



Northern Ireland
Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Environmental Better Regulation Bill:
Deliberation on Clauses

22 October 2015

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Ms Anna Lo (Chairperson)
Mrs Pam Cameron (Deputy Chairperson)
Mr Barry McElduff
Mr Gary Middleton
Lord Morrow
Mrs Sandra Overend

Witnesses:

Mr Dave Foster	Department of the Environment
Mr Robert Gray	Department of the Environment

The Chairperson (Ms Lo): We are into our second session of informal clause-by-clause scrutiny, which will give us the opportunity to discuss whether we need further information or are minded to amend or reject particular clauses and schedules. The updated clause-by-clause table is on page 282 of your electronic pack, but there is also a hard copy for members. The Committee Clerk has also tabled a memo summarising the clauses that we discussed at last week's meeting. The Bill, written submissions and other documents received are in the Bill folder on your tablets.

I welcome Robert Gray and Dave Foster from regulatory and natural resources policy division. I remind members that this meeting is being recorded by Hansard. Bill Clerk Stephanie Mallon is also in attendance in case we need to think about amendments.

Last week, we looked at Part 1 of the Bill, which contains clauses 1 to 5. Members indicated that they were content with clauses 2 and 4 as drafted, but we asked the Department to consider amendments to clauses 1 and 3 and to provide a more detailed explanation in the explanatory notes for clause 5. The Department's response to that is at page 280. First of all, we will look at the Department's responses to our consideration last week. Clause 1 is "General purpose: protecting and improving the environment". The Committee agreed to ask the Department to consider an amendment to elaborate on the purpose of the Bill, to address concerns regarding the vagueness of the Bill and to better define the framework of what will be enforced in the future. The Department has proposed, subject to the necessary approvals, to insert a new clause, 3A, into the Bill with the following wording:

"Regulations relating to protecting and improving the environment: objective".

That is a new bit to set out the objective. It continues:

"3A. The Department must, in making regulations under section 2, have as an objective reducing the regulatory and administrative burden on persons carrying on regulated activities to the greatest extent possible consistent with protecting and improving the environment."

Members, are you content with what the Department has proposed? It has added a new clause, 3A, to make it clearer that we are trying to, on one hand, remove some burden from businesses and, on the other hand, we are still very much into protecting the environment. Members, are you content with that? It is like an extra one on the objective and is making it clearer.

Lord Morrow: Would you please just tell us again what that is Chair? Because, quite frankly, it is not coming over very clearly.

The Chairperson (Ms Lo): OK. Last week, were saying that yes, we know that the Bill is to streamline regulations and make them less burdensome for business. However, on the other hand, we also wished to make very clear that it is not diluting the aim of protecting the environment. So, this is trying to elaborate on that in the Bill.

Lord Morrow: You are not trying to confuse me?

The Chairperson (Ms Lo): You think that I confuse more. Do you want to ask the officials to explain more?

Lord Morrow: Yes. If they can add something to illuminate us, that would be great.

Mr Robert Gray (Department of the Environment): We took on board the comments from the Committee last week, and I consulted with the draftsman on this particular issue. We accepted the fact that the Bill simply states that it is about protecting and improving the environment. That is the key purpose of the Bill, but we appreciate the concerns that were expressed by the Environment Committee that there was nothing in the Bill to elaborate on the overall aims set out in the explanatory and financial memorandum. That is why we have come forward with this expansion of clause 1, which now sets out the complete general purpose of this part of the Bill.

The Chairperson (Ms Lo): We asked for that in response to submissions from stakeholders, who said that the Bill's objective of making it easier for business and industry was not very clear. So, this is to state that objective, but also set out to say that we also have the objective of protecting the environment.

Mr Gray: Last week, I thought that there was maybe an opportunity to expand the long title, but I was corrected on that point by the legal draftsman, who said that that is not the place to explain the Bill's purpose. Instead, you put in one of these general-purpose clauses in the Bill itself.

The Chairperson (Ms Lo): OK. Members, are you content with that? Gary, we are on our second session on the informal clause-by-clause scrutiny and we are looking at the proposed amendment from the officials. Are members happy with that? Barry?

Mr McElduff: I am happy, yes.

The Chairperson (Ms Lo): OK. Everyone?

Members indicated assent.

The Chairperson (Ms Lo): So, we are content with the proposed departmental amendment to clause 1. So, just to check, are members content with clause 1, subject to that amendment being added as clause 3A?

Members indicated assent.

The Chairperson (Ms Lo): We move to clause 3, which is "Regulations relating to protecting and improving the environment: consultation". We agreed to ask the Department to consider an amendment to replace:

"such other persons as it thinks fit"

with "such other relevant persons". The Department has advised that it would wish to resist the use of the word "relevant", as it begs the question: relevant to what? They are proposing, however, subject to the necessary approvals, to bring forward an amendment for tabling at Consideration Stage to amend clause 3(1)(b) by removing the phrase "thinks fit" and substituting it with "considers appropriate". There is a slight confusion in your memo.

Mr Gray: Yes, I apologise for that. Again, I consulted with the draftsman on that and want to thank the Committee for that particular point. The draftsman was quite happy. He said that the term "thinks fit" is quite common in legislation, but in view of the comments of the Committee, we are happy to seek to change "thinks fit" to "considers appropriate", so we are removing the words "thinks fit" altogether.

The Chairperson (Ms Lo): OK. You are keeping the second "thinks fit" though, at the end of that line. Oh, no; there is no "thinks fit". Now they are all "appropriate". That is gone. Again, members, that was mentioned by stakeholders a number of times. I am content with that. Members, what do you think? Are you happy with it? We are just going to take away "thinks fit". It is still there, but we are going to amend it to "appropriate".

Mr Gray: We have to get the necessary approvals.

Mr Dave Foster (Department of the Environment): That also makes a consistency in language with clause 10(b), where the similar wording is "appropriate".

The Chairperson (Ms Lo): Yes, it correlates with the end of the sentence as well. Are members content with that?

Members indicated assent.

The Chairperson (Ms Lo): OK, so you are content with the proposed departmental amendment. Are you content with clause 3 as amended?

Members indicated assent.

The Chairperson (Ms Lo): We are on to clause 5, which is on interpretation. We agreed to ask the Department to provide more detailed information in the explanatory notes to explain what is meant by:

"offence to the senses of human beings"

and "ecosystems". The Department stated that it will include more detailed information in the explanatory notes to accompany the Bill once it is passed to explain what is meant by:

"offence to the senses of human beings"

and "ecosystems" in the definition of environmental harm. Will we see the proposed wording at some stage?

Mr D Foster: We hope to get that to you by 5 November.

The Chairperson (Ms Lo): We can have a look at that too. Members, do you agree with that?

Members indicated assent.

The Chairperson (Ms Lo): Members, are you content with the Department's clarification that it will add more detail in the explanatory notes?

Members indicated assent.

The Chairperson (Ms Lo): OK. Are you content with clause 5 as drafted in the Bill, or do you wish to ask the Department to amend that clause?

Members indicated assent.

The Chairperson (Ms Lo): Happy with that? OK; we move on to Part 2. We will really try to finish this as soon as we can. We are quite tight for time today, but, obviously, members are at liberty to ask questions and ask for clarification.

Part 2 is on powers of entry and associated powers. We are going to start with clause 6. With each clause I will briefly remind you of the issues that have been raised and of more detail in your clause-by-clause table. Members, you have all of that in your tabled packs. It is also in hard copy on the table and in the electronic pack.

Clause 6 is on repealing unnecessary or inappropriate powers of entry. Comments made in respect of the clause were supportive. One general comment made was that good communication is a key issue regarding powers of entry. So, members, are you content with clause 6 as drafted? Do you want to ask any questions of the officials? Are members happy with that? I think that a lot of people welcome it.

Members indicated assent.

The Chairperson (Ms Lo): Members, are you content then with clause 6 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 7 is "Adding safeguards to powers of entry". No issues were raised about the clause. So, members, are you content with clause 7 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 8 is "Rewriting powers of entry". The Examiner of Statutory Rules suggested that clause 8(3) should take account of the distinction in the statement of maximum fines as being between summary-only offences, not exceeding the statutory maximum, and summary fines, not exceeding the statutory maximum, in the case of offences triable or punishable either summarily or on indictment. The Department is proposing an amendment to deal with that point.

In addition, the Committee asked the Department whether there could be an increased level of interference as a result of rewriting and attaching an offence that did not previously exist. So, the Examiner asked you to amend it, and you are prepared to go ahead with that at Consideration Stage?

Mr Gray: That is right, yes.

The Chairperson (Ms Lo): What about the concern that, if you rewrite that clause, you would have more power for interference in the future?

Mr Gray: As I have tried to explain in the departmental response, the crucial clause in all of Part 2 is the clause to review powers of entry. The review has to take place first, and that will inform the Department on the extent to which the powers of entry could be rewritten, what powers of entry are unnecessary and whether additional safeguards need to be added. All those things. Issues such as this — increased interference as a result of rewriting — will all have to be fully explored in the review, which will then be laid before the Assembly. Before anything can happen under that Part, the review has to take place. As I have said, that review will determine, on issues such as this, the content and scope of any proposal for regulations.

In taking the review forward, the Department will have to engage completely with the Environment Committee, key stakeholders and so on. So, if issues like that emerge, they will have to be dealt with and considered. So, I am not ruling out that possibility, but if that happens, it will have to be dealt with in the review.

The Chairperson (Ms Lo): But it still does not alter the fact that you have the power to rewrite this following a review.

Mr Gray: Yes.

The Chairperson (Ms Lo): Members, are you satisfied with the explanation? This is to do with after the review. So, they are going to carry out a thorough review that will be subject to consultation and will need scrutiny by the Committee. If there is a need to rewrite the powers of entry —

Mr Gray: The review should question whether the existing powers are fully justified and proportionate. It should give a full picture of how officials in the Department and district councils should exercise those powers and in what circumstances, and it should make the use of the powers more transparent to the Assembly, the Environment Committee, the public and businesses.

The whole concept of Part 2 has been universally welcomed by businesses, stakeholders and the Department. You only have to start looking through environmental legislation to see that there is a huge scope of environmental legislation. In all the different bits of legislation there is a chunk relating to powers of entry. When you start looking at each one, there are inconsistencies, and businesses get confused as to what powers of entry are actually being used here. Powers of entry are very important powers that should not be used lightly. There are human rights implications and so on in relation to powers of entry. So, the Department thought that the idea of a robust statutory review was very important before embarking on a rewrite of legislation.

The Chairperson (Ms Lo): As you said, the main issue in Part 2 is on the review.

Mr Gray: I think so.

Mr D Foster: If any regulations were to follow on from that review, they would be subject to affirmative resolution in the Assembly.

The Chairperson (Ms Lo): Are members satisfied with the explanation? You are content with the proposed amendment by the Department in relation to the points raised by the Examiner? Are you content with clause 8 or do you wish to ask — I have not heard members say whether they are content with the proposed amendment.

The Committee Clerk: The proposed amendment is at pages 19 and 20 of your tabled pack. It relates to clause 8(3)(b)(ii), to add after "scale", the words, "for an offence that is triable only summarily or the statutory maximum for an offence that is triable summarily or on indictment".

Mr McElduff: Does it pass the plain English test? Is it meant to be understandable? Is that an aspect of it or is meant to be exact?

The Chairperson (Ms Lo): Do not ask someone whose first language is not English. *[Laughter.]*

Mr Gray: It is a very technical point that has been raised by the Examiner. I have sought very technical, legal advice on it, and they came up with that. It is all to do with the Fines and Penalties (Northern Ireland) Order 1984 and the way that the legislation is worded.

The Chairperson (Ms Lo): It is very legalistic. We will just depend on the expertise of the Examiner.

Lord Morrow: So, it is not meant to be understood, Chair. Is that right?

The Chairperson (Ms Lo): It will be argued by lawyers.

Lord Morrow: It is funny that they are not here today, is it not?

The Chairperson (Ms Lo): Perhaps you can explain it to us to clarify it.

Mr Gray: I prefer to read it out, if you do not mind.

The Chairperson (Ms Lo): I tried to read it a couple of times and just gave up.

Mr McElduff: The point that I will make is that, when we receive advice from experts on the scrutiny of legislation, one of the first pieces of advice that we are given is, "Try to make sure that it is understandable". So it is surely a flaw if it is not understandable. I am not personalising this in any way.

The Chairperson (Ms Lo): I think that they have to use those terms. The problem is with the use of legal terms, is it not?

Lord Morrow: But when we had the guy over here, we were told that they did not have to now. He said contrary to that. He said that they did not have to use it. I know that that is not a given to these folk here.

The Chairperson (Ms Lo): Yes. Well, Dave and Robert may enlighten us on this.

Mr Gray: It is a technical drafting amendment addressing an issue raised by the Examiner of Statutory Rules during the Environment Committee's formal scrutiny of the Bill. The issue that is being addressed is the stipulation of maximum fines for offences that are tried summarily rather than on indictment. In general terms, the offence that is tried summarily, usually in a Magistrates' Court, falls into one of two categories — A, an offence that can be tried only summarily and B, one that can be tried either summarily or on indictment.

The Fines and Penalties (Northern Ireland) Order 1984 makes a distinction between the two categories in respect of the maximum fines that can be imposed. In the case of A — an offence that can be tried only summarily — the maximum fine is one not exceeding level 1 to level 5 on the standard scale, while B should refer to the statutory maximum, which is set out in the Fines and Penalties Order. At the minute, both those fines are £5,000; they are both the same. Clause 8 as drafted does not make that distinction and refers only to level 5 of the standard scale. Although level 5 on the standard scale and the statutory maximum are both currently £5,000, they are two distinct legal concepts, and the monetary values may change in the future. For that reason, the Department has agreed with the Committee to address the issue by way of an appropriate amendment.

The Chairperson (Ms Lo): OK. Given that all of us asked you that question because we did not understand, can all that be explained in the explanatory and financial memorandum?

Mr Gray: Yes, it can.

The Chairperson (Ms Lo): Can you add a paragraph to try to explain, in layman's terms, what it really means?

Mr Gray: Yes. That will be in the explanatory notes. In fact, I appreciate that doing that would be helpful to the reader, yes.

The Chairperson (Ms Lo): Would that be OK?

Mr Gray: It is very technical, as you appreciate, and I do not think that there is any other way around the legal language that is used here.

The Chairperson (Ms Lo): I do not think that we can change it. I agree with you. Are members content with that?

Members indicated assent.

The Chairperson (Ms Lo): So are members content with 8 as amended?

Members indicated assent.

The Chairperson (Ms Lo): We move to clause 9, "Review of powers of entry". That is really, as Robert said, the major one. No issues were raised about this clause. Are members then content with clause 9 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move to clause 10, "Consultation requirements". One stakeholder who commented on this clause broadly supports the rationalisation of powers of entry but highlighted the need for the Department to consult with councils, where any council powers of entry are to be

changed. I think that that came from the Northern Ireland Local Government Association (NILGA). Can the officials comment?

Mr D Foster: The consultation process, as envisaged, would include councils as a matter of course, as will anyone likely to be affected any of those changes around powers of entry. So, councils will be included in that exercise, and their views and concerns taken board as part of the Department's consideration of all responses to the consultation.

The Chairperson (Ms Lo): That will be subject to consultation with the councils. Members, are you content with the explanation?

Members indicated assent.

The Chairperson (Ms Lo): Are members content with clause 10 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We will move on to clause 11, which is "Regulations". No issues were raised on that clause. Members, are you content with clause 11 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We will move on to clause 12, which is "Code of practice in relation to powers of entry". Stakeholders were broadly supportive of the clause. However, two suggested that the code of practice should be subject to an increased level of Assembly scrutiny, and one suggested an amendment to reflect that. Robert, will you talk us through this, please?

Mr Gray: As you can see from the clause, the arrangements concerning the code of practice are quite robust, in that a draft is prepared and then published; representations are taken; it is reviewed from time to time; and the courts may then take into account a failure of a person to have regard to the code of practice in determining any question in proceedings.

The point raised was about the lack of direct Assembly control. There are examples in legislation of similar codes of practice that do not have Assembly control built in, and other examples that do have Assembly control built in. We are of the view that, if the Committee wishes this matter to be in the code, we would consider that. We are content, in that we think that it is sufficient, as there is quite a procedure to go through in relation to the code, and the Environment Committee and so on will be consulted on it.

The Chairperson (Ms Lo): You said that the Department is required to publish a draft code and invite representation on it. Will you send it just to stakeholders or will there be a public consultation? You said that you would invite representations on it and consider them, so it is not an open public consultation.

Mr Gray: That is open to us to decide. The businesses should be involved in that obviously, as should the people who operate powers of entry — the council staff and so on — and people who are authorised by the Department and the councils to carry out powers of entry. That gives us the flexibility to consult all those persons.

Mr D Foster: Given the implications of powers of entry and the fact that this code of practice has to be taken account of by those exercising those powers, I imagine that the consultation would be wide, given the human rights implications of powers of entry. The Department recognises that the widest range of people and organisations possible should have the chance to comment on the draft code of practice.

The Chairperson (Ms Lo): If we want more power to scrutinise the draft code, it will be through an SL1 and come to us for negative resolution.

Mr Gray: No, it is not a statutory rule. It is just a code of practice, but it is a statutory code of practice to which people operating those powers must have regard. It is quite important.

The Chairperson (Ms Lo): How could we get to look into it more before you publish it? How can we have more scrutiny of it?

Mr Gray: As I said, if the Committee is asking the Department to consider a further level of control — laying the code before the Assembly — we are happy to consider that. We want to work with you on it.

The Chairperson (Ms Lo): If we say that we want that, what would the procedure be? At what stage would your draft code come to the Committee?

Mr Gray: When it is going out for consultation. The normal procedure is that the Committee is advised in advance of public consultation.

Mr D Foster: Presumably, we will also bring a synopsis of the responses to the Committee for it to go through, as we would with most consultations, if the Committee requests it.

The Chairperson (Ms Lo): OK. So, members, are you content that we ask to have more scrutiny of the draft code of practice for the power of entry?

Members indicated assent.

The Chairperson (Ms Lo): OK. So you will come back to us with an amendment in November, and perhaps you could send it to us in the next couple of days.

Mr D Foster: We will do that as soon as we can.

The Chairperson (Ms Lo): OK. Members, are you content with clause 12 as amended?

Members indicated assent.

The Chairperson (Ms Lo): We move on to clause 13, "Interpretation". One stakeholder suggested that the clause be amended to ensure that no particular group — for example, Travellers — is discriminated against. That was raised by the Northern Ireland Human Rights Commission (NIHRC). Will you talk us through that?

Mr Gray: Yes, that was mentioned last week as well. It relates to the definition of premises. I think the Northern Ireland Human Rights Commission focused on the words "movable property". It also highlighted the fact that there was no reference to, for example, residential property. I tried to explain last week that premises is defined so as to give it its ordinary, everyday meaning, so it would include things like residential property. That definition simply seeks to clarify the point that it also includes any tent or movable property, so there is no discrimination.

The Chairperson (Ms Lo): So it covers all premises — residential, commercial or movable.

Mr Gray: Yes.

The Chairperson (Ms Lo): OK, members, are you satisfied with that? We are not particularly picking on caravans or movable premises. Are you happy with the clarification?

Lord Morrow: We are happy with the clarification, as far as it goes, but the NIHRC is saying that, for example, Travellers are discriminated against. That does not exclude others, does it, or will it be specific because the NIHRC has mentioned one group? There will be no direct reference to the example that the commission has raised, will there?

Mr Gray: My understanding was that, although it does not say so in the table provided, the point was raised simply because there was an explicit mention of movable property. I think that the commission took that to mean that there was a particular focus on movable property but not on, say, a residential home, but that is not the case; it is just legal drafting.

The Chairperson (Ms Lo): Lord Morrow is right, but is there a need to put it in? Sub-paragraph (a) says "any land", (b) "any vehicle, vessel", and (c) "any tent or movable property", but should you not say "homes"?

Mr Gray: If it were left as "premises", some people might think that it did not cover a tent or movable property, and we are just making clear that it does.

The Chairperson (Ms Lo): OK.

Lord Morrow: At sub-paragraph (c), it says, "any tent or moveable property".

Mr Gray: "Tent" could be a marquee.

Lord Morrow: A circus marquee?

Mr Gray: Yes.

The Chairperson (Ms Lo): A wedding marquee or whatever.

Mr Gray: Yes.

Lord Morrow: I ask this question then: will what is suggested by the NIHRC be in the Bill?

Mr Gray: No.

Lord Morrow: We are not really moving much from what we have here, which, I might add, I am content with.

Mr Gray: We do not propose any change there. That is quite a common definition, by the way.

Lord Morrow: Yes. I was just wondering why we stopped at clause 13, only to come to the conclusion that we are not doing anything different. Anyway, that is fair enough, Chair.

The Chairperson (Ms Lo): The inclusion of "premises" is really to say that it goes beyond buildings to include land, vehicles, caravans and movable properties.

Mr Gray: Exactly.

The Chairperson (Ms Lo): Are you happy with that?

Lord Morrow: Thank you.

Mr McElduff: Is it really about tying down the definition of premises, is that right?

Mr D Foster: Yes, that is what it is.

The Chairperson (Ms Lo): It is to include more than buildings made of bricks and mortar.

Mr D Foster: Yes. "Premises" is given its ordinary, everyday meaning, and sub-paragraphs (a), (b) and (c) outline what is also included.

The Chairperson (Ms Lo): Is there is a legal definition of premises?

Mr Gray: No. Premises is given its ordinary, everyday meaning, and the sub-paragraphs elaborate on that.

The Chairperson (Ms Lo): OK.

Mr McElduff: It does not include a reference to "structures". Is that one of the words?

Mr Gray: I would think so. Ultimately, these things are a matter for the courts to decide. We look at it as having its ordinary, everyday meaning.

The Chairperson (Ms Lo): Would it be useful to explain in the explanatory and financial memorandum (EFM) what "premises" means?

Mr Gray: Yes.

The Chairperson (Ms Lo): Just so that we understand that we are not specifically picking on Travellers.

Mr D Foster: We can add some text to the EFM to make that clear.

The Chairperson (Ms Lo): OK. Are members content with that?

Members indicated assent.

The Chairperson (Ms Lo): Are members content with clause 13 as drafted but with further explanation to be included in the EFM?

Members indicated assent.

The Chairperson (Ms Lo): We move on to Part 3. We are doing well, members. Part 3 is "Amendments to the Clean Air (Northern Ireland) Order 1981".

Clause 14 is "Authorised fuel". Two stakeholders commented on the clause and were broadly supportive of it. Members, are you content with clause 14 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move on to clause 15 on "Exempt fireplaces". Four stakeholders commented. Two welcomed it, but two requested clarification on the definition of "substantial quantity of smoke", particularly how it can be quantified and the impact on air quality. We have already raised this matter with officials. Would Robert or Dave like to explain further?

Mr D Foster: I will try to, Chair. The phrase:

"any smoke or a substantial quantity of smoke"

is provided for in the Clean Air (Northern Ireland) Order 1981 and allows the Department to determine what a "substantial quantity" is. The purpose of this clause is to enable potential exempt fireplaces to be agreed in relation to smoke control areas. That process is done on a UK-wide basis and under contract. There is a British standard, the details of which we have provided in our response. That is used by the testing house to determine what a "substantial quantity" is. Obviously, over time, with technical advances, that British standard may or may not be updated. However, that is what we reference, so, if it can be shown that a fireplace that is being put forward by a manufacturer produces smoke that meets that British standard, that shows that it is not producing a "substantial quantity" of smoke and, therefore, is fit to be passed to be used in smoke control areas.

The Chairperson (Ms Lo): Is that all done in the factory?

Mr D Foster: In a laboratory, yes.

The Chairperson (Ms Lo): Well, it can be fudged, as we have seen with some cars.

There are means of testing it, and "substantial quantity" is not just a phrase. People were concerned about how you would gauge it, but they have a set of parameters that they have to work within.

Are members content with clause 15?

Members indicated assent.

The Chairperson (Ms Lo): We move on to Part 4, "Amendments to the Environment (Northern Ireland) Order 2002". Clause 16 is "Removal of assessments under article 13". Two stakeholders commented on the clause and welcomed the proposal. That is quite sensible because it means that councils do not have to do the assessment again.

Are members content with clause 16 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 17 is "Amendments consequential on the amendments to article 13". Two stakeholders commented on the clause and welcomed the proposal.

Are members content with clause 17 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move on to Part 5, "Amendments to the Water and Sewerage Services (Northern Ireland) Order 2006. Clause 18 is "Enforcement authorities". No issues were raised, and I think that it is quite sensible for DOE to take over certain responsibilities for inspection of water in domestic and commercial premises.

Are members content with clause 18 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 19 is "Regulations relating to wholesomeness of water". No issues were raised.

Are members content with clause 19 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 20 is "Appointment and powers of inspectors". No issues were raised.

Are members content with clause 20 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 21 is "Publication of certain information and advice". No issues were raised.

Are members content with clause 21 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Clause 22 is "Transitional provisions". No issues were raised.

Are members content with clause 22 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Part 6 is "Miscellaneous and supplementary". Clause 23 is "Regulations and orders". One stakeholder noted the Part, and another stakeholder, the Northern Ireland Human Rights Commission, said that it:

"welcomes the requirement for affirmative resolution procedure contained within clause 23(2)(b) of the Bill".

We had asked the Department why only the first set of regulations are subject to affirmative resolution, and further sets are subject only to negative resolution. We asked why the Bill did not cover affirmative resolution regulations, which create penalties for a non-criminal kind and provide for compensation, and whether there are any provisions that change the effect of Northern Ireland legislation that are not subject to affirmative resolution.

Why are some subject to affirmative resolution and others not?

Mr Gray: We had to make a judgement here. We are conscious of the nature of regulations that go to the Assembly subject to affirmative resolution and the nature of regulations that are subject to negative resolution. First, we looked at the Westminster model for this, which was the model that it adopted for the first set of environmental permitting regulations, because that is such significant legislation. I mentioned before about the substance and so on. It sets out the overall framework for the whole new permitting regime, and we took the view that it clearly deserved and needed affirmative resolution control.

If any of the second set of regulations dealt with offences or amended primary legislation, they would also be subject to affirmative resolution. Other regulations that we have stipulated here are subject to negative resolution. We are thinking about a one- or two-page minor amendment that comes through that changes one regulation, for example, in the large principal set — the framework regulations — that may contain over 200. You have to make a judgement call on what is affirmative and what is negative, and that was the thinking behind that.

The Chairperson (Ms Lo): Are members content with the rationale for differentiating between the two sets of regulations?

Members indicated assent.

The Chairperson (Ms Lo): It saves time, as well. If it is affirmative resolution, you have to schedule it to go to the Chamber.

Mr Gray: They are still subject to Assembly control. Even when a regulation is subject to negative resolution, if there is a problem with it, it can be prayed against.

The Chairperson (Ms Lo): Absolutely, and we have done that.

Are members content with clause 23 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move to clause 24, "Interpretation". No issues were raised. Are members content with clause 24 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move on to clause 25, "Repeals and revocations". No issues were raised. Are members content with clause 25 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We move on to clause 26, "Commencement". The Examiner of Statutory Rules suggested that the clause be expressly limited to giving full effect to any provision of the Bill or to the coming into operation of any of its provisions.

The Committee also wrote to the Department to clarify what is meant by "including provisions modifying statutory provisions". Does that mean that you can change anything? The Committee sought clarification on whether this would, effectively, give the Department the ability to do anything that it likes in connection with the provisions. Do you want to comment on that, Robert?

Mr Gray: I took a legal view from the draftsman on this because it is another technical drafting point. I have included our written response, which makes clear that this phrase must be read in the context of a commencement order provision. It can, therefore, be a provision only in the sense of a

commencement order that is consequential, incidental, supplementary or transitional. It does not give the Department the ability to do anything that it likes in connection with the provisions of the Bill.

The Chairperson (Ms Lo): What is a "saving provision"?

Mr Gray: If, for example, legislation repeals a complete Act, the Department may wish to keep part of that Act in force for a while, and the saving provision is included to enable that.

The advice is that the power in that clause is narrow in scope, and, if it is used in the future to amend Northern Ireland primary legislation, it can do so only by the affirmative resolution procedure. That is the safeguard.

The Chairperson (Ms Lo): Members, are you content with the explanation? You have the Department's written response. The good thing is that it will be subject to the Assembly's affirmative resolution procedure. The departmental response states:

"The power in clause 26(3) is therefore narrow in scope and if it is used in the future to modify any Northern Ireland legislation it can only do so subject to the Assembly affirmative resolution procedure."

That is the safeguard.

Mr Gray: If it is ever used.

The Chairperson (Ms Lo): If you wanted to make a change, would there need to be consultation as well?

Mr Gray: If it was going to amend, it could do so only subject to Assembly affirmative resolution. There is not normally consultation on commencement orders, but, if a commencement order that emerged from this proposed to modify legislation using this power, I think that there would have to be some form of consultation.

Mr D Foster: Yes, if it was proposing to amend Northern Ireland primary legislation.

Mr Gray: Yes.

The Chairperson (Ms Lo): Are members content with that? This is really giving you the flexibility to bring it in at a later date that is suitable and appropriate.

Mr Gray: Yes.

The Chairperson (Ms Lo): Are members happy with that. It is quite standard, too, in a way.

Lord Morrow: I have some reservations about that, Chair, but I am not going to make an issue of it.

The Chairperson (Ms Lo): Share it with us.

Lord Morrow: No.

The Chairperson (Ms Lo): Do you need any clarification?

Lord Morrow: No. Let us move on.

The Chairperson (Ms Lo): Members, are you content with clause 26 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We have lost our quorum. We will wait for Lord Morrow to come back.

The Committee suspended at 11.21 am and resumed at 11.27 am.

The Chairperson (Ms Lo): Right, members, we are on to the short title. Are you content with clause 27, the short title, as drafted?

Members indicated assent.

The Chairperson (Ms Lo): We are on to schedule 1, "Matters for, or in connection with, which regulations may be made under section 2". A number of general comments have been made in respect of schedule 1 regarding emissions, environmental permits, penalties and compensation. We asked the Department to justify the use of "Further defining environmental activities" in paragraph 1, and for examples of what that might cover that is not already covered in the Bill.

On paragraph 13, the Committee asked the Department to explain why powers relating to breaches of regulations and maximum fines are not in the Bill, and the justification for allowing magistrates to impose daily fines. On paragraph 14, the Committee asked why there is not a guaranteed right of appeal. On paragraph 15, the Committee asked the Department to clarify the relationship between compensation and civil proceedings. Will you comment on that, Robert or Dave?

Mr Gray: On "Further defining environmental activities" —

The Chairperson (Ms Lo): We just think that there can be so many. There are already so many and you are going to further define them.

Mr McElduff: In the written response, "activities" features a lot. In fact, environmental activities are defined as "activities connected with such activities".

Mr Gray: Yes, as was mentioned last week, the definitions in the Bill are very broad —

The Chairperson (Ms Lo): That is what we are worried about.

Mr McElduff: Chair, issues that are broad, flexible or standard are things that we are meant to challenge. To me, the definition of "environmental activities" is now broadened to include "activities connected with such activities". It is not easily understood or clear. I would not mind if there were a basis for it and if it were well explained, but we would not be doing our job if we did not at least ask those questions.

The Chairperson (Ms Lo): What you are saying is that, under legislation, there is already a definition of "environmental activities".

Mr Gray: That is in clause 5.

The Chairperson (Ms Lo): Yes, but you also want to have further definition of "environmental activities" to give you flexibility so that you can cover yourself if anything may come along in the future that we do not know about now.

Mr Gray: As I have said, "environmental activities" are already defined, but it could be that, in developing the subordinate legislation programme, something might emerge that highlights a deficiency in the definition. It appears to be very broad, but just in case something emerges that the definition does not cover or requires further clarity, that provision would allow us to provide that clarity in the regulations. It is also based on another piece of legislation that was taken through in Scotland. The Regulatory Reform (Scotland) Act 2014 has a similar provision, and we also took that into account.

The Chairperson (Ms Lo): OK. I think that the Committee is concerned that we are giving you free-for-all power.

Mr McElduff: Too much scope.

The Chairperson (Ms Lo): We understand the need for flexibility, but we have been given no examples of what that might be.

Mr D Foster: Subject to Robert's explanation, we recognise that the definition of environmental activities in the Bill is broad. If the Committee has concerns that trying to further define activities in the schedule is perhaps asking for further flexibility, we can certainly go back to the Minister and suggest that we might remove that part of schedule 1.

The Chairperson (Ms Lo): What do members think?

Mrs Cameron: I am content that officials will go back to the Minister to look to amend.

Mr D Foster: Subject to his views, we will further consider that.

The Chairperson (Ms Lo): Are members content with that?

Members indicated assent.

The Chairperson (Ms Lo): Is it necessary to state "Further defining environmental activities"? We are into the unknown, but we want to have the safeguard that it will not just be anything that you can name.

We will move on to maximum fines under schedule 1(13), which relates to why powers relating to breaching regulations and maximum fines are not in the Bill, and the justification for allowing magistrates' daily fines. That was your query, Lord Morrow, was it not?

Lord Morrow: Yes.

Mr Gray: I do not follow the point about the maximum fine not being in the Bill, because it is. The schedule is as much a part of the Bill as any other. On page 21 of the Bill, it states:

"a fine not exceeding such amount as is specified (which must not exceed £50,000)".

I was not quite sure what the issue was because the maximum fine is stated in the Bill. Daily fines are common in environmental law. I picked out a couple of examples for the Committee's information. In the law in relation to litter, for example, a Magistrate's Court may impose a litter abatement order on a business or person to clean up their land. If they refuse to do that, there is a conviction. The court, in order to ensure that the land is cleaned up as quickly as possible, can impose a fine of one twentieth of the original fine for each day that the offence continues. That concept is used quite a lot in environmental law. That just gives us the power to continue using that approach.

The Chairperson (Ms Lo): European infraction fines are the same. There are massive daily fines.

Mr D Foster: Yes, there is certainly a parallel in European law in the Court of Justice applying fines.

The Chairperson (Ms Lo): Yes, the idea is to force you to act as quickly as you can to avoid the fines continuing.

Lord Morrow: I want to ask about the maximum fine of £50,000. If we find it necessary to state in the Bill that the maximum fine must not exceed £50,000, why do we never put in a minimum fine? Is that interfering with a judge's discretion?

Mr Gray: Yes, it is.

Lord Morrow: Why do we interfere with his discretion on a maximum fine but not on a minimum?

The Chairperson (Ms Lo): There have always been legal procedures. You always have a maximum fine but very seldom have a minimum fine. Is that right?

Mr Gray: The judge may decide not to impose a fine at all.

Mr D Foster: The use of a maximum fine is not unusual in environmental legislation.

The Chairperson (Ms Lo): They have all those statutory levels anyway.

Lord Morrow: Paragraph 13(10) states:

"Providing for such an offence to be punishable—

(a) on summary conviction by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 6 months)".

We are quite content to talk about that. Is that not interfering with a judge's discretion? I have some understanding of why it is there, but I am trying to ask the question because we never say that the minimum fine cannot be below £1,000 or £5,000.

The Chairperson (Ms Lo): Yes.

Lord Morrow: I am concerned about why we feel we are meddling in a judge's affairs and so do not impose a minimum but we do not see it as meddling when we say, "You can't do more than this." I take the answer that you have given. I am not fighting with you about that. I know that you said that this is the way that it has always been done. Sometimes it is time to change the way things have always been done.

Mr D Foster: As I said, it tends to follow precedent. This is an area of law that the Examiner of Statutory Rules is often very keen to look at in detail.

Mr Gray: And the Department of Justice.

Mr D Foster: Yes. If it helps, we could investigate whether there is a technical legal reason why we do not specify minimums and come back to the Committee on that.

Lord Morrow: I think that that would be useful, but I will not hold up the proceedings over it. It is just to satisfy some of us, in our own minds, about why we always have "must not exceed".

Mrs Cameron: Paragraph 13(11) states:

"Providing for continuing offences and for any such offences to be punishable by a daily or other periodic fine of such amount as is specified (in addition to any punishment provided for under sub-paragraph (10))."

Paragraph 13(10) talks about not exceeding £50,000, but could what is outlined in paragraph 13(11) not be much more than £50,000?

Mr Gray: Do you mean that the daily fine could be more than £50,000?

Mrs Cameron: Yes. Could it not, in practice, be more?

Mr D Foster: In practice, I would imagine that the judge would seek to impose a fraction of the original fine, as in the Litter Order.

Mr Gray: The "amount as is specified" means specified in regulations. The regulations would have to indicate that. The example that I gave earlier was one twentieth of the original fine. In other pieces of legislation, it might be one tenth or one fiftieth. I appreciate the point. It is an amount to be specified in the regulations. Having looked at the previous examples and so on, I think that the court would be more likely to impose a percentage of the original maximum fine. That would be for the court to decide. The regulations may specify an amount, for example, up to and not exceeding level 2 or level 3 on the standard scale. The exact formula would have to be worked out in the context of the regulations. I do not know what the amount would actually be.

Mrs Cameron: Chair, can we get further clarity on that?

Mr D Foster: We can endeavour to do that; certainly.

The Chairperson (Ms Lo): You will bring that back to us next time. Paragraph 14 deals with appeals. Why is there no guaranteed right of appeal?

Mr Gray: The regulations will contain detail of a right of appeal. If they did not, they would not go anywhere. They would not get passed.

The Chairperson (Ms Lo): Say that again.

Mr Gray: The regulations will contain details of rights of appeal. Otherwise, there are human rights implications and so on. They just would not get through without details on a right of appeal. It is a requirement under the European Convention on Human Rights.

Mr D Foster: It will be a key component of the first set of regulations, which is subject to affirmative resolution and normal Assembly scrutiny.

The Chairperson (Ms Lo): OK. Fair enough. Are members content with that? It will come in regulations.

Members indicated assent.

The Chairperson (Ms Lo): We will move on to compensation and civil proceedings. What is the difference? What is the relationship? That is under schedule 1(15).

Mr Gray: We are getting into the territory of what is going to be in the regulations and issues such as interaction between compensation and civil proceedings. That would all have to be explored under the development process for the regulations. As I said, we are not really in a position to elaborate on that. That is for the regulations to sort out.

The Chairperson (Ms Lo): It will come later in the regulations. Members, are you content, then, with schedule 1 as drafted in the Bill, but with further explanation coming from the officials in November when we come back?

Members indicated assent.

Mr McElduff: Chair, I think that we can revisit issues, because this is informal scrutiny. Is it legitimate to say that we could revisit aspects of this?

The Chairperson (Ms Lo): Yes. We have asked the officials for a number of amendments. You are going to go and ask the Minister, your draftsman and all the rest, and you will come back with amendments. At that stage, if we are not happy with the amendments, we can put forward amendments ourselves. We can ask the Bill Clerk to help us to draft amendments.

Mr D Foster: In relation to schedule 1, we have agreed to approach the Minister regarding removing the language around the further definition of environmental activities.

The Chairperson (Ms Lo): Sorry, on the further activities?

Mr D Foster: Yes, in relation to schedule 1, we agreed that we would look to the Minister for his agreement to remove the wording around further definition of environmental activities in paragraph 1.

The Chairperson (Ms Lo): Yes. Are we clear on schedule 1, members?

Members indicated assent.

The Chairperson (Ms Lo): We will revisit that in November. Schedule 2 covers repeals, and no issues were raised. Members, are you content with schedule 2 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): Schedule 3 is on revocations. No issues were raised regarding this schedule. Members, are you content with schedule 3 as drafted?

Members indicated assent.

The Chairperson (Ms Lo): That concludes the informal clause-by-clause scrutiny of the Bill. The officials will go away to look at what we have discussed today. They agreed to look at a number of amendments and clarifications, and they will bring all that back on November 5. We would appreciate sight of the wording as soon as possible. Thank you very much.