



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

LOCAL GOVERNMENT AND REGENERATION COMMITTEE

Wednesday 1 February 2012

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LOCAL GOVERNMENT AND REGENERATION COMMITTEE

3rd Meeting 2012, Session 4

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Kevin Stewart (Aberdeen Central) (SNP)

COMMITTEE MEMBERS

*Anne McTaggart (Glasgow) (Lab)

*Margaret Mitchell (Central Scotland) (Con)

*John Pentland (Motherwell and Wishaw) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*Bill Walker (Dunfermline) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Mark McDonald (North East Scotland) (SNP)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 4

Scottish Parliament

Local Government and Regeneration Committee

Wednesday 1 February 2012

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

Decision on Taking Business in Private

The Convener (Joe FitzPatrick): Good morning. I welcome everyone to the third 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 devices.

Our first item of business is a decision on whether to take in private agenda item 3. Are we agreed?

Members *indicated agreement.*

Proposed High Hedges (Scotland) Bill

10:00

The Convener: Our next item of business is an evidence-taking session with Mark McDonald MSP on a draft proposal for a member's bill. We have before us a proposal for a high hedges bill, along with a statement of reasons from the member as to why he feels that no further consultation on the proposal is required.

I welcome Mark McDonald to the meeting and invite him to make an opening statement on why he feels that there is no need for further consultation on his proposed bill.

Mark McDonald (North East Scotland) (SNP): Thank you, convener. I am grateful to the committee for inviting me here today. I will offer a bit of background and outline my ideas on the measures that I will seek to introduce in the proposed high hedges (Scotland) bill. I hope that what I say will add to your consideration of the statement of reasons that I lodged on 21 December last year.

The journey to introduce legislation on high hedges in Scotland has been a long one, but I am confident that my proposal will result in an outcome that will be welcomed by the people of Scotland. My aim is to bring to Parliament a member's bill that will provide residents of Scotland with a mechanism that others across the United Kingdom take for granted: a right to a legal framework for settling disputes related to high hedges.

This is not the first time that the Parliament has considered the issue; proposals for similar members' bills have been lodged on three separate occasions previously. I intend that my proposal should be the last and I hope that members will agree with that and support me.

The Scottish Executive consulted on the issue in January 2000 but it received a poor level of response in comparison with similar consultation in England and Wales—a consultation there in 1999 received more than 3,000 responses. Former MSP Scott Barrie also consulted on the issue as part of his attempt to introduce a bill.

The Scottish Government's most recent consultation on the issue ran from August to November 2009 and attracted more than 600 responses. I believe that that makes the case for having no further consultation on the issue. Ninety-three per cent of those responses came from private individuals, many of whom described themselves as being in dispute. Over 77 per cent of respondents favoured a legal solution to the

problem. The consultation included a number of legislative options on which respondents could express a view, and over two thirds of private individuals favoured the replication or modification of the English and Welsh legislation. My proposals build on the analysis of the consultation and I anticipate that the views will be reflected in the draft bill.

In the short time in which I have been taking forward this work, I have met ministers; the campaign group Scothedge; a number of local authority tree officers from Scotland and England; and, crucially, officials of the Convention of Scottish Local Authorities and the Scottish Court Service.

I came to the issue with an open mind about solutions. I am sure that the committee knows that the option that was promoted previously was the creation of a right that would be exercised through the courts. I investigated that and built on the considerable work of the previous Minister for Community Safety, Fergus Ewing. A right could be created and a court could consider whether it had been breached. A court could then make a judgment. However, addressing the problem caused by the hedge itself would be problematic. The court would have to enforce a decree in ways other than fining or imprisoning the hedge owner. We do not want to punish growers of high hedges; we want to address the problem that is caused.

Officials of the Scottish Court Service advised me that a potential mechanism to enforce the court's decision would be to use the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. Unsurprisingly, that legislation was not designed with high hedges in mind. However, that mechanism would move the court option away from being an anticipated simple and straightforward solution towards something that I regard as untried and untested and not necessarily a simple option at all. I think that it would carry the risk of significant costs for individuals and the potential for things to go wrong. Of course, it remains an option should the committee decide that it is worthy of further exploration.

My view is that the best way to achieve an effective, practical and sustainable resolution to this long-standing problem is to provide local authorities with powers of last resort that would allow them to take action to resolve a high hedge issue should other attempts to resolve it fail. That path has been followed in all other parts of the UK: in England and Wales through the Anti-social Behaviour Act 2003; in the Isle of Man through the Trees and High Hedges Act 2005; and in Northern Ireland through the High Hedges Act (Northern Ireland) 2011. The bill would ensure that neighbours attempted to resolve the problem

before having recourse to the local authority. When everyone can agree on the solution to a problem, that is likely to achieve the most effective and sustainable solution.

The next step would be to approach the authority, which could assess the problem, decide on a course of action and inform neighbours. It would be up to the hedge owner to take the required action. If that action was not taken, the authority could take it and reclaim the costs from the hedge owner. I stress again that the authority taking such action would be very much a last resort. My intention is that authorities that did that would be able to recover the costs involved.

I will speak briefly about the consultation and direct engagement that I have had with local authorities in England. I met officials from two authorities—Hartlepool Borough Council and South Tyneside Council—and those who are supporting me in the work on the bill have engaged directly with a number of other people.

Experience in England has shown the proposed solution to be effective. What can start as lots of inquiries quickly becomes just a handful of complaints and an even smaller number of enforcement actions. To illustrate that, Tony Dixon of Hartlepool Borough Council told me that only seven of the 170 initial inquiries following commencement of the relevant legislation became formal complaints and that no formal complaints have been made since 2009.

There is more work to be done to develop the proposals for further scrutiny by the committee. However, the discussions that I have had satisfy me that remedial action through the provision of the proposed modest powers to local authorities is the best way forward. The very existence of effective powers that can be exercised by a local authority is enough to bring together disputing parties and to make resolution more likely.

My preferred option's benefits over the court option are clear. I have chosen a practical solution that is tried and tested and which has been proven to be effective over an untried and untested option that would bring with it significant financial risks. I hope that the committee will agree with me, on the basis of what I have outlined, and that it will agree that further consultation would take time, when all interested parties want action. Furthermore, there have been no significant developments since the previous consultation. I am happy to take questions from the committee.

The Convener: Thank you for your opening statement. As MSPs, we all have frequent correspondence from constituents who have difficulties with high hedges, so they are an important issue.

You said that the relevant provisions in England are part of the Anti-social Behaviour Act 2003. Why did you decide that your provisions should not be part of similar antisocial behaviour legislation in Scotland?

Mark McDonald: When I was down in England to take evidence and meet local authority tree officers, probably the only drawback to the legislation that they identified was that it hangs on the 2003 act. Essentially, an antisocial behaviour order is applied to a hedge. When the owner sells the relevant property, that antisocial behaviour order remains on the hedge. That causes problems for property owners. I am interested not in attaching a stigma but in resolving an issue.

Kevin Stewart (Aberdeen Central) (SNP): You said that local authorities would have powers of last resort. Often, the local authority owns the land on which the problem vegetation grows. How do you foresee that being dealt with, if local authorities have powers of last resort and choose not to or cannot afford to deal with the vegetation for which they are responsible?

Mark McDonald: That issue will need to be looked at more closely. I have discussed with COSLA how we ensure that, when local authorities own the vegetation, they are aware of their responsibilities.

The officials who are supporting me have had discussions with Network Rail, which is responsible for a number of screens that have involved planting high hedges and other vegetation. Network Rail has been constructive in those discussions and I hope that local authorities will be constructive in their discussions. I agree that we will have to consider the position of local authorities as we discuss matters.

Kevin Stewart: The previous consultation was on

“high hedges and other nuisance vegetation”.

I take it that we are not talking about trifids or rogue carrot patches. What would other nuisance vegetation be? Would it include trees and Japanese knotweed? Will your bill cover that?

Mark McDonald: I have concluded that I want a tightly defined bill that concerns specifically high hedges. If I were to pull in other vegetation, that would run the risk of creating unwieldy legislation that was difficult to enforce.

I am open to the prospect of inserting in the bill a clause to the effect that the legislation should be reviewed after a period of time. Such a provision was part of the legislation in England and Wales. However, I am wary of including too many provisions in the bill because, in doing so, I would run the risk of creating legislation that was virtually unenforceable and unworkable.

Bill Walker (Dunfermline) (SNP): Good morning, Mark. I have two follow-up points. In my mailbag, I have had lots of correspondence on the issue in Fife. Unfortunately, trees are often part of the problem, because they can form a neat barrier. The issue is not just shadow, but the views that people should be able to enjoy from their garden. I am talking about trees that are pretty close to the boundary fence and which form a barrier to light and vision. That is my first point. I hope that, despite what you have said, you will not dismiss that and that, somehow, you will be able to take trees into account in your bill.

Secondly, I agree that we have been consulted out on the issue, but I want to clarify, just for the avoidance of doubt, that although public consultation has been carried out you still intend to consult local government and local bodies. I refer to the last page of your statement of reasons, which mentions discussion with local partners.

Mark McDonald: To answer your first question, which was about how we define a high hedge, we are talking about evergreens or semi-evergreens that are packed tightly together. At the moment, I do not intend to include deciduous trees, because there are loopholes to do with whether trees that shed their leaves could be considered to form a constant barrier to light in the same way that evergreens and semi-evergreens can. I am not persuaded to go down the route of including deciduous trees in the provisions, and I do not think that that has been part of previous proposals on high hedges. When it comes to the tree element, evergreens and semi-evergreens that are packed tightly together and which form a barrier to light are pretty much where the definition will land.

There will be consultation with local partners. I have had discussions with COSLA, which has agreed to work with me on the bill, to ensure that it is framed in such a way that it will allow local authorities to play a proper role in its implementation.

Bill Walker: A tree can be a barrier not just to light coming in, but to a view. We all like a view from a garden and do not want to be fenced in—that is why I raised the issue. It is difficult to see through trees for most of the year.

Mark McDonald: I take on board your point but, as I said in my previous answer, if high hedges are too widely defined, I run the risk that the bill will have loopholes that can be run through.

Margaret Mitchell (Central Scotland) (Con): Good morning. High hedges are a contentious issue, so your bill is welcome. However, there is evidence that local authorities have enforcement powers for a range of issues that they do not use. At a time of pressure on budgets, will dealing with high hedges be enough of a priority to ensure that

the remedy that we all seek to achieve is achieved?

Mark McDonald: I can give you some examples of what happened in England. The English authorities from which we requested information said that although, initially, they got a large number of inquiries, that number soon became a very much smaller number of complaints. The intention is that a fee would be attached to a complaint, so there would be a cost-recovery mechanism to ensure that the costs of investigating a complaint and issuing an enforcement notice were covered.

If an authority had to take remedial action because a notice had not been obeyed—the evidence from England is that that happens once in a blue moon—full cost recovery would be attached to that as well. In other words, the authority would do the work and it would recover the costs. I do not think that we are talking about a significant burden from the point of view of the amount of work that local authorities are likely to do. The evidence from down south is that when the legislation was introduced, although a number of authorities thought that they would have to recruit a high hedges officer, they quickly discovered that the high hedges work could be wrapped up inside work that they were already doing, so it did not add a significant cost burden. They found out that they could carry out the role that they had to play.

10:15

Margaret Mitchell: I think that you said that legislation elsewhere provides for a meeting at which mediation can take place. Such an approach incurs costs in officials' time. If talks break down, what is the ultimate sanction for the local authority?

Mark McDonald: The ultimate sanction is that the local authority issues a notice that requires the hedge to be cut to a certain level, which is for the local authority officer to determine, based on professional expertise. That is what happens in England and Wales. There is a height beyond which the legislation comes into play and an assessment is made, but that does not mean that all hedges must be cut to that height.

The official would assess the situation on site, and if they determined, for example, that cutting the hedge below a certain level would damage it they would not recommend such a course of action. The authority's role would be to go in and issue a remedial notice, provided that a formal complaint had been lodged, of course. That is the point at which the local authority would get involved.

One of the reasons why I have leaned towards using local authorities rather than the Scottish Court Service is that local authorities can be much more enabling than perhaps the courts can be in identifying potential sources of mediation. An issue was raised with me about what would happen if the person who owned the hedge was elderly and could not cut it themselves or afford to pay for a private company to do the work. A local authority might be able to direct the person to a social enterprise, for example, which might do the work at a much-reduced cost or no cost. In my visits down south, I found that in such circumstances the local authority is able to identify such organisations for people. The Scottish Court Service could not have that role; the courts would deal with the case and leave it to the parties to resolve the situation. That led me to think that the local authority option might be better at resolving things than the court option would be.

Margaret Mitchell: What would happen if there was a wilful refusal to heed the notice?

Mark McDonald: The local authority would have the power to go in, take the action and recover the costs from the individual. There are a number of ways in which local authorities can recover from individuals the cost of works that they have had to carry out, such as attaching a land debt or invoicing. We would look to build on existing approaches.

Margaret Mitchell: If the approach failed, could there be court proceedings?

Mark McDonald: There would be the potential for that, but I hope that it would not happen. The bill would reflect the opportunity that local authorities would have to take such a route, should that be required.

John Pentland (Motherwell and Wishaw) (Lab): I think that all members are delighted to hear about the proposed bill and I agree that the best way forward is through the local authority rather than court proceedings. Like Mrs Mitchell, I have some concerns about enforcement, especially in a time of austerity when local authorities might prefer to do something other than spend money and then try to recover it. I hope that the approach would work.

The bill would respond to a problem, and rightly so. You explained why you did not want to use the antisocial behaviour legislation and I take the point that we would end up with antisocial behaviour orders on trees. Have you thought about using the planning legislation? If someone wants to build a fence, they cannot make it higher than 6ft. Could the planning process be more proactive?

Mark McDonald: I take your point entirely. I considered the matter. The problem is that if someone builds a 6ft fence, it will not grow,

whereas a 6ft hedge will grow. I do not intend the bill to be prescriptive about the height of all hedges in Scotland; the intention is to provide an opportunity for disputes about the height of a hedge to be resolved. Currently, that cannot be done and such disputes go unresolved, which has a significant personal cost for people's mental health and wellbeing.

Some neighbours have no problem with the high hedge next door, so I do not want to create a problem where none exists. The bill will be very much about resolving disputes and it will not be prescriptive about the height of hedges. That is why I decided against using the planning system.

John Pentland: I understand that fences do not grow, but my point was whether there might be a restriction on what a person could grow in, for example, their back garden. However, you have explained that you do not want such restrictions, which is fine.

Anne McTaggart (Glasgow) (Lab): As Kevin Stewart said, the local authority sometimes owns the land that has the problem and the cost of doing something about it would fall on the local authority. Have you considered the cost implications of that for local authorities?

Mark McDonald: We considered cost issues. The evidence from down south is that dealing with high hedges is not a significant sum in a local authority's budget.

I am promoting the bill, so I have been receiving e-mail complaints about disputes. However, I have not come across a complaint that involves a person being in dispute with the local authority. The vast majority of disputes tend to be between private home owners and neighbours. That is reflected in the fact that there have never been any complaints about the Network Rail screening measures to which I referred earlier. That is not to say that they might not happen, but at present disputes are predominantly between neighbours. However, that is not to say that circumstances such as those that Kevin Stewart and you have identified would not arise in the future.

The evidence from down south on fees for taking remedial action is that, in some places, fees are being levelled only to deter people from pursuing frivolous complaints. However, in most local authorities the fee is just a few hundred pounds, which enables full cost recovery.

Kevin Stewart: Margaret Mitchell made a point about costs for mediation and other possible measures. Has COSLA or any local authority indicated how much the disputes cost—in terms of officer time and elected member time at Parliament and council level that is required to deal with them—when we have no way of resolving them? I remember an occasion many

moons ago when the police became involved because of things that developed from the initial dispute.

Mark McDonald: We do not have such figures and I suspect that it might be difficult to get them. Authorities do not have any power in that regard, so they probably do not have estimates for costs. However, you are right to identify the kind of cost that exists at present. The disputes are not necessarily just about high hedges; often they are about high hedges, but in other cases, including cases from down south, we have seen that a dispute about the hedge is often the culmination of an existing dispute between neighbours.

Unlike the situation down south, we do not have the ability to resolve that aspect of a dispute, which leads to things getting out of control. You cited an example of the police getting involved. We want to try to resolve such disputes and ensure that they do not escalate to that level.

Bill Walker: Do you agree that the evidence from England not only supports your proposal but shows that the existence of legislation will act as a deterrent and encourage people to behave properly in the first place, such that there will be no need to go down another route? If we had such legislation, pointing a finger at the law would make people see sense. Do you agree that the deterrent value of law is often a strong argument in favour of it?

Mark McDonald: Yes. For example, the Royal Borough of Windsor and Maidenhead, which I suspect is a place where high hedges are somewhat popular and prevalent, said that it had concerns before the legislation was enacted. After that happened, it received 300-plus initial inquiries, its approach to which was to ask people whether they had spoken to their neighbours, gone through mediation or taken other steps before it considered getting involved. In many instances, the answer to those questions was no because, as its evidence shows, it progressed five complaints from the more than 300 inquiries that it received in the first year.

The answer to your question is that the existence of legislation will often result in people resolving disputes before they reach the stage of progressing a complaint. Of course, there will be a few intransigent cases in which a complaint has to be progressed, but the examples from down south suggest that they will be very much in the minority.

Anne McTaggart: What discussions have you had with the Scottish Government on the proposed bill?

Mark McDonald: I have met ministers a number of times. As you know, the Scottish Government has agreed to support my bill, as a result of which Scottish Government officials have been assisting

me with drafting and setting up the kind of meetings that I have been attending. I have had a number of discussions with ministers; I am constantly liaising with officials; and the Government supports my measures.

John Pentland: Mr McDonald must have been persuasive, because I note that back in 2010 the then Minister for Community Safety said that he would prefer to create a legal remedy. Obviously you have been able to persuade ministers that it should be a local authority matter. Well done. *[Laughter.]*

If the power in question were extended to local authorities, could it also be extended to housing associations or would the local authority be asked to act as intermediary in cases involving housing associations?

Mark McDonald: I do not want to overstate my powers of persuasion; the fact is that, since 2010, Roseanna Cunningham has become the minister with responsibility for community safety. I have spoken to her and the new Minister for Local Government and Planning, Derek Mackay, a number of times and they both agree that my suggested route is the way to go. I would not say that I am not a persuasive individual, but in this case the final decision was not down to my powers of persuasion.

As for extending the powers to housing associations, I point out that the bill seeks to deal with disputes not just between council tenants but between private individuals and, possibly, housing association tenants. Creating one body of last resort is, I think, the way to go on this issue and extending the power to other organisations might well create difficulties. As a result, I will not be extending the power to housing associations; the local authority will be very much the point of last resort.

The Convener: As there are no more questions, I thank Mark McDonald for his evidence, which we will now discuss in private.

10:28

Meeting continued in private until 10:57.

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