



Northern Ireland  
Assembly

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COMMITTEE FOR THE  
ENVIRONMENT

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**OFFICIAL REPORT**  
(Hansard)

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**Waste and Contaminated Land  
(Amendment) Bill: Clause-by-Clause  
Scrutiny**

28 September 2010

**NORTHERN IRELAND ASSEMBLY**

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ENVIRONMENT**

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**Waste and Contaminated Land (Amendment) Bill: Clause-By-  
Clause Scrutiny**

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28 September 2010

**Members present for all or part of the proceedings:**

Mr Cathal Boylan (Chairperson)  
Mr Patsy McGlone (Deputy Chairperson)  
Mr Roy Beggs  
Mr Thomas Buchanan  
Mr Willie Clarke  
Mr John Dallat  
Mr Alastair Ross  
Mr Peter Weir  
Mr Brian Wilson

**Witnesses:**

Mr Karl Beattie            )        Department of the Environment  
Ms Jennifer McCay        )  
Mr Denis McMahan        )  
Mr Donald Starritt        )

**The Chairperson (Mr Boylan):**

We will conduct our clause-by-clause scrutiny of the Waste and Contaminated Land (Amendment) Bill. As we do, I will remind members of the key issues that were raised by stakeholders and the Department's response to those issues. After each clause is considered, I will ask members to agree a formal Committee position on that clause. An updated version of the

clause-by-clause table is included in members' papers.

Any clauses that are agreed today, as drafted, will be agreed subject to any consequential amendments arising from substantive issues raised by the Department or from other clauses deferred today. The Committee will park and revisit any clause about which members cannot reach agreement today, but I would like to complete as much work on the Bill as possible.

***Clause 1 (Fixed penalty notices for offences under Article 4)***

**The Chairperson:**

There are five key issues in respect of clause 1, the first of which concerns the shift in the burden of proof from the enforcing authority to the accused. The Department of the Environment (DOE) originally consulted on the inclusion of such an amendment but decided not to proceed when human rights issues were raised.

Banbridge District Council suggested amendments to achieve to changes that it wanted while still protecting responsible landowners. The NIEA (Northern Ireland Environment Agency) agreed that a shifted burden of proof might have made some of its enforcement duties easy in the past, but, for it, the issue was one of proportionality: that is, they focus on large cases, which, by their nature, almost always have implications for the landowner. The NIEA also noted that such an amendment would have no impact on the removal of illegally dumped waste, which may be the more significant issue.

Following last week's discussion, the Ulster Farmers' Union (UFU) submitted an e-mail reminding the Committee of its position on the shift in the burden of proof. The union argues that it is impossible for landowners to fully prevent fly-tipping because such incidents are often unknown to them. The submission argues that simply prosecuting the landowner just because they own the land does little to prevent future incidents, and a landowner could potentially become a repeat offender without committing a criminal act.

The Assembly Research Services has provided members with a comparison of legislation in other jurisdictions. That report indicates that, in all other similar legislation in the UK and the South, the burden of proof lies with the enforcing body.

Having consulted the Office of the Legislative Counsel, DOE pointed out that excluding the

word “knowingly” would mean that Banbridge District Council’s suggested amendment would have no practical effect. DOE concluded that it would maintain its position of not amending the Bill to include that provision.

Are members content to include the Assembly Research Services’ paper on the comparative legislation and the UFU update on its position in the Committee’s report on the Bill?

**Mr Beggs:**

I declare an interest: my father owns a legal landfill site. Looking carefully at some of the detail, it is safer for me to also declare that I own 25 acres of agricultural land.

**The Chairperson:**

That is fine.

Are members happy to include the paper from Assembly Research Services and the UFU paper in Bill report?

*Members indicated assent.*

**The Chairperson:**

Will the departmental witnesses come forward as we need some guidance? The Committee’s position, therefore, is that establishing the burden of proof is to remain with the enforcing body. Is that correct?

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

That is correct.

**The Chairperson:**

Banbridge District Council formed wording for a proposed amendment. The inclusion of the word “knowingly” would shift the burden of proof onto the landowner. Do members accept the DOE’s rationale for excluding that provision or do they require more clarification?

**Mr Buchanan:**

It is important that the burden of proof is not put on the landowner. From what you said,

Chairperson, I understand that that burden of proof will stay with the Department.

**The Chairperson:**

Yes. The Banbridge amendment calls for the opposite. Are you clear on that, gentlemen? Do you need any further explanation or have you any other comments to make?

Are members, therefore, content with DOE's rationale for excluding that provision? For clarification: you do not want to pursue Banbridge District Council's proposed amendment. Is that agreed?

*Members indicated assent.*

**The Chairperson:**

We will move on from the burden of proof to the second issue that was raised under clause 1. Most respondents told the Committee that guidance should be provided outlining circumstances for the use of fixed penalty notices to ensure consistent enforcement across councils. The Department agreed. It indicated that it proposes to prepare guidance in consultation with councils and waste management groups. That is not the protocol, gentlemen; it is guidance. Are members content?

*Members indicated assent.*

**The Chairperson:**

We will move on to the third issue that was raised under clause 1. I remind members that most respondents told the Committee that fixed penalty notices should be set at a level that acts as a deterrent. One also suggested that two upper limits might be set to differentiate between domestic offences and minor commercial offences, such as £200 and £500. Prior to recess, the Committee agreed that a cap of £200 was too low and that £300 to £400 would be more appropriate. DOE has accepted that the upper level could be increased to £400. However, it remains adamant that the legislation should provide for a range of fines of between £100 and £400, and that consistency between councils should be addressed in the guidance.

Will the Committee will have an opportunity to see its proposed amendment to clause 1(9)(b) to increase the upper fine limit from £200 to £400 while the Bill is still at Committee Stage?

**Mr Starritt:**

Yes. That is fine.

**The Chairperson:**

Are members, therefore, content with the Department's decision? Alternatively, we could prepare amendments to set different maximum and minimum fines and/or to set separate fine ranges for domestic and minor commercial offences. Are member's content with the Department's decision?

*Members indicated assent.*

**The Chairperson:**

We will move on to the fourth issue that was raised under clause 1. I remind members that the Committee felt that the emphasis of the wording of clause 1(11) should be changed so that instead of implying that offenders would receive a "discount" on prompt payment, they would have to pay an "enhanced" penalty if late.

The Department argues that the wording is consistent with the existing provision for fixed penalties and suggests that the form of wording could be reflected in the guidance on the use of fixed penalties specifically in relation to the format of the fixed penalty notice itself.

Our options are to accept the Department's proposal or to propose an amendment. Are members content with the Department's proposal?

*Members indicated assent.*

**The Chairperson:**

We will move on to the fifth issue that was raised under clause 1. I remind members that the Examiner of Statutory Rules suggested to the Committee that the power to alter the amount of a fixed penalty notice under new article 4A(10) should be subject to draft affirmative procedure rather than to negative resolution. The Examiner argues that that would be consistent with other Bills that are before the Assembly.

DOE's response indicates that, having consulted the Office of the Legislative Counsel, it believes that that power does not require affirmative procedure because it sets out parameters rather than setting the actual amount.

The actual amendment to make that power subject to draft affirmative procedure would be made by an amendment to article 82 of the Waste and Contaminated Land (Northern Ireland) Order 1997 in schedule 1 to the Bill. I will come back to that particular issue when we deal with schedule 1.

**Mr McGlone:**

Maybe I am just blind to some of this stuff, but I honestly do not know what is attempted to be explained in the Department's submission when it states:

“The Department accepts the need for consistency of approach. However OLC —”

Who or what is OLC?

**Mr Weir:**

It is the Office of Law Reform.

**Mr McGlone:**

No, OLC.

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

It is the Office of the Legislative Counsel.

**Mr McGlone:**

All right, some bigwig somewhere. Sorry, right, but to read on there:

“In addition, OLC states that while there may be cases – eg in particularly sensitive or politically controversial areas - where this type of power is subject to affirmative resolution, the majority of precedents are for negative resolution.”

To be honest with you, I just have not one clue what that is attempting to explain, and I do not think that I am entirely thick.

**Mr Starritt:**

We were trying to say that, under existing legislation, the existing fixed penalties can be changed by negative resolution. In other words, the legislation can be brought forward, and unless some prays against it, it would go through.

**Mr McGlone:**

As I said, the submission says that:

“OLC states that while there may be cases – eg in particularly sensitive or politically controversial areas - where this type of power is subject to affirmative resolution, —”

What does that mean?

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

When we have a proposal to change some piece of legislation, we would tend to go to the Office of the Legislative Counsel to get advice on how well the change would work with regard to the law and how well it would fit in. I suppose the advice it was coming back to us with was that, if it is something that is particularly sensitive or an issue that will clearly require detailed political consideration and input on every situation, it should be done by affirmative resolution. However, in cases in which there may be political input, in which case people can pray against it in the Assembly, although it may be a more routine issue, the precedent has been to use the negative resolution.

**Mr McGlone:**

It all seems very complicated simply to alter the amount of a fixed penalty.

**Mr McMahon:**

The point was that, because it is not complicated or necessarily contentious, it is better to use the negative resolution procedure.

**Mr McGlone:**

Maybe it is just to me — coming from up the country — that that paragraph was a bit convoluted.

**Mr McMahon:**

Sorry, that is our drafting more than the —

**Mr McGlone:**

Sorry about that, Chairperson. It is maybe a wee bit clearer now.



**Mr Weir:**

That paragraph explains the process of tackling the general situation, rather than its specifics.

**Mr McMahon:**

That is it exactly.

**The Chairperson:**

We will come back to that matter when considering schedule 1. We will wait to see the amendment before formally agreeing to clause 1.

*Clause 1 referred for further consideration.*

*Clauses 2 to 4 agreed to.*

***Clause 5 (Councils to enforce Articles 4 and 5 of 1997 Order)***

**The Chairperson:**

I remind members that several respondents stressed that councils must be given the same powers of entry and investigation as the Department under article 5(7) or powers under articles 4 and 5 will not be deliverable. DOE's response indicates that it intends to propose an amendment that would give councils those powers, so that they would be able to take enforcement action in the event of a failure to present appropriate waste documents.

**Mr McGlone:**

I may be just having one of those days, but it says in the scrutiny table: "which would give councils powers"; it does not say "those powers". Can we assume that it is, in fact, those powers?

**Mr Starritt:**

Yes.

**The Chairperson:**

Are members content with the Department's response?

*Members indicated assent.*

**The Chairperson:**

Will the Committee have an opportunity to see the Department's proposed amendment to give councils powers under article 5(7) of the 1997 Order during Committee Stage?

**Mr Starritt:**

Yes.

**The Chairperson:**

Well, gentlemen, we will wait to see the amendment before formally agreeing the clause.

*Clause 5 referred for further consideration.*

**Mr Dallat:**

Clause 6 refers to heavy equipment. Does that mean a Centurion tank or a sledgehammer?

**A Member:**

This is being recorded by Hansard. *[Laughter.]*

**The Chairperson:**

Maybe that happens only in the north-west.

*Clauses 6 and 7 agreed to.*

**Clause 8 (Appeals against remediation notices)**

**The Chairperson:**

I remind members that the Committee was concerned that there was a risk that the Planning Appeals Commission would be used to buy time for an offender being given a penalty, especially if there was no charge. The Department's response indicates that existing legislation provides for appeals against remediation notices to be made within 21 days. The Department points out that no fee can be charged by the Planning Appeals Commission, although £100 is chargeable for an appeal heard by a court of summary jurisdiction. There is currently no enabling power for the introduction of a fee for this type of appeal, but the Department would be happy to consider an amendment to the Bill to that effect.

Do members want to recommend that the Department amends the Bill accordingly?

*Members indicated assent.*

**The Chairperson:**

We will wait for that amendment. Again, could we see sight of it while the Bill is still at Committee Stage?

**Mr Starritt:**

Yes.

*Clause 8 referred for further consideration.*

**Clause 9 (Interaction with other provisions)**

**The Chairperson:**

I remind members that the Committee suggested that a timescale should be introduced for the final disposal of illegally deposited waste. The Department's response indicated that it feels that existing legislative provision in this area is satisfactory. Councils can currently serve notices requiring the removal of waste and remedial action within a specified time period, which could be as short as 21 days, and the legislation provides for a fine of up to £5,000 for non-compliance and a subsequent daily fine of up to £500. The Department believes that a set timescale could prove counterproductive.

Our options are to accept the Department's response or to pursue the introduction of a time frame through recommendation or proposing an amendment. Are members content with the Department's response?

*Members indicated assent.*

*Question, That the Committee is content with the clause, put and agreed to.*

*Clause 9 agreed to.*

*Clauses 10 and 11 agreed to.*

***Clause 12 (Commencement)***

**The Chairperson:**

I remind members that, although generally supportive of the commencement clause, several respondents were keen to see a requirement for the protocol to be in place before the Bill commences and for a slush fund to be established that councils can access for larger clean-ups in the interim. The Department response indicates that the specific clauses that relate to councils' enhanced waste management powers will not be enacted until a fly-tipping protocol is in place. It is possible that other clauses may require a different commencement date. Also, DOE suggests that the issue of a slush fund cannot be addressed because of resource constraints.

Are Members content with the Department's response or do they wish to look at options to ensure that the commencement of the Bill does not take place until a protocol is in place?

**Mr McGlone:**

Why can a slush fund not be set up?

**The Chairperson:**

Obviously, it is a resource issue.

**Mr McGlone:**

I thought that it was just a dosh issue.

**Mr Starritt:**

It is partly to do with the context of use. I think that the question was about whether receipts from landfill tax may be used. However, that is ring-fenced by the Treasury, so we do not have access to those funds.

**Mr McMahon:**

That comes back as part of the Northern Ireland block grant.

**Mr McGlone:**

Sorry, I am coming to this issue a wee bit late and lack a general grasp of it, so, please, bear with me. As regards the slush fund, I thought that seized assets were the kind of direction in which we

were going as opposed to taxes or other stuff that is ring-fenced by the Treasury.

**Mr Starritt:**

I think that I am right to say that the issue was raised in the context of using landfill tax. Other than that, I suppose that it is a resource issue.

**Mr McMahon:**

You are talking about fines and property being seized.

**Mr McGlone:**

Yes, I am talking about assets or something like that being seized.

**Mr Starritt:**

Any fines or fixed penalties levied by councils, fixed penalties, for example, —

**Mr McGlone:**

We will take an example. Say an unidentified car — runabouts and the sorts of things that we see lying round the countryside — with a notional value is disposed of at auction and realises perhaps £100 or £200 or even £1,000. That is the sort of thinking that I have around the issue.

**Mr McMahon:**

I think that we are confusing a number of issues. Money from fines for cars or property would go back to the council, if it successfully prosecutes someone in a case. There is, therefore, no issue with that coming back to the council in question.

I think that we confused matters by talking about the issue of landfill tax, which was raised previously. We were saying that landfill tax does not come back to us as a separate source of money that we can then use to set up an additional central fund. Therefore, if we were going to set up a central fund, it would have to come out of the resources that the Department already has. The question is, therefore, about what we would not do to fund that. There are two separate issues there. However, you are quite right about the fines.

**Mr McGlone:**

Is the second issue, therefore, addressable by making provision for a slush fund elsewhere in what

is being proposed here?

**Mr McMahon:**

All that we are saying is that we currently do not have a budget to set up a fund in addition to what is there already. We are saying that the money that councils make from fines, for example, will come back to them. However, we do not have a pot of money in addition to that that is ready to diverge into a central fund.

**Mr McGlone:**

I was not even thinking about diverting money to a central fund at all. Maybe we are reading off two separate hymn sheets. I was talking about cases where councils may identify and scoop up realisable assets that they then dispose of to create a slush fund, just in the same way as assets from crime are seized and then sold off. Is that the sort of thinking that could be adopted? Say a Mercedes were left on council property and nobody claimed it and the council then disposed off it at public auction, what would happen to the moneys realised from that?

**Mr McMahon:**

The moneys would go to the council.

**Mr McGlone:**

I would see that as a slush fund. I am sorry for labouring the point, but I wanted clarity on that.

**Mr Weir:**

I suspect that slush fund is perhaps not the ideal terminology. I appreciate that there are constraints and that there is confusion as people are talking at cross purposes, so I want to make sure that we are all singing from the same hymn sheet. From a legislative point of view, the issue that has been raised here could not be an amendment to the Bill, whatever attitude is taken. Under certain circumstances, the council can retain certain things, but there are restrictions regarding landfill tax, for example. It is out of the picture.

**Mr McMahon:**

Yes.

**Mr Weir:**

I want to try to bridge the gap. Given that there seems to be confusion about the issue, could the Department provide a letter of clarification and assurance to the councils and copy it to the Committee? That could clarify some of the points that Mr McGlone raised about what can be retained. I am not sure whether setting aside a specific fund would be the best way of doing things, but councils do not want to be put in a position where something major has to be done before the protocol is agreed. Could some words of comfort and assurances be given on that? I wonder whether that could be a way forward.

**The Chairperson:**

I want to tease this out. The Committee could proceed through the Bill and propose an amendment to say that the Bill will not commence until the protocol is in place, but that could take 12 or 24 months; it could happen at any point in time. How do we nail it down so that the protocol is in place within a reasonable period to allow us to commence the Bill?

**Mr McMahan:**

We touched on that at the previous evidence session. One of the problems has been that the matter has never had the urgency that the Bill has now given it, but we are confident that we will have the threshold issue and the key elements of the protocol ready to go out for consultation at the end of October. I think that that is the date that we are aiming for.

**Mr Starritt:**

It may take a little longer than that, but we certainly hope that it will be this side of Christmas.

**Mr McMahan:**

The idea is to have it ready to go out for consultation. However, I am not sure whether there is a way of putting that into legislation in advance, because, ultimately, it will come down to a decision following consultation.

**The Chairperson:**

I understand that. If the Committee agrees the Bill as drafted and we know where we want to take it, that is fine, but that still leaves us open to questions about when it will commence. We can only say that we are moving forward together and want it to work. Even if the Committee proposed an amendment to say that the Bill could not be commenced without the protocol in

place, we would not know the time period involved.

**Mr McMahon:**

The only thing that I can say is that the Bill has, helpfully, put a lot of pressure on the issue. If the Department were unable to commence the Bill because there was an extended period when the protocol was not in place, it would be in a very difficult position. Therefore, there is a natural incentive for the Department to ensure, with colleagues, that the protocol is in place. That is the best that I can say.

**The Chairperson:**

It is key that the protocol is in place and that the Bill is commenced as soon as possible. Do members have any other comments on that? We can agree the issue today, park it or attach an amendment from the Committee. Basically, it is important that the commencement of the Bill takes place in tandem with the protocol. That could take any length of time. However, the Department has said that it is hopeful that that will come through very quickly.

**Mr McGlone:**

If the protocol is going to come through very quickly, it would make sense to wait and see what it is.

**The Chairperson:**

We need to know what the period of consultation will be.

**Mr Weir:**

It is one of those things that are difficult to legislate for. However, the Committee should send a very clear message that we, and, I am sure, the Department, want to see a robust and agreed protocol in place. Councils are concerned and do not want to get, for want of a better word, dumped on. However, we appreciate that the Department is doing all that it can to make sure that the issue is brought to a swift conclusion.

**The Chairperson:**

Are members happy that the Committee recommends that the Bill is not commenced until the protocol is in place?



*Members indicated assent.*

**Mr Starritt:**

I want to make a point of clarification. It will be possible to commence certain provisions in the Bill that have nothing to do with fly-tipping. However, we would undertake not to commence the fly-tipping provisions.

**The Chairperson:**

Are members happy with that?

*Members indicated assent.*

**Mr McGlone:**

As long as it is not a reason for prevarication.

*Clauses 13 to 14 agreed to.*

*Schedule 1 (Amendments)*

**The Chairperson:**

I remind members that they agreed in clause 1 to look at the level of Assembly control over a new power in the Bill to alter the amount of a fixed penalty by Order, which, as drafted, is subject to negative resolution. Before deciding, I also remind members that the Examiner of Statutory Rules has drawn to their attention further powers to alter fixed fees by negative resolution. Those powers can be found in the Waste (Amendment) (NI) Order 2007. Unlike the powers in new article 4A(10), which involve a range of fees, those powers refers to specific fees. He also notes that the Order was made with very limited scrutiny, before the restoration of the Assembly.

I advise members that the Examiner of Statutory Rules has also recently drawn the Committee's attention to a similar issue in relation to fixed penalties in the Clean Neighbourhoods and Environment Bill. His report on the Clean Neighbourhoods and Environment Bill has been included for information in the Committee papers. We want to avoid being inconsistent. Therefore, are members content to agree schedule 1, subject to an amendment to make some or all of the powers to alter fees subject to draft affirmative procedure? That gives

the Committee an opportunity to scrutinise the matter. I think that that is how we should proceed, but the decision is for the Committee to take. Do members have any comments? If not, are we content with schedule 1, subject to our Committee amendment? The amendment proposes:

“to make the new power, 4A(10), and the existing powers, 5A(10), 22B(5) and 42B(10) to alter the amount of fixed penalty, subject to draft affirmative procedure.”

*Schedule 1, subject to the Committee’s proposed amendment, agreed to.*

*Schedule 2 agreed to.*

*Long title agreed to.*

**The Chairperson:**

That concludes scrutiny of the clauses of the Bill. I remind members that, after the briefing from the Department two weeks ago, the Committee agreed that an amendment should be proposed to provide enabling powers to allow the Department to put in place targets for the quality of recycled material to be produced by councils. The Department argued that it was trying to achieve the same goal through voluntary initiatives and stressed that no other legislature legislated for quality. The Department informed the Committee that there was a balance to be struck between quantity and quality and was concerned that a singular focus on quality could compromise the North’s ability to meet EU recycling targets, which are quantitative.

Do members wish that a Committee amendment be prepared that will introduce powers into the Bill to enable the Department to put in place recycling quality targets at local authority level?

*Members indicated assent.*

**The Chairperson:**

That concludes the Committee’s analysis of the clauses of the Waste and Contaminated Land (Amendment) Bill.