

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT (NORTHERN IRELAND) 2010

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010 which received Royal Assent on 26 March 2010. They have been prepared by the Department of the Environment in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes need to be read in conjunction with the Act. They do not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The EC Landfill Directive (1993/31/EC) aims to prevent or reduce, so far as possible, negative effects on the environment from the landfilling of waste. The Directive requires Member States to meet recycling targets from 2010 through to 2020 and reduce the volume of biodegradable waste being sent to landfill.
4. District councils are responsible for the collection and disposal of waste and it is imperative that they meet the Landfill Directive targets to avoid possible infraction proceedings. To do so will require the construction of significant new waste facilities (e.g. Mechanical Biological Treatment plants, Energy from Waste facilities and other recycling measures). One of the options under consideration by councils involves the private sector building the facilities and providing recycling services to councils by means of Public Private Partnership (PPP)/Private Finance Initiative (PFI) contracts. At present, however, there are some doubts about the powers of councils to enter into such contracts.
5. The Act aims to clarify the powers of district councils to enter into long-term service contracts with the private sector and so remove any concerns contractors and financiers might have about such contracts.

6. The Act provides additional powers to councils and certain joint committees in relation to the granting of joint and several liabilities, warranties and indemnities in connection with their waste management functions. It also enables councils and certain joint committees to acquire land otherwise than by agreement (i.e. to vest land) for waste management purposes.
7. The Act makes preliminary arrangements for the reorganisation of local government. It permits controls to be introduced in respect of specified financial activities of the 26 existing district councils in the period leading up to their dissolution and the establishment of the 11 new district councils as part of the reorganisation of local government. The aim is to ensure that the new councils are not constrained by being bound to long-term financial commitments entered into on their behalf by the existing councils. The Act enables the Department to introduce the system of controls by direction.
8. The Act enables the Department to make regulations to establish statutory transition committees for the purpose of preparing for, and giving full effect to, the reorganisation of local government.
9. The Act enables the Department to make regulations to provide for severance payments to be made to councillors who resign during a specified period.

CONSULTATION

10. In 2005, the Department established a Waste Infrastructure Task Force – a partnership between central and local government – to elicit the views of key stakeholders on proposals for delivering a new waste infrastructure for Northern Ireland. Those stakeholders were generally in agreement with the Department’s proposals.
11. The Department also carried out a formal consultation exercise with interested parties on its contracts and compulsory purchase proposals over a 3-month period between December 2008 and March 2009. While the 14 respondents who commented generally welcomed the Bill and were supportive of the Department’s proposals, 7 mentioned that it did not cover all of the legislative issues that would arise in the waste infrastructure procurement process.
12. The Department conducted a consultation exercise on its proposal for a Waste Bill from April 2009 to July 2009 which included provisions to address the remaining legislative issues which were considered necessary for the waste infrastructure procurement process. On the recommendation of the Environment Committee, those provisions were moved from the Waste Bill into the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010.

13. There was no formal consultation on control of disposals, etc. by existing councils; however, the Local Government Taskforce Finance Sub-group, which submitted its final report to the Taskforce in July 2006, flagged this up as an issue to be addressed. Membership of the sub-group included elected members and officers from local government and officials from central government.
14. Proposals in relation to the composition, governance arrangements and functions of the statutory transition committees were developed through the Strategic Leadership Board which was chaired by the Minister and included elected representatives from the five main political parties. A formal consultation exercise was carried out from 6 April 2009 to 31 May 2009 on the composition, role and governance arrangements for statutory transition committees.
15. Severance arrangements for councillors was one of the areas considered by the Councillors' Remuneration Working Group which reported in June 2006. Membership of the Group included representatives of the Northern Ireland Local Government Association, the National Association of Councillors, the business sector, the voluntary sector, trade unions, the Department and an independent. The report was issued to councils and local government representative bodies for comment. A formal consultation exercise was carried out from 6 April to 31 May 2009.

OPTIONS CONSIDERED

16. There is a lack of private sector confidence concerning the powers of councils to enter into long-term service contracts. The Act clarifies the contractual powers of councils so that contractors will be encouraged to compete for contracts for the construction of the necessary waste infrastructure in Northern Ireland. To have done nothing would have run the risk of EC Landfill Directive targets not being met and possible infraction proceedings.
17. Consideration was given to whether it would be prudent to introduce a system of controls on existing councils in the run-up to reorganisation. It was concluded that such an approach would be desirable to ensure that the new councils would not be bound into long-term and significant financial commitments over which they had no control. While consideration was also given to a wider range of controls, it was concluded that that would be too restrictive, and that controls should apply only to disposals of land and contracts in excess of specified thresholds, with additional scope for exemptions in certain cases. The Department agreed with the recommendation of the Environment Committee that there should be a mechanism to allow a district council, which disagreed with the decision of its statutory transition committee regarding the proposed disposal of land or a contract being entered into, to refer the matter to the Department for decision.

18. Consideration was given to whether the new councils should operate in shadow form for a period after the 2011 elections before assuming full powers and responsibilities. The public will, however, expect to see modern, effective public services in place as soon as possible. It was therefore decided that statutory transition committees should be established and be responsible for a significant programme of work in the run-up to the elections to ensure that the new councils will be in a position to take full executive control for services from the outset.
19. Following an Executive meeting on the Review of Public Administration in relation to local government, the then Minister of the Environment, Arlene Foster, announced, on 31 March 2008, that she would introduce a severance scheme in order to recognise the contribution of long-standing councillors who opt not to stand for re-election. No other options were considered.

OVERVIEW

20. The Act has 27 sections and comprises 3 Parts. Part 1 contains 8 sections concerning contracts of councils; Part 2 contains 12 sections concerning local government reorganisation matters (e.g. control of disposals, etc. by existing councils, statutory transition committees and severance payments to councillors); and Part 3 contains 7 sections on the exercise of waste management functions by district councils and joint committees and on supplementary matters.

COMMENTARY ON SECTIONS

21. A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

Section 1: Functions to include power to enter contracts

This section clarifies the power of councils to enter into contracts for the provision of assets or services (or both) for the purpose of discharging any of their functions. Although this provision enables councils to enter into PPP/PFI type contracts, it is not restricted to such contracts. The section also enables councils to enter into separate or collateral contracts with the financiers, or insurers of or trustees for the financiers, of the contracts. This will give a third party, who provided finance to a contractor, “step-in” rights in the event that the contractor produces an unacceptably poor performance, becomes insolvent or is otherwise unable to honour the contract.

Section 2: Certified contracts to be intra vires

This section is the first of a two-staged approach providing “safe harbour” protection from legal challenge to private sector contractors and their financiers. It does so by introducing a presumption that a certified contract is legal for private law purposes. The section provides that, even if a council had no power at all to enter into a contract or had abused a power it did have, a certified contract is presumed to be legal unless it is successfully challenged by means of a public law review (i.e. by judicial or audit review).

Section 3: The certification requirements

This section sets out the certification requirements a council must satisfy for a contract to be a certified contract. One of the requirements is that the contract will operate, or is intended to operate, for a period of at least five years. The section also provides that the Department may make regulations concerning certain certification requirements.

Section 4: Certified contracts: supplementary

This section provides that, where a council has satisfied the certification requirements in respect of a certified contract, the certificate that is issued will have effect and is not invalidated by anything in the certificate which is inaccurate or untrue.

Section 5: Special provision for judicial reviews and audit reviews

While section 2 introduces the presumption that a certified contract is lawful, this section preserves the right to challenge the lawfulness of such a contract. Such a challenge is restricted to public law challenge by means of judicial review or audit review. Section 5 also provides the second stage in giving “safe harbour” protection to private sector contractors and their financiers. It does so by providing that where, on public law challenge, a court takes the view that a certified contract is unlawful (because the council did not have the power to enter into the contract or had exercised any power improperly), the court may nevertheless decide that the contract can continue to have effect. In reaching such a decision, the court may take into account a number of factors, in particular the likely consequences for the financial position of the council and the provision of services to the public if a decision were made that the contract should not have effect.

Sections 6 and 7: Relevant discharge terms and Absence of relevant discharge terms

These sections provide for special terms (i.e. relevant discharge terms) of a certified contract, whether the main or collateral contract, which come into play in the event that a court finds the contract to be unlawful and that it should be set aside. Section 6 provides for terms to be agreed between the parties for this eventuality and section 7 provides for the situation where no discharge terms have been agreed or where the court finds that such terms are unenforceable.

Section 10: Control of disposals and contracts of existing councils

This section sets out a system of controls on disposals of land, and capital and non-capital contracts being entered into, by the existing 26 district councils in the period leading up to their dissolution and the establishment of the 11 new district councils. The section enables the Department to direct that a council must obtain consent from its statutory transition committee before disposing of any land or entering into a contract above specified values.

Section 12: Consideration to be taken into account for purposes of direction

This section provides that in determining whether a proposed disposal of land or contract being entered into exceeds the specified values, account is to be taken of any other disposals of land or contracts entered into after a specified date.

Section 13: Referral to Department where consent refused or granted subject to conditions

This section permits an existing council to refer a decision of its statutory transition committee not to give consent to a proposed disposal or contract, or where consent is given but subject to conditions, to the Department for decision.

Section 15: Statutory transition committees: constitution

This section makes provision for the Department to make regulations to establish a statutory transition committee, which will be a body corporate, for each new council. The regulations will provide for the membership of the committees, their governance arrangements and their procedures.

Section 16: Statutory transition committees: functions

This section provides that the functions of a statutory transition committee are essentially to prepare for, and give full effect to, the reorganisation of local government. It also enables the Department to make regulations to confer powers on or impose duties on statutory transition committees, including the making of rates and the appointment of staff for the new councils.

Section 17: Power to modify existing legislation

While sections 15 and 16 set out specific provisions in relation to the making of regulations for the establishment and operation of statutory transition committees, this section provides a power for the regulations to apply (with or without modification) or to disapply the provisions of relevant local government or rating legislation.

Section 18: Guidance to statutory transition committees

This section permits the Department to issue guidance to statutory transition committees in relation to the exercise of any of their functions and requires committees to have regard to such guidance.

These Notes refer to the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010 (c.7) which received Royal Assent on 26 March 2010

Section 19: Severance payments to councillors

This section confers a power on the Department to make regulations providing for the making of severance payments to councillors who resign as councillors before the end of a specified period and who meet such other criteria as the Department may specify. The section also amends section 4 of the Local Government Act (Northern Ireland) 1972 to provide that a person who has received a severance payment is disqualified from being elected, or being, a councillor.

Section 20: Power to modify legislation in connection with local government re-organisation

This section permits the Department to make subordinate legislation which would modify local government legislation and rating legislation in connection with the reorganisation of local government.

Section 21: Acquisition of land otherwise than by agreement

This section provides that councils may vest land for any of their purposes in Part 2 of the Waste and Contaminated Land (Northern Ireland) Order 1997.

Section 22: Exercise of waste management functions of councils

This section clarifies the powers of councils concerning the granting or the provision of warranties and indemnities. This section also makes provision for a district council to enter into an agreement with one or more councils for the exercise of specified waste management functions, to enter into waste contracts on their behalf or to acquire and hold land on behalf of and in the name of other councils.

Section 23: Application of certain provisions to certain joint committees constituted as bodies corporate

Northern Ireland councils have formed themselves into 3 joint committees (Waste Management Groups) to address waste management issues. Two of the joint committees have been constituted as bodies corporate by orders made by the Department. This section amends those orders to apply certain provisions of the Act to those bodies. The amendments will permit arc21 and SWaMP2008 to enter into certified contracts, vest land for waste management purposes and provide warranties or indemnities in relation to contracts.

Section 24: Regulations and orders

This section essentially sets out the means by which the Department may make different regulations as provided for in the Act.

HANSARD REPORTS

22. The following table sets out the dates of the Hansard reports for each stage of the Act's passage through the Assembly.

STAGE	DATE
Introduction To The Assembly	22 June 2009
Second Stage Debate	30 June 2009
Committee Stage – Evidence From Craigavon Borough Council	10 September 2009
Committee Stage – Evidence From Belfast City Council, Arc21 And The Northern Ireland Local Government Association	17 September 2009
Committee Stage – Evidence From Omagh District Council – Consideration Of Clauses 1-8 And 18 And 19	24 September 2009
Committee Stage – Evidence From Mr James Whitten – Consideration Of Clauses 9 – 17 And 20-23	1 October 2009
Committee Stage – Consideration Of Clauses 2, 9, 10 And 13-17	8 October 2009
Committee Stage – Consideration Of Clauses 9, 10 And 13-15	13 October 2009
Committee Stage – Finalisation Of The Committee's Report	15 October 2009
Committee's Report On The Act – Report Number 15/09/10r	15 October 2009
Consideration Stage	2 February 2010
Further Consideration Stage	15 February 2010
Final Stage	23 February 2010
Royal Assent	26 March 2010

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