

Consultation on High Hedges: Response from West Lothian Council

1. **Do you think high hedge disputes are a matter for government intervention or best left to individuals to resolve privately?**

Government Intervention

2. **Which of the four options identified in this paper do you favour?**

Option 4: Provide a legislative solution by utilising or extending existing provisions or introducing new ones

Option 2: Promote existing remedies such as mediation

Option 3: Strengthen and supplement existing remedies with research, guidance and title conditions

2(a): Would your preference be for:

Combination of two or more options

Q2(b): What are the main reasons for your preference? (if you have chosen “Combination of two or more options” or “Alternative solution” please supply further details here)

The public expect local authorities to be able to intervene, just as they would with an unauthorised building or fence. Creation of sensible legislative controls would:

- Provide an ultimate means of remedy; and
- Encourage those causing the problem to resolve matters, knowing that otherwise they may be subject to legal action and / or works in their garden by the local authority or its contractors

I would advocate the use of the powers in the Public Health (Scotland) Act 2008 to extend the definition of ‘statutory nuisance’ to include high hedges and other nuisance vegetation. Another alternative would be the use of use of Work Notices (S 30) and / or Maintenance Orders (S42) under the Housing (Scotland) Act 2006. (These apply due to the definition of a house including its garden by dint of Section 194).

Mediation is always to be pursued if at all possible, but again, mediation may work better when it is known that if matters cannot be resolved by mediation, there is a legal remedy.

Good research to back up mediation or legal action is always useful. If coupled with education at the point of sale, this could help to prevent future problems developing, particularly where fast growing species are concerned.

Q2(c): Are you strongly opposed to any of the 4 identified options?

Doing nothing fails to address what is a significant problem for some, but not all citizens. However, it should be recognised that Work Notices and Maintenance Orders under the Housing (Scotland) Act 2006 will provide some controls if no further legislative controls are developed.

3. **Do you have any views on the creation of a legal right? For instance, is the right in the English and Welsh legislation appropriate (“reasonable enjoyment of property”) or should there be a more stringent right (e.g.**

“serious interference with quality of life”) or can you suggest an alternative basis for a right?

It is essential that the ‘right’ of the hedge owner is balanced by the ‘right’ of the neighbour, thereby creating a ‘responsibility’ on the part of the hedge owner. The two options suggested would directly affect the number of cases brought to the local authority; in the first instance, more cases could be forecast that would be the case with the second. It may be worth including in any code a reference to what effects the hedge in question has on the degree of daylight entering the neighbour’s garden, and more so, the neighbour’s home.

4. If Option 4 (legislative solution) were to be pursued, which delivery mechanism would you favour?

The preferred order would be:

- Statutory Nuisance
- Replication or modification of English & Welsh legislation
- Lands Tribunal for Scotland
- Civil action – summary cause or small claims
- Civil action – summary application (as direct route to Sheriff Court)

Q4(a): What are the reasons for your preference?

Statutory nuisance is well tried and tested and used on a daily basis by local authorities to secure remedies to a wide variety of environmental problems. Local Authority officers are well versed in determining whether a matter would be a nuisance to ‘the normal person’. High hedges and other nuisance vegetation could easily be added to the statutory nuisance provisions of the Environmental Protection Act 1990 using the powers to do so in the recent Public Health (Scotland) Act 2008.

The English and Welsh legislation, incorporating a fee, as it does, will have the effect of significantly limiting demand for the local authority to intervene. However, a flat fee would disproportionately disadvantage the less well off and vulnerable in society.

The Lands Tribunal would have the effect of acting as a legally backed arbitrator.

Civil action disproportionately disadvantages the less well off and vulnerable in society.

Q4(b): If you have a proposed alternative delivery mechanism for legislation, please supply details here:

I would advocate the use of the powers in the Public Health (Scotland) Act 2008 to extend the definition of ‘statutory nuisance’ to include high hedges and other nuisance vegetation.

Another alternative would be the use of use of Work Notices (S 30) and / or Maintenance Orders (S42) under the Housing (Scotland) Act 2006. (These apply due to the definition of a house including its garden by dint of Section 194).

Q4(c): Are you strongly opposed to any of the identified delivery mechanisms?

Replication or modification of English & Welsh legislation

Civil action – summary cause or small claims

Civil action – summary application (as direct route to Sheriff Court)

The English and Welsh legislation, incorporating a fee, as it does, would disproportionately disadvantage the less well off and vulnerable in society.

Civil action disproportionately disadvantages the less well off and vulnerable in society.

5. Should a definition of a high hedge or nuisance vegetation be set down in legislation, in a code of practice or should it be left to any adjudicator appointed to determine whether the vegetation is deemed to breach any legal right created (e.g., right to reasonable enjoyment of property)?

Setting a specific height may create more legal argument than it solves, particularly where the measured height is within 5-10% of any specific figure. It also fails to take into account the effect on the complainant's property and their use / enjoyment of it.

An approved code of practice with numerous examples would be useful. However, specific heights should generally be avoided, with the following caveats:

- Hedges up to 2m tall should not be considered to be a 'nuisance', as householders have the right to erect a solid fence up to that height at the moment, without having to seek any permission from the local authority ; and
- Hedges over 2m tall should may be considered to be a 'nuisance' if by reason of their siting relative to the complainant, they have a significant effect on light entering the complainant's garden and home.

Local Authority Environmental Health staff are commonly called upon to interpret and apply examples in codes of practice to real life situations.

6. Is the following definition of a hedge, as set down in Part 8 of the 2003 Act, appropriate for Scotland?

Definition: "so much of a barrier to light or access as is formed wholly or predominantly by a line of two or more evergreen or semi-evergreen trees or shrubs and rises to a height of more than two metres above ground level"

No

Q6(a): If you believe the above definition is not appropriate, why not, and – if you think a definition is required – what should it be instead?

High hedges and other nuisance vegetation are primarily problems due to blocking light, blocking access or threatening structural damage. Therefore the issue of whether the trees are evergreen is not relevant. An overgrown thorn or beach hedge could be as much or more of a nuisance as a *leylandii* of the same size.

Specifying exactly two metres is fraught with difficulty in that it may create more legal argument than it solves, particularly where the measured height is within 5-10% of any specific figure. It also fails to take into account the effect on the complainant's property and their use / enjoyment of it. The previous point about householders having permitted development rights to erect a fence of up to 2 metres in height in most cases is relevant here; the difficulty in enforcing a height restriction is in the fact that hedges grow. The legislation could usefully indicate a 'tolerance' of 10%, over which action would be more likely to be taken if there is

proven to be a measurable degree of harm being caused to a neighbour's enjoyment of property by means of overshadowing.

7. Do you have any further information about the financial costs associated with any of the options discussed in chapter 3? Information relating to the costs associated with the delivery mechanisms under Option 4 would be particularly welcome

Mediation is costly due to the staff time involved, particularly as it may involve regular work outwith office hours. Staff must, in addition, be trained to be able to apply the BRE (Building Research establishment) guidelines and calculations on overshadowing, or must have access to a surveyor or architect who can do this.

Where a statutory notice is served, this can be done quickly and inexpensively. However, if appealed, it can take up a considerable amount of time.

There must be a robust means of securing costs where a local authority has to carry out works to resolve a problem. (This is essential)

8. **Do you believe the legislation in force in England and Wales has been effective?**

Don't know.

Q8(a): Please specify any reasons or other evidence for your answer here:

The outcomes of the review are not yet available. Anecdotal evidence is mixed.

9. **Do you have any information that would help to establish the nature and prevalence of the problem of high hedges? Please supply details here or enclose relevant information with your response. Please provide or cite supporting evidence or source data.**

For the past two calendar years, West Lothian Council's Environmental Health service received around 16 complaints annually relating to overgrown gardens. Further complaints also go to West Lothian Council's Development Control service.

It is our experience that most problems arise from neglect rather than any intended antisocial behaviour.

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