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The Control of High Hedges

This paper covers the Private Member's Bill introduced by Andrew Rowe to deal with the problem of high hedges in urban areas. It also covers the Private Member's bill introduced by Jim Cunningham, whose Second Reading has been deferred until 7 May.

The background to the problem is explained, including the role of leylandii and current legal position.

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Summary of main points

- The problem of high hedges, often leylandii, has been the source of a large number of neighbour disputes.
- There is no satisfactory remedy under current law.
- The Government is still considering whether to intervene and, if so, in what way.
- Mr Rowe's Bill offers a way of tackling the problem by the use of planning law.
- Mr Cunningham's Bill offers a way of tackling the problem by the use of nuisance law.

CONTENTS

I	**The Problem**		**7**
II	**The Position of the Government**		**8**
	A.	**Government Policy**	**8**
	B.	**Government Advice**	**9**
III	**Possible Approaches**		**10**
	A.	**Nuisance**	**10**
	B.	**Is there a right to light?**	**11**
	C.	**Stanton v Jones**	**11**
	D.	**Tree roots and foundations of houses**	**12**
	E.	**Planning Law**	**12**
	F.	**Anti-Social Behaviour**	**13**
IV	**Private Members' Bills on High Hedges**		**14**
	A.	***The Hedges Control Bill* [Bill 28 of 1998-99] (Andrew Rowe's Bill)**	**14**
	B.	***The Control of Residential Hedgerows Bill* [Bill 61 of 1998-99] (Jim Cunningham's Bill)**	**15**

I The Problem

There is a widespread problem of people losing light in their gardens and houses, because of the planting of a high hedge in the neighbouring garden. This is often associated with Leylandii (cupressocyparis leylandii), a conifer that can grow by four feet in a year and reach a height of 100 feet or more. Gardens and even houses, can be thrown into the shade.

The owners of the hedge do not necessarily want that situation to arise. The fast-growing properties of the hedge mean that if the owner fails to trim it for a year or two, the extra growth can result in considerable problems. Even the owner willing to trim his hedge may find that he needs to pay a tree surgeon to do so.

Most people believe, at first, that the law prevents such a situation arising, but in normal circumstances it does not. There is law, relating to planning, nuisance, tree roots, and the right to light, but none of it appears to offer a solution.

II The Position of the Government

A. Government Policy

The Government has been saying for more than a year that it was considering whether to intervene and, if so, in what way. The most recent statement came in March 1999 in reply to a PQ:

> **Mr. Rowe:** To ask the Secretary of State for the Environment, Transport and the Regions how many representations he has received on the issue of fast-growing hedges; how many responses have been received from local authorities to the recent circular issued by his Department; whom he has consulted other than local authorities on this issue; and if he will make a statement.[77459]
>
> **Mr. Meale:** This Department has received around 2,500 letters on the issue of fast-growing hedges in 1998 and 1999. The number of telephone calls received has not been recorded.
>
> 114 local authorities have so far responded to the circular issued by the Local Government Association on 11 February 1999.
>
> The Department is working with the members of the Leylandii Working Group to draw up a voluntary code of practice on the information to be provided on the sale of hedging plants. The members of the Leylandii Working Group are the Local Government Association, the Horticultural Trades Association, the Arboricultural Association, The British Association of Landscape Industries and the Consumers Association. My Department has contacted a number of other bodies, including the Garden Centre Association, the House Builders Federation, the Chartered Institute of Environmental Health, the Planning Officers' Society, the National Association of Tree Officers, Mediation UK and the Hedgeline campaign group.
>
> We are considering whether there is anything further the Government should do to address the problems caused by high hedges. We will announce our conclusions in due course.[1]

On 23 September 1998, the Government announced that a voluntary code of practice would be drawn up to try to ensure that potential buyers are aware of the properties of leylandii.[2] Apparently, very large numbers of leylandii are still being sold, and the buyers may not realise the potential problems. However, that voluntary initiative does nothing about the existing leylandii nor about the people who welcome their fast-growing properties.

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1 HC Deb 19 March 1999 c 881W

2 Department of the Environment, Transport and the Regions 780, *Leylandii - new advice on taming the monster*, 23 September 1998

B. Government Advice

Possible remedies to Problems with High Hedges in Gardens

Under the Environment Protection Act 1990 local authorities are required to investigate complaints about possible statutory nuisance occurring on premises, which include land. If, following investigation, the authority consider that a statutory nuisance exists, or that one is likely to occur or recur, they must serve an abatement notice on the person responsible for the nuisance.

It is open to any person to make a formal complaint to their local authority's Environmental Health Department if they believe a neighbour's hedge constitutes a statutory nuisance. Whether or not the local authority believe a statutory nuisance exists, the 1990 Act allows a person to complain directly to the magistrates' court, independent of the local authority. If successful, the court can order abatement of the nuisance. The Department of the environment, Transport and the Regions (DETR) are not aware of any cases which establish one way or the other whether a high garden hedge can constitute a statutory nuisance under the Act.

In October 1997 the Lord Chancellor announced the Government's plans to reform the civil justice system to make it more accessible to all people. A key proposal is to introduce a fast-track procedure for small cases by April 1999. These cases would be subject to a fixed timetable and a fixed-costs regime.

The best solution is for neighbours to resolve these disputes themselves. Over 10,000 neighbour disputes have been settled with the help of mediation in the last ten years. Mediation, when it can be used, is quick, cheap and informal. DETR helps support the work of mediation UK which is the umbrella group for all initiatives concerned with mediation and other forms of conflict resolution. They can be contacted at Alexander House, Telephone Avenue, Bristol BS1 4BS (tel: 0117 904-6661).[3]

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[3] DETR, *Possible Remedies to Problems with High Hedges in Gardens*, Advice sent to Individuals

III Possible Approaches

A. Nuisance

The Government's advice on the use of nuisance legislation has apparently done little to solve the problem. Statutory nuisances are defined in the Environmental Protection Act 1990 s79 (1).

> Subject to subsections (2) to (6) below, the following matters constitute "statutory nuisances" for the purposes of this Part, that is to say-
> (a) any premises in such a state as to be prejudicial to health or a nuisance;
> (b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
> (c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;
> (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
> (e) any accumulation or deposit which is prejudicial to health or a nuisance;
> (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
> (g) noise emitted from premises so as to be prejudicial to health or a nuisance;
> (h) any other matter declared by any enactment to be a statutory nuisance.
> and it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.

The problem with nuisance legislation, is that until a court rules that a high hedge can constitute a nuisance, local authority environmental health officers are not willing to act. After all, high hedges do not fall into any of the categories listed in s79(1). It is open to an individual to go to a magistrate's court, but they would face the same problem. In order to get a ruling from a Judge that a high hedge can constitute a nuisance, the complainant would have to risk a very large amount of money, with no particular expectation of winning. Legal aid would not be available for such a case.

One possible approach would be to amend the *Environmental Protection Act 1990*, by adding high hedges to the list of statutory nuisances in s79, and this is proposed in Jim Cunningham's Bill. The advantage is that the 1990 Act provides a procedure requiring local authorities to investigate potential nuisances and to issue abatement notices. There are penalties for ignoring such notices. If the local authority fails to act, then the individual can apply to a magistrate's court.

However, high hedges are very different from other nuisances. One particular problem with any type of remedy is that the owner of the hedge has to take positive action, at considerable expense, to prevent the hedge growing. Repeated action will be required, perhaps with repeated abatement notices or repeated court appearances for a recalcitrant owner.

Jim Cunningham's Bill would amend nuisance legislation to deal with the problem.

B. Is there a right to light?

The general principle, is that at common law the owner of land has no right to light, for the general doctrine of law with respect to land is that everyone may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and buildings of another person.[4] Any right to light has to be acquired as an easement, in other words, these are special cases relating to particular properties rather than a general principle.

There is some legislation that might help, including the *Prescription Act 1832*, if the light going to the house has been enjoyed for some time and is then sharply reduced. In practice, the legislation does not seem to have helped people suffering from Leylandii. It is also possible that interference with light may, in some circumstances, amount to a nuisance, and thus be actionable. A legal textbook discusses the point:

> The extent of the easement is a right to prevent one's neighbour from building upon his land so as to obstruct the access of sufficient light to such an extent as to render the premises substantially less comfortable and enjoyable than they were without the infringement in question. Whether there has been an actionable interference with the right so as to amount to a nuisance is a matter of fact and degree.[5]

C. Stanton v Jones

This is by far the most famous case concerning hedges and Michael Jones, of Selly Oak in Birmingham, the successful defendant in the final part, went on to found hedgeline, the advisory service for those suffering from neighbours' hedges.[6] The dispute dated back to 1971 and for 24 years Jones tried to curb his neighbour's leylandii hedge.

> The dispute began after Mr Stanton, now aged about 90, planted a hedge of leylandii along the boundary between the two neighbours' houses. When the hedge reached 15 ft, Mr Jones complained his garden was being robbed of sunlight. In 1979, with the row of conifers at 25 ft, the first of dozens of solicitors' letters passed between them. Mr Stanton eventually agreed to trim the hedge back to 22 ft, but Mr Jones wasn't satisfied. In 1989, Mr Jones lopped 5 ft off the top and, the following year, another 4 ft. Writs followed and Mr Jones won a court ruling that the hedge could be "maintained and repaired". Then Mr Stanton, a former engineer, sued his neighbour for £32,000, but Birmingham County Court rejected his case. Mr Jones finally won the right to cut the hedge substantially and in 1996 the conifers were reduced to 12 ft.[7]

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4 *Halsbury's Laws of England* (4th ed) Volume 14 para 210
5 G.Wignall, *Nuisances*, first edition, p 150
6 *Hedgeline* (tel: 0121-472-4540)
7 "When hedges rule your life", *Birmingham Post*, 24 July 1998

Mr Jones was also awarded his costs, said to be £50,000.[8] However, this judgement is not of general application. In this case, the hedge marked the boundary between the two properties and was a party hedge to be maintained by the occupants on either side. The dispute reached the Court of Appeal in 1994 and was then was referred back to the County Court in November 1995. There was scope for legal argument as to whether cutting off the tops of the trees in the hedge did or did not constitute maintenance. Mr Jones won the right to trim the hedge[9] and has apparently trimmed the hedge for four years running and spent £650 in so doing. He hopes to regain that money via the small claims court.[10] However, Mr Stanton has apparently now planted another leylandii inside his garden. Since that leylandii is on his side of the boundary, it is questionable whether anything that can be done about it.

D. Tree roots and foundations of houses

A totally different way to approach this problem is that the neighbour's tree roots might damage your foundations, which has insurance implications. The Association of British Insurers has recently arranged the domestic tree root claims agreement, to simplify procedures if subsidence is caused by a tree in a neighbour's garden. In the past, companies would sometimes spend years trying to establish whose tree was to blame for subsidence. If the tree was in the next garden, the insurer for the next door property would pick up the bill. Under the new agreement, there will be no discussion about blame in most cases. The insurer of the home in which the damage is incurred will be liable. However, that might have benefits:

> [M]ore responsibility will be placed on homeowners to stop their trees causing damage. "The owner of a neighbouring tree could be put under notice that their tree is likely to cause damage," says Rob Hooker, surveyor at the Subsidence Claims Advisory Bureau. If the tree was not pruned back, the neighbours would no longer be covered by the tree root claims agreement and their insurance claims may be invalidated.[11]

E. Planning Law

Current planning law offers no solution to the problem of control of high hedges, although it could be changed, in order, to do so. The obvious suggestion is to require planning permission for high hedges, in the way, that it is required for fences. The issue here, however, is fundamental to planning law. Section 55 of the *Town and Country Planning Act 1990* defines development. Planning permission is required for development, although minor developments are granted permitted development rights

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8 "Hedges feud lands pensioner with £50,000 legal bill", *Daily Telegraph*, 1 December 1995

9 C.Arnot, "Once a hedgecutter, now a cult", *Daily Telegraph*, 15 August 1998

10 "Hedge battle still growing", *Birmingham Post*, 13 January 1999

11 N.Macerlean, "Subsidence claims are growing and insurance premiums could follow", *Observer*, 12 October 1997

without needing a planning application. The basic definition of development in section 55(1) is as follows:

> Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

Growing a hedge does not require planning permission. A fence, on the other hand, does require planning permission, and the Permitted Development Order grants permitted development rights for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.[12] However, a planning application is required if a gate, fence or wall next to a highway used by vehicular traffic is more than one metre in height, or if "the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed two metres above ground level".

In other words, the rules for fences might be suitable for hedges but the principle of only requiring planning permission for development would mean that a change of a major definition in planning law would be required before applying planning law in this way to the problem of high hedges. In France, under the Code d'Urbanisme, hedges within two metres of the boundary of a property, cannot grow beyond 2 metres. That is a different legal system, so the same solution could not necessarily be applied. However, the fact that France can legislate to solve the problem shows that it can be done.

F. Anti-Social Behaviour

Lynne Jones campaigned for the Home Office to allow an amendment to the Crime and Disorder Bill to outlaw hedges that have become a nuisance to those who have to live in their shadow. That might have allowed "anti-social behaviour orders" to be made against those whose high hedges were causing severe problems for neighbours. That suggestion was not accepted.

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[12] *Town and Country Planning (General Permitted Development) Order 1995* SI 418 Schedule 2 part 2 Class A

IV Private Members' Bills on High Hedges

A. *The Hedges Control Bill* [Bill 28 of 1998-99] (Andrew Rowe's Bill)

This bill offers a new way to deal with the problems of high hedges, using planning law in a different way from the normal suggestion of simply requiring planning permission for hedges.

Clause 1 deals with the ownership of hedges and would provide that hedges growing within two or more parcels of land in separate ownership would be owned in common by the owners of all those parcels of land.

Clause 2 is the key to the Bill, and it would insert a new Clause 215A to the *Town and Country Planning Act 1990*. To put it into context, it may help to see s 215 of the 1990 Act.

> (1) If it appears to the local planning authority that the amenity of a part of their area, or of an adjoining area, is adversely affected by the condition of land in their area, they may serve on the owner and occupier of the land a notice under this section.
> (2) The notice shall require such steps for remedying the condition of the land as may be specified in the notice to be taken within such period as may be so specified.
> (3) Subject to the following provisions of this Chapter, the notice shall take effect at the end of such period as may be specified in the notice.
> (4) That period shall be not less than 28 days after the service of the notice.

The Bill would extend that provision by applying a similar procedure to land in a residential area "adversely affected by the condition of any hedge in the area". A notice may be served specifying steps for remedying the harm to amenity of the area.

The Bill does not specify the nature of the harm to amenity. There is, for example, no height limit or stipulation that a hedge of a certain height is too near another house. That would have to be decided by the relevant local authority official, but could be challenged on appeal.

Clause 2(2) would apply a similar provision to Scotland via s 179 of the *Town and Country planning (Scotland) Act 1997*.

Clause 3 would extend the right of appeal to the Secretary of State to cover notices under s 215A. This is the administrative system of appeal to a planning inspector that applies to those who are refused planning permission.

Clause 4 deals with tree preservation orders. S 98(6)(a) of the 1990 Act already states that no tree preservation order shall apply:

To the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous,

Clause 4 would add to that category "the cutting down, uprooting, topping or lopping of any trees in compliance with a notice under section 215A" of the 1990 Act. It also makes a provision for Scotland.

B. *The Control of Residential Hedgerows Bill* [Bill 61 of 1998-99] (Jim Cunningham's Bill)

This Bill would add to the list of statutory nuisances in s 79 of the Environmental Protection Act 1990:

> Any residential hedgerow planted in such a place, or maintained in such a manner, as to be prejudicial to health or a nuisance

It would also define a residential hedgerow as " any hedge forming a boundary between two private dwellings". In other words, the bill would apply to boundary hedges, but would require environmental health officers to inspect to see if a nuisance existed and, if so, to use the procedure in the 1990 Act for handling nuisances.