



**Northern Ireland
Assembly**

**COMMITTEE FOR THE
ENVIRONMENT**

**OFFICIAL REPORT
(Hansard)**

Waste and Contaminated Land Bill

24 June 2010

NORTHERN IRELAND ASSEMBLY

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ENVIRONMENT**

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Members present for all or part of the proceedings:

Mr Cathal Boylan (Chairperson)
Mr Patsy McGlone (Deputy Chairperson)
Mr Roy Beggs
Mr John Dallat
Mr Ian McCrea
Mr Alastair Ross
Mr Peter Weir
Mr Brian Wilson

Witnesses:

Mr David Lindsay)	Banbridge District Council
Mr Jason Patterson)	SWaMP2008
Mr Shaun Gallagher)	
Mr Mark Kelso)	Northern Ireland Local Government Association
Ms Karen Smyth)	
Mr Tim Walker)	

The Chairperson (Mr Boylan):

Banbridge District Council and SWaMP2008 — the Southern Waste Management Partnership — will brief the Committee on the Waste and Contaminated Land Bill.

I welcome David Lindsay, who is the director of environmental services for Banbridge District Council, and Jason Patterson, who is SWaMP2008's technical officer. Gentlemen, you have five or 10 minutes in which to make your presentations, after which I will open the meeting up for Committee members' questions.

Mr David Lindsay (Banbridge District Council):

Thank you, Chairman, for the opportunity to appear before the Committee. Banbridge District Council, in consultation with local government partners, submitted a written response to the consultation on the Bill that highlighted several issues of significant concern. The first is the offence specified in article 4 of the Waste and Contaminated Land (Northern Ireland) Order 1997. We understand from the initial consultation document that there was a proposal to change the wording through the Waste and Contaminated Land (Amendment) Bill so that the offence would be

“to deposit or permit or cause a deposit on land”,

and that the defence of someone who was being taken to task over the issue to argue that they did not knowingly permit or knowingly cause a deposit on land. From the perspective of enforcing the legislation, the council was strongly in favour of the suggested change, and we note that that suggested change has not been carried through. The council feels strongly that that will make it very difficult to follow through on enforcement action.

Members will be aware that councils, historically, played a significant role in the enforcement of offences relating to the illegal deposit of waste on land. Going back a number of years, my experience as an officer is that that was a significant impediment to enforcement. A landowner could argue quite easily in court that they had not knowingly caused or knowingly permitted a deposit, and that was a significant impediment to securing a conviction against a landowner. As enforcers of the legislation, we felt strongly that there was guilt but that the burden of proof was on the council, as enforcer, to prove beyond all reasonable doubt that the landowner had knowingly permitted or had knowingly caused a deposit.

I draw the Committee's attention to the proposed change to shift the burden of proof. There are many precedents for it. Legislation is littered with instances in which there is an offence and there is then a defence on the part defendants to prove that they did not do something or other, or that they did do something or other to prevent the commission of the offence. One significant example of that is in the Water (Northern Ireland) Order 1999, where the offence is to pollute water and where there is a defence to say that the person did not do so knowingly do so or took steps to prevent that from occurring. We feel strongly that the effectiveness of the legislation will be significantly impaired if the original proposed change to the offence under article 4 does not proceed.

The council also felt strongly about the issue of special waste and the proposed amendments to involve local councils in the enforcement of the legislation. We feel strongly that instances of special waste should be the sole preserve of the Northern Ireland Environment Agency (NIEA) and that councils should not be involved in issues of enforcement regarding illegal special waste deposits. There is a significant body of expertise in the NIEA that does not necessarily exist to the same degree in local councils. A particular knack and expertise is required in dealing with special waste deposits, and we feel that the Department should be responsible for taking forward such issues.

The other main issue that Banbridge District Council brought to the Committee's attention concerned the division of responsibility for enforcement. The council, and, I think, the local government sector in general, wholeheartedly supports council involvement in the local enforcement of local issues regarding illegal waste disposal.

We feel that it would greatly improve the whole situation to take offenders to task in local settings around the various council areas, where NIEA resource is simply not there to deal with smaller-scale incidents. Incidents may have small-scale pollution impact, and all the rest, but in relation to local and environmental amenity they are very important to local ratepayers and local councils, and we feel that councils would play a very significant role there.

We urge the Committee to consider seriously the issue of the division of responsibility. I know that the Department and the local government sector have been trying for some time to develop a protocol, but it is my understanding that that has yet to be tied down. It is a recipe for disaster if the legislation is introduced without any clearly defined protocol that outlines a clear demarcation of responsibilities and a clear understanding on both sides as to who will tackle what. Those are the main issues. I know that Jason from SWaMP2008 has a couple of issues that he wants to raise.

Mr Jason Patterson (SWaMP2008):

I have prepared a handout for members that outlines the main points. SWaMP 2008 welcomes the opportunity to build on the response that it submitted to the consultation on the Waste and Contaminated Land (Amendment) Bill. The response has been prepared on behalf of the eight member councils of SWaMP 2008, including Banbridge. Our member councils have agreed the following on the Bill's clauses.

Clause 1 deals with the fixed penalty notices under article 4 of the 1997 Order. The option of issuing fixed penalties would provide a more flexible and less costly alternative to prosecution for lesser illegal dumping offences. However, the proposal that the relevant council should be able to decide whether the option of issuing a fixed penalty is appropriate in each individual case raises some concern and would, therefore, necessitate additional training for each council before any implementation. Guidance would be necessary to ensure the provision of a set of criteria for when the option of issuing a fixed penalty notice would be appropriate in order to achieve consistency of enforcement across Northern Ireland. That guidance would be best produced in partnership with the waste management groups.

Clause 4 deals with the powers to require the removal of waste unlawfully deposited. SWaMP2008 views it as essential that discussions take place with the Minister of Justice on the prosecution and criminalisation of landowners whose lands are the subject of environmental crimes for which, under current law, they have responsibility by default. SWaMP2008 also requests clarification as to who is responsible for clearing litter in the case of unregistered land,

where no landowner can be indentified.

The proposed amendment to article 28 of the 1997 Order makes provision for both regulators to have the power to serve a notice on a suspected offender is supported by SWaMP2008. However, it requests clarity on the issue of special hazardous waste, as David highlighted earlier. Our councils have been told that such material could be dealt with by councils under the Litter (Northern Ireland) Order 1994. There is an urgent need to deal with that confusion, as it is inappropriate for councils to deal with special hazardous waste.

Although the proposal to give councils a more proactive role in enforcement is welcome, SWaMP2008 is of the view that a demarcation of responsibility between the NIEA and councils is necessary. On the issue of fly-tipping data, SWaMP2008's constituent councils are insistent that no legislation should be passed before a protocol is developed to address the grey area of who is responsible for the different scales of deposited waste. Only then will it be possible to develop any system for recording accurate data on those incidents.

The Chairperson:

Thank you very much for your presentations. I am a former councillor, and I know that we suffered a lot in the Armagh area with illegal dumping. Much of the time the councils had to foot the bill, and sometimes the landowners had to as well. That is an issue for them, so we need to get the legislation right.

We will take on board your issue around article 4 and will ask the question of the departmental officials on your behalf when they come before the Committee.

To follow on from your presentation, have you looked at the potential costs? Have you tried to draft something to see what you could realistically deal with and what would be value for money for the ratepayer? You mentioned demarcation, division and separation of

responsibilities. There need to be clear guidelines on who is responsible for what and what is achievable for local councils.

Mr Lindsay:

It is fair to say that there is a history. Councils have environmental health officers and other enforcement officers in place. There is undoubtedly value for money to be had by integrating the investigation of local, smaller-scale dumping incidents with the role of officers who are located where the problems arise. That will be a significant benefit to the cost of enforcement.

Councils are happy to support local districts to improve local environmental quality. An exercise has been ongoing to quantify the scale of incidents of dumping, including smaller-scale dumping, and the impact that that is likely to have on the ability to allocate officer time and goals within council budgets. Subject to the outcome of the review and the intelligence-gathering exercise, councils are adamant that they should receive resource allocation for that enforcement work. In the past, our council has always taken the view that responsibility for dealing with waste that is deposited on private property should rest with the person who perpetrated the offence and/or the landowner. However, there are discretionary powers in the legislation for councils to carry out clean-up acts in default.

In the past, Banbridge District Council has not taken up those discretionary powers. We have not exercised those discretionary powers except in really exceptional circumstances, in which there is an imminent risk to public health. We have dealt with deposits in public areas, and so on. We agree that the powers proposed in the Bill continue to be discretionary powers for the council to carry out works in default, and we strongly advocate that that should continue to be discretionary. It would be a significant imposition on councils to have to carry out that work and do clean-up operations with no prospect of ever recouping money from the perpetrators.

There is strong support in our council and, I feel, among our partners that we want to be involved. In fact, we lobbied for it after the legislation was changed to remove the powers

completely from councils. Experience over the past few years has shown that this legislation is badly needed, and councils need to be brought back into the arena to provide a solution to the problems. However, as you rightly mentioned, Chairman, there is a resource issue, and it needs to be quantified. An exercise is being undertaken at the moment that will help to quantify the scale of the role on both sides, and the likely financial implications for that.

The Chairperson:

Jason, you mentioned the fly-tipping protocol and data recording. Will you expand on your views on that?

Mr Patterson:

The issue with the fly-tipping protocol arose from the way in which the Department went about implementing the capture of data. It was put through the environmental health section, but, as David said, various sections of councils deal with fly-tipping material, be it technical services or environmental health.

On the scale of the incidents, I sent a report to the Minister on fly-tipping incidents in our region between 2007 and 2009. I can circulate that report to the Committee. There were three separate incidents of fly-tipping of cat litter, which is used in diesel laundering, and the clean-up came to £11,000 for the council involved. The costs are not associated with collecting the material, but with its disposal and treatment. There is a higher disposal cost for special hazardous waste materials, if councils are in a position to have to deal with those incidents.

The Chairperson:

Have you looked at any protocols in England, Scotland and Wales that are working? Have you any ideas?

Mr Patterson:

In our response, we said that the capture of the data would work, but it is necessary to have a protocol in place to see who deals with what scale of incidence. As David said, we are not concerned about what scale is set — obviously, the councils have to deal with anything under the current limit of 20,000 tons. The establishment of a protocol as to who deals with what size of a load, be it a trailer load or a lorry load, is key. If that is established, the authorities will be able to record the data more successfully, because we will know who is dealing with the case.

At the minute, no one knows who is dealing with each incident. They are done on a case-by-case basis. In the worst-case scenario, three or four statutory organisations are brought into the loop for cases in some of our bordering councils. HM Revenue and Customs gets involved when material is brought across the border and deposited. The buck is being shifted all around the place, and it is not effective.

Mr McGlone:

Thank you for your presentation. Those of us who have been on local authorities are aware of such cases. I heard some of the figures that you quoted about cat litter, and I would not be surprised if they were from Cookstown District Council. I am aware of at least three such cases, and the problem usually relates to where the responsibility lies; it is like pass the parcel. We hear that it is not the responsibility of the NIEA but the responsibility of the council. Meanwhile, some critter is crying because there is a pile of stuff dumped beside a stream.

I agree that there needs to be some definition as to where the responsibility lies, Mr Lindsay, because the dumping of hazardous waste needs to be dealt with promptly. I have had experience of several illegal dumps, including one big one that was difficult to deal with. It takes time to establish who is responsible. How do you define “hazardous waste”?

Mr Lindsay:

The legislation contains definitions of special or hazardous waste. The type of material that you

refer to, which is used in diesel laundering, and so on, falls into the category of special hazardous waste. There are value-for-money issues, because that is one of the most common types of illegal special waste disposal. Invariably, it appears on a public road or a lay-by, and the finger will point to the council as the body whose duty it is to remove litter and any material or debris that is on the roadway.

Each council is being left to try to deal with each deposit, and that is not cost-effective. If the NIEA had central responsibility for dealing with any illegal waste deposit that was classified as special or hazardous, which would include that type of thing, it could have one big contract with one large provider. The unit cost of treating or disposing of that material might be a fraction of what each council has to pay to deal with it on an ad hoc, one-off basis. It makes sense to centralise and co-ordinate how that material is dealt with. That is aside from the expertise issue — councils do not possess as much expertise as our NIEA colleagues.

Mr McGlone:

Did I detect a difference of emphasis between the two of you on the question of the land on which the waste is disposed? Mr Lindsay was very clear on it, but perhaps I did not pick up on what Mr Patterson said.

Did I pick up a slightly different tone in what you were saying on that? You talked about contacting the Department of Justice. I will explain where I am coming from. I can see that there are cases in which people, perhaps for £70 a ton, open up the bottom of their field, which may be up a long lane, and I understand that. Equally, I have had cases in which access to people's private land was achieved just by opening up a gap, and they had a volume of stuff dumped on their property. They did what was proper, which was to contact the statutory agencies and tell them that a pile of stuff had landed on their property. What happened? As a consequence of NIEA enforcement, in one case, the landowner was charged £16,000. I met NIEA officials about that incident: they were reasonable enough about it, but that was the situation. On one side, I can hear the just defence from the chancer and, equally, on the other side, I can hear the defence of the genuine person who had that stuff lumbered on him. Have you given any consideration as to

whether there is a reasonable path to be trod?

Mr Lindsay:

Jason and I discussed that earlier. The tone that Jason was setting had a slightly different slant, with which I totally agree. However, they are not contradictory views. Council officers and members feel strongly about the fact that they do not want people to be labelled inappropriately as criminals. Nevertheless, the proposed amendment to existing legislation gives a clear defence to landowners that they did not knowingly permit or cause that deposit. The burden of proof to the court is less on that side of the fence than it is for the enforcement authority to prove that they did knowingly cause or permit deposits. That must be proved beyond all reasonable doubt. Case law has shown that that burden of proof and the evidence that has to be presented are very significant.

I understand from NIEA colleagues, and they can speak for themselves, that they have found the existing wording to be a significant impediment. They may relate some of the cases in which they have failed to bring someone to justice: someone whom they were fairly confident was guilty but they were not able to prove that beyond all reasonable doubt, which is what they were required to do. The defence is there, and we feel that there is enough of a defence to the landowner in the originally proposed amendment. It does not necessarily give a blank cheque to the councils or to the NIEA to prosecute any landowner willy-nilly where a bit of waste appears on unlicensed land. We would use proper enforcement protocols.

When I was dealing with the enforcement issues from the council's perspective under the previous legislation, I would have been looking to see whether the deposit was fresh, whether it had been going on for weeks and months and years, or whether it was, quite evidently, a one-off deposit that had happened quite recently in the middle of the night and was something that the landowner could not have foreseen. In those circumstances, good enforcement practice would dictate that we would not be trying to pillory an innocent landowner.

However, there is the other extreme, where it is evident that there has been co-operation, at the very least, over a piece of land, and where the landowner has allowed an illegal deposit. If we

have to prove beyond all reasonable doubt, before we ever get past the starting point, that that landowner knowingly permitted or knowingly caused the illegal deposit, it is a significant impediment, which our experience of enforcement has shown.

The Chairperson:

Is that in relation to your amendment to article 4?

Mr Lindsay:

The article 4 amendment.

The Chairperson:

Following on from that example, I know where something exactly the same happened. The landowner had asked for hard fill and, either by accident or design, was given an illegal deposit. As a result, buildings were contaminated and had to be closed off. Even when I acted to ask questions of the NIEA, because there was ongoing enforcement, I could not get anywhere near it or ask any questions. Co-operation needs to be much better. I do agree with you that we clearly need to look at some instances and get an understanding of who is perpetrating the crime.

Mr Lindsay:

In a case such as that, the defence is quite clearly there. Any landowner could explain those circumstances to the magistrate. There is a lesser burden of proof for the landowner to prove that he took the actions necessary to avoid knowingly depositing or knowingly causing. I argue that the original proposed change, which has not been included in the Bill, was a good balance. It made it much easier to enforce against the really guilty people, but it also provided a defence for the landowner who is genuinely innocent.

Mr McGlone:

On that point, do you accept that most of those chancers dump it on someone else's land anyway?

Mr Lindsay:

Yes. I would say that there are very few landowners taking money for waste and depositing it on their own land. In most circumstances, the landowner is probably co-operating with someone who is taking the money for the waste.

Mr McGlone:

The point that I am making is that the last place that people who are engaged in the activity are going to dump the cat litter or diesel waste is on their property. They will dump it and leave somebody else with it.

Mr Lindsay:

It may well be that they just do not have land of their own on which to deposit the waste.

Mr McGlone:

I see our chief environmental health officer sitting behind you. He knows exactly what I am talking about, because he has been to Ardboe air drum many times for that very reason. My problem is that the innocent landowners are the people who were lumbered with the grief.

Mr Patterson:

That point emphasises the need for guidance for council staff as to when to issue a fixed penalty notice if they have to make a call on a site or a landowner.

Mr Beggs:

I declare an interest as a member of Carrickfergus Borough Council but also as a homeowner. I own 25 acres of land, and that illegal stuff could be dumped on my home or agricultural land. I can see both points of view. It is important that there be an appropriate balance. You referred to the original proposed amendment. Do we have a copy of that? It is important that it is clear that the entirely innocent property owner is not being hammered, and there must be clear guidance to

ensure that that does not happen. However, there must also be appropriate regulatory powers to enforce against those who may not be as innocent.

I see that the powers to remove the unlawful deposit will apply to the landowner. The landowner will have to be responsible if there is no tenant or anyone else responsible. There has to be a method of tidying things up, so I can understand that, but there is an issue about whether other penalties should fall on someone who is entirely innocent. What makes you so sure that the balance will not go too far the other way? We want to catch the guilty and ensure that the innocent are protected.

Mr Lindsay:

The offence outlined in the Water (Northern Ireland) Order 1999 is there, and it has been tried and tested through courts. I know from an environmental health perspective, as I have been dealing with NIEA water-quality inspectors taking cases from water pollution offences, that sometimes, to their frustration, the defence available is successfully made. Yes, there was a pollution incident, but the person against whom enforcement action was proposed was quite able to avail himself of the defence that he did not knowingly permit, or took reasonable steps to prevent, that pollution incident.

There is precedent. It has been couched and balanced in that way, and the law has worked in that respect. Enforcement practice and protocols are important, because enforcers must not be permitted to try to take to court innocent landowners who will have to avail themselves of the defence. That is where the expertise and professionalism of the enforcement agencies come into play. They carry out the relevant pre-investigation work, decide whether a landowner is liable to be able to avail himself of a defence of knowingly permitting or causing an offence and, in that situation, not proceed against the landowner.

The Chairperson:

I want to read something for clarification. The consultation document that was issued last year

stated:

“The Department proposes that the wording of Article 4 should be amended to provide that an offence is committed in instances where an unlawful deposit of waste is made, whether knowingly or otherwise. The Department proposes that the wording of Article 4 should be amended to provide that an offence is committed in instances where an unlawful deposit of waste is made, whether knowingly or otherwise. The Department further proposes that the amended legislation should provide for a possible defence in circumstances where the accused can demonstrate that he exercised all reasonable care to prevent the incident. These changes would effectively shift the burden of proof from the enforcing authority to the accused.”

You sent us that.

Mr Lindsay:

In the original proposal, the Department went on to say that mention of whether the offence was knowingly permitted should be made. I do not necessarily agree that the Department needs to say that. I would argue that the offence should be the deposit or the causing or the permitting of the deposit on land for which there is no licence for that purpose. One of the possible defences of an individual against whom the Department proposes to take action would be that he did not knowingly cause or permit waste to be dumped. I do not necessarily agree with the Department that article 4 needs to contain the words “whether knowingly or otherwise”, because that seems to almost contradict the defence. There is a subtle difference there, but it may be important.

Mr I McCrea:

I declare an interest as a member of Cookstown District Council, which is represented by SWaMP2008. There will always be cowboys whose intention it is to dump waste anywhere that they can to try to save money. They get away with it many times, and, depending on how much waste has been dumped, councils are left to carry out the clean-up and to try to get their money back. There is a grey area as to who is responsible for the clean-up. The Department says that it is the council, and the council says that it is the Department. I have been involved in a few cases in which the argument between the Department and the council went back and forward.

You mention the defence of individuals not knowingly permitting someone to dump waste on their land. I know of a case in which an alcoholic who never left his house did not knowingly permit anyone to dump waste on his property. The logic is that the council will do the clean-up,

because that is what the Department will say should happen. How will the council get its money back? At a cost to the ratepayer, the councils have to clean up what are, in some cases, large amounts of material. In some circumstances, there is no opportunity for councils to get their money back. Do you foresee any changes that would, in effect, force the Department to have to do it, or the introduction of a mechanism that will allow finances to be easily reimbursed if the landowner is not responsible?

Mr Lindsay:

The powers for the council to do clean-up works in default must continue to be discretionary. There must be no obligation on councils to go in in default and try to clean up private land.

Mr I McCrea:

Is that the case no matter what the amount of waste? Sometimes the deposits can be small.

Mr Lindsay:

That is certainly the case with private land, regardless of the amount. Otherwise, it would bring us to a nightmare scenario. If perpetrators got to know that they could deposit waste and avoid paying a £100 or £120 landfill fee — or a lot more in the case of special waste — they would dump the material and not worry about the circumstances of the landowner, because, if the landowner could not be found or could not pay for the removal of the waste, the local authority or the NIEA would go in and clean it up. That is a nightmare scenario, and one that must not happen. However, the authorities, either the NIEA or the councils, may intervene in exceptional circumstances in which there is an immediate threat to public health or an immediate serious risk of significant pollution, if it is in the greater public interest to intervene.

It is a matter for debate as to what sort of slush fund should be set up to pay for that, and as to who should pay into it, in the event of an authority not being able to recoup the money. It is an interesting area. It may be that some sort of fund could be set up — for example, through tax credits — to draw down money in situations such as that, in which it has not been possible for the relevant landowner to expedite a clean up, either quickly enough or at all, and in which there is a

real imperative to get it sorted. It is important that that cost is not borne by, for example, the ratepayers of a particular district.

Mr Patterson:

Under clause 1, proposed new article 4A of the 1997 Order states that councils will be permitted to use the funds from the fixed penalty notices to recover the cost of offences. However, those powers are intended to be used for less serious offences. Therefore, councils would still be left with the burden of the bigger offences.

Mr Dallat:

I do not understand why criminals who dump stuff illegally are always described as cowboys. John Wayne was my favourite cowboy, and he never did anything like that. *[Laughter.]*

Mr I McCrea:

He is also a fictional character.

Mr Dallat:

Perhaps the odd butt on the ground, but that would be it.

On a serious note, following the Minister's announcement last week that the 26 councils are to remain, I thought that there would be a renewed enthusiasm among local councils to make their worth felt in a real and practical way. I am probably picking up the wrong message that this should be the overall responsibility of the Environment Agency, which is cocooned in the Gasworks, seldom seen and grossly understaffed. However, is there an opportunity for collaboration among councils to seriously take on board the wishes of the public? Our environment is a mess, largely through criminality, but also through a culture of untidiness.

There is not a person out there who does not use the term buck-passing. This morning, I passed three dead badgers, and I know that people will want to know whose responsibility it is to remove them from the road. They cause a serious stink and are a health hazard. Councils do not like to remove a dead badger, particularly if it is on a border between two council areas. Staff will practically go out with a foot ruler to show that it is not in their area.

The issue we are here to discuss is a very serious one. It is good that councils come and give evidence, and we certainly want to make best use of your presence. However, there is a horrendous problem over who is responsible. People can spend a whole day, as you know, ringing organisations such as the Rivers Agency and Waterways Ireland. Something that we have not discussed is the fact that much of the pollution in our rivers and lakes. Who is responsible for cleaning them up? That should be covered in legislation and should be addressed. The practice of buck-passing all over the place among Departments must end, and we need the legislation.

I have a great deal of sympathy for landowners, but, from experience, I know that, when a landowner erects a clearly defined fence, by and large that stops the problem. Perhaps landowners should define their land, because fly-tipping occurs when slats are left open. I would like to hear your response to those points.

Mr Lindsay:

From Banbridge District Council's point of view and based on my collaborations with other councils through the chief environmental health officers' group and with SWaMP2008, I know that councils are wholeheartedly in favour of getting stuck in and dealing with the blight that is illegal waste disposal, and associated issues. We see that as a key role for councils and local government officers who, as I said earlier, have local presence, local knowledge, local contacts and local intelligence. We are well placed to carry out that role, and we are wholeheartedly up for making a significant contribution to tackling the problem. That is a given; there is no argument about that. As I said before, collaboration and working together among central government, the NIEA and local councils is absolutely essential. Local government officers want to do that.

Mr Dallat talked about buck-passing. If the legislation gives a dual role to councils and NIEA on those issues, that will be a 110% guaranteed recipe for buck-passing, the like of which you have never seen before, Chairman, unless we get a clearly identified, mutually agreed demarcation of roles and responsibilities in an enforcement protocol. That is paramount. Local government officers have been making that point for at least the past two or three years, when it was on the cards that councils were going to be given back the enforcement role. We need that to happen, and it needs to be mutually agreed and clearly communicated. Then, anyone who tries to pass the buck will fall foul of the clear protocol.

Mr Dallat:

That is good. I agree with all that.

The Chairperson:

There were some good and some bad cowboys, Mr Dallat.

We will have more questions to ask about article 4. Will you provide us with your preferred exact wording? The Committee would like to look at that. Thank you.

Mr Lindsay:

Thank you very much, Chairman.

The Chairperson:

We will now receive a briefing from representatives of the Northern Ireland Local Government Association (NILGA) on the Waste and Contaminated Land (Amendment) Bill. I welcome Mr Shaun Gallagher from Derry City Council, who is the chairman of NILGA and vice-chairman of the Strategic Waste Board (SWB); Mr Tim Walker, from Belfast City Council, who is the UK president of the Technical Advisors Group (TAG); Mr Mark Kelso, who is Cookstown District Council's chief environmental health officer; and Ms Karen Smyth, who is NILGA's head of

policy.

Mr Weir:

I declare an interest as a vice-president of NILGA.

Mr Beggs:

I declare an interest as a member of Carrickfergus Borough Council and as a landowner.

Mr B Wilson:

I declare an interest as a councillor and as a member of NILGA.

The Chairperson:

Here we go with all the dual mandates. I ask Mr Gallagher to open up the discussion.

Mr Shaun Gallagher (Northern Ireland Local Government Association):

I thank the Committee for the opportunity to talk to you today. Much of what you will hear will follow on from what the previous set of witnesses talked about. My colleagues and I will take a few minutes to highlight the key issues for local government that have arisen from the Waste and Contaminated Land (Amendment) Bill, after which we will be happy to answer any questions that Committee members may have about local government's waste management role.

Waste management is a key issue for local government because of the huge impact that it has on local communities, the economy, the environment and council budgets.

The Bill marks an opportunity to amend and make small additions to current legislation. We

welcome that. Local government asks the Committee to take note of the fact 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. In addition, we would value the Committee's support in ensuring that the relevant units of the Department are adequately resourced to do that important work. Furthermore, we request that the Committee considers the potential for the Department of the Environment (DOE) to establish a working forum in which the Department, the NIEA and councils can meet regularly to consider and discuss enforcement matters.

Members will have received our written submission on the Bill and will be aware of the issues that it highlights. The key issues for councils in the proposals are the sharing of enforcement responsibilities with the NIEA, and the necessary working arrangements and protocols that need to be developed. That is what we shall focus on today.

Before handing over to Mr Walker, I want to highlight one simple fact: the NIEA's responsibility for a site kicks in when 20,000 tons of waste has been deposited on it. A council's responsibility kicks in when 20 tons of waste — around two bin lorry loads — are involved. Consequently, responsibility for the 19,980 tons in between is a grey area. As the previous witnesses said, things could be tightened up a lot.

Mr Tim Walker (Northern Ireland Local Government Association):

Good morning, Chairman and members. I shall cover the proposed amendments to articles 4 and 5 of the Waste and Contaminated Land (Northern Ireland) Order 1997, how to set rules and responsibilities, and the establishment of a protocol. I shall then hand over to Mark Kelso, my colleague from the Northern Ireland Chief Environmental Health Officers Group (CEHOG).

At present, the issue for councils is that our enforcement options on the legal disposal of waste are limited merely to issuing article 28 notices, which relate to the removal of waste from land but do not include a facility to recover costs. Therefore, we are pleased to see the legislative

proposals and amendments to allow councils to prosecute offences for breaches under articles 4 and 5. However, we are also of the view that the proposals need to go further in order to give council officers the same comprehensive set of powers of entry and investigation that the NIEA has under article 72 of the 1997 Order, including regulations under article 5(7), which are to do with the recovery of data and the storage of and access to information. Otherwise, the powers under articles 4 and 5 will not be sufficiently deliverable.

For a number of years, NILGA, TAG, CEHOG, the Society of Local Authority Chief Executives and Senior Managers (SOLACE) and the Department have been working on an agreed approach to on-the-ground enforcement and delivery. It has come to bear that the NIEA — formerly the Environment and Heritage Service — does not have the resources to tackle breaches at the lower level that you heard about a few minutes ago. The almost arbitrary figure of 20,000 cubic metres — 20,000 tons — of waste has become the cut-off point. Therefore, we believe that a large number of illegal sites in Northern Ireland are not being actively or rigorously pursued. In addition, a multiplicity of smaller incidents is also being overlooked. If that situation is allowed to continue, given the legislative changes that are coming from the framework directive and increasing landfill charges, it is likely that that level of dumping and illegal fly-tipping will increase, leading to quite a significant problem. You heard from our colleagues in SWaMP2008 of the potential for a fly-tipper's charter. Fly-tipping is likely to become more of a problem as the departmental focus shifts increasingly to commercial-, industrial-, construction- and demolition-type wastes, which, as I said, are a result of the increased cost of landfill — rapidly approaching £100 a ton.

How do we come up with a solution? As I said a minute ago, for a number of years, we have been discussing with the DOE how to establish a working protocol. You heard that councils would like to play a more proactive role and that the amendments under articles 4 and 5 would provide them with that. However, we are also firmly of the view that it is critical that we know what the councils and the DOE will do, and how we will transfer the responsibility from one party to the other.

Currently, local government is only responsible for the Litter (Northern Ireland) Order 1994, and, as you heard, the NIEA has informed us informally through various conversations that it is not really interested in dealing with any waste volumes or events of less than 20,000 tons. The entire local government sector is firmly of the view that the demarcation point, as developed through a protocol in England and Wales, should be around 20 cubic metres, which is of the order of a single, large skip lorry full of waste. That is the established protocol that was developed in England and Wales, and the phraseology is:

“fly-tipping of quantities of waste up to and including a single tipper load of waste deposited at one time (i.e. up to approximately 20 m³ in a single deposit)”.

Our recommendation from the consultation document is that that should be applied in Northern Ireland.

The protocol developed a number of years ago in England and Wales was based on the most appropriate organisation, or tier of government, dealing with incidents. Our colleagues in SWaMP2008 told you about local knowledge and ability to respond. The protocol is not based on the quantity or number of incidents but on volume. Therefore, a clearly set out fly-tipping waste disposal protocol is required to ensure an effective working partnership between us and the Environment Agency. That should be done before the proposed amendments to the 1997 Order are implemented.

Given the relative size of councils here, we recognise that a demarcation point of 20 cubic metres would be a much more extensive commitment on behalf of Northern Ireland councils compared with their English and Welsh counterparts. As you heard, adequate resources will also be needed to allow councils to investigate and enforce articles 4 and 5 and to deliver any requirements arising from such a protocol. We feel strongly that, at this point in time, it is unacceptable simply to pass on inspection, enforcement and clean-up costs directly to ratepayers. Even with the identified delineation between councils and the NIEA, they will both need to seek additional resources to discharge those duties.

I shall now pass over to Mark Kelso, who will look at some research and data issues, after which I am sure that there will be questions about the best mechanism with which to go forward.

Mr Mark Kelso (Northern Ireland Local Government Association):

Before I talk about data, I must say that, until December 2003, councils did the work. They were the sole regulators for illegal waste disposal in Northern Ireland. There was no such thing as the Northern Ireland Environment Agency's environmental crime unit. The work was delivered by a small body of officers in local government. With the introduction of this legislation, hopefully, we will come full circle, and councils will have a statutory role to play.

With respect to research and data collection, I want to highlight the fact that discussions have been ongoing with the DOE to develop an evidence base of the level of illegal activity across the 26 council areas. That has been difficult to achieve, for the obvious reason that councils do not have the statutory remit to undertake such a body of work. Nevertheless, we have been trying to collate information. At this point, I should emphasise that councils already populate an information base on waste data-flow information for the Department, and that is provided quarterly. It should also be noted that two of the questions to which councils respond relate specifically to illegal waste disposal. Therefore, there is already a data set in the Department, although there may need to be more cross-sectoral working.

Taking forward a new data information system will involve a new body of work, so it must be realised that, in doing so, councils will incur considerable costs. Some research has been carried out into the matter, and the estimated cost for Northern Ireland ranges from £350,000 to £500,000. Would that be a good use of ratepayers' money? Although at government level it would not be, we argue that there is a sufficient evidence base to move forward on the basis of adopting the level of waste for which councils will be responsible — up to 20 cubic metres or 20 tons — that Tim Walker identified. Anything above that level would be the responsibility of the Department or the Northern Ireland Environment Agency.

Of the statistics that have been gathered, I draw members' attention to the work that was carried out in 2006-07 and 2007-08. In 2006-07, 17 councils participated in a short, snapshot survey, in which a total of 3,243 incidents of fly-tipping in their localities were identified. That is not a full picture, but one can safely say that the figure for the whole of Northern Ireland would be in the region of 4,500 to 5,000. In 2007-08, 250 formal referrals were made to the Northern Ireland Environment Agency, using its formal referral process, which involves completing a very detailed form by setting out the nature of the incident, its geographical location and the potential volume and type of material that needs to be dealt with. My understanding is that the feedback on referrals made to the NIEA is very poor. Of the 250 formal referrals, councils received feedback on any action that was taken in only 1% of cases. I also understand that the level of referrals has not decreased. A snapshot survey carried out last week indicates that the number of incidents per council is of the same order. Any additional workload that might be placed on councils in order to gather statistical information would have to be treated as a new burden. As such, any cost element would have to be allocated to councils.

We welcome the opportunity to dispose of some incidents by use of fixed penalty notices. It has already been said that the relevant agencies need to produce a clear enforcement guide that identifies the parameters for using the fixed penalty process. Fixed penalties provide a cost-effective regulation mechanism, and they would enable councils to dispose of a number of small-scale incidents without going through the full rigour of the court process, which can be very time-consuming and costly. However, there are instances in which rogue traders must be dealt with, and the fixed penalty process would not be a suitable measure with which to do so. In such cases, the legal process would be the option to choose.

It has been suggested that, for domestic incidents, a fixed penalty fine of £200 should be levied. CEHOG, which is my professional group, identified a fixed penalty of £500 for a small commercial-type incident; for instance, a hot-food vendor who decides to throw his accumulated waste from a day's trading over a hedge rather than deal with it himself. Therefore, we are suggesting a £200 fixed penalty fine for domestic waste and a £500 fine for minor commercial-type incidents. The moneys accrued from those fines would be used to pay for the service and the clean-up costs that councils might incur as a result of undertaking their responsibility. Obviously,

there needs to be some communication between the regulators. NIEA also has the option to levy a fixed penalty fine, and its guidance would need to be taken into consideration on that matter.

We need a very clear protocol to determine who does what in Northern Ireland. It is evident that such a protocol must be finalised, agreed and put in place before the legislation comes into effect, or we will be faced with a situation in which one body will point the finger of responsibility at another. The agencies need to engage in clear partnership-working. For instance, I work in the west of the Province, and I cannot tell you who in the Environment Agency has responsibility for my region. That person has never made himself or herself known to me or my council. That is an indictment of the way in which the service is delivered. There must be clearer and more robust mechanisms for the way in which we do our business.

There have been situations in the west of the Province in which we have had to bear the costs of the clean-up of contaminated waste from fuel-laundering processes. We need a fund to be set aside to deal with that issue so that councils can bid for the costs of those activities. The protocol would sort out who has the responsibility for cleaning up material that is dumped in watercourses and waterways.

Mr S Gallagher:

That completes our submission, Chairperson.

The Chairperson:

You said that, before 2003, councils had responsibility for waste management.

Mr Kelso:

Yes.

The Chairperson:

Did they have responsibility for all types and amounts of waste management? Was there a threshold?

Mr Kelso:

No. Through the councils, local authorities were, before 2003, under the Pollution Control and Local Government (Northern Ireland) Order 1978, fully responsible for dealing with all waste licensing and enforcement against illegal waste dumping activities in Northern Ireland.

The Chairperson:

Do you want to set a threshold for councils? How would such a threshold be set? You said that councils in England were bigger, which is fair enough. They may have the ability to facilitate a higher threshold. However, there are bound to be examples where the protocol is working better — in Scotland, perhaps. Can you expand on the protocol and on the threshold?

Mr Walker:

The threshold that we are suggesting is borrowed specifically from the English and Welsh protocol, which, I think, was developed and finalised between 2004 and 2005. It very clearly involves a variety and range of partners. It is not just about a relationship between the councils and the Environment Agency; it also brings in the National Farmers' Union, the Forestry Commission, National Rail and a whole range of landowners on whose land waste might be dumped. The protocol looks at roles and responsibilities, and at who is best placed to respond. Councils recognised that they could respond to and deal with 20 tons of waste quite quickly. Any larger amounts could be referred to the Environment Agency, which could take appropriate measures. A series of hotlines and freephone reporting lines were put in place.

The protocol allows individual counties to work specifically with the Environment Agency in their area. It provides an overall framework for the whole of the UK, in which individual Environment Agency officers put in place. The partnership in the locality, in places such as

Leeds or Bristol, was supplemented with the likes of Flycapture to record and report the number of incidents nationally.

Where it has worked, it has done so very well. In many instances, there have been successful prosecutions, and partnerships been very successful in reducing the amount of fly-tipping. There are other areas in which it has worked less well, because partnerships do not always work.

The protocol is not a very large document. Nevertheless, it has been produced, and there is a separate version specifically for Wales. It runs to only something in the order of 35 to 40 pages, but our contention is that it could act as an effective starting point for discussions with the DOE or the NIEA. We could use it as a framework document from which to work up a local edition.

The Chairperson:

It is common sense to set out responsibilities and guidelines, and we need to achieve those through the legislation.

Mr S Gallagher:

In fairness, the NIEA, which was formed in 2003, took on responsibilities that, I believe, it did not have the resources for or the expertise to deal with. The difficulty is that communication between the NIEA and local government is, as most representatives will agree, very poor. I get the impression that it does not feel obliged to engage with local government, politicians or elected Members, and that is a serious difficulty. For example, as the vice-chairperson of the SWP, Fermanagh District Council approached me concerning an illegal trailer of waste that had been dumped on the main road into Enniskillen. It was over the 20-ton limit, so it sat there for a week because nobody could agree on who should dispose of it. It was supposed to be the NIEA, but it said that it did not have the expertise. Eventually, Fermanagh District Council processed the waste. The NIEA then, for want of a better word, summonsed the council to court for illegally processing illegal waste. I had to speak to Minister Poots to get the case withdrawn. That is the kind of nonsense that sometimes happens. Local government does waste very well; the expertise

and history are there. We must restore the balance.

Economic pressures and the growing list of materials that are not allowed to go to landfill mean fly-tipping will increase. Therefore, measures to tackle it will have to be resourced. At this moment, in Craigavon Borough Council's area, there is a trailer of waste that has obviously come from the illegal fuel industry. It is parked up and will have to be dealt with. Again, it will be the council that will have to move in to process the illegal waste, because acids and all sorts of chemicals are involved. I commend the NIEA for its work on the big, high-profile cases, with which it has had success, but it needs to learn to engage at lower levels so that, as elected members, we get fewer and fewer such incidents.

The Chairperson:

I totally agree. Down through the years as a local councillor, I had similar difficulties. A gap clearly exists, and it must be closed. We will go back to the NIEA to find out exactly what the problems have been. Sometimes the NIEA gives the impression that it is operating in a silo. To be fair, it is not about individuals, but that is the impression that the agency gives. Nevertheless, it is opening up a wee bit.

Ms Karen Smyth (Northern Ireland Local Government Association):

Fly-tipping is such a big problem, so finding adequate resources to tackle it has been the main issue for the NIEA. In recent months and years, NILGA has begun to ask itself about the future of landfill tax. At the moment, landfill tax is collected from councils, goes into the Exchequer and comes back through the Northern Ireland block grant. However, if landfill tax money were to be ring-fenced in order to deal with environmental issues, we would be ahead of the game in dealing with and resourcing the solutions to the problem.

The Chairperson:

It is very hard to get money out of Sammy Wilson.

Ms Smyth:

Yes, I know.

The Chairperson:

Nevertheless, it is a resource issue. I would like you to talk about actual costs. You have data on fly-tipping incidents, and, presumably, you have projected costs. How will councils cope? We must ensure that we get value for money, and anyone who has been a councillor will know that when someone sees something dumped on the road, whether it be a crisp bag or a lorry load of stuff, the council is the first port of call.

Mr S Gallagher:

To give you an idea of costs, Craigavon Borough Council, for example, has to deal with that trailer full of materials from the illegal fuel business. That will cost the council around £10,000 to process. That money will come out of the council's engineering department's budget or some other budget. We have all been there and we all know what happens. Something else will have to do without, because 10 grand will have to be allocated to process the waste. If we get tighter control and co-operation, it is important that a resource fund is in place that councils can dip into so that their budgets do not go haywire during the year. Unfortunately, such illegal activities continue.

The Chairperson:

You talked about bidding for funds to tackle the collection of waste. It is obvious that you will want to set a threshold for that. The other issue that I want to raise concerns fuel laundering. It seems that there is one threshold for one type of activity, but you are talking about bidding for funds to deal with diesel laundering, and so on. Can you expand on that?

Mr Kelso:

I will deal with the laundered product to start with. The best way to describe that product is as a hazardous waste. On that basis, it should not even be discussed at this table, because it falls into a

different category altogether. It should be dealt with by the Department of the Environment through the Northern Ireland Environment Agency as a hazardous waste. Obviously, the Department can respond to the issue of whether it should deal with complaints when it gets them. To date, however, councils have been identifying issues in their area and formally notifying the Department that there is potentially hazardous waste that needs to be dealt with, yet nothing has happened. It has fallen to local councils, in the best interests of public safety, to address the issue and deal with it to the cost of the ratepayer. As Shaun Gallagher said, some of those illegal activities, which are happening regularly in Northern Ireland, have cost more than £10,000 each to deal with. If councils are going to have to keep doing that work, a fund should be set aside for it. Some sort of cost-recovery mechanism is needed for councils that are doing work that the Department should be doing.

You asked about the data collection situation. We collected data in 2006-07 and 2007-08. We have had discussions with the Department since then about the need to put in place a data collection system to provide an evidence base to identify where the cut-off point for responsibility lies between councils and the Northern Ireland Environment Agency. At present, we are saying that we do not really need that level of detailed information to agree the protocol. If we are to replicate the protocol in England, Wales and Scotland, a demarcation level will be set at 20 tons. A load of less than 20 tons will be dealt with by councils, but any load greater than 20 tons will be dealt with by the NIEA. There is a need to gather information, but that information can be gathered further down the track. We can put measures in place to do that, but we need to agree the protocol first, after which we can look at the potential for gathering information as we start doing the business.

At present, we estimate the costs to Northern Ireland local government of data recovery, based on 2008 figures, to be between £350,000 and £500,000. That alone, if we have to go down that route, will be a new burden on councils. We will have to bid for that money to be made available to councils to put in place a robust data collection system.

The Chairperson:

Do members have any questions? They are very quiet today.

Mr Beggs:

You say that you want a fund to enable local government to recover significant costs that may be incurred. Will that be on a percentage basis, so an incentive remains for ratepayers to report incidents? Will councils be able to recover 100% of their costs, or perhaps 50% or 90%?

Mr S Gallagher:

Do you mean for the recovery of more than 20 tons of waste?

Mr Beggs:

For whatever the council is bidding for. You are bidding for a fund.

Mr S Gallagher:

If the Department provides a fund, improving the situation will prove very simple. As I said, councils do waste well, so if something is dumped illegally, the NIEA will have the facility to approach the relevant council to ask for the problem to be cleaned up and sorted out. It will be able to authorise the council to deal with the incident. Subsequently, the council will submit a bill to the NIEA, and, hopefully, funds will be available. That is how I envisage the problem being resolved. If there is still a grey area, there will be a fight for different budgets, and it will be very difficult for councils and the NIEA to allocate parts of budgets that they may not have.

Mr Beggs:

What happens if less than 20 tons of waste is dumped?

Mr S Gallagher:

If it is less than 20 tons, the local authority will deal with it. Twenty tons is a substantial amount of waste, equating to the average 40-foot lorry full to capacity. I would class anything more than that as a major waste incident, which the NIEA would probably need to deal with.

Ms Smyth:

In the current economic environment, we must be realistic, because bidding for resources will be very difficult. Nevertheless, we have to keep to the forefront of our minds in local government that we want to minimise the impact on ratepayers. We are willing to sit down with the Department and the NIEA to work out a system that is realistic and will have a minimum impact on ratepayers.

Mr Kelso:

Any fund would be for situations in which we are unable to identify the offender and, consequently, cannot follow through with legal action. If a council is following through with a formal process for under 20 tons of waste, hopefully it has identified the offender and is taking legal action. A cost-recovery mechanism should already be built into that process. In that situation, there would be no need to bid for funding. We are talking about funding in situations that involve laundered fuel waste, where we cannot trace ownership because the waste has been abandoned on vacant ground, and dealing with it is a real problem involving a lot of cost.

Mr Walker:

We are also talking about the fund being available for a limited time — until the protocol is established and the roles and responsibilities are enshrined. It will not be in perpetuity, but just until we establish a working relationship. Thereafter, we will look at how best to apportion costs to or recover costs from the two parties involved.

Mr Dallat:

You said that local councils are good at disposing of waste, Shaun, and that is absolutely true. However, they are not so good at preventing waste being dumped. NILGA put years of effort into trying to bring about new council areas. That will not be happening. We now have this big problem that affects the environment. Should the issue be tackled in collaboration with neighbouring councils?

Mr S Gallagher:

As you know, there are currently three waste management groups: SWaMP2008, the North West Region Waste Management Group and Arc21. Those groups are focusing minds in local government on waste. Recycling rates have gone up. They are at almost 37%, which, if you think back five years, is a massive increase. In fairness, it is a credit to local authorities, and very much a matter of co-operation. The problem with fly-tipping and illegal dumping is that it is done by people who do not give two damns about the environment. As Patsy McGlone said, it is usually done in somebody else's backyard. People never dump near their own yard. Therefore, there will always be clean-up and environmental costs. Better co-operation between the NIEA and local authorities is needed, because there is a gap, and while that gap exists, these boys can have a field day.

Mr Walker:

We need to take legal advice on how collaboration between councils should be conducted and discharged. Nevertheless, the prospect exists.

Mr Dallat:

We spend a lot of time seeking legal advice, while those who commit the crimes do not seek any.

Mr S Gallagher:

Good point.

Mr McGlone:

If there is expanded collaboration among clusters of councils, a communication issue with the NIEA will arise. Mark's comments surprised me.

It seems amazing that an enforcement body that is responsible for the environment has not communicated with an essential wing of local government, which is responsible for enforcement

and waste. One of the lessons that we can learn and have learnt — indeed, I heard it very acutely from Mark — is that enhanced and increased communication is needed. It is amazing that officers with a responsibility for an area have not reached out to that area to touch base, or even to send their business card or an e-mail. That is astounding in this day and age. Further lessons need to be learned on the basic rules of communication.

Mr S Gallagher:

Many councils would welcome that, particularly council officers.

The Chairperson:

The Committee will contact the NIEA. I would like to think that over the past 12 or 18 months that some liaising has taken place, but the Committee will find out if that has been the case.

Finally, having listened to the previous evidence session, does NILGA agree with the wording of the proposed amendment to article 4 of the 1997 Order? The proposal is to withdraw the original amendment —

Mr Kelso:

The professional officer group agreed with the proposal put forward by the Department. However, the officer's comments have been well made, and NILGA is happy to consider any further amendment that the Department puts forward.

The Chairperson:

Thank you.

Mr S Gallagher:

I thank you, Chairman, and Committee members for the opportunity to speak with the Committee today. Keep up the good work.