Graham Ross

The High Hedges (Scotland) Bill is a Members’ Bill and was introduced in the Scottish Parliament on 2 October 2012 by Mark McDonald MSP. The Bill seeks to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property.

This briefing includes information on: the current law in Scotland in relation to high hedges; previous developments in relation to high hedges; the consultation process prior to the introduction of Mark McDonald’s Bill; the main provisions contained within the Bill; and legislation on high hedges in other jurisdictions.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>3</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>4</td>
</tr>
<tr>
<td>THE CURRENT LAW</td>
<td>4</td>
</tr>
<tr>
<td>- Encroachment</td>
<td>4</td>
</tr>
<tr>
<td>- Title conditions</td>
<td>4</td>
</tr>
<tr>
<td>- Nuisance</td>
<td>5</td>
</tr>
<tr>
<td>- Mediation</td>
<td>5</td>
</tr>
<tr>
<td>PREVIOUS DEVELOPMENTS</td>
<td>5</td>
</tr>
<tr>
<td>CONSULTATION ON THE CURRENT BILL</td>
<td>6</td>
</tr>
<tr>
<td>THE BILL</td>
<td>7</td>
</tr>
<tr>
<td>- Definition of a high hedge</td>
<td>7</td>
</tr>
<tr>
<td>- Complaints and applications for high hedge notices</td>
<td>9</td>
</tr>
<tr>
<td>- High hedge notices</td>
<td>11</td>
</tr>
<tr>
<td>- Appeals</td>
<td>12</td>
</tr>
<tr>
<td>- Tree preservation orders and conservation areas</td>
<td>12</td>
</tr>
<tr>
<td>LEGISLATION IN OTHER JURISDICTIONS</td>
<td>14</td>
</tr>
<tr>
<td>- England and Wales/Northern Ireland</td>
<td>14</td>
</tr>
<tr>
<td>- Isle of Man</td>
<td>15</td>
</tr>
<tr>
<td>SOURCES</td>
<td>17</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

- At present, there are no statutory controls over high hedges in Scotland. Instead, the main remedies which may be used to resolve disputes are provided by the common law i.e. the law developed over time by judges’ decisions in individual cases.

- On 21 December 2011, Mark McDonald MSP lodged a draft proposal for a Members’ Bill on high hedges. In light of the Scottish Government’s most recent consultation which was undertaken in 2009, Mr McDonald also lodged a statement of reasons as to why, in his opinion, there was no need for further consultation on his draft proposal. At its meeting on 1 February 2012, the Local Government and Regeneration Committee concluded that it was satisfied with the reasons given by the member for not consulting further on the draft proposal. Mark McDonald MSP lodged his final proposal and a revised statement of reasons on 22 March 2012.

- The High Hedges (Scotland) Bill is a Members’ Bill and was introduced into the Scottish Parliament on 2 October 2012 by Mark McDonald MSP. The Scottish Government announced that it would support Mr McDonald and officials have been working with Mr McDonald on all aspects of the Bill. The Bill seeks to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property.

- For the purposes of the Bill, a high hedge is one which: is formed wholly or mainly by a row of 2 or more evergreen or semi-evergreen trees or shrubs; rises to a height of more than 2 metres above ground level; and forms a barrier to light.

- The Bill provides that where a hedge has been defined as a high hedge, an owner or occupier of a domestic property may apply to the relevant local authority for a high hedge notice. It provides local authorities with new powers to issue high hedge notices to owners of hedges specifying the work, if any, to be carried out to remedy problems and prevent their re-occurrence; and also to carry out any work where owners fail to do so.

- Local authorities will set fees which must also accompany any application for a high hedge notice. The Bill does not set any upper limit on the fees to be charged but requires that fees must not exceed an amount which the local authority considers represents the reasonable costs that it incurs in coming to a decision on the application and issuing of a high hedge notice.

- Where a local authority finds it necessary to undertake the works specified in a high hedge notice due to the hedge owner not having done so, the Bill provides that the local authority can recover any expenses (including administrative expenses), reasonably incurred in taking the action required and may also charge interest.
INTRODUCTION

The issue of high hedges and their potential for causing disputes (mainly between neighbouring domestic properties) has been the subject of much discussion in both the Scottish Parliament, and the public domain in Scotland for some time now. The most well-known species of plant relating to complaints about high hedges is the Leyland cypress, commonly known as “Leylandii”. This particular species of plant can grow to heights of over 30 metres at a rate of one metre per year. Other varieties of hedge which have been known to cause problems in relation to domestic properties include the Western red cedar and the Lawson cypress, as well as (to a lesser extent) yew, holly and privet hedges.

While some of these hedges have, undoubtedly, been the cause of domestic disputes between neighbours, there are potential benefits to be derived from having such hedges as part of a property. For example, some hedges can absorb (although not completely eliminate) noise from roads or railways, and form an effective shelter from wind. They can also offer a degree of privacy to occupants; attract wildlife such as birds, butterflies and insects; and, depending on the type of hedge, may deter criminal activity such as housebreaking.

Problems tend to arise where a particular type of hedge is not suitable for its location and/or not properly maintained. This can occur where people do not realise the full growth potential or maintenance requirements of the plant in question. In addition, a once well-maintained hedge may become neglected and overgrown where the ownership of a property changes or where a change in the personal circumstances of the hedge owner means that they are no longer able to maintain it effectively. This is not to ignore the potential for what might be termed “vindictive” or “aggressive” planting of hedges by certain individuals which can also lead to the types of dispute which the current Bill is seeking to address.

THE CURRENT LAW

At present, there are no statutory controls over high hedges in Scotland. Instead, the main remedies which may be used to resolve disputes are provided by the common law i.e. the law developed over time by judges’ decisions in individual cases. These are considered below.

Encroachment

Encroachment is the permanent or quasi-permanent intrusion into land which is owned or lawfully possessed by another person. It is possible to bring a civil court action to prevent or rectify an encroachment. It would appear that encroachment is a suitable legal remedy for a court action in relation to high hedges and other vegetation. For example, the leading case on this topic is Halkerston v Wedderburn where the judge ordered the person defending the court action to prune branches from trees in his garden which were protruding over the wall into the garden of his neighbour. This case established the potential applicability of the law of encroachment to neighbour disputes relating to trees in some circumstances and has been followed in other cases.

Title conditions

In some cases “title conditions”, i.e. conditions imposed in title deeds burdening one property for the benefit of another property, which survive changes of ownership of the affected properties, may be relevant to the issue of high hedges. A type of title condition called a ‘negative real

---

1 Halkerston v Wedderburn (1781) Mor 10495.
burden’ can oblige the owner of the affected property not to do certain things, including not to build or plant things which would cut off or seriously impair a neighbour’s light or view. Title conditions are enforceable by way of a civil action in the sheriff court.

**Nuisance**

The law of nuisance is another area of law which is thought to be of potential relevance in relation to high hedges. It confers upon the owners or occupier of land the right to comfortable enjoyment of their property free of material damage or substantial interference. A civil court action to prevent or rectify a nuisance can be brought by a private individual. The leading text on the English law in relation to hedges cites nuisance as a possible remedy for the problem of high hedges. However, some Scottish writers caution against assuming that the law of nuisance is the same north and south of the border.

**Mediation**

Mediation is also a possible alternative to legal action. However, this is entirely voluntary on the part of those involved in the dispute and an agreement reached in mediation is not, on occasions, legally binding on the parties concerned.

**PREVIOUS DEVELOPMENTS**

In January 2000, the then Scottish Executive published a consultation on high hedges, proposing various options to address the problem of high hedges, namely:

- promoting existing remedies
- strengthening current measures by taking further non-legislative action including providing more advice to those affected
- creating a tailor-made solution by introducing a complaint-based system for local authorities to control high hedges

The Scottish Executive consultation followed a UK Government consultation in November 1999 which eventually led to the introduction of Part 8 of the Antisocial Behaviour Act 2003 which gave local councils in England and Wales the power to deal with complaints about high hedges. Legislation on high hedges has since been introduced in the Isle of Man in 2005 and Northern Ireland in 2011 (see below).

In January 2001, the then Justice Minister, Jim Wallace MSP, announced that he supported new powers for councils to intervene to tackle the problem of high hedges but stated that the introduction of new powers would have to wait for a suitable opportunity in the parliamentary programme. (Scottish Executive, 2001)

In response to a Parliamentary Question answered on 10 March 2005 (S2W-14715), Tom McCabe MSP, for the then Scottish Executive, stated that it did not intend to introduce legislation relating to high hedges in that parliamentary session.

---


Former MSP Scott Barrie lodged proposals for a Members’ bill on high hedges on previous occasions, in May 2002, September 2003 and November 2006. A bill was never introduced into the Parliament as a result of these proposals.

High hedges have also been the subject of two petitions in the Scottish Parliament: PE497 and PE984. Petition PE984 was lodged by Dr Colin Watson on behalf of Scothedge in June 2006 and called on the Scottish Parliament to introduce legislation to provide local authorities with the power to deal with complaints regarding vigorous growing trees, hedges, vines, or other plants. Following detailed consideration of the petition and the exchange of correspondence with Scottish Government, the then Public Petitions Committee decide to close the petition in May 2009 on the grounds that the Scottish Government would launch a consultation on the subject of high hedges. The Consultation on high hedges and other nuisance vegetation (which is the most recent consultation on the subject) was launched in August 2009 and is discussed further below.

CONSULTATION ON THE CURRENT BILL

On 21 December 2011, Mark McDonald MSP lodged a draft proposal for a Members’ Bill on high hedges. In light of the Scottish Government’s most recent consultation (see above) which was undertaken in 2009, Mr McDonald also lodged a statement of reasons as to why, in his opinion, there was no need for further consultation on his draft proposal.

The 2009 consultation considered the practical, operational, legal and financial considerations associated with the likely measures required to address the issue of high hedges in Scotland. This was achieved through posing a number of questions on the main themes of this issue including: the creation of a legal right to be introduced in relation to high hedges; where such legal responsibility arising from a right might rest; how a high hedge might be defined in legislation; the factors to be considered when determining if or when action is required to address disputes surrounding high hedges; the methodology that might be used to resolve such disputes; the costs associated with such actions; and the role of Government in this matter. A total of 617 responses were received to the consultation, 515 of which came from private individuals. The remainder came from a range of ‘other respondents’ of which the largest group was the 13 local authorities that responded.

The overwhelming majority of respondents to the consultation favoured Government intervention in the issue with nearly 90 per cent of all respondents indicating their preference for this option. The consultation paper outlined four policy options ranging from doing nothing to providing a legislative solution. An overwhelming number of respondents indicated that their preference was for a legislative solution. The vast majority also supported the creation of a legal right to enjoyment of property. Nearly half of all respondents supported the definition of high hedges and other nuisance vegetation being set down in legislation, while around one third felt that it should be left to the discretion of an adjudicator. Overall, views were relatively evenly spread as to whether the definition of a high hedge used in English and Welsh legislation (see below) was appropriate for Scotland, with many highlighting the limitation of the definition used, with some suggesting that it should be based on the impact of the hedge rather than trying to define the hedge itself. (Scottish Government, 2010)

In his statement of reasons, Mark McDonald MSP pointed out that he had, in the process of putting together his proposal for a Members’ Bill on high hedges, met with Scothedge and other interested parties and stated that:

Views that have been expressed to me so far, as part of my ongoing engagement with a number of bodies, the public and others with an interest in this proposal, confirm those views expressed during the formal consultation process from August to November 2009.
I therefore believe that the views of stakeholders and the public submitted during that period have not materially changed. As a result, I consider that any further consultation would duplicate effort already expended on this issue, incur additional and unnecessary costs and be construed by the public as “over consultation” on a process on which views have already been clearly expressed. (Scottish Parliament 2011)

At its meeting on 1 February 2012, the Local Government and Regeneration Committee concluded that it was satisfied with the reasons given by the member for not consulting further on the draft proposal. Mark McDonald MSP lodged his final proposal and a revised statement of reasons on 22 March 2012.

THE BILL

As pointed out above, the primary objective of the Bill is to provide a solution to the problem of high hedges which interfere with the reasonable enjoyment of domestic property. The Bill provides that where a hedge has been defined as a high hedge, an owner or occupier of a domestic property may apply to the relevant local authority for a high hedge notice. It provides local authorities with new powers to address these problems by issuing high hedge notices to owners of hedges specifying the work, if any, to be carried out to remedy problems and prevent their re-occurrence; and also to carry out any work where owners fail to do so. The Bill also enables local authorities to recover the costs of carrying out the work specified in a high hedge notice thereby minimising the costs to the public purse.

Definition of a high hedge

For the purposes of the Bill, a high hedge is one which:

- is formed wholly or mainly by a row of 2 or more evergreen or semi-evergreen trees or shrubs;
- rises to a height of more than 2 metres above ground level; and
- forms a barrier to light

This definition is similar to those used in England and Wales and in Northern Ireland (see below) and is intended to capture the commonly perceived problem of fast-growing conifers in suburban areas. A single tree is not considered to be a high hedge. The Policy Memorandum to the Bill points out that shrubs are typically woody plants smaller than trees and usually have multiple, permanent stems branching from or near the ground. The definition of a high hedge in the Bill does not take the roots of a plant into account. Although roots can have a number of adverse effects in relation to property, these would be likely to be covered under the common law of encroachment (see above).

For the purposes of the Bill, a high hedge must form a barrier to light. The Policy Memorandum to the Bill suggests that evergreens and semi-evergreens form a constant barrier to light all year round although semi-evergreens may shed some foliage during severe winter weather in order to survive. Notwithstanding the possibility of a semi-evergreen shedding foliage in the winter, it is suggested that semi-evergreens will form as much of a barrier to light as an evergreen.

Deciduous plants (those which mainly shed all their leaves in winter) are likely to only form a barrier to light at certain times of the year. However, the Bill does not rule out deciduous plants from being part of a high hedge which need only be “wholly or mainly” evergreen or semi-evergreen. Effectively, this means that a mainly evergreen hedge which contains some
deciduous plants would be captured by the definition. Similarly, a large hedge which contains a large number of deciduous plants could still be captured by the definition if it contains an even larger number of evergreens and it forms a barrier to light. The Bill provides that 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. Whether a hedge comes within the ambit of the Bill will be decided by the relevant local authority.

The Bill, therefore, is relatively tightly defined as it concerns predominantly evergreen and semi-evergreen high hedges and excludes single trees. The Policy Memorandum states that if single trees and other types of plants and vegetation were to be included, this may run the risk of creating legislation which is complex, unwieldy and difficult to enforce. To ensure that decisions are as straightforward as possible, the Bill focuses on evergreens and semi-evergreens.

The Policy Memorandum to the Bill points to a number of organisations which have expressed support for the definition outlined above:

COSLA supports a narrow and focussed Bill as the experience of its implementation elsewhere provides comfort that costs will not be significant and numbers will not be unmanageable. The Royal Society for the Protection of Birds also supports a narrow definition which excludes wholly deciduous hedges as deciduous plants generally have a greater wildlife value than conifers. The Woodland Trust also supports a narrow definition as does the Scottish Tree Officers Group, who are concerned that a wider definition would be more difficult, time-consuming and expensive to administer. (page 9)

It is reasonable to assume that some single trees will rise to heights of more than 2 metres and form a barrier to light which may affect a person’s reasonable enjoyment of their property. This concern has been expressed by Scothedge. While generally supportive of the approach taken to high hedges, they have previously voiced concerns about both single trees and deciduous plants. For example, they have stated that deciduous plants can hold on to their leaves for parts of the winter:

The period when deciduous trees are without leaves is actually quite short. Brown leaves persist well into winter months awaiting a good storm to strip them off. Even without leaves many deciduous species have a dense pattern of small branches and shoots that still form an effective barrier to light and outlook. In spring, summer and early autumn there is no significant difference between species and this is when those affected by an unreasonable hedge suffer most. This is the time of long days for just enjoying the sun, an outlook or cultivating a garden. The reasonable right to enjoy all these things can be lost to a rogue hedge, evergreen or deciduous. 81% of cases reported to Scothedge listed garden light blocking as a major problem. (Scothedge 2009)

They go on to say that there is a possibility that someone who is prepared to cultivate a nuisance hedge would probably not hesitate to switch to a deciduous species if an evergreen hedge became subject to restriction.

As pointed out above, deciduous plants are not excluded if they are part of a mainly evergreen or semi-evergreen hedge. As previously mentioned the Policy Memorandum states that widening the Bill further in relation to the definition of a high hedge is not considered to be appropriate given the possibility of the legislation becoming too complex or unwieldy.

Mark McDonald MSP has stated however, that while a narrow definition has received support from stakeholders, (derived in part from a caution on the part of COSLA and local authorities about potential implications of new systems and powers which have not yet been tested in Scotland), it will be important to react to any lessons learned once the new powers have been utilised. To that end, the Bill provides that Scottish Ministers may modify the definition of a high
This will enable changes to be made to the definition of a high hedge in the future in light of the Scottish experience of the operation in practice of high hedges legislation.

Complaints and applications for high hedge notices

The Bill provides that home owners and occupiers, who feel that they are affected by a high hedge, can make a complaint to the local authority where the hedge is located and where a dispute over the height of a hedge has not been resolved by the parties involved. The complaint will take the form of an application to the relevant local authority for a high hedge notice. The application will include information on the hedge’s perceived adverse effect on the property of the complainer.

The application can only be made where an individual has complied with the pre-application requirements as set out in the Bill. Pre-application requirements require individuals to have taken all reasonable steps to resolve the dispute before making an application. The Bill does not specify what action or actions would constitute ‘reasonable steps’ as individual circumstances will differ and there may be disparity in the services available across individual local authority areas. As such, it will be for local authorities to decide, given the services available and the circumstances of individual disputes, whether an applicant has taken all reasonable steps before making an application for a high hedge notice. To that end, the Bill enables local authorities to issue pre-application guidance which individuals must have regard to in relation to the steps to be taken before proceeding to making an application.

Local authorities will set fees which must also accompany any application for a high hedge notice. The Bill does not set any upper limit on the fees to be charged but requires that fees must not exceed an amount which the local authority considers represents the reasonable costs that it incurs in coming to a decision on the application and issuing of a high hedge notice. The Bill also provides that local authorities may fix different fees for different types of application. The Bill does not specify what the different types of application will cover but presumably, this could include an application which is concerned with more than one hedge. The Bill also provides that any fees paid to an authority may be refunded in circumstances which the authority determines.

The Financial Memorandum to the Bill includes an example of projected costs associated with making a decision but emphasises that these figures are only indicative and, as pointed out above, local authorities will be expected to set fee levels that reflect their own circumstances and issues. The Financial Memorandum points out that the following range of timings, costs and resultant fee levels was reached following a discussion with one of Scotland’s tree officers:
<table>
<thead>
<tr>
<th>Activity</th>
<th>Estimated Time</th>
<th>Projected Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Visit</td>
<td>1 - 2 hours</td>
<td>£50 - £100</td>
</tr>
<tr>
<td>Travel Time</td>
<td>0.5 - 1 hour</td>
<td>£25 – 50</td>
</tr>
<tr>
<td>Land Check</td>
<td>0.5 – 2 hours</td>
<td>£25 – 100</td>
</tr>
<tr>
<td>Report from Visit</td>
<td>2 hours</td>
<td>£100</td>
</tr>
<tr>
<td>Follow-Up Visit</td>
<td>1 hour</td>
<td>£50</td>
</tr>
<tr>
<td>Travel Time (2\textsuperscript{nd} Visit)</td>
<td>0.5 – 1 hour</td>
<td>£25 – 50</td>
</tr>
<tr>
<td>General Administration</td>
<td>1 hour</td>
<td>£50</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>6.5 – 10 hours</td>
<td><strong>£325 - £500</strong></td>
</tr>
</tbody>
</table>

Once the local authority is satisfied that individuals have taken all reasonable steps to resolve the dispute themselves, it will make an assessment of the situation and must decide whether the hedge in question is adversely affecting the reasonable enjoyment of the applicant’s property. This will involve seeking representations on the application and may include investigations being undertaken by the local authority. An application may be dismissed by a local authority if it is decided that all reasonable steps to resolve the dispute have not been taken prior to the application being made, or where an application is deemed to be frivolous or vexatious. The Explanatory Notes state that whether an application is frivolous or vexatious will turn on the particular circumstances of the application but could include a situation where an individual has repeatedly applied unsuccessfully to the local authority without there being any change in the circumstances of the case which may affect the authority’s decision.

Should an application be dismissed, the applicant must be informed of the decision as soon as is reasonably practicable and must be provided with the reasons for the application being dismissed.

If the application is not dismissed, the local authority will notify the owner of the land where the hedge in question is situated. The Bill provides that the local authority must send a copy of the application to every owner and occupier of the land containing the hedge; set out its powers in relation to decisions on high hedges; inform recipients that they have 28 days to make representations in relation to the application; and make clear that copies of all representations made must be passed to the applicant.

In coming to decisions on applications, local authorities must take any representations made into account and may also undertake their own investigations to inform decisions. Authorities will be able to visit locations, take necessary measurements, and investigate any other issues which are deemed to be relevant. The Bill provides that a person authorised by a local authority can enter the land where a hedge is situated in order to obtain the necessary information required to consider an application. That person may also do any of the following: take with them on to the land where the hedge is situated any other persons, materials, equipment and vehicles that may be necessary; take samples of any trees or shrubs which form part of the hedge; and do anything else which is reasonably required to fulfil the purpose for which entry is taken. The Bill requires that hedge owners are given fourteen days’ notice prior to an authorised person exercising power of entry to the land where the hedge is situated and also provides that it will be a criminal offence to prevent or obstruct an authorised person from carrying out their duties. A warrant may be obtained from a sheriff or justice of the peace to gain entry to land.
using reasonable force (although not against a person) where entry has been refused, is
reasonably expected to be refused or where the land where the hedge is situated is unoccupied.

The power to enter land includes a power to enter buildings (including houses) by virtue of the
definition of “land” in the Interpretation and Legislative Reform (Scotland) Act 2010, which
includes buildings and other structures. The Explanatory Notes point out that this power may be
used for entry where the building is occupied as a residence only if there is no other reasonably
practicable means of access to the high hedge.

The Bill requires that a decision on an application must be taken by a local authority after the
period of 28 days has passed. At this point, the local authority must decide, taking all
reasonable factors into account, whether the height of the hedge in question is adversely
affecting the enjoyment of the property that an occupant of the property could reasonably expect
to have. Crucially, the test therefore, is an objective occupant’s enjoyment and not the
enjoyment that a particular applicant has, or expects to have. The Bill does not specify what
kinds of things may be taken into account in relation to determining whether enjoyment of
property is affected other than the hedge being of a certain height and a barrier to light. The
intention is that local authorities will act as independent and impartial adjudicators as to whether
a hedge is having an adverse effect. As such, local authorities should endeavour to balance the
competing rights of neighbours to enjoy their respective properties and also the rights of the
community in general when coming to a decision.

The Bill specifically requires that a local authority must have particular regard to the effect of the
hedge on the general amenity of the area and also consider whether the hedge is of cultural or
historical significance. The Policy Memorandum to the Bill points out that this is intended
to ensure that the nature of the hedge in its widest sense, as well as the local community context
are taken into account alongside all the other factors and circumstances being considered. It
goes on to say that local authorities must have regard to any special characteristics of ancient
hedgerows or hedges of a historical nature.

If, having taken all relevant factors into account, a local authority decides that a hedge is having
no adverse effect it must inform all parties to the dispute of its decision, the reasons for that
decision and the right to appeal the decision (see below). If the local authority decides that a
hedge is having an adverse effect, it must then consider what, if any, action requires to be taken
in order, not only to remedy the adverse effect, but also prevent it from recurring. Where a local
authority decides that action must be taken (“initial action”), it must, as soon as is reasonably
practicable, issue a high hedge notice.

**High hedge notices**

If initial action is required, a local authority will be required to decide a reasonable period of time
for this action to be taken (“the compliance period”) and must also decide whether any
preventative action should be taken to prevent a recurrence of the adverse effect which gave
rise to the action. Preventative action may involve annual or periodical maintenance of the
hedge.

A high hedge notice must stipulate the identification of the hedge and the date on which the
notice is to take effect – this must be at least 28 days after the date on which the notice is
issued so as to allow time for any appeals to be made (appeals are discussed below). It must
also specify the action to be taken in order to remedy the adverse effect caused by the hedge
and the compliance period within which the action must be taken. The notice may also specify
whether preventative action is required. The owner of the hedge which is the subject of the
notice is required to carry out any work specified in the notice at their own expense.
However, the high hedge notice will also inform the owner of the local authority’s power to enforce the decision which has been made (i.e. carry out the work itself), and to recover from the owner any costs if the owner fails to comply with requirements of the notice. The Policy Memorandum to the Bill states that it is not anticipated that local authorities will require to undertake enforcement action other than in exceptional cases and as such, the need to recover costs in such cases should also be exceptional. However, where a local authority finds it necessary to undertake the works specified in a high hedge notice due to the hedge owner not having done so, the Bill provides that the local authority can recover any expenses (including administrative expenses), reasonably incurred in taking the action required and may also charge interest. According to the Policy Memorandum, the ability to charge interest should also act as an additional incentive for prompt payment should the local authority be required to carry out the work.

The Financial Memorandum to the Bill states that it is not possible to be definitive about the costs of enforcing a high hedge notice as the costs incurred will vary according to individual circumstances in each case. Examples of variations could include the height and/or length of the hedge; the type of worker(s) who would be required to carry out the work specified (e.g. those with expertise of working at height and with ropes); how accessible the hedge is for vehicles and specialist equipment, etc.

A local authority may vary or withdraw a high hedge notice which has been issued but before doing so must consider what effect this action would have, having regard to all the circumstances. The Policy Memorandum makes clear that the withdrawal of a notice does not prevent the issue of a further notice in respect of the same hedge. It also points out that a notice which has been varied can itself be varied. All owners and occupiers of the property affected by the hedge, as well as owners and occupiers of the property containing the hedge must be informed by the local authority that a notice has been varied or withdrawn.

**Appeals**

The Bill provides for appeals to Scottish Ministers in the following circumstances. Applicants for a high hedge notice can appeal a local authority’s decision not to issue a notice; and owners and occupiers of both the land occupied by the high hedge and the property affected by the high hedge may appeal a local authority’s decision to issue, vary or withdraw a high hedge notice. It should be noted that there is no appeal mechanism where an application for a high hedge notice has been dismissed, but it is open to individuals to make a fresh application in respect of a high hedge, taking into account the local authority’s reasons for dismissal of a previous application.

**Tree preservation orders and conservation areas**

Where a tree has already been identified as having particular significance, it may be protected by a tree preservation order. The intention of the Bill is that local authorities should take account of any tree preservation orders which are in place when making a decision on a high hedge application but should not be unnecessarily constrained by an order in deciding what action should be taken in respect of a high hedge. The Bill (at section 11) specifies that a tree preservation order which applies to a tree or trees which are included in a high hedge, has no effect in relation to any action specified in a high hedge notice i.e. action to remedy the adverse effect or any preventative action.

4 Under section 160 of the Town and Country Planning (Scotland) Act 1997 (as amended by section 28 of the Planning etc (Scotland) Act 2006.)
The Policy Memorandum to the Bill points out that a similar issue arises where a hedge is situated in a conservation area as such hedges which include trees not subject to a tree preservation order are afforded similar protection under section 172 of the Town and Country Planning (Scotland) Act 1997. In the Policy Memorandum, Mark McDonald MSP has stated that he favours a similar approach being taken for conservation areas as that for tree preservation orders.

The Policy Memorandum states that:

The legal framework for conservation areas is however different from that regarding tree preservation orders in that a legal power already exists to dis-apply the effects of a conservation area. That power is set out in section 173 of the Town and Country Planning (Scotland) Act 1997 and provides that Scottish Ministers may by regulations direct that section 172 shall not apply in such cases as may be specified in the regulations. Scottish Ministers are considering the use of those powers in relation to this Bill’s provisions.

As pointed out above, the historic and cultural significance of a hedge and its effect on the amenity of the local area are expressly mentioned in the Bill (section 6) as having to be taken into consideration in all decisions. Local authorities would also need to have regard to other legal and local policy restrictions and guidelines which are intended to protect the wider public interest which could be relevant. The Policy Memorandum states that examples of these include whether:

- any protected birds, animals or plants are present in the hedge (having regard to the Wildlife and Countryside Act 1981 and the subsequent amendments found in the Nature Conservation (Scotland) Act 2004 as well as local Biodiversity Action Plans);
- the hedge is within the boundary of a listed building or historic site;
- there are planning conditions attached to a planning permission which relate to the hedge;
- the hedge is situated in a designated nature conservation site such as a Site of Special Scientific Interest;
- the hedge is situated in a National Scenic Area;
- any licence or consent is required from the Forestry Commission; and
- the hedge is within the boundary of a National Park.

There are currently two National Parks in Scotland – Loch Lomond and the Trossachs National Park, and the Cairngorms National Park. The Bill provides for local authorities to make decisions with regards to certain high hedges, and to enforce those decisions. There is a general duty on local authorities, under section 14 of the National Parks (Scotland) Act 2000, to have regard to National Park Plans (prepared by the National Park authority and approved by the Scottish Ministers) when exercising functions which affect a National Park. It is expected that any local authority considering issuing or enforcing a high hedge notice in its area and which also falls within the boundary of a National Park, would then liaise with that National Park, taking due account of the National Park Plan.
LEGISLATION IN OTHER JURISDICTIONS

Scotland is currently the only part of the UK which has not enacted primary legislation to address the issue of private disputes between property owners in relation to problems caused by high hedges.

England and Wales/Northern Ireland

The UK Parliament passed legislation to address the problem of high hedges in England and Wales under Part 8 of the Antisocial Behaviour Act 2003 (“the 2003 Act”). The legislation came into effect in Wales in December 2004 and in England in June 2005. Under the 2003 Act, local authorities in England and Wales are empowered to operate a scheme for resolving high hedge disputes. The Department of Communities and Local Government is empowered to make regulations and provide guidance to regulate the scheme operated by English local authorities, while the power to make regulations for the scheme in operation in Wales rests with the Welsh Government.

In England and Wales, the law makes provisions for local councils to determine complaints about high hedges by the owners/occupiers of domestic property adversely affected by evergreen hedges over two metres high. The council is able to charge a fee for this service, to be paid by the complainant. It may also reject the complaint if it considers that insufficient effort has been made to resolve the matter amicably, or that the complaint is frivolous or vexatious.

After inspecting the hedge in question, the council may – if it considers the circumstances justify it – issue a “remedial notice” requiring the owner or occupier of the land where the hedge is situated to take action to remedy the problem and to prevent it recurring. Any remedial notice may be enforced through criminal prosecutions and/or by the council entering the land and carrying out the necessary work if the owner or occupier fails to do so.

Section 75 of the 2003 Act provides that failure to comply with a remedial notice (i.e. a notice specifying the hedge it relates to; what action is required to be taken in relation to the hedge in order to remedy the adverse effect and by when; what further action, if any, is required to prevent recurrence of the adverse effect; what date the notice takes effect; and the consequences of failure to comply with the requirements of the notice) is a criminal offence punishable on summary conviction by a fine not exceeding level 3 on the standard scale (£1,000). There is also provision for daily fines if the requisite work remains outstanding following a court order.

In the Policy Memorandum to the Bill, Mark McDonald states:

I have given consideration to whether or not non-compliance with a high hedge notice should be an offence, as is the case in the Anti-social Behaviour Act 2003 which contains the English provisions, but concluded it should not. I consider that the powers of enforcement and cost recovery which this Bill grants to local authorities should be sufficient to encourage compliance and I do not believe that it would be useful to criminalise people for failing to control high hedge growth in the context of trying to resolve problems between neighbours.

In 2011, the Northern Ireland Assembly enacted the High Hedges (Northern Ireland) Act 2011 (“the 2011 Act”). The 2011 Act established a scheme which is similar to that which exists in England and Wales. The provisions of the 2011 Act came into force on 31 March 2012.
The definition of a high hedge used in the current Bill is very similar to that currently in place in England and Wales and Northern Ireland (in section 66 of the Anti-social Behaviour Act 2003 and section 2 of the High Hedges Act (Northern Ireland) 2011 respectively). Both of these Acts define a high hedge in terms of forming a barrier to light, greater than two metres high, and consisting wholly or predominantly of a line of two or more evergreens.

In Northern Ireland, the 2011 Act provides a legal basis for taking action over a problem high hedge and deals with evergreen and semi-evergreen hedges that are more than two metres in height and affecting light reaching a neighbouring domestic property. The 2011 Act introduced a formal complaints system that is operated by local councils, which should only be used as a last resort as neighbours are encouraged to resolve the problem themselves.

Councils will only intervene in circumstances where a complaint is made. Complainants must demonstrate that they have tried to resolve the issue with the owner of the hedge before making a formal complaint. Even then, each case will be determined on its own merits.

A complaint cannot be made about single trees or single shrubs, whatever their size. In addition, the High Hedges Act excludes areas of forest or woodland (greater than 0.2 hectares in area).

As is the case in England and Wales, failure to comply with a remedial notice within the compliance period or the period specified for any preventative action to be undertaken, is a criminal offence punishable on summary conviction by a fine not exceeding level 3 on the standard scale.

With regard to application fees (i.e. fees which accompany an application for a high hedge notice), there is currently no limit placed upon application fees in England, whereas Wales currently has an upper limit of £320. In Northern Ireland, the High Hedges (Fee) Regulations (Northern Ireland) 2012 specify the maximum amount which can be charged by councils and is currently set at £360.

Isle of Man

The relevant legislation in the Isle of Man is the Trees and High Hedges Act 2005 (“the 2005 Act”). The 2005 Act uses a similar definition to that used in both England and Wales and Northern Ireland but defines a high hedge as a row of “two or more trees or shrubs” and does not require that they are wholly or mainly evergreen or semi-evergreen plants. It follows that deciduous plants may constitute a high hedge within that definition. The 2005 Act also covers single trees but does not define a tree, or provide a test that a tree would have to meet to be covered by the Act, other than it is affecting a person’s reasonable enjoyment of property.

Section 10 of the 2005 Act provides that failure to comply with a remedial notice is an offence punishable by a fine not exceeding £5,000.

With regard to fees, there is no upper limit or cap applied and these are determined by the Department of Local Government and the Environment to whom applications are made.

In the Policy Memorandum to the Bill, Mark McDonald MSP has stated that extending legislation to include trees and deciduous hedges would increase the complexity and difficulty of decision-making in considering such cases in comparison with evergreen hedges:

In my view, those difficulties – and the consequent additional expense for all involved – are demonstrated by the recent appeal case of Boardman versus the Braddan Commissioners heard by the High Bailiff’s Court sitting at Douglas on the Isle of Man
which relates to a deciduous hedge. The decision itself extends to 18 pages and the High Bailiff noted that the “amount of paperwork generated by this appeal has been somewhat large”. The High Bailiff’s decision also refers to the difficulties in noting that “disputes of this kind can result in a certain amount of heat and for landowners, perhaps, to a lack of ability to see a problem from both sides”. This Bill does not include trees and adopts a narrower definition of a high hedge to provide a more straightforward decision-making process which will limit costs both to the public purse and to the parties involved in the dispute, who will themselves bear the majority of those costs.
SOURCES


Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Graham Ross on extension 85159 or email Graham.Ross@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at SPICe@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament’s Public Information Service at sp.info@scottish.parliament.uk.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

www.scottish.parliament.uk