

Local Government and Communities Committee

Post-Legislative Scrutiny of the High Hedges (Scotland) Act 2013

Submission from Julian A Morris

Preamble: I am an arboricultural consultant based in Scotland, and I have represented several parties in pre-application high hedge disputes, High Hedge cases and appeals. Since the Act was proposed, I have amassed a detailed knowledge of daylighting science and practice to supplement my arboricultural expertise. However, I have no current live cases or appeals and my submission is independent of the interests of any clients. It represents a personal overview of my experience of the Act, and is made as a citizen of Scotland rather than as a consultant. I have no vested interest in the outcome.

- ***Has the definition of a high hedge as set out in the Act proved helpful? If not, please provide details.***

The definition in the Act is not particularly helpful. The definition is this –

(1) This Act applies in relation to a hedge (referred to in this Act as a “high hedge”) which— (a) is formed wholly or mainly by a row of 2 or more trees or shrubs, (b) rises to a height of more than 2 metres above ground level, and (c) forms a barrier to light.

It is clear that (a) to (c) are the definition of a hedge, and that the Act does not in fact have a definition of a hedge anywhere. It only sets out those kinds of hedges to which the Act applies. The *'row of 2 or more trees or shrubs'* part accords with part of the fundamental characteristic of any hedge, namely that it is generally linear in form. The *'height of more than 2 metres'* part only excludes low hedges, and cannot be seen as being a definition of a hedge. The *'barrier to light'* part has nothing to do with the definition of a hedge, especially deciduous ones that can be a barrier to light in summer and not in winter.

The operation of the Act therefore relies in the first instance on the common meaning of 'hedge'. The Guidance in this respect is not helpful either. The original guidance said that -

"For trees or shrubs to be considered as a high hedge, they must first be a hedge."

This was the single most pertinent part of the Guidance, as it gets to the nub of almost every non-standard hedge case (of which there have been many).

Unfortunately it has been removed from the revised guidance, without explanation. Far from clarifying things, the revision now fails to address the plain English of the Act.

Rather ominously, the closest the new guidance comes to interpreting what is a 'hedge' is that -

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.

The dangers are obvious - the original intentions of the planter are irrelevant compared with how the line of trees and shrubs is currently being used and is affecting its neighbours. Over time an innocuous hedge or line of trees could have been allowed to grow unchecked (by the original or subsequent owner(s) despite the original purpose. It is these sorts of hedges that can cause the greatest misery for complainants. Furthermore, the property on which the hedge is situated does not, for the operation of the Act, have to be another garden. The Act must guard against abuses of narrow definitions that would circumvent the laudable intention of protecting people against the misery of unnecessary and adverse shade from perennial vegetation, regardless of its form or origins. The current definition and/or lack thereof does not help; in addition to inviting abuse, it encourages Councils to take an inappropriately narrow view.

On the positive side, the revision to the guidance removed the part that said

A hedge is defined by the Oxford English Dictionary as:

“A row of bushes or low trees (e.g. a hawthorn, or privet) planted closely to form a boundary between pieces of land or at the sides of a road”.

This definition could only have been checked by buying a subscription to an online dictionary, or (as I did) visiting a public library. On checking I found that the definition was only one of several that the dictionary contained. A hedge needs neither to be low (obviously!) nor to be 'on' a boundary. Some of the most abhorrent high hedges are set back from the boundary, even if only by a few feet. Some are there to genuinely to protect privacy. In urban situations it is rare indeed for a hedge's sole purpose to be a boundary marker or a natural physical barrier.

- ***Do you have any experience of the appeals procedure as set out in the Act?***

I have been involved in 20 or so appeals. Experience has been mixed, and has depended very much on the personal skills and willingness of Reporters to attempt to fill in the gaps in the legislation and Guidance. Some of the Reporters' reasoned

justifications have been helpful and have given a foundation for better quality subsequent decisions. Others have not. But the filling in of gaps has no judicial precedence, and if (and inevitably when) some of the custom and practice that has emerged is challenged in court it could lead to the re-opening of many cases that have relied on flawed previous decisions. As such, there is no substitute for fixing the legislation and guidance as soon as possible.

Some of the early decisions were quite alarmingly naive, and I have every sympathy for those who had these decisions foisted upon them. However, to have challenged these the cost of even a fairly straightforward judicial review with every prospect of succeeding would be several £000s. The availability of this remedy is quite simply not available to almost every ordinary member of society, and it is therefore no substitute for fair decisions in the first place. In a just society, fair treatment should not be available only to the rich.

Local Authorities usually have available within their staffing the expertise of architects, planners and tree officers to contribute to good decisions that take account of quantification of light, application of British Standards site measurement and arboricultural and ecological ramifications. But if a decision of a Council is to be set aside, Reporters must substitute the decision with one of their own, and they quite simply do not have the qualifications, experience, equipment, reference material and technical abilities to do so, or access to technical advice. Decisions become subjective and unexplainable. The frustration for parties to appeals is palpable and real.

- ***Do you have any comments on the enforcement procedures under a high hedge notice?***

My experience of enforcement (or lack thereof) is limited to 2 cases.

In one, the Council was blindly pursuing enforcement without (as the Guidance says it should) considering "the degree of harm caused by failing to meet the conditions of the notice" (the degree of harm had not been assessed and was trivial and invisible to the complainant).

In the other case, the Council has done nothing, a year on from the decision. The problem appears to be that Local Authorities "may" take enforcement. This leaves too much to their discretion or available resources, and does nothing to remove the adverse effects of a hedge being suffered by the complainant. The Guidance does not address this matter adequately, and should make a presumption in favour of prompt enforcement in every case that breach of a High Hedge Notice is demonstrably having significant effect on the enjoyment of the complainant's property.

- ***Do you have any comments on fees and costs?***

The national variances of fees is largely inexplicable and a source of great frustration to clients.

The Guidance allows the Government to issue Guidance about the refund of fees, but not the setting of fees. Applicants have effectively no mechanism for challenging the level of fees established by their Council for the fees payable for an application.

- ***Overall, are there any aspects of this Act which has had a positive or negative impact on your life?***

My experience is that of my clients. The matters having a positive or negative impact run through my comments as a whole in this submission.

- ***Any other issues relating to the Act which you wish to bring to the attention of the Committee?***

The rest of my submission is devoted to this question.

OBJECTIVE STANDARDS OF DAYLIGHTING AND ENJOYMENT OF DOMESTIC PROPERTY

High Hedge applications and their determination almost invariably turns on the matter of daylighting. Unfortunately through a combination of the wording of the Act, the wording of the Guidance and a lack of technical guidance and know-how the available standards are incapable of application in some cases and in others are poorly applied. Poor decisions, resented or incomprehensible to the parties, are the outcome.

One has to go back to the setting up of the Scottish high hedges regime to see why this is the case. The principal reasons are these –

(i) There has been no public consultation on the implications of deciduous trees and shrubs being included in the scope of the Act. These were introduced only between the 2nd Committee stage of the Bill and the final approval of the Act by Parliament. Only a couple of months after this the Act came into effect. The result is that no accepted technical basis could emerge for even straightforward hedge cases, and certainly more complex cases, being assessed by Councils and Reporters.

(ii) Scotland is the only country in the UK that has not issued central technical/policy guidance to householders on the assessment of daylighting. I submit that in hindsight this is an oversight that has served the Scottish people very poorly. This is doubly significant because, like the other UK countries' legislation the parties are bound to show that they have tried to reach agreement with a neighbour before

making an application for a High Hedge Notice, yet the parties in Scotland have no means to assess what a reasonable negotiated outcome would be.

(iii) There appears to be no rationale for relying on the 'localism' argument for Local Authorities producing their own individual Guidances. Apart from this being a very inefficient way to go about producing clear householder guidance, the matters that would vary from Council to Council are very slight, and could easily be incorporated into central guidance.

(iv) The standard response to all this by most Local Authorities has been to rely almost entirely on the Government Guidance when it comes to the nitty-gritty of assessing the daylighting effects of hedges - they simply include the Government Guidance verbatim, or a link to it, in their own Guidances.

(v) A rather undemocratic circularity ensues. Councils "*must have regard to*" the Government's Guidance. They "*may*" also produce their own Guidance. In their Guidance, they defer to the Government's Guidance. After the unsatisfactory determination of many applications, appeals are decided by "*a person appointed by the Scottish Ministers*", being those Ministers who authorised the Guidance.

(vi) For daylighting to buildings, the Government Guidance commends the adoption of the daylighting standards in BS 8206-2 (a document that costs £228, effectively cost-prohibitive for householders). This is an incredibly technical document, but nevertheless provides an objective standard for acceptable daylighting to buildings.

Unfortunately elsewhere in the Government Guidance it is incorrectly stated that "This guidance does not specify limits for light levels, and local authorities are free to measure light levels using any methods they consider reasonable and suitable for their needs."

(vii) More than a few words are merited at this point about the English Government's High Hedge and Light Loss document. This document was produced to help householders in England in their attempts to reach pre-application agreement with neighbours in high hedge disputes. It is an indication of how little expertise that exists about daylighting issues even amongst many Councils, that it rapidly became the default tool of Councils too.

On close analysis, the document is a high quality piece of work by the Building Research Establishment, and in England may well provide consistently fair outcomes in high hedge cases where the hedges and garden layouts are not markedly different from the model used in creating the guidance. That said, there are some shortcomings in the adoption of the guidance to Scotland that just cannot be overlooked -

(a) The guidance only works with the English/Welsh legislation, and its definitions. In particular it can only be used with dense evergreen hedges of only 4% light transmittance. As such it breaks down rapidly with any deciduous or less densely evergreen elements.

(b) The Building Research Establishment's first draft of the guidance accorded more or less exactly with the British Standard, but the adopted final version changed the parameters significantly, without explanation. It is assumed that this was done under the political direction of the Office of the Deputy Prime Minister. This has broken the objective reliability of the guidance; for the devolved Parliament of Scotland (with aspirations of independence) to acquiesce to the adoption of limited and flawed English guidance in Scotland is inexplicable.

(c) The Guidance was restricted to English latitudes. With parts of Scotland being as much as 8 degrees north of the centre of England, the differences in available light are significant; given the universal recognition of the importance of daylight to human health and wellbeing, the use of English guidance in Scotland appears a disservice to the Scottish people.

(d) Even in England the guidance has been shown to be defective for certain types of cases, and it would be remiss to replicate these errors in Scotland.

(vii) The Government Guidance elsewhere says that in each hedge case the "local authority must decide how useful this HLL will be in any given circumstances".

In my experience it is rare for Councils to apply the British Standard or to explain whether or why it does not consider it appropriate to the particular circumstances of a case. It cannot possibly suffice for Councils neither to consider this matter nor to explain why it can safely use the English Guidance or should not use the British Standard directly.

(vi) The Building Research Establishment has produced a separate publication called Site Layout Planning for Daylight and Sunlight. This publication is a skilfully produced practical toolbox for the objective application of the British Standard to the daylighting relationship between dwellings and buildings opposite or nearby. It reduces the complex British Standard to a set of methods for applying it to real situations. In the latest edition of the document, a whole section is devoted to adapting the tools to the daylighting effects of trees and hedges. It provides or alludes to a solution to even the most complex of high hedge cases. It is an internationally renowned publication. Having cited it and used it diligently in several High Hedge cases and met dismissive decisions from Reporters who can see no citation of it in the Government guidance, I think it is high time it is referred to in revised Scottish High Hedge Guidance, as it provides the straightforward and objective answer to almost every high hedge case.

THE ACID TEST OF REASONABLE ENJOYMENT IN THE SCOTTISH ACT

The Act says that action is merited where "*the height of a high hedge situated on land owned or occupied by another person adversely affects the enjoyment of the domestic property which an occupant of that property could reasonably expect to have*".

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

We are left to imagine that there is some unwritten level of enjoyment that can be expected. For properties lawfully built in accordance with planning permissions that contain no conditions relating to the control of boundary vegetation, the owner of that vegetation has done nothing lawfully wrong. Centuries, possibly even millennia, of common law has resulted in no right of light. Notwithstanding that it may be socially desirable for Parliament to intercede in this, the vagueness and circularity of the definition in the Act falls short of replacing common law on this point. It does not create a right of light, unless of course the thing blocking the light falls into the narrow definition of a high hedge. And even in these cases the level of enjoyment is not, by the wording of the Act, measured in terms of reasonability. We have only the Government Guidance's suggestion that the British Standard provides a standard for windows, and nothing for gardens.

There is perhaps one exception to the 'expectation' argument, and that is in relating to views. Unlike in England where views are ruled out, appeal cases in Scotland have resulted in a few cases justifying the reduction in hedges on the basis of expectation of views. I think it quite right that views cannot be newly created by the Act, but the few cases suggest that where properties were built lawfully and with the endorsement of planning consents to enjoy views as a fundamental design ethos, and where those views are being arbitrarily removed by a high hedge out of all proportion to the benefits of the hedge to its owner, these views should be protected and reinstated by the Act. I believe the current Guidance should clarify this issue. It currently says nothing on the matter.

SUMMARY

I commend the following approach as a means of addressing the vagueness and unfairness of the current Scottish High Hedges regime.

1. The production of centralised householder guidance that is robust enough to be used in most cases by Councils too. The guidance could easily incorporate a scope for localism for individual Councils.
2. Insofar as the English guidance can be used as a starting point for this, the differences in Scottish law, latitudes and independent political determination of Scottish citizens' expectations should be reflected in it.
3. The parameters within which the simplified guidance should be set out explicitly, so that more appropriate methods can be used for more complex cases, particularly those involving predominantly deciduous hedges.
4. The Building Research Establishment document Site Layout Planning for Daylight And Sunlight should be introduced into the Guidance and commended strongly to Councils and Reporters.
5. The matter of entitlement to views should be clarified in revised Guidance.
6. Meaningful public consultation should take place with the public and industry on what should be stated in the guidance.
7. To fill the void in the British Standard as to acceptable standards of garden daylighting, (i) the BRE's original standard ("Only 7% of the garden is in deep shade and most of it has more than the 55% daylight you would get near an unobstructed east or west facing wall") and (ii) the sunlighting threshold in Site Layout Planning for Daylight and Sunlight, would be a useful starting point.
8. Artificial guidance about whether the original intention of vegetation as a boundary should be abandoned in favour of an approach based on disproportionate disadvantage to a complainant; the myth of there being definition of a hedge in the Act should be recognised for what it is, and a presumption in favour of adverse effect adopted instead of arguments about narrow definitions of hedges.
9. In that respect, there is a huge demand for a right of appeal against decisions by Councils that vegetation does not comprise a hedge. This question should be considered alongside adverse effect on enjoyment rather than as a pre-qualification criterion. This and other matters will require changes to the primary legislation.
10. The honest statement that a high hedge must first be a hedge in the common sense of the word should be reinstated in the Guidance.
11. The Government should do all that it can to make material breaches of High Hedge Notices enforced promptly by Councils.

Scotland was the last country in the UK to give its citizens relief from problem hedges. In so doing, it had an opportunity to correct the shortcomings of its predecessors and to tailor the legislation and guidance to Scotland. In the sole matter of introducing relief from deciduous hedges it was progressive, but it has never consulted its citizens on that question and on its ramifications. It is not too late to redress the latter. It has the opportunity to lead the UK by creating robust and objective guidance, and I believe that it can and should to this.

Personally I would be happy to contribute to any progressive approach to the current vague and subjective operation of the Act, but it doesn't matter who does it, only that it is done. I believe everybody would welcome clarity and retrospective improvements. We should not wait for the Court of Session to struggle someday to make sense of the inadequacies of the High Hedge regime if it can instead be repaired in a way that brings the citizens of Scotland along with it.