

NILGA comments on the Waste and Contaminated Land (Amendment Bill)

The following is a response to the request for views on the Waste and Contaminated Land (Amendment) Bill, currently at Committee Stage. This builds on the response to the consultation document published by the Department in April 2009. This paper has been drafted in liaison with the NILGA Waste Working Group, the local government Waste Management Groups, the Technical Advisers Group, SOLACE and the Chief Environmental Health Officers Group.

This consultation considers vital proposals for legislation for which local government has been pressing, for a number of years, including better provisions to deal with fly-tipping, including an operating protocol

INTRODUCTION

NILGA, the Northern Ireland Local Government Association, is the representative body for district councils in Northern Ireland. NILGA represents and promotes the interests of local authorities and is also supported by all the main political parties. Waste management is a key issue for local government due to the huge impact it can have on local communities, the economy, sustainability, climate change and council budgets. NILGA is pleased to be able to have an opportunity to comment on the proposals for the Waste Bill and we trust that our comments will be taken into account when developing the final proposals. This response was developed in liaison with the NILGA Waste Working Group, the local government Waste Management Groups, the Technical Advisers Group and the Chief Environmental Health Officers Group.

This draft response follows the format of the Bill, and is arranged into sections, designed to address specific clauses, following a section giving general comments.

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GENERAL COMMENTS

NILGA is pleased to be able to give views to the Environment Committee on the proposals contained within this Bill, which marks an opportunity to amend current legislation and to make some small additions. We would ask the Committee to note our view that we are encouraging the Department to work on a longer term, more creative strategic approach to developing appropriate legislation for Northern Ireland on environmental issues, including climate change and waste management. Whilst working within the framework of EU legislation, Northern Ireland now has the ability to form and frame its own legislation and it will be vital as we move forward with a legislative assembly, to create what an appropriate legislative base for the region.

NILGA notes the current need to work within the legislative timetables available and to prioritise heavily, but the earlier a strategic approach is embarked upon, the sooner it will become more viable to deliver appropriate and innovative legislation to deal with the waste management and other issues Northern Ireland has to face.

There is a need to properly resource Planning and Environmental Policy Group to provide the necessary research and scoping exercises to ensure the timely development of legislation and guidelines that are necessary and appropriate to the Northern Ireland situation.

NILGA would also request that Committee consider the potential for the DOE to establish a working forum where the Department, NIEA and councils can meet regularly to consider and discuss matters of enforcement.

Waste

1. Fixed penalty notices for offences under Article 4

NILGA would support the proposal to give NIEA and councils the power to issue fixed penalty notices as an alternative to prosecutions to the courts, in relation to breaches of Article 4 of the 1997 Order. NILGA believes that this would provide for more cost-effective regulation in appropriate cases, i.e. cases of small scale dumping of domestic waste, which is more likely to be dealt with by councils.

NILGA believes that Fixed Penalty Notices should be set at a level that acts as a deterrent, although there are many aspects of fly-tipping that require further consideration, and consultation with stakeholders, such as domestic rubbish versus illegal commercial dumping. One such issue is that of known repeat offenders, who may be small scale commercial operators, and whom it may be more effective to deal with by taking straight to court.

NILGA is of the view that a fixed penalty of £200 would provide a reasonable deterrent for non-commercial small scale offenders. These figures should be reviewed regularly to ensure that the legislation keeps up with economic circumstances. The fixed penalty fines should be payable to councils and sufficient to cover council enforcement and clean-up costs, whilst remaining below the level of court fines.

Guidance will be necessary to ensure the provision of a set of criteria for when the option of fixed penalty notices would be appropriate in order to achieve consistency of enforcement across Northern Ireland. This guidance would be best produced in partnership with councils.

2. Detention of seized property

- **Power to retain seized vehicles**

This proposal is supported.

3. Offence of failing to pay charge for subsistence of licence

- **Creation of a new offence of a failure to pay subsistence fees with respect to a waste management licence**

NILGA would agree to this proposal.

4. Powers to require removal of waste unlawfully deposited

NILGA is supportive of this clause in principle. However given the duplication of powers it will be necessary for agreement to be reached on the appropriate organisation to use the powers in any given circumstances.

5. Councils to enforce Articles 4 and 5 of 1997 Order

The proposal to provide council officers with the same comprehensive set of powers of entry and investigation as those provided to departmental enforcement officers for this purpose under Article 72 of the 1997 Order, **including regulations under Article 5(7)** is absolutely essential if councils are to be given the powers proposed under Articles 4 and 5.

Amendments to Articles 4 & 5 of the Waste & Contaminated Land (NI) Order 1997

Currently, the enforcement options open to district councils in respect of illegal disposal of waste (rather than littering) is limited to the service of Article 28 notices. It is proposed that the Waste and Contaminated Land (NI) Order 1997 is amended to allow councils in NI to prosecute for offences related to breaches of Articles 4 and 5.

NILGA has been working with TAG, CEHOG, SOLACE and the Department to seek to develop an agreed approach on this issue, to which councils have been requesting a better solution for some years. Experience since the implementation of the legislation is that NIEA (formerly EHSNI) has not had sufficient resources to pursue all breaches of Article 4 and has prioritized heavily, focusing on what it believes to be the most serious cases. Accordingly, a large number of illegal sites are not being pursued, despite having a serious detrimental impact on local amenity. In addition, a multiplicity of small incidents has no chance of being dealt with by NIEA, given the resource-based approach to enforcement.

NILGA believes that to allow this situation to continue, would develop an increased confidence in offenders in their ability to get away with such behaviour and thus lead to an escalation of the problem. This situation will only be exacerbated with increased departmental focus on commercial industrial and construction and demolition waste, coupled with increasing landfill costs and the development of more stringent EU legislation.

Demarcation of responsibilities and development of a protocol

Although the proposal to give district councils a more proactive role in enforcement through the appropriate powers under Articles 4 and 5 is welcomed, NILGA is of the view that a demarcation of responsibility is necessary between NIEA and councils. The working group has been trying to reach agreement on where this demarcation should lie.

Currently local government is only responsible for the enforcement of the Litter Order, and NIEA will not deal with incidents of less than 20000 tonnes of waste.

The entire local government sector is firmly of the view that the demarcation point, specified in the protocol in existence in England and Wales, where the agreed basis for council action is “fly-tipping of quantities of waste up to and including a single tipper load of waste up to and including a single tipper load of waste deposited at one time (i.e. up to approximately 20m³) in a single deposit, should be applied in Northern Ireland.

<http://www.environment-agency.gov.uk/homeandleisure/waste/flytipping/37853.aspx>

In England and Wales this protocol was developed based on which was the most appropriate organization to deal with the incident, **not** on quantity or number of incidents. A clearly set out fly-tipping/illegal waste disposal protocol is required to ensure an effective working partnership between NIEA and councils, and agreed **before** the proposed amendments would be implemented. Adequate resources, financial and otherwise would also be needed to enable councils to effectively investigate

and enforce Articles 4 and 5 offences and meet the requirements of the protocol. Councils feel that it is unacceptable to pass the costs of inspection, enforcement and clean-up onto the ratepayer.

NILGA believes that the existence of a working protocol in England and Wales has greatly assisted in the enforcement of illegal waste disposal, and that such a protocol should be developed in Northern Ireland, to also involve liaison with major landowners such as DARD, Translink and the National Trust. **The proposed amendments to the legislation cannot work until an appropriate demarcation and division in working is set between NIEA and councils, and would be keen that this demarcation is the same as that in the English protocol.**

Even with this line of demarcation, both councils and the NIEA will need to seek additional resources to discharge their duties but NILGA will be stating that the detail can follow using a suitably agreed methodology

Research and Data Collection

Although it would be preferable to have a research base in order to assist councils to bid for resources, given that councils do not currently enforce illegal dumping activity, at present it is difficult to quantify the scale of the work involved. NILGA and the Department have been working together to attempt to develop proposals for a data capture system suitable for local government use, but it has become clear that councils do not have the resources available to populate a detailed data capture system (a particular issue for the larger urban councils).

NILGA has done some research with councils to estimate how much a data capture and research programme, that would satisfy the requirements of the Department and NISRA, would cost local government to populate satisfactorily. This research has shown that to gather information on fly-tipping and illegal dumping incidents would cost the ratepayer at least £300,000 pa, and potentially up to £500,000. Local government does not view this as a good use of resources.

NILGA will be encouraging the department to liaise with the data collection staff in NIEA to examine what might be possible through other data streams already being collected from councils. In the interim, NILGA would encourage the Committee to ensure the Department views this legislation as a '**new burden**' for councils, and to provide associated resources to assist in councils taking on new enforcement responsibilities.

Facts and Figures:

Following a Freedom of Information request to NIEA, NILGA was informed that NIEA do not have information on the number of Article 28 notices they issued between April 2007 and March 2008 and although 250 incidents of fly-tipping were referred to NIEA by Councils during the period April 2007 to March 2008, information about the quantity of waste for each referral is apparently not held by NIEA. Thus research is also required within government on this issue.

From internal local government research we are aware that in the year 2006/7, the 17 councils participating in the study reported 3243 incidents of fly tipping and illegal dumping in their areas that would fall outside the remit of the Litter Order. Research of this nature is continuing.

6. Right of entry with heavy equipment or to domestic premises

NILGA would support this proposal.

Contaminated land

7. Contaminated land: pollution of waterways and underground strata

8. Appeals against remediation notices

9. Interaction with other provisions

Part 3 of the 1997 Order makes provision with respect to land contaminated by pollution. This part of the Order has not yet been commenced, and the proposed Bill includes a number of amendments to the existing legislative framework, mainly to reflect lessons learned through operational experience in England and Wales.

These amendments include:

- All appeals now to be heard by Planning Appeals Commission
- Definition of contaminated land to be made more accurate with regard to waterways
- Improved interaction with the pollution prevention and control regime

NILGA is supportive of these proposals given that they have arisen from experience of operating the contaminated land regime in GB.

Producer responsibility obligations

10. Producer responsibility obligation regulations

Proposals are made in the Bill to improve the department's powers of entry and inspection, to bring the powers available in the producer Responsibility Obligations (NI) Order 1998 into line with Article 72 and Schedule 4 of the Waste and Contaminated Land (NI) Order 1997. This will include powers to:

- Take photographs and make recordings, where these are deemed necessary for the purposes of any examination or investigation under the Order
- Take samples of anything found on the premises
- Require appropriate persons to answer questions relevant to the examination or investigation and to sign a declaration of the truth of his answers

It will also allow a Magistrate's Court to authorise entry to premises in circumstances where an entry has been refused or is likely to be refused.

NILGA notes these proposals and agrees that they are necessary.

Supplementary

11. Minor and consequential amendments and repeals

The proposal to review the references to 'waste in or on land' in Part 2 of the Order and to amend these where necessary to cover the illegal deposit of waste in, or over, or under land is supported in view of the Department's experience of difficulties with existing wording/definitions.

12. Commencement

NILGA largely agrees with the proposals as outlined, but is of the view that a carefully choreographed approach is required with regard to fly-tipping and the development of a protocol. There is no point enacting this legislation before a suitable protocol is in place.

Financial Implications

The new enforcement powers for Councils, although discretionary, will inevitably have cost implications for councils which is unlikely to be fully absorbed by the potential for some cost recovery. Councils should be given an adequate level of resource from central government to enable them to properly implement any new policing powers.

For further information regarding this response, please contact Karen Smyth, Head of Policy at NILGA on (028) 9079 8972 or at k.smyth@nilga.org