

**LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE – EVIDENCE
SESSION – HIGH HEDGES (SCOTLAND) ACT 2013**

<i>Date and Time of Committee Appearance</i>	Wednesday 24 May 2017 - 10:00am – 11:00am
<i>Where</i>	James Clerk Maxwell Room (Committee Room 4), Scottish Parliament
<i>Purpose of Evidence session</i>	On 6 February 2016, the Local Government and Communities Committee announced it had agreed to undertake post-legislative scrutiny of the High Hedges (Scotland) Act 2013 to determine whether it is working effectively. The Minister has been invited to give oral evidence as part of this process.
<i>Official Support Required</i>	<p>██████████ Policy Officer - Safer Communities Division ██████████</p> <p>██████████ Chief Reporter and Director for Planning and Environmental Appeals ██████████</p>
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COMMITTEE AGENDA

16th Meeting, 2017 (Session 5) - Wednesday 24 May 2017

The Committee will meet at 10.00 am in the James Clerk Maxwell Room (CR4).

1. **Post-legislative scrutiny of the High Hedges (Scotland) Act 2013:** The Committee will take evidence from— Kevin Stewart, Minister for Local Government and Housing, Paul Cackette, Chief Reporter, and Julie Robertson, Policy Officer, Scottish Government.
2. **Post-legislative scrutiny of the Disabled Persons' Parking Places (Scotland) Act 2009**
3. **Subordinate legislation:** The Committee will consider the following negative instruments— The Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2017 (SSI 2017/120); The Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No.2) Regulations 2017 (SSI 2017/149).
4. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 12 May 2016 to 11 May 2017. LGC/S5/17/16/A
5. **Consideration of evidence (in private):** The Committee will consider the evidence heard at agenda items 1 and 2.

SPEAKING NOTE

(attached as a separate word document)

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STRATEGIC OVERVIEW

- The High Hedges (Scotland) Act 2013 came into effect on 1 April 2014 and grants local authorities the powers to act as independent adjudicators in disputes between neighbours about high hedges within their local area. Prior to this date there was no legislative solution in Scotland to resolve disputes between neighbours about overgrown hedges.
- The Act was a Private Member's Bill sponsored by Mark McDonald MSP, which was given the government's support. The Scottish Government carried out a consultation in 2009 which asked respondents whether they would prefer a legislative solution to resolve high hedge disputes, or whether it was best left to individuals to resolve privately (as was previously the case). Over 95% of respondents expressed a preference for government intervention.
- The Act contains a provision that places a duty on the Scottish Parliament to make arrangements for one of its committees or sub-committees to report to Parliament on the operation of the Act during the "review period". The review period began when section 2 (enabling applications for high hedge notices to be made to a local authority) came into force (on 1 April 2014) and ends 5 years after that date, or on such earlier date as either the committee or sub-committee may determine. The Committee has determined an earlier date for the end of the review period than the 5 years outlined in the legislation. The Committee must produce a report, made in such form as the committee considers appropriate, but no later than 18 months after the end of the review period.
- The Committee's call for written evidence invited all interested parties to provide written submissions, setting out their views on how the Act is working. The call for views closed on 20 March 2017 and 62 responses were received. Following the call for written evidence, the Committee published its timetable for considering oral evidence:
 - 19 April:** individuals who responded to the call for written evidence
 - 10 May:** local authorities (Perth & Kinross; Fife; Aberdeen City)
 - 17 May:** Mark McDonald MSP
 - 24 May:** Minister for Local Government and Housing
- A high hedge, under the provisions of the Act is described as **a hedge which is formed wholly or mainly by a row of 2 or more trees or shrubs; rises to a height of more than two metres above ground level; and forms a barrier to light.** The Act does not take the roots of a high hedge into account, nor does it cover overhanging branches which can be cut back to the property boundary under common law.
- It is possible for both the applicant and the hedge owner to appeal the local authority's decision. Appeals are handled by reporters at the Scottish Government's Directorate for Planning and Environmental Appeals (DPEA).

POLICY NOTE – DEFINITION OF A HEDGE

- A high hedge, under the provisions of the Act is described as **a hedge which is formed wholly or mainly by a row of 2 or more trees or shrubs; rises to a height of more than two metres above ground level; and forms a barrier to light.**

Parliamentary consideration – definition of a high hedge

- The definition of a high hedge as provided in the High Hedges Bill, as introduced, was undoubtedly the key issue raised by witnesses who gave evidence to the Committee at stage 1. The Bill as introduced, defined a high hedge as one which:
 - (a) is formed wholly or mainly by a row of 2 or more **evergreen or semi-evergreen** trees or shrubs;
 - (b) rises to a height of more than 2 metres above ground level; and
 - (c) forms a barrier to light
- Most of the written and oral evidence received by the Bill Committee commented on that part of the definition which limited a high hedge to one consisting of “evergreen or semi-evergreen trees or shrubs”. Opinion varied between those witnesses who believed that the definition should be expanded to include other forms of vegetation, such as single and deciduous trees, while others favoured retaining the definition as set out in the Bill. Other witnesses believed that the definition should be narrowed even further to provide protection to various types of evergreen or semi-evergreen species (e.g. yew or juniper).
- A number of amendments were lodged at stage 2 with regard to the definition and meaning of a high hedge as outlined in the Bill as introduced. Anne McTaggart MSP, stated that she was concerned that the exclusion of the word ‘deciduous’ from the definition of a high hedge would potentially leave many long-standing disputes over high hedges without a resolution. Ms McTaggart also put forward the argument that where vindictive intent or bullying is involved, a deciduous species could simply replace one which came within the scope of the definition in the Bill and lodged an amendment to include the word ‘deciduous’ in the definition of a high hedge.
- Responding on behalf of the Scottish Government, the Minister for Local Government and Planning, Derek Mackay MSP, said that while the Government was willing to listen to arguments seeking to amend the definition of a high hedge, any substantial change to the definition would only be considered once local authorities had been consulted on the matter. To that end, and in light of the amendments put forward, he had written to local authorities to seek their views on the potential impact of widening the definition with a view to revisiting the issue at Stage 3 consideration of the Bill. Anne McTaggart agreed not to move her amendment following reassurances that the issue would be considered prior to Stage 3.
- At Stage 3, Anne McTaggart MSP lodged a similar amendment, seeking to change the definition of a high hedge. Her amendment at Stage 3 sought to expand the definition of a high hedge to include deciduous species and to achieve

this by changing the definition of a high hedge to simply “a row of two or more trees or shrubs”. Derek Mackay MSP confirmed that, following consultation with local authorities, the Scottish Government would support Ms McTaggart’s amendment.

- As a hedge consists of a row of two or more trees or shrubs, a single tree is not considered a hedge and therefore it was decided to exclude applications relating to single trees from the legislation. At the time of the Bill, it was felt that if single trees and other types of plants and vegetation were to be included it would run the risk of creating complex and unwieldy legislation that would be difficult to enforce.

Post-legislative scrutiny – definition of a hedge

- A number of respondents, both individuals and local authorities, have highlighted issues with the definition of a hedge, as set out in the Act in their written evidence to the Local Government and Communities Committee.
- **Angus Council** questioned whether the definition of a high hedge applied to high trees, **Stirling Council** felt the definition was too general and **East Dunbartonshire Council** felt it had to be improved. **North Ayrshire Council** called for more clarity in cases where trees not initially planted or maintained as a hedge but which have become over grown and taken on the form of a hedge, as these cases attract a lot of complaints. **Glasgow City Council** also felt more clarity was needed and said it should be emphasised that a hedge needs to have been planted as a boundary treatment hedge rather than a collection of trees to meet the definition. **Aberdeen City Council** stated that *“future clarification should clearly state that the Act only applies to hedges and that any group of trees and/or shrubs needs to firstly be considered to constitute a hedge”*.
- Where the vegetation consisted of mixed trees and shrubs, it was highlighted that local councils have **differing interpretations of the definition of a high hedge**. One individual suggested that local authorities and the DPEA Reporters were misinterpreting the meaning of the term high hedge leading to many applications being dismissed as ineligible. **While we are aware of differences in interpretation between local authorities and that DPEA views sometimes differ from local authorities, we are not aware of significant degrees of error or inconsistency in DPEA decisions** (where the remedy is to challenge by judicial review).
- In the Scottish Government guidance published when the Act was commenced, there was reference to the Oxford English Dictionary definition of a hedge however, officials received a number of complaints about this as several local authorities were quoting the definition and using it as a reason not to consider an application. Working with local authorities and stakeholder groups such as Scothedge the guidance was revised and reissued (with a Plain English Crystal Mark) removing the reference to the dictionary definition. At the oral evidence session with individuals (including members of Scothedge) on 19 April, there were concerns raised that the term ‘hedge’ was not defined in legislation or associated guidance.

POLICY NOTE – PRE-APPLICATION REQUIREMENTS AND DISMISSALS

- Making an approach to the Council to serve a high hedge notice upon a neighbour is intended as a last resort. A potential applicant must take “all reasonable steps” to resolve the issue themselves first.
- Pre-application requirements vary between local authority areas. In some areas a set number of written approaches in the weeks and months leading up to lodging an application is sufficient, other councils offer free mediation services and parties may be required to attend this before applying. Under section 31(2)(a) of the Act, Councils may issue guidance on how these requirements can be met – and/or shown to have been met.
- Section 5 of the Act sets out the grounds on which an application can be dismissed:
 - (a) an application will be dismissed if a potential applicant fails to take all reasonable steps to resolve the matter in accordance with the Scottish Government guidance.
 - (b) an application will also be dismissed if the application is considered to be **frivolous** (that it is not a reasonable application and it has no reasonable chance of succeeding) or **vexatious** (that is, the application is intended to harass, annoy or cause frustration or financial loss to the other person despite there being little justification for a complaint in the first place).
- The Act only applies to high hedges i.e. hedges which meet the 3 requirements set out in section 1 of the Act. An application for a hedge which does not meet these requirements or is not deemed to be a hedge, can also be dismissed by a local authority. If a local authority dismisses an application because it is considered that the applicant has not complied with the pre-application requirements or it is considered that the application is frivolous, vexatious or ineligible (they do not believe it relates to a hedge or a high hedge as defined in the Act) there is no right of appeal.

POLICY NOTE - FEES FOR PROCESSING APPLICATIONS

- The high hedges legislation allows local authorities to set fees for processing an application under its provisions (section 4). **The legislation does not set a national 'flat fee' since it was recognized that each local authority has to take its own needs and circumstances into account**, however the level of fee is expected to be 'cost neutral'.
- There are some **disparities in fee levels** across the country. The cheapest is Inverclyde Council at £182, while the fee for Glasgow City Council is £500. (the highest registered fee in England was £600).
- The legislation allows councils to set different fees for different types of application or refund fees and the circumstances under which a fee may be refunded is expected to be published on councils' websites. The vast majority of councils simply set a single flat fee, although **City of Edinburgh Council** waive fees for registered disabled people and in cases of hardship (the latter is determined by the head of service).
- When the legislation was introduced, complaints were received by policy officials about the level at which fees were set, with applicants feeling they were generally set too high. The number of complaints about fees has reduced significantly however, the differing costs across council areas was raised by many respondents in the Committee's call for written evidence, particularly the lack of explanation provided by councils for the level set in an area. **South Lanarkshire Council** and **Perth & Kinross Council** both felt the fee charged should be set nationally.
- At the first oral evidence session and in the written evidence, it was suggested that the fee associated with applying should be paid by the hedge owner where the applicant is successful. **East Ayrshire Council** suggested that applicants should be able to recover the costs as part of the enforcement process. Some respondents suggested waiving fees for those who were unable to pay, giving access to the legislation to all, not just those that can afford to apply.
- Officials attended an event with local authorities in March 2015 and local authority practitioners said, in a number of cases, that fees were set by council committees and in some cases they were at a lower level than the Planning Department had originally proposed. In written evidence to the Committee, the **Royal Town Planning Institute** (RTPI) highlighted the current financial constraints in the planning service and said that the fees charged are unlikely to be at a level that would compensate for planners being diverted from their primary duties. **Glasgow City Council** responded saying that it set the fee for a High Hedge Notice at £500, the same as the fee for a planning application, because the same amount of processing and consideration is required for a High Hedge Notice but with a higher potential for appeal related work given the rights of appeal available to the applicant and the recipient.
- DPEA do not at present charge a fee for appeals, but DPEA feeing for planning appeals was raised in the recent Planning White Paper and, subject to consideration of the consultation responses and Ministerial decisions, may be introduced for High Hedge appeals if introduced for planning appeals.

POLICY NOTE - ISSUING A HIGH HEDGE NOTICE

- Once the council is satisfied an application meets the criteria for consideration, it will write to everyone who owns or occupies the land to inform them they are considering an application for a high hedge notice regarding their hedge. The local authority will allow the hedge owner 28 days to make representations.
- The local authority will then send the investigating officer to visit the property where the hedge is located. The officer will assess the hedge and decide whether the height of the high hedge adversely affects the enjoyment of the neighbouring domestic property by considering factors such as the amount of light loss to the neighbours, representations from the hedge owner in respect to their right to privacy and the effect of the hedge on the general amenity of the area. If it is considered that the high hedge adversely affects the enjoyment of the domestic property, the local authority must consider whether any action is required to remedy the adverse effect or prevent the adverse effect recurring (or both). Once the case has been assessed, the council will notify both the applicant and the hedge owner of its decision.
- If the decision is to issue a high hedge it must:
 - a) identify the high hedge it relates to and where it is growing;
 - b) identify the domestic property it is having a negative effect on;
 - c) state the date on which the notice will take effect, which must be at least 28 days after the date on which the notice is given;
 - d) state the initial action the hedge owner must take and the time limit for taking that action;
 - e) state any action the hedge owner must take to prevent the problem from happening again (preventative action) following the time limit for the initial action;
 - f) tell the person receiving the notice about their right to appeal; and
 - g) tell the person receiving the notice about the local authority's power to carry out the work set out in the initial or preventative action if the owner does not meet the conditions of the high hedge notice and recover the costs of doing this, and explain that it is an offence to obstruct a person authorised to carry out the work on behalf of the local authority.
- The notice will normally contain two parts, namely **initial action** and **preventative action**. Initial action is the work which should be carried out immediately in order to bring the hedge down to an acceptable height. There is a compliance period for this work to be carried out, which will depend on the scale of the work required.
- When setting the compliance period, local authorities should take account of how much work is involved and other factors such as whether specialist equipment or professional help will be needed. The compliance period should also take account of any special circumstances that limit when the action can be taken, such as the need to protect nesting birds.
- Under the terms of the Wildlife and Countryside Act 1981 consideration must be given to whether there are any protected birds, animals or plants in the hedge and how they would be affected by any work; legislation which protects wildlife; and whether any work should be carried out, or avoided, at a particular time of year

(for example, if birds are nesting in the hedge, hedge cutting should be avoided during the nesting season). DPEA practice is to assume that the nesting season is March to end August.

- The high hedge notice will also be most likely to contain preventative action. This sets out what action(s) must be carried out in order to maintain the hedge at an acceptable height in future.
- A high hedge notice remains in force until it is withdrawn, most likely as a result of removal of the hedge. A notice would no longer have any practical effect if the property concerned ceases to be used as a domestic residence.
- Failure to comply with a high hedge notice means the local authority may consider intervening. Initially, it is recommended they write to the land owner warning of the consequences of non-compliance with the notice, in case the land owner is not aware of the existence of the high hedge notice.
- Continued non-compliance means the local authority may consider carrying out the necessary remedial works themselves and charging the expenses for doing so to the land owner/occupier. They are required to provide the site owner with 14 days' notice of their intention to carry out this work. Deliberately obstructing an officer from carrying out their duties may see the land owner/occupier issued with a fine of up to £1,000.

POLICY NOTE – LOCAL AUTHORITY CONSIDERATIONS

Barrier to light

- The Act applies to hedges that, despite any gaps above the 2-metre mark, act as a barrier to light. This issue is about the physical appearance of the trees and shrubs in question and whether or not they form a hedge. The local authority must decide whether a particular hedge meets this condition by considering the trees or shrubs that make up the hedge, including its shape, its growth habit, and, most importantly, what it looks like above 2 metres.
- Even though there might be gaps in the foliage or between the trees or shrubs, the local authority must consider whether the hedge is obstructing light. The trees or shrubs in the hedge may have been closely planted and become so entangled that they appear as a solid green wall. In these circumstances, the matter may be straightforward as the hedge is evidently capable of blocking light. Other cases may be more difficult to judge. Local authorities must assess each case individually.
- If individual trees or shrubs are so widely spaced, or the gaps in the leaves are so big that it is possible to see what lies behind them, the hedge may not be covered by the Act, but this decision must be based on the circumstances of each case.
- In some cases, it may be possible to tell from photographs or other evidence whether a hedge forms a barrier to light. In other cases, a local authority may need to visit the property to see the hedge before making a decision.
- The Scottish Government 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. Whichever method the local authority decides to use to help them make their final decision as to whether a hedge is a barrier to light, they must consider the circumstances of each case.

Obstruction of light: domestic premises

- The *British Standard Lighting for buildings: Code of Practice for daylighting* sets out the standard for what is a reasonable amount of daylight and sunlight for people to get in their house. It works on the basis that properties should receive enough natural light during daylight hours to allow the people living there to carry out normal household tasks without eye strain. The Scottish Government guidance suggests that local authorities should use this as a guideline as to what the applicant should expect.
- The *Hedge Height and Light Loss* (March 2004) guidelines which were developed by the Building Research Establishment (BRE) are intended to be used when a local authority are looking at the effect a hedge has on the main rooms of the applicant's house (including living rooms, dining rooms, kitchens and bedrooms) and apply whether a hedge is opposite or to one side of the window, or at an angle to it. They also suggest suitable adjustments if the land is sloped or if the hedge is set back from the boundary.

Obstruction of light: gardens

- The *British Standard Lighting for buildings: Code of practice for daylighting* does not apply to gardens, and local authorities cannot rely on it when considering how a hedge is affecting a person's reasonable enjoyment of their garden. In their guidance on *Hedge Height and Light Loss*, the BRE based their approach on the daylight and sunlight received in the garden as a percentage of that on ground not affected by a high hedge over the whole year. The code of practice makes allowances for existing obstructions, such as the house and boundary fences, which could increase the effect of a hedge. It suggests making suitable adjustments to take account of sloping sites or situations where a hedge is set back from the boundary – although the guidance applies only to evergreen hedges.

Scottish guidelines

- The *Hedge Height and Light Loss* guidelines were created to help local authorities in England and Wales make decisions under the Anti-Social Behaviour Act 2003 and the method was designed to apply only to evergreen hedges. The High Hedges (Scotland) Act 2013 covers all types of hedges and so that method cannot be applied in all cases.
- In the first oral evidence session **Scothedge argued that a Scottish version of the *Hedge Height and Light Loss* guidelines should be developed** because the High Hedges legislation in Scotland includes deciduous trees, which are slightly different from evergreen trees such as leylandii. It was also argued that Scottish guidelines could take into account Scotland's more northerly latitude as this means that we have shorter days so are in a slightly different position in terms of the length of the days and the way in which the sun interacts with gardens than in England.

Reasonable enjoyment of a property

- The Act applies to high hedges which are acting as a barrier to light and adversely affecting a person's reasonable enjoyment of their domestic property.
- Local authorities must assess the effect that the hedge has on the applicant's reasonable enjoyment of their home and garden, so introducing a degree of objectivity to the decision-making process. The level of enjoyment the local authority consider reasonable may be different from what the applicant considers reasonable.
- The local authority must also consider what is reasonable in the circumstances of the application. This means the local authority must take account of all relevant factors, including the opinions of the hedge owner and the applicant and any wider considerations (they will not look only at the applicant's concerns); and look at each case individually.
- If a local authority decide that a high hedge does have a negative effect on the applicant, the Act (section 6(7)) states that they must take account of "the effect of the hedge on the amenity of the area" and "whether the hedge is of cultural or

historical significance” when deciding whether the owner should take any initial action.

POLICY NOTE – APPEALS

- It is possible for both the applicant and the hedge owner to appeal the local authority's decision. Appeals are handled by reporters at the Scottish Government's Directorate for Planning and Environmental Appeals (DPEA).
- The terms of a high hedge notice are suspended whilst an appeal is being determined. Appeals must be made no later than 28 days after the date when the local authority notified the parties of its decision. Appeals made after this timescale cannot be heard.
- Possible outcomes from appeals are that the reporter can uphold the local authority's original decision or high hedge notice; they could quash the decision (with or without issuing a high hedge notice), or the high hedge notice issued by the local authority; or vary the terms of the notice, i.e. change the work required or the compliance period.
- The decision of the Scottish Government reporter is final unless parties seek a judicial review on a point of law
- There is no additional fee for making an appeal, although the appellant would be liable for any costs incurred if they choose to appoint a representative to handle their case.
- The number of High Hedge appeals received since 1st April 2014 (up to 3rd May 2017) is 149 although the number has declined year on year:

2014-15	2015-16	2016-17
67	51	31

- The appeal decisions are as follows:

Interest in Land	Reporters Decision			Total
	Quashed	Varied	Confirmed	
Owner/Occupier of Property Affected	10	24	31	65
Owner/Occupier of land where hedge is situated	6	40	8	54
Total	16	64	39	119

(Live Cases = 10; Withdrawn = 6; Admin decisions = Too Late 4; No Remit 10)

- A number of respondents to the call for written evidence argued that **the legislation should allow individuals to appeal to the DPEA on local authority decisions where it is deemed that the vegetation is not a hedge.**

POLICY NOTE - ISSUES EXPERIENCED WITH THE ACT AND POSSIBLE CHANGES

- Scottish Government officials have received correspondence from members of the public and their political representatives about problems they have experienced whilst trying to make an application for a high hedge notice.

Non-hedge - definition of "hedge" (see policy note on p6 for more background information)

- Some local authorities have been accused of not following "the spirit of the law" by dismissing applications because they do not apply to hedges. According to the legislation, a high hedge is a hedge which is formed wholly or mainly by a row of 2 or more trees or shrubs; rises to a height of more than two metres above ground level; and forms a barrier to light. The key part though is that it must be a hedge or it is an ineligible application. Some local authorities have dismissed applications stating the vegetation is a shelterbelt, a woodland fringe, an ornamental feature or that the trees/shrubs were not originally planted as a hedge.
- Where it is deemed that an application relates to a non-hedge it is dismissed as ineligible and there is no right of appeal as you can only appeal against a Council's decision and a decision can only be made on an eligible application.
- Scothedge, a leading campaign group said in its written evidence that having no right of appeal in these circumstances constitutes a breach of natural justice.

- [REDACTED]

Timescales

- The Act does not set specific time limits on decisions, however, the Scottish Government guidelines confirm that we expect that local authorities will process high hedge applications as soon as reasonably possible. Because the facts and circumstances are likely to be different in each case, individual local authorities must decide on appropriate timescales in each case.
- In both written and oral evidence, the time some local authorities are taking to process applications has been raised as an issue.

- [REDACTED]

Non-compliance

- Failure to comply with a high hedge notice means the local authority may consider intervening. Initially, it is recommended they write to the land owner warning of the consequences of non-compliance with the notice, in case the land owner is not aware of the existence of the high hedge notice.

- Continued non-compliance means the local authority may consider carrying out the necessary remedial works themselves and charging the expenses for doing so to the land owner/occupier. They are required to provide the site owner with 14 days' notice of their intention to carry out this work. Deliberately obstructing an officer from carrying out their duties may see the land owner/occupier issued with a fine of up to £1,000.
- In both written and oral evidence there have been calls for greater penalties for non-compliance with a High Hedge Notice – similar to the penalties for failure to pay a parking fine - and some suggestions that local authorities are not very proactive in pursuing notices that are not complied with leading to the legislation being seen as “toothless”.
- We are aware that an on-going problem for local authorities has been that high hedge notices differ from planning enforcement notice appeals in that appeal period is not prior to the “effective date” but within 28 days of service. This has resulted from time to time in errors within the Notice.
- [REDACTED]

Fees (see policy note on p9 for more background information)

- The high hedges legislation allows local authorities to set fees for processing an application under its provisions (section 4). The legislation does not set a national ‘flat fee’ since it was recognized that each local authority has to take its own needs and circumstances into account, however the level of fee is expected to be ‘cost neutral’.
- It was hoped that the requirement to pay a fixed fee at the time an application is made by an individual would act to discourage vexatious or frivolous applications.
- It has been suggested that the fee associated with applying for a high notice (varying from £182 to £500) should be paid by the hedge owner where the applicant is successful.
- [REDACTED]

Making changes to the legislation

- Section 35 states that Scottish Ministers may by regulations, subject to the affirmative procedure, modify the meaning of “high hedge”. The power to modify is limited to the circumstances set out in section 35(1)(a) to (c) outlined below:

- (a) adding a type of tree or shrub to, or removing a type of tree or shrub from, section 1(1)(a);*
- (b) increasing or reducing the height above ground level specified in section 1(1)(b) and (2);*
- (c) modifying or adding to the effect of a hedge specified in section 1(1)(c).*

[Note that section 35(1)(a) no longer applies given the stage 3 amendment to remove “evergreen” from section 1 which consequential amendment was not picked up at stage 3]

- Regulations under section 35 are subject to the affirmative procedure. It is likely that changes beyond that which are allowed by section 35 i.e. changes to the appeal provisions, would result in the Act operating in a different way and **would require primary legislation.**

Q&A

Q: What is a 'high hedge'?

A: According to the Act, it must form a row of two or more trees or shrubs; rising to a height of more than two metres above ground level; and forms a barrier to light.

Q: Are all hedges over two metres in height classed as a "high hedge"?

A: No, not all hedges over two metres in height will automatically be classed as a "high hedge". This will only happen where a formal complaint is made via a High Hedge Notice Application and that complaint is upheld by the council. For example, a hedge would not be regarded as forming a barrier to light if it contains gaps which reduce its overall effect as a barrier at heights exceeding two metres.

Any hedge not over two metres in height cannot be considered a "high hedge".

Q: What types of hedge will be considered?

A: All types of hedge will be considered by the Act, whether they are evergreen, semi-evergreen, or deciduous trees.

Q: The Act refers to the 'reasonable enjoyment' of property in Section 2. How can this be measured since it appears to be quite subjective?

A: When making a decision, the local authority has to balance the adverse impacts of the hedge on the applicant's property against its amenity for the hedge owner, the adjudicating officer will not focus solely on the concerns of either the applicant or the hedge owner to the exclusion of the other party.

Factors taken into account will include what the adjudicating official determines to be a reasonable amount of light for the time of year; the impact the hedge has on the view from the property and whether the hedge provides the owners home with privacy and/or security.

Q: What is not covered by the provisions of the Act?

A: The Act does not cover single trees and it does not take the roots of a high hedge into account. The legislation does not apply to trees which do not form a hedge. Two trees growing together do not automatically form a hedge. For example, well-spaced tree lines and avenues are not generally considered as a hedge, even if canopies coalesce. Similarly, woodlands are not hedges.

The Act also does not cover overhanging branches or blockages caused by falling leaves. Under common law, householders have the right to cut overhanging branches back to the boundary of their properties, although it is recommended you let your neighbour know that you intend to do this.

Q: What are the requirements before an application can be submitted to a council?

A: Making an application to the council for a high hedge notice is intended as a last resort. The Act requires that potential applicants must take “all reasonable steps” to resolve matters relating to the high hedge themselves before making an application. A council is likely to ask applicants to provide supporting evidence to show that they have done this.

The Act does not specify what constitutes “reasonable steps”, because this will vary between different local authority areas. However, a potential applicant would likely be expected to make a number of written approaches to their neighbour over a period of weeks or months prior to making an application. It is possible some councils will also offer a free mediation service and applicants may be required to attend.

Potential applicants should contact their own local authority prior to making an application in order to find out what those pre-application requirements are.

Q: Is a fee payable for making my application and can it be refunded under any circumstances?

A: Yes. The Act gives local authorities the discretion to charge a fee to cover the administrative costs for processing a high hedge application. The Act does not set a national flat fee since each local authority has to take its own individual circumstances into account, however the fee is intended to be cost neutral. Information on fee levels should be published on each council’s website.

The Act also grants local authorities the discretion to refund fees under certain circumstances. Information on the circumstances under which fees are refunded, either fully or in part, should be published on each council’s own website. Examples of circumstances under which fees *could* be refunded are instances where the investigating officer decides the subject of the application is not a hedge. [*There have been some calls in the written and oral evidence for fees to be refunded when a local authority has said that the application is ineligible*].

Q: Are there any circumstances under which an application will be dismissed?

A: Yes. If an applicant goes directly to the council, without having made any attempt to resolve the issue themselves first, their application will be dismissed. Applications will also be dismissed if they are considered to be frivolous or vexatious or if the application is ‘ineligible’, i.e. the subject of the application is not a hedge.

Q: Can I ask the council to reconsider their decision to dismiss my application, or appeal in any other way?

A: There is no statutory right of appeal where the application has been dismissed on the grounds the subject of the application is not actually a hedge, since the provisions of the Act do not apply. It is recommended to applicants contact their council before making an application if they are in any doubt about its validity or ask the council to reconsider its decision if one has already been made.

It is also not possible to appeal cases where the application has been dismissed on the grounds of it being frivolous or vexatious, or because the local authority does not consider all reasonable steps to resolve the matter have been taken by the applicant.

Q: What happens after an application has been submitted?

A: The council will normally provide the applicant with a letter of acknowledgement, giving them the contact details for the officer dealing with their case. The council will then write to everybody who owns and occupies the land upon which the hedge is situated to notify them they are formally considering an application for a high hedge notice against their hedge inviting them to make representations in relation to the application.

The council will then send the investigating officer to visit the property where the hedge is located. The officer will assess the hedge and consider factors such as the amount of light loss to the neighbours, representations from the hedge owner in respect to their right to privacy and the effect of the hedge on the general amenity of the area. Once the case has been assessed, the council will notify both the applicant and the hedge owner of their decision.

Q: What is the right of appeal in a decision not to award a high hedge notice?

A: Unsuccessful applicants have the right of appeal to Scottish Ministers through the Scottish Government's Directorate of Planning and Environmental Appeals (DPEA). However, this course of action is only open in cases where the council has determined the subject of the application is a high hedge in the first place.

Q: Can a council's decision to issue a notice be appealed?

A: Yes. Both the applicant and hedge owner have a right of appeal to Scottish Ministers. Reasons for the applicant appealing a notice may be because they feel the terms of the high hedge notice do not go far enough, whilst the hedge owner may consider appealing because they feel the issue of a high hedge notice is either not justified or its terms go too far.

Q: Is there a fee for appeals to be considered?

A: No, this is included in the cost of the application.

Q: What is the time period for submitting an appeal?

A: The appeal must be made within 28 days, beginning on the date when the local authority notified the relevant party of its decision.

Q: What is the process involved in determining an appeal?

A: When an appeal is received, the DPEA will copy the appeal form and any supporting documents to the council against whose decision is being appealed. The DPEA will also notify the other party to the appeal (i.e. the applicant, if the hedge owner is appealing or the hedge owner if the applicant is appealing). The council and the party being appealed against will be given 21 days to comment on the appeal. If they do so, the appellant will be given a further 14 days to respond.

The reporter dealing with the appeal case will then visit the site of the hedge and the property affected by it. 14 days' notice of the site visit will be given to the local authority, hedge owner/site occupier and the hedge neighbour, inviting them to attend.

The DPEA will normally aim to issue a decision within 12 weeks of receiving an appeal.

Q: What are the possible outcomes of an appeal?

A: The possible outcomes are: that the DPEA's reporter will uphold the council's decision; the reporter could also quash a high hedge notice, or issue a high hedge notice (where there council had previously decided not to); or the terms of the high hedge notice could be varied i.e. the works set out in the original notice are changed in some way.

Q: Can the DPEA's decision be appealed?

A: No. The Scottish Government reporter's decision is final and there is no right of appeal to the Court of Session, although parties may seek a judicial review on a point of law.

Q: What happens once the high hedge notice has been issued?

A: The council must provide a copy of the high hedge notice to the applicant and every owner and occupier of neighbouring land, setting out the decision and details of what action is required to be taken. The issue of the notice marks the start of the compliance period, during which 'initial action' must be taken. The date the notice takes effect must also be stated. This date must be at least 28 days after the date when the high hedge notice was issued to allow the hedge owner sufficient warning.

Q: What does 'initial action' mean?

A: Initial action refers to the one-off works that must be carried out to the hedge within the specified compliance period (set out in the high hedge notice) to alleviate the problems caused by the hedge. The initial action may specify that a hedge must be cut below what height is necessary to remedy its adverse effects if this will help to prevent the problems recurring.

Q: Does the compliance period start 28 days after the issue of the notice?

A: The compliance period is a reasonable period of time within which the initial action is to be taken (section 6(6)(a)) – this can start any time after the notice takes effect and the notice takes effect at least 28 days after the notice is given. The compliance period should reflect upon what can reasonably be achieved, taking into account the extent of work involved and whether specialist equipment or professional help may be required. Other factors may also have to be taken into account too, such as whether the hedge is protecting nesting birds or securing a food supply for a range of local wildlife.

Q: Can the council do anything to prevent the problem recurring in future?

A: Yes, a high hedge notice will also include 'preventative action'. This section of the high hedge notice specifies what continuing work must be taken beyond the initial compliance period to ensure the hedge does not cause issues in the future.

Q: How long does a high hedge notice remain valid for?

A: The notice remains in force until it is formally withdrawn. However, there would be no requirement for preventative measures if the hedge was removed.

Q: What happens if a high hedge notice is not complied with?

A: Initially the local authority should consider sending the hedge owner a warning letter advising of the consequences of not complying with a high hedge notice. It may be the owner of the land upon which the hedge is situated was unaware of the notice.

Continued non-compliance means the local authority can consider intervening by entering the land themselves to carry out the necessary work, however they are required to give 14 days' notice of their intention to do so. The deliberate obstruction of an officer from entering the site to carry out their duties may result in a fine of up to £1,000.

Q: What happens when the high hedge belongs to the council itself?

A: There are no special rules and applicants should follow the normal procedures. The applicant should write to the council to ask if they will consider cutting back the hedge in question. As with all cases, it is hoped this initial approach will be enough to see an amicable solution reached. If the written approaches to the council do not bring about the desired result, then an applicant may begin the process for making a formal application for a high hedge notice to be served.

The Act also applies to land owned by the Crown, for example a hedge located on land owned by a Government Department.

Q: What happens if the owner of the land upon which the hedge is situated is unknown?

A: An applicant is expected to take all reasonable steps to identify the owner of the land before an application is submitted. Registers of Scotland could be contacted to find out if the land is registered, whilst Companies House may have information on land owned by businesses. In exceptional circumstances ownerless property, under common law, passes to the Queen's and Lord Treasurer's Remembrancer.

Q: Can a single application cover more than one hedge affecting a property?

A: Yes, a single application may cover more than one hedge affecting a property. However, the standard fee for one application may not apply in such instances. The council will have to consider the impact of each hedge individually, as well as their cumulative impact on their property.

Likewise, if the hedges belong to multiple owners then each owner/occupier of the properties upon which the hedges are sited will be invited to comment upon the application. If the outcome of the decision is to issue a high hedge notice, it is more

likely than not that a separate notice will have to be issued in respect of each individual hedge.