The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 19 December 2012

Session 4

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE
30th 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:

Derek Mackay (Minister for Local Government and Planning)
Norman MacLeod (Scottish Government)
Mark McDonald (North East Scotland) (SNP)

CLERK TO THE COMMITTEE

David Cullum

LOCATION

Committee Room 1

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 19 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 30th and final meeting in 2012 of the Local Government and Regeneration Committee. As usual, I ask everyone to ensure that they have switched off mobile phones and other electronic equipment.

Agenda item 1 is to consider whether to take in private agenda item 5, which is consideration of our approach to a forthcoming regeneration inquiry. Are we agreed to take item 5 in private?

Members *indicated agreement.*

Subordinate Legislation

Energy Performance of Buildings (Scotland) Amendment (No 3) Regulations 2012 (SSI 2012/315)

10:00

The Convener: Agenda item 2 is consideration of a negative instrument. Members have a paper from the clerk setting out the purpose of the instrument.

The Subordinate Legislation Committee has highlighted an exchange with the Scottish Government on parts of the instrument where it feels that definitions are unclear in relation to certain classes of buildings that are excluded from the requirement to produce energy performance data.

Do members have any comments?

Members: No.

The Convener: Do we agree not to make any comments on the instrument to the Parliament?

Members *indicated agreement.*

Public Services Reform and Local Government: Strand 2 (Benchmarking and Performance Measurement)

10:01

The Convener: Agenda item 3 is to take oral evidence on the committee's report on strand 2 of its inquiry into public services reform and local government. The strand examined benchmarking and performance measurement in local government.

I welcome Derek Mackay, Minister for Local Government and Planning—your arrival is well timed, minister—and David Milne, team leader in the local government outcomes and partnerships unit of the Scottish Government. Minister, would you like to make a brief statement?

The Minister for Local Government and Planning (Derek Mackay): Thank you; I will do so briefly.

We take a particular interest in this workstream. We value benchmarking in local government and commend local government for progressing it. We look forward to further discussions on its findings over the weeks, months and years to come.

The Convener: Thank you, minister. Obviously, the benchmarking project has been a long time in the making and it seems that there may be some further difficulties, according to some of the information that we have seen over the past day or two. The Society of Local Authority Chief Executives and Senior Managers—SOLACE—has said that some of the difficulty might lie with getting information from the Government about some of the education statistics. Will the Government do all that it can to ensure that the project can progress quickly?

Derek Mackay: Absolutely. It is the case that Government statistics are produced with 12 months' notice. I am not aware of a delay for any particular statistics that would create an issue. However, I would of course want every part of Government to support the process—I give you that commitment.

The Convener: Thank you very much. I open up the discussion to questions from members.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): In your opening remarks, minister, you said that the Government values benchmarking. Do you think that there are lessons and opportunities for other parts of the public sector that derive from the benchmarking project that local government is undertaking?

Derek Mackay: I suppose there are. Generally speaking, the assessment and comparison of data to understand what is going on in service delivery and improvement are certainly worth doing. Taking a more proportionate approach to the indicators that we choose to use is also significant, because we can assess and monitor areas that add value to understanding, as opposed to simply ticking a box.

Benchmarking and choosing the family composition model by which local authorities compare themselves with similar local authorities is also a useful approach, as opposed to simply having a league table of 32 local authorities. The methodology used and the value that we attach to it are worth recommendation.

Stewart Stevenson: Does that imply that as part of the public services reform agenda the Government will be looking at whether there are statistics that no longer have any value because there is no clear objective or programme to which they contribute and they are merely counting things for the sake of it?

Derek Mackay: I suppose that some people will argue that the public sector does things in a certain way because that is how it has always done them. This approach has shown how the process can evolve to meet current challenges.

I would take the issue wider than just the benchmarking process. In the step change that we want to make in community planning, we want to use disaggregated data in order to find out what the issues in a local community are and how each public sector partner might come to the community planning table and deliver on local outcomes. That is separate from the benchmarking process, which looks specifically at council services and functions. In short, I think that there are lessons for community planning to be learned through the process with regard to assessing the areas and indicators that matter most to local communities.

Stewart Stevenson: The committee always aims to please, and you will be delighted to hear that one of my colleagues will ask some questions on community planning a little later.

My closing question relates to the convener's question and the more general issue. The Government produces a lot of statistics, which are used by local government and others, but is there a clear link between the need for statistical information—say, in the example of education that has been mentioned—and the statistics that the Government actually produces? Is there an underlap in the sense that, although the Government is producing a lot of stats for Government purposes, the information might not adequately meet the needs of other parts of the public service and local government in particular?

Derek Mackay: I can really only speak about my own portfolio. I certainly see the need for most of the statistics that I come across, in that they give me information that is worth having. Occasionally, I would like more information and sometimes I would like to see different statistics from those that are provided but, generally speaking, there is a correlation between what we are provided with and the outcomes that we are trying to achieve. The strongest link in that respect can be found in community planning.

The Convener: John Pentland has a supplementary.

John Pentland (Motherwell and Wishaw) (Lab): Good morning, minister. Like you, the committee values the benchmarking process. What would you say to the doubters who see benchmarking as the thin end of the wedge with regard to standardisation and as something that takes away local democracy and local priorities?

Derek Mackay: If local authorities make no comparisons with each other, they will have no sense of how well they are performing relative to others. We should use benchmarking to get an understanding of how well local authorities are performing in the different levels of service in each area. Of course, there might well be reasons for such differences, but the family groupings in the benchmarking process can address, say, rurality, issues in urban authorities, the size of authorities or even deprivation. The approach is right, and I do not think that there is anything to fear from benchmarking.

That said, I would hazard a guess that some elements of the political world and the media might choose to use the process in a particular way. That is unavoidable but, at its very heart, the process of comparing local authorities' performance is good for understanding how well a local authority is performing. What I suppose might be called a competitive approach can support continuous improvement in performance.

The Convener: Stewart Stevenson wants to come back in on that point.

Stewart Stevenson: I want just to ask the minister what the central purpose of benchmarking is. I am not sure that I am necessarily representing the committee when I say this, but surely the comparison is for councils rather than of councils. In other words, the purpose of comparison is to help councils understand the opportunities to learn from local government colleagues rather than to give those externally an opportunity to comment, audit and review matters. After all, many such processes are already in place.

Is that how you as the minister see the process? Would you support that as being the primary focus of benchmarking—in other words, that it is for councils rather than of councils?

Derek Mackay: I would not want to disagree with Mr Stevenson. Benchmarking is certainly for councils. It is of council services and many will take a great interest in it irrespective of its driving force, but its driving force is surely to deliver improved services by enabling comparison of services across the local government spectrum.

Anne McTaggart (Glasgow) (Lab): Good morning, minister and Mr Milne. Minister, you said earlier that you do not foresee any delays. Is the benchmarking project still to be launched in January?

Derek Mackay: That is not a matter for me. It is a matter for the Improvement Service and the local authorities because it is their project. I cannot speak for them.

The Convener: Are you encouraging them to ensure that the project is online as soon as possible?

Derek Mackay: The commitment was given that it would be in place in January, but it looks as if it might now be February. I would encourage them to make sure that it is in place in February. It is their project, but I think that the sooner it is completed and delivered, the better.

Anne McTaggart: Are you aware of any issues related to buy-in to and acceptance of the benchmarking project by local authorities?

Derek Mackay: I have seen evidence from your committee—both in the *Official Reports* of your committee meetings and in briefings—that suggests that you perhaps believe that not all local authority leaders buy in to the project to the level that they should. Other than that, I am not aware of evidence that local government is not taking it seriously.

I suppose that the length of time that it has taken to get to the current position is slightly concerning, but that is all the more reason to get on with it and do it now. It has taken two years to get to this stage, which is longer than one would expect.

Anne McTaggart: What will the Scottish Government and you as the minister do to ensure that some of the difficulties that you are aware of are resolved and, thereafter, the project is in place in February?

Derek Mackay: This is a local government-led project. From the Scottish Government's perspective, I am not aware of any issues where we have not given support, advice or information, so I do not think that we have put any barriers in the way. I simply want to encourage local government to see the project through to its

conclusion. I am happy for my officials to do anything that we can to encourage that process, but I am not aware that we have presented any barriers to progress.

Anne McTaggart: Okay. Thank you, minister.

John Wilson (Central Scotland) (SNP): I welcome the minister to our evidence session. Before I ask my main questions, I ask him to clarify his comment that the project is an Improvement Service and local government project. What exactly is the role of the Improvement Service in the process? My understanding is that it is there to assist SOLACE and the Convention of Scottish Local Authorities in developing the benchmarking, rather than to lead the project.

Derek Mackay: My understanding is that the Improvement Service is doing the official work in pulling together the data and then presenting the report, as informed by SOLACE and agreed by COSLA.

John Wilson: Thank you for that clarification. I just find it interesting that an organisation that is not part of an elected representative body and which is not directly employed by local authorities is leading on the project and is responsible for the delivery of the benchmarking outcomes that we are looking at. I would like to think that, in future, COSLA and SOLACE will take full responsibility rather than leaving it to, in effect, an external body to lead the project. However, that is an issue for another day.

Do you believe that the current indicators sufficiently cover all the services that are delivered by local government?

Derek Mackay: No, I do not, but frankly they are not designed to do that. This is the start of a process. If I was to look at local government in the round, I would look at the other indicators that are available. For example, with my planning minister hat on, I would be interested in planning performance, and I could also look at educational attainment. There are a host of indicators that relate to local government.

The benchmarking process is a comparison of certain indicators between local authorities, but—to answer your question—that is not the end of the story. Many other indicators will be looked at to judge what is happening on the ground and the performance of local authorities. The benchmarking indicators are the ones that local authorities have determined are appropriate for the project.

I do not know whether the committee is aware of yesterday's direction from the Accounts Commission on the benchmarking indicators and statutory performance indicators.

The Convener: We are, but there is no harm in your repeating it.

10:15

Derek Mackay: I simply want to flag it up, because it is pertinent to your discussions.

The Accounts Commission has given a direction that it will use the benchmarking indicators—rather than the SPIs that it used previously—as the basis for on-going scrutiny of local government. That said, the Accounts Commission and Audit Scotland will look at the figures not in isolation but in the round. Therefore, when those bodies assess best value, they will challenge local authorities on whether the indicators that they use are appropriate and they will consider what other information should be brought to the process of scrutiny.

John Wilson: I thank the minister for his candid response, particularly in relation to other indicators that might be used in future. We were made aware of the Accounts Commission's approach this morning. Is the minister aware of whether any other statutory agencies that currently demand submissions on performance from local authorities will take the same view as the Accounts Commission and will be satisfied with the benchmarking regime and the data from the benchmarking process?

Derek Mackay: I first want to double-check Mr Wilson's interpretation of what I said earlier. The Improvement Service is a body of local government and COSLA, so it does not make decisions on what items are scrutinised—it provides the technical support.

Mr Wilson asked about other agencies using the benchmarking process to understand local authority performance. The process will tell the story of only certain issues and indicators—it will not tell the whole story of local government. Therefore, other agencies and other parts of the public sector world might use other indicators to understand the performance that interests them. For example, the benchmarking indicators do not tell me terribly much about economic development or planning, which I mentioned earlier, so I would use other reporting mechanisms in local government to understand what is going on with that. I suppose that it is a matter of horses for courses.

For the exercise of comparing service provision in local government—with the driving force being the outcome of continuous improvement—the indicators are relevant. I am not saying that, as there are other meaningful indicators, they have to be included in the process; I am saying that I would like those other indicators and other areas of work to continue so that we can rely on them to

understand what is going on in those areas, too. One example is community planning but, if there are more questions to come on that, we can pick up that point later.

John Wilson: On the indicators that other agencies might require from local authorities under the current reporting structures, I understand that one desire of SOLACE and COSLA is to try, through the benchmarking process, to streamline reporting. If you are saying that other statutory agencies might continue to look for information that is not in the benchmarking indicators, what comfort can we give local authorities that we are moving towards streamlining the information that they must gather and report on?

Derek Mackay: We are not compelling local authorities to provide a whole host of data that they think is irrelevant—the benchmarking project is local authority led. We will still seek statistical information from local government. Since 2007, as a consequence of the concordat and the Crerar review, the general approach has been to be more proportionate in our approach to scrutiny and audit of local government, and the benchmarking process fits with that agenda.

John Wilson: One fear is that benchmarking will be used to create a league table for setting local authority against local authority on delivery of services. The proposed benchmarking process involves setting up a family structure to group local authorities together, so that we can compare like with like. Is the minister happy with that approach to measuring how local authorities perform against benchmarking indicators?

Derek Mackay: That is an appropriate approach to benchmarking.

Margaret Mitchell (Central Scotland) (Con): Good morning to the minister and Mr Milne. It seems that the "families" of authorities will provide a good analytical tool. I understand that the analysis will be based on 2010-11 data and 2011-12 data. If we are talking about the financial year, such data would be available some time after March. Would that contribute to slippage in the timetable, about which the committee is generally concerned?

Derek Mackay: That is possible. You might have more information than I have about how the delay to the statistics has come about. I was asked whether the Government contributed to that; our proposed release of data is published 12 months in advance. A slight delay in relation to collection and analysis of data will always arise because of when some data sets are released, as is unavoidable in an exercise of such a scale.

The Convener: We should say that SOLACE said that it relies on Scottish Government data for a couple of indicators, such as the per pupil spend indicator in education services. Perhaps you could ask colleagues whether something can be done about that. I do not know when such data are likely to be available, but SOLACE said that that is one indicator that is causing it some grief.

Derek Mackay: I am happy to look into any specific circumstances.

John Pentland: Does the minister have concerns about the opportunity cost that could be associated with benchmarking? In aspiring to do what another authority in a family has done, might an authority have to take money from other services, which might then fail?

Derek Mackay: If each local authority uses benchmarking properly, it will consider where it is, the kind of services that it provides, the costs and the outcomes. The indicators in the benchmarking process are a mixture of input measures and outcomes. If they drive leaders and officials to think about the services that they deliver, that might well lead to change. We would like that to lead to change as each authority strives to improve performance.

John Pentland: John Wilson mentioned league tables, which takes me on to a question about the political and media challenges. Does the Scottish Government have plans to reduce, following implementation, the number and content of returns for which it asks local government? I am sorry. That was the wrong question. Can I rewind?

From the Government's point of view, what political and media challenges are involved in launching and publishing the benchmarking project?

Derek Mackay: As I suggested, it is unavoidable that, in comments to an administration or the media, political opponents in the system might make comparisons that are controversial or which some people feel are unfair. Some such comments might be justified, but they could put council administrations in an awkward position in defending their performance. That is inevitable when we have a process of scrutiny and transparency and it is not a bad thing, especially if such added pressure and public awareness of comparisons with other authorities drive improvement and change. Of course, the Scottish Government wants the process to be fair, proportionate and appropriate.

Public awareness of benchmarking and performance is not in itself a bad thing. Maybe we all—politicians, the Government, partners and media—need to be mature about the data and how we report them.

John Pentland: Will the Government support media management and publicity in relation to the project's launch?

Derek Mackay: As I said, you must understand the Scottish Government's role in what is a local authority-led initiative. Of course we want to support the process and the engagement that it brings. I will happily welcome its progress and development over the period to come.

The Convener: I will start on a different tack. The benchmarking project is local government's baby, but a huge number of the indicators that are in place form the main planks of the outcomes that we hope to achieve through community planning partnerships. Should community planning partnerships benchmark their activities, too? If so, how do we integrate service delivery in the health service and local government? We have heard about conflict in the context of information gathering for local government and national health service HEAT—health improvement, efficiency and governance, access and treatment—targets, for example.

Derek Mackay: That is an interesting question, which we will consider. In the review of community planning there has been a focus on getting public sector partners to work together. The guidance that we issued a few weeks ago on single outcome agreements focuses on joint working and on understanding an area's needs and how services can be delivered jointly to meet them, so that we have harder-edged single outcome agreements. A crucial new element is prevention and integration plans, with a focus on prevention, to get an understanding of what each part of the public sector in an area is doing on that important agenda. We are asking for more information on that, I suppose, without asking for exhaustive information in the way that previous bureaucratic regimes did.

We have not considered comparing community planning partnerships on a data basis, but the Accounts Commission for Scotland is taking assessment of community planning seriously. I will be happy to talk to the Accounts Commission about how it will assess the new community planning arrangements. It is currently undertaking three pathfinder projects, with a view to carrying out a robust analysis of community planning arrangements in three councils, which will be informed by proposals on how the approach goes forward. We are happy to explore the convener's suggestion, which fits with the way the Accounts Commission is going on inspection of community planning.

The Convener: I might be reading you wrongly, but are you saying that it is better to look at best practice in community planning partnerships than to concentrate on data at this point?

Derek Mackay: Yes. I am a listening minister and I am interested in the committee's views. We have put the impetus on getting public sector partners to work together on a community plan basis through focusing on the single outcome agreements and looking at the data in each area. I am a bit less concerned that partners should worry about what is going on in neighbouring community planning partnerships, because the big task is to get them to work together in their own locality, rather than to compare themselves with other groups.

I see the value of benchmarking in the context of community planning partnerships, but I am trying not to create an unnecessary level of bureaucracy. The Accounts Commission will focus on what is going on in each community planning partnership area, based on evidence and the data that we have.

That said, a task group—the improving evidence and data group—is looking at how partnerships can use relevant data by focusing on outcomes rather than indicators to drive improvement in each area. It is a two-way process between the community planning partnership and the Scottish Government. That is the nature of the relationship. Traditionally, we have not compared the CPPs with one another or provided a national overview of what is happening in each area. To the best of my knowledge, such information has never been produced.

10:30

The Convener: It would be interesting for the committee to have sight of the work that is progressing on that front. We would all be grateful for that.

John Wilson: I have a question about single outcome agreements, which are agreements between the CPPs and the Government. How do you see the benchmarking indicators fitting into that process? That goes back to my question about the fact that, as I understand it, local authorities are trying to streamline the number of issues on which they need to report. At the same time, we still have single outcome agreements and the national performance framework. How do the NPF and the SOAs link with the benchmarking indicators that local authorities have proposed? Will information on the SOAs and the outcomes from them still be relevant for the Government to gather, or will it be content just to use the benchmarking indicator information that is provided by local authorities?

Derek Mackay: There is an important distinction to make between the national performance framework, the single outcome agreements and the benchmarking indicators, but they all inform one another. It is interesting that although we want a more proportionate approach to auditing of local government, the Accounts Commission says that

we do not have enough data on some elements of service. We need to get the balance right.

The distinction that I would make between the three is that the NPF is the picture of how Scotland is performing, based on the Government's targets; the SOAs provide the agreed targets for the community planning partnerships—they represent what every public sector partner should be delivering for an area, in partnership with the Government; and the benchmarking indicators relate to how the services that local government runs are performing. I think that there is a clear function for all three and they are complementary. I do not think that they are particularly burdensome on the organisations that collect and report the data. They all serve an important purpose.

Stuart McMillan (West Scotland) (SNP): As part of our evidence taking, we heard from Councillor Michael Cook. His evidence is mentioned in paragraph 53 on page 11 of our report. He said:

"Sometimes we hear complaints about the postcode lottery. Sometimes the postcode lottery is local democracy in action."—[*Official Report, Local Government and Regeneration Committee*, 31 October 2012; c 1343-4.]

As one of the newer members of the committee and someone who does not come from a local government background but who has been involved in politics for some years, I firmly believe in having a joined-up approach. I believe that the benchmarking process will allow that to happen, and that it will lead to better outcomes for those who receive the public services that we all value and require. When Councillor Cook made his comment, I was slightly taken aback. It was as if a wall was being built between local government and the rest of the public sector and the Government. I am keen to hear your views on that.

Derek Mackay: I thank you for that question. I have never previously been asked to interpret for Councillor Cook, who is a robust character who is well able to speak for himself. If the committee were to recall him and probe his evidence further, I would come along as a spectator.

In all seriousness, there is some truth in what Councillor Cook said, depending on one's interpretation of it. There are some issues that are truly local, which involve local authorities making choices about service provision or what policies to adopt or deploy. There are other areas in which provision should be national and should meet a national standard. Some people confuse a postcode lottery with local choice—an example of which is one local authority deciding to charge for a service for which another council does not charge. As a Government, we are relaxed about the fact that sometimes there will be national provision while on other occasions, where appropriate, there will be local discretion.

That said, there is no excuse for poor performance; we should never say that poor performance in any service area is acceptable anywhere. For me, that is the difference. Policies can be deployed as appropriate, but good and robust service performance should be expected across the country. I hope that that clarifies my understanding of what benchmarking can achieve.

Stuart McMillan: That is helpful. Thank you.

The Convener: There are no more questions, so I thank the minister for his comments. I suspend the meeting while the minister's supporting officials change over.

10:35

Meeting suspended.

10:37

On resuming—

High Hedges (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is on the High Hedges (Scotland) Bill. This will be the third day this month that we have taken oral evidence as part of our examination of the bill, and today we will hear from two panels of witnesses. First, we will hear once more from the Minister for Local Government and Planning, Derek Mackay, who is joined for this session by Gery McLaughlin, head of community safety law, and Norman MacLeod, a senior principal legal officer in the Scottish Government's legal directorate. I had thought that we might be joined by the member in charge of the bill, but we can probably expect him to arrive in the course of the session.

Minister, would you like to make some brief opening remarks?

Derek Mackay: I welcome the opportunity to provide the Government's views on the High Hedges (Scotland) Bill, which is being promoted by Mark McDonald MSP. I am happy to reaffirm the Government's support for the bill and for Mr McDonald. In doing so, I pay tribute to Mr McDonald for all his efforts in taking forward the legislation. The written submissions to the committee and the evidence that has been heard in person, in particular from Scothedge, have made clear the serious impacts that high hedges have in the most serious cases. The Government welcomes the positive impact that the bill will have on the lives of those affected.

The Government's views on the bill are set out in our memorandum of 30 October 2012. We recognise that Scotland is the only part of the United Kingdom without high hedges legislation and that the bill fulfils our manifesto commitment to provide a legal framework for settling disputes related to high hedges. Our position remains as stated in the memorandum: we support the bill.

The Government has not been prescriptive about what the bill should contain or how it should work. It has been for Mark McDonald to identify and develop a solution and set it out in the accompanying policy memorandum and financial memorandum. Given that Mr McDonald will appear after me, I do not intend to go into the bill's fine detail; however, I am keen to hear the committee's views on one particular issue.

I am aware that there has been much discussion of the bill's interaction with tree preservation orders. The Government's memorandum makes it clear that we support the bill's approach as it ensures that a local authority's decision to issue a high hedge notice will not be frustrated by an inappropriate TPO. The committee will be aware that a similar issue arises in relation to conservation areas. The Government's memorandum makes it clear that we are prepared to take forward regulations under the Town and Country Planning (Scotland) Act 1997 to ensure that high hedge notices are not adversely affected by conservation areas, and I would welcome the committee's views on the proposal.

I know that stakeholders have raised a number of issues, including the bill's definition of a high hedge, the fees that it sets out and its interaction with TPOs. Nevertheless, there appears to be broad support for legislating to tackle high hedges. The Government welcomes that recognition and I will be interested in hearing Mark McDonald's responses to stakeholders' views and in finding out the committee's conclusions and recommendations on the bill.

The Convener: Thank you, minister. What is your view of the statutory definition set out in section 1?

Derek Mackay: The Government's view is that the definition is appropriate and in line with comments made by a number of other stakeholders. Broadly, it strikes the right balance and requires neither narrowing nor expanding.

The Convener: I open the questioning to members.

Stuart McMillan: The definition has been one of the two or three issues raised in the oral and written evidence that we have received. Indeed, most of those who made a written submission feel that the bill does not go far enough and that the definition is too narrowly drawn. For example, one particular individual has highlighted an equality element, pointing out that paragraph 111 of the policy memorandum says that the bill

"does not unlawfully discriminate in any way with respect to any of the protected characteristics"

and then goes on to state:

"The Bill promotes the resolution of disputes ... By doing so it promotes strong supportive communities for all people".

However, if the bill continues as it stands, leaving out an opportunity for dispute resolution with regard to, say, deciduous trees and nuisance vegetation, it does not really support "all people". In that respect, is the bill too narrowly drawn?

Derek Mackay: Not on the basis of your proposition. After all, equality legislation already exists to protect individuals and groups. People might be looking for equality with regard to other forms of vegetation, but I think that this particular conclusion has been reached for good reason.

The bill, which will put us on a par with other parts of the United Kingdom, has benefited from their experience, and if it acts as a deterrent and leads to the resolution of a number of disputes, it will serve a very useful function.

I suppose that if the committee wished the definition to be expanded, such a suggestion could be considered, but we feel that, based as it is on evidence from other parts of the UK, it strikes the right balance.

Again, to highlight the deterrence argument, I think that the bill sets a scene and a tone such that one would hope that others would not use vegetation or other such growth to upset their neighbours. Moreover, widening the definition in a way that satisfied everyone would come with its own particular difficulties and I am not sure that that could be achieved. However, as with all matters, the Scottish Government will listen to the views of the committee and other stakeholders.

We could go through other arguments about creating loopholes depending on definitions, but I am trying to argue the point as concisely as I can.

10:45

Stuart McMillan: The fact that there has been discussion around a potential bill for some years indicates the difficulty of dealing with the situation. The legislation in England and Wales and in the Isle of Man was passed some years ago. Clearly, this is not an easy thing to deal with and every situation and dispute that comes up will be different in some shape or form. I fully appreciate that any legislation will not deal with everything, but dealing with high hedges will deal with many of the issues that parliamentarians confront from their constituents.

On deciduous trees, we have received evidence from UK Mediation. Minister, you talked about looking at the experience from elsewhere. In its submission, UK Mediation said:

"home owners have been known to plant 3-4 broad leaved trees in amongst their evergreen hedge (usually Leylandii) and thereby to get around the English legislation which defines the hedge as being solely evergreen."

Therefore, the experience elsewhere shows that some people use a loophole to create an opportunity for them to not have to act. If the bill proceeds as it is currently drawn, that type of situation might arise in Scotland as well.

Derek Mackay: Mr McMillan is absolutely correct that no legislation has been enacted here because there has never been agreement on what we should proceed with. I think it is sensible of Mr McDonald to begin with this definition and a proposition that—it is largely agreed—will resolve a majority of cases. It is a good starting position.

That said, I understand that there is an enabling power in the bill to expand the definition—as long as it still refers to high hedges, because this is, at the end of the day, a high hedges bill. There are reasons why trees have not been considered, other than in the scenario that is outlined in the definition.

This seems a good starting position, although I understand the experience elsewhere and I acknowledge the point that there is no legislation to cover the issue at the moment. There is provision to expand the definition if that is the view of Parliament, based on the experience of the community.

Stuart McMillan: We heard some evidence last week about what happened on the Isle of Man. Its legislation is different as it includes deciduous trees and single trees. The evidence was very strong. The Isle of Man has some challenges—no legislation is perfect, which we accept—but there was some compelling evidence that its legislation appears to work and that it helps all of the Isle of Man.

A witness said that the proportion of complaints about hedges to the proportion of complaints about trees was probably around 50:50. If we extrapolate that to Scotland, if the bill as it is drawn is passed, 50 per cent of issues in Scotland might not be covered by it.

Derek Mackay: From the evidence that I have seen—perhaps Mr McDonald can go into more detail—the ratio would not be 50:50; a majority of cases would be resolved. That is based on analysis, and of course it is difficult to predict how this will be introduced in Scotland and what the reaction will be. The evidence that I have seen indicates that the bill will resolve a majority of cases, but you are correct: some cases that are not covered by the definition in the bill would still be outstanding. I would like to think that it will create the environment—excuse the pun—in which people want to address their issues.

My official has helpfully informed me that Scothedge predicts that 92 per cent of cases would resolve themselves as a consequence of the bill. That is just one indicator or assumption, and I am sure that there are many, which are just views. I am therefore not sure that I would accept the contention that the proportion of evergreen to deciduous trees would be 50:50.

It would be a somewhat long-term strategy, of course, for someone to plant a single tree and get into a position of warfare with their neighbour because of it. I am not trying to undermine the point, but I am saying that doing that would be a somewhat long-term strategy, so we are talking about existing trees. On the definitions of hedges and semi-evergreens and wholly evergreens, our

view is the same as Mr McDonald's, which is that they will capture much of the behaviour that causes so much angst across Scotland.

Anne McTaggart: Good morning, panel.

Minister, I have a few questions about the fees as stated in the financial memorandum to the bill. This morning, we have received evidence from the Finance Committee and some information on its concerns, which I will try to amalgamate, although probably not very well. The bill does not specify an upper limit or cap on fees. Do you have any concerns about that?

Derek Mackay: I do not have concerns, because the proposition is that the fee will reflect the cost of the local authority's work. If that is applied proportionately, fairly and reasonably, that would not give us cause for concern. I have no reason to believe that if local authorities have the relevant power and people apply, local authorities will try to make a profit from that. Local government is a multibillion pound sector with a massive spend. Therefore, I am content that we do not require a cap, which would be an arbitrary figure that we would set, based on data that local authorities would provide.

The Scottish Government is fairly content as long as the approach is followed of local authorities recovering the costs by using the fee for the applicant and recovering the costs of any enforcement work from the so-called perpetrator. The fee will be fair and proportionate to the cost of the service, which is why we are content that we do not need to set a national cap on the fee.

Anne McTaggart: Might some people be concerned about applying because they do not know what the fee will ultimately be?

Derek Mackay: They would of course know the fee on application. We do not know just now what the fee will be, because local authorities have not determined that, as they do not have absolute clarity in that regard. As it stands, they do not know what the law or guidance will look like. However, once they know that and what system they will deploy, they will have a figure and they will then set the fee or charge. Before anyone makes an application under the power, they will understand what the fee is.

It could then be said that it was still too expensive, which is why, as I understand it, there are proposals in the bill for local authorities to have some discretion to waive the fee in particular circumstances or to set it at a level that is appropriate for them. For example, to follow on from the discussion that we had earlier, we might find that a local authority will see this as an area in which they would want to invest resource and it might therefore not go for full cost recovery or apply the full charge. However, it would be able to do so if it did not want to subsidise the service at the expense of other public services. Again, I think that the balance in the bill is correct; there will be flexibility for local discretion.

Anne McTaggart: Thanks, minister. You just answered my other questions.

John Pentland: Minister, so far your knowledge has been much appreciated. I believe that if "The Beechgrove Garden" ever comes back, you will be a prime candidate for fronting the show.

If the bill is passed, much of the work that will be associated with it will be done retrospectively. So, some people might wait to see where we go next. However, for the future, will existing trees in a new development be exempt? If a planning application is to be agreed, will a condition have to be inserted that no house should be able to have anything beyond 6 feet high?

The Convener: Minister? Or perhaps I should call you Renfrew's answer to Jim McColl.

Derek Mackay: I thought that the highlight of my political year was the local government elections, but it might well now be the High Hedges (Scotland) Bill.

There are different procedures and processes in play. We will have a look at the TPO legislation and guidance, but we think that it can be complementary to the bill. In effect, the bill outlines how the issue would be tackled if a tree is subject to a TPO or an application for one.

The member asked about the planning system. Each planning application will continue to be developed on its merits. Issues about trees, hedges and the environment are already a consideration in any planning application. To take it a level further, perhaps local authorities will consider producing good practice guidance on being a good neighbour in relation to hedge growing and so on. We do not have a plan for new national guidance on the issue but, as people will want to understand and interpret the bill, we will want to produce guidance on it.

The planning system, however, will continue as at present, with each planning application being considered on its merits.

The issue is not necessarily just that someone is growing a hedge; it is that they are growing a hedge that is a barrier to light for their neighbours. Part of the issue is about how people plant things, how they grow things and how they care for their garden and environment, but there is the next stage of how we resolve disputes. The bill anticipates that and provides a function in enabling people to resolve such disputes, rather than have to go through formal channels.

I hope that that answers your question. The issue has different elements, which include TPOs, the planning system, mediation and good or neighbourly behaviour, and then what will be produced as a consequence of the bill.

John Wilson: Last week, we heard evidence from the Isle of Man. In one example, an appeal was taken forward by an individual against whom a complaint had been made. We were told that it cost about £30,000 to deal with that, £7,500 of which was legal fees. Given that the bill is supposed to be cost neutral, how will local authorities recover such fees for work of that nature? Who will be charged the £30,000?

Derek Mackay: I would want to understand how that figure was arrived at and whether the same definitions as those that we are deploying in the bill were used. Mr McMillan outlined that the approach in the Isle of Man is working fairly well. A £30,000 cost for an individual resolution does not feel particularly proportionate, so I would want to probe those figures further. That level of cost seems particularly high and we would want to avoid that. We would not want that level of cost to any individual or, frankly, to a local authority. We should be able to design a system that is as low cost as possible. Just because that is difficult does not mean that we should not proceed, because clearly there is a need for legislation to enable action to be taken where none has been taken in the past. We will want to design the legislation, regulations and guidance in a way that tries to keep costs down and avoids such figures.

11:00

John Wilson: I agree that any legislation that we introduce should be cost effective and, for local authorities, cost neutral in many respects. The difficulty is that the bill contains certain definitions and sets out certain processes. You referred to guidance, and I want to be clear that any bill that is introduced and agreed to by the Parliament is accompanied by clear guidance to local authorities to ensure that not only they but the general public understand the intention behind the legislation.

One of the major drivers in this debate has been Scothedge's consistent campaigning but, in its oral and written evidence, it has indicated that it is not content with the bill's present definition and wants it to be extended to include single and mature trees that might be causing "a barrier to light", which is set out in section 1(1)(c) as one of the definition's three broad elements. A number of submissions that we have received have expressed concern about barriers to light caused not so much by high hedges as by single overarching trees with branches in full leaf. The "barrier to light" element of the definition will be applied throughout the year, but the question is: who will be able to decide that a high hedge is creating enough of "a barrier to light" on 31 December or 30 June to chop it down? Throughout Scotland, different light situations will arise. Who at the end of the day will determine what constitutes "a barrier to light"? Do local authorities have the skills and knowledge to make that determination at any time of the year?

Derek Mackay: In arguing with himself—quite successfully—Mr Wilson has made the point that this is a question of interpretation, application and assessment and that, sometimes, it will be difficult to reach a judgment.

I believe that the required environmental and planning expertise exists in local government. Every day, people in local government make determinations on planning applications; sometimes those applications cause conflict and come down to judgment and observation. That the skill set is largely there is certainly COSLA's view on the proposals—and I note that it has commented only on the current proposals. In any case, local authorities will ultimately deliver this service.

The application of the definition will require a judgment call. The guidance can be as clear as we can possibly make it, but a human element will still be required to determine what constitutes "a barrier to light". You described the difference between evergreens, whose very name suggests a permanence in their composition and the barrier to light that they form, and deciduous trees, which will be a different scenario. Judgment will be required in applying the definition. Having been in post for a year now, I have learned that however clear the legislation and regulations might be, it all comes down to local interpretation and application. Whatever legislation is passed should be applied proportionately and, as COSLA has suggested in its submission, the expertise to apply it already exists. The structure to deliver these proposals could also be established without any particular expansion, although local authorities might have to rely on one another for specific expertise on species and so on that might be required.

John Wilson: I welcome the minister's confidence that the guidance to the bill will be right and that there will be a consistent approach to its implementation by 32 local authorities and, indeed, the various planning and tree officers employed by those authorities. I have to say that I thought that the Government's role was to ensure that any legislation was applied in a standard way throughout Scotland instead of leaving it to local interpretation by 32 local authorities, the national park authorities or whoever else, and I want some confidence that the legislation will be accompanied by clear guidance that local authorities and

planning and tree officers can apply in a standard way throughout the country.

Derek Mackay: We aspire to as much consistency as possible. However, in a dispute there will be local circumstances and local application of the guidance. It will be a judgment call. To assist the standards, regulations and guidance, there will be the appeals mechanism, which, it is proposed, would be for the directorate for planning and environmental appeals, which is well versed in planning applications. It may feel as though there will be local variation, because the staff who are sent to a situation will use their judgment on the guidance. Any differences in the decisions that are made will be the inevitable consequence of the issue that we are dealing with.

Margaret Mitchell: Setting aside how the fee is calculated, the financial memorandum makes it plain that the fee will be paid by the complainant. The minister will be aware that in Northern Ireland, if a notice is served—in other words, if a complainant's case has been upheld—the owner of the hedge should bear the fee or at least a percentage of the fee. Are you sympathetic to that approach?

Derek Mackay: We are interested to hear the committee's views, and those of Mr McDonald, but we are content with the current proposition, which is, as Margaret Mitchell has described, that the complainant pays the fee, in effect to get a resolution. If the complainant is paying the fee to get a resolution and the owner cuts down the hedge and makes it a more reasonable height, I suppose that that is a resolution. While the complainant might be out of pocket, they have got what they sought.

There may be specific issues about fairness in that, having taken appropriate action, someone might still be charged. We are interested in the committee's views, but we are content with the proposals, which seem like the right balance.

If the owner does not cut the hedge back, having been instructed to do so, and the local authority has to intervene, I dare say that that will not be cheap. The owner will have to pay the full costs of that. As the member says, how we arrive at the fee is an entirely separate issue.

Margaret Mitchell: I put it to you that charging the owner of the hedge may be a powerful deterrent that could lead to an early resolution, saving the local authority and all the participants quite a lot of money. If that approach were adopted, it could stop vexatious thwarting of a notice by an owner. If owners realised that they would be financially liable for some of the fees, it might make them much more amenable to mediation and to reaching a resolution.

Derek Mackay: I understand the rationale, and I can see how what you describe could be a deterrent. However, the system in which the complainant pays the fee works, too, and also serves as a deterrent. Rather than a free-for-all, in which people complain frivolously, it seems to encourage an appropriate use of the system. I understand the rationale for both approaches. The Government is content with the proposals and interested in the committee's views.

Margaret Mitchell: The percentage probably strikes the right balance in that if the notice is upheld—or even if there is a threat that that will happen—the complainant and the owner will pay some of the fee.

Derek Mackay: I am happy to take those comments on board and I hear Mr McDonald's views on the technical issues. We are content with either approach and we understand the rationale of both approaches. An argument can be made for both, but we get the logic that the complainant pays the fee to get a resolution, which is what we will try to achieve.

Margaret Mitchell: I will raise a point that other members have raised. You have given us a strong indication that you think that the legislation will solve the majority of cases. I would be interested to see all the evidence to support that. There is a strong body of anecdotal opinion that, if single trees and deciduous trees are not included in the bill, an opportunity will be missed.

That brings me to the Subordinate Legislation Committee's report on the bill. Section 34 confers on ministers the power to alter the definition of a high hedge. The Subordinate Legislation Committee is concerned that that could allow a future Administration to change entirely the nature of the act that the bill will become and make it almost a different act, simply through subordinate legislation. Do you have a view on that?

Derek Mackay: On your first point, the only evidence that I have is the same evidence as the committee has, which has been comprehensive on the issue. My reading of the responses to the 2009 consultation and of the current evidence suggests that the majority of cases will be resolved and that a great many cases will be deterred. Of course, we can predict all we like, but we will not know the bill's effect until it is implemented. If the definition does not cover everything, some issues will still be outstanding. I understand your point about taking the opportunity to address issues now.

We are listening to what this committee and the Subordinate Legislation Committee say is the appropriate vehicle for amending the definition that is in the bill. The bill is about high hedges and it is framed in that context. I understand that it would not be unreasonable for ministers to return to the

Parliament with a statutory instrument to change the definition.

If we wanted to change the height from 2m to 3m or whatever, subordinate legislation would feel like a proportionate way to amend the definition. If we wanted to amend the definition more drastically and to expand it beyond hedges to cover single trees and so on, members might well argue that that would be outwith the bill's competency and would require primary legislation. That is a matter for the committee to give a view on. We are open minded about the route that the committee would like ministers to take.

Right now, we are saying that the bill is a good start on tackling the issues. We are asking what the best device for amending the definition would be if we had to return to it. What all members of the Parliament would be content with in allowing us to amend the definition is up for debate. We have no strong views on the vehicle that should be used.

Margaret Mitchell: The concern is that using subordinate legislation to change the bill's nature completely in one fell swoop should not be encouraged.

Derek Mackay: Any subordinate legislation would be subject to the affirmative procedure, which is more involved than the negative procedure. The matter is for the committee. If the committee thinks that the bill is inadequate because it does not go far enough, and if the committee would like to have the safety net of the option of expanding the definition in the future, the more liberal or flexible the bill is, the easier it will be to make a necessary amendment. That is just a view that I give.

If the bill continues to have the definition that it has but the view is that we might want to expand that in the future, that could be done more easily and more quickly by statutory instrument than by primary legislation. That is for the committee to consider.

Equally, the committee might say that it would prefer such a change to be made in primary legislation and that it would not like such flexibility to be available through a statutory instrument. However, if a statutory instrument was used, I understand that it would be subject to the affirmative procedure and not the negative procedure.

Margaret Mitchell: Why should we not have a catch-all bill now that includes single trees and deciduous trees?

Derek Mackay: Some of the evidence has been that such a bill would have wider application and that the system could be more expensive to administer. The current definition captures the majority of issues. However, we are open minded about whether deciduous trees or single trees should be included.

We have the sense that the bill will capture the majority of issues.

If that was not to be the current definition, the views of COSLA and others would have to be sought because that presents a different scenario and it might have a cost implication.

11:15

Margaret Mitchell: On cost, if 92 per cent of cases would be resolved, 8 per cent are not covered. Surely the costs must be relatively small in proportion to the majority of trees that are being covered.

Derek Mackay: That is making the assumption that it would simply be a 92 per cent cost for hedges and that the 8 per cent would have been as straightforward as the 92 per cent. Those are just assumptions, but if the committee is leaning towards expanding the definition I am keen that we consult on that basis in order to understand the full implications of it—not least for local government, which would have to enact it.

COSLA's current position is that it supports the definition and it supports the terms of the bill as it stands. It cannot offer the committee a view on a new definition without going back to council leaders on what a different bill would look like. If the committee was to suggest that we should look again at that, I would want to seek COSLA's views because there are specific issues around cost and administration. I refer to Mr Wilson's comment about the judgment that is required. Of course Mr McDonald may go into the technical detail as to why he has arrived at that decision, which we are quite content with in terms of definition.

Margaret Mitchell: Thank you.

John Pentland: Minister, my question is probably about an unlikely scenario, but it could happen. If a private individual has a dispute with the local authority about a high hedge, can the local authority issue a notice against itself?

Derek Mackay: My understanding is that the legislation is framed around domestic dwellings. Are you referring to someone who is a tenant in council property?

John Pentland: Someone in council property—anybody, if, for instance, a local authority is not maintaining its environment with regard to high hedges, if we go back to the part of the bill about when the light is not getting through.

The Convener: Minister, please feel free to bring your officials in to comment.

Derek Mackay: I am worried that they will give me contradictory advice.

The Convener: I am afraid that we cannot help you there, minister.

John Pentland: Minister, you could hedge your bets.

Norman MacLeod (Scottish Government): The simple answer is that if the hedge is on local authority land, the notice can be brought against the local authority and vice versa. There are no restrictions on local authority use and there is an option to appeal to ministers in the event that you do not like the decision that you get.

Derek Mackay: I may want to contradict my official now. I am sure that he is absolutely right in what he is saying, but we would want to check who would be responsible. If it was a council tenant, for example, they have probably signed a tenancy agreement that says that they are responsible for the maintenance of the garden. If the tenant has taken responsibility for the garden and the hedge and the hedge is a problem, it is not necessarily the local authority that would be charged by the tenant. Fundamentally, though, the issue would still have to be resolved. We are happy to look into the detail of that to ensure that we are absolutely accurate and to bring back a response through me or through Mr McDonald.

The Convener: I can throw something else into the ring on the scenario that has been painted by the minister and by Mr Pentland. As regards hedging in flatted properties, nobody is sure who is responsible for the hedge and it may fall to the council's housing revenue account rather than to anyone else. Such issues have exercised the committee to a degree because the guidance will have to be particularly specific around certain points such as those. They may seem like foibles to some but they are likely to occur.

John Wilson: The bill makes reference to appeals to Government ministers. The minister quite rightly said that the directorate for planning and environmental appeals would be the body that would deal with those appeals. Just for clarification, would those appeals also be subject to an individual taking an appeal to the Court of Session—or would it be the sheriff court or the High Court?

Derek Mackay: I imagine that the only way to do that is through judicial review.

John Wilson: Such a route would be open to someone who felt aggrieved enough to take a case that far.

Norman MacLeod: Yes, on the legality of the decision, rather than on its merits.

John Wilson: Yes.

Derek Mackay: Any decision of a public authority can be subject to judicial review.

The Convener: There are no more questions from members. Mr McDonald, do you have questions for the minister?

Mark McDonald (North East Scotland) (SNP): No. I have no questions for the minister, thank you.

The Convener: I thank the minister and suspend the meeting for 10 minutes, to allow for a change of witnesses.

11:20

Meeting suspended.

11:30

On resuming—

The Convener: I welcome our final panel of witnesses: Mark McDonald, who is the member in charge of the bill; John Brownlie, who is a policy manager in the community safety unit and a member of the bill team; and Emma Thomson, who is a principal legal officer in the Scottish Government's legal directorate.

Mr McDonald, would you like to make some opening remarks?

Mark McDonald: Yes, I would. Good morning. I thank the committee for the opportunity to attend today and, indeed, to have attended all the committee's evidence sessions on my bill. I acknowledge the work that this committee, the Finance Committee and the Subordinate Legislation Committee have put into their consideration of the bill.

I believe that there is a clear demand for the legislation, and I am pleased at the level of support that the bill has received. I think that my bill represents the most progress that any proposal for high hedges legislation in Scotland has made, given that the three previous attempts did not make it to stage 1. I know that the committee is keen to question me, so I will not go heavily into the background to the proposal. Suffice it to say that the bill is largely an enabling measure that will provide local authorities with the power to resolve high hedge disputes while giving them flexibility to take account of their own circumstances. The bill will also ensure that local authorities are able to meet the costs of providing the service.

I should perhaps highlight three issues, on which I am sure there will be further discussion. First, on altering the definition of "high hedge" that I have set out in the bill, I have heard all the arguments that have been put forward during the previous oral evidence sessions. My definition is

narrow—although evidence suggests that it is not as narrow as some stakeholders would like—but it mirrors the definition that is used elsewhere, which evidence suggests would ensure an effective and straightforward decision-making process.

The mere presence of legislation will ensure that the vast majority of high hedge disputes resolve themselves—a point well made by the Scothedge representatives who gave evidence on 5 December—and I understand that an email from Scothedge suggests that some cases are already resolving themselves simply as a result of the current bill process. Evidence from England shows that what starts as a large number of inquiries quickly becomes a small number of formal applications, on which the need for enforcement action by local authorities is extremely rare. I am keen that the existing definition is used rather than risk introducing a more complicated decision-making process, as several stakeholders, including RSPB Scotland and the Scottish Wildlife Trust, have highlighted in evidence to the committee. A more complex process might also mean less certainty on fee levels for members of the public.

My view is that we should go forward on the current basis and see how the definition works in a Scottish context. We already know that the bill will solve a significant percentage of the problems—92 per cent, according to Scothedge's evidence to the committee on 5 December—and we should also bear in mind that section 34, which I am sure we will discuss, provides a power to modify the definition, if ministers feel that to be necessary at a later stage.

Secondly, turning to the issue of fees, I am keen to ensure that the costs of providing the service can be recovered by local authorities. I believe that my bill provides the ability to do that while giving local flexibility on the fee-setting process. The bill provides that, in setting the fees, a local authority

"must not exceed an amount which it considers represents the reasonable costs"

to the authority of making that decision. That is a key point. Although there will be no cap on fees, in effect the bill provides a form of capping by ensuring that the service cannot be a revenue raiser while simultaneously providing flexibility to take account of local circumstances.

Finally, let me briefly turn to tree preservation orders. Section 11 provides that a TPO has no effect if a tree with a TPO forms part of the high hedge under consideration. However, section 6(6) ensures that the same test that is applied to tree preservation orders is made at the point of assessing whether any action is required to be taken in relation to a high hedge notice. That ensures that, once a high hedge notice has been issued, there does not need to be a separate process to vary the TPO in relation to the high hedge, thereby making the process more streamlined and straightforward. The bill therefore enables high hedges to be dealt with through a pragmatic approach, which will not be frustrated by other legislation and will ensure that protections for valuable trees are kept in place.

For the reasons that I set out, my bill should go forward with the narrow definition that I proposed. I think that the two officers who gave evidence to the committee last week said that there would be many more cases if the definition were widened, and other stakeholders pointed out that the decision-making process would have to become more complex.

Local authorities should have the flexibility to set fees to take account of their circumstances. That is important, to ensure that the costs of making a decision are covered and that the approach is not regarded as a revenue-raising exercise.

My bill addresses the issue of valuable trees that might form part of a high hedge in a pragmatic way, which reduces bureaucracy and ensures that decisions can be made.

I am happy to take questions from the committee.

The Convener: I have asked all witnesses about their view of the proposed statutory definition in section 1, which you went over in depth. A number of folk are unhappy with the limited definition and want to expand it. Why do you think that the approach in section 1 strikes the right balance?

Mark McDonald: The fact that Scotland is in many ways behind the rest of the UK on high hedges legislation has brought a benefit, in that we have been able to learn from experience elsewhere. Experience suggests that a definition along the lines that I proposed allows for quick and effective decision making.

I think that witnesses from the Isle of Man told you that the decision-making process around deciduous trees can be extremely lengthy and complex and inevitably gives rise to difficulties in the context of challenges—you heard about the case in which the Braddan parish commissioners' decision was challenged. My proposed approach will facilitate quick and effective decisions, which give rise to minimal challenge.

There will no doubt be people who appeal—that is in the nature of things. The option to appeal is open to people. However, for the reasons that I set out, the proposed definition is the best one.

The Convener: The Isle of Man does not appear to have tree preservation legislation such

as we have in Scotland. If we expanded the definition, would the fact that we have TPOs reduce our risk of facing issues like those that Braddan parish faced?

Mark McDonald: I do not think so. The bill makes provision for vegetation that has "cultural or historical significance." I think that you heard that such things are taken account of in the Isle of Man, too. In effect, it has a tree preservation order process, although that is not what it is called. Our having TPO legislation does not necessarily mean that the process would be less complex if single trees were included in the definition.

Of course, deciduous trees will be covered by the bill if they are part of a high hedge that is mainly formed of evergreen or semi-evergreen plants. Deciduous trees are not, by definition, completely off the agenda. However, in our view, the real problem in the context of barriers to light is the semi-evergreen or evergreen hedge.

Margaret Mitchell: Given that the bill's objective is to ensure that no one is unreasonably deprived of light, is there not an overwhelming case for the bill to apply to single trees, which can block out light?

Mark McDonald: I take the view that a single tree is not a hedge. I understand your point but, as the minister said, the intention behind the planting is an issue. Long-standing neighbour disputes are often continued or escalated through the use of a high hedge to block off a neighbour. It would take a considerable amount of time for a deciduous tree to mature to the stage at which it would create that problem, so it is difficult to argue that a deciduous tree could be deployed as part of a dispute in the same way that a leylandii hedge might be.

My view is that there is a difficulty to do with whether there is a constant barrier to light. We heard from the Isle of Man that all-year-round checking was necessary to see what the light issues were. I think that that would add a layer of complexity to the process; it would certainly add a cost. Given the evidence that we have provided on the fees, it might lead to a much higher fee than the one that is anticipated in the financial memorandum.

Margaret Mitchell: Given that someone might deliberately plant a tree to obstruct light to be vexatious, are you supportive of looking at the loser-pays argument, which is used in the Northern Ireland legislation? It says that if a notice is served and the complainant's case is upheld, a proportion of the fee, or the whole fee, should be attributed to the owner.

Mark McDonald: When your colleague Gavin Brown raised that with me at the Finance Committee, I was not as well versed on the Northern Irish situation as I ought to have been. I have since had a look at the system there, and I am interested in the committee's view on the matter.

I have two initial reactions. First, I do not think that we have a sufficient body of evidence from Northern Ireland to tell us how that system is working in practice, so that we can be sure that difficulties are not arising as a result of it.

Secondly, I have a practical concern. Let us say that I am in dispute with my neighbour about my neighbour's high hedge and I make an application and pay the fee. If the local authority adjudicates, says to my neighbour that they must take remedial action and my neighbour complies with that notice, in my view it would not be very helpful from the point of view of the dispute resolution process for the local authority to thank them for complying with the notice and ask them to pay it the £300 or £400 that I have paid. That is likely to lead to a grievance.

If the neighbour refuses to pay the money, the local authority will be in the position of having to pursue them for a few hundred pounds, which may end up being disproportionately costly to recover, whereas if the neighbour does not take the remedial action and the local authority has to take it, it will be more cost effective for the council to pursue that cost than it would be to pursue the initial fee.

Margaret Mitchell: I think that the cost is applied only once the notice has been served—in other words, once the complainant's case has been upheld.

Mark McDonald: Absolutely, but the point—

Margaret Mitchell: Is the point not that the prospect of having to pay the complainant's fee would be quite a deterrent? As your bill stands, there is no deterrent for the owner of a high hedge and no incentive for him to do anything until the very last minute. The loser-pays principle could be a powerful incentive for early resolution and could result in huge cost savings for local authorities in administration and in avoiding escalating costs were the process to continue.

Mark McDonald: I will make two points. Both the examples that I cited relate to the situation in which the local authority finds in favour of the complainant. The difference is that, in one example, the neighbour takes the action and pays for it through getting a contractor in to lop the hedge or do whatever else needs to be done. In the second example, they refuse to do so. In one of those cases, the local authority will be pursuing a few hundred pounds to recover the fee that has been paid; in the other, it will probably be pursuing several thousand pounds' worth of costs. My issue there is about cost effectiveness.

As far as your point about deterrence is concerned, I think that the committee has had fairly compelling evidence from Scothedge on the issue. In addition, there is fairly compelling evidence from south of the border that the mere presence of legislation will resolve a large number of cases. People will modify their behaviour because such legislation exists. The other day, Pamala McDougall told me that there is a case in Airdrie in which one of Scothedge's members has said that the hedge next door has been dealt with simply as a result of the bill going through the parliamentary process.

The mere presence of legislation will modify behaviour, but we will be left with a number of intractable cases that will require adjudication by local authorities. That has been borne out by the evidence from south of the border.

11:45

Margaret Mitchell: I certainly did my part in publicising the committee's work in the *Airdrie & Coatbridge Advertiser*, so perhaps the person saw that.

Mark McDonald: It could well have been all down to your efforts, Ms Mitchell.

Margaret Mitchell: You raised the point about costs escalating and the authorities pursuing complaints. If that is a factor just now, are we not sending out entirely the wrong message by suggesting that, if the cost becomes too prohibitive, we just will not bother? The legislation has to be very robust.

Mark McDonald: I do not want to sound as if I am passing the buck but, in many respects, it is for local authorities to make their own decisions. It may be that a local authority will decide to charge a fee of a few hundred pounds but, rather than having that fee paid all at once up front, it may allow it to be paid in stages, as long as it is recovered over the course of a financial year. Local authorities may take that decision and I will not dictate to them how they should pursue things. However, if I were a councillor and constituents were saying to me that they were having trouble accessing a particular process at the local authority level, I would ask questions about how that process could be made more accessible. I am sure that councillors will ensure that their constituents have access to the process and that it is not cost prohibitive.

Margaret Mitchell: Will you reflect on that at stage 2?

Mark McDonald: Absolutely, and I am more than happy to listen to the committee's views on ways by which the bill could be improved. I am in listening mode—I think that that is the term.

Margaret Mitchell: That is very helpful. Thank you.

John Wilson: Good morning, Mr McDonald, and welcome to the other side of the table. Over the past couple of weeks, you have joined us on the members' side.

I noted that, in your comments on the definition of "high hedge", you referred to

"a constant barrier to light"—

I am sure that that will be reflected in the *Official Report*. However, the current definition in the bill refers to "a barrier to light".

My understanding of the evidence of our witnesses from the Isle of Man, which we heard last week, is that they had estimated costs of £30,000 because they had to visit a particular site for more than 10 months in a year to determine whether there was an infringement of someone's rights.

The difficulty is that the definition of "high hedge" in the bill states that a high hedge is one that

"forms a barrier to light".

Could you be specific? Do you mean

"a constant barrier to light"

or "a barrier to light"? Someone's definition of "barrier to light" could be that they have a barrier to light over the months of November, December and January, but for the other nine months of the year they have sunlight. How do local government officers determine that there is sufficient barrier to light to take action?

Mark McDonald: When I used the word "constant", I was simply referring to the fact that an evergreen or semi-evergreen will form the same barrier to light in June as it will in December, because it does not shed its live foliage. That is the point from which I am coming at this.

John Wilson: I seek clarification because my understanding from the Isle of Man case is that light is not constant. How sunlight approaches and accesses a property shifts throughout the year. How light is shed on a property or garden in November, December and January could be different from how it is shed during the other nine months of the year. We need to be clear that we are not taking action in situations in which there is a barrier to light at a specific time of the year but there is no infringement for the other nine months of the year.

In one piece of evidence that we received, someone had included an aerial photograph. The submitter claimed that they have to use their lights throughout the year because of a high hedge behind them. When you first look at the

photograph, you see that the house faces the sun to the south, and the house itself casts a shadow. The owner on the other side of the hedge could argue that it is not their hedge that is causing artificial lighting to be used throughout the year, but the way in which the house is positioned—the front of the house faces south and the back faces north.

Mark McDonald: There is guidance south of the border, and there are industry standards on hedge height and so on. At the end of the day, the decisions will be for the individual local authority officers who make the assessment. Each case will be judged on its merits. I do not want to talk about the specific examples that the member raises, because I do not want to prejudge cases. In some cases, the officer will find in favour of the complainant and in other cases the complaint will not be upheld. That is just how it will go. However, the right of appeal will exist.

The bill is an enabling bill. The guidance will look to draw on best practice elsewhere. I believe that documents have been drafted on taking account of issues such as the height of the hedge and the effect of light when making an assessment. We put our trust in the professionalism of the officers who will make the decisions.

John Wilson: I welcome those remarks. I hope that we can get a solution to the problem, but my fear is that many people will see the bill as the solution to their problem when it might not be. Scothedge and others have raised issues about single trees and barriers to light from leaf formation on trees at particular times of the year. We need to be careful not to present the bill as something that will encompass everybody who has a complaint against a neighbour who is growing a tree or a high hedge.

For clarification, will the bill affect single trees that are covered by a TPO and which are part of a high hedge, meaning that they could be cut down if action was taken on that hedge?

Mark McDonald: That is a possibility. A mechanism is already in place whereby TPOs can be subject to review. In essence, the section of my bill that deals with TPOs encompasses that process as part of the high hedge assessment. Any case will be looked at holistically and in the round, taking account of the decision-making process that would have been gone through in applying a TPO. If the criteria no longer apply, that might result in the tree being dealt with, if that is the decision of the officer who adjudicates on the case.

John Wilson: In that situation, when would action be taken against such a tree? At certain times of the year, trees are a habitat for wildlife such as birds. If someone makes a complaint in January and the complaint is upheld, do you envisage that action would be taken in February or March, which would be during the breeding season for some species?

Mark McDonald: During the process of piloting the bill, I have become an expert on many things, but I do not claim to have the professional expertise to address that question. It would be for the professionals who are dealing with the case to adjudicate on that matter. We have heard evidence that there is professional expertise out there that can answer such questions on a case-by-case basis.

Stuart McMillan: Good morning. For me, definition is one of the key issues. You will have heard my questions over the past few weeks about that. During the past five years, many constituents have contacted me with issues involving individual trees or trees in general, as opposed to hedges. As drafted, the bill will help a large number of people around the country but it will not affect others. My concern follows on from Mr Wilson's comment. In the first few years after enactment, the bill might create further animosity or disputes between neighbours because folk might have the impression that it will be a panacea and will fix all issues. I know that section 34 says that ministers can amend the definition, but do you foresee any future opportunity to widen the definition? Would you consider widening it as the bill goes through Parliament?

Mark McDonald: I have not developed the ability to see into the future, and I do not want to put myself into a purely hypothetical situation. We have included the power in the bill so that if, after the legislation has been enacted and we have seen it in practice, it is determined that the definition requires amendment, that can be done. Let me be clear that only the definition of a hedge, including its height, can be amended. As I understand it, the provision will not allow for a statutory instrument to bring single trees into the picture at a later stage. The definition could be amended to include, for example, deciduous hedgerows as opposed to evergreens or semi-evergreens. That might well happen. However, I am not going to give a yes or no answer to the question. Who knows what the future holds? Who knows what is going to happen tomorrow, never mind in a few years' time?

Stuart McMillan: The suggestion has been made in some of the written evidence that we have received that the age of a tree should be considered, and a tree that has been there for X number of years should be protected. Last week, we discussed the issue of whether a tree or a property was there first. What happens when an individual who moves into a property does not like

the tree that has been there for many years? It is difficult to legislate for what should happen in such cases, and I fully accept that legislation, including the bill, cannot legislate for every eventuality, irrespective of parliamentarians' desires.

Although I support what you are trying to do through the bill, I feel that neighbour disputes will not go away but will continue in perpetuity because of the narrowness of the definition in the bill.

Mark McDonald: To answer your point about the chicken-and-egg scenario, the bill essentially provides for a cold analysis of a situation, and the simple criterion is whether there is a barrier to light. The question who planted what first, or who built what first, does not enter into it. There is a simple assessment of whether the hedge is a barrier to light.

You could move next door to a property that has a 2m high hedge already planted before you built your house or moved in. If the person next door allows it to grow to 30 feet so that it becomes a barrier to your light, and you are told that because you built your house after the hedge grew, there can be no adjudication, you are not going to get satisfaction. That is why the criterion of whether there is a barrier to light is in the bill.

12:00

On your second question, which was whether neighbourhood disputes will continue, I will not pretend that the legislation will resolve every dispute between neighbours. After all, there are times when the process will not find in the complainant's favour. However, the bill allows for the introduction of a mechanism for resolving such disputes that exists in other parts of these islands but not in Scotland, and I believe that that is a key step forward. Given evidence from the main campaign group that more than 90 per cent of cases will be dealt with, I think that the vast majority of people will find satisfaction as a result of the bill.

Stuart McMillan: That response is a wee bit different from what it says in paragraph 111 of the policy memorandum, which states:

"The Bill promotes the resolution of disputes ... By doing so it promotes strong supportive communities for all people".

Surely if the bill leaves out deciduous trees and nuisance vegetation it will not promote

"strong supportive communities for all people".

Mark McDonald: First of all, I am seeking the most cost-effective way of resolving disputes. At a time when local authorities do not have huge amounts of money to throw around, I do not want to make the process very complex, which is what I think would happen if we included single trees and deciduous vegetation. The vast majority of cases will be dealt with on their own terms; I am not claiming that the bill will deal with every dispute. The wider aim in the policy memorandum of having strong communities will be borne out in the legislation, which provides a dispute resolution mechanism that does not exist at the moment. I certainly think that it will be effective in that respect.

Stuart McMillan: I note that the definition in the Isle of Man legislation is wider than that in England and Wales and covers deciduous trees. In light of the research and preparation that you have done in introducing the bill and bearing in mind the evidence that we heard last week from witnesses from the Isle of Man, do you think that the Isle of Man experience has been successful and has worked well?

Mark McDonald: Indeed. However, I found the Isle of Man evidence interesting because although the witnesses thought that the legislation had worked well they also talked about a protracted and expensive case that they had had to deal with. Braddan parish is very small—it has fewer electors than in a former one-member council ward in one of our urban local authorities—and if you were to extrapolate the number of cases for that population to, say, an urban area you would be talking about several hundred. I do not think that that would necessarily be borne out in practice but the number of cases relative to the population is, I think, quite significant.

Moreover, as the Isle of Man witnesses' evidence made clear, introducing that layer of complexity also introduces an element of cost, and the last thing that I want to do is to put on to local authorities a much more significant cost burden than has been envisaged under the current bill, which would then be transferred to individual applicants. I am open to the committee's views on the matter but my view is that introducing single trees and deciduous vegetation into the bill at this stage would result in a layer of complexity that might have unforeseen consequences.

John Pentland: I am glad to hear you say that you will take on board the committee's views. The issue that I want to raise relates, again, to the definition. In response to Margaret Mitchell, you said that individual trees sometimes take a long time to grow. However, such problems already exist. We have been talking about single trees proving a barrier to light but the fact is that they are also associated with organic litter, problems as a result of their deep bulb root, damage to property and so on. If you are reconsidering widening the definition, I hope that you will also seriously bear in mind that single trees do not just

form a barrier to light and that there are other issues to consider.

Mark McDonald: Sure. As part of the process of drafting and introducing the bill, I met a number of organisations and spoke to a number of different groups before composing the final draft. One such group was the Scottish tree officers group, which sent representatives to the committee last week. Their unanimous view was that single trees should not be included in the legislation.

I take on board your points about leaf litter and root damage. First, there are several means by which things such as root damage can be addressed at present, and secondly, people already have the right to deal with any encroachment of branches on to their property.

On the issue of trees being a barrier to light, I have put on record my views about the nuances and complexities that might arise in that regard.

The Convener: I will play devil's advocate on that one. The representatives said that there were difficulties in getting on to some private property to deal with the issues. I do not know whether that is a matter for this bill, or whether it should be taken up elsewhere. During discussions, you have probably come across a number of anomalies. Could any of those be resolved by the bill, or would they be better addressed by other means?

Mark McDonald: The bill gives rights on accessing property in order to take remedial action where that is required. There is an important point to put on record with regard to the situation in England after the legislation was introduced. We wrote to a number of local authorities, and the information that we received is laid out on page 15 in the financial memorandum. There is a table that shows the local authorities that responded, and the number of occasions on which those authorities have had to take enforcement action by going on to the property and cutting back the hedge.

The Royal Borough of Windsor and Maidenhead, Ashford in Kent and Sandwell in the West Midlands all had zero examples of that happening. Only in South Tyneside has there been one example, among all the local authorities that responded, of an authority having to go in and take enforcement action.

The evidence from south of the border is that, in instances in which a formal application is made and a notice is issued, the notice is complied with in almost every case. I accept that there will be a need to ensure that safeguards are in place to ensure that, where access to a property is required, it can be gained, and I take on board the committee's point in that regard. I am happy to look at whether there are other ways in which that could be addressed rather than simply through the measures that are in the bill. However, it is worth bearing in mind that the number of times that such action is likely to be required is very small.

The Convener: With regard to definitions, the Scottish Wildlife Trust has raised concerns that the bill as currently drafted will capture native evergreen species, which can provide a significant haven for wildlife. The trust suggested that the bill should refer specifically to non-native fast-growing conifers rather than using the term "evergreen". How do you feel about that?

Mark McDonald: I understand the point that is being made, but the difficulty is that it would create a significant loophole, in that anyone who wished to pursue a neighbourhood dispute through the deployment of vegetation could simply shift from a non-native to a native species and they would no longer be captured by the legislation.

We should judge each individual case on its merits. Undoubtedly, there will be some requirement to look at the biodiversity impacts of any action that will be taken, but I do not view the inclusion of native species in the bill as a problem. It prevents the creation of an unnecessary loophole.

John Wilson: On the issue of biodiversity surveys being carried out before action is taken, will the cost of that be borne by the local authority or the complainant? Biodiversity studies can be fairly expensive—any developer would say that they cost thousands of pounds. I do not expect a large-scale survey to be done for a hedgerow, but the costs will increase if a survey or monitoring of the wildlife in a hedge and of various other aspects is carried out. Will the fees that local authorities set capture all the costs that they will bear, or might the costs for individual complainants rise substantially? One big issue that Scothedge raised was that, if the fees are too high, that might restrict the number of complaints. How do we achieve a balance and ensure that the bill is cost neutral to local authorities?

Mark McDonald: I have a few points on that. First, if the committee is minded to consider the possible inclusion of single or deciduous trees in the definition of a high hedge, it is worth bearing in mind that the RSPB, the Woodland Trust and the Scottish Wildlife Trust strongly made the point that there would be significant need for biodiversity assessments in those instances, and significantly more so than in the case of evergreens and semi-evergreens.

Secondly, I take on board Mr Wilson's point about biodiversity surveys. Based on the evidence that we have heard, such surveys will probably be few and far between, but the costs would be factored into any costs that the local authority is

likely to incur. In essence, the bill says that a local authority must not charge a fee that is higher than the amount needed to recover its costs. However, it is up to each local authority to set its fees. A local authority might decide that, because the occasions on which a biodiversity survey is required will be few and far between, it will not factor those costs into the fee, but will just suck them up as and when they arise. That is a decision for the local authority to take.

On whether the cost will be prohibitive, I return to the point that it is for each local authority to determine how to levy the fees. The local authority officers who set the fees will be held to account by locally elected members through the local authority's committees. If councillors are having their doors battered down by constituents who cannot gain satisfaction because the fees are prohibitive, I would suggest that those councillors will consider ways in which they can ensure access to dispute resolution for their constituents. There will be a self-regulating mechanism, if you will. There will be an onus on local authorities to set a fee that does not go above and beyond the costs that they are likely to incur, but that does not mean that they will have to set it on a cost-neutral basis; it simply means that, if they wish to do so, they have the ability to do so.

The Convener: I thank Mark McDonald for his evidence. I also thank all the witnesses who have given evidence on the bill and on every other issue that the committee has considered during 2012, and I wish everyone a merry Christmas and a happy new year.

Mark McDonald: Convener, I might have forgotten to add my thanks to the witnesses who gave evidence on the bill. I want to put my thanks to them on the record.

The Convener: Thank you.

As agreed, we move into private session.

12:14

Meeting continued in private until 13:20.

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