I submitted evidence to The Scottish Executive in 2015 showing what Scothedge believed were four areas where the Guidelines issued to Local Authorities (“LA”) were having a negative effect on the implementation of the Act.

These were:

1 The Shelter Belt
2 The Non Hedge
3 The Woodland
4 The Owners removing 50% of the Hedge.

These topics were discussed at length and Revised Guidelines were issued in May 2016 attempting to address these matters and improve the operation of the Act.

The Revised Guidelines would appear only to have helped those with a Shelter Belt.

We continue to have problems in the following areas and therefore the topics we would like to cover in this submission are:

1. The Non Hedge
2. The Woodland
3. The Owners removing 50% of the hedge &/or creating gaps
4. Fees

It is still apparent that some Local Authorities are continuing to find ways of evading implementation fairly, in the spirit, and in the meaning of the Act itself.
I will go on to explain and give examples.

It also appears reporters of the DPEA are applying the terms of the Act inconsistently. This comparison is made in the section where 50% of the hedge has been removed.

**The Non-Hedge Hedge**

These are cases where the applicant has a boundary treatment of trees, which falls squarely within Section 1 of the Act.

"Meaning of a high hedge"

That is;
(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 meters above ground level, and
(c) Forms a barrier to light.
The applicants in these cases have all conformed to the pre application requirements of mediation and contact with their neighbours. They had included their fee, and their applications were not considered frivolous or vexatious. However, their applications were dismissed without registration or record because their LA decided their trees were not a hedge.

As their cases were dismissed in this way, the applicants have no right of appeal. This constitutes in my opinion a breach of natural justice. The LA’s have thereby wholly circumvented the intention and purpose of the Act and prevented any appeal upon their decision.

LA’s has given varying reasons as to why the trees before them do not qualify in their opinion, as a hedge and here are some of them.

The trees were not planted at the same time.
The original intentions were not that of planting a hedge.
The trees are ornamental, part of a larger landscaping feature.
The trees are what you would expect in a mature garden boundary.
The trees are a tree belt and landscape feature of a golf course.
The trees are not managed as a hedge.
The trees are individual tree specimens.
The spacing between the trunks is not what you would expect of a hedge.

None of these are included as exclusions in terms of the Act or the Guidelines. In many cases the definition of the Act I would contend was specifically intended to cover these situations.

Examples of Non Hedge Hedges

Perth and Kinross Council (P&KC)

P&KC wrote in their Site Assessment, “the 15 trees that have been detailed in the high hedge notice application have been planted as ornamental trees and whilst arbitrarily close to the garden boundary are not all so. It is the opinion of the council that the trees within this garden were not planted as a hedge whether formally or informally, but as individual specimens.”

In one sentence the report states that the trees “do not form a continuous barrier to light” and in the next paragraph goes on to say “I consider that whilst some tree canopies may coalesce and form a barrier to light, and this barrier to light may impact on the enjoyment of neighbouring dwelling-house, fundamentally this application does not relate to a hedge or indeed a high hedge, but individual trees”.

It was not disputed in the report that “the trees blocked the sun when due south and west, the photographs produced by the applicant showed this”. P&KC continued, “that there was a barrier to light, resultant adverse impact on the reasonable enjoyment of the applicants property however the barrier to light is a consequence of trees and not a hedge”.

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This application was dismissed without registration or record with no right of appeal to the DPEA.

Surely, to acknowledge the applicant had a high hedge under the Act, Section 1, it formed a barrier to light and had an adverse effect on the enjoyment of their property, it should at the very least been allowed to move forward to be allowed to go to the DPEA as an appeal?

Highland Council Non-Hedges

Applicant 1

Applicant 1 is approx. 10m from the boundary, the trees are 15m + tall on what is a south facing garden. He gets no sunshine in his garden at any time of year and also suffers lack of daylight in all rooms to the south.

Applied for a high hedge notice in July 2014, which was dismissed.

HC wrote, “having assessed the trees in question, please note we do not consider them as falling within the definition of a high hedge as prescribed by Section 1 of the high Hedge (Scotland) Act namely;

(a) Is formed wholly or mainly by a row of 2 or more trees or shrubs;
(b) Rises to a height of more than 2m above ground level; and
(c) Forms a barrier to light

The reason for this determination is as follows;

The trees in question do not appear to have been planted in a row as a hedge, nor do they take on the character of a hedge or have been maintained as a hedge. While tightly planted, they constitute woodland and form part of a woodland belt.”

They go on to say,

“While I can appreciate that the trees may form a significant barrier to light they do not form a hedge therefore do not fall within the ambit of the high hedges (Scotland) Act.”

Case dismissed, no right of appeal to the DPEA.

Why is this different?

Applicant 2

Applicant 2 is some 11m from the boundary, on what is a south facing garden, the trees are 15m + tall. He gets very little sunshine and also suffers from lack of daylight to all south facing rooms.

Applied for a high hedge notice at the end of 2016 on the basis the guidelines were revised. This was dismissed in Feb 2017.
Highland Council wrote, “The trees while closely planted, do not form any clearly recognisable linear feature that could be reasonably described as a hedge. AND the trees have not been planted in any clearly ordered linear fashion that would allow them to coalesce and form the solid wall type feature that is normally associated with a hedge. I appreciate that the lack of depth perception within the crowns may give rise to the impression that these trees were planted to form a hedge” HC continue, “That the coalescence of the crowns of the trees is not, in itself, sufficient for the trees to be considered a hedge. I appreciate that the trees will likely impact on the light available to you, however the trees do not form a hedge”

Case dismissed, no right of appeal to the DPEA

Applicant 1 and 2 are affected by the same boundary treatment of one house within a large garden. It is obvious from the aerial photograph that the trees have been planted along the boundary and are a boundary treatment, not woodland or a forest.

The previous owner of the house where the trees are planted, wrote to HC in support of the application of a HHN to say that he planted the trees originally to give privacy between his house and the new development of houses to the north of his plot back in the 60’s. He never intended it to be a woodland or forest and certainly never intended to block out the light or sunlight of his neighbouring houses.

HC have chosen to ignore this letter of support. The trees were clearly intended as a boundary treatment to separate plots, which have become a hedge in the meaning of the intention of the Act and Guidelines.

This application was dismissed with no registration or record and no right of appeal to the DPEA.

There are several houses along a street in Inverness all waiting on the outcome of this case. The householder here and many in the street have no sunshine in their gardens at all, summer or winter.

I refer you now to cases where LA’s have dealt with similar cases very differently.

HHA-350-6- reporter Michael Cuncliffe

Para 1, the reporter writes, “the trees alleged to form a high hedge are about 16 meters in height and are situated on the north east boundary of the back garden of the affected property. They are mature coniferous trees, of which the bottom 5 meters are so largely devoid of foliage, but which coalesce to form a dense canopy further up. They are located about 10 m from the rear wall of the original two–storey house and 6m from the single story extension. They give rise to morning overshadowing of the house and garden and their height and proximity result in a significantly negative effect on the amenity of the property”.

This Inverness applicant is some 10m from the boundary and his trees are 15m tall and his garden is south facing with overshadowing all day.
How can this not be accepted as a High Hedge application in the spirit of the Act?

HHA-350-6, para 3 the reporter goes on to say, “It appears to me that the trees form part of, and reinforce, the boundary between Woodend and the neighbouring properties. It is my opinion that, notwithstanding the presence of the rest of the woodland behind it, the row of trees which is subject to the notice does indeed, in this case, take the form of and have the effect of a high hedge”.

HHA -250-6 reporter John H Martin

Para 3, “The hedge in question comprises of a continuous row of mainly deciduous trees the highest being 12-13 m.”

In para 5, he continues, “bearing in mind the windows to the appellants bedrooms and kitchen are only 5.5m from the hedge, the overall impression from the house is one row of a dominant and oppressive wall of foliage extending well above the ridge height of the bungalow. I am therefore satisfied that, together these trees meet the description of a high hedge in the HHA ad the council was right to issue a High hedge Notice.”

Para 7 he continues, “I appreciate that the appellant has no legal right to a view but by allowing the trees to grow so high and dense in this rather un-neighbourly manner, the hedge owners have effectively diminished her right to reasonable levels of natural daylight.”

Para 8 he continues “While I can see the benefits of the new orchard to the east, with the extent of the land surrounding Gifford farm, neither of these need have been planted right on the boundary, so the high hedge gives the impression of a deliberate screen to separate two properties. This has clearly had little impact on the hedge owners enjoyment of their own property, but clearly it has considerably reduced the appellants enjoyment of her garden and the rooms on that side”

You can see that the trees have little effect on the owner but considerable effect on the High Hedge applicants.

How can HC deny the applicants access to an appeal when you see these DPEA reporters above have taken a very different view?

I submit that HC are wilfully seeking to avoid the issue of High Hedge notices and to refuse to register applications and thereby to deny any appeal of their view.

East Renfrewshire Council- (ERC)

Applicant -Newton Mearns

ERC wrote in their dismissal of this application that it “first must be a hedge as defined by the Oxford English dictionary”. (Although this definition has now been
removed from the guidelines) The council went on to say that the” Act concerns hedges and is not designed to impact on woodlands and forests which as a general rule not planted as hedges” Again this paragraph in the revised guidelines has been changed since this decision was made by ERC.

However ERC go on to say that “the trees have been assessed by the council as not being a hedge but instead a tree belt which forms one of the landscapes features of the golf course. The trees would not appear to have been planted as a boundary treatment between the golf course and the site boundary and the planting is not in the form of a hedge.”

Application dismissed, no registration or record and no right of appeal to the DPEA.

“Tree belt” does not appear anywhere in the Act or the Guidelines but has been “made up” by ERC.

Aberdeen City Council (ACC)

Applicant 1

When the applicant advised his neighbour they intended applying for a High Hedge notice, there was a flurry of activity removing some of the understory planting along the boundary fence that gave both parties complete privacy at a low level. It of course made no difference to the light at a higher level and to the tree owner who is some 60m from the fence. Although this did create gaps at 2m and below none were sufficient to let light through to any great degree where it was required.

This first application in Oct 2014 was dismissed on the basis the hedge did not comply with the “Oxford English Dictionary Definition” of a hedge. Despite ACC acknowledging the trees in question fell squarely within Section 1 of the Act. They also made reference to the fact that the trees adversely affected the enjoyment of the property and south-facing garden that the applicant would otherwise would have had.

Application dismissed, no registration or record, no right of appeal to the DPEA.

The second application was made in Oct 2016 when the reason for refusal of their first application had been removed from the Guidelines in terms of the Revised Guidelines.

This application was also dismissed. ACC quoted pg 12 para 2 of the revised guidelines “that well-spaced treelines were not considered a hedge”. This sentence was taken out of context as the Guideline goes on to say “it is not normally expected that trees planted between properties would be classified as either woodland or forests so local authorities should consider whether trees and shrubs were planted with the intention of forming a boundary between two gardens in order to separate neighbouring properties.” However ACC chose to ignore this.
After discussion with Head of Legal Services for ACC, he advised the applicant to reapply for a third time. This time the application was dismissed on the basis that ACC use their own criteria.

ACC wrote, “The Planning Authority considers an number of criteria in assessing whether the vegetation is a hedge. **This is the criteria that a number of Scottish Authorities apply.** The following tests are used in determining this point;

1. The original intention at the time of planting
2. The spacing of trees and shrubs
3. The past and current management of trees and shrubs

ACC dismissed the case under section 5 of the Act, which, in itself is incorrect. Section 5 of the Act allows dismissal if the applicant has not conformed to the duty imposed by;

Section 3(1)

(a) Which is mediation and contact with neighbours trying to resolve the situation,
(b) Whether the application is frivolous or vexatious.

**Neither of which apply.**

Equally, each of the reasons given does not stand real scrutiny. Why can a LA choose its own criteria when the meaning of a High Hedge is clearly laid out in the Act itself?

**Again because this application is dismissed, without registration, there is no right of appeal to the DPEA.**

Neighbours either side of this applicant are significantly affected by this boundary too and had been awaiting a successful outcome before applying themselves.

One neighbour has failed to sell her house because of the boundary trees.

Further up and down the street neighbours in the same situation have had no problem removing or reducing in height their boundary treatments as their neighbours had taken a sensible approach to the problem.

The evidence of HHA cases contrary to ACC approach can be found in my personal submission.

These cases present very different views of DPEA reporters compared to ACC arguments of the above.

See cases
HHA-320-2
HHA-390-22
HHA390-21
HHA-350-3
Applicant 2 Aberdeen

This applicant has been advised in pre-application discussions and correspondence with ACC that his hedge in not a hedge per the Act. He is currently going through due process to make an application but has been told his application will be dismissed.

The applicant’s garden is small, measuring 5.5m along the boundary with the tree owner, 6m from the boundary to his kitchen window and back door. He is east facing and could only enjoy the morning sunshine. However his biggest concern is the lack of light at all times of the day. He requires artificial lights at all times. The tree owner has also a fairly small garden but within it contains 5 trees. The canopies all pretty much coalesce into what one could describe as one single canopy covering the whole of his back garden. The trees range in height from 10-20m.

ACC advised on a site visit that even if he should loose 100% of natural light to his house, they would NOT issue a High Hedge Notice.

Was this not precisely what this Act was brought in to give the LA’s power to stop?

Why is Aberdeen not embracing this law with the intention it was brought in to achieve?

I submit that ACC are also wilfully seeking to avoid the issue of High Hedge Notices and refuse to register applications to deny any appeal of their view.

For the Act to be effective in any form at all, action must be taken to have this approach and attitude changed.

The Non-Hedge Hedge Conclusion

As you can see from the cases above that each case is different but similar in their dismissal.

Each and every one of the cases falls squarely within the Section 1 of the Act.

Each applicant has followed the pre application requirements and their applications were not frivolous or vexatious.

However, their LA’s have denied their applications and thereby denied them a chance of access to the Appeals Process, their right to natural Justice and their basic human rights.

I submit that further revision to the Guidelines at the very least is necessary to ensure that, should your trees fall under the Section 1, of the Act, meaning of a
“high hedge”, you have undertaken all the pre application requirements of trying to resolve the situation with your neighbour, your application isn’t vexatious or frivolous, then you should at the very least be entitled to demand registration of your application and then depending on the decision of the LA the applicants would then at the very least have access to the Appeal process.

The Woodland

The Woodland issues have mainly been covered by the Highland Council cases.

The Revised Guidelines May 2016 state that, “It is not normally expected that trees planted between properties would be classified as a woodland or forest, so local authorities should consider whether the trees and shrubs were planted with the intention of forming a boundary between two gardens in order to separate neighbouring properties”.

This paragraph was altered to provide clarification but clearly LA’s have not embraced the intention of the revised guidelines.

This paragraph requires clarification so that LA’s are in no doubt.

With that in mind and the aerial Google Earth photographs, on what grounds can HC still maintain this is woodland?

The Tree Owner Removes 50% of the hedge.

This has resulted in LA’s and the DPEA in some cases dismissing the application, as it was no longer a High Hedge.

Applicant 1

Angus Council

The applicant here applied as soon as the Guidelines to Councils were first issued in 2014. AC made a site visit but took 5 months to give them a decision. In the meantime the tree owner had removed every alternate tree.

The refusal letter from the LA stated they no longer had a High hedge as per the Act, (although at the time of the site visit it was!)

Due to personal health issues and devastation of the decision the applicants did not have the energy to appeal.

The applicant paid £250 at the time and now faces a further fee as the trees have grown into the gaps and her hedge is becoming an ever-higher hedge again.

Applicant 2

Moray Council HHA300-1
MC issued a High Hedge Notice.

Again in the time between the notice being issued and the DPEA site visit the tree owner removed sufficient trees to create gaps. As it was no longer a high hedge the DPEA reporter quashed the LA’s decision.

**Applicant 3**

**Fife Council HHA-250-3**

Fife Council – Issued a High Hedge Notice but between the LA’s decision and the DPEA’s visit, the tree owner had removed every second tree. As such the reporter deemed it no longer a high hedge. The height and over shadowing still remains although there are gaps. With new side growth the trees are coalescing again.

**Applicant 4**

**Fife Council HHA-250-1**

This applicant applied for and was granted a high hedge notice. However, after the decision was granted by the DPEA, the owner removed every other tree. Fife Council wrote to the applicant to say the order had been *largely* complied with, and no further action was to be taken against the tree owner.

Surely this attitude of the LA condones bad behaviour from the Hedge Owner who now believes his actions are now sanctioned by the Law.

**Contrary to the cases above**

**HHA-220-4 Reporter Trudi Craggs**

**East Renfrewshire Council**

ECR issued a High Hedge notice but the hedge owner had cut the trees to 15ft before the DPEA got there.

The reporter wrote para 11, ”*Not withstanding that the hedge has been cut down to what I agree appears to be 15ft in height, and no longer forms a barrier to light given the lack of growth and foliage, I have to determine this appeal against the context of what was there at the time that the high hedge application was made and determined*”.

She continues in para 12, “*In order to do this I relied on the evidence before me and in particular photographic evidence provided with the application*”

Photographic evidence was available in Fife, Moray and in Angus but their outcomes and treatment by the DPEA and LA was very different. Had their photographic evidence of how their hedges had looked like at the time of application, there seems little doubt a high hedge decision would have been made in their favour.
Conclusion

The tree owner removing 50% of the hedge.

Photographic evidence prior to application should be considered as there needs to be consistency in dealing with tree owners whose aim to thwart the Act.

Removal of part of the hedge should not be allowed without enforcement of the removal of the height too as it is quite clear what the tree owners intentions are.

By enthusiastic enforcement of a few cases like these, this type of action would quickly stop.

Fees

It is apparent that the huge variance in fees from £192 to £500 is a barrier to many people applying in the first instance. It gives the message that to gain access to the law you must have money.

I think it more appropriate that those on low incomes, benefits and pensions should be allowed to apply but pay fees on a sliding scale according to their incomes.

This is intimated in the Guidelines to Councils but has not been adopted.

I also suggest that should the tree owner have a High Hedge Notice placed upon him, he should have to pay the fee.

By applying this strategy, tree owners who know they will possibly incur even more costs (if they lose their case or are simply putting their neighbour to aggravation of applying in the first instance) may cooperate at a much earlier stage.

Conclusion

On one hand you could argue that the Act and Guidelines need stronger and clearer definition. However it does seem that currently certain Authorities are collectively or individually are seeking every excuse and reason to refuse not only the issue of a High Hedge Notice but more worryingly even to allow registration of an application in anything other than with respect to a simple straightforward Leylandi Hedge. This approach thereby denies access to an appeal and this being contrary to the principles of natural Justice.

By dismissing applications in this way, the LA’s are giving their endorsement to the hedge owners to allow their hedges/trees call it what you may, to carry on growing even taller, knowing that their actions are now sanctioned by the Law.

When processing cases, LA’s often seem to prioritise and protect the rights of the hedge owner over the rights of the neighbour who is suffering the effects
of the hedge. I'm certain this is not what the Scottish Parliament had in mind when the Act was introduced.

I would contend on behalf of all parties suffering at the hands of unreasonable neighbours that a short period of more enthusiastic application of High Hedge Notices would soon bring such bad neighbours to heel and would over time would reduce applications made.

This must surely be the ambition of all those who supported the passing of the Act.

To date The Act is not working for the very many people who after years of suffering and patience had very high hopes.