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**Local Government and Communities Committee
Comataidh Riaghaltas Ionadail is Coimhearsnachdan**

**Post-legislative scrutiny of the High
Hedges (Scotland) Act 2013**



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Local Government and Communities Committee

To consider and report on communities, housing, local government, planning and regeneration matters falling within the responsibility of the Cabinet Secretary for Communities, Social Security and Equalities.



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Introduction

1. The Committee reports to the Parliament as follows—
2. The High Hedges (Scotland) Act 2013¹ ("the Act") places a duty on the Parliament to make arrangements for a committee or sub-committee to report to the Scottish Parliament on the operation of the Act during the review period. That review period began on 1 April 2014, when section 2 (relating to applications for high hedge notices) came into force and ends 5 years after that date, or on such earlier date as either the committee or sub-committee may determine.
3. At its meeting on 1 February 2016, the Committee agreed to fulfil this requirement and undertake post-legislative scrutiny of the Act to consider whether the legislation has been working well in practice.

Background to the Act

4. The principle aim of the Act is to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property and give local authorities powers to settle disputes between neighbours related to high hedges.
5. Where a hedge has been defined as a high hedge under the Act, an owner or occupier of a domestic property can apply to their local authority for a high hedge notice. Under the Act, local authorities must act as an independent third party to consider the circumstances of each case to identify whether a high hedge is having a negative effect on neighbours' reasonable enjoyment of their house.
6. If the local authority, having taken all views into account, finds that the hedge is having an adverse effect, it could issue a high hedge notice requiring the hedge owner to take action to remedy the problem and prevent it reoccurring. Failure to comply with such a notice would allow the authority to go in and do the work itself, recovering the costs from the hedge owner. There is a right of appeal to the Scottish Ministers against decisions of an authority and any high hedge notice issued by it.
7. The Act allows local authorities to issue their own guidance on the Act, which can be more specific about how that authority will carry out their duties under the Act. However, section 31² states that local authorities must consider guidance produced by the Scottish Government³ when issuing their own guidance on the Act.

Evidence received

8. The Committee issued a call for views on 6 February 2017, which closed on 20 March 2017, and received 64 responses, mainly from individuals involved in disputes with their neighbours over high hedges. In order to consider the operation of all aspects of the Act effectively, we posed the following questions:
 - Has the definition of a high hedge as set out in the Act proved helpful? If not, please provide details;
 - Do you have any experience of the appeals procedure as set out in the Act?
 - Do you have any comments on the enforcement procedures under a high hedge notice?
 - Do you have any comments on fees and costs?
 - Overall, are there any aspects of this Act which has had a positive or negative impact on your life?
 - Any other issues relating to the Act which you wish to bring to the attention of the Committee?

9. The Committee then took evidence from a range of witnesses during April and May 2017, including individuals who had responded to the call for written views, local authorities, Mark McDonald MSP, the member who introduced the Bill, and finally from the Minister for Local Government and Communities. The Committee would like to thank all those who gave evidence. Further details on all the evidence gathered, including a summary of the written submissions, can be found on our [website](#).

Issues explored

10. Concerns regarding the operation of the Act broadly covered the following areas:
 - Data collection and record keeping;
 - Definition;
 - Enforcement;
 - Fees and costs;
 - Timing.

Data collection and record keeping

11. There is no requirement under the Act to keep records of the number of applications, failed applications or appeals or to provide any reports to the Scottish Government in relation to high hedges. This means that procedures in individual local authorities differ and that it is a challenge to build up a full picture across Scotland of the level of activity/demand in relation to high hedge issues.
12. One further challenge we heard about relates to the circumstances whereby a local authority refuses an application on the grounds that it is a non-hedge, resulting in no record being kept of this application. Concerns were expressed regarding this lack of information on the number of failed high hedge applications across local authority areas as this makes it difficult to gauge the actual level of demand placed on local authorities. In addition, where disputes had been settled prior to any formal application having been made, again no records were kept. Witnesses argued that it was impossible to fully understand the scale of the impact of this legislation when the number of pre-applications or failed applications is unknown.
13. In contrast to Scotland, when high hedge legislation came into effect in England in 2005, local authorities were asked to keep records of the following to inform a review of the process to take place on a 5 yearly basis: ⁴
 - number of enquiries about the legislation;
 - number of formal complaints;
 - number determined;
 - number of remedial notices issued;
 - number of complaints regarding failure to comply;
 - number resolved informally;
 - number of prosecutions and outcome;
 - number of occasions that default powers were used to carry out works to a high hedge.

14. Pamala McDougall said that English legislation had had a deterrent effect, discouraging people from growing anti-social high hedges and her hopes were that the Act in Scotland would do the same. However she told us—

” I know from anecdotal evidence that it did but, as far as I know, there are no records to tell us how many situations it has dealt with. It would be interesting to get that information from another source. We could not find that out from the councils.

Source: Local Government and Communities Committee 19 April 2017, Pamala McDougall, contrib. 31⁵

15. Julie Robertson from the Scottish Government confirmed that data was not collected from local authorities and explained—

” We expect that some local authorities will keep a record of the number of applications that they process. However, we know that where an application is dismissed by a local authority, the local authority does not tend to record that information, because it does not see it as an application.

Local authorities will keep records of the applications that they accept, receive and process. The DPEA will keep records of the appeals, but the Scottish Government does not collect any data.

Source: Local Government and Communities Committee 24 May 2017, Julie Robertson, contrib. 51⁶

16. The Minister for Local Government and Housing indicated that he was less concerned by this issue and was also not convinced that the collection of data and reporting centrally on high hedges would be helpful. He told the Committee—

” I would have to be convinced that there was a real benefit in adding to the bureaucracy, which would inevitably add to the cost that falls on the people who apply for the notices.

Source: Local Government and Communities Committee 24 May 2017, Kevin Stewart, contrib. 66⁷

17. During the course of the evidence-taking, we agreed with witnesses that this lack of data was concerning and wrote to the Minister asking him to gather information on what data exists from local authorities in relation to pre applications, applications and appeals. He noted this request and, on the issue of having uniform data collection across all local authorities, informed the Committee again that this could involve additional costs for local authorities which could increase the cost of applications—

” As you are aware, the Act requires potential applicants to take “all reasonable steps” prior to an application being lodged. As such, information on applications will only provide us with a partial view of the situation across local authorities. Therefore any new uniform data collection system would be disproportionate to the information gathered and the costs attached to the collection of data could make the application process disproportionately expensive. For these reasons, I remain of the view that there is no benefit to be gained from collecting data uniformly from all 32 local authorities. ⁸

18. In July 2017, the Scottish Government - following a further request by the Committee - provided additional [supplementary written evidence](#). We requested information on the:

- Number of pre applications, including situations where the authority has dismissed the application on non-hedge grounds;
 - Number of applications;
 - Number of appeals; and
 - Timescales for processing applications.
19. In total, 28 of Scotland's 32 local authorities completed the survey requested by the Committee. In relation to pre-application checks, 23 local authorities offer these whilst 5 do not (4 local authorities did not respond to this question), with the annual number of pre-application enquiries fairly consistent with the number of checks that take place across Scotland (around 80 or so in any year).
20. The data also shows that the number of applications had decreased across Scotland since 2014 (when there were 115 applications) to 2016 (when there were 55). Fife Council, Stirling Council and City of Edinburgh Council saw the most applications in 2014.
21. Local authorities did not hold substantive and reliable data on timescales, with some reporting a response taking 7.5 hours and some 17.5 weeks.

22. The Committee acknowledges that there is no requirement under the Act to instruct local authorities to uniformly collect data and report back to the Scottish Government.
23. Given that the Act made it a legal requirement that post-legislative scrutiny was undertaken by a parliamentary committee, it seems remiss that there is no provision to collect data and report to the Scottish Government on aspects of high hedge applications.
24. Without this data, it is extremely difficult to undertake effective post-legislative scrutiny to ascertain the extent to which the Act has been working in practice and, in particular, the extent to which the existence of the Act has prevented neighbourhood disputes over high hedges by discouraging neighbours to grow such hedges.
25. The Committee recommends that there should be consistent data collection across all local authorities in order to allow the effectiveness of the policy to be evaluated. The Scottish Government should take steps to achieve this.

Definition

26. Section 1 of the Act, sets out the meaning of 'High Hedge' as follows—

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

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

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

(c) forms a barrier to light.

(2) For the purposes of subsection (1)(c) a hedge is not to be regarded as forming a barrier to light if it has gaps which significantly reduce its overall effect as a barrier at heights of more than 2 metres.

(3) In applying this Act in relation to a high hedge no account is to be taken of the roots of a high hedge.

27. A key issue for witnesses was the fact that the Act sets out what it means by a high hedge but does not actually define what a hedge is, which has led to different interpretations of the Act across Scotland. In addition, individuals told us that they felt that local authorities were not adhering to the spirit of the Act by adopting a rigid approach when considering high hedge applications. We were told of numerous examples where the local authority decided that tree lines and other nuisance vegetation did not constitute a hedge in the first instance and therefore could not be considered under this Act.

28. Original guidance on the Act, published in 2013, by the Scottish Government contained the Oxford English Dictionary definition of a hedge. However, following consultation and a number of complaints, this was removed from the revised guidance which was issued in 2016.

29. Local authorities took different views on this issue and asserted that they were following the spirit of the Act, which they firmly believed covered hedges and not tree belts and other vegetation. Kevin Wright from Aberdeen City Council explained that they have numerous applications which relate to non-hedges which consists of trees rather than hedges and told us—

” ...I want to take this opportunity to flag my concern about this potential review expanding the remit of the 2013 act.

Source: Local Government and Communities Committee 10 May 2017, Kevin Wright (Aberdeen City Council), contrib. 57⁹

30. Alastair Hamilton, of Fife Council, pointed out that local authorities must consider both the views of the hedge owners and the neighbours who apply for a high hedge notice and that the legislation has to be robust in order to justify affecting someone's property.

31. Subsection 1(1)(c) of the Act introduced the concept that blocking of natural daylight from a domestic property by high hedges close to an adjoining property needs to be addressed. Individuals argued that the Act should contain a definition of a hedge which related to loss of light. This would be a less subjective way of deciding whether a row of trees or shrubs or nuisance vegetation is a hedge in the first instance.

32. For example, Hugh Brown believed that "to decide that a high hedge is not a high hedge because there are other trees behind it making it part of a wood is absurd. A high hedge is a high hedge no matter what is behind it." ¹⁰ Kenneth Gray made the point ¹¹ —

” The definition of a high hedge is too restrictive when the problem lies with closely-planted trees which spread sideways as well as upwards at a horribly quick rate. Too much sympathy and leeway seems to be given to the offending party who is generally basking in the sunshine denied to the complainer.

33. Dr Brown told us—

” It seems to me that the act was intended to alleviate the effect of people living in the shadow. Surely that should be the focus, not whatever causes that. Something that was not planted as a hedge might still not let light through. We are going down the wrong track. The question should be: does it affect the amount of light that reaches a property and does it affect the view? We should focus on that rather than on what plants cause the problem.

Source: Local Government and Communities Committee 19 April 2017, Dr Brown, contrib. 63¹²

34. However, local authority witnesses argued that the Act should be amended to clearly define what a hedge is, which would preclude woodland and tree belts from being covered under the Act. Kevin Wright, of Aberdeen City Council, on situations where the Council has deemed the vegetation not to be a hedge, explained how difficult it was for applicants to understand their decision saying—

” Perhaps the Act’s biggest failure is that there is no clarification in that respect.

Source: Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 62¹³

Non-hedges

35. Roger Niven told us that his application was turned down. Despite having confirmation from the previous owners that the trees were planted with the intention of forming a hedge, the local authority still deemed it not to be hedge. He said—

” For us, that sums up where the process is going well wrong. If someone says that they planted a hedge and that they would not have planted the vegetation in question unless it was going to be a hedge but the council can say that it is not a hedge, I am afraid that that means that the legislation is not working.

Source: Local Government and Communities Committee 19 April 2017, Roger Niven, contrib. 37¹⁴

36. Pat MacLaren, representing Scothedge, accused local authorities of circumventing the Act and bringing in their own criteria when considering applications. She said the reasons given for deciding that certain trees did not form a hedge were that they were not all planted at the same time, they are a landscape feature or tree belt, they are not managed as a hedge or the spacing between the trunks are not what would be expected of a hedge. She said—

” Aberdeen City Council has brought in its own criteria for deciding whether something is a hedge without referring back to the act, which is what it should always refer back to. It should refer back to the law, not to its own guidelines.

Source: Local Government and Communities Committee 19 April 2017, Pat MacLaren, contrib. 50¹⁵

37. Pat MacLaren later clarified in correspondence that only formal applications to a local authority will be shown in any statistics collated by councils on the number of applications or appeals. She said that cases which have been deemed 'not a hedge' will only appear in the statistics if, like hers, a person had made a formal application which was then rejected. ¹⁶

38. Kevin Wright, from Aberdeen City Council, acknowledged that a non-hedge could still have the same negative impact as a high hedge but—

” As a local authority, we are asked to implement the legislation... When it comes to whether it is a hedge or trees that were not planted as a hedge, there is not flexibility in the legislation; we do not have the legal opportunity to exercise such flexibility.

Source: Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 75¹⁷

39. Paul Kettles also agreed. He said—

” I know that we could debate the matter for a long time, but in the end my colleagues and I look at applications, and we consider that we are operating within the act and within the spirit of the act, because it is not a high trees act. If you want to bring in a high trees act, you should introduce such legislation.

Source: Local Government and Communities Committee 10 May 2017, Paul Kettles, contrib. 78¹⁸

40. Kevin Wright acknowledged that a row of trees could indeed fit the three criteria set out in the Act to define a high hedge however—

” Nobody here is saying that a row of trees cannot have the same effect as a hedge; a row of trees can certainly meet those three tests, but it is not a hedge. It would be extremely useful if the act and the guidance were to make it abundantly clear that whether there is a hedge is the first test, and also if further definition were perhaps to be provided in the guidance.

Source: Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 68¹⁹

41. Local authority witnesses also made the point that if trees were to be included under the Act, then this would be at odds with local authority green space strategies. Alastair Hamilton said that it could have unforeseen consequences through the impact on tree cover and Paul Kettles believed that the phrase '2 or more trees' has led to this confusion and should be removed from the Act—

” ... this is not a high trees act—it is a high hedges act. Fundamentally, it must first be a hedge, and defining that is difficult... To me, therefore, it is relatively clear what a hedge is and what it is not, but the way in which the act has been narrated gives rise to some confusion.

Source: Local Government and Communities Committee 10 May 2017, Paul Kettles, contrib. 66²⁰

42. He went on to warn—

” I live in big tree country, in Perth and Kinross. Perth and Kinross is a tourist destination, and one of the attractions is the tree cover. I am not saying that, if we opened the act up to cover trees, it would devastate trees in Perth and Kinross, but it would be opening a door to something at a time when we are seeking to preserve and protect trees. If we were to broaden the act to include trees, that could give rise to a significant loss of urban trees.

Source: Local Government and Communities Committee 10 May 2017, Paul Kettles, contrib. 111²¹

43. Mark McDonald MSP - member in charge of the then Bill - was asked his view on failed applications where a council decided it was a non-hedge and provided clarification on the question of intention versus effect. He said—

” The Act is looking at the effect, rather than the intention. When an individual plants leylandiis, for example, in their back garden, it may not be their intention to give effect to a hedge or a light barrier for their neighbour, but allowing the leylandiis to grow to a certain height and, therefore, a certain density gives that effect. It is about the effect, rather than the intention at the point at which planting takes place.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 19²²

44. Where councils decline applications on the basis that it is a non-hedge, he said—

” ...I would hope that local authorities are not seeking to exclude applications on the basis of their own determinations, rather than the determinations that are set out for them in the 2013 act.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 25²³

45. The Minister for Local Government and Housing took a different view as to what was covered under the Act. He thought it was quite clear that—

” The 2013 Act was not designed to deal with trees, woodlands and forests.

Source: Local Government and Communities Committee 24 May 2017, Kevin Stewart, contrib. 11²⁴

46. He went on to say—

” That was the scope of the bill; it dealt with high hedges and not nuisance vegetation or anything else. The question about the scope of the bill is best asked of Mr McDonald, who introduced a bill to deal with nuisance high hedges and not other forms of plant life and vegetation.

Source: Local Government and Communities Committee 24 May 2017, Kevin Stewart, contrib. 18²⁵

47. The Minister acknowledged the debate around the definition of a hedge and told the Committee that—

” The definition was felt to be adequate when the High Hedges (Scotland) Bill was passed, but if the committee feels that the balance of evidence that you are hearing supports a change to the definition, I am open to considering a change. However, definitions are always difficult...I think that the dictionary definition, which has been removed from the guidance, was a good one. I will be interested to hear what the committee has to say, and we will consider the issue in light of your findings.

Source: Local Government and Communities Committee 24 May 2017, Kevin Stewart, contrib. 9²⁶

48. Mark McDonald MSP, who introduced this legislation, when asked about the lack of definition of a hedge, explained—

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

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 13²⁷

49. He did acknowledge that there may be merit in the Scottish Government considering whether to define a hedge within the Act however this—

” ...may kick open a rather large can of worms, in terms of the cases that may or may not be included or excluded as a consequence of what he suggests.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 23²⁸

50. He explained that he tried not to be too prescriptive around defining high hedges in order to ensure the widest number of cases could be considered under the legislation and told us—

” However, it might be the case that, as a consequence of that, local authorities have chosen to use the broader flexibility that the act provides in the opposite direction, to enable them to rule things out. I freely admit that that might have been an unintended consequence.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 34²⁹

Lack of appeal in non-hedge cases

51. Where the local authority has issued a high hedge notice, a person that made the application can appeal, under section 12 of the Act, where they feel the notice does not stipulate adequate height reduction of the hedge. The owner of the hedge can also appeal when they think that no notice should have been served or that the work set out in the notice goes too far or there is not enough time set to carry out the work.

52. There is no right of appeal against a local authority's decision to dismiss an application for a high hedge notice. The applicant cannot appeal at this pre-application stage on a non-hedge decision.

53. A number of witnesses argued that there should be a right of appeal in these cases. Paul Bruce told us when his application was rejected—

” We believe that the council's definition of a high hedge has not been accurate as we have shown above that it has failed to help our situation. Furthermore we have been told that we are unable to lodge an appeal as our vegetation has not been found to be a hedge.³⁰

54. When asked if there should be provision to appeal in non-hedge cases, Paul Cackette of the Scottish Government said he saw no reason why that should not be the case however he cautioned—

” ... were a change to the legislation along those lines to be suggested, because that is a matter of fact and not at the discretion of the local authority, if a reporter were to decide that something was a hedge, we would need to know what should be done next. Should they refer the matter back to the local authority to start over again? Should the DPEA [Planning and Appeals Division] take over the function of the local authority in exercising discretion about what to do? Should it take on the dispute resolution process at that stage?

You would need to think through reasonably carefully what the implications of such a change would be, not least because if the DPEA were to take on those functions, the appeal route would be closed off.

Source: Local Government and Communities Committee 24 May 2017, Paul Cackette, contrib. 107³¹

Alternate tree removal

55. We heard of instances where owners of high hedges appeared to deliberately circumvent a high hedge notice by removing half the number of trees, thus making it no longer a hedge. Pamala McDougall representing Scothedge stated—

” The time from our application for a high hedge notice to the decision was five and a half months. In that time, half the trees were removed. When the council man came back out of the blue, he said that what was there was not a hedge any more. That was a serious blow.

Source: Local Government and Communities Committee 19 April 2017, Pamala McDougall, contrib. 66³²

56. Dr Brown, whose high hedge application was initially successful, told us however that the owner subsequently removed half of the trees and successfully appealed the decision. He said that the trees are still growing together and argued that costs should be refunded in such cases—

” It is ridiculous—it is robbery in two ways. Not only do I not get my daylight; I also lose everything that I have paid out in my attempt to get the trees reduced in height. Some kind of punishment for landowners who subvert the intentions of the Act should be enforced.

Source: Local Government and Communities Committee 19 April 2017, Dr Brown, contrib. 109³³

57. Donald Shearer, among others, argued that in these circumstances—

” ..taking out every other tree does not take the hedge away, according to the definition in the act. I would say that such things are still high hedges and that councils should still act on them.

Source: Local Government and Communities Committee 19 April 2017, Donald Shearer, contrib. 83³⁴

58. Kevin Wright of Aberdeen City Council told us that, in such circumstances, the council would seek legal advice and pointed out that—

” If somebody removes every second tree, as unfair as that approach is, then, by the definition that we currently have, it is no longer a hedge but a row of trees. If they remove every second tree, the canopies will not coalesce, therefore it is not a hedge. If it is not a hedge, we cannot use the legislation.

Source: Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 80³⁵

59. Mark McDonald MSP suggested that in these circumstances—

” ...there would be the potential to look at the historical position on what was there, and to decide whether there is the likelihood that the situation would continue to be exacerbated by the individuals.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 73³⁶

60. Paul Cackette from the Scottish Government said he understood the frustration that this would cause and told us—

” In those circumstances, although the councils would make the point that, technically, it was no longer a high hedge, the suggestion would be that there was still an underlying issue to be addressed. The role of pre-application mediation is therefore vital...If the hedge is altered by the time that the notice is served, there is a difficulty... If a hedge is different—because somebody has cut down part of it or because, after the passage of time, it looks different, and the impact is different—the reporter will normally seek to identify what it was like when the notice was served...In most cases, they make a judgement on the basis of what the hedge was like at the time when the notice was served.

Source: Local Government and Communities Committee 24 May 2017, Paul Cackette (Scottish Government), contrib. 39³⁷

61. He went on to say—

” I imagine that, if there is a belief that steps have been taken to circumvent the process but longer-term steps could be taken that would ensure that the hedge owner could not let the hedge grow and start becoming a problem again, the notice could contain such longer-term steps.

Source: Local Government and Communities Committee 24 May 2017, Paul Cackette, contrib. 41³⁸

Reasonable Enjoyment

62. The subjective nature of what exactly is meant by ‘reasonable enjoyment’ as set out in the Act was also raised in evidence both by individuals and local authorities. Ann

Forbes recommended that guidance should be produced for local authorities on what constitutes 'reasonable enjoyment'.

63. Sarah Chadfield stated—

” Is the act about shadow length etc., or are 'amenity' and 'reasonable enjoyment' looser terms? To my mind, I have lost 'reasonable enjoyment' in that I now sit and look at 4 metres of hedge rather than the open panorama I had previously. I am unable to make an informed decision as to whether this hedge should be subject to a high hedge order because I have no specific information to go on. It is 'high' and I have lost my 'reasonable enjoyment', but apparently not necessarily so in the subjective eyes of the planners. ³⁹

64. Perth and Kinross Council called for greater clarity on what is meant by 'reasonable enjoyment of a domestic property' and Angus Council said—

” The question of reasonable enjoyment is quite subjective and hard to quantify. This is a key consideration of any High Hedge application yet the guidance does not provide any substantive guidance of the factors to be considered. ⁴⁰

65. Vreni Fry, owner of two spruce trees, said it would be useful if all emotive language, such as 'reasonable enjoyment' were removed from the Act. Julian A Morris said—

” This is an odd variation of the wording of legislation in all other parts of the UK. In short, without the Act, there can be no expectation of relief from neighbouring vegetation. This amounts to a classic Catch 22 situation. From whence comes the expectation but from the Act itself? It leaves no objective basis for defining expectation. ⁴¹

66. When asked what was originally meant by the the phrase 'reasonable enjoyment', Mark McDonald MSP replied—

” That is about whether the barrier to light that is created affects an individual's ability to enjoy their property—their ability to use their garden or to receive natural light into certain rooms in their house, for example. Those are the kind of considerations that we were thinking about in relation to “reasonable enjoyment”.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 86⁴²

67. The Committee notes that there is a clear difference of opinion on what is covered under the Act and this difference of opinion and lack of clarity is hindering the effective operation of the Act.

68. We are concerned that the flexibility around interpretation originally envisaged by the member who introduced the bill is not being used in practice and that some local authorities are dismissing applications on non-hedge grounds despite the obvious detrimental impact on individuals' 'reasonable enjoyment' of their property.

69. We recommend that the Minister considers using the powers under Section 35 to clarify what is and what is not a high hedge.

70. We were disturbed to hear of instances where alternative trees are being removed in order to circumvent the Act (and its definition of what constitutes a hedge) and believe that local authorities must take into consideration the original state of the hedge and the likelihood that the trees would cause further problems in future when considering these applications and subsequent appeals.

71. We recommend that the Scottish Government publishes revised guidance setting out clearly that applications should be considered in terms of the impact of the vegetation rather than whether or not the barrier was originally planted as a hedge. In addition, the revised guidance should encourage local authorities to be flexible when considering high hedge applications, while still adhering to their green space strategies.

Fees and costs

72. Section 4 of the Act states that the fees set by local authorities should not exceed the amount it would cost the local authority to deal with the application and it allows local authorities to refund fees where it considers it appropriate to do so. Local authorities must publish information on the circumstances in which they will refund fees.

73. The differing costs and the lack of explanation for this across council areas was raised by many respondents to the call for views. The cost for a high hedge application ranges from around £200 to £500. Denis Parry told us—

” As regards fees and cost there is a wide disparity amongst Local Authorities as to what they consider appropriate.⁴³

74. South Lanarkshire Council and Perth and Kinross Council said that the fee charged should be set nationally and should not be determined individually by each local authority.

75. Royal Town Planning Institute Scotland (RTPI) highlighted the current financial constraints in the planning service and said that the fees charged are unlikely to be at a level that would compensate for planners being diverted from their primary duties.

76. Paul Kettles of Perth and Kinross Council said that a standard fee would be a good idea. However, Mark McDonald MSP disagreed, noting—

” I ensured that local authorities had the opportunity to set their fees because I did not believe that a simple centralised fees system was the right way to go. I chose not to put a cap in, because the evidence from Wales was that, if fees are capped, everybody goes to the cap and charges the maximum amount.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 57⁴⁴

Means tested and cost recovery

77. Duncan McAllister was concerned about the general cost, stating that "the proposed fee is extortionate and should not exist" and Kenneth Gray made the point that the fees could make applying prohibitive—

” Our local council requires an up-front fee of £495 before proceeding with a High Hedge Notice application. This is a considerable amount of money to spend with no guarantee of success. It must deter many put-upon people from proceeding, and begs the question of what is the point of legislation which makes it so difficult and pedantic to fulfil its purpose. ⁴⁵

78. Vreni Fry believed the fees to be reasonable saying "It does encourage people to think twice before submitting an application". ⁴⁶

79. A number of witnesses argued that successful applicants should be able to recover the cost. For example, East Ayrshire Council suggested—

” Where it subsequently turns out that the hedge is causing a nuisance and gets a notice served it may be worthwhile exploring a mechanism where the recipient of the notice is required to refund any fees paid by the applicant as part of the enforcement process. ⁴⁷

80. Sandra Dobson agreed with this and also suggested waiving of fees for those unable to pay—

” Where an application is successful it would be reasonable if the fee charged was repaid to the appellant and recharged to the hedge owner. Not everyone has the money to pay the fee. Some system should be in place where those unable to pay are able to have the fee waived. That would give them the ability to access legislation that better off people can afford. ⁴⁸

81. Paul Kettles agreed—

” If a local authority serves a high hedge notice on a hedge owner and they have the opportunity to address the issue but do not do so, we should seek to get perhaps half the fee back, or set up some other arrangement whereby the applicant is refunded, either in part or in total.

Source: Local Government and Communities Committee 10 May 2017, Paul Kettles, contrib. 87⁴⁹

82. Mark McDonald MSP told us that nothing in the Act precludes local authorities from introducing different schemes for the payment of fees—

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

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 65⁵⁰

Who should pay

83. Many respondents including Alasdair Moodie, Nancy Clunie and Pamela Baillie, suggested that the fees associated with applying for a high hedge notice should be paid by the hedge owner, not the complainant. James Barr's comments were typical—

” There should be no cost to the complainer where a Council upholds their cause for complaint. All costs should be borne by the hedge owner.⁵¹

84. Mark McDonald MSP explained his reasoning behind the fee setting provisions—

” My thinking was about the legislation's aim, which is to help to resolve neighbourhood disputes. If an application was made and an order was granted, and the owner of the hedge complied but was then told, “Thanks for complying with that order, but you now have to pay your neighbour £500”—or whatever the sum is—that might not be the best means to ensure that neighbourhood disputes are completely resolved.

If that individual said that they were not going to pay, the local authority might have to expend disproportionate sums of money to recoup a few hundred pounds.

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 63⁵²

85. The Committee notes the disparity in fees across Scotland. However, we would caution against setting a standard fee which would not take into account the varying costs to administer high hedge applications across each local authority.

86. We believe that local authorities should introduce concessionary rates for those who are in difficulty paying. We also consider the cost of the application should be recoverable from the hedge owner where an application has been successful, such that the local authority can reimburse the applicant.

Enforcement

87. Where the owner or occupier of the land on which the hedge is growing on fails to carry out the work stated in the high hedge notice, section 22 gives local authorities the power to take action and enter the land to carry out the work and recover any expenses incurred.

88. The Guidance issued to local authorities suggests that prior to enforcement, a local authority—

” ...might want to encourage the hedge owner or occupier to meet the conditions of the high hedge notice by sending them a letter formally warning them of what will happen if they do not take the necessary action. If investigations show that the owner or occupier was not aware there was a high hedge notice, the local authority should provide them with a copy and should normally give them more time to meet the requirements in it.³

89. Witnesses suggested that local authorities were reluctant to use the enforcement powers set out in the Act given the financial implications. John Bolbot argued that the law could not be effective unless local authorities were to use this power. He said—

” Any kind of legislation that is as toothless as that is never going to work.

Source: Local Government and Communities Committee 19 April 2017, John Bolbot, contrib. 52⁵³

90. Some witnesses suggested that fixed penalty notices should be issued in cases of non-compliance, however Mark McDonald MSP argued that this could extend the process and would not provide more of a deterrent than the powers already in the Act to allow local authorities to do the work and recover the cost—

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

Source: Local Government and Communities Committee 17 May 2017, Mark McDonald, contrib. 94⁵⁴

Timing

91. The lengthy nature of the application process and, where successful, the subsequent enforcement procedures was raised by witnesses. Pamala McDougall suggested that there should be a specified time limit set by which time a decision on the application is required.

92. Kevin Wright of Aberdeen City Council agreed that the overall process can be long however he suggested that given the openness of the process and the numerous steps which must be gone through, it would be difficult to set a deadline for processing applications in less than three months.

93. Alastair Hamilton of Fife Council also made the point that would be difficult to prescribe a precise period of time by which applications must be processed as wildlife considerations must be taken into account—

- ” There are close periods for breeding seasons during which it may not be acceptable to cut or alter a hedge—when there are nesting birds, for example. There are also issues, depending on the scale of the works, about how long that might take to factor in.

Source: Local Government and Communities Committee 10 May 2017, Alastair Hamilton, contrib. 95⁵⁵

94. Paul Kettles told us that in his experience the average time taken to process an application and come to a decision was six to eight weeks. However, he also made the point that it would be unreasonable to set a time-frame to include enforcement given wildlife considerations.
95. Mark McDonald MSP said there might be merit in looking at timescales and the Minister said that he would be willing to look at this issue, however said that how local authorities conduct their business is a matter for them.

96. The Committee believes that it is imperative that local authorities fully use the powers they have under the Act to ensure owners of high hedges comply in a timely fashion with the conditions of any high hedge notice issued, subject to any wildlife considerations.

97. The Committee does not believe it is practicable to set a statutory timescale by which applications should be processed however, we recommend that the Scottish Government makes it clear in its guidance that councils should ensure that all applications are processed in a timely manner and, where the process exceeds three months, that councils should update interested parties on progress to date and indicative timescales of when the process will be completed.

Overall conclusion

98. The Committee believes that the High Hedges (Scotland) Act 2013 has been beneficial for some of those affected by high hedges however further work is needed to ensure its effectiveness.

99. The Committee is concerned that the Act is not currently operating in the spirit that was intended and that, despite having this Act, some people are still unable to enjoy their homes as a result of nuisance high hedges.

100. Consequently, we encourage the Scottish Government and local authorities to consider and take on board our recommendations on how the provisions of the Act - in practice - can be made to work better to the benefit of all.

Annexe A - Written and Oral Evidence

The written and oral evidence received, correspondence and links to the Official Reports of our meetings when we considered the High Hedges (Scotland) Act 2013 are all available [online](#).

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- [12] Local Government and Communities Committee 19 April 2017, Dr Brown, contrib. 63, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10899&c=1992337>
- [13] Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 62, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10944&c=1999629>
- [14] Local Government and Communities Committee 19 April 2017, Roger Niven, contrib. 37, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10899&c=1992311>
- [15] Local Government and Communities Committee 19 April 2017, Pat MacLaren, contrib. 50, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10899&c=1992324>
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- [17] Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 75, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10944&c=1999642>

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- [19] Local Government and Communities Committee 10 May 2017, Kevin Wright, contrib. 68, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10944&c=1999635>
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- [32] Local Government and Communities Committee 19 April 2017, Pamala McDougall, contrib. 66, <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10899&c=1992340>
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