



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 12 December 2012

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE
29th Meeting 2012, Session 4

CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

DEPUTY CONVENER

*John Wilson (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Stuart McMillan (West Scotland) (SNP)

*Anne McTaggart (Glasgow) (Lab)

*Margaret Mitchell (Central Scotland) (Con)

John Pentland (Motherwell and Wishaw) (Lab)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Roy Corlett (Isle of Man Government)

Eric Hamilton (Dundee City Council)

Peter Keenan (Isle of Man Government)

Mark McDonald (North East Scotland) (SNP)

Paul Parker (Braddan Parish Commissioners)

Robert Paterson (Clackmannanshire Council and Scottish Tree Officers Group)

Graham Phillips (Bell Ingram Ltd)

Dr Richard Simpson (Mid Scotland and Fife) (Lab) (Committee Substitute)

Colin Whiteway (Braddan Parish Commissioners)

CLERK TO THE COMMITTEE

David Cullum

LOCATION

Committee Room 1

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 12 December 2012

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Kevin Stewart): Good morning. I welcome everyone to the Local Government and Regeneration Committee's 29th meeting in 2012. As usual, I ask everyone to ensure that they have switched off mobile phones and all other electronic devices.

I have received apologies from John Pentland, and we are joined for the meeting by his committee substitute, Dr Richard Simpson, whom I welcome. I ask Dr Simpson whether he wishes to make any declaration of interests.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): Yes. Apart from drawing attention to my written declaration, I declare that my wife is a councillor.

The Convener: Thank you very much.

Item 1 is to consider whether to take item 5, on consideration of the evidence that the committee took on Scottish local elections, in private. Do we agree to take that in private?

Members *indicated agreement.*

High Hedges (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is an oral evidence session on the High Hedges (Scotland) Bill. This is the second of three evidence sessions that we are holding this month as part of our examination of the bill. We have two panels of witnesses today.

First, I welcome Mark McDonald, who is the member in charge of the bill. Our first panel of witnesses joins us live from Douglas in the Isle of Man via videolink; the witnesses represent the Manx Government and the local authority in Braddan. I ask them to introduce themselves for the record and to confirm that they can hear and see us.

Roy Corlett (Isle of Man Government): Good morning, Scotland—we can hear you loud and clear. My name is Roy Corlett and I am the legislation manager in the department of infrastructure on the Isle of Man.

Peter Keenan (Isle of Man Government): My name is Peter Keenan and I am a southern area forester in the department of environment, food and agriculture's forestry directorate.

Colin Whiteway (Braddan Parish Commissioners): Good morning. My name is Colin Whiteway and I am clerk to Braddan Parish Commissioners, which is one of the larger of the 24 local authorities on the island.

Paul Parker (Braddan Parish Commissioners): Good morning, Scotland. My name is Paul Parker. I am the community warden for Braddan Parish Commissioners and I deal with enforcement.

The Convener: Thank you, gentlemen. As I said to you before we went live, I am Kevin Stewart, the committee's convener. I will ask the first question and other members will ask questions as we go along.

What are your views on the statutory definition of a hedge as set out in section 1 of the bill?

Roy Corlett: From an Isle of Man perspective, we are aware of the proposals that Scotland seeks to introduce, which we recognise as being very similar to legislation that already operates in England and Wales. We are conscious that the Isle of Man legislation contains what is being proposed in Scotland and what is already in operation in England, which is why we have been asked to provide evidence today.

As the meeting progresses, I am sure that we will explain in more detail our views on the

definition in Scotland's bill. We will try to emphasise our experience of the introduction of the legislation from an Isle of Man perspective.

The Convener: Okay, gentlemen. Your legislation is obviously somewhat different from ours. Have you had any difficulties with it?

Roy Corlett: We have had only a few days to discuss the issue with some of the larger enforcing authorities on the Isle of Man. It might help if I explain that, on the Isle of Man, we have nine Government departments. Two representatives from those departments are here today: I am from the department of infrastructure, and my colleague Peter Keenan is from the department of environment, food and agriculture. The department of infrastructure is responsible for overseeing local authorities on the Isle of Man and is involved in any legislation that could have an impact on local authorities.

It might also help if I point out to the committee that the Isle of Man has 24 local authorities, so it has not been possible in the short time that we have had available to consult all of them. We have tried to concentrate on obtaining views from a few of the people involved. The committee must recognise that the answers that we are giving today are a bit limited, because we have not had a chance to consult fully.

Having said that, I think that the general view is that, although we have had a few difficulties with enforcing the legislation, nothing has proved to be insurmountable. We have been able to rely on the guidance that is available for England from the BRE, although we have had to bear it in mind that that needs to be slightly adjusted to take account of the differences in our definition of a high hedge and the fact that we also include single trees.

The Convener: My colleague Margaret Mitchell has a specific question on your legislation.

Margaret Mitchell (Central Scotland) (Con): Good morning, gentlemen. My question may well be directed at Colin Whiteway and Paul Parker. We are examining the bill that is before us and deciding whether it should be extended to include trees and deciduous hedges. We are aware of the recent appeal court case in the Isle of Man, which was known as Boardman v Braddan commissioners. Will you outline for the committee the background to that recent appeal case and tell us whether it has led to any similar appeals?

Colin Whiteway: I can explain that briefly. The complaint was submitted to the authority, and the community warden was asked to deal with the matter once he was confident that there was sufficient mediation between both parties. I will pass you on to Paul Parker, who will explain what happened then.

Paul Parker: Good morning. Basically, the act in the Isle of Man requires all other avenues to be exhausted prior to any case being taken on board and reviewed by the local authority. We received the initial inquiry on 25 January 2011 from the complainant, Mr Boardman, and we explained the situation to him. He then went back and discussed the issues that he had with the hedge owner, which led to a formal complaint being submitted on 22 May.

On that occasion, the complainant could evidence the fact that he had exhausted all other avenues by showing us correspondence and records of telephone conversations et cetera. That was perfect, as we could see that there was an issue and that it was not going to be resolved between the two parties, so we took the case on board from that point.

On 24 May, we carried out site visits. First, we went to the complainant to establish his side of the story and his views. In that way, we got a visual on the issue concerning the hedge in question and its make-up, and we saw how it was affecting the property as a whole.

We then went to the hedge owner and got their views on why the hedge was planted and when it was established. From there on in, we carried out the investigation, which consisted of many field trips to both properties, including the gardens, and external inspections at various times of the day and in different months.

The benefit of the act is that we have no time constraints from the initial complaint being made to the resolution point. That allows us to view the alleged effects and see whether they are adverse seasonally. The process goes on for a long time, which gives us a chance to see the hedge in each growing period. We see it in full leaf and when it has lost its leaves if it is deciduous, which gives us an idea of the growth rate for the non-deciduous and deciduous plants and shrubs that make up part of the hedge that we are investigating.

That process went on for a number of months in the Braddan case, with visits backwards and forwards throughout June and July. We keep records from the Met Office in relation to the weather conditions, because we can get complaints that hedges are shading lawns and causing issues in that area and many other areas of gardens.

With all that said and done, the initial case that we are talking about, which was Boardman v Braddan commissioners, went on for quite some time. It was 14 September 2011 before we had a date from the courts for a directions hearing, and it was not until June this year that we got the case in court. It is therefore good not to have the time constraints, but—unfortunately—the process goes

on for a long time, so it can be time and cost consuming.

Margaret Mitchell: It would be helpful if you gave some details about what the hedge owner and the complainant said in the case. What was the issue? Was it light or something else?

Paul Parker: The main issue for the complainant was the amount of light for the garden and the property. He alleged that there was a continuous barrier to light, which affected the ground-floor rooms in his dwelling—mainly the living area and the kitchen area at the rear of the property. On investigation, we found that there was an issue, but not to the extent claimed. There was an adverse effect on part of the house, but not the whole house. The case therefore became quite complex.

The boundary between the two properties involved was a 2m-high bank on the complainant's side, and the hedge line started at the centre of that bank and dropped on the owner's side to between 2m and 3m in depth. The hedge owner said that he had established the hedge, that it had been professionally planted and that they had picked suitable hedges, although there were a couple of deciduous trees in there that perhaps were not suitable and had a growth rate that would cause issues in the coming years. The hedge owner said that the hedge was established for privacy reasons, because the upper-floor windows of the complainant's property looked straight into the bedroom windows of the hedge owner's property. We therefore had to take into account privacy issues that would be caused if everything was cut down to an action hedge height.

The view was that we could gain more light for the complainant by having strategically placed, significant gaps in the hedge at heights above 2m, allowing for an extended growth area for the deciduous trees and some of the deciduous shrubs. That allowed light to come through, but it maintained the hedge owner's privacy.

Margaret Mitchell: That is helpful.

Anne McTaggart (Glasgow) (Lab): Good morning. The evidence suggests that no upper limit or cap is applied to the fees in the Isle of Man. What is the average fee for a single application?

Roy Corlett: I am pleased to assist with the answer. The fees on the Isle of Man are set at £150 and have been set at that figure for several years now. However, there is discretion to allow a refund, depending on the stage of the complaint at which the matter is dealt with—that might be after the first remedial letter is issued or a visit is made to the site. The department would encourage the two parties to continue talking and to take part in a mediation process, even though the fee would have been paid by the complainant.

Anne McTaggart: Has the fact that there is no upper limit or cap on application fees in your jurisdiction proven to be prohibitive for those who are experiencing problems with nuisance vegetation?

Roy Corlett: I think that the department will look to gain views from all the local authorities on that issue. We have had only a limited number of cases in which an amount of the fee was paid.

The department wanted to set a figure that was not too cost prohibitive, which would encourage people to use the applicable legislation. At the same time, in the light of experience, the department might want to consider the current level of fees.

10:15

The Convener: I take you back to Boardman v Braddan commissioners. That sounds like quite a complex case and I am quite sure that it will have cost quite a bit of money. Who has been picking up the tab for that case?

Colin Whiteway: The local authority picked up the tab for the case. We had to present it. Because it was so important, we had to instruct an advocate. By the end of the case, we had spent more than £7,500. We think that the complainant had spent considerably more than that. The case was adjudicated by the High Bailiff, and we were to meet our own costs so, in the end, £7,500 of the local authority's money was spent on the matter.

The Convener: When we are dealing with our deliberations, it would be interesting for our committee to have a comprehensive figure for how much the case cost. If it is possible to email that to the clerks, I would be grateful.

John Wilson (Central Scotland) (SNP): Good morning. I want to ask about fees. Will you clarify whether the £7,500 that we have just heard about was the cost of taking the case to court or whether it was all the fees, including the cost of the site visits that staff made to monitor the growth and barrier to light?

Colin Whiteway: We have not calculated the cost in staff time. The £7,500 relates to the legal expenses that were paid to our advocate. The amount of time spent on the matter was extraordinary and I am sure that the cost would be many thousands of pounds. We could probably calculate that and come back to you with a figure, but the £7,500 was what we paid our advocate.

John Wilson: Paul Parker mentioned that there were a number of site visits throughout what I would assume was the growing season. If the barrier to light was being monitored, that would have to be done for 12 months and throughout all four seasons. I am concerned about the cost to a

local authority of 12-month monitoring of any barrier to light or growth that might accrue before the local authority decides to take action.

Colin Whiteway: Again, we would have to make a calculation, but Paul Parker spent a lot of time on making regular visits to both sites. We can probably work something out for you.

John Wilson: Did staff use specialist equipment when they were monitoring the barrier to light and other issues?

Colin Whiteway: The most advanced equipment was a 6m pole. No specialist equipment was used at all.

Stuart McMillan (West Scotland) (SNP): Is the legislation that has been passed on the Isle of Man popular with people or has there been any campaign to suggest that it is overly cumbersome and too much of a burden on the population of the Isle of Man, compared with the legislation that has been passed at Westminster?

Roy Corlett: The department feels that the legislation has worked well on the Isle of Man. The majority of people can access the information—*[Interruption.]* The complainants and the hedge owners can mediate among themselves. The department would not necessarily hear much more about a particular case apart, perhaps, from a telephone call. People are advised to look at the website. They do their own research about the issue on the website and work out whether they have a case that they can take forward.

The legislation has gone down well on the Isle of Man. It certainly seems to have settled many cases that would previously have caused issues, but I am sure that my colleagues would like to expand on individual cases, which might be helpful to the committee.

The Convener: That would be useful.

Colin Whiteway: There are quite a number of complaints—perhaps six or seven a year. Boardman v Braddan commissioners is the only case that has got as far as going to court. It is a landmark case. In general, the legislation has worked well.

The Convener: Will you clarify that number? Did you say six or seven cases a year?

Colin Whiteway: Yes. We are only one authority, but we have six or seven a year.

The Convener: Is that for Braddan only?

Colin Whiteway: Yes. There are a couple of larger authorities. We do not have the figures for those—I think that we will do some work on that—but we certainly have six cases a year.

Stuart McMillan: It would be useful for our deliberations if, once you have undertaken your further work on the figures for the 24 authorities, you could send the information to us to provide us with a wider view of how much the legislation has been used.

Roy Corlett: We would be more than happy to assist the committee. I am sure that we can work out a figure from all the island's 24 local authorities that would pinpoint the information that you require.

Stuart McMillan: That would be great. Would it be possible to break that information down by type of dispute—that is, into disputes about hedges or trees—and by the subject of the applications?

Roy Corlett: Yes, by all means. We will try to break the information down into whatever format is most helpful for you.

Stuart McMillan: That would be helpful.

Dr Simpson: Would it be possible to indicate not only whether the disputes were about single trees or hedges but whether they were about deciduous or evergreen plants? I know that you do not treat them differently in the Isle of Man.

Would it also be possible to show at what stage in the process the disputes were resolved? From what you have said, it appears that many disputes have been resolved because there is a website, information is available and people are more prepared to reach agreement because the legal underpinning means that, otherwise, a case would have to go on to a more complex approach. It would be useful to know how many cases have been resolved at an early stage.

Roy Corlett: Again, we will do what we can to assist.

The Convener: That is most appreciated.

We have had evidence that safeguards would have to be built in for wildlife and biodiversity in the case of action on a single deciduous tree. Are there such safeguards in your legislation? Have there been any difficulties on that aspect of the legislation?

Roy Corlett: Section 4(4)(b) of the Isle of Man Trees and High Hedges Act 2005 requires the enforcing authority to consult the department of environment, food and agriculture on

“the extent to which”

any tree

“contributes to the amenity of the neighbourhood”.

In other words, on the Isle of Man, the enforcing authority is obliged to seek the professional advice of the forestry division. I am sure that my

colleague Peter Keenan will be able to provide further details on that point.

Peter Keenan: All trees are assessed individually for biodiversity and amenity value. We consider that and take on board any questions or queries that are raised.

The Convener: We have with us Mark McDonald, who is the proposer of the bill. He will ask you some questions.

Mark McDonald (North East Scotland) (SNP): Thank you very much, convener. Good morning, gentlemen. Most of the issues have been teased out, but I have a supplementary on biodiversity and amenity impact. Have local authorities been required to bring in external consultancy or external expertise on that, or is it all dealt with by central Government departments?

Roy Corlett: I can confirm that that is all dealt with through Government departments. The local authorities and the department of infrastructure work with the department of environment, food and agriculture. Peter Keenan will explain what qualifications the forestry officers have.

Peter Keenan: All foresters are trained to degree level. We also have trained arborists and wildlife officers in the department. We have a whole team that can be drawn on to give its views on any issues that may be raised.

Mark McDonald: In discussions that I had before I introduced my bill, a point was made quite strongly by local authorities about the need for an element of cost neutrality. It appears from your evidence that the legislation in the Isle of Man is not cost neutral, in that the fees that are charged do not cover the costs that are incurred. When Government advice is required on biodiversity and amenity, are those costs factored into the local authority's costs or are they factored into central Government costs? Could you provide us with that information?

Roy Corlett: At the moment, the costs are covered by central Government, but it is probable that the department will look to undertake a review of the fees in the near future, in the light of experience.

Colin Whiteway: The fees do not cover our costs, but absorbing that is part of our function as a local authority.

Mark McDonald: You mentioned that Braddan parish had about six cases per annum as a result of the legislation. To put that in context, will you tell us what the population of Braddan parish is?

Colin Whiteway: There are just over 2,000 registered voters in the parish, but the parish is quite a large rate income producer, because it includes a lot of businesses.

Stuart McMillan: Your legislation has been in operation since 2005. Do you feel that any parts of it could be amended or adjusted to make the system smoother and to allow it to work better? Is your legislation the best that it can be?

Roy Corlett: The department may wish to consult on that issue, or some local authorities may wish to draw issues with the legislation to our attention. The department would certainly be prepared to review any elements of the legislation if it received a request from a local authority. We would undertake due consultation to seek the views of all 24 local authorities on the island. Our colleagues from the department of environment, food and agriculture would be involved, too.

Stuart McMillan: Thus far, have you had any requests to review the legislation?

Roy Corlett: Not at the moment but, in the light of recent developments, I suspect that that could happen in the next few weeks.

Stuart McMillan: If that happens, it would be useful if we could be kept informed.

Roy Corlett: By all means. However, the emphasis in any proposed change is likely to be along the lines of reviewing the appeal process rather than the definitions that are in place. Perhaps my colleagues may be able to help on that.

10:30

Paul Parker: From a local authority point of view, it might be beneficial to look at the definition, but it would not prove conclusive. Personally, I think that the issues that arose in the Boardman v Braddan commissioners case related more to the guidelines, which we might need to consider adjusting—I hope that we will be able to discuss that with the department in the near future. That issue, which has come out of the recent court case, has come to light since our discussions with the Scottish Government.

In my opinion as a local authority enforcement officer, it has proven to be beneficial to include deciduous trees in the legislation. Of the six cases a year that on average we have dealt with since the act came into place, 75 per cent have included a deciduous tree of some sort, whether in a hedge or a row of trees or as a lone tree. Of those, 50 per cent have included a single deciduous tree that was situated within 5m to 10m of a property. As you can imagine, a tree within that distance might dwarf the property and block out as much light as, if not more than, an evergreen hedge.

Stuart McMillan: In that final example, is the tree or the property there first?

Paul Parker: It is hard for me to say, as I have not been here for very long. Probably the tree is established first and is inherited by the property after the property is built. As my colleague Peter Keenan may confirm, due to the mild weather conditions on the island—we get very little frost—we get rapid growth of some trees.

Peter Keenan: Yes, in some locations.

Paul Parker: In the cases that we have dealt with, it is probably 50:50 about whether the tree was established first.

Margaret Mitchell: Gentlemen, I have a final question. Are there tree preservation orders on the Isle of Man? If so, how have those worked in relation to the legislation?

Peter Keenan: There are no tree preservation orders as such, but areas of trees and individual trees are registered under the Tree Preservation Act 1993. We monitor and supervise those as part of that legislation.

Margaret Mitchell: Have you covered the scenario where one piece of legislation might affect, or need to take precedence over, another?

Peter Keenan: We have had no such cases, to be honest, because everything has been sorted at the initial stages. As an authority, we are the Government body that issues felling licences for trees. We are unique in a way, in as much as home owners need to apply to us for a felling licence to remove any trees from their property. Obviously, that is not the case in the United Kingdom. We can deal with any cases that might crop up before they come under the Trees and High Hedges Act 2005. We can assess problems as and when they come up, and many of them are resolved by a site visit from us.

The Convener: Gentlemen, we have no further questions, so I thank you very much for agreeing to give evidence. I am glad that we have got through this videolink evidence session without any problems. I thought that I had put the hex on the entire thing earlier, but obviously my luddite ways were proven wrong by the technology working all the way through.

I suspend the meeting for 10 minutes.

10:34

Meeting suspended.

10:44

On resuming—

The Convener: The clerks have corrected me on what I said under item 1, because my briefing note was a little bit wrong. We had already agreed

to take in private item 5, but do members also agree to take in private item 3?

Members indicated agreement.

The Convener: I welcome our next panel of witnesses. They are Robert Paterson, who is a land services officer at Clackmannanshire Council and a member of the Scottish tree officers group; Eric Hamilton, who is a forestry officer at Dundee City Council and treasurer of the Arboricultural Association's Scottish branch; and Graham Phillips, who is a forest manager for Bell Ingram Ltd.

I will ask you the same question as I asked the panel from the Isle of Man. What are your views on the statutory definition of a hedge in section 1 of the bill?

Graham Phillips (Bell Ingram Ltd): I feel reasonably comfortable with the definition of a high hedge. It is tight enough to deal with the specific problems that the bill wants to address without giving too much scope for capturing individual trees and woodland trees.

I noted the point that has been made by others that, for example, a row of two Scots pines could fall under the definition. However, the crucial provision is that

“a hedge is not to be regarded as forming a barrier to light if it has gaps”.

As a result of that, Scots pine would almost always elude the definition. However, I would certainly support any extra guidance on the definition that would reduce the amount to which it was open to interpretation.

Eric Hamilton (Dundee City Council): As far as we and people to whom I have spoken are concerned, the high hedge definition must cover just high hedges and not any trees of any type. A high hedge must have been planted as and grown as a hedge. Provisions on trees being introduced to a bill on high hedges would lead to tremendous problems.

Robert Paterson (Clackmannanshire Council and Scottish Tree Officers Group): I agree entirely with my colleague Eric Hamilton.

Margaret Mitchell: You will have heard the last questions that we asked the Isle of Man witnesses, which were about tree preservation orders. You will be aware that the bill provides that, although local authorities can have regard to TPOs, they should not be constrained by TPOs in carrying out their duties under the bill. What is the panel's view on that provision? We can start with Mr Paterson and work in the opposite direction from before.

Robert Paterson: The tree officers group has a specific response. Trees are protected because

they provide amenity or landscape value or because of their intrinsic beauty in the area in which they grow. Secondary to that is the point that, if two evergreen trees were to come under the bill's auspices, the bill would affect a few semi-evergreen trees, with the odd exception—their appearance and physiological condition could be ruined if pruning were undertaken to abate what was termed a nuisance under the bill.

Eric Hamilton: I am aware of no cypress hedges or other hedges in Scotland that are the subject of tree preservation orders. Such orders can include hedges, but they have been used mainly for trees.

Margaret Mitchell: You will be aware that we are looking at the possibility of extending the bill to cover deciduous trees, so the question pre-empts your assumption.

Eric Hamilton: I would ask Parliament to remove altogether from the bill any contact with tree preservation orders.

Graham Phillips: I support that view. If the bill is kept essentially to leylandii and similar hedges, the TPO section will be unnecessary. If the definition was broadened to cover single and deciduous trees, that could lead to valuable trees being damaged or lost.

Margaret Mitchell: So you would in no circumstances favour looking at the issue on a commonsense basis, with the passage of time. The Isle of Man seems to look at the particular circumstances and I understood from the Isle of Man witnesses' evidence that trees that are covered by tree preservation orders there are monitored regularly through site inspections. The Isle of Man witnesses thought that they had almost pre-empted problems by doing that.

Graham Phillips: The issue should be dealt with more through a review of TPOs rather than through the bill. If a tree became dangerous, that would not preclude a TPO. The commonsense approach is valid, but it should be taken at the TPO stage rather than under the bill.

Margaret Mitchell: The question is particularly relevant to the other two panellists. I am not sure whether trees that are the subject of TPOs are regularly inspected in each local authority area in Scotland; perhaps you can tell me.

Eric Hamilton: Parliament has given us a get-out clause in the current TPO legislation, because it does not define the length of time between each review of an order. My authority is undertaking a 10-year review after 30 years of not reviewing anything.

Robert Paterson: Similarly, Clackmannanshire Council has not had the resources or the time to review the existing tree preservation orders. We

have produced three new orders in the past five years and have a total of about 27 orders, most of which are area orders that cover more than one tree. One order is specific to a *Sequoiadendron giganteum* that is a specimen tree in the village of Devonside. All the other orders are area orders.

Margaret Mitchell: Clackmannanshire Council is the smallest local authority, so I imagine that the resource problem would be much worse for larger authorities.

Robert Paterson: I agree.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): In engaging with the issue, the bill was able to take one of two approaches. The approach that the bill takes is to have a tight definition of what will be caught. An alternative approach could have been to lay out the objectives and have guidance that led more to a judgmental situation in which officers would look at a case and decide whether there is a problem. What are your views on the relative merits and disadvantages of those two approaches to deciding when the law would apply?

Robert Paterson: Every application or complaint needs to be dealt with on its merits. I noted that your colleague Anne McTaggart MSP mentioned nuisance vegetation, on which our colleagues at Scothedge have actively campaigned for many years. However, the definition in the High Hedges (Scotland) Bill needs to be about what the title says—it needs to relate to hedges, as my colleague Eric Hamilton said.

In a horticultural sense, a hedge is formed by individual plants that have been planted no more than 1m apart—sometimes, there are four or five plants to the metre; if the row is staggered, there can be up to nine plants to the metre. The intention is to form a hedge or a screen—I notice that the bill does not use the word “screen”. The bill should be specifically about hedges and no other nuisance vegetation, on which there are already statute law, precedents in previous court cases and common-law rights.

The Convener: Does Mr Hamilton want to respond?

Eric Hamilton: No. The issue has been covered.

Stewart Stevenson: The evidence that we received from the Isle of Man, which works on a different definitional basis, suggested a much higher frequency of cases. Six or seven cases a year in a parish with 2,000 electors is perhaps more than we might have expected.

Given the relatively tight and quite specific definition to which we are currently working, and given that any of the options to open it up would still leave it quite tight and specific, do you have

any sense—it would have to be a judgment, because I do not think that you could actually answer the question—of what you would expect the number of cases to be in a typical Scottish local authority, if there is such an animal, or in Scotland as a whole? I make the distinction between the backlog that might be dealt with in the first year or couple of years and what the steady state might be once you have dealt with the backlog, because I recognise that those are two distinct situations.

Eric Hamilton: If the bill sticks to hedges, I will be able to deal with that comfortably. If trees are introduced to it, I will be taking early retirement.

Stewart Stevenson: What are the numbers, if I may ask that? I am a mathematician. I just cannot help it.

Eric Hamilton: I would think that, in my urban environment, once all the hoo-ha had died down, I would be looking at 10 cases a year, or perhaps fewer.

Stewart Stevenson: Do you mean in Dundee?

Eric Hamilton: Yes.

The Convener: Mr Paterson, do you want to comment?

Robert Paterson: Yes. The mere fact that acts exist in England and Wales and, from a later period, in the Isle of Man has given some members of the public in Clackmannanshire the opinion that a high hedges act exists in Scotland. I get six to eight inquiries a year, a couple of which are repeat inquiries. In the case of three current inquiries, people are waiting for the High Hedges (Scotland) Bill to be enacted before they consider their individual situations further.

As Eric Hamilton suggested, when the bill is enacted, there will be an initial flurry of complaints. That has already been anticipated in the background papers to the bill. We hope that we will deal with that at the inquiries stage and that the number of cases in which there is a need for a notice will be few, but it is difficult to ascertain that because such legislation is a new beast for us in Scotland.

The Convener: Do you have any comments, Mr Phillips?

Graham Phillips: I do not have any numbers based on local authority areas. I am aware of six cases in the past two years that would probably be subject to the legislation if it had a broader definition. They relate to four separate properties, rather than areas, and they all involve individual deciduous trees.

In one area in particular, I would expect the number of cases to snowball if the definition was broadened to include deciduous trees.

John Wilson: Good morning. On inclusion of trees in the bill, Mr Hamilton said that his option would be to take early retirement. The issue for us is that there is a demand to widen the scope of the bill to include deciduous trees.

I note that the final paragraph of the submission from the Scottish tree officers group mentions trees that have been in place for longer than properties or for longer than a conservatory or sun room. How many complaints do you think would emanate from people who decided to build a conservatory or sun room and then decided that a tree next door, which has been there for 50 or 100 years, is a barrier to light and to their enjoyment of that conservatory or sun room?

Eric Hamilton: I could not put that into numbers. There would be too many—we would be inundated. My switchboard and emails would light up.

John Wilson: You think that a substantial number of complaints would emanate from that if we extended the definition.

Eric Hamilton: The number would be very substantial.

11:00

John Wilson: The bill defines a high hedge as being more than 2m high. In last week's evidence and in the preceding evidence today from witnesses from the Isle of Man, we heard about examples of hedges that are more than 2m high in respect of which an element of local discretion might be applied or in which, because of privacy or other issues, the 2m limit might not even be appropriate. For example, a hedge might sit on a slope and overlook a garden or house. Is the 2m height limit appropriate or should there be more discretion in the bill with regard to the height of hedges that form a barrier to light?

Robert Paterson: As was described in the Isle of Man case, the topography of the land on which the vegetation is growing is given a great deal of weight in any such judgment. As I have suggested, each case has to be judged on its own merits. Obviously some calculation will be provided as a guide to take the matter further.

John Wilson: Do you wish to respond, Mr Phillips?

Graham Phillips: I support Robert Paterson's comments.

John Wilson: On the barrier-to-light issue, the Isle of Man witnesses told us that the only measuring tool they use is a six-foot pole. Should more technical equipment be used in order to determine and define appropriate measurements

when someone complains that a particular hedge is a barrier to light in their amenity or garden?

Eric Hamilton: As far as I recollect, most of my complaints are about hedges that have been allowed to grow only 2m or 3m from windows or buildings. There is software to determine shade that could be applied to hedges that are further away and concerns about which relate to garden ground, but a pole would do for high hedges that are only 2m or 3m away from a property.

John Wilson: That is interesting. A high hedge might be only 2m or 3m away from a property, but surely it all depends on where the property lies in relation to sunlight or daylight. If the hedge sat to the west of a property, for example, would it be appropriate for someone to complain about its being a barrier to light if the main part of the building faced south? After all, we know where the sun rises and sets and the only time that that hedge might be a barrier to light would be in the late evening.

Eric Hamilton: That is a problem. People work during the day and might come home expecting to see sunlight in their garden; instead, they find their garden shaded by the hedge. That certainly happens with trees, but hedges can be managed and controlled. As I have said, there is software to determine how much shade will come from a hedge of a particular height.

John Wilson: In the previous evidence session, Paul Parker, who is a community warden in the Isle of Man, said that throughout the year they carry out extensive surveys on the impact of the hedges or trees that have been complained about and how much of a barrier to light they actually are. Would local authorities in Scotland have to carry out the same due diligence and the same monitoring of the barrier-to-light issue for at least 12 months to ensure that any decision for lopping a hedge or tree was justified?

Robert Paterson: The case that our Isle of Man colleague Paul Parker cited went to court, and the situation was monitored for a full year to allow judgments to be made on what happened in the different seasons. I doubt very much that such an approach will be necessary in every case. If something like the "Hedge height and light loss" document that the Office of the Deputy Prime Minister issued for the England and Wales legislation were to be made available in Scotland specifically for hedges, making a calculation and a judgment would be a straightforward process.

John Wilson: Let me just clarify that, Mr Paterson. In your opinion, that would be specific to hedges.

Robert Paterson: Yes.

John Wilson: It would not include trees or other vegetation.

Robert Paterson: No. As I stated earlier, deciduous trees have never been the subject of precedence or successful court cases with regard to loss of light. Light would have to be totally excluded from a property for the entire year and for a significant number of years before a civil action would even be considered. I strongly suggest that the same would apply to individual deciduous trees and groups of trees and that they should be excluded from the bill.

John Wilson: I thank the witnesses for their evidence.

The Convener: I have Anne McTaggart and Stuart McMillan on my list. I wonder whether you would mind if I let Mark McDonald in. He has to go to the Finance Committee. Do you mind?

Stuart McMillan: No.

Anne McTaggart: That is fine.

Mark McDonald: I thank committee members for their forbearance. Mr Hamilton, in your written evidence you suggest that there should be a standard fee across all Scottish local authorities. Is it your view or the view of your organisation that the costs that would be borne by local authorities would be of a similar or equal value?

Eric Hamilton: The policy would be easier to apply if there were one price for all. I do not know how much everybody else gets paid, but most local authority tree officers are on the same salary—it is when lawyers and everybody else gets involved that the price goes up.

Mark McDonald: Does the tree officers group have a view on that?

Robert Paterson: Aye. The fee will vary depending on the local authority that takes the case and the number of different departments that are involved—the legal advisers and others that Eric Hamilton mentioned. From the initial meeting that I had with my service manager at Clackmannanshire Council, I know that she takes the view that we should deal with such issues as we deal with planning applications and should apply the same fee. That may be the way in which Clackmannanshire Council will take the matter forward.

Mark McDonald: Although the definition in the bill may not deal with all the cases that Scotland raised, do you feel that it would address the majority of cases that exist in your local authority areas in high-hedge or vegetation-related matters?

Robert Paterson: If the definition remains that of a hedge, I think that it will.

Eric Hamilton: If the definition means a hedge and not trees, the bill will do what it says on the tin.

Mark McDonald: I have no further questions at this stage, convener. Thank you for your time.

Anne McTaggart: Mark McDonald just asked the questions that I was going to ask about fees, convener, so they have been covered.

Stuart McMillan: Good morning, gentlemen. Mr Paterson, you just referred to planning.

Robert Paterson: I am sorry.

Stuart McMillan: I know. In the evidence that we heard today from the Isle of Man, the question was posed: what came first, the tree or hedge or the house? By the time that we got to the end of the answer, there was a 50:50 split. In some of the information that we have heard from you today, there has also been debate about what existed first.

My question does not relate to the bill per se but addresses the wider planning context. It appears that this type of issue has not been considered in the past when planning applications have been made to build new housing developments. With that in mind, do you think that it would be useful if, when a planning application was made, there were a condition, thought process or understanding relating to existing high hedges, deciduous trees or whatever, so that we could try to plan out any such issues and prevent them from arising further down the line?

Robert Paterson: When construction is concerned and planning consent is required, such as for an extension to a house, the advice note BS5837—the amended 2012 version—takes cognisance of trees in relation to the proposed development. Advice would be given to our development team on how the application should be processed in view of that issue.

Stuart McMillan: Is that just in relation to an extension?

Robert Paterson: No, that would be for any type of construction, but you mentioned a conservatory or something like that. For anything that requires planning consent, if there are trees involved there should be a consultation process whereby the tree officer is asked to give advice to the development team on the relationship of the proposed building to the tree and whether there would be any adverse effects on the residents—the occupants—or indeed on the tree.

Stuart McMillan: What happens if there is going to be a new housing development?

Robert Paterson: The same thing applies.

Stuart McMillan: That is helpful. Thank you.

Margaret Mitchell: Mr Paterson, your written submission refers to what could be described as an original-intention-of-planting test. It says:

“if the row of trees is a feature of the wider landscape of a garden or park then it could be unreasonable to consider these as a ‘hedge’ if the original intention was not to form a hedge but to form a row of trees.”

How feasible, relevant or realistic is the point about the original intention?

Robert Paterson: It is realistic. As we said in the submission, in such a situation we have to take into account the intention at the time of planting and how the trees have been managed. Lawson cypress trees, for example, are often planted as a hedge but they are also often planted as ornamental trees because there are so many different variants of them, including golden, green and blue types. It is not uncommon for them to have been planted as ornamental trees around large houses and estates that have then had houses built around them. At large houses such as Balloch castle, cypress trees are a feature of the landscape—there is a formal double row of cypress trees either side of a path leading to Balloch castle.

If properties are built adjacent to such planting and then become affected, they could be captured under the legislation. Theoretically it could be acceptable for a notice to be served in such a situation. If those trees were 100 to 150 years old, pruning them would be to their severe detriment—it would damage them irreparably. In such situations, each individual case has to be taken into account, first to ascertain the precedence and whether the trees existed prior to the complainant moving into the property. If so, there has to be an element of acceptance of that and the fact that trees grow.

Margaret Mitchell: In the example that you cite there might be some documentation—something written down about why the trees were planted—but in the vast majority of cases it would be one person’s word against the other’s: “No, no, I didn’t mean to form a hedge”. Regardless of that, the fact of the matter is that something might look like a hedge and have the effect of a hedge. How relevant is the original intention if someone is faced with something that is doing everything that a hedge does?

Robert Paterson: In almost all such circumstances, you would find that there would still be some tree shape to the plantation. There would be little or no evidence of any trimming. That would give the tree officer the opportunity to decide what the intention had been.

Let us take Glebe Terrace in Alloa, for example. It is a conservation area—the buildings there go back to the 19th century, when trees and hedges

such as yew and holly were planted. When the houses became flatted, different owners started maintaining the plantings differently, either by allowing them to continue as the original planter had intended or by managing the planting as a trimmed hedge rather than as individual trees. There are a lot of different individual circumstances, which should be judged on their own merit at the relevant time.

11:15

Margaret Mitchell: Do you think that there could be a blanket provision, or should it be tailored to certain circumstances?

Robert Paterson: As we said earlier, the definition in the bill has to relate to hedges. A tree officer would know immediately if two or more trees in a row had been intended to be planted as a hedge. A hedge is generally maintained at some stage in its existence, if not by every owner of the property over the years.

Margaret Mitchell: Forgive me but, again, I do not see the relevance of the intention, other than in very specific circumstances such as for historical or cultural reasons, in which case it would not be a blanket provision.

Robert Paterson: Yes, you are correct in that sense.

John Wilson: I want to examine that further. Mr Paterson, you talked about a row of cypress trees that were planted 100 to 150 years ago when there were no adjacent properties but which are now adjacent to land on which a developer wants to build houses. Is your fear that whoever moves into those houses could say, under the legislation, that they want those cypress trees to be cut down to 2m because they are a barrier to light getting to the newly built house into which they have just moved?

Eric Hamilton: Surely a developer, a local authority or whoever moves into the house should take the fact of the trees' existence into account before they build or buy the house.

The Convener: If only common sense applied across the board. The other week, I talked about someone who moved next door to a playground and then campaigned for the removal of the playground. Mr Wilson's point is extremely relevant. We should forget about what common sense would normally suggest and deal with the question as is.

John Wilson: My concern is to do with the urban growth areas. Last week, the Scottish Wildlife Trust gave an example of the occupiers of a new development that had been built next to a woodland glen complaining about the larch trees that someone had planted at the edge of the glen

30 or 40 years ago, which led to the Scottish Wildlife Trust stepping in to take remedial action. That situation arose because there were no houses there when the trees were planted.

As the convener says, things would be better if common sense applied. However, our job is to assess whether the bill, as it is written and as it will be applied, guarantees protection to trees and hedges in spite of any development that might take place or any conservatories and so on that might be built on to nearby properties. We are trying to find out the level of protection that you would like there to be for trees such as those in an established avenue of cypress that was planted long before any developer thought about building houses.

Robert Paterson: I think that I have already covered this, but I would have thought that a row of cypress trees such as you describe would have some impact on the landscape, as it provides a feature within the estate on which properties are built.

You alluded to trees being reduced to 2m in height. As it stands, the bill suggests that no action will be taken on any hedges or row of two or more trees that exceed 2m in height. However, it does not give guidance on the calculation that would have to be carried out to determine the height to which the hedge or trees should be reduced.

That goes back to what I previously stated: if a row of 30-foot cypress trees had to be reduced by two thirds, the trees would no longer be viable. They would become brown at the top, snow would gather on them and eventually they would go into decline. If the act applied to such a situation, the trees would be better removed because, otherwise, we would be left with something unsightly and unviable.

John Wilson: Section 1(1) says:

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

(b) rises to a height of more than 2 metres above ground level".

I am assuming that an interpretation of that provision could be that, if someone had a hedge that is higher than 2m, it could be argued that that hedge should be brought down to 2m.

Robert Paterson: That would be the general opinion of the public, but it is not how the legislation works in reality. That is not how it works in England and Wales. If an evergreen hedge is involved, it is reduced to a height that allows the optimum amount of light while retaining the hedge.

The Convener: Mr Hamilton was desperate to come in on that point.

Eric Hamilton: I would not class an avenue of mature Lawson cypresses as a hedge. If the trees had been planted significantly far apart—4m, 5m or 6m apart—and they matured, I would not class that as a hedge. It is an avenue of trees.

John Wilson: I refer you to section 1(1)(a), which says that a hedge

“is formed wholly or mainly by a row of 2 or more evergreen or semi-evergreen trees or shrubs”.

The difficulty seems to be in the definition and the interpretation of the definition.

Mr Paterson talked about the general purpose of the bill and the public’s interpretation of the bill. Lawyers make a lot of money out of interpreting legislation. We heard about some costs earlier from the Isle of Man, and I am concerned about the cost to a local authority of defending its decision not to take action in favour of a complainant who says that a hedge is more than 2m high and therefore causing a barrier to light.

A local authority might say that a hedge is not causing a barrier to light and that it has decided that a hedge can be anything up to 5m—that height is an example; I am not saying that it will do that. The complainant might then say, “The hedge is a severe detriment to my property. It causes a barrier to light and I want the local authority to take appropriate action.” We might end up with local authorities in the Court of Session, trying to defend decisions that were taken with the best intentions, based on their knowledge and understanding of what would form a barrier to light.

Robert Paterson: My understanding of section 1 is clear, which is that it applies to a hedge or two or more trees growing closely together. We would seek to have the latter part of the provision removed because it could relate to a couple of mature yew trees that are 3,000 years old. If, as you suggest, those trees are reduced to 2m high, we will no longer have yew trees that look individual. However, in no way does section 1 suggest that the resultant height of the hedge should be 2m. It merely expresses that action will not be taken unless the hedge is more than 2m high.

John Wilson: As I said, it will be down to interpretation. If the bill is passed, an interesting development will be the public’s interpretation of the act as opposed to that of local government officers in the field. I thank the witnesses for their evidence.

Margaret Mitchell: Mr Phillips, you say in your submission that yew hedges should be excluded. Will you put on record why you consider that to be the case?

Graham Phillips: In the majority of cases where I find yew hedges or avenues of yews that

have grown together, they tend to form part of a historic landscape. Churchyards are the prime example, and there are also policy grounds of old houses. That is one reason why I would want extra protection for that type of hedge or row of trees.

The other reason is that yew is generally a fairly slow-growing species. My interpretation of the bill is that it intends to capture neighbourly disputes in which people have planted leylandii as a weapon, as I believe Scothedge described it. Yew would not be used for that purpose. It would not grow fast enough to cause problems in the same kind of timeframe.

Margaret Mitchell: Would it be sufficient for the legislation to include a presumption against the inclusion of yew hedges while allowing for the odd, random case in which a yew hedge could be unacceptable?

Graham Phillips: I think that I would be content if there was a written presumption in the bill against action being taken on yew hedges.

The Convener: I turn to Mr Hamilton’s submission, which was very concise—I like concise. To the question that asked whether there are

“any aspects of the systems used in other jurisdictions which should be included within this Bill”

your response was an emphatic no. If we were to amend the bill, are there any aspects of the system in other jurisdictions that we should definitely leave out of the bill?

Eric Hamilton: We should leave out any reference to TPOs and leave it at high hedges.

Robert Paterson: I absolutely concur.

Graham Phillips: I would agree.

The Convener: I thank you for your evidence, gentlemen.

11:27

Meeting continued in private until 12:04.

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