



Northern Ireland  
Assembly

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**COMMITTEE FOR THE  
ENVIRONMENT**

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**OFFICIAL REPORT  
(Hansard)**

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**Departmental Briefing on the Waste and  
Contaminated Land (Amendment) Bill**

23 September 2010

**NORTHERN IRELAND ASSEMBLY**

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ENVIRONMENT**

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**Departmental Briefing on the Waste and Contaminated Land  
(Amendment) Bill**

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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 Trevor Clarke  
Mr Willie Clarke  
Mr John Dallat  
Mr Danny Kinahan  
Mr Peter Weir  
Mr Brian Wilson

**Witnesses:**

Karl Beattie )  
Jennifer McCay ) Department of the Environment  
Denis McMahon )  
Donald Starritt )

**The Chairperson (Mr Boylan):**

I welcome Denis McMahon, Donald Starritt, Jennifer McCay and Karl Beattie.

**Mr T Clarke:**

Forgive my ignorance, because I am new to the Committee. Does the Bill deal with new contamination or land that was filled in the past, either legally or illegally?

**Mr Denis McMahon (Department of the Environment):**

The Bill refers to all contaminated land.

**Mr T Clarke:**

Does it apply to land that was filled when councils were in control of it? I declare an interest as a member of Antrim Borough Council, because there are implications for some councils from changes to legislation on contaminated land. Is the Bill part of that legislation?

**Mr McMahon:**

There is a different piece of legislation to deal with that. You are talking about closed landfill sites and whether they complied with the European directive?

**Mr T Clarke:**

That is one point. The other point is about individuals who filled land and, in their opinion, did so lawfully. If that land turns out to be contaminated, does this Bill cover such land?

**Mr Karl Beattie (Department of the Environment):**

Yes, if it meets certain criteria.

**The Chairperson:**

Are there any interests to declare?

**Mr Beggs:**

I declare an interest as a member of Carrickfergus Borough Council. My father owns a legal landfill site.

**Mr Weir:**

I declare an interest as a councillor in North Down Borough Council.

**Mr McMahon:**

With your permission, we will comment briefly on the key issues in each clause. We have tried to address the Committee's key concerns, and we are keen to work through them. We are happy to deal with any questions on any aspect of the Bill as we go through it.

**Mr Donald Starritt (Department of the Environment):**

Clause 1 deals with fixed penalty notices, but an issue about burden of proof was raised. The Committee suggested an additional clause to deal with that. The Committee suggested that we should amend article 4 of the Waste and Contaminated Land (Northern Ireland) Order 1997 to shift the burden of proof from the enforcing authority to the accused. The objective of that is to make it easier to prosecute waste offences. The amendment that the Committee proposed was quite similar to the original policy proposal in the consultation document. As members know, the Minister decided to not proceed with that.

After receiving the Committee's suggestion, we went to the Office of the Legislative Counsel (OLC). It suggested that removing the word "knowingly" from the clause, which was the gist of the Committee's proposal, would still mean that the prosecution would have to prove that the accused caused or permitted the offence. Essentially, the OLC was suggesting that the change would not make a great deal of difference to the legislation.

**Mr T Clarke:**

Is the person liable the landowner or the person who deposited the waste into the ground?

**Mr Starritt:**

As things stand, the legislation would allow us to pursue either the occupier or the landowner. When we make the changes to the Bill, we will be allowed to pursue the person who is perceived to have committed the offence, and that could be a third person entirely.

**Mr T Clarke:**

Under the current regime, is the person liable not the person who deposited the waste, even where permission had been sought and it had been done legally, as opposed to the landowner? I just want clarity on that issue.

**Mr Starritt:**

Leaving aside the Bill, the current legislation allows either the occupier or the owner to be liable. Initially, it will be the occupier, and if there is no occupier, it will be the owner of the land. The Bill proposes a change to say that the Department and councils may know that neither the occupier nor the owner is at fault and that someone has accessed the land and dumped the waste.

**Mr T Clarke:**

I disagree with that. Under the current legislation, I thought that, if proof could be given about who had deposited the waste, that person was responsible.

I am trying to tease out the fact that there are cases — not in my council, but in others — where contamination has been caused knowingly. This is going back to the issue of historic sites. What we are saying is that local authorities could have used an individual's land to make a landfill site, and we are now shifting the blame from the local authority that deposited waste on that land to the landowner who owned the land and who received the waste in good faith.

**Mr McMahon:**

This legislation applies very much a different scenario in that it is about going after people who have knowingly broken the law by deliberately —

**Mr T Clarke:**

Sorry; that is why I asked the question at the outset. We are talking about contaminated land; we are not talking about new cases. That is why I wanted clarification at the start. There are historic cases, where people gave permission for their sites to be filled, and, at that time, the sites were legally filled, but that has caused contamination. I want to tie down, today, before I agree to anything, whether the Department is going after the landowner or the person who carried out the activity.

**Mr Beattie:**

I can perhaps provide some clarification. This particular clause relates to the deposit of waste on land; it does not refer to contaminated land. Contaminated land is detailed in part 3 of the 1997 Order. Only clauses 7 to 9 of this Bill are directly related to contaminated land. The legislation

for contaminated land has not yet been commenced, but when it is, there will be a hierarchy of offenders. The initial action will be taken against the person who originally deposited the waste if they can be found and made amenable.

**The Chairperson:**

I just want a clear understanding for my own benefit; if I owned land and illegal waste was dumped on it, I am responsible for its removal. Is it my responsibility to prove either way that it was not my fault, irrespective of its removal? Is that what the Bill is saying at the minute? Can you explain that clearly, please?

**Mr Starritt:**

First, we have to make the distinction. As Karl said, there are three clauses in the Bill that deal with contaminated land, and what we are talking about are the provisions relating to waste. Basically, current legislation requires that, where the Department becomes aware that there is illegal waste activity, it can pursue either the occupier or the landowner. Sometimes it is difficult to know who is responsible. Equally, if it is known who deposited the waste and there is evidence to prove that, the Department can pursue the offender who may be a third party entirely under article 4 of the 1997 Order.

**The Chairperson:**

OK, to follow on from that, let us say that I am the landowner, the waste is on my ground, and I hold my hands up and say that is nothing to do with me. What impact does that have? What responsibility is there?

**Mr Starritt:**

On the landowner?

**The Chairperson:**

Yes.

**Mr Starritt:**

First, if the Department accepts that argument, it would try to pursue the person responsible. The

other issue that would come into play is whether the landowner may in some way be deemed to be responsible for it. The landowner may not have committed the offence, but the ground may not have been controlled or fenced off properly.

**The Chairperson:**

Ultimately, what we are talking about is the cost of removal of waste, which most people address. I am trying to tease that out.

**Mr W Clarke:**

To continue in that vein, if a person bought land in good faith and had no knowledge of any contamination or waste on the land, who is responsible if a new case is discovered and the farmer or landowner has no idea?

**Mr Starritt:**

Do you mean if there is a historic deposit of waste on the land?

**Mr W Clarke:**

Even if it happened six months or a year before that person bought the land.

**Mr McMahon:**

That comes back to the issue of burden of proof. If someone buys a piece of land in good faith, and there is evidence that they have gone through a process, and there is no evidence that they had any sense that the land was contaminated beforehand, it comes down to the burden of proof. The authorities would have to prove that the person had knowingly bought a piece of contaminated land. That is why the use of word “knowingly” is so important.

**The Chairperson:**

I was just going to bring that up. That is why the issue of the use of “knowingly” has arisen. The person could have bought the land in good faith, and the waste could have been hidden.

**Mr Kinahan:**

The witnesses indicated that if someone has not fenced their land properly, they could be deemed

to be at fault. One can never fence land completely.

**Mr Starritt:**

There is currently a defence in the legislation for someone to say that they neither knowingly caused nor permitted the offence. That defence may not apply in a scenario in which a break in fencing was drawn to someone's attention and they did not take action to address that. However, I do take your point that it will be difficult.

**Mr McMahon:**

One of the challenges is trying to tease the issue out on a case-by-case basis, and it will depend on the actual circumstances of the case. It is one thing if there is a natural break in the fencing, but it is another thing if someone said that they did not know about illegal dumping on their property yet lorries came on to their site every day. There are also a whole range of scenarios in between. It is about the burden of proof.

**Mr Kinahan:**

I have a slight difficulty with the concept of throwing a burden on to the accused. I know that we have to do that to control illegal dumping, but we are basically now changing our whole legal system from the basis that someone is innocent until proven guilty. We must be careful.

**Mr McMahon:**

The Department agrees.

**Mr Starritt:**

The point that was made by the Office of the Legislative Counsel was that even if the word "knowingly" was removed, you would still have to prove that someone caused or permitted the offence. That begs the question whether someone could cause or permit without knowing about it. That was the crux of the comments from the OLC.

**The Chairperson:**

OK.



**Mr Starritt:**

I will move on to address the issue of the fixed penalties in the Bill and summarise my comments under four main areas: the levels of fine and provision for their future amendment; the issue of guidance on the use of fixed penalties; the number of funding issues; and the whole question of a fly-tipping protocol.

Some of the witnesses who came to the Committee suggested that a higher level of fixed penalties would be appropriate. The Department looked at that issue again and spoke to the Minister, and it is now happy to support an increase in the upper limit of the fixed penalty range. However, it feels that the lower limit should stay at £100 and fairly close to the fine for the offence of littering. That approach will provide a good range of fixed penalty fine amounts. Therefore, in summary, the Department proposes that the legislation should provide for a scale of fines that range from £100 to £400. The Department accepts that there is a need for consistency and proposes that that is addressed through departmental guidance.

**The Chairperson:**

Before the summer recess, the Committee spoke about setting the range of fines from £200 upwards, yet the Department has decided that the range of fines should be between £100 and £400.

**Mr Starritt:**

As it stands, the Bill says that that range should be between £100 and £200. Different levels of fines have been suggested, and £400 and £500 were both suggested as upper limits.

**Mr T Clarke:**

I was not a member of the Committee before the summer recess, so I apologise for these questions. Given the lengths to which the agencies must go in order to find out who has dumped waste, is £100 a big deterrent to someone who wants to tip a lorry load of waste? Would someone not be better off paying a £100 fine to dump that waste, rather than hundreds of pounds to take it to a proper landfill site? It does not seem to be a deterrent.

**Mr Starritt:**

The fixed penalties would only be for low-level or minor offences.

**Mr T Clarke:**

Such as?

**Mr Starritt:**

I suppose they would be one step up from littering, such as, perhaps, dumping two or three bin bags full of waste. The legislation already provides for significant fines with up to five years imprisonment and an unlimited fine for very serious offences.

**Mr T Clarke:**

Who is going to enforce that limit of three bags of litter?

**Mr Starritt:**

We will address that issue when we come to discuss the fly-tipping protocol. It will be a matter of deciding at what level councils enforce the legislation, but I would say that the lower level would be the responsibility of councils.

**Mr Beggs:**

Why do you state in your evidence that a £400 upper limit would be better than a £500 limit? Why do you not want to go for a higher amount and avoid court action? Fixed penalties may be a possible method of dealing with minor issues over which there may be a grey area about whether to go to court. Why not give yourself that flexibility?

**Mr Starritt:**

We are content to go back to the Minister again on this point. We were considering the range of fines. If the range is too great, it may make it a wee bit more difficult to achieve consistency across the board. However, we are happy to bring that back to the Minister if the Committee feels that a higher level of fines is appropriate.

**Mr Beggs:**

I am looking for an explanation. I do not have a particular view on it, but I can see the benefits of having a choice.

**Mr Starritt:**

It is really just to keep the range fairly tight.

**Mr W Clarke:**

I agree with what you are doing in having different levels of fines. Can you outline what the different levels are for; why choose the amount of £200 or £400? Would a different level be applied if someone dumped additional bags or a different type of waste? Is there a guide to what that is about? I understand that major incidents will not be subject to fixed penalty; they will go directly to court. Is the high-level fine for a repeat offender?

**Mr Starritt:**

Yes; it could be for a repeat offender, or it could be that someone has committed a more significant offence either because of the nature or the volume of the waste.

**Mr W Clarke:**

Or where it is dumped; for example in a nature reserve or something like that? I am just trying to get an idea of what we are talking about.

**Mr McMahon:**

The overall seriousness of the offence is the distinguishing factor. Guidance needs to be drawn up. The Committee raised that issue previously, and we accept that, but it is really about defining the seriousness of the offence and trying to ensure that the fine reflects that.

**Mr W Clarke:**

Sorry, I am new to the Committee, so I am just catching up.

**Mr Starritt:**

I will speak about the provision for the future amendment of the level of fines later, as it comes

up again under schedule 1.

**The Chairperson:**

OK.

**Mr Starritt:**

I will deal fairly quickly with the guidance on the use of fixed penalties. We fully accept the need to produce guidance, and we will be doing so in consultation with the local government sector.

Funding was another issue that was raised, and we note that concern. Funding is likely to be an issue for the Northern Ireland Environment Agency (NIEA) and for councils. We recognise that it is likely that the councils and NIEA will have to prioritise their activity. The Minister feels that the best way forward is for councils and the Department to act together to tackle illegal waste activity. A partnership approach is key to the Bill, and that brings me nicely on to my next issue, which is the fly-tipping protocol.

As we have said previously, if one was to summarise this Bill, one could say that its key function is to give councils and the Department pretty much identical powers to tackle illegal waste activity. The protocol is needed to decide who does what. The legislation will allow everybody — both councils and the agency — to investigate and to enforce it. However, there is a need for a quantitative threshold; a cut-off point, if you like, to say that councils will deal with an issue up to a certain level, beyond which it will be up to the agency.

We recognise that there have been widely differing views on the level at which the threshold should be set. The Minister has signalled that he is very keen to work with local government on the issue, and, just last week, he met with a number of council technical staff to discuss the way forward. The Minister has now committed to consulting with the key stakeholders — the councils and waste groups — to develop a fly-tipping framework to establish the principles on which we move forward and to use that as the basis for developing a firm protocol.

The other important issue is that, under clause 12 of the Bill, the Department is required to make a commencement order to bring various bits of the Bill into operation. The Minister has

signalled that he does not intend to commence the provisions that deal with fly-tipping until a protocol is in place. It is not possible to operate the new arrangements until there is a protocol, and, essentially, the Department would not be making a commencement order in that area.

**Mr W Clarke:**

Will the fly-tipping protocol include materials used for bonfires and any types of waste streams that are fly-tipped? Leading on from that, who will prosecute the Housing Executive, housing associations or councils for knowingly allowing waste to be dumped on their properties? Will the fly-tipping protocol cover bonfires or will there be a separate protocol for them?

**Mr McMahon:**

The protocol will set out roles and responsibilities and look at different types of land, such as public land and public sector land as a subset of that. Clearly, if an organisation owns and is responsible for land, it is up to it to ensure that fly-tipping is dealt with. The protocol is really about ensuring that nothing falls between organisations. Until now, there has been some confusion as to who is responsible for what, and everyone was unhappy. The protocol will also establish which organisations should deal with fly-tipping incidents of a certain scale, and councils could be responsible for some smaller-scale incidents. It is about getting the balance right. Donald made the point about partnership, and the protocol will only work if all the organisations co-operate. I do not know if that is any help to you.

**Mr W Clarke:**

Yes; sort of. Just to tease it out a little, the Department will obviously be the guardian of the protocol. If there are clear breaches of the fly-tipping protocol and how it is managed, the Department will have the power to enforce it.

**The Chairperson:**

It is about whether we set thresholds and whose responsibility it is if the waste that is fly-tipped is under a certain tonnage etc. That is Mr Clarke's point. There could be a gap in responsibility, and we need to close that gap.

**Mr McMahon:**

There are two issues. First, you are absolutely right to say that a threshold needs to be set. One of the reasons why the Minister spoke to our technical colleagues was to get a sense of the scale of those incidents, so that the Department can set the threshold at an appropriate level or, at least, consult on it at an appropriate level. The second issue is that the legislation provides a level of flexibility. The last thing the Department wants is for a certain number of bags or amount of waste to be dumped on a site and an argument to ensue about whether it is over or below the threshold and for no one to deal with it. The protocol must ensure that someone deals with incidents of fly-tipping. The fact that its powers will be equal powers means that, no matter what side of the threshold the offence comes under, either organisation can deal with it. That will mean that people will not be able to say that they have been prosecuted by one organisation when it should have been the other or that an organisation did not have the powers to prosecute because it picked the wrong threshold.

**Mr T Clarke:**

What Denis just said demonstrates the problem with the Bill. Should the Department not have the protocol sorted out before the Committee even discusses the clause? We will then know who is responsible for what and what levels of fines apply to the different levels of offence.

Some of the responses from Arc21 and the Southern Waste Management Partnership (SWaMP) raise questions on that issue. Indeed, the summary of responses states that they:

“need clarity on who is responsible for clearing litter on land where no legal owner can be identified.”

Yet the Department says that that issue must be discussed between the councils and the Northern Ireland Environment Agency with respect to resources. Those arguments should have been teased out before the Committee began to discuss them.

**The Chairperson:**

I agree, but what we are actually looking at is the commencement of that provision. The protocol needs to be in place before that provision can be implemented.

**Mr T Clarke:**

Yes, but we need the detail of what is going to happen before we can discuss the substance of the commencement.

**Mr Starritt:**

The main change that this clause will make is that it will give councils the same powers that the Department has.

**Mr T Clarke:**

The Department has done nothing with those powers and is now trying to pass the matter on to local councils.

**Mr Starritt:**

It is not fair to say that it has done nothing.

**The Chairperson:**

It is an important issue. Obviously, we rely on the protocol being set, but Trevor raises a valid point: we need to know the thresholds and who is responsible. If that can be dealt with outside this clause, that is fine.

**Mr McGlone:**

I, like a few others, was not here when all this was going on. In many ways, Mr McMahon answered Trevor's question about different organisations prosecuting wrongly. I presume that the protocol will add clarity and ensure that that does not happen. It could be a case of putting the cart before the horse. If the protocol is not in place, the situation that you outlined and defined as the problem will continue.

**Mr McMahon:**

I will talk about where we are at the moment. Councils deal with a lot of cases. We know, for example, that one council was dealing with something like 9,000 cases. We also know that the Northern Ireland Environment Agency (NIEA) has a register of around 1,200 cases. So, there is activity. It is absolutely right that we should have a protocol. Ideally, we would like to be able to

say today that we have a protocol. We probably have a lot of the fundamentals of a protocol, but the threshold is the one thing that we need to agree finally and do some consultation on.

We have tried to push the issue in a number of ways. We have had quite a lot of intensive engagement. Donald mentioned meetings with technical officers, and we have also had intensive engagement with NIEA. We are close to putting the threshold out for consultation. Once that key issue is resolved, a lot of the roles and responsibilities will be clarified.

**The Chairperson:**

That will indicate whether the responsibility lies with a council or central government.

**Mr McMahan:**

People are dealing with the issue as we sit here today, but the powers are unequal between councils and the Department. We are trying to ensure that there is an equal set of powers so that both sets of organisations have the power to deal with it. The idea is to have a protocol to ensure that the right organisation uses those powers in each case.

**Mr McGlone:**

Is the threshold the issue then?

**Mr McMahan:**

There are others, but the threshold is the key issue.

**Mr McGlone:**

If the threshold is the issue, why do you not establish a protocol in principle and work out the threshold afterwards? There is bound to be a series of key principles that formulate any protocol. Why do you not develop a protocol and then insert, by legislative or other means, the threshold when it is agreed? That would enable people to see the areas and remits of responsibility and the threshold kick-in point. I presume that that is the way that it works. Forgive me if I am wrong; perhaps I am taking a simple view. Normally, there is a protocol with details and measures around it. Is there some problem with that line of thinking? Am I skewed in my thinking? I am sure that it is not beyond the realm of possibility to do that.



**Mr Starritt:**

A lot of that work has been done. The Department and, indeed, the Minister have spoken with council staff and teased out — for want of a better phrase — the general principles that need to be established. As Denis said, the threshold is the sticking point. However, we are hopeful that we can put the principles out for consultation very soon and establish the thresholds at that stage.

**Mr McGlone:**

I find that a bit odd to be honest.

**Mr Dallat:**

Maybe I am going off the subject, but should there be something in the legislation to compel NIEA or the councils to provide resources to enforce the legislation? What I am seeing is some fairly fancy footwork by the Department, which is all very constructive and useful but does not tell me who will enforce the legislation.

We have heard about 20% cuts from the Finance Minister. Could we end up with legislation that is not worth the paper that it is written on? NIEA, based somewhere in Belfast, will send the odd helicopter out over the country, and, let us face it, that will be all. Councils will increasingly say that they do not have the resources because they have cut their overtime costs and do not have the manpower to find the people who are polluting the countryside. The people dumping cat litter are out at night when everybody is away home with their lunchboxes. Should there be something in the legislation to compel whoever is responsible to enforce it?

**Mr McMahon:**

The Bill will not be able to deal with the full resource issue. My understanding is that the debate about a fly-tipping protocol has been going on for some years, and a key issue has been resources. For a while, there was a situation where some organisations were saying that they could not sign up to any threshold.

Some of the points that are being made are absolutely valid, but there may be a slightly different way of looking at the situation: the legislation is forcing the issue. People are well

aware that the legislation is going through and that organisations, including NIEA and the councils, will all be given powers. People will be looking at those organisations and asking whether they are going to use the powers. That is why we think that we have made a lot of progress in getting to the point on the threshold issue and on the roles and responsibilities.

Given that the Minister is committed to not commencing certain measures until the fly-tipping protocol has been dealt with, people are saying that they now know that there is a very clear set of powers and that it is a matter of organisations using those powers. That will ensure that a fly-tipping protocol is finalised before commencement.

**Mr Dallat:**

When the legislation is passed, will Joe Bloggs have the power to take his local council to court for its failure to carry out its responsibilities?

**Mr Starritt:**

I am not sure about that, to be honest. I would have thought that it would always be possible for a civil case to be brought by an individual, but I would need to check that.

**Mr McMahon:**

Whatever measure you take to try to ensure that an organisation is dealing with something, a lack of clarity will not be an acceptable defence once the threshold is agreed.

**Mr Dallat:**

What about a lack of resources?

**The Chairperson:**

To clarify, we have a situation where there are fixed penalties to address fly-tipping from single bottles to the three or four bags of waste. That is as matter of cost recovery. Then, there is a point between dumping a lorry load of material and 20-tons of material. That is where we want to set a threshold on who is responsible for enforcing the legislation. That is what the protocol is about.

You are having ongoing discussions with local councils on who will be responsible for what. The key for us is that, when the protocol is drawn-up, we are able to hold it up to see exactly what the protocol is and what the responsibilities are before the commencement of the Bill itself.

**Mr McMahon:**

That is correct.

**The Chairperson:**

That is the crucial part of what we are trying to do. We can get into who is responsible, but that is what we are trying to work out in the protocol. That is the important part for us.

Are members aware that that is what we need to thinking about? It is important that members understand that. We then need to look at who pays and what is council responsibility. Is that clear?

**Mr Beggs:**

The evidence given to us was that there are protocols between local government and central government elsewhere that appear to be working and where there is a consensus. I suggest that that is the direction in which we should go. You talked about not proceeding with the commencement order until there is clarity on the issue.

As regards the commencement order, will you clarify whether that means that there would be a statutory rule so that that the Committee or the Assembly could block commencement if there was no agreed protocol? I appreciate that if you wait until everything is agreed, perhaps nothing will be agreed. If the commencement order can proceed to a certain extent while some remaining checks are made, something reasonable could come forward that would give a degree of protection.

When will the guidance go out for consultation? That is important. I encourage you to do that sooner rather than later, because then I would have greater confidence in accepting what is being said here.

**Mr Starritt:**

We would approach the Committee about bringing a commencement order. To be honest, that is common sense. The legislation cannot work unless there is a protocol.

**Mr Beggs:**

It is about getting the appropriate level.

**Mr McMahon:**

I agree. However, the point is that the commencement order would go to the Committee.

**Mr T Clarke:**

That has not answered the other question about stopping it at a later stage.

**Mr Beggs:**

That is the commencement order.

**Mr T Clarke:**

Are you bringing it?

**Mr Starritt:**

We would bring a commencement order to commence those clauses once we felt that that would work.

**Mr Kinahan:**

I am reasonably happy. However, we must scrutinise the Bill in two meetings and find a way of agreeing the principles to make it happen, as Patsy McGlone said.

**Mr Starritt:**

Clause 2 deals with the retention of seized property, which I will quickly summarise. Not a lot of issues were raised about the clause. Under existing waste management legislation, the Department can already seize vehicles and other property that are suspected of being used in illegal waste activity. There is subordinate legislation in place to exercise those powers. The new

clause will allow the Department to make provision in that subordinate legislation to retain property for a certain period after seizure. The clause, therefore, needs to specify a number of days, be it 14 or 21 days. The only issue, which is a separate issue, was about the responsibility for dealing with hazardous waste. Again, we propose that that should be addressed in the protocol.

**The Chairperson:**

Are members happy with that?

*Members indicated assent.*

**Mr Starritt:**

Clause 3 deals with the offence of failing to pay a charge for subsistence of the licence. The clause creates two new offences: failure to pay subsistence fees in the first instance and continued non-payment after a conviction for failure to pay. The feedback was generally supportive of that. Therefore, there are no real issues to discuss.

**Mr W Clarke:**

I wish to expand the point about failure to pay. What happens if somebody goes to court and has no income and cannot pay the fine? If someone's disposable income were less than the fine, there would be a never-ending scenario. How would that be dealt with? Would that individual go to jail? If people dump waste and cannot pay the fine, do they go to jail for life?

**Mr Starritt:**

That scenario would be addressed by looking to the waste management licence. Everyone who operates a facility is required to have a waste management licence. Therefore, if someone is unable to pay a fine, his or her licence would, ultimately, be suspended or revoked.

The point is that, even if the licence is suspended or revoked, the Department would still incur costs in leasing and inspecting the site and ensuring that the waste does not cause any damage to the environment.

**Mr W Clarke:**

Sorry to go back to this, but that is probably more relevant to the payment of fixed penalties. If people just keep refusing to pay fixed penalties, how would that be resolved?

**Mr Starritt:**

The fixed penalty fine is an option for the council or the Department. If someone did not pay it, they would be taken to court.

**The Chairperson:**

OK; let us move on to clause 4.

**Ms McCay (Department of the Environment):**

Clause 4 refers to the powers to require the removal of waste that has been unlawfully deposited. It makes two main changes to the existing article 28. Some of this has been covered already, so I will just cover it briefly, but, basically, the Department will have powers to issue notices requiring the removal of waste or the clean-up of land. Only councils have those powers at present. It will be possible to serve notices under article 28 on the person responsible for the illegal deposit as well as the occupier or the landowner.

Comments from stakeholders on that clause focused on three areas: the potential liability of landowners for waste on their land; who is responsible for cleaning up waste on unregistered land; and who is responsible for cleaning up hazardous waste. Really, we are back to the protocol here. The common theme running through the comments is the need for clarity over who will be responsible for what, once the waste enforcement powers between the Department and councils have been harmonised. The need to avoid duplication and confusion was also mentioned.

We accept that, and I will come back to those issues as they will be addressed in discussions on the protocol, as will the quantitative threshold. As we have said, the protocol will deal clearly with who does what and the need to deal with the issue of the clearance of waste from private land. We have already discussed that, and I will not go over the same ground. The relevant aspects of the legislation will not be commenced until the fly-tipping protocol is in place. I have one word of caution; despite the protocol setting out who is responsible for this, realistically, we

are back to the subject of resources. Resource constraints on councils and on the Department are likely to limit what action can be taken to clean up unregistered and private land.

Clause 5 states that councils are to enforce articles 4 and 5 of the 1997 Order. Again, we have covered some of this ground. As members know, this clause extends the Department's enforcement and investigation powers to councils under the 1997 Order. Several of the issues raised by stakeholders here have already been covered, particularly the issue of resources and the need for a clear demarcation of responsibilities.

I will focus on two main issues that have not already been covered. First, as it is currently drafted, the Bill excludes councils from the enforcement of article 5(7) of the 1997 Order, which means that council officials would not be able to take enforcement action against anyone who failed to present appropriate documents relating to the transfer of waste. The main reason for that was because the Department, at the start, did not think that councils would require those powers. However, we have considered the points made by stakeholders, and the Minister has no objection to extending the powers. Therefore, we will propose an appropriate amendment to the Bill so that councils and the Department would effectively have the same investigation and enforcement powers in all aspects.

Secondly, and again we have discussed some of this already, there is the quantitative threshold. Several stakeholders mentioned, and I heard it suggested this morning, that the quantitative threshold should be written in to legislation rather than being in the fly-tipping protocol. Our preference would be for the legislation to have only the broad enabling powers, leaving the specific quantitative threshold to be set out in the protocol rather than written into the Bill. That is based mainly on the fact that there are very few definitive statistics on smaller scale fly-tipping in Northern Ireland. Also, there are differing views on where the threshold should be set. On that basis, our view is that specifying the threshold in the protocol will allow more flexibility if that needs to be adjusted in the light of experience of operating it and the statistics gained through monitoring the use of the protocol.

**Mr W Clarke:**

Why do we not have comprehensive data on fly-tipping?

**Mr McMahon:**

One reason has been the associated costs. Going back to a point that I made earlier, because the issue is being forced by the Waste Bill, there is now much greater emphasis because everybody realises that it will have a huge impact on resources. Until now, resources have been an issue, but it is becoming clear to all concerned that we are going to have to get better information, and we are certainly looking at ways of doing that.

**Ms McCay:**

That would have to be addressed in the protocol. The need for monitoring and for statistics would be a key issue.

**The Chairperson:**

Clearly, we have information from some councils.

**Mr McMahon:**

Yes; it would be wrong to say that we do not have any information. The key point about setting the quantitative threshold in the Bill is about having a certain amount of flexibility. It is not even so much about the existing statistics; the situation could change over time. Hopefully, there will be a big drop in certain types of fly-tipping.

**Ms McCay:**

Clause 6 removes a requirement for enforcement officers that are investigating waste offences to give 24 hours' notice before they can go into residential premises or bring heavy machinery onto premises. They will still need a warrant or the permission of the occupier. The only change is the notice requirement. There were no real issues with that clause, and the feedback was generally supportive. I am happy to hand over the Karl Beattie, who will deal with contaminated land clauses.

**Mr Beattie:**

Clause 7, entitled "Contaminated land: pollution of waterways and underground strata", amends the definition of "Contaminated land" for the purposes of part 3 of the 1997 Order by revising the definition of "underground strata" and introducing a test of significance to the pollution of



waterways and underground strata.

The Department has worked very closely with a number of the Committee's respondents through the contaminated land liaison group. The comments that we have received in response have been generally supportive.

Clause 8, entitled "Appeals against remediation notices", provides for all appeals against remediation notices to be heard by the Planning Appeals Commission (PAC), rather than responsibility being split between PAC and the courts according to which regulator issued the notice.

The Department notes the generally supportive comments from stakeholders and that the Committee has raised concerns that unscrupulous operators may seek to use the appeals process to extend the time available to them to fulfil their obligations, especially if there is no charge. There has to be some form of appeals process, and there is always the possibility that that may be used to gain additional time. The question is whether a fee should be attached to the process to discourage the most vexatious appeals.

Although a fee would lead to disparity with the equivalent legislation in GB, we already have a similar situation with the environmental liability regulations, which provide for an appeal fee of £126 to be charged by the PAC. Although experience in GB suggests that that is not a major issue, with only two appeals having been brought since a similar amendment was made there in 2006, the Department has no objection to amending the clause to provide for the charging of a fee similar to that chargeable for a planning appeal.

Clause 9 precludes the use of the contaminated land regime where land has been contaminated by the final disposal of controlled waste, and enforcement action can be taken under the Pollution Prevention and Control Regulations (Northern Ireland) 2003.

The Committee raised the issue of whether there should be a timescale for the final disposal of controlled waste. Although that was raised in respect of this clause, it is not a specific contaminated land issue, so I will hand back to Donald.

**Mr Starritt:**

The timescale issue is something that we had previously responded to the Committee about in detail. Essentially, the Department believes that the existing legislation is satisfactory, because waste management notices can be served under article 28 of the 1997 Order. Those can specify that the waste must be removed and remedial action taken within a specified time period. They also include fines for non-compliance. The Bill provides for the Department to serve those notices as well as councils.

The most serious offences will be dealt with through prosecution. As we said earlier, the Bill makes provision for unlimited fines and up to five years in prison. Given the severity of those penalties, it can take quite a long time to gather the information that is needed to secure a successful prosecution. The Department feels that existing legislation is appropriate, and it is committed to ensuring that illegal waste activities are tackled as quickly as possible.

Clause 10 will simply amend existing legislation on producer responsibility to provide a more precise definition of the Department's powers of entry and inspection. It is really a clarity clause, and no issues have been raised with it. Clause 11 deals with minor and consequential amendments and repeals. No issues were raised with that clause.

Clause 12 deals with commencement. We referred to that clause earlier and the fact that the fly-tipping provisions would not be commenced until a fly-tipping protocol is in place. Clause 13 and 14 deal with the interpretation of the Bill and its short title respectively

I now move on to the proposed amendments of schedule 1, which refers back to the earlier point on fixed penalties. The clause-by-clause analysis suggested that the Committee may want to consider changing a number of provisions in the Waste and Contaminated Land (Northern Ireland) Order 1997, to require that any changes to fixed penalties would be subject to draft affirmative procedure.

It may be helpful if I summarise the current position. The Waste and Contaminated Land (Northern Ireland) Order 1997, which will be amended by the Bill, provides for three separate fixed penalties for the misuse of waste bins, the transfer of waste and the transportation of waste. As we

heard earlier the Bill will introduce a fourth fixed penalty for fly-tipping. Currently, the three existing fixed penalties can be amended by negative resolution, which does not require debate in the Assembly. The reason for that is that the provisions are not considered to be especially sensitive or controversial. For consistency the Department proposed that the new fourth fixed penalty would be the same. The Examiner of Statutory Rules recommended that the process for amending all the fixed penalties should be changed to draft affirmative procedure. The Department discussed that with OLC, and the OLC pointed out that there are quite a few precedents for negative resolution, and, on that basis, the Minister felt that negative resolution remains justified. However, we are happy to go back to the Minister on that, subject to the views of the Committee.

**The Chairperson:**

OK.

**Mr Beggs:**

There may be precedent. However, is it not good practice for everything to be agreed in advance, rather than going through negative resolution and potentially having to change the penalties if the Assembly does not agree?

**Mr Starritt:**

I take the point that that is a control mechanism, but it will mean that, for example, inflationary increases would need to be brought to the Assembly and undergo draft affirmative resolution. It is a judgement call as to whether that is deemed to be appropriate, but the Minister is content to look at it again if the Committee wishes him to do so.

**The Chairperson:**

I will put that to the Committee.

**Mr Starritt:**

There are no issues with schedule 2 to the Bill. That concludes our comments.

**Mr McMahon:**

There is one other issue.

**The Chairperson:**

Will you cover the quality of recycling?

**Mr McMahon:**

We probably need to touch on a couple of other issues.

We responded to the issue about the quality of recyclates and talked about what we are trying to do in that regard. We also talked about the fact that, at this point in time, none of the other jurisdictions is going down the route of setting quality targets in legislation. However, it is worth saying that the Welsh Assembly is looking at powers to set a range of targets. That could ultimately include quantitative and qualitative targets and some specifications, such as segregated collection. We just wanted to ensure that the Committee was aware of that. We will obviously need to look at a number of practical issues, and we are happy to do that if the Committee feels that we should.

We identified three issues. The first issue was about the types of powers set in statutory guidance or subordinate legislation. The second issue was about the types of targets. As I said before, it is up to the Committee whether it wants us to look specifically at the quality of outputs or at broader powers that are along the lines of the Welsh model. The third issue was about consultation. To date, there has been no consultation. However, we will look at that should the Committee feel that that is required.

**The Chairperson:**

Are there any other points?

**Ms McCay:**

The vast majority of issues from the general comments have already been covered. However, I wish to mention quickly two points. The first is the ring-fencing of landfill tax to deal with environmental issues. Our point is that that is not the Department's responsibility; that is a reserved matter. On that basis, the landfill allocation is a matter for the Executive. We are, therefore, not able to control that through the Bill.

My second point is about the suggestion that the Department, NIEA and councils should meet regularly to discuss enforcement matters in a working forum. We already work with councils on waste management issues through the waste programme board, and there has been ongoing dialogue on the development of the protocol. We are happy to work with the councils to explore further options as part of that work. However, we will obviously need to discuss the remit and authority of the group.

**Mr Kinahan:**

I have two questions about the obligations relating to private land. On Monday night, I was with a farmer who has had tyres — not a big amount — dumped on his land, and I can see from the Department's response to the clause-by-clause analysis that the council concerned will not want to pick up those tyres. However, given that there is money involved in tyres, can that issue be taken into account in the protocol? How do we get councils to deal with the small issues that matter to farmers, because the farmers have to pay to get rid of what has been dumped on their land? That farmer has to pay to get rid of two piles of tyres that are nothing to do with him.

**Mr Starritt:**

As regards private land, that is always going to be difficult. That will have to be addressed through the protocol. However, if we are realistic, it will always come back to resources and whether the councils or the agency will be in a position to deal with that. The protocol will certainly encourage either councils or the agency to deal with private land. However, it is unlikely that they will realistically be able to do that in every instance.

**Mr W Clarke:**

I wish to make a point about the landfill tax. I appreciate what you said about the British Treasury being in control of that. However, do you have any figures for the amount of money that is generated from landfill tax in the North? What kind of money are we talking about? What receipts come from landfill tax?

**Mr McMahon:**

We do not have that information to hand, but we will certainly see whether we can get it.

**Mr Dallat:**

Private operators have to pay landfill tax as well. What safety measures are in place to ensure that landfill tax is not used to buy off, for example, objectors to a particular facility or to exploit or encourage activity that is the very opposite of environmentally friendly.

For example, if I was running a particularly objectionable project to which there was fierce opposition from a community group, the obvious thing to do would be to pay out the landfill tax in large quantity to buy that group off.

**Mr McMahon:**

Basically, what happens with the landfill tax is that the operator has to pay it. It goes to the Treasury and, inasmuch as it comes back, it comes back through the Northern Ireland block.

**Mr Beggs:**

Is it in the Northern Ireland block grant?

**Mr McMahon:**

It is in the Northern Ireland block grant; it is not something that we can identify separately. It cannot be used for any purpose like that.

**Mr Dallat:**

So, are you saying that the operator who collects the landfill tax has no influence whatsoever in how it is awarded?

**Mr McMahon:**

No, the operator pays the landfill tax.

**Mr Dallat:**

I know, but when that landfill tax goes back to the community, are you telling me he has no influence on who gets it?

**Mr McMahon:**

We never actually see landfill tax. Once it goes, it goes to the Treasury. Again, I am happy to look at any specific cases.

**Mr Dallat:**

That would probably be the best way to handle that.

**The Chairperson:**

I am conscious of the time.

**Mr Dallat:**

So am I; I have another Committee meeting at 2.00 pm.

**The Chairperson:**

That is why I asked for patience. I just want to go through the Bill informally clause by clause. Can members indicate if they have any questions or need to suggest amendments or think that we should come back to or park the issue —

**Mr W Clarke:**

I do not have time. I have another meeting; I am sorry.

**Mr Weir:**

A number of us are under pressure, and I am not sure at this stage what the benefit of going through an informal clause-by-clause scrutiny would be. We will have to come back to it.

**The Chairperson:**

We will have to defer. We may need to set up another meeting. We have a big programme of work, as members are aware. We will defer the informal clause-by-clause scrutiny until next week. We will continue with business. Thank you.