PROPOSED HIGH HEDGES (SCOTLAND) BILL

A CONSULTATION
Introduction

The Proposal
Scott Barrie MSP (Dunfermline West) has lodged a draft proposal for a bill which seeks to provide an arbitration mechanism dealing with complaints about high hedges:

Draft proposal for a Bill to resolve disputes regarding high hedges.  
(lodged 14 November 2006)

This consultation is intended to help shape new legislation which is will aim to resolve disputes about high hedges. Consultation is an important part of the legislative process and is required by the members’ bill procedures of the Scottish Parliament to help it achieve legislation which is of high quality, which works, and is in the interests of the people of Scotland. This is your opportunity to have your say on what the law should be.

I have prepared this consultation with two key aims in mind: to set out my thoughts on what the Bill might look like and to invite comments on the broad thrust and on the detail of the proposal by setting out two options for your consideration. The more detailed responses that are received, the better the Bill will be. If you are affected by a neighbour’s high hedge please respond by saying whether the proposals in this consultation would help you; if not, why not; and if so, how they could be made better. If you own a high hedge and want to keep it that way please say how the Bill would affect you.

Hedge disputes are a major cause of anxiety for many people; they can give rise to feelings of intimidation, of powerlessness and can damage property.

We can find an appropriate way to deal with hedge disputes, but it is important to remember that in a number of cases the hedge is simply a tool in a dispute. Animosity between neighbours, or from one unreasonable householder onto another, can be focussed on a boundary hedge. Removing the hedge nuisance will not necessarily restore peace and harmony; it will only remove the problem hedge.
How to Respond
Please take the time to read this consultation. Your response will form a central part of the legislative process and is important in getting the law right for Scotland.

The consultation period will run for fourteen weeks and will close on 21 February 2007.

Please feel free to pass this paper onto other individuals and organisations who you think might be interested in participating in the consultation process.

Confidential Responses
To help inform debate on the matters covered by this paper and in the interests of openness, the responses submitted on this consultation document will be made public. It is assumed that responses can be made public unless the respondent indicates that his or her response is confidential.

Confidential responses will nevertheless be included in any summary or statistical analysis, which does not identify individual responses.

You can respond on paper to:

Hedge Consultation
Room M4.02
The Scottish Parliament
Edinburgh EH99 1SP

Or by email:
scott.barrie.msp@scottish.parliament.uk
Background

Plants commonly used as hedging
The most well known plant relating to complaints about high hedges is the Leyland cypress (X Cupressocyparis leylandii), commonly known simply as leylandii. It can grow to a height of over 30 metres at a rate of 1 metre per year. Other common residential garden hedges include:

- Western red cedar: grows 75cm/y to a height of 25m;
- Lawson cypress: 60cm/y to 20m;
- Yew: 20 cm/y to 13m;
- Holly: 30cm/y to 10m;
- Privet: 60cm/y to 7m.

The benefit of these plants is that a hedge can absorb up to 10 per cent of noise, form a barrier against some forms of pollution (from roads and railways, for example), provide a natural windbreak and offer privacy. However, these plants need to be trimmed regularly and to be maintained properly. This should be carried out at least two or three times a year depending on the variety.

Problems caused by high hedges
Problems tend to occur where a hedge is not suitable for its location or not properly maintained. This can happen because people do not realise the full growth potential or maintenance requirements of the plants used. In addition, a once well-maintained hedge can become neglected and overgrown when ownership changes, or perhaps a change in personal circumstances of the hedge’s owner mean that they are no longer able to maintain it.

Problems that can occur as a result are:
- a reduction in light;
- blocking of views;
- difficulties in growing plants near these hedges;
- roots could lead to property damage through subsidence;
- a sense of oppression/being hemmed in;
- effect on the value of a neighbouring property; and
- enjoyment of homes and gardens being spoiled.

Existing remedies not involving legal action
Anyone affected by the problem hedges or a tree branch intruding onto their property should, in the first instance, speak to the relevant neighbour about the problem and ask them to cut it back. Unfortunately neighbours do not always respond to such a request.
Mediation is also available to help resolve disputes over hedges. This course of action is relatively quick, cheap and informal. Although it can only be successful if the neighbour is willing to communicate and co-operate.

The common law self-help remedy of abatement is available to the owner of an affected property. In other words they may cut back any overhanging branches or any roots which cross the boundary. However this is only a partial remedy in that it will have no effect on the height or thickness of the hedge on the hedge-owner’s side of the boundary. In practice though, an individual should always take legal advice prior to undertaking any action to cut back encroaching plants.

**Legal basis for dealing with problem hedges**

There are 3 legal bases on which a person affected by inappropriately sited or ill-maintained hedges can seek recourse:

- **Encroachment** - Scots law prohibits an ‘encroachment’ which is a permanent intrusion into the land or property of another. Legal textbooks suggest that overhanging tree branches could constitute an encroachment.¹ A court action can be raised in the sheriff court to prevent an encroachment.

- **Real burdens and servitudes** - 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, are relevant to the issue of overhanging branches. One type of title condition is a ‘real burden’ which sometimes creates a limit on the height to which trees are allowed to grow on a boundary between properties. There is also a possibility that the relevant title deeds contain a ‘negative servitude’ which obliges the owner of the affected property not to build or plant trees to cut off his neighbour’s light or view.² Title conditions are enforceable by way of a civil action in the sheriff court. A right to light is not automatic and must actually be created by an express grant and cannot be implied.

- **Statutory Nuisance** - A formal complaint can be made to the relevant local authority Environmental Health Department. Under the Environmental Protection Act 1990, local authorities are required to investigate complaints about possible statutory nuisances occurring on premises (which include land). If the authority concludes that a statutory nuisance exists, or that one is likely to occur or recur, they are obliged to serve an abatement notice on the person responsible for the nuisance. It is not possible to say whether a local authority would regard overhanging

¹ See e.g. Stair Memorial Encyclopaedia, Volume 14, paras 2027–2028.

² The Title Conditions (Scotland) Act 2003, section 80 (which came into force on 28 November 2004) converted existing negative servitudes into the form of real burdens but did not alter their actual content.
branches as constituting a nuisance. However, in a Scottish Executive consultation paper on high hedges from 1999, the Executive expressed doubt about whether high hedges would constitute a statutory nuisance.\(^3\)

In the case of actual harm caused by encroaching roots or branches it is possible to sue for damages and to apply for an interdict to prevent future harm.

\(^3\) Scottish Executive, Consultation Paper on High Hedges, para 13.1.
Why Legislate?

The Scottish Executive’s Consultation on High Hedges

The Scottish Executive issued a consultation paper on high hedges in January 2000. The paper sought views on whether existing remedies are indeed inadequate in practice. There were more than 90 formal responses to the paper (compared with around 3,000 when a similar exercise was undertaken in England and Wales). In addition to the formal responses, about 120 individuals wrote to the Executive, almost all of whom explained their own difficulties and called for a statutory remedy.

Asked about the extent to which there was a perceived problem caused by high hedges in Scotland, the formal response revealed differing views: 6 local authorities, 4 organisations and 47 individuals thought there was a significant problem; 10 local authorities, 6 organisations and 1 individual thought there was not. However, almost all of the 120 members of the public who took the trouble to write to the Executive saw themselves as victims of their neighbours’ high hedges and regarded such hedges as a problem requiring legislative action.

While the overall level of response was low compared to a similar consultation exercise south of the border, it is clear from the responses that there is a small hard core of cases where existing remedies are ineffective leading to unnecessary distress for those concerned.

Furthermore, it may be that now is the right time for Scotland to legislate rather than wait for the number of complaints relating to nuisance hedges to rise as housing densities increase, and gardens and houses become smaller. This change in housing patterns can be seen on the outskirts of our cities and towns – a good example of this change is the eastern expansion of Dunfermline in Fife. If Scotland, or parts of Scotland, are likely to see a shift from the traditional urban/rural split to one where more and more people live in suburban housing developments of a relatively high density, with garden hedges along property boundaries, then as a country we should be ready to manage any disputes which arise.

The policy outcome of the Scottish Executive consultation was that the Scottish administration is supportive of the principle of legislation to curb nuisance hedges and they considered that a Member’s Bill would be the appropriate means for bringing forward that legislation.

A bill to address troublesome hedges would need to give some body powers to deal with this issue – but only as a last resort if matters cannot first be resolved amicably between neighbours.

4 http://www.scotland.gov.uk/consultations/leylandii-00.htm
Planning Legislation in the Scottish Parliament

During the consideration of the Planning etc (Scotland) Bill\(^5\) in the Parliament, amendments relating to high hedges were lodged at Stage 2 by John Home Robertson MSP (amendment 129) and by Dave Petrie MSP (amendment 156)\(^6\). Amendment 129 aimed to introduce similar planning controls to high hedges as applies to garden walls. Amendment 156 aimed to introduce local authority powers to tackle problem high hedges, modelled on those in existence in England and Wales (see below). These were debated by the Communities Committee on 13 September 2006\(^7\) and were not agreed to as the issue of high hedges relates to nuisance and not regulation of new development.

Antisocial Behaviour Legislation in England and Wales

Over the past few years several Private Members’ Bills have been debated by the UK Parliament at Westminster. None got further than third reading because of lack of parliamentary time. The last of these bills, the High Hedges (No. 2) Bill, introduced by Stephen Pound MP, ran out of time but was resurrected by the Government and, in effect, became Part 8 of the Anti-social Behaviour Act 2003 c38.\(^8\) Section 8 deals with the criteria for admissible complaints, the definition of a high hedge and a domestic property, the complaints procedure, appeals procedure, powers of entry and enforcement powers.

Scottish Ministers agreed that it would not be appropriate to simply insert a comprehensive section of high hedges into the recent Antisocial Behaviour (Scotland) Act 2004 without proper scrutiny of any proposed measure. To do otherwise would have meant that the UK Parliament had the opportunity to fully debate the law on high hedges while the Scottish Parliament would not. It would also have meant that any measures would not have been consulted on in Scotland.

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\(^5\) Planning etc. (Scotland) Bill
\(^6\) See 3rd Marshalled List of Amendments for Stage 2
\(^7\) Official Report, Communities Committee 13 September 2006
\(^8\) http://www.opsi.gov.uk/acts/acts2003/20030038.htm
Local authority complaints procedure or Summary Cause action in the Sheriff Court

The proposed bill is intended to resolve disputes regarding high hedges in Scotland. Complaining to the responsible body would be a last resort. People should have tried to resolve their hedge problems through negotiation with their neighbours before approaching the responsible body. Otherwise their complaint would be rejected.

I have been considering two options to handle complaints in structuring my Bill; the creation of a complaints procedure for which the local authority would be the responsible body, or utilising the Courts perhaps under the Summary Cause Procedure.

The following paragraphs will take you through both options and seek your views on the detail.

Option 1: Local Authority Complaints System

My proposed bill could be modelled on the legislation in place in England and Wales. It is in this context that I am consulting on the adoption of the principles of Part 8 of the Antisocial Behaviour Act 2003, suitably modified to be appropriate for Scottish circumstances and practices.

The evidence available so far suggests that the English and Welsh legislation is working reasonably well and it appears that local authorities are not overburdened by the added responsibility. Anecdotal evidence also appears to suggest that people generally think that local authorities are the natural home for mechanisms to solve neighbourhood disputes of this kind.

Given the existing local authority infrastructure and the projected low additional workload, coupled with a desire for solutions responsive to local needs and for local accountability this function could rest with local authorities.

The model used in England and Wales is attractive in that it gives local authorities the power to adjudicate on hedge disputes and to reach a conclusion based on the individual circumstances of each case. The law creates a framework in which complaints can be resolved rather than stipulating the maximum height of a hedge, or exactly how far a hedge can be from a neighbouring dwelling or a boundary.

In order for this approach to work in Scottish circumstances there are a number of elements that have to be considered.
**Definition of a high hedge**

Before local authorities can consider complaints in relation to high hedges there will have to be a definition of what constitutes a high hedge. The legislation in England and Wales specifies that a hedge should be considered to be formed wholly or predominantly by a line of two or more evergreen or semi-evergreen trees or shrubs of more than 2 metres in height above ground level.

Semi-evergreens are plants which are able to keep their leaves all year round under certain conditions, but otherwise would lose them. In Scotland for example, privet would tend not to retain green leaves in the winter but in some milder areas or less exposed sites it may retain its leaves. Another aspect for consideration is that both trees and shrubs are included in the example definition. A tree is a tall perennial woody plant having a main trunk and branches forming a distinct elevated crown, whereas a shrub is a woody plant with a framework of branches and little or no central stem. Another section of the definition relates to the number of plants needed before it can be regarded as a hedge. The example definition requires a line of 2 plants but it could be more.

The last attribute that helps to define a high hedge is its height; again this could be higher (or lower). Two metres is suggested as the trigger height above which the local authority would be able to investigate whether a hedge is a nuisance requiring action. This does not mean that 2 metres would be the maximum height of a hedge, but the minimum height above which action could be considered. The height of 2 metres corresponds to the height at which a structure would require planning permission, for example a wall less than 2 metres in height would not require planning permission. There is some logic to following the same height criterion whether it is a wall, a fence or a hedge.

**Question 1. How should high hedges be defined and why?**

**Criteria for admissible complaints**

If someone could not settle their hedge dispute amicably, they would be able to take their complaint to their local authority. There should be some criteria adopted by the local authority to enable it to assess whether the hedge is a problem hedge and therefore come within the complaints procedure. Possible criteria based on the system in England and Wales would be:

- the hedge in question was formed wholly or predominantly by a line of two or more evergreen or semi-evergreen trees or shrubs;
- it is over 2 metres high;
- the hedge acts, to some degree, as a barrier to light or access; or
- because of its height, it was adversely affecting the complainant’s reasonable enjoyment of their domestic property (that is, their home or garden);
- complainants should have taken all reasonable steps to resolve the dispute.
Question 2: Are the criteria for admissible complaints sufficient or should there be any other criterion?

A separate but related issue is who can make a complaint to a local authority about a high hedge. The Anti-social Behaviour Act 2003 sets out that a complaint can come from an owner or occupier of a domestic property where their reasonable enjoyment of that property is being adversely affected by a high hedge situated on land owned or occupied by another person.

However, you could widen this to include for example, the users of neighbouring land and footpaths, although consideration would have to be given as to whether this would potentially lead to more vexatious or frivolous complaints. It could also be argued that users of footpaths or neighbouring land do not have the same level of rights as owners and occupiers of domestic property affected by a high hedge.

Question 3: Who should be allowed to complain about a high hedge?

Remedies
If the local authority decided that action should be taken to remedy the complaint, they would issue a formal notice setting out what must be done and by when. This could well include long-term maintenance of the hedge at a lower height, but could not involve reducing the height of the hedge below 2 metres, or its removal. This would be known as a ‘remedial notice’. It would be binding not only on whoever was the owner or occupier of the land where the hedge was situated at the time the notice was issued but also on their successors. A system will need to be created in the legislation to provide for the detail of the remedial notice process and the consequences should the person responsible for the hedge not comply with the remedial notice (see below).

Enforcement
Failure to comply with a remedial notice could be made a criminal offence liable, on conviction in the sheriff court, to a level 3 fine (currently up to £1,000). The court might then - in addition to, or in place of, a fine - issue an order for the offender to carry out the required work within a set period of time. Failure to comply with the court order would be another offence, liable to a level 3 fine. From this point, the court would also be able to set a daily fine of up to one twentieth of a level 3 fine for every day that the work remained outstanding. The local authority would also be given powers to go in and do the work itself, recovering its costs from the hedge owner. The authority would be able to use these powers whether or not the criminal offence was pursued.

Appeals
Both hedge owners and complainants should have a right of appeal against the local authority’s decision. The legislation would need to set out the detail of the appeal process. This would ordinarily be by summary application to the
sheriff court. The Sheriff may order as he sees fit and the Sheriff’s decision would be final.

Alternatively, appeals could be made to the Lands Tribunal. The Lands Tribunal has a variety of powers. These include the power to hear and determine questions of disputed compensation for land acquired compulsorily and the power to hear appeals by public sector housing tenants regarding the delay in relation to, or refusal of, an offer to buy their council house. It also deals with applications to vary or discharge land obligations.

Question 4: How should the appeals process work?

Costs
Under the system south of the border the costs of the complaints system are borne by the complainant. The Anti-social Behaviour Act 2003 provides for local authorities to recover costs by charging a fee. The local authority can determine the level of fee but it cannot exceed an amount prescribed in Regulations. Using the most recent Welsh Regulations the fee should not exceed £320. It could be argued that the costs should be borne by the owner of the high hedge if the complaint is upheld. This could also serve as a deterrent for those with nuisance hedges. Because this will be a new system, which may require additional staff and appropriate staff training the level of fee would have to go some way to supporting this extra duty on local authorities.

Question 5: What should be the basis for setting fees and who should pay them?

Option 2: Summary Cause action in the Sheriff Court
A summary cause is a user friendly type of court procedure originally designed for use by lay people which can only be raised in the sheriff court. To give you an idea of the level, if an action relates to money, it is would be used where the value of the claim is over £750 and up to, and including £1,500. You do not need a solicitor to raise an action.

In the same way as option 1, you should raise court proceeding only as a last resort, having tried to resolve the dispute about the high hedge amicably.

Under this option the Bill would create a new type of summary cause to be used where a dispute over a high hedge cannot be resolved. Presently there are several different kinds of action which can be raise under summary cause procedure. The most common is for payment of a sum of money but there are others such as an action for delivery (recovery of moveable property) or an action for implement of an obligation (when you want the court order someone else to fulfil an obligation or perform a duty).

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summary cause action could leave it to the court to specify what remedial work has to be taken by the hedge owner in order to alleviate the complaint.

Like the local authority option where authorities operate in a local context, summary cause actions are raised in the local sheriff court maintaining the local connection.

**Appeals**

There is a right to appeal from the sheriff’s final decision in summary cause actions. This would be available to both hedge owners and complainants. Appeal is to the sheriff principal on a point of law only (not the facts of the case) and then to the Inner House of the Court of Session, and then finally to the House of Lords. The appeal mechanism for a summary cause action is already in place.

**Costs**

There is a court fee payable by the person who raises the action of £39. There is no fee payable for defending the action. There is also a fee of £32 for making an appeal against the court’s decision.

Over and above this there are costs in the form of court expenses. Court expenses are normally awarded to the person who succeeds in the case. These expenses must then be paid by the unsuccessful party. Expenses which you may incur are the cost of any solicitor (if you choose to employ one) or loss of wages and travelling expenses for yourself or any witnesses you may require to bring to court.

**Conclusion**

In conclusion option 1 establishes a new duty for local authorities in relation to complaints against about individual hedges. The proposal would create: a new duty on local authorities; a complaints system; a remedial notice process; an offence relating to non compliance with a remedial notice; a mechanism for appeal; and the level of fees to be charged. Option 2 is founded on existing court procedures requiring only amendment to an existing statute to add a new type of summary cause action specifically to deal with complaints about high hedges. Both options would provide a connection to the local context by using the existing local authority framework or the court network.

In terms of cost initially both options see the complainant bearing the cost. Option 1 this will remain the case, however in Option 2 if the complainant is successful in their action the expenses would normally be paid by the person against which the action has been brought. Option 1 caps the fees required to be paid but would have to go some way to funding the new complaints system and the recruitment and training of extra staff that may be required.
Question 6: Should local authorities administer the complaints system or should the Sheriff Courts resolve high hedge disputes, which might be better and why?

And finally…
I have endeavoured to cover the main areas associated with legislating with regard to troublesome high hedges, but there may be other issues that require to be addressed or other matters that you think should be considered in relation to the proposed Bill.

Question 7: Do you believe any equal opportunity questions will arise from this proposal?

Question 8: Do you have any other comments?

How to Respond
Thank you for taking the time to read this consultation. The consultation period will run for fourteen weeks and will close on 21 February 2007.

You can respond on paper to:

Hedge Consultation
Room M4.02
The Scottish Parliament
Edinburgh EH99 1SP

Or by email:
scott.barrie.msp@scottish.parliament.uk
Annexe 1 – Summary Questions

1. How should high hedges be defined and why?

2. Are the criteria for admissible complaints sufficient or should there be any other criterion?

3. Who should be allowed to complain about a high hedge?

4. Should the appeals process work administer the complaints system or is there an alternative solution which might be better?

5. What should be the basis for setting fees and who should pay them?

6. Should local authorities administer the complaints system or should the Sheriff Courts resolve high hedge disputes, which might be better and why?

7. Do you believe any equal opportunity questions will arise from this proposal?

8. Do you have any other comments?