



Northern Ireland
Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Environmental Better Regulation Bill:
Department of the Environment

5 November 2015

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mrs Pam Cameron (Deputy Chairperson)

Mr Cathal Boylan

Mr William Irwin

Mr Barry McElduff

Mr Gary Middleton

Mr Ian Milne

Lord Morrow

Mrs Sandra Overend

Witnesses:

Mr Dave Foster

Department of the Environment

Mr Robert Gray

Department of the Environment

The Deputy Chairperson (Mrs Cameron): I welcome Robert Gray. Robert, are you on your own today?

Mr Robert Gray (Department of the Environment): No, Dave will be here in a minute.

The Deputy Chairperson (Mrs Cameron): Dave Foster will be coming shortly.

Members, this session will be covered by Hansard. I remind you that, last week, the Committee decided that it was content with many of the clauses as drafted. It was also content with the proposed new clause 3A as drafted and with the amendment to clause 8 as drafted. The Committee considered a draft version of the amendment to clause 3. However, the final version differs slightly, so it will be considered again today.

The Department has also provided the wording that will be added to the explanatory notes for clauses 5, 8 and 13, as requested by the Committee. It has also provided draft amendments to clause 12 and schedule 1, as requested by the Committee, and additional information on paragraphs in schedule 1 that relate to penalties and fines. The information on the additional amendments is in members' tabled papers. We will look at each of those in turn.

Clause 3 deals with regulations relating to protecting and improving the environment: consultation. The Committee previously agreed the draft amendment to clause 3, which would leave out "as it thinks fit" and replace it with "considers appropriate". The Committee was content with that. However, the final amendment will replace:

"as it thinks fit, including such"

with ", including". Therefore, the amended clause would read:

"(b) such other persons, including such persons appearing to it to be representative of the interests of district councils".

Are members content with the proposed amendment by the Department?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): Are members content with clause 3 as amended, or do you wish to ask the Department to amend the clause further?

The Committee Clerk: Members, we previously considered an amendment that the Department initially thought it would table to replace "as it thinks fit" with "considers appropriate", but that was only a draft amendment. The final version that it now proposes to table will not use the words "considers appropriate" but will just replace:

"as it thinks fit, including such"

with ", including". That means that the clause 3(1)(b) will read:

"such other persons, including such persons appearing to it to be representative of the interests of district councils, industry, agriculture, fisheries or small businesses, as it considers appropriate."

The Deputy Chairperson (Mrs Cameron): Do members have any comments or queries?

Lord Morrow: I am sorry; I think that I missed that meeting. I was hoping to get to it, but something turned up at the very last moment.

The amendment proposes to leave out "as it thinks fit". That is a very wide phrase, and it is, therefore, replacing it with those other words. Are we saying that we are being specific? I am coming in cold to this, so I am looking for some guidance.

The Committee Clerk: The Committee had asked for the Department to remove "as it thinks fits", as it did not like that phrase. When we went out to a call for evidence, there was a suggestion that it should include "relevant persons". The Department responded to advise that it would be its preference not to use "relevant persons", and it initially came up with a proposal to add "considers appropriate" instead of the phrase "as it thinks fits", which is the phrase that the Committee did not like. The final version of the amendment will now just be ", including". It will remove "as it thinks fit".

Mrs Overend: Deputy Chair, "as it considers appropriate" is already there at the end of that subsection.

The Committee Clerk: It was already there. The initial proposal was to put it in twice. The final amendment will just be ", including" instead of "considers appropriate", because that is already the final wording in that subsection.

Mrs Overend: It seems like a bit of duplication.

Lord Morrow: I agree that it is not acceptable to use the words "as it thinks fit". The amended subsection would state:

"such other persons, including such persons appearing to it to be representative".

That is another bit of jumping off into the dark and saying that those folk or that group appear to be representative. As long as they have the perception, that is all right. Is that the case, Mr Foster? I am maybe thinking out loud.

The Deputy Chairperson (Mrs Cameron): Do the officials wish to comment on that?

Mr Dave Foster (Department of the Environment): Using the words "appearing ... to be representative" illustrates the fact that we do not have 100% knowledge of who is representative, so

we can only make a judgement as to who is representative. In reality, we publish consultations on our website and that is our attempt to ensure that the most representative batch of people are able to access it.

Lord Morrow: I think that I understand what you are saying and why you are saying it, but we are still saying this after the consultation. This is now the drafting stage. Maybe this is common language, in drafting a piece of legislation. Is it, Mr Gray?

Mr Gray: I think that it is common language. The Department will attempt to consult with as many people as it is aware of who are:

"representative of the interests of district councils, industry, agriculture ...".

If we try to limit that in some way, it might be more constraining. The Department wants to be all-embracing in its consultation exercise, and that wording allows us to do that. The Department is under a statutory requirement to consult. It is a statutory duty imposed on the Department to consult with all the representatives who appear to it to be representative of all those sectors.

Lord Morrow: Mr Gray, why would it not just read, "including such persons who are representative of the interests of district councils, including" etc?

Mr Gray: I do not know that, in practice, that would make any difference. I am just trying to think that through. Would that make any difference in actual practice?

Lord Morrow: Yes, that is a fair question. There is something vague about the word "appearing", but if it is in the drafting lingo, let us settle on it. I think that you are saying that it would be common language.

Mr Gray: This provision has been drafted by the Office of the Legislative Counsel, which is familiar with consultation provisions in legislation.

Lord Morrow: That is a fair point. We will live with it.

The Deputy Chairperson (Mrs Cameron): Will members confirm that they are content with the amendment proposed by the Department?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): You do not wish to ask the Department to further amend clause 3?

Members indicated assent.

Lord Morrow: No, I do not. It appears we do not. *[Laughter.]*

The Deputy Chairperson (Mrs Cameron): Let us move to clause 5, "Interpretation". The Committee 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 has provided the suggested wording at page 27 of the tabled papers. Dave or Robert, do you want to give a brief explanation while members are checking their papers?

Mr Gray: I have to admit that I struggled with this one, and I consulted the legal draftsman and so on about it. We agreed that primarily what we are talking about here is pollution caused by excessive noise or unpleasant odours. It is pollution in the sense of environmental harm and harm to human beings. The best examples that we came up with were excessive noise or unpleasant odours or stench. The word "offence" is quite a strong one. An example was cited in one of the previous sessions about an ugly-looking building and whether that could be used in this situation. On

consulting with the legal people and looking at the regulations that are due to come forward under the Bill, it is the case that the use of the word "offence" in relation to the senses of human beings deals with issues concerning noise and odours. It is that type of thing. It is offence to those senses.

The Deputy Chairperson (Mrs Cameron): I am struggling to hear you up here. My hearing is not great. You may want to raise the level a bit. Are members satisfied, or do you have any further queries?

Mr Gray: That is a common provision. That term already exists throughout existing environmental law. It is nothing new. It is already in various areas of environmental law.

Lord Morrow: If this is the way that it is done and if it ain't broke, we will not fix it.

The Deputy Chairperson (Mrs Cameron): Members, as a Committee, are we content with the Department's explanation for the explanatory and financial memorandum (EFM)?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): The Committee agreed at last week's meeting that it was content with clause 5, as drafted, and now members have seen the wording for the EFM. Are you still content, or do you wish to ask the Department to amend that clause? Are you content?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): We will move on to clause 8, "Rewriting powers of entry". The Committee agreed to ask the Department to provide additional information in the explanatory notes to explain the technical amendment proposed by the Department. The Department has provided the suggested wording at page 28 of the tabled papers.

Members, are you content with the proposed wording in the EFM? The Committee agreed clause 8, as amended, at the last meeting. Now that members have seen the wording for the EFM, are they still content or do they wish to ask the Department to further amend that clause?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): We move on to clause 12, "Code of practice in relation to powers of entry". The Committee asked the Department to amend the clause to allow further Assembly scrutiny of the code of practice. The Department has provided details of the proposed amendments at page 26 of the tabled papers. Could Dave or Robert comment on the proposed amendment?

Mr Gray: Again, this is a common provision in existing environmental law and in codes of practice. I mentioned, last time, that Assembly controls are imposed in some legislation and that they are not in other legislation. In view of the Committee's concerns about the lack of Assembly control, the Department was content to put those provisions in. It means that, in effect, the code of practice, whenever it is drafted, has to be laid before the Assembly in draft. So, it is subject to that Assembly control. It is subject to a resolution, and, if the Assembly prays against it, the Department would have to revisit the whole code and bring it forward again in a different form. It gives the Assembly ultimate control over the release of that document.

The Deputy Chairperson (Mrs Cameron): Can you confirm that subsection (5) will be expanded to cover the new subsections (3A), (3B) and (3C)?

Mr Gray: Yes. There will need to be a consequential renumbering. Obviously, when you put three new subsections in that clause, the other subsections will have to be renumbered. That will be reflected in the version of the Bill that is published after it is amended.

The Deputy Chairperson (Mrs Cameron): OK. That is grand. Members, are you content with the proposed departmental amendments, numbers 4 and 5? Are you content with clause 12, as amended, or do you wish to ask the Department to further amend that clause? Are you content?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): We move on to clause 13, "Interpretation". The Committee agreed to ask the Department to provide additional information in the explanatory notes to further define "premises". The Department has provided the suggested wording at page 29 of the tabled papers.

Members, are you content with the proposed wording in the EFM? The Committee agreed clause 13 at the last meeting. Now that members have seen the wording for the EFM, are they still content or do they wish to ask the Department to further amend that clause? Are you content?

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): Schedule 1 is on matters for, or in connection with, which regulations may be made under section 2. The Committee asked the Department to consider an amendment to remove the words, "Further defining environmental activities" in paragraph 1; and to provide further detail on schedule 1 in relation to the following: in paragraph 13(10), clarification of the reason why a maximum fine is defined in the Bill but a minimum fine is not; and in paragraph 13 (11), further clarification regarding what this will mean in practice.

The Department has provided details of the proposed amendment at page 26 of the tabled papers. At page 30 of the tabled papers, the Department has provided clarification of the reason why a maximum fine is defined in schedule 1(13)(10) but not a minimum fine. Do you have any comments on the issues that were raised?

Lord Morrow: Are the gentlemen telling us anything additional, or is this as good as it gets?

Mr Gray: We have tried our best to elaborate on that, following your comments last week. Again, this is in keeping with legislation throughout the environmental and other areas where, whenever we are dealing with offences, a maximum amount is referred to. This provision allows the Department to bring forward regulations that will specify an amount that must not exceed £50,000. There is no reference to a minimum amount, and the reasoning behind that, as I understand it, is to allow the courts discretion to deal with perhaps an exceptional case. Again, it is in common with the way that such offences provisions are drafted in legislation. Again, all the finer detail surrounding all of this will be a matter for the regulations to be made under the Act. It is about the courts exercising their discretion depending on the individual circumstances of a particular case. If the Department were to set in the Bill a minimum fine — say, for the sake of argument, £1,000 — that could have unwelcome or unintended consequences in relation to, say, an exceptional case where a court may decide that that really is not appropriate in that particular case. It is difficult to comment in any more detail because every case will be different.

The Deputy Chairperson (Mrs Cameron): To go over this: you have agreed to remove the words, "Further defining environmental activities" in schedule 1(1)(1). However, you are planning to retain sub-paragraphs (2) and (3). Does this not also give the Department powers to further define environmental activities?

Mr Gray: Yes. I would maybe like to get some more legal advice on that. The environmental permitting regulations to be made under Part 2 and schedule 1 cover a really wide range of issues, as I have said several times before. I do not want the Department to be left short with the powers that it has, so I would not like to commit to removing that. I would like to consider it and get some further legal advice on that point.

The Deputy Chairperson (Mrs Cameron): You are quite late in the day to bring this to the Committee's attention.

Mr Gray: No, we have removed the power that the Committee asked us to remove. The Committee asked us to remove paragraph 1(1).

Mr D Foster: We did not discuss sub-paragraphs (2) and (3) in any detail at the last session, I do not think.

The Deputy Chairperson (Mrs Cameron): Sorry?

Mr D Foster: We did not discuss sub-paragraphs (2) and (3) in any detail at the last session. I think that the conversation was focused on sub-paragraph (1), which we have sought to remove.

The Deputy Chairperson (Mrs Cameron): How quickly can we get the response regarding the legal advice?

Mr Gray: Before your next meeting.

The Deputy Chairperson (Mrs Cameron): OK.

Members, are we content then with the explanations given by the officials on paragraphs 13(10) and 13(11)?

The Committee Clerk: In relation to the minimum fines.

Lord Morrow: Chair, I have heard what Mr Gray has said here. I think that he is saying that it is not often, if ever — I know that those are not his words — that you put in a minimum sentence; you always go for a maximum sentence, which cannot be in excess of whatever it is. There is not, in any legislation, a provision stating that there must be a minimum sentence. Is that not what you are saying?

Mr Gray: In relation to drink-driving offences, I am aware, because I was doing some research on this, that, if someone is breathalysed and is shown to have a certain level, that will automatically attract a minimum fine. There is no room for manoeuvre there, presumably. I am not an expert in that area, but that is the only example that I could find.

Lord Morrow: I think that the argument that you articulated was that it would restrict the courts, but the courts are always restricted to a certain degree in some way. I do not see it fettering any court or judge in making a decision. Anyway, I am not prepared to labour it any further, Chair. I have made those points in the past, and, obviously, I am not winning the argument. I know when I am beaten.

The Deputy Chairperson (Mrs Cameron): OK. I take it that we are content with the explanation, then?

Lord Morrow: I think so, yes. I surrender.

Members indicated assent.

The Deputy Chairperson (Mrs Cameron): Robert and Dave, will you tell us more about the new amendment on national security that you are planning to bring forward?

Mr D Foster: OK, certainly.

As members are aware, a large part of the Bill — Part 1, in particular — deals with the powers for us to bring about regulations regarding permitting. That will bring together a number of existing permitting regimes: waste management licensing, pollution prevention and control etc. In parallel with the work on the Bill, we have been doing policy development work for the first set of regulations that we have referred to on a number of occasions when we have been before the Committee on the new permitting regime. It has become apparent during that work that, in order to mirror provisions in our existing permitting regimes on some issues of national security, the power that we had previously in the existing regimes for the Secretary of State to direct regulators on issues of national security is not in the Bill. So, subject to the views of the Secretary of State, we propose to table an amendment to deal with that.

By way of example, the regulations as currently drafted for the existing regimes allow direction from the Secretary of State for reasons of national security, and that might be in relation to public registers. The Secretary of State might issue a direction to the regulator to exclude certain information from the public register of applications for permits. That might be an example of when such a direction might be needed. Generally, it is not in relation to environmental information being excluded from registers, it is, perhaps, to do with requirements around the labelling of particular locations on site plans which security advisers might judge to be important for vulnerable facilities.

I appreciate that this comes somewhat late in the day for the Bill, but it has arisen from the work on the first set of secondary legislation and the requirement to ensure that the current powers in existing regimes could be mirrored in the new set of regulations for indicative permits.

The Deputy Chairperson (Mrs Cameron): Do you have a timescale for the national security amendment?

Mr D Foster: We are working on it urgently. We are looking to bring something forward at Committee Stage.

Mr Gray: We will be looking to bring forward an amendment in time for the next meeting of the Committee, but the actual wording of the amendment will probably be subject to the Secretary of State's approval.

The Deputy Chairperson (Mrs Cameron): Members, are there any questions on this?

Mrs Overend: Can you give us an example of when this sort of power would be used, just for clarification or to help the understanding of someone who is not an expert in the field?

Mr D Foster: I am not a security expert either, so it is somewhat difficult. When applicants submit an application form for a permit, all sorts of information comes with it, and there is also ancillary information. Quite often, there will be a requirement for a detailed site plan of the facility. Where it is a large facility, say a large industrial facility, a site plan is often already in existence. So, for what is seen as being a vulnerable facility, there might be a direction to not put that detailed site plan on the public register. Instead, there may be a more high-level plan showing the main elements of the site, but perhaps not in as much precise detail. That is the kind of broad example that has been used previously, although rarely, to my knowledge.

The Deputy Chairperson (Mrs Cameron): There are no further questions on that. Thank you very much, gentlemen. I do not think that we have any further questions. Do you have a question, Cathal?

Mr Boylan: No, it is my first day back, Chair.

The Deputy Chairperson (Mrs Cameron): It has been too much.

To summarise, then, the officials will bring forward advice on schedule 1, paragraphs 1(2) and 1(3) for the next meeting. We will therefore wish to defer our formal clause-by-clause scrutiny until next week when we will receive that information. We will move on to that when all outstanding issues have been resolved. The Department may have a new amendment for next week's meeting, but, given the late stage of our scrutiny, we may wish just to note it.

Thank you very much.