OFFICIAL REPORT
AITHISG OIFIGEIL

Local Government and Communities Committee

Wednesday 17 May 2017

Session 5

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
15th Meeting 2017, Session 5

CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

DEPUTY CONVENER

*Elaine Smith (Central Scotland) (Lab)

COMMITTEE MEMBERS

*Kenneth Gibson (Cunninghame North) (SNP)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Graham Simpson (Central Scotland) (Con)
*Alexander Stewart (Mid Scotland and Fife) (Con)
*Andy Wightman (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Duncan Bowins (NCP)
Mark McDonald (Aberdeen Donside) (SNP)
Tony McElroy (Tesco)

CLERK TO THE COMMITTEE

Clare Hawthorne

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Local Government and Communities Committee

Wednesday 17 May 2017

[The Convener opened the meeting at 10:00]

High Hedges (Scotland) Act 2013

The Convener (Bob Doris): Welcome to the 15th meeting of the Local Government and Communities Committee in 2017. I remind everyone to turn off their mobile phones. As our meeting papers are provided in digital format, tablets may be used by members during the meeting.

We have a full house today; no apologies have been received.

Agenda item 1 is post-legislative scrutiny of the High Hedges (Scotland) Act 2013. The committee will take evidence from Mark McDonald, who was the member in charge of the High Hedges (Scotland) Bill.

I welcome Mark McDonald and give him the opportunity to make opening remarks before we move to questioning.

Mark McDonald (Aberdeen Donside) (SNP): It is best to go straight to questioning, convener.

The Convener: Has the 2013 act delivered what you intended?

Mark McDonald: I will track back to the intention behind the act. In Scotland, neighbour disputes that centred on high hedges had no means of resolution and the bill sought to remedy that situation. It built on examples from south of the border, and I visited a couple of local authorities in north-east England to discuss how the approach had worked in their areas.

What has happened in Scotland broadly mirrors their situation. A number of cases have in effect resolved themselves as a consequence of the 2013 act. People changed their behaviour because they recognised that there was a means by which the neighbour could pursue a high hedge complaint. In the cases in which there has not been that behavioural change and people have made applications, then, generally speaking, if the authority has found in favour of the applicant, it has not been required to take action. The notices have tended to be complied with. That was borne out, I think, by the evidence that you took last week from local authority officers. How timely compliance has been is something that might come out in further questioning.

There will, of course, be people who say that they do not feel that they have achieved resolution as a result of the 2013 act. They fall broadly into two camps: those who feel that the local authority's approach to and interpretation of the act has not been in the spirit of the act, and those who, with the best will in the world, the act was never going to be about. Not every single case was going to be determined in favour of the person applying for a high hedge notice. The purpose of the act is to ensure that there is a means by which a dispute can be resolved; that does not mean that it will always be resolved in one direction. Some people will undoubtedly feel that the act has not worked effectively for them, because it has not given them the result that they wanted. That feeling does not always mean that the act has not been effective.

The Convener: That is helpful. Last week, the councils asserted that, where they have applied the legislation, it has been successful. Local authorities are good at saying that they do things well, but that is not necessarily the reality of the situation. As the member who was initially in charge of the bill before it became law, have you had time to assess to what extent constituents who have referred cases to local authorities agree with the local authorities? Is there any data that quantifies that?

Mark McDonald: I freely admit that at the point at which the bill was passed it became the responsibility of the Government to introduce relevant guidance and to monitor how the act was implemented. I have not been in a position to keep up that level of scrutiny.

As a constituency member, I have not had individuals coming to me who have found it difficult to gain resolution for their problems, but it may be that there are no people in my constituency who have those particular issues.

As the member who introduced the bill, I have had one or two emails from individuals in other parts of Scotland. Where possible, I have directed them to either their local member or their local authority, with whom they can best pursue their issues. I do not have to hand the kind of data the convener asked about; it might be something for the committee to pick up next week when the minister will be in front of you.

The Convener: Absolutely—that is our intention. We will move on to some further questions now.

Andy Wightman (Lothian) (Green): I have read some of the debate that happened when the bill was introduced, and there was quite a bit of discussion about what kinds of vegetation the bill was intended to cover. Can you confirm that the

intention of the bill was to deal with the problem of high hedges?

Mark McDonald: Yes. That was the point. I am sure that Mr Wightman will have read the 2013 act, which sets out what is meant by a high hedge.

Andy Wightman: Was it intended to cover trees, forests and shelter belts?

Mark McDonald: No. I will read section 1 of the 2013 act, which sets out what it was designed to deal with:

"This Act applies in relation to a hedge (referred to in this Act as a "high hedge") which—

(a) is formed wholly or mainly by a row of 2 or more trees or shrubs,

(b) rises to a height of more than 2 metres above ground level, and

(c) forms a barrier to light."

If something meets those three definitions it would fall within the realm of the act.

Andy Wightman: That brings me to one of the central problems that has come up for people trying to use the 2013 act. Section 1 defines a high hedge, but for a hedge to be high it needs to be a hedge in the first place. There seems to be some confusion as to whether paragraphs (a), (b) and (c) of section 1 are defining a high hedge—that is, a subset of hedges—or whether they are also defining a hedge. Do you accept that for it to be a high hedge, it needs to be a hedge in the first place?

Mark McDonald: The 2013 act is designed to recognise that certain vegetation beyond a certain height—2m is what is specified in the act—could have an effect that is essentially the same as the effect of what might be defined as a hedge in a dictionary. We deliberately stepped back from applying a dictionary definition of a hedge because that could have excluded some of the cases that we had seen that were entirely appropriate to catch under the bill as we were drafting it.

Andy Wightman: In excluding those, you were presumably excluding vegetation that was not a hedge.

Mark McDonald: I am not entirely sure that I am following you.

Andy Wightman: You said that you did not want to define a hedge.

Mark McDonald: We looked at the cases that existed across Scotland, and we decided on the most effective way to draft legislation that would give the best chance of resolving those disputes. The definition that is in the act is what I felt at the time was the most appropriate means of enabling resolution.

Andy Wightman: You may have seen the evidence from Aberdeen City Council that makes my point. The council has denied applications for a high hedge notice on the basis that the vegetation was not a hedge.

Mark McDonald: That is a question about intention versus effect, I think. The act is looking at the effect, rather than the intention. When an individual plants leylandiis, for example, in their back garden, it may not be their intention to give effect to a hedge or a light barrier for their neighbour, but allowing the leylandiis to grow to a certain height and, therefore, a certain density gives that effect.

It is about the effect, rather than the intention at the point at which planting takes place. That is why the 2013 act makes it clear that a high hedge is, for example,

"formed wholly or mainly by a row of 2 or more trees or shrubs".

An individual tree could cause difficulties for someone, but we recognised that that would not fall within the realms of the definition of a high hedge.

Andy Wightman: Are you suggesting that when Aberdeen City Council rejects applications for things that meet those criteria but in its view are not hedges, it is wrong to do that?

Mark McDonald: Councils should have due regard to how a high hedge is defined in the 2013 act. That would have been my expectation when the bill was passed.

Andy Wightman: The problem seems to be that the 2013 act contains solely a definition of a high hedge, not a definition of a hedge. That matters, because arboriculturists will say that there is a distinct difference between a hedge and a shelter belt or a row of trees. Do you recognise that there might be some merit in defining a hedge before we define a high hedge?

Mark McDonald: I am trying to work out whether I am disappointed or pleased that Mr Wightman was not here when we discussed the bill in its initial stages. I take on board the point that he makes, and it is certainly something that could be considered. Of course, attempting to do what Mr Wightman suggests may kick open a rather large can of worms, in terms of the cases that may or may not be included or excluded as a consequence of what he suggests. However, it may be something that the Government would want to consider and I am sure that the minister would be interested in discussing it next week.

Andy Wightman: Do you agree with Aberdeen City Council, which says in its evidence that it declines to deal with applications for things that have not been defined in the first instance as a

hedge? Is it inappropriate to do that, or is it within the bounds of flexibility that you intended?

Mark McDonald: It is difficult for me to give you a definitive response to that, because I am not looking at each individual case. I would not want to put a blanket yes or no answer over that situation, but I would hope that local authorities are not seeking to exclude applications on the basis of their own determinations, rather than the determinations that are set out for them in the 2013 act.

The Convener: With regard to what the bill was intended to do, does it actually matter whether something is a hedge or not? Is the issue not whether something meets the conditions that you read out at the start of this evidence session? It would need a botanist or whoever to determine what kind of plant life or shrubbery something is, but would you not agree that that is kind of irrelevant and that that should be clear in whatever changes are made to the 2013 act or the guidance? I am minded to think that having a clearer definition of a hedge could be restrictive rather than inclusive. We have to be careful that there is not an unintended consequence. Would you like to make sure that as long as something impacts on someone's quality of life and, irrespective of what kind of plant life it is, meets the conditions that were set out in the bill—which was passed with you as the member in charge—local authorities should use enforcement powers?

Mark McDonald: The bill was written in such a way as to provide a definition of what constitutes a high hedge, but its purpose was not to define a hedge in law but to create a means by which neighbour disputes that related to high hedges could be resolved. We set out the definition in section 1, and that is the definition that should be followed.

The Convener: Should local authorities be inclusive and open minded in how they interpret what is or is not a high hedge, or should they be restrictive? Some evidence that we have had appears to show that local authorities are being highly restrictive, rather than inclusive. If there is an area of doubt, local authorities apply restrictive practices rather than deal with a neighbourhood dispute in an open-minded way. Where do you sit in relation to that?

10:15

Mark McDonald: If there is a row of two or more trees or shrubs, it rises to a height of more than 2m above ground level and it forms a barrier to light, according to the law it constitutes a high hedge. That is what the 2013 act says.

The Convener: Irrespective of whether it is a hedge.

Mark McDonald: Well, local authorities must then make a determination as to the effect of the vegetation in order to determine whether a high hedge notice should be applied.

The Convener: Other members want to pursue the issue further.

Elaine Smith (Central Scotland) (Lab): Thank you for joining us as we try to tease out some of these matters.

Part of the problem—I just heard Andy Wightman say this—is the fact that the act says that

"This Act applies in relation to a hedge",

which has led to local authorities saying that they do not know whether something is a hedge, so they cannot deem it to be a high hedge.

If I recall correctly, I think that some amendments were lodged to the High Hedges (Scotland) Bill that sought to define a hedge. Will you take us through your understanding of the phrase,

"This Act applies in relation to a hedge"?

How would one define "a hedge"?

Mark McDonald: That is part of the difficulty that we have encountered, although section 1 says in brackets, after the phrase that you have quoted,

"(referred to in this Act as a 'high hedge')",

so we were speaking specifically about high hedges.

We did not want to have a definition that referred to individual species, because that would have created loopholes that people could have exploited. For example, we discussed the possibility that if the definition referred specifically to leylandiis, a case in which leylandiis had another species planted in between them might be excluded from consideration, even though such a hedge could have the same effect as one made up entirely of leylandiis. As I recall, at stage 3 of the bill's consideration, we accepted an amendment from Anne McTaggart that removed from the definition the reference to evergreen trees or shrubs so that the bill would cover deciduous trees or shrubs, because we recognised that they could also form a barrier to light. That was part of our consideration. We tried not to be overly prescriptive on the basis that we wanted to ensure that the widest number of cases could be considered under the legislation.

However, it might be the case that, as a consequence of that, local authorities have chosen to use the broader flexibility that the act provides in the opposite direction, to enable them to rule

things out. I freely admit that that might have been an unintended consequence.

Elaine Smith: We heard from people whose light was being blocked out by a row of leylandiis—I think it was leylandiis—that was extremely high and which had been planted with the intention of it forming a hedge. Even though they had it in writing from the person who had planted the row of leylandiis that it was planted as a hedge, the local authority still did not deem it to be a high hedge. The committee will have to explore whether that relates back to the problem of whether the authority deemed it to be a hedge in the first place.

I know that some of my colleagues have questions on the same issue.

The Convener: Mr Simpson wants to ask about that, as well as pursuing his own line of questioning.

Graham Simpson (Central Scotland) (Con): I will describe a situation and ask whether you think that it is covered by the act. I live in East Kilbride, where I used to be a councillor. Large parts of the area where I live were planted with trees and shrubs—but not hedges—by the original developers. Those trees and shrubs have grown up to form barriers of the kind that you have described, which back on to people's gardens. The local council has a policy of not cutting down healthy trees, but a number of households are badly affected by loss of light. Is that situation covered by the act?

Mark McDonald: I face a difficulty, in that I do not want to be seen to be attempting to adjudicate on individual cases.

Mr Simpson referred to the policy of not cutting down healthy trees. I am trying to find a provision in the legislation; if I remember correctly, the legislation merely asks authorities to consider issues such as historical or cultural significance and tree preservation orders. In referring to action that could or should be taken, it does not stipulate whether the tree will be healthy or otherwise.

I would hesitate to adjudicate on the particular case, because I am not familiar with it and it would not be my position to do so.

Graham Simpson: I was describing a general situation in which things have been planted, have grown up and have formed what any sensible person would describe as a barrier, but they are clearly not hedges. We have heard evidence in which—[*Interruption*.] I am sorry, convener—I am being distracted.

Kenneth Gibson (Cunninghame North) (SNP): I apologise. I was asking a colleague about individual cases.

The Convener: I apologise to Mr Simpson. I was trying to let the conversation with the witness go on for as long as possible without asking members to stop talking in the background. All members should note that they should not talk in that way, out of courtesy to witnesses and other members.

Graham Simpson: Thank you, convener.

We have things that have been planted and have grown up. They were not hedges to start with, but they have formed a barrier to light. Was your act intended to deal with that situation?

Mark McDonald: The question is whether there is a right for the situation to be considered under the act versus whether there is a right to a decision. The decision would ultimately come down to the adjudication of the individual local authority officer. As I have said, if a case meets the criteria as set out in the legislation, there is a duty to consider it. That does not mean that there is a duty to find in favour; it means only that the case should be considered if it meets the criteria.

Graham Simpson: Are councils falling back on the word "hedge"?

Mark McDonald: I think so. There is good reason for saying that defining a hedge in the legislation could have proven to be difficult, particularly if one were to use only the "Oxford English Dictionary" definition, for example. However, if committee members are minded that they want to see that happen—or that they want to have a go—they can think about that.

Graham Simpson: So if we called the legislation something else, such as the high foliage act, councils could not say, "Well, it is not a hedge."

Mark McDonald: Potentially.

The Convener: We should not continue this conversation without bringing in Mr Wightman to discuss the definition—which we are not going to do just now. Do you want to follow up on any of that, Mr Simpson?

Graham Simpson: That is fine.

Alexander Stewart (Mid Scotland and Fife) (Con): Good morning, minister. When we took evidence, we heard about wildlife and we talked about green space. Was the potential impact on wildlife and green space considered when you introduced the bill and defined what it would affect?

Mark McDonald: We had discussions with a number of organisations that offered advice on what the impact might be on, for example, nesting areas and other habitats. That would have to be a consideration in any determination. For example, I am aware of a case in which a notice has been

issued but can be given effect to only outside the nesting season.

Alexander Stewart: When many housing developments are built, shrubbery creates green space that later becomes a massive forest or has serious implications for individuals who live in its vicinity.

Mark McDonald: There are two—and probably more—ways in which problems arise. One is from people planting things such as leylandii trees because they know that leylandii will grow quickly and will block their neighbours. People do that either in what they consider to be an attempt to gain privacy or to give effect to or continue a dispute with those neighbours.

In other cases, people have lost, or do not have, the ability to maintain their vegetation properly, and as a consequence it has got out of hand. The act can take effect in a number of ways, and the situation that you describe is one such circumstance.

Alexander Stewart: When we took more evidence, the appeals process became part of the discussion, because of what individuals who had to cope with the situation were finding. Is the appeals process robust enough and does it achieve what you wanted from the act? How it is managed has been open to interpretation, and councils have used that to say, “It’s not a hedge.” Individuals have found that the appeals process does not progress as they expect it to and that councils seem to have the upper hand.

Mark McDonald: I have not had people coming to me about appeals, so I am not entirely clear about how effective or otherwise the process has been for individuals. It is undoubtedly in the nature of any legislation, and particularly any legislation that deals with dispute resolution, that there will be aggrieved parties throughout the country who have attempted to use the legislation to resolve a dispute but have not been able to do so. People may feel that the appeals process has not worked in the way that it was intended to in some circumstances, and the committee would need to come to a judgment on that.

The Convener: There is a question about the fees base to mop up. Has the application of fees been implemented as expected? What about a means-tested approach to fees? Fees vary across the country and could be prohibitive. Would a standard fee across all local authority areas make the process more accessible? If people wish to appeal, that has a cost, which varies across the country. Is there a better way of doing it?

Mark McDonald: I remember that there was a degree of discussion at the Finance Committee about fees, when Mr Gibson was in the chair. I am reliving my past somewhat today. The evidence that we took suggested that the fees system south of the border varied quite substantially. I ensured that local authorities had the opportunity to set their fees because I did not believe that a simple centralised fees system was the right way to go. I chose not to put a cap in, because the evidence from Wales was that, if fees are capped, everybody goes to the cap and charges the maximum amount.

Based on my experience of the houses in multiple occupation licensing approach, I built in a mechanism whereby the fee could be charged only at a rate that would cover the administrative costs of dealing with the application. Essentially, a council cannot arbitrarily set a fee; it has to demonstrate that the fee relates to the administrative costs. I know that some local authorities have suggested that they are undercharging on that basis and that some people suggest that local authorities are overcharging on that basis.

Another thing that I set out was that, if people were chapping on councillors’ doors and saying that they could not access the system because prohibitive and unfair fees were being charged, I would expect councillors to have due regard to that when making decisions at committee about the fees and how they should be structured. That is why I went in the direction that was taken, rather than setting a national fee to be charged in all parts of Scotland.

Andy Wightman: You mentioned that if a hedge meets the definition in the act the council has a duty to consider it. However, the act allows people to make an application with an accompanying fee, and in some instances the application has been made and the fee has been paid but the local authority has come back and said, “This doesn’t qualify under the act.” In those circumstances, it seems unfair that people should have to pay the fee in the first place. Is that your understanding of how the fees structure works? That is certainly one of the complaints that we have heard.

10:30

Mark McDonald: Under section 4(4),

“A fee paid to an authority may be refunded by it in such circumstances and to such extent as it may determine.”

I would be surprised if, in the circumstances that you describe, the fee was not refunded. If an application has been dismissed before any assessment has been undertaken, the fee should come back. However, the fee is there to enable a determination to be made and there will not necessarily be a positive outcome for the individual who makes the application.

Andy Wightman: I understand that a certain amount of work has to be done to determine whether an application is legitimate. However, one or two aggrieved parties have suggested that, when applications are knocked back quickly on the basis that the subject of the application is not a hedge—rather than on the basis of a full determination, which may take some time—it is a bit unfair that people should pay the full fee.

The act makes it clear that there should be preliminary investigations. The question is whether there should be some minimum fee for ensuring that an application is valid in the first instance, with people then paying the full fee for the determination.

Mark McDonald: That is a potentially sensible suggestion, although the position would depend on how that was applied at local level. If the committee's view was that fees should continue to be set at local level, it would be for local authorities to determine what the initial fee was. However, that is not an unreasonable suggestion.

Kenneth Gibson: A number of applicants have expressed concern about having to pay the fee even if the finding is against the hedge grower. If the finding is against the hedge grower, should they pay the fee? If they had cut the hedge in the first place, someone else would not have had to pay several hundred pounds to take the case forward. That seems to coincide with the polluter-pays principle.

Mark McDonald: That issue was discussed when the bill was considered; I think that Gavin Brown on the Finance Committee and then Margaret Mitchell on the Local Government and Regeneration Committee pursued it. My thinking was about the legislation's aim, which is to help to resolve neighbourhood disputes. If an application was made and an order was granted, and the owner of the hedge complied but was then told, "Thanks for complying with that order, but you now have to pay your neighbour £500"—or whatever the sum is—that might not be the best means to ensure that neighbourhood disputes are completely resolved.

If that individual said that they were not going to pay, the local authority might have to expend disproportionate sums of money to recoup a few hundred pounds. There was a question as to whether that approach would mean that local authorities had to chase relatively small sums of money, although I take it on board entirely that the sums are not small for the people who have paid them. There was also a question about whether that approach would be a means to resolve the dispute that was under way. I have set out my determination.

I think that Northern Ireland has a fee repayment approach on the lines of the system that Mr Gibson suggests. I do not know whether there have been any difficulties with that since the law came into effect there, but the committee might want to look at that further.

Kenneth Gibson: The owner of the hedge would not pay the neighbour—the owner would pay the council and the council would refund the neighbour. That would be the mechanism. A lot of people feel quite hard done by because, to get rid of hedges that block light, they have to pay several hundred pounds, and not all of them can afford that. Certainly, the constituents who come to me about the issue are almost always elderly retired people, and they are not all particularly well heeled. We have evidence that one or two people have been put off the application process by the fee.

I accept that there has to be a fee so that councils are not out of pocket and so that they do not receive random applications that would choke the system. However, if a decision has gone against someone, it is up to them to make restitution—I do not see why the person who has been in the right throughout the process should be out of pocket because of it. The situation is stressful enough. If the situation had been resolved without action through an application, the person who ultimately had to cut down their hedge would not have to be out of pocket in that way. In the light of experience of the act, I think that the arrangements should be changed.

Mark McDonald: Section 4(2) states:

> "An authority may fix different fees for different applications or types of application."

Nothing in the act prevents or precludes local authorities from introducing a scheme for the type of individuals to whom Mr Gibson refers—people on low incomes or people who are retired and do not have the means to pay a lump sum up front—that allows them either to pay the fee in instalments over a year or to pay a reduced fee that is based on their income. Authorities have the ability to do that; nothing in the legislation prohibits or excludes them from doing it.

Kenneth Gibson: I probably conflated two issues. One is the cost in itself—I think that South Ayrshire Council is the only authority that has means testing and a sliding scale of application costs—and the other is natural justice, which concerns the question of why someone should be out of pocket when the decision has gone against the person they had to make the application against. I have no doubt that the situation is stressful for both parties, but there is an issue of natural justice.

Mark McDonald: Sure—I take that point on board. In the previous parliamentary session, we rehearsed that argument at stages 1, 2 and 3. I take on board the point that the money would be paid to the council, which would then reimburse the applicant's fee, but people would understand where the money was going in the grand scheme of things, and that might have the side-effect of creating further animosity between neighbours.

Kenneth Gibson: Can I ask a final question, convener?

The Convener: Is it on the same issue?

Kenneth Gibson: No.

The Convener: We will come back to it, then.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): In previous meetings we have heard from people from across the country who have got in touch with their local authority and tried to go through the high hedge process, but before the notice has been served, their neighbour or whoever has cut down every second tree. Do you have a view on how we can safeguard against people trying to get round the legislation in that way?

Mark McDonald: I am not sure, to be honest. It would disappoint me if that was happening across the country. In such circumstances, there would be the potential to look at the historical position on what was there, and to decide whether there is the likelihood that the situation would continue to be exacerbated by the individuals.

Jenny Gilruth: From what we have heard, that practice is pretty commonplace. When we heard from local authorities, they washed their hands of the matter and said that if every second tree has been cut down, it is no longer a hedge. There is a lack of responsibility being taken. The bill feels a bit toothless in terms of its implementation—local authorities say that they cannot do anything about it. I do not know whether they are waiting for action from the Government, but there is a disconnect between the intention of the legislation and folk being able deliberately to get round it.

Mark McDonald: That will, unfortunately, always happen with legislation when individuals are minded to try to circumvent the law. The question is whether the committee feels that a change to the guidance or the wider definition of a hedge would help. The difficulty is that if we were to widen the definition, we might start to get into difficulties in other areas. Unfortunately, I am not sure that we can always protect against individuals who wish to be vindictive in their approach.

Jenny Gilruth: I have one more question about the act. How was it intended that it would deal with new houses that are built where a high hedge already exists? To be fair to the hedge, it was there first.

Mark McDonald: Yes—I am always keen to be fair to the hedge. If I remember rightly, the purpose of the legislation was not to ensure that when someone moves into a house and there is a hedge next door they can say, "Right—that's it; I'm applying for a high hedge notice." The person has to demonstrate that they have to some extent tried to resolve the issue in an amicable fashion with their neighbour. The first step to be taken by somebody who moved into a property that was built next to a hedge that they decide is causing them a bit of a problem should be to chap on their neighbour's door and ask whether there is any chance that the neighbour could trim the hedge and help to create a better situation. If there was no amicable resolution, that is the point at which an application would be made. It would not be the case that someone would move in and say, "I'm going to get rid of that hedge by getting a high hedge notice." They would have to demonstrate that they had first tried to come to an amicable agreement with the individual who owned the hedge.

The Convener: I will mop up on Jenny Gilruth's questioning. I seek clarification on the initial point about the situation in which a person goes through the process of trying to get a high hedge notice because of the detriment that they are suffering, under the terms of the act, and somewhere down the line before a high hedge notice is issued or enforcement action is considered, the hedge is pruned or trimmed in the way that Jenny Gilruth outlined. The point has been made to the committee that the enforcement should be against the original hedge when the application was made: the determination should be based on what the hedge looked like at the point of application, and the determination that the hedge should be removed, cut completely or trimmed should be enforced. There should not be retrospective mitigation action taken by a person trying to protect their hedge just—in a way—to game the system. Could legislation or guidance be changed so that local authorities have to make a ruling based on the situation at the point when the application went in from the plaintiff? That would help a lot of people from whom we have heard.

Mark McDonald: The difficulty in that situation is that probably the only evidence would be photographs and it would not possible for the local authority to make a firm determination on, for example, the height of the hedge. In some cases it will be very obvious that the hedge is taller than 2m, but local authorities run the risk of opening themselves up to challenge if they make their determination based on anything other than full consideration of the application, so I could see difficulties for them in those circumstances.

The Convener: Okay. You see difficulties, but in terms of natural justice would it be a good and positive thing to make the guidance and the legislation point in that direction? I accept that there would be borderline cases, but if the first thing that the local authority did once the application fee had been paid was a basic assessment of the situation by taking photographs, video footage or whatever and that evidence was banked for processing at a later date, it could become fairly obvious—

Mark McDonald: I am sorry; I was not responding on the basis that an initial assessment had been undertaken. If a local authority officer has examined the hedge, and in the intervening period before making a determination some action is taken, the local authority should still consider issuing a notice, because the notice may require that more action be taken than has been taken. That would be for the local authority to determine.

The Convener: I have a final question on the issue. I assume that the applicant for a high hedge notice could be dissatisfied and seek to appeal the determination, and could be told that it is a different structure now and they have to apply a second time for a high hedge notice, because they are now looking at a different beast. Is there anything in the regulations that precludes local authorities from charging fees twice in such circumstances?

Mark McDonald: I do not think that there is a stipulation that a person can apply for a notice only once and that is it. In general terms, the person could apply again in the future if, for example, the situation developed beyond that which had originally been assessed by the local authority. However, I am not sure that there is anything that would automatically prevent the circumstances that you describe from happening.

10:45

The Convener: Okay. We will move on.

Elaine Smith: I will follow on from something that Jenny Gilruth was exploring. Can you talk a bit more about what was meant originally by the phrase "reasonable enjoyment" in the 2013 act, and what it might include?

Mark McDonald: That is about whether the barrier to light that is created affects an individual's ability to enjoy their property—their ability to use their garden or to receive natural light into certain rooms in their house, for example. Those are the kind of considerations that we were thinking about in relation to "reasonable enjoyment". I met people during the passage of the bill who had to have a light on in one room of their house all through the day because they could not get any natural light into it.

Elaine Smith: Should such situations be apparent to an officer who has to make a judgment?

Mark McDonald: I would expect such situations to be fairly obvious, although they will obviously apply to different degrees.

Elaine Smith: Okay. You spoke, in answer to the convener's first question, about maybe coming back to some practicalities. What is your view of the suggestion that a time limit should be set for a council's decision on the application of a high hedge notice? Obviously, we should bear in mind the issue that was raised earlier about wildlife.

Mark McDonald: Some timescales are laid out in the legislation, but we did not set one to cover the time between an individual applying to the local authority for a notice and the authority making a determination. I am aware that people have mentioned the length of time that it takes to get a decision from the local authority. There might be some merit in looking at that.

Elaine Smith: Another issue that has come up in our exploration of the matter is whether fixed penalty notices should be issued for failure to comply with high hedge notices. Would that be worth considering?

Mark McDonald: Our decision was that when a person does not comply with a high hedge notice, the local authority is empowered to do the work and then to recover its costs—which would probably be much more than the cost to the individual of a fixed penalty notice. I am not sure that adding a fixed penalty notice to the cost of the work that a local authority undertakes would provide more of a deterrent.

Elaine Smith: I will explore that slightly further. Part of the problem with what you suggest is that the local authority might hesitate and be reluctant to do the works itself because that would mean taking steps to enter someone's property, which might have repercussions. A fixed penalty notice could focus the mind of the owner of a high hedge and encourage them to do the work themselves.

Mark McDonald: A fixed penalty notice could do that, but it could also elongate the process of the person who made the application getting the resolution that they seek. Obviously, a fixed penalty notice would have a date by which the individual must pay: if they chose not to pay it, the local authority would then have to chase them for it. There could be a more protracted process before the local authority eventually undertook the work. My instinct was that the best way to ensure compliance was to say that if people do not comply with notices, the authority will do the work and the person will pay the local authority for that, which might cost more than it would have cost to do it themselves. My view has not shifted.

Elaine Smith: Should the process be a reasonably simple one in which the local authority—having done all the work, deemed a hedge to be a high hedge and issued a notice—can take down the hedge to a reasonable level and then give the bill to the owner?

Mark McDonald: Yes. Local authorities obviously have a number of different ways for getting payment from individuals for works that the council undertakes. People should be given reasonable time to comply with an order, but if they do not comply with it, the local authority has the power to intervene and to recoup its costs.

Elaine Smith: Does guidance to authorities need to be more robust?

Mark McDonald: Do you mean overall?

Elaine Smith: Should the guidance be more robust in relation to issues that we have been discussing—the original intention of the act, how it is implemented and how local authorities interpret parts of it?

Mark McDonald: There is a question about whether authorities are complying with the spirit of the legislation. It might be possible to consider whether the guidance could be tightened up to make that more likely.

Kenneth Gibson: I will ask about flexibility. At the start, you read out from the act the definition of a high hedge as

"formed wholly or mainly by a row of 2 or more trees or shrubs",

but the interpretation of the local authority representatives from whom we heard last week seemed to be very strict and to err on the side of caution. All the members of the public from whom we took evidence wanted the act to be strengthened in order to eliminate the avoidance that Jenny Gilruth touched on, but the councils seem to take the opposite approach, which is to define a hedge even more narrowly, which would not impress many members of the public who raised the issue. Are the local authorities working within the spirit of the legislation or are they being a bit too cautious in how they interpret it?

Mark McDonald: I suspect that, as with most matters that we consider across all the local authorities in Scotland, the approaches will be like Heinz's "57 Varieties". There will undoubtedly be some who take a positive approach to the act and others who take an approach that is less in keeping with the spirit of the legislation. We need to consider whether the best way to achieve parity of approach is through the guidance that comes with the legislation or whether that can be driven at local level. Ultimately, all the officers from local authorities who appear before you are answerable to the committees of their councils for the decisions that they take.

Kenneth Gibson: The legislation has been in place for some years and we have had a lot of evidence about how it is or—allegedly—is not working. How can it be improved directly or through guidance? Given what you have heard, if you could go back in time and redo it, are there any glitches that you would address or are you more or less content with the act?

Mark McDonald: Gosh. I have to be careful, of course, because the act is now the responsibility of the Minister for Local Government and Housing.

Kenneth Gibson: Ach, go on. Do not sell out.

The Convener: The act is not under your portfolio, Mr McDonald. Freedom.

Mark McDonald: It is not. I was distraught to learn when I took on my portfolio that childcare and early years does not cover high hedges. It would certainly make for some interesting conversations with Kevin Stewart in the car on the way back up to Aberdeen.

The majority of cases have either resolved themselves or been resolved and, as was the case south of the border, we are left with the more intractable cases, in which we are dealing with long-standing disputes and individuals who, as Jenny Gilruth highlighted, are exploiting opportunities to circumvent the legislation. It is not possible to build legislation that will enable everybody who applies for a high hedge notice to achieve an outcome that satisfies them, and that was never the intention. I recognised at the outset that it should be about providing determinations on neighbourhood disputes and not about coming down 100 per cent on one particular side of such disputes.

The question then is whether the way in which the legislation has been interpreted locally enables people to have confidence in the decisions that are made. People can be unhappy with the decision that is made but have confidence that it has been made using the legislation appropriately. There question on which the committee will have to reflect is whether that is happening in all local authority areas. If it is happening in some places but not in others, the committee will have to reflect on the differences. Is it about the approaches of individual officers, and is guidance the best way to get them to take a different approach? Is it about councils, when they make their determinations on fees and the process, taking a more robust approach to ensure that what they do is in the spirit of the act? I have kind of not answered your question, Mr Gibson, as you may have noticed.

Kenneth Gibson: You have not—clearly, you are going to duck and dive.

Mark McDonald: Being wise after the event, I can say that those are the questions to which I might have given consideration when putting the bill together, had I known about them at the time.

Kenneth Gibson: Okay. Thank you.

The Convener: Mr McDonald, you have perhaps answered the final question. Is there anything else that you would like to put on the record as we continue with our post-legislative scrutiny of the act of which you were the member in charge?

Mark McDonald: I will put on record only my gratitude to the committee for allowing me to have this jaunt down memory lane, convener.

The Convener: It does not end there. [*Laughter*.]

Mark McDonald: I know that.

The Convener: We are keen to hear further from you on whatever the committee decides to recommend.

Mark McDonald: I look forward to it.

The Convener: We are also keen to hear more about that car journey with Kevin Stewart, the Minister for Local Government and Housing.

Mark McDonald: I am sure that he will tell you all about it next week.

The Convener: That was my link to next week's evidence-taking session, when we will have before us the minister who is responsible for ensuring that the act is working as it should. I thank you for your time this morning.

10:56

Meeting suspended.

11:00

On resuming—

Disabled Persons' Parking Places (Scotland) Act 2009

The Convener: We move to agenda item 2, which is post-legislative scrutiny of the Disabled Persons' Parking Places (Scotland) Act 2009.

The committee will take evidence from a private car park operator and a supermarket. I welcome Tony McElroy, head of devolved Government relations and communications for Tesco plc, and Duncan Bowins, managing director of NCP. Thank you for coming. We will go straight to questions.

Graham Simpson: I thank the witnesses for coming. You are from different sectors, so I ask the same question of both of you. Do you monitor the misuse of disabled spaces in your car parks? If so, how widespread is the problem?

Duncan Bowins (NCP): The context is that we have 15 car parks in Scotland, which is about 5,000 spaces. We monitor and enforce disabled bay use. Over the past two years, on average, 4 per cent of all penalty charge notices issued were for disabled bay abuse—that is about 900 notices. That compares with 2 per cent across the rest of the UK. Those figures are for abuse, not for non-payment. We monitor and track all the data and records, going back three or four years.

Tony McElroy (Tesco): Similarly, I will give a bit of context. We have more than 200 Tesco stores across Scotland from the Highlands and Islands to exceptionally urban locations such as Princes Street and Sauchiehall Street. We have about 39,000 parking bays, of which about 2,100 are disabled bays. In the previous financial year, we issued about 500 fines for disabled parking bay abuse in our stores in Scotland. Monitoring is currently done through a mixture of fixed cameras and marshals, albeit our business is moving away from the marshalling approach as the dawn of new technology enables us to offer a store-by-store opportunity to empower our colleagues to enforce parking by harnessing the step change in technology. Every store will be equipped to monitor and enforce its disabled bays, whereas the historical approach was intelligence led, in that we put in marshals where there were customer complaints or colleague feedback about abuse.

Graham Simpson: Do NCP car parks have barriers?

Duncan Bowins: Some car parks are surface pay-and-display sites, which are patrolled. The barriered sites are still patrolled, but they have barriers on the front.

Graham Simpson: Do disabled drivers have to pay at those barrier sites?

Duncan Bowins: Yes, they have to pay—the car parks are still patrolled. The numbers that I gave are not for non-payment; they are for manual contravention notices for people who have not displayed a blue badge while parking in one of those spaces and who have been spotted by an individual on patrol.

One of our sites in Glasgow is an automatic number plate recognition site. That is the latest technology, which Tony McElroy talked about, but it cannot monitor every space, so we patrol to check for such abuse. The cameras are normally for non-payment.

Graham Simpson: So at those barrier sites, disabled people have to pay the same as everyone else and your company takes enforcement action if non-disabled drivers use disabled spaces.

Duncan Bowins: Absolutely. We have spent a lot of time as a business on disabled parking. We were pretty much a founder member of Disabled Motoring UK's disabled parking accreditation scheme. We spent a lot of time consulting with Helen Dolphin MBE, who leads on that, and with People's Parking. We hold 15 accreditations across Scotland. We were given a lot of advice on friendly enforcement and the charging of disabled customers. A paramount point that we learned from that advice and the counsel that we got from Helen Dolphin is that it is not about the charging or non-charging of a disabled customer; it is more about the enforcement of the spaces and having the right facilities. We spent a lot of time working with those bodies. We had people come in to all our front-line conferences to talk to the front-line guys who patrol about how to enforce and why they are enforcing. Most of our route to develop our approach was therefore through consultation with an expert third party.

Graham Simpson: I hear what you say about your company, which sounds fine. When the committee discussed the issue previously, I described another quite big company—I did not name it and I will not name it today—which, in my experience, does not appear to take enforcement action because its disabled spaces are routinely abused. Is there an industry body in Scotland that monitors that?

Duncan Bowins: All large professional parking operators should be members of the approved operator scheme of the British Parking Association. The BPA should give guidance on legislation.

There is legislation on disabled parking, but it is also about how the company approaches it. Issuing a penalty charge of any description is always quite an emotive thing for someone to do, because it can be confrontational and difficult. As a business, we challenge the guys issuing the penalty charges to take a certain approach—it is about learning why it is important to issue a ticket for abuse of disabled spaces. They follow what is more of a company guideline, although there are some legislative rules around it. It is down to the individual company to decide whether to take enforcement action on disabled spaces. Some do not charge.

Graham Simpson: I have one final question, which is for both witnesses. Do you display notices in your car parks saying that enforcement action will be taken against people who abuse these spaces?

Tony McElroy: Yes, we do. An additional benefit of the technology roll-out is that a signage refresh is part of that. As a business, we absolutely want to distinguish ourselves on customer service. It is about making sure that our car parks offer a full suite of opportunities for our customers, whether that is clearly marked disabled bays that are close to the front of the store and have a short flat access to the front of the store or the parent and child parking that we offer, which again is clearly marked. In fact, we are in the process of trialling mum-to-be parking as well. We are constantly innovating in the area as we continue to speak to our customers about what they want and expect in order to have a fantastic shopping trip.

The Convener: How much money is raised from enforcement? What does enforcement mean? What is the level of fines, how are they collected, how are they escalated and where does the money go? It would be good to get the context around enforcement before we move on to the next section of questioning. Mr Bowins, can you answer that?

Duncan Bowins: Over the past two years, we have issued 981 penalty charge notices for disabled bay abuse. The charge is £100, or £50 if it is paid within 14 days. That revenue goes back into the company.

The Convener: Does the revenue function as cost recovery for patrolling or enforcement?

Duncan Bowins: Yes. You can imagine the costs for patrolling, and we spent more than £200,000 on signage alone when we redrafted all our terms and conditions three years ago.

On the previous question, all our car parks are fully signed to deal with abuse of disabled parking spaces, and the signs clearly state what the charge will be if people who are not disabled use the space. The cost goes back into the business to ensure that we can operate more patrols and provide more signage.

The Convener: The question of what should happen to that money, given that I am sure—or I hope—that your company makes a significant profit, is maybe a debate for another day. I will just put on record that there are perhaps queries around how that money could, in theory, be used. We are not exploring that issue today, but thank you for letting us know about it.

Tony McElroy: At Tesco, there is a £70 charge, which is reduced to £42 if it is paid within 14 days. All the revenue that is generated through that charge is absolutely reinvested in parking enforcement across our store estate. We certainly do not generate enough revenue through fines to recover the cost of things such as refreshing bay markings and signage, employing marshals and cameras.

At present, the revenue that is raised is reinvested in technology, in particular in a tech roll-out that we hope will lead to enforcement rates going up. We hope that, as enforcement rates go up, there will be a diminishing return because we will generate less money as people see that there is a higher degree of enforcement taking place. There would probably be less money involved than there is at present.

The Convener: As I said, it is good to put that on record, but it is a debate for another day—it is not what we are looking at just now, although it is important that we understand how those revenues are used, so thank you for that.

Elaine Smith wants to come in next.

Elaine Smith: Yes—I have a short follow-up on that line of questioning. The ethos of the 2009 act is to ensure that, as far as possible, disabled parking spaces are left free for people who are entitled to use them because they have disabilities and a blue badge. However, if those people happen to make a mistake—for example, if their badge is displayed upside down or it falls down on to the seat—would you take that into consideration? If you have issued a notice, can you cancel it if, for example, the person sends you a copy of their blue badge?

Duncan Bowins: We review every penalty charge notice in every case if there is an appeal. There is an appeals process for all notices through the POPLA—parking on private land appeals—service, which is independent.

We take a commonsense approach. If someone parks in a disabled space and they do not have their blue badge but they are evidently disabled, one of our colleagues will not say, “You’re going to get a ticket.” That is one approach. Someone would certainly not receive a penalty charge for displaying their badge upside down. In addition, if a badge genuinely falls off and the person appealed by sending in a photograph, we would normally use common sense.

We are looking for blatant abuse. Disabled parking at airports is one of our biggest challenges; 27 per cent of all our tickets are issued at airports, because people just want to drop off and pick up. That is where the highest level of enforcement takes place. However, every appeal against every ticket, whether or not it is related to disabled parking spaces, goes through the appeals process.

Elaine Smith: I want to put the same question to Tony McElroy, because I have dealt with many cases in which disabled drivers have displayed their badge upside down and been issued with a notice, especially in Tesco car parks. As their MSP, I have faced a bit of a fight to get those penalties overturned.

Tony McElroy: There is an appeals mechanism and process in place. If somebody could prove that they were a blue-badge holder and they had been issued a ticket in error, we would be able to deal with that.

The technology that is being introduced across our estate enables us to take out some of the third-party operatives—who, frankly, are incentivised not on customer service but on the volume of tickets that they issue—and to put the power to enforce disabled parking into the hands of our colleagues who are trained to Tesco’s standard of customer service. As a business, we want great customer service, and we want to enforce disabled parking. It is about striking the right balance, and our view is that the enforcement is best done by Tesco people rather than third parties. That is the trajectory that we are on.

11:15

Elaine Smith: Mr Bowins, can you tell us more about the BPA, which you mentioned earlier? Does it cover Scotland and, if so, is it more about the companies than the customers?

Duncan Bowins: I do not actually know the BPA’s coverage. We are a member of it, but it will represent itself. I can say that it is the governing body of all professional parking. Under the legislation, anyone who issues a penalty charge notice of any description needs Driver and Vehicle Licensing Agency access to get keeper information. If you are not a member of the approved operators scheme, you cannot get that access. I do not know who in Scotland is a member of the BPA—which is, as I have said, the governing body—but I can tell you that we are.

Elaine Smith: Thank you.

The Convener: I should put it on record that we invited the BPA to this session, but it was unable

to make it. It did not decline our invitation because it did not want to attend—it just could not make it.

Alexander Stewart: Gentlemen, you have both talked about accessibility of disabled parking bays and ensuring that they are located in your car parks or outside your stores to make it easy for individuals with a disability to use them. Mr McElroy, you encourage people to come into your stores; indeed, you have also done a lot of things inside your stores to provide more disabled access and to make progress on that issue. However, I want to ask about repeat offenders. Have either of you looked at how you might tackle such individuals and the best way of managing what continues to be an issue across both of your sectors?

Tony McElroy: From our perspective, there is a hard core of repeat offenders, but I suspect that their activity is not unique to Tesco. Indeed, I suspect that they are repeat offenders whether we are talking about on-street parking, off-street parking or whatever. With the roll-out of hand-held technology, we can more easily and in a targeted way capture and identify patterns of behaviour with regard to antisocial drivers and antisocial parking. Increasingly, we can build an evidence base on those repeat offenders.

A huge amount of effort goes into thinking about the design of our car parks, which you referred to. For example, we try to ensure that cash machines are not overly close to disabled parking bays, because that might incentivise people to think, "I'll just nip in here and take out some cash." There will be cash machines accessible to our disabled customers and colleagues, but on the whole we are extremely choiceful in the way in which we lay out car parks and make them as accessible as possible for disabled customers and, as I said, colleagues. We can discuss that issue later, but I should say that, as the largest private sector employer in Scotland, we are fundamentally committed to having diversity in our employment base, and we are an active recruiter of colleagues with disabilities.

Alexander Stewart: Do they feed into how parking is managed and operated and how the whole process works from the beginning? After all, some of your stores are open 24 hours a day, and there will be peak times when individuals using disabled bays will require more support and assistance.

Tony McElroy: Yes—I think that that is right. Given our business mission of serving Scotland's shoppers a little better every day, we want to—

The Convener: I suppose that we should put on the record that other supermarket chains are available, as are small corner shops. [*Laughter*.]

Tony McElroy: To my mind, that mission means ensuring that disabled customers can access the car park, that there is a clearly identified bay in the car park that is a safe and secure environment for them to park, that there is level access to the front of the store and that our stores meet customers' specific support needs. For example, in the past year, we have purchased around 1,000 specialist trolleys for disabled children in order to help to make shopping trips a little easier for parents who have children with special needs.

We are also rolling out disability awareness training to help our colleagues to understand the special needs of disabled customers.

Alexander Stewart: Thank you.

The Convener: Mr Bowins, the original question was about repeat offenders. That might be the wrong term, but it was about those who are not disabled but who persistently park in disabled bays. Can your company track them?

If your company has a tag line, feel free to put it on the record, as well. [*Laughter*.]

Duncan Bowins: That was good marketing.

Repeat offenders are a challenge, but we have data and we monitor it. Every time a ticket is issued, we know who it is issued to. This is getting a lot more sophisticated. It is something that we can be a lot cleverer about, especially if we share between businesses information on who the repeat offenders are.

We get to the point where we issue banning notices. That is the point at which we inform the client that, because of their repeat offending, they are banned from the site. However, enforcing that is very difficult. In a 24-hour car park, how will we know whether the person is in or out? Also, they could use a different vehicle. However, we do take steps to say, "You are now banned from this car park."

The answer to the question is that we try to do that, but enforcement can be very difficult once people have been banned.

The Convener: I wanted to give you an opportunity to put that on the record.

Andy Wightman: The thrust of the 2009 act is to create enforceable parking places for disabled people that are then policeable by public authorities. We have had quite a bit of evidence from public authorities expressing their frustration at their inability to reach agreements with private operators of off-street sites in that regard. Do you have any views as to why that might be?

Duncan Bowins: We have no record of any approach from a local authority to patrol any of our car parks in the past two years. We checked with

our management team in Scotland. If there has been such an approach, we have no record of it. We patrol anyway, and you can see from the data that we do enforce.

Andy Wightman: This is not to do with the powers of local authorities to patrol. It is to do with bringing the disabled parking places that you provide within the enforceability of local authorities, as opposed to their being enforceable by civil action in the private sector. Have you had any approaches from any local authorities in Scotland—

Duncan Bowins: No. I spoke to my team in Scotland and we have nothing on the record.

The Convener: I am sure that that is accurate, but it would be very helpful to us if you were able to interrogate that a bit further.

Duncan Bowins: Absolutely. I am happy to have discussions if that would help.

Andy Wightman: That is fascinating, because local authorities are under a duty, at least every year or two years, to attempt to create these enforceable places.

Mr McElroy, do you want to comment?

Tony McElroy: Given our volume of stores—I think that we touch every local authority—I could not be as absolute on levels of contact. However, I suspect that the local authorities adopt a risk assessment as to whether businesses in their communities are enforcing disabled bays. I would certainly like to think that any local government official or member of Police Scotland who approached one of our stores would quickly see that it, like all our stores, has a parking plan and an enforcement plan for its disabled parking bays. I suspect that that is the approach that local government takes but, obviously, I cannot speak on its behalf.

Andy Wightman: Police Scotland and the local authorities do not have any powers to enforce disabled bays on private land—that is the whole point of this act. It mandates them to try to make disabled spaces enforceable under the statutory regime, rather than under private civil law. There are many private operators out there—general practice clinics and all the rest of it—but is your argument that, at least from your point of view, there is no need for statutory enforcement?

Tony McElroy: From my perspective, I say that you should look at the evidence of what Tesco is doing. We want to set ourselves apart from our competitors by offering great service for our customers—we want customers to choose Tesco. Therefore, if having access to the car park and to a disabled parking bay is an important part of our customers' shopping trip, we want them to choose Tesco for exactly those reasons. The fact that it becomes a competitive element among retailers is probably quite a good thing for disabled motorists.

Andy Wightman: That is not the evidence that we have heard from disabled interests—that it should be left to the market and competition. It is about having the right and the expectation that disabled parking places will be available and that they are properly enforceable, wherever anyone chooses to go.

Tony McElroy: They should get that at Tesco.

The Convener: Can I take that a little further? I appreciate that both witnesses are giving evidence based on the experience of their companies. Mr Bowins, you have pay-and-display surface sites rather than in-the-sky sites with barriers. I can see that a commonsense approach would be for a local authority to make a traffic regulation order to bring disabled bays in line with every other disabled bay in a town, village or city, so that they are enforced by local authority wardens. Whether there would be a financial accommodation between your company and the local authority on that, I have no idea. Common sense is a dangerous thing in politics, but that would seem to me to be a commonsense approach.

In the case of Mr McElroy, it depends on which Tesco store. In my constituency, I can think of one large 24-hour Tesco store that sits away from everywhere else, so it might not be common sense to have local authority wardens patrolling the bays at that store, but I can think of another store in a different urban setting where the local authority wardens would be out and about anyway. Given that there are statutory duties on local authorities to approach your companies every couple of years about parking, would it not be reasonable, whether or not you put your bays over to be enforced by the local authority, that at least a partnership agreement should be struck between each local authority and your companies.

Duncan Bowins: We already have partnerships with local authorities across the country. We have contracts with St Albans and Manchester whereby all our penalty-charge notices are served by the local authority under a TRO, depending on the mechanics of the agreement. It is possible and we already do it. I am not sure whether that would make enforcement better, because we track our own rates and know that the percentages are normally better than those of the local authorities. I think that that is because of our closer manpower—they are on site all the time, rather than patrolling eight or nine sites. However, we do have enforcement under TROs with some councils already.

The Convener: Are there any examples in Scotland?

Duncan Bowins: No, not in Scotland.

The Convener: This is a question for local authorities rather than your companies, but it seems a little bit odd, given the statutory duty on local authorities to approach each of your sites every two years, that that has not been progressed. What is your experience, Mr McElroy?

Tony McElroy: The point that I will make about local authority enforcement draws on our experience of having had third-party operators patrolling our car parks. We have moved away from having third parties patrolling our car parks, so that we can set the standard on what great service looks like and set the standard on how we work with our customers to enforce the bays. Private operators still patrol Tesco car parks, but they are probably the same private operators that local authorities use. We want to move away from that, bring things in-house and have Tesco set the standard for what great service looks like.

11:30

The Convener: This is not a reflection on Tesco, but the law of the land should set the standard for what great service looks like—that was the point of the 2009 act. If any private company with its own land can go beyond that and provide an even better service, that is fantastic.

Local authorities have a statutory duty to approach companies every couple of years. Does Tesco have any recollection of being approached by a local authority? I think that Dundee City Council has tried quite hard, and I am sure that there are Tesco stores in Dundee. What is Tesco's experience of having that discussion with local authorities in Scotland?

Tony McElroy: I would not be able to comment specifically on that. I am not aware of individual local authority agreements or conversations that we have had.

We deal with local government officers—from licensing standards officers through to community workers—in our stores, probably daily. Our store in Alloa even shares its car park with the council offices. The nature of our business is such that we have a near-daily relationship with local government. I am absolutely confident that a local government officer approaching one of our stores would quickly see that every store has a parking plan and every store manager is committed to offering our customers a great, safe place to park.

The Convener: Next week, local authorities and Police Scotland are coming to the committee to talk about enforcement and their statutory duties. This is post-legislative scrutiny. If there are ways to improve the 2009 act to better formalise the relationship between private companies, private land and the law of the land—local authorities' statutory duty—by all means we should look at that.

We have had some evidence that the take-up by large private companies has been pretty poor. What I am hearing today suggests that local authorities' proactive approach may not be all that it should be either. Is there any partnership agreement? Mr Bowins helpfully said that he is not aware that his company has any partnership agreement in Scotland. Has Tesco entered into any partnership agreement with local authorities?

Tony McElroy: I am not aware of any formal agreement but, as I said, we have a regular relationship with local government at all levels.

The Convener: It may be that nothing formal has been created but there are informal discussions.

Elaine Smith: One of the main reasons for inviting the witnesses was to explore with them how they feel about enforceable parking bays in their areas. We will leave that to one side for the moment, because it has been explored by the convener and others. The other side of that is how the witnesses enforce their own situations. I can understand that barrier parking would be easier to enforce, Mr Bowins. If Tesco gives notices or tries to charge customers for parking in disabled bays when they should not have done so, what is to stop people ignoring that, given that it is contract law?

Tony McElroy: Potentially there is an issue with repeat belligerent offenders, but you tend to find that there is far less ambiguity with blue-badge issues, given their nature, than there is with people overstaying a three-hour time limit in one of our car parks. Somebody could overstay in one of our car parks for perfectly good reasons, and you could have a conversation with them and be able to fix the problem. There is less ambiguity with the blue-badge scheme, so the conversation with the customer is—

Elaine Smith: If someone parks in a disabled bay, they are sent a notice by one of the operators that are enforcing the laws for you and your car parks, and they simply bin it because they happen to know that it is contract law and that it is highly unlikely that you will pursue them all the way to court. Would it not be better for you and your customers, particularly your disabled customers, if enforcement were provided by the councils and the law rather than by contract law?

Tony McElroy: That might have been the case historically. I would be quite happy to talk you through the hand-held equipment that colleagues have. The evidence that that creates is such that, if somebody is a repeat offender, we are in a position to pursue a prosecution.

Elaine Smith: How would you pursue it? Would you take the case to court under contract law?

Tony McElroy: I think that we will increasingly have the evidence to enable us to do that. I am not a lawyer, so I cannot go into specific detail of how we would pursue a prosecution. The technology can now capture in a far better way the people who are abusing disabled bays. Historically, the warden would walk up, issue a ticket and move on to the next job. We now have the power to give our colleagues an enforcement role and to build up evidence so that we can challenge repeat offenders in a far more targeted way.

Elaine Smith: I am sorry to keep on about this, but the bottom line is that you have talked about your customers and you might have a customer who says to one of your colleagues, "I'm parking here because I'm going into your store to spend £100 on my week's shopping. If you don't like that, I am going to take my custom elsewhere." That might put your colleagues in a difficult position. However, if the local authority was enforcing for you, it would take that away from you and it would also take away the fact that you are relying on contract law and, unless you have a barrier, as Mr Bowins has in some of his car parks, you will find it rather difficult to prove that the person saw that the space was a disabled space when they came into your car park. It is up to you, but we are asking whether you are considering the option of local authority enforcement under the legislation instead of relying on what is basically contract law and having to prove that someone broke some kind of contract with you.

Tony McElroy: There is no ambiguity for our customers as to whether they are parking in a disabled bay. The bays are clearly marked, there is clear signage and the purpose of the bays is quite obvious.

Our colleagues are perfectly well equipped to have that difficult conversation with customers. In exactly the same way as our customers are appalled by people who park in disabled bays when they should not, our colleagues are appalled by such antisocial behaviour. They know that it could deprive a disabled motorist who needs to access that space. This is a customer service initiative in Tesco. It is not a commercial thing. It is about offering our customers great service because that is the point of differentiation for us.

The Convener: Mr Bowins, I will bring you back in soon. We seem to be focusing on the supermarket sector at the moment and Elaine Smith is exploring a worthwhile line of questioning. Mr McElroy, do you have any information about how many fines go unpaid?

Tony McElroy: For disabled bays, the figure is reasonably low compared with the figure for overstays. There is a far broader spectrum of reasons why somebody might overstay. As I said, the blue-badge bays are less ambiguous, as a person either has a blue badge or they do not.

The Convener: You are talking in general terms. If that information exists, it would be quite helpful for the committee to get it. That is not targeting Tesco; you just happen to be the supermarket chain that was kind enough to agree to give evidence to the committee today, and we thank you for that.

I understand why a large commercial retailer would want to keep a degree of control over the customer service that it provides to its patrons using its car parks and what those standards look like. I get all that. However, if there was a way of squaring the circle—via a new form of TRO or whatever—without losing the flexibility that supermarkets and others have, and if it could be enforced under the law of the land in partnership with local authorities to create at least a minimum standard, that would surely be a good thing. Would Tesco be willing to explore that with local authorities across Scotland, as well as considering whether the legislation needs to be tweaked or amended to give the assurances that your sector needs in order to sign up to some of this stuff?

Tony McElroy: Yes. Looking at it through the prism of what Tesco does in enforcement and customer service, it is very much about raising public awareness of the unacceptability of someone who is not a disabled motorist parking in a bay that is identified as being for a disabled motorist. It is about changing the behaviours of people who are, for whatever reason, inclined to park in disabled bays.

As a business, we will continue to enforce the disabled bays to the best of our ability—we are undergoing a step change in how we do that—but, if the committee is thinking about where we go next with the legislation, my steer is that we should reinforce the social unacceptability of parking in a disabled bay, because that will reinforce the enforcement mechanisms that we have and the actions that we are taking to ensure that people do not park in disabled bays when they are not entitled to do so.

The Convener: The committee is trying to tease out not just the social unacceptability aspect but the consistency of the approach that is taken across the country on public highways and on private land, where supermarkets and car park operators are significant players. One way of ensuring consistency would be compulsion, which has been shied away from. That might involve local authorities approaching private sites every couple of years to see whether a TRO could be developed to bring about a consistent level of enforcement.

What I am saying is that, rather than Tesco, Asda, Morrisons or whoever having wonderful corporate policies—they might or might not be wonderful; I have no idea—for consistency, there must be a minimum standard and equity for people with blue badges right across the country, which must surely involve partnership working between local authorities and the private sector. That is not happening just now. That is not to say that there is not good practice out there—you are hinting that there is, Mr McElroy, and Mr Bowins is doing likewise—but would you be open minded about working in a more formal partnership with local authorities to see how we could improve the legislation? Surely, that would be better than finding those supermarkets or car park operators that are—I was going to say the cowboys of the sector, but I do not mean that—performing poorly and introducing a degree of compulsion for everyone in order to get consistency. I would like to think that Tesco and NCP would be open to new models of working. Do you have any comments to make on that issue? I will then bring in Mr Wightman, who wants to follow up on what has been said.

Tony McElroy: As I say, we work with local government across the huge number of areas in which we operate. Whether that is to reach a formal agreement or an informal agreement, we are always happy to have that conversation to ensure that we are working in partnership with local government. Our ambition is always to set the standard for customer service, and, as long as nothing happened that prevented our setting the standard, we would always be happy to have that conversation.

The Convener: I think that I almost got you there, but not quite. We are trying to set the standard for disability rights in Scotland. If Tesco and others want to go beyond that, that is fantastic, but there has to be a partnership with local authorities whereby we set the standard for disability rights in Scotland in the first instance, separate from corporate and commercial concerns. I am glad that we heard a little about how we can take some of that forward.

11:45

Duncan Bowins: We are absolutely happy to have that discussion. As I said, we already work with Disabled Motoring UK, People's Parking and the disabled parking accreditation scheme. We have local authority joint ventures, and we already have TROs in some of our car parks. We are having discussions with local authorities about parking joint ventures. That is just another discussion to have, and it is one that we would be absolutely happy to have.

The Convener: That was really helpful.

Andy Wightman: I would like to follow up on my previous question. Glasgow City Council and the City of Edinburgh Council have confirmed to us that no TROs have been issued since the act came into force, and you have hinted that you have had no discussions with them on the matter. Could you supply in writing to the committee a record of any correspondence that you have had with local authorities about the duties under the act that would help us in our post-legislative scrutiny?

Duncan Bowins: We could give you a response that said that there was nil response. Over the past week, I have spoken to the last three senior managers who have run the Scottish portfolio, and apart from one telephone conversation in—I think—2009, when someone had a conversation about arranging a meeting that never took place, there has been nothing. We can respond to confirm that we have had no such contact.

Andy Wightman: That would be helpful because, on the face of it, there is a contradiction between what local authorities say that they have done under the act to secure enforceable bays and what you are saying, which is that you have heard nothing.

Mr McElroy, could you do likewise?

Tony McElroy: I can try to provide some clarity on that for you, although there is a caveat—the number of sites that we operate means that I would not be able to capture local conversations that have taken place. I can try to capture any such information that exists centrally.

Andy Wightman: We are interested only in any approaches that you have had from local authorities about their powers under the act; we are not interested in approaches on anything else.

Tony McElroy: I will be able to capture any such approaches that have been made to our head office, but contact that has been made in a localised environment—in our store in Fort William, say, to pick an example out of thin air—is a bit trickier to capture. However, we will do what we can.

Andy Wightman: Fair enough.

Duncan Bowins: The challenge relates to the point of contact. Today's meeting was identified—we picked up the invitation straight away and said that we would be happy to come. That is because the approach was made to the right place. As Tony McElroy said, when it comes to contact with lots of local people, they might not know what to do, they might not be aware of the issue and the contact might not go anywhere. At national level, it is easy to identify proper conversations.

Elaine Smith: Mr McElroy, would it be difficult to email all your store managers to inquire whether their local authority has approached them under the duties that exist under the act? Would you be able to do that?

Tony McElroy: We could do it, but it is uncertain whether the managers will have captured in writing any conversations that might have taken place over the past few years. The process of asking colleagues is straightforward, but capturing the data in a form that is meaningful for the committee will be a bit of a challenge.

Elaine Smith: We would be grateful if you could try, because, if your stores received email approaches or letters from local councils, it would be of interest to us to find that out. I presume that the people who would know whether an approach had been made by the local authority would be the store managers. I am conscious that Tesco is the only supermarket that we are asking to do that, but we might want to make the same request to other operators. We are not putting you on the spot; it is just that you happen to be with us today. We would be interested in finding out that information.

Tony McElroy: I am more than happy to try to harness any information and data that I can get for you; I am just not sure whether colleagues in stores will have captured that, particularly if we are talking about an informal conversation or an informal agreement. In some cases, obtaining such information will be slightly trickier, but I have committed to do what I can to help the committee.

The Convener: We will finish the evidence session shortly. Do any other members wish to come in?

Elaine Smith: I would like to have clarification of something. Mr Bowins, you mentioned at the beginning of the meeting that people can make an independent appeal to POPLA, but my understanding is that POPLA operates only in England and Wales. Am I right?

Duncan Bowins: Yes. That was an example of how people can appeal. They can also appeal to us. The commonsense approach is that they write to us in the first instance and, if they are in England, we refer them to POPLA. However, we always make a case-by-case decision.

Elaine Smith: For clarity, is it the case that, if someone is in Scotland, they cannot appeal to POPLA, because POPLA does not cover Scotland?

Duncan Bowins: Yes.

Elaine Smith: Thank you. I wanted to have that clarified for the record.

The Convener: It is reasonable to say that it is a two-way process. Mr Bowins and Mr McElroy have come in as representatives of large-scale operators in the private sector so that we can hear their experiences of trying to improve disability access in the services that they provide in towns and cities in Scotland. Local authorities will come to next week's meeting so that we can hear what they are doing.

Mr McElroy—I take on board what you said about store managers not necessarily capturing the information that we are asking about, and perhaps the guidance should say that local authorities should make direct representations to the corporate head of an organisation rather than to a store manager, who has a 1,001 other things to do. That should link in with companies' corporate policies.

There is a two-way process. We have to get the guidance and the legislation right, and we have to make sure that there is an acceptable minimum standard, even if companies assert that they follow good practice and can demonstrate that. We have to ensure consistency and quality of service for everyone in Scotland who is disabled, whether they are on the public highway or not.

I thank everyone for coming along. We have a few minutes left, so, if there is anything else to put on the record, there is an opportunity.

Tony McElroy: I briefly touched on what, to my mind, is the next phase, which is to reinforce to the general public that parking in a disabled bay when you are not entitled to do so is unacceptable. Businesses and councils are proactively taking action to deal with that, but we need some kind of targeted public information campaign. I do not know whether that is to be done by ministers or Police Scotland—which, as you said, the committee will see next week. If there were a campaign that reinforced messages about socially unacceptable parking, we would get behind that.

Duncan Bowins: We are quite proud of the work that we have put into disabled parking so far. We are very happy to have conversations with local authorities, as we are already doing in other parts of the country, because the issue is never about revenue generation; it is about doing the right thing with disabled parking. If there is anything that can make that better, we are happy to have conversations about it.

The Convener: Gentlemen, I thank you both again for your time here this morning. That ends agenda item 2 and we now move into private session.

11:53

Meeting continued in private until 12:24.

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