the interests of consistency, the Department feels that a single appellate body would be appropriate and that the PAC should assume that role.

The capacity of the PAC to deal with the additional case load has been raised; however, the number of cases is likely to be extremely small. For example, in the first five years of the equivalent regime in England and Wales being in operation only four notices were appealed.

The Chairperson:

Another job for the PAC. We will take your word for it that there will be minimal appeals.

Mr Dallat:

How much will it cost to submit an appeal?

Mr Beattie:

There are no provisions in the legislation to charge for submitting an appeal to the PAC.

Mr Beggs:

If there is no charge, might offenders abuse the system by pulling in the PAC to buy time? It can take two years for PAC decisions to be made, so is there potential for abuse of the system by people who want more time?

Mr Beattie:

The experience in GB has not shown that to be a problem. As I said, in the five years in which it has been in operation in England and Wales only four appeals have been made.

The Chairperson:

Could the Committee look at that?

Mr Beattie:

Yes, certainly.

Clause 9 seeks to update article 70 of the 1997 Order to take account of the fact that although the Industrial Pollution Control (Northern Ireland) Order 1997 remains in operation, many of its provisions have been superseded by the introduction of the Pollution, Prevention and Control Regulations (Northern Ireland) 2003.

As it was always intended that the contaminated land regime would deal primarily with historic land contamination for which appropriate regulatory controls were not in place, it is appropriate that that exclusion be put in place rather than replace existing control measures.

To clarify the meaning of the clause, the preclusion of the part 3 regime applies only where contamination is the result of the final disposal of controlled waste; it also means that enforcement action can be taken under regulations 24 and 26 of the Pollution, Prevention and Control Regulations (Northern Ireland) 2003. It in no way dilutes the existing provisions; it

merely updates them in light of the legislative changes since the 1997 Order was introduced.

Mr Dallat:

Is there a timescale for final disposals? I know places where material has been in final disposal for the past 30 years but has never actually gone anywhere.

Mr McMahon:

We will have to consider that issue. It is a fair point; I know of a few instances of material sitting out.

Mr Starritt:

Clause 10, "Producer responsibility obligation regulations", makes minor changes to the Producer Responsibility Obligations (Northern Ireland) Order 1998, which gives the Department powers to require producers to take certain actions to increase reuse, recovery or recycling.

It refers to powers of entry and inspection. However, we have been advised that the powers of entry and inspection are not defined in the Order and, for the sake of completeness, they should be. It is a technical amendment. We have referred to the powers of entry and inspection that are defined in the 1997 Order and made a link to that Order to clarify what the Department can do. It does not change the Department's powers; it merely clarifies the position.

Clause 11 covers minor and consequential amendments and appeals. We have discussed the meat of the Bill.

Mr McMahon:

We are happy to take any views on board, and we will come back to the Committee on the points

on which we have been unable to give a full answer.

The Chairperson:

Thank you.

We move to a briefing from Arc21 on the Waste and Contaminated Land (Amendment) Bill. I welcome Ricky Burnett, policy and operations manager, and John Quinn, director.

Mr Beggs:

I declare an interest as a member of Carrickfergus Borough Council.

The Chairperson:

We have gone through the Bill clause by clause. Gentlemen, you have five to ten minutes to make a presentation, after which members will ask questions.

Mr John Quinn (Arc21):

I am here to support my colleague Ricky, who has co-ordinated the response on behalf of Arc21 and comes from a regulatory background in Northern Ireland and Scotland. He is more amenable to today's discussion.

Mr Ricky Burnett (Arc21):

Thank you, John, and thank you, Chairman and Committee members. There are three main elements to our response. We support the move to give duplication of powers to councils and to the Department as a matter of principle; indeed, we supported that some time ago. As members will be aware, councils undertook that function until 2003 when it transferred to the Department.

At that time, councils suggested that duplication of powers made more sense than transferring them to one organisation, given the scale of the problem at that time. Therefore, the principle sits comfortably with Arc21 and Arc21 councils. That said, as you heard from the Department, the key is deciding the demarcation lines between councils and the Department on who does what and when. It is important that that be decided before the Bill is enacted. If the Bill is enacted before agreement can be reached, it will make the situation worse because there will be more confusion and obfuscation of responsibility.

I am sure that members will be aware, and they will it hear from other witnesses, that there have been discussions between the Local Government Association and the NIEA, which is the body responsible, to devise agreement on those lines; so far, however, that has not been possible. Indeed, I understand that the gap in the demarcation lines between the Local Government Association and the Department is quite big. That is not unusual. There is a similar situation in Scotland, England and Wales where there is duplication. Indeed, in England, a protocol was agreed in March 2005. It sets a line with which, as I understand it, the Local Government Association is relatively comfortable but with which the NIEA is not. Its line is much higher, and it does not want to come down. I am sure that the NIEA will come before the Committee, so I will let it explain its position, but resources are at the core of it. Demarcation and the protocol are vital to moving forward.

The second main thrust in our response is resources, and that is looking at the quantum of the problem and ensuring that there is an effective and efficient policing regime that involves everybody. The third thrust of our response is to ensure that duplication of complete powers — the tools in the box given in the Bill, if you like — is as equal with councils as it is with the Department. However, I am not sure that the Bill ensures that, particularly clause 5, which provides for the power to serve notice on someone requiring the submission of transfer notes. That is an important tool and investigatory box for officers; however, it is not exclusive to that, as powers of seizure and the power to enter premises also come into it. It is important that there is parity of powers. If you have duplication of powers, parity of tools seems rational. There is no point in giving an organisation powers only to tie one hand behind its back. Those are the three elements of our response.

The Chairperson:

Thank you very much for your presentation. Will you comment on fixed penalties? Defining responsibility clearly is vital as is better co-operation and setting out guidelines from the start. Resources are a major issue. Should the fines that councils impose be set in stone? Given the amount of illegal dumping, will councils have the powers and the enforcement sections to impose fines?

Mr Burnett:

Fixed penalties have a role in enforcement; however, they should not be seen as a panacea, as they have flaws. For instance, there are difficulties for councils administering the Litter Act 1983. Fixed penalties are not a panacea, but they have a role to play, and it is right and proper that they are an available option for minor transgressions.

However fixed penalties are no longer an option for significant or repeated transgressions by individuals; in such cases it is better to pursue court action. There should be guidance for practitioners that sets out in detail when certain penalties should be applied. The fines in the Bill are sensible. It is important to be able to decide when to apply the fixed penalty and when to take the more serious action of going to court.

Councils need those powers. It is not unknown for unscrupulous operators, as has happened in England, to know how councils operate. They will dump in one area and pay the fixed penalty because they know that their actions will be treated as a single event. There needs to be a network of intelligence among councils, the policing agencies and the NIEA to combat those who work the system to their advantage.

The Chairperson:

Are the enforcement powers sufficient? That will be a key element.

Mr Burnett:

The powers are sufficient; who applies them and how is important. I cannot underestimate the value of having a protocol in the agreement. The template for that is the one in England and Wales. If an organisation wants to move away from it, it must provide evidence for doing so. Resources should not be the basis of that evidence. It is about deciding on the most appropriate organisation to deal with the incident, not who has the resources. Resources should be dealt with separately.

Mr Dallat:

You talked about penalties. If I get four fixed penalties for speeding, I am off the road. How do we decide when someone has received enough serious fixed penalties to put them inside for a while?

Mr Burnett:

That is a valid question. The way to deal with that should be included in the guidance. It also means that there will be consistency of approach throughout Northern Ireland; no area will adopt a slightly different approach from another. People will know that that is the case at present and will use it. Guidance will assure consistency of approach throughout Northern Ireland by NIEA and the councils.

Mr Dallat:

I live in the Coleraine District Council area, within half a mile of Ballymoney and Magherafelt, and I can see problems where someone wants to exploit differences between councils. If Magherafelt takes a soft approach, an individual can go half a mile away and dump waste in Coleraine or Ballymoney. That goes back to the point about uniformity. Do we need better guidance so that all council areas are the same and one area does not become a happy dumping ground?

You heard the discussion about whether the proposed penalties reflect the cost of recovering

waste or the damage that it is doing to the environment. A person can be fined £100 for dropping a cigarette butt.

Mr Burnett:

First, we must differentiate between littering and fly-tipping. The English protocol defines anything less than one bag of material as litter and anything more than that as fly-tipping. It is right and proper that the penalty for fly-tipping is seen to be bigger than the penalty for litter. A penalty of the magnitude that is contained in the Bill sends out that signal. The maximum penalty for the worst cases could be an unlimited fine and up to five years' imprisonment.

There is quite a spectrum between a fixed-penalty notice and a prison term. The application is important.

Mr Beggs:

You mentioned the importance of intelligence gathering, particularly if fixed-penalty notices are used. I can see some advantages of that being an efficient method for smaller transgressions. However, does the intelligence gathering in the model used elsewhere include fixed-penalty notices so that someone does not regularly abuse the system to make money and to establish whether there is a wider picture of regular infringements by individuals? Such information could tie in with new vehicle operator licences that are being introduced. If that information was being fed through, and someone cannot even operate an HGV vehicle, that could have a major impact. Who gathers the intelligence and how is the information collated?

Mr Burnett:

A mechanism needs to be devised for all policing agencies to feed into. The main matter of discussion among those agencies is where it sits. The ability of policing agencies to access the system is more important than who deals with it. Having an accessible system is the important point. The application of penalties is the important issue. At the moment, certainly at the lower level, there is no effective deterrent for fly-tipping.

Mr Beggs:

You mentioned the gap between local government and NIEA in where the protocol should sit and who should be responsible for what. Can you give an example of where responsibility was applied outside local government elsewhere? Is NIEA suggesting that that level should apply to councils?

Mr Burnett:

I am happy to give an example with the caveat that I am not directly involved with the latter end of the discussions between NIEA and the Local Government Association, which, I am sure, could confirm the figures. My understanding is that the English protocol, which is the one that local government will suggest using, states that councils should deal with anything less than 20 cubic metres, and the Environment Agency would deal with any amount over that. The protocol also contains an ability to set local agreements, and that happens. We have a slightly different local agreement. The NIEA mentions 20,000 cubic metres; that is a significant gap.

The protocol in England was developed over many years. A great deal of discussion, debate and energy went into it, and it seems to me to be a very good starting point. Let those who want to deviate from that protocol provide evidence for wanting to do so, although resources should not be a pertinent element of that evidence. The main point is who the most appropriate agency is and who is best designed to deal with it in those particular cases. England and Wales have been through the process. Unless there is a good local reason, why reinvent the wheel?

The Chairperson:

Mr McCrea mentioned a problem about landowner liability.

Mr Burnett:

To some extent, that extends to the application aspect. Some members of Arc21 were a wee bit concerned that unwitting landowners are left with large bills through no fault of their own. There are checks and balances in the Bill that may help to address that, but there was a concern that

landowners would be left with big bills.

The next stage is that, once the regulators — the policing agencies — can agree on the lines of demarcation, the landowners become involved because they have a part to play in developing the protocol on who does what.

That is a stage that can only happen when the policing agencies have agreed. There is no point involving landowners unless the policing agencies agree on how to take that forward. That is what happened in England and Scotland; the major landowners became involved in a forum to speak and debate. Some of the information that came out of that forum is in the protocols.

The Chairperson:

Thank you very much, gentlemen.