

TASMANIA
LAW REFORM
INSTITUTE

**Neighbours' Hedges as Barriers to
Sunlight and a View**

ISSUES PAPER NO. 19

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

Acknowledgments

This Issues Paper was prepared for the Board by Ms Pip Shirley. Supervisory Assistance was provided by Mr Lynden Griggs. Valuable feedback was provided by the Institute's Director, Professor Kate Warner, Executive Officer, Dr Helen Cockburn and TLRI Board members. Bruce Newey edited and formatted the final version of the paper.

Background to this Report

This project considers the remedies available to a property owner affected by a neighbour's hedge which creates a barrier to sunlight or to a view. The issue was referred to the Institute by Dr Vanessa Goodwin MLC after an approach by a constituent. Following the initial approach Dr Goodwin was provided with some twenty-one other examples of problem hedges from Southern Tasmanian residents. Dr Goodwin reported on the issue to the Legislative Council which on 15 May 2012 moved the following motion:

That the Legislative Council:

- Notes the problem caused by trees or hedges which obstruct the views or sunlight of neighbouring residents; and
- Notes the lack of redress available to residents whose enjoyment of their property is reduced due to the presence of trees or hedges on a neighbouring property which block their sunlight or views; and
- Notes that there is also a need to recognise the right of a resident to establish and maintain a garden on their property, which may include the use of trees and hedges to provide some form of privacy screen; and calls on the government to investigate this issue further to identify a suitable mechanism to resolve disputes between neighbours which involve competing interests concerning trees and hedges.

The matter was subsequently referred to the Institute which agreed to examine the need for law reform in this area.

How to Respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. There are a number of ways to respond:

- **By briefly relating your experience with problem hedges**

It is important to understand the extent of the issue in Tasmania. You are encouraged to complete a short survey about your experiences with problem hedges. No personal information will be solicited and all responses will remain anonymous. The survey can be accessed at the Institute's webpage at <<http://www.utas.edu.au/law-reform/>>. The survey will be open until Friday 2 May 2014.

- **By filling in the Submission Template**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute's webpage <<http://www.utas.edu.au/law-reform/>>.

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible. Submissions will be published on the Institute's website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a final report, containing recommendations, will be published. Responses should be made in writing.

Electronic submissions should be emailed to: law.reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

The Issues Paper is available at the Institute's web page at <<http://www.utas.edu.au/law-reform/>> or can be sent to you by mail or email.

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquiries should be directed to Dr Helen Cockburn on the above contacts, or by telephoning (03) 6226 2069.

CLOSING DATE FOR RESPONSES: Friday 2 May 2014

Report Structure

The purpose of this Issues Paper is to examine whether sufficient remedies are currently available to a property owner affected by a neighbour's hedge which creates a barrier to sunlight or to a view or whether there should be reform of the existing law. The Issues Paper comprises five parts:

Part 1: Introduction

Part 1 briefly describes the genesis of the Issues Paper and provides an outline of its scope.

Part 2: Problems with the Current Law

Part 2 outlines the extent to which the law currently recognises rights to sunlight and to a view. It discusses the two areas of the common law that are most relevant to that discussion, easements and restrictive covenants, as well as briefly outlining the particular statutory law that may be relevant, such as abatement notice provisions under the *Local Government Act 1993*. This section concludes by examining the adequacy of the law in responding to disputes about rights to sunlight and a view.

Part 3: Reform in other Jurisdictions

Part 3 outlines the response in other national and international jurisdictions to the issue of problem hedges and trees. In particular it considers the development of statutory law in New South Wales and Queensland; the reasons why the law developed; its content and the way it has been applied. The situation in these jurisdictions can be contrasted with the situation in Victoria where there is currently no separate statutory regime dealing with high hedges. Instead government funded neighbourhood dispute resolution centres assist neighbours to resolve their own disputes.

International examples are provided from the United Kingdom and the United States and the commonalities between the domestic systems and some of these international models are discussed. These include the codification of minimum threshold requirements which must be met before resolution of an issue can be sought and the nature of the bodies tasked with hearing disputes. The models in each jurisdiction are discussed in detail and provide the context for considering the reform options outlined in Part 4.

Part 4: Options for Reform

Part 4 considers five options for reform and invites responses to a series of questions about those options.

The options are:

- Option One: Make no change and rely on existing law
- Option Two: Adopt the Victorian model of dispute resolution
- Option Three: Develop a statutory scheme
- Option Four: Extension of abatement notice provisions under the *Local Government Act 1993* (Tas)

A fifth option seeking views on alternative or hybrid models is included.

List of Questions

The Issues Paper poses the following questions:

Question 1

What evidence is there that hedges blocking access to sunlight and/or to a view is a significant issue in Tasmania?

Question 2

Should there be additional remedies for property owners who are aggrieved by another property owner's high hedge that is blocking access to sunlight and/or a view or is the current law sufficient?

Question 3

Should the Victorian model of dispute resolution be adopted and if so:

- (a) what range of matters should it deal with; and
- (b) what key features should it possess?

Question 4

If a statutory remedy is provided, which model should be adopted:

- (a) a model with a local council as the initial decision making authority with appeal rights to the Resource Management and Planning Tribunal;
- (b) a model with a local council as the initial decision making authority with appeal rights to the Administrative Appeals Division of the Magistrates Court of Tasmania;
- (c) a model where application is made directly to the Court; or
- (d) a variant model?

Question 5

Should the legislation include a requirement that an applicant take all reasonable attempts to resolve the issue before recourse to a statutory remedy?

Question 6

How should the degree of obstruction be defined:

- (a) by reference to its severity; and/or
- (b) by reference to the owners' use and enjoyment of the land; and/or
- (c) by reference to a 'reasonable' person's use and enjoyment of the land; and/or
- (d) otherwise?

Question 7

Should the obstruction of sunlight only relate to the dwelling or extend to the land itself?

Question 8

If legislation is enacted to respond to the issue of high hedges blocking sunlight or a view, should that legislation incorporate a requirement that:

- (a) there needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view before a remedy is provided; or
- (b) there needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view, and in resolving the issue the court must balance the rights of property owners to legally plant or do anything on their land that they desire; or
- (c) that in resolving the issue the court must balance the rights of property owners to legally plant or do anything on their land that they desire but that the legislation not require any consideration of whether a hedge was planted or not maintained for malicious reasons?

Question 9

If a statutory scheme is adopted should it seek to remedy an obstruction to sunlight, an obstruction to a view, or both?

Question 10

What minimum height should apply to vegetation before an application can be made for resolution and what justification is there for this?

Question 11

Should the legislation apply only to vegetation that is planted so as to form a hedge-like structure or should it apply equally to single trees?

Question 12

Should there be restrictions regarding the zoning of property to which the legislation applies?

Question 13

Should there be any requirement limiting applications to the owners of adjoining properties?

Question 14

Should the decision maker be required to consider whether a hedge existed before the complainant acquired the land?

Question 15

Should an order requiring action by an existing property owner in relation to a hedge/tree be binding on successors in title and if so, to what extent?

Question 16

How should the burden of costs resulting from an application be apportioned?

Question 17

How should legislation deal with the potential conflict between orders to remedy barriers to sunlight/a view and other laws, regulations or by-laws such as tree preservation orders, heritage orders or where a hedge/tree provides a habitat for birds and/or wildlife?

Question 18

If a local government model is adopted should new legislation be developed or should provisions be incorporated in the abatement notice provisions of the *Local Government Act 1993* (Tas)?

Question 19

Is there an alternative or hybrid model that should be considered?

Part 1

Introduction

They [some neighbours] were so friendly, that it was once proposed to cut it [a hedge] down, and give me and my flowers more air; but we both reflected that we were mortal; circumstances might change with both of us; I might die, and someone else come to the cottage whose inspection might not be desirable; or the Admiral might die, and his girls marry, and strangers come. In short, the end of it was that the hedge remained; but instead of being a thick holly wall, like the rest of my enclosure, it was a picturesque hedge of hawthorn, which was very sweet, in spring and a perfect mass of convolvulus in autumn; and it had gaps in it and openings.¹

1.1 Background

1.1.1 This project arose from a specific conflict over a hedge which ran along the boundary between two suburban properties. The residents of one of the properties complained that the height of the hedge obstructed the sunlight and blocked their view. Attempts to negotiate a solution with the neighbouring homeowner were unsuccessful and there was no suitable mechanism for resolution through local government, state government, or the legal system. Although a restrictive covenant limits the height of buildings in the area, it does not cover vegetation.

1.1.2 The property owners contacted their local member, Dr Vanessa Goodwin, MLC who took up the issue on their behalf and subsequently uncovered a further 21 examples across several southern municipalities where residents reported problems with neighbours' hedges and/or trees. She voiced her concerns in the Legislative Council and as a result, on 15 May 2012, the Legislative Council moved the following motion:

That the Legislative Council:

Notes the problem caused by trees or hedges which obstruct the views or sunlight of neighbouring residents; and

Notes the lack of redress available to residents whose enjoyment of their property is reduced due to the presence of trees or hedges on a neighbouring property which block their sunlight or views; and

Notes that there is also a need to recognise the right of a resident to establish and maintain a garden on their property, which may include the use of trees and hedges to provide some form of privacy screen; and calls on the government to investigate this issue further to identify a suitable mechanism to resolve disputes between neighbours which involve competing interests concerning trees and hedges.

1.1.3 Ultimately, the owners of the property, with the endorsement of Dr Goodwin, approached the Institute with a request to investigate the development of a suitable mechanism to resolve neighbourhood disputes over problem trees and hedges. In proposing this reference Dr Goodwin asked that the Institute examine the dispute resolution mechanisms available to neighbours who have

¹ Margaret Oliphant, *Neighbours on the Green* (BiblioBazaar, 2008) 2.

issues with high hedges and in particular to consider the desirability of a legislative response to the resolution of neighbour disputes over problem trees and hedges.

1.1.4 The issue has also been the source of some academic interest² and has been the subject of legislative intervention in the United Kingdom,³ New South Wales⁴ and Queensland.⁵ In Victoria, the problem has been addressed by providing assistance through the Dispute Settlement Centre of Victoria.

1.1.5 The fundamental dilemma in so-called problem hedge disputes is the difficulty that an individual seeking a legal remedy faces in demonstrating the existence of a legal wrong. Generally, property law is premised on the principle that a landowner has the right to the full use and enjoyment of her/his land. However, in some cases the exercise of that right may impinge on another landowner's right to the use and enjoyment of their land.⁶ This is where the law relating to high hedges, as barriers to sunlight and a view, finds its genesis. It is rooted in the ideal of promoting orderly neighbour relationships, mindful of notions of mutual obligations premised on proximity, but also acknowledges the tensions which accompany attempts to balance competing interests.

1.1.6 Where it exists, a right to seek legal redress for barriers to sunlight and/or a view is a creature of statute which takes its general principles from an extension of the common law of private nuisance.⁷ As discussed in Part 2, the common law has only recognised the right to a view and the right to sunlight in very limited situations. Given the limitations of common law solutions, legislation has been enacted in a number of jurisdictions to provide a remedy when a dispute between neighbours over high hedges occurs. The law in these jurisdictions is outlined in Part 3. Where statutory change has been implemented, there is also a range of supporting policy documentation providing guidance to individuals and officers in the application of the legislation. Educative material about the type of hedges that should be grown, so as to avoid potential disputes, is available and promoted through local government and other authorities. In other jurisdictions, in the absence of a statutory scheme, mechanisms for dispute resolution exist solely through the common law, local government planning law and the use of Neighbourhood Dispute Resolution Centres.

1.1.7 This Paper considers both common law and statutory responses to neighbour disputes involving access to sunlight and/or a view, and ultimately concludes that, due to the clear inadequacies in the existing regime in Tasmania, major reforms in this area are required.

1.2 Scope

1.2.1 The project's scope was determined primarily with reference to the concerns raised in the initial approach to Dr Goodwin and by the substance of the Legislative Council motion passed in May 2012. Therefore, other neighbour disputes to which the existence of high hedges might give rise do not fall within the scope of the project. Similarly, while built structures may also create barriers to

² See, eg, Lynden Griggs and Rouhshi Low, 'Cutting down the Cypress Leylandii, Pittosporums and Cotoneasters on Your Neighbours' Land — The Resolution of Spite Hedges' (2012) 21(1) *Australian Property Law Journal* 1; Adrian J Bradbrook, 'Solar Access Law: 30 Years On' (2010) 27(5) *Environmental and Property Law Journal* 5; Bill Dixon, 'The Neighbourhood Disputes Resolution Act 2011 (Qld) and Disclosure Issues' (2012) 32 (2) *Queensland Lawyer* 80.

³ *Anti-social Behaviour Act 2003* (UK) c 38; *High Hedges (Scotland) Act 2013* (Scot) asp 6; *High Hedges Act (Northern Ireland) 2011*(NI) c 21.

⁴ *Trees (Disputes Between Neighbours) Act 2006* (NSW).

⁵ *Neighbourhood Disputes Resolution Act 2011* (Qld).

⁶ For consideration of this issue see J R L Milton, 'The Law of Neighbours in South Africa' (1969) *Acta Juridica* 123, 128.

⁷ *Ibid* 123: Generally an action in private nuisance arises where there has been a substantial and unreasonable interference in the use and enjoyment of land. See J S Gillespie, 'Private Nuisance as a Means of Protecting Views from Obstructions' (1989) 6 *Environmental and Planning Law Journal* 94.

sunlight, existing local government laws regulate their maximum height and thus they are outside the scope of the reference. The project does not include costings for the various proposed reform options.

1.2.2 The publication of the Issues Paper is the first of the project outputs. It will be followed by a period of public consultation. At the conclusion of the consultation period the public responses to the Issues Paper will be collated and a final report prepared containing recommendations for reform.

Part 2

Problems with the Current Law

2.1 Introduction

2.1.1 The focus of the Issues Paper is on the adequacy of existing avenues available to a property owner who is aggrieved in the following circumstances:

- at the time of purchase there was a view from the property and/or sunlight accessing the property; and
- a hedge/tree or hedge-like structure has grown to a height where it now blocks that view or sunlight; and
- discussions with a neighbour have not resolved the problem; and
- he/she is seeking a legal remedy to restore access to sunlight and/or a view.

There are a limited number of legal options covering this situation and in most cases they are unlikely to provide a satisfactory resolution. Strongest rights protection might be achieved by the creation of an easement or a restrictive covenant. An easement is ‘a right enjoyed by a person with regard to the land of another person’.⁸ In this situation an easement would grant the property owner the right to restrict the height of neighbouring vegetation in order to secure access to sunlight and prevent a neighbouring property owner from planting a high hedge. A restrictive covenant is ‘a formal agreement ... limiting the actions of one or both parties to the agreement’.⁹ In this case, a property owner may agree not to do anything to his/her land which would impede his/her neighbour’s access to sunlight or to a view.

Easements

2.1.2 Easements can be created as part of an approved subdivision and registered by the Recorder of Titles.¹⁰ If this is the case, the easement will appear on the property title and bind the current owners. However, it would be unusual for an easement of sunlight to be created in large-scale subdivisions by this method. Usually a large-scale subdivision is created for profit. The subdivider would only have created an easement if satisfied that the financial benefit in attaching easements to the blocks would outweigh the financial cost of creating the easement. It is unlikely that the time and cost taken to create the easements would make this a worthwhile exercise.¹¹ Furthermore, the right to a view has been held to be too vague to form the subject matter of a grant of an easement by one property owner to another.¹²

⁸ Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 142.

⁹ Ibid 378.

¹⁰ *Local Government (Building and Miscellaneous Provisions) Act 1993* (Tas) s 99.

¹¹ It is more likely that an easement for sunlight might be retained in instances where the subdivision merely consists of the excise of one parcel of land from the parent property.

¹² *William Aldred’s Case* (1610) 77 ER 816, 821: ‘[F]or prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect ... But the law does not give an action for such things of delight.’

2.1.3 An easement might also be created by agreement between two property owners. This would take the form of a written agreement providing for a free flow of sunlight to defined areas on the landowner's property, which is registered on the title. The easement effectively ensures the neighbouring landowner maintains a hedge to a height which does not block the free flow of sunlight. The easement is considered to attach to the land, is registered on the land title and binds future owners. However an easement created in this way would be dependent on the grant by one landowner to another. While two neighbours may agree to keep a hedge at a certain height during their tenure on the land, few neighbours are likely to voluntarily grant an interest in land that will bind their land in perpetuity.¹³

2.1.4 If a property owner has the benefit of an easement which has been obstructed he/she may seek legal redress through the law of private nuisance.¹⁴ If successful, the normal remedy is damages or an injunction, which might require the hedge owner to remove that part of the hedge blocking the light. However, for a number of reasons, it is unlikely that an action in private nuisance provides a suitable avenue for remedy. Private nuisance provides a remedy where:

1. a person has title to sue in relation to the nuisance;¹⁵ and
2. the defendant has interfered with the property right of the person with title to sue with their use and enjoyment of the land; and
3. the interference has been substantial and unreasonable.

2.1.5 The law generally takes the position that a property owner has the right to do anything to her or his property which is within the law. In addition, what is considered 'substantial and unreasonable' will vary according to the nature of the neighbourhood and what is generally accepted. For these reasons, the court may be reticent to find in favour of a property owner seeking to use private nuisance to sustain an action against a neighbour who has blocked their view or blocked sunlight. Moreover, the expense associated with running private civil litigation may prove prohibitive for many would-be litigants.

Restrictive covenants

2.1.6 A restrictive covenant is a form of contract between property owners. Normally contracts only bind the parties to the contract; however, a restrictive covenant can be recorded on the title and become enforceable on future property owners provided that certain requirements of the rules of equity are met.¹⁶ A restrictive covenant based on an agreement between two landowners in the first instance, will be unlikely to yield a principled and satisfactory long-term solution for all landowners. As noted above, individual landowners may come to a mutual agreement during their individual tenure, but it is unlikely that a landowner will voluntarily agree to have an interest recorded or

¹³ A personal right or burden only binds the people who create it, however, as an easement attaches to the land, it binds both the parties who create it and future owners of the land. See Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 442. For a more detailed exposition of the law of easements and restrictive covenants see Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (LexisNexis Butterworths, 3rd ed, 2011).

¹⁴ See J S Gillespie, 'Private Nuisance as a Means of Protecting Views from Obstructions' (1989) 6 *Environmental and Planning Law Journal* 94. The remedy for breach of an easement also lies in the action of nuisance.

¹⁵ 'At common law, only a person with an interest in land or a right to occupy or exclusively possess land has title to sue. ... An owner not in possession does not have title to sue unless there is injury of a permanent character to his or her reversionary interest in the land.': LexisNexis, *Halsbury's Laws of Australia*, 415 Tort, '3 Nuisance' [415-640] with reference to *Malone v Laskey* [1907] 2 KB 141; *Oldham v Lawson (No 1)* [1976] VR 654; *Hunter v Canary Wharf Ltd* [1997] AC 655. See also *Metropolitan Properties Ltd v Jones* [1939] 2 All ER 202, 205 (Goddard LJ); *Benning v Wong* (1969) 122 CLR 249, 320 (Windeyer J). The reversionary interest is the interest the landowner retains when resuming occupation.

¹⁶ See *Forestview Nominees v Perpetual Trustees WA* (1998) 193 CLR 154.

registered on their title that could limit what they can do on their land, with this potentially remaining on title in perpetuity.

2.1.7 If there is a restrictive covenant on the height of vegetation and it is breached, a cause of action exists in nuisance. Accordingly, the discussion above at [2.1.4] also applies to such breaches.

Self-help remedies (abatement)

2.1.8 Instead of taking the matter to court, a property owner whose rights have been infringed may seek to rely on the self-help remedy of abatement.¹⁷ This allows the affected property owner to enter the property on which the infringement is occurring and remedy the situation.¹⁸ The courts have held that abatement is a remedy that the law does not favour¹⁹ and that abatement will only be justified when it is absolutely necessary.²⁰ It is unlikely that the reduction or removal of vegetation in order to secure sunlight or a view would satisfy the test of absolute necessity.

2.2 Statutory remedies

2.2.1 In limited circumstances a statutory remedy may facilitate removal of the obstruction created by the hedge/tree. There are a number of statutes that in some way touch on problems created by hedges or other vegetation. Generally they enable responsible authorities to deal with hedges which constitute a nuisance;²¹ a fire hazard;²² or which pose a danger to road users.²³ A property owner aggrieved by a neighbour's hedge which is blocking either sunlight or a view has limited recourse under these Acts. For instance, pt 12, div 6 of the *Local Government Act 1993* (Tas) empowers councils to issue abatement notices on property owners if satisfied that a nuisance, as defined under the *Act*, exists. The definition of nuisance is currently limited to five categories; something that causes harm to the health, safety and welfare of the public; a risk to public health; excessive levels of noise or pollution; a fire risk; and unsightly articles or rubbish. If a hedge creates a nuisance under the *Local Government Act 1993*, an aggrieved property owner can approach the relevant council to remedy the situation. A council officer inspects the hedge and if it constitutes a nuisance²⁴ serves an abatement notice on the property owner requiring her/him to remedy the situation. Appeal rights exist to a magistrate against the issue of the abatement notice and against any action taken by the General Manager to abate the nuisance in the event of the property owner's non-compliance. Any protection of a view or access to sunlight under these statutes would be incidental to what was otherwise sought to be achieved.

2.3 Problem hedges and planning law

2.3.1 Each Tasmanian local council has one or more planning schemes that guide land use, planning and development in its local government area. In any development application to erect buildings on land, councils require information on a range of factors and in some instances this may

¹⁷ Bradbrook and MacCallum, above n 13, ch 18. See also, *Tapling v Jones* (1865) 11 HLC 290, 311(Lord Cramworth).

¹⁸ Bradbrook and MacCallum, above n 13, [18.1]; In the case of a hedge this would amount to removing the portion of the tree that is blocking the passage of sunlight.

¹⁹ *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, 244.

²⁰ *Roberts v Rose* (1865) LR 1 Exch 82, 89.

²¹ *Local Government Act 1993* (Tas) pt 12 div 6.

²² *Fire Service Act 1979* (Tas) s 49.

²³ *Local Government Highways Act 1992* (Tas) s 39; *Roads and Jetties Act 1935* (Tas) s 42, 49; *Traffic Act 1925* (Tas) s 60.

²⁴ As defined by the *Local Government Act 1993* (Tas) pt 12, div 6.

include landscaping.²⁵ There are restrictions limiting the height of dwellings erected on land as well as limiting the minimum distance of buildings from property boundaries. However, there are no restrictions limiting the height of hedges/trees planted on property boundaries.

2.4 Alternative dispute resolution

2.4.1 Neighbours can attempt to mediate an issue instead of using formal court processes. Mediation may occur informally, talking to a neighbour or sending letters to identify the issues and seek an agreeable remedy, or by using formal mediation services which involve experts assisting both parties to reach agreement. These types of processes are collectively referred to as alternative dispute resolution (ADR).²⁶ Compared to resorting to litigation, the benefits of using ADR to resolve this, and similar types of neighbourhood disputes are said to include the reduced cost, the relative speed in resolving an issue, the ability to craft innovative solutions and that parties are empowered when they are able to control the process and determine their own mutually agreeable outcome.²⁷ However, there are some authors who identify concerns about the ADR process suggesting that it can undermine the role of publicly appointed adjudicators to apply the law consistently and objectively.²⁸

2.4.2 While ADR processes may provide a resolution and are widely accessible in some mainland jurisdictions, they are less accessible in Tasmania. In NSW, Community Justice Centres provide free mediation to help people in disputes reach an agreement (see discussion below at 3.2).²⁹ In Queensland and Victoria similar services are provided by Dispute Resolution Centres and the Dispute Settlement Centre of Victoria respectively (see discussion below at 3.3 and 3.4).³⁰ All three jurisdictions provide free mediation services which are government funded and therefore accessible to most neighbours to resolve disputes.³¹ There is no free government funded ADR service in Tasmania and therefore neighbours who seek to resolve their dispute through the assistance of a trained mediator must pay for private mediation services.

²⁵ For instance Clarence City council requires a landscaping plan showing the landscaping treatment of any common property or communal areas for applications relating to multiple dwellings or community living: Clarence City Council, *Application for Development/Use or Subdivision — Checklist* <<http://www.ccc.tas.gov.au/webdata/resources/files/develop.pdf>>.

²⁶ Alternative dispute resolution is defined by the National Alternative Dispute Resolution Council (NADRAC) as ‘an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them’: NADRAC, *What is ADR?* <http://www.nadrac.gov.au/what_is_adr/Pages/default.aspx>.

²⁷ See Michael King et al, *Non-adversarial Justice* (Federation Press, 2009) 91–4.

²⁸ Fiss suggests that the purposes of adjudication extend beyond the mere settlement of disputes. He argues that the role of publicly appointed adjudicators is not ‘to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.’: Owen M Fiss, ‘Against Settlement’ (1983-1984) 93 *Yale Law Journal* 1073, 1085. Additionally, there is a broader concern generally with the ADR process where outcomes negotiated in private are not subject to public scrutiny. However this concern is more relevant in the context of large corporations negotiating outcomes through ADR where there may be legitimate public interest in the outcome.

²⁹ NSW Government, Attorney General and Justice, *Community Justice Centres* (22 February 2013) <http://www.cjc.nsw.gov.au/cjc/com_justice_index.html>. The service provides trained facilitators who determine if mediation is suitable, and if so, arrange mediation between the parties. Approximately 80 per cent of mediations are reported as resolving the dispute.

³⁰ Queensland Government, *Neighbourhood Mediation* (31 October 2013) <<http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/neighbourhood-mediation/>>; Department of Justice (Vic), *Dispute Settlement Centre of Victoria* <<http://www.disputes.vic.gov.au/services>>.

³¹ The main barrier to accessibility may be geographical location, however a degree of assistance by suggesting mediation strategies and techniques can be provided over the phone.

2.5 Are current legal avenues sufficient to deal with the problem of high hedges in the context of sunlight and/or a view?

2.5.1 From the discussion above it is evident that a landowner will usually only have access to a remedy when an easement or a restrictive covenant already exists and is of such a type that access to sunlight and/or a view is protected. This is unlikely to be the case. Therefore an owner who is aggrieved will have no remedy unless the adjoining property owner is willing to negotiate a solution to maintain the hedge to an agreed level.

2.5.2 The question for this review is therefore whether statutory law should be developed to provide a remedy for aggrieved property owners. From one point of view a property owner should be free to do anything to her or his land, including growing a hedge, provided that what is done is otherwise lawful. This view more or less aligns with the current law. However, there is another point of view which regards the residents of a community as incurring mutual obligations which require them to consider not only their own property rights but also how their actions affect others living in that same community.

2.6 The extent of the issue in Tasmania

2.6.1 The extent of the issue in Tasmania is unclear. On the one hand, some preliminary inquiries suggest the number of property owners affected is not significant,³² however, media publicity about the issue driven by Dr Goodwin uncovered more than twenty separate neighbourhood disputes. The responses were mainly limited to the larger southern councils — Hobart, Clarence, Glenorchy and Kingborough. The TLRI is interested in gaining evidence of property owners' experience of difficulties or disputes in relation to this issue.

Question 1

What evidence is there that hedges blocking access to sunlight and/or to a view is a significant issue in Tasmania?

³² Email from Dr Katrena Stephens, Policy Director, Local Government Association of Tasmania to Pip Shirley, 25 June 2013.

Part 3

Reform in Other Jurisdictions

3.1 Introduction

3.1.1 This Part of the paper considers reforms already implemented in selected domestic and overseas jurisdictions. In these jurisdictions the common law relating to problem hedges has been supplemented by statute. An aggrieved property owner can apply to a court, tribunal or local government authority to seek to have access to sunlight and or a view restored by an order relating to the hedge or tree. The features of the statutory schemes vary across jurisdictions.

3.1.2 The Australian models vest the decision making process with a court or tribunal.³³ An applicant must meet threshold requirements before the jurisdiction of the court is enlivened. The court/tribunal has a number of orders available to it and an affected property owner has the right of appeal through superior courts.

3.1.3 In the international jurisdictions considered in this paper the resolution process vests in local authorities and planning appeal authorities. Once again, threshold requirements must be satisfied prior to application. If these are met, the applicant applies to a local authority which makes a decision guided by statutory stipulations about whether action is required. Having made its decision, the local authority serves or refuses to serve notice on the landowner to remedy the situation. The landowner and the applicant have appeal rights to a planning authority.

3.1.4 Details of the various models are outlined below.

3.2 The New South Wales model

3.2.1 In 2010, NSW adopted a statutory based model of dispute resolution for problem hedges causing severe obstruction to sunlight or to a view via amendments to the *Trees (Disputes Between Neighbours) Act 2006*.³⁴ Key features of the model include:

- a court based model of resolution with statutory requirements about the nature of vegetation and the height of vegetation as a threshold to making an application to the court for resolution;
- property owners must have taken reasonable efforts to resolve their dispute prior to the court application;
- the *Act* only covers severe obstruction to sunlight to the windows of a dwelling or a severe obstruction to a view from a dwelling situated on the applicant's land;

³³ In both NSW and Queensland the legislation incorporates larger issues than those solely related to obstruction to sunlight and to a view. In NSW the *Trees (Disputes Between Neighbours) Act 2006* also deals with trees in certain zones under a planning scheme to prevent the tree causing damage to property or injury to a person. No action in nuisance can be brought where a matter of a tree or hedge is dealt with under the Act. In Queensland the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* also deals with boundary fences, boundary fence contributions and trees (overhanging branches or where the tree is or is likely to cause serious injury to a person, serious damage to the land or substantial unreasonable interference with the neighbour's use and enjoyment of the land).

³⁴ *Trees (Disputes Between Neighbours) Act 2006* (NSW), as amended by *Trees (Disputes Between Neighbours) Amendment Act 2010* (NSW).

- the jurisdiction only applies to land in urban areas; and
- the court must be satisfied that the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order.

3.2.2 The jurisdiction to hear these matters was an extension of existing legislation dealing with matters under the common law of nuisance. The genesis of the dispute resolution mechanism is located some 20 years earlier in the NSW Law Reform Commission's (NSWLRC) review of neighbourhood disputes³⁵ and the more recent government review of the legislation conducted in 2009.³⁶

The legislation

3.2.3 Part 2A of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* provides for resolution of disputes in the following circumstances:

- Where there are two or more trees³⁷ planted (in the ground or otherwise) so as to form a hedge and which rise to a height of at least 2.5m above existing ground level,³⁸
- The trees must be located on adjacent property³⁹ and in land that is urban,⁴⁰
- The applicant must first make a reasonable effort to resolve their dispute amicably,⁴¹
- Notice must be served on the adjoining owner;⁴²
- There must be a severe obstruction to sunlight to the window of a dwelling situated on the applicant's land⁴³ or a severe obstruction to the view from a dwelling situated on the applicant's land;⁴⁴ and
- The court must be satisfied that the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order.⁴⁵

3.2.4 In effect, this requires a threshold determination that the obstruction is severe prior to conducting a balancing test of the individual interests of property owners. The *Act* also specifies a number of matters the court is to consider before determining an application under this Part. The word 'is' suggests that there is a mandatory requirement for the court to turn its mind to each and every

³⁵ NSWLRC, '*Neighbour and Neighbour Relations*', Report No 88 (1988).

³⁶ Department of Justice and Attorney-General (NSW), *Review of the Tress (Disputes Between Neighbours) Act 2006 (NSW)* (2009).

³⁷ 'Tree includes any woody perennial plant, any plant resembling a tree in form and size': *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3; 'bamboo and any other plant that is a vine': *Trees (Disputes Between Neighbours) Regulation 2007* (NSW) reg 4.

³⁸ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A.

³⁹ *Ibid* s 14B.

⁴⁰ *Ibid* s 4, but does not include rural-residential land: at s 14A(2).

⁴¹ *Ibid* s 14E(1)(a).

⁴² *Ibid* s 14C, 14E(1)(b).

⁴³ *Ibid* s 14E(2)(a)(i).

⁴⁴ *Ibid* s 14E (2)(a)(ii).

⁴⁵ *Ibid* s 14E (2)(b).

matter outlined in that section.⁴⁶ A full list of the matters is outlined in Appendix A of this Report. Generally these matters relate to issues such as the environmental, historic and aesthetic value of the trees, the reason the trees have grown to a height above 2.5m, the nature and extent of the interference to sunlight and/or a view and steps taken to rectify any matter.⁴⁷

3.2.5 The court has a broad jurisdiction as to the orders that it can make: ‘such orders as it thinks fit to remedy, restrain or prevent the severe obstruction’.⁴⁸ The non-limiting provision outlining the type of orders is included in Appendix A. Non-compliance with an order attracts a maximum penalty of 1000 penalty units.⁴⁹ If the tree owner sells her/his land and an order of the court remains on foot, the immediate successor in title is bound as if the order had been made in the successor’s name.⁵⁰ This only applies where the applicant for the order has provided the immediate successor with a copy of the order.⁵¹ There is no time limit for such notification specified in the legislation.

Application of the Act

3.2.6 The NSW Land and Environment Court (LEC) gained jurisdiction to hear and determine matters on 2 August 2010. Since that time, there have been 154 applications of which 141 have been completed.⁵²

3.2.7 The NSW Attorney-General’s Department advises:

Most applications are from residents within the greater Sydney region. Applications are usually finalised well within the Court’s time standard of six months — with a median completion time of 105 days. To date 18% of all hedge applications have been discontinued pre-hearing. More than half of all hedge applications (54%) are dismissed/refused by the Court as the applicants’ cases fail to meet the jurisdictional tests under Part 2A of the *Trees Act*. For instance, the hedge may not meet the legal definition of a hedge or the obstruction of sunlight/views is not ‘severe’. Occasionally (6% of all cases) the respondent has trimmed or removed the hedge prior to the hearing. All hearings are conducted on-site by a Commissioner, who is usually a qualified arborist. The majority of applications involve obstruction of sunlight (44%) only, while 29% involved obstruction of views only. In 27% of all applications the applicant alleged severe obstruction of both views and sunlight.⁵³

3.2.8 More detailed information on the nature of applications is available for the year 2012. In that year 26% of finalised applications concerned a hedge severely obstructing sunlight or views and 74% represented a tree causing damage to property or person.⁵⁴ In total these applications represented approximately 11% of the LEC’s finalised applications in 2012.⁵⁵ Nineteen per cent of tree disputes

⁴⁶ Ibid s 14F.

⁴⁷ Ibid.

⁴⁸ Ibid s 14D.

⁴⁹ Ibid s 15. A penalty unit is currently \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

⁵⁰ *Trees (Disputes Between Neighbours) Act 2006* (NSW), s 16(1A).

⁵¹ Ibid s 16(2).

⁵² Email from V Ferguson, Research Officer, Attorney-General’s Department NSW Government to P Shirley, 3 October 2013.

⁵³ Ibid.

⁵⁴ NSW Land and Environment Court, *Class 2: Tree Disputes and Local Government Appeals, Fast Facts* (24 October 2013) <http://www.lec.lawlink.nsw.gov.au/lec/types_of_disputes/class_2.html>.

⁵⁵ Ibid. Eleven per cent of finalised matters were what is referred to as ‘Class 2 matters’ and the majority of these were applications under the *Trees (Disputes Between Neighbours) Act 2006* (NSW).

were finalised by alternative dispute resolution processes and negotiated settlement, without the need for a court hearing.⁵⁶

3.2.9 In applying the *Act*, the LEC has had to determine a number of issues which include:⁵⁷

- whether trees are considered to be on adjoining land;⁵⁸
- whether two or more trees are planted to form a hedge;⁵⁹ and
- when an obstruction is considered to be severe.⁶⁰

3.3 The Queensland model

3.3.1 In Queensland the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)⁶¹ provides avenues for neighbours to resolve disputes about dividing fences and trees. Like New South Wales, the Queensland model is a statutory based scheme which incorporates actions in common law nuisance and also includes jurisdiction to make orders where there is a severe obstruction to sunlight to a window of a dwelling on the neighbour's land or a severe obstruction to a view from a dwelling on the land.⁶² The jurisdiction is somewhat broader than NSW as it extends to issues where high hedges create a substantial and unreasonable interference with sunlight to the roof of a dwelling.

3.3.2 The key features of the legislation are:

- jurisdiction is based in the Queensland Civil and Administrative Tribunal (QCAT),⁶³
- the neighbours must have first taken all reasonable steps to resolve the issue under any other relevant law;
- the *Act* outlines obligations of tree keepers to minimise disputes in the first instance;
- the *Act* specifies numerous criteria the QCAT must consider in making a decision; and
- specific requirements for obstruction of a view include that the view must have existed when the applicant took possession of the land.

Full details of the legislation follow.

History of the Act

3.3.3 The *Act* was the end result of a process of community consultation which commenced in 2007 and which considered two specific causes of neighbourhood disputes: dividing fences and dangerous

⁵⁶ NSW Land and Environment Court, above n 54.

⁵⁷ A review of all cases on the Land and Environment Court website as at the beginning of October 2013 was undertaken to extract this information.

⁵⁸ *P Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128.

⁵⁹ *Johnson v Angus* [2012] NSWLEC 1207, [25]–[27] (Galwey AC).

⁶⁰ *Wood v Berg* [2011] NSWLEC 1068, [18]–[20], where the court held that for an obstruction to a view to be severe, the majority of the view would have to be obscured from the living area demonstrated to be the most frequently used. In *Haindl v Daisch* [2011] NSWLEC 1145, [64] the court considered that severity involved quantitative (the degree of the obstruction) and qualitative aspects (the type of view being obstructed).

⁶¹ Previously *Neighbourhood Disputes Resolution Act 2011* (Qld).

⁶² *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 3(b)(i)–(ii).

⁶³ The QCAT is an independent tribunal amalgamating a previous 18 tribunals and 23 jurisdictions into one which commenced operation in December 2009.

or intrusive trees.⁶⁴ An on-line survey found that almost 80% of respondents had had a dispute with their neighbour, almost 60% had been in a dispute over a dividing fence and 56% had been in a dispute over dangerous or intrusive trees.⁶⁵

3.3.4 The legislation defines the obligations and rights of neighbours in residential areas regarding contributions and maintenance to dividing fences and defined issues relating to trees. The intent is to minimise disputes in the first instance, however the legislation contains an overarching provision in Part 5 granting the QCAT jurisdiction to make an order when land is affected by a tree and the neighbour cannot resolve the issue by the dispute resolution mechanisms provided in Part 4 of the *Act*.

Definition of a tree

3.3.5 The provisions cover any woody perennial plant, any plant resembling a tree in form or size (eg bamboo, banana plant, cactus, and palm), a vine or a tree prescribed under regulations.⁶⁶

The obligations of tree keepers

3.3.6 The *Act* sets out rules to minimise disputes in the first instance.⁶⁷ The statutory obligations of ‘tree keepers’⁶⁸ are to: cut and remove overhanging branches, ensure the tree does not cause serious injury to a person, ensure the tree does not cause serious damage to a person’s land or property on a person’s land, or substantial, ongoing and unreasonable interference with a person’s use and enjoyment of land.⁶⁹

Resolving issues about shading from trees and obstruction of a view

3.3.7 In the first instance neighbours are encouraged to resolve the matter informally, however in the absence of a resolution the affected owner can exercise the common law right of abatement⁷⁰ or apply to the QCAT for resolution.⁷¹

3.3.8 In effect a neighbour will have been required to take the following action prior to the matter being heard by the tribunal:⁷²

- (a) the neighbour has made a reasonable effort to resolve the issue with the tree-keeper; and
- (b) the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process.⁷³

⁶⁴ Renee Gastaldon, *Dividing Fences and Dangerous or Intrusive Trees: The Draft Neighbourhood Disputes Resolution Bill 2010* (June 2011) Queensland Parliamentary Library e-Research Brief, 2
<<http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2011/eRBR201109.PDF>>.

⁶⁵ Hon C Dick MP, Attorney-General and Minister for Industrial Relations, ‘Neighbourhood Disputes over Trees and Fences to be Easier to Resolve’ (Ministerial Media Statement, 12 May 2010)
<<http://statements.qld.gov.au/Statement/Id/69663>>. The actual number of respondents was not included in the statement.

⁶⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 45.

⁶⁷ *Ibid* s 3.

⁶⁸ Just who is a tree-keeper for the purposes of the *Act* is set out in s 48.

⁶⁹ *Ibid* s 52.

⁷⁰ Under the common law right of abatement a property owner can cut any branches or part of a hedge that encroaches onto his or her property provided that any part of the hedge that is removed is returned to the owner. Normal thresholds for a private nuisance apply meaning the interference would need to be unreasonable.

⁷¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 60.

⁷² This is statutorily achieved by placing limitations on the court’s ability to make an order unless satisfied of the matters outlined in s 65.

3.3.9 The QCAT is provided with broad jurisdiction to hear and determine any matter in relation to a tree in which it is alleged that land is affected by the tree⁷⁴ however the jurisdiction is in effect limited by the orders that the QCAT is authorised to make.

Orders relating to obstruction to sunlight and a view

3.3.10 The QCAT is authorised to make such orders as it considers appropriate in relation to a tree affecting a neighbour's land to remedy, restrain or prevent substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land⁷⁵ providing the tree rises to at least 2.5m above the ground⁷⁶ and the obstruction is,

- (i) [a] severe obstruction of sunlight to a window or roof of a dwelling on the neighbour's land;
or
- (ii) [a] severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.⁷⁷

3.3.11 By virtue of the legislation, the land can also be affected by a tree if the interference is likely within the next 12 month period to cause such obstruction.⁷⁸ The legislation is limited in its application to the severe obstruction of a view from a dwelling on the neighbour's land.⁷⁹

Matters the Tribunal is to consider in making an order

3.3.12 The Tribunal is statutorily required to consider a number of general matters before making an order.⁸⁰ The list of factors is contained in Appendix B of this Paper.

Tribunal decisions

3.3.13 **Obstruction to a view:** The Queensland legislation in effect incorporates a 'first in time' requirement. The view that is now obstructed must have existed when the applicant took possession of the land.⁸¹ This, in effect, means that the QCAT needs to receive information about the view at the time the applicant initially acquired possession to determine the extent of obstruction since then.⁸²

3.3.14 **Substantial, ongoing and unreasonable interference:** The Queensland legislation is modelled in part on the NSW *Trees (Disputes Between Neighbours Act) 2006* and while not binding on the QCAT, the Tribunal has seen fit to consider the NSW Court's decisions in determining both the definition of 'view' and when an obstruction is 'severe'.⁸³

⁷³ There is a third threshold requirement outlined in s 65(c) relating to the dispute resolution for overhanging branches but this has not been included as the discussion in this section is limited to obstruction to light and views.

⁷⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) s 61.

⁷⁵ Ibid s 66(2)(b).

⁷⁶ Ibid s 66(3)(a).

⁷⁷ Ibid s 66(3)(b)(i)–(ii).

⁷⁸ Ibid s 46(a)(ii).

⁷⁹ Ibid s 66(3)(b)(ii).

⁸⁰ Ibid s 73.

⁸¹ Ibid s 66 (3)(b)(ii).

⁸² *Werndly v Orchard* [2012] QCAT 599, [43].

⁸³ Ibid [29]–[34].

Expert evidence

3.3.15 In order to provide evidence about the matters under the *Act*, the parties will normally need to provide expert evidence about the trees, growth patterns, shading, views, and options for maintaining trees to an acceptable level and similar matters.

3.3.16 This could result in significant expense and a contest between experts providing opposing views. The Tribunal has mitigated this through Practice Direction No 7 of 2013 which specifies that instead of individuals appointing their own expert, the Tribunal will appoint a single expert tree assessor (a qualified arborist) to provide expert evidence in proceedings. The role of the assessor is to inspect the tree and the properties involved and provide a report to the court outlining possible solutions. The Tribunal has the power to apportion costs as it sees fit.⁸⁴

Supporting policy documents

3.3.17 The *Act* is supported by a range of policy documents to assist neighbours to resolve disputes amicably in the first instance. These include:

- Neighbourhood Mediation Kit: The kit provides information to neighbours about mediation, how to prepare for mediation and a mediation checklist.⁸⁵
- Dispute Resolution: Tips on how to manage conflict.⁸⁶

3.3.18 The Queensland government hosts a separate website providing a range of information outlining the rights and obligations of neighbours relating to fences, trees and buildings.⁸⁷

3.4 The Victorian model

3.4.1 No specific legislation in Victoria governs disputes over high hedges.⁸⁸ Whilst there is some control of native vegetation under the Victorian Planning Provisions,⁸⁹ this appears to be directed toward ensuring the protection of native vegetation and placing restrictions upon its removal. Other planning provisions consider the location of buildings to maximise energy efficiency and to ensure there is the retention of daylight into existing habitable dwellings.⁹⁰ Trees can also be protected under heritage listing.

3.4.2 When neighbours have disputes about hedges they can be referred to the Dispute Settlement Centre of Victoria. The Centre is part of the Victorian Department of Justice and provides free dispute resolution services to all Victorians,⁹¹ with 15 offices located in regional and metropolitan Victoria. A number of different levels of dispute resolution are available.

⁸⁴ Queensland Civil and Administrative Tribunal, *Practice Direction No 7 of 2013 — Arrangements for Applications for Orders to Resolve Other Issues About Trees*, 1 July 2013.

⁸⁵ Queensland Government, *Neighbourhood Mediation Kit* (November 2011) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0014/9131/neighbourhood-mediation-kit.pdf>.

⁸⁶ Department of Justice and Attorney General (Qld), *Tips on How to Manage Conflict* (April 2007) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0015/9132/tips-on-how-to-manage-conflict.pdf>.

⁸⁷ Queensland Government, *Disputes about Fences, Trees and Buildings* (3 September 2013) <<http://www.qld.gov.au/law/housing-and-neighbours/disputes-about-fences-trees-and-buildings/>>.

⁸⁸ Email from Shirani de Saram, Planning and Building Systems, Department of Transport, Planning and Local Infrastructure (Vic) to Pip Shirley, 13 August 2013.

⁸⁹ Minister for Planning (Vic), *Victorian Planning Provisions*, 20 December 2013, cls 52.16, 52.17.

⁹⁰ *Ibid* cls 54, 55.

⁹¹ Department of Justice and Attorney-General (NSW), above n 36.

3.4.3 Dispute Assessment Officers (DAO): On contact with the Centre a DAO assists to narrow the issue in dispute and suggest options, strategies and negotiation techniques to resolve the dispute. The DAO might also refer the client to other services, such as a local council, a lawyer or the police, where the matter falls within those areas. The DAO, with the client's agreement, can write to the other party and ask if they would like the Centre to be involved. If that person agrees, the DAO provides assistance to resolve the matter by talking to each party separately over the phone. The Centre also has an online resource for parties in dispute, which offers techniques to help in reaching agreement.⁹²

3.4.4 Mediation: If no resolution can be achieved and both the matter and parties are suitable, the dispute may be referred for mediation. Mediations are facilitated by an accredited mediator and are usually held within two weeks of referral. The mediator assists parties to explore issues, develop options, consider alternatives and ultimately to reach an agreement which can be reduced to writing. Approximately 85% of matters are resolved through mediation.⁹³

3.4.5 The Centre also provides a Magistrates Court Civil Program where the Court can refer disputed claims under \$40,000 to the Centre for mediation.⁹⁴ Below is an example of a case study from the Centre's website where a dispute relating to an extension of a fence was resolved.

Maria called the Dispute Settlement Centre of Victoria (DSCV) after her neighbour added an extension to three quarters of the dividing fence. She said the extension, which increased the height of the fence by 60 cm blocked light for her garden and hindered her view of the street.

Todd from next door told Maria's husband Rick what they were doing, and Rick initially agreed because he thought the neighbours were going to put up a trellis with roses.

Maria said that when Todd and Liz moved in two years ago, Liz was very friendly, but that changed, and they became 'peculiar' to Maria. So when Maria had tried to talk to Liz about the fence Liz became hostile, and then Todd came out of the house and told Liz not to speak to her.

The DSCV wrote to Todd and Liz, inviting them to a mediation session with Maria and Rick. Five days later Todd called the Centre and said that his partner didn't want to speak to the neighbours because of all the pain they had caused from malicious gossip and rumour spreading.

The DSCV's assessment officer explained to Todd that attendance was voluntary and Liz did not have to attend if she did not want to, however mediation would provide a safe environment for them to raise uncomfortable issues that was clearly causing them distress.

Liz then spoke to the assessment officer, who explained that the mediators control the discussion to make sure everyone has a chance to put forward their point of view, and that they listen to each other. The mediators also keep a positive focus on the discussions, helping neighbours to reach an agreement on the problems they have been having.

The assessment officer organised a mediation date at a venue not far from Todd, Liz, Rick and Maria's street. The mediation went for over three hours and Maria was shocked to hear some of the things her neighbours believed she had said about them. But she was also grateful to have an opportunity to put across her point of view, and apologise for any offence she had caused. When it came time to talk about the fence, Todd was reluctant to pull down the extension, which he had just installed at great expense. Rick offered to reimburse him for the materials and help install a trellis as originally proposed. In the end, Todd agreed to take down

⁹² Department of Justice, *Dispute Settlement Centre of Victoria: Dispute Assessment and Advice* <<http://www.disputes.vic.gov.au/dispute-assessment-advice>>.

⁹³ Department of Justice, *Dispute Settlement Centre of Victoria: Mediation* <<http://www.disputes.vic.gov.au/mediation>>.

⁹⁴ Department of Justice, *Dispute Settlement Centre of Victoria: Court-based Programs* <<http://www.disputes.vic.gov.au/court-based-programs>>.

the extension and give the material to Rick to use [to] fix a shed. They also agreed to pay 50/50 for a trellis on top of the fence instead.⁹⁵

3.4.6 The Centre does not keep separate statistics relating to disputes involving obstructions to sunlight and/or to a view but it does capture statistics across broader categories. In relation to the total number of disputes involving trees, shrubs and creepers, the Centre recorded an annual average of 2900 disputes from 2008 to 2013.⁹⁶ Disputes involving trees, shrubs and creepers were the third most common type of dispute during this period (behind ‘fence’ and ‘general behaviour’ disputes respectively). However, only a proportion of these may relate to problem hedges, as separate statistics are not available. Nevertheless, if this number were extrapolated to current Tasmanian population figures it would equate to an average of 260 disputes per year. A smaller number would relate specifically to problem hedges.

3.5 International examples

*England and Wales*⁹⁷

3.5.1 The English and Welsh model for resolving issues of high hedges can be seen as a suite or a toolkit of policy options.

3.5.2 The toolkit consists of:

- better planning and information about growing hedges to prevent problems occurring;
- individual responsibility for resolution where there is a problem;
- supporting policy documents produced by the UK government and relevant authorities;
- legislation — formalised dispute resolution mechanisms through legislation and regulations pursuant to the *Anti-social Behaviour Act 2003* (UK) c 38;
- appeal processes through planning bodies (as distinct from the Australian court or tribunal based models); and
- ombudsman oversight.

The Legislation

3.5.3 The *Anti-social Behaviour Act 2003* (UK) c 38 which regulates disputes over high hedges came into force in England and Wales on 1 June 2005.⁹⁸ The *Act* provides the framework for resolving disputes between neighbouring property owners about high hedges. Specifically jurisdiction for resolution arises in the following circumstances:

⁹⁵ Department of Justice, *Dispute Settlement Centre of Victoria: Case Study* <<http://www.disputes.vic.gov.au/case-study-fence-dispute>>. The case is based on an amalgam of actual DSCV file material. Names and details have been changed to protect client confidentiality.

⁹⁶ The number of disputes recorded by the Centre between 2008 and 2013 involving trees shrubs and creepers are as follows: 2008-2009 = 2363; 2009-2010 = 2701; 2010-2011 = 2981; 2011-2012 = 3291; 2012-2013 = 3163. See Department of Justice, *Dispute Settlement Centre of Victoria: Frequently Asked Questions - Statistical FAQs – Top 10 dispute types.xls* <<http://www.disputes.vic.gov.au/frequently-asked-questions#statistical>>.

⁹⁷ The issue of high hedges in Northern Ireland and Scotland is covered by legislation similar to that in England and Wales but with minor variations to meet local circumstances. The history and detail of the Northern Ireland and Scotland legislation is included in Appendix C and Appendix D respectively.

⁹⁸ *Anti-social Behaviour Act 2003* (UK) c 38.

- the complainant is the owner or occupier of domestic property;⁹⁹
- the complainant's reasonable enjoyment of that property is being adversely affected by the height of a high hedge situated on land owned or occupied by another person,¹⁰⁰
- the complaint does not relate to the roots of a high hedge;¹⁰¹
- the high hedge must be a barrier to light or access; and
- it must be formed wholly or predominantly by a line of two or more evergreens; and
- it rises to a height of more than two metres above ground level.¹⁰²

3.5.4 If these conditions are satisfied the dispute can be referred to the local authority provided the complainant has first taken all reasonable steps to resolve the matter.¹⁰³

Individual responsibility for resolution

3.5.5 It is a requirement under Part 8 of the *Anti-social Behaviour Act 2003* (UK) c 38 that the parties to a dispute first attempt to resolve the problem themselves and exhaust the avenues of mediation and negotiation before lodging a complaint with their local council. Individuals are assisted in their efforts at dispute resolution by the publication *Over the Garden Hedge* which provides practical suggestions for settling differences without involving the local council.¹⁰⁴

3.5.6 The legislation is thus the final recourse for the resolution of complaints. It codifies the requirement of self-help and confirms the power of the relevant authority to dismiss a complaint if it considers 'that the complainant has not taken all reasonable steps to resolve the matters complained of without proceeding by way of such a complaint to the authority'.¹⁰⁵

Supporting Policy Documents

3.5.7 The Department of Communities and Local Government (UK) publishes a number of policy documents that provide guidance to complainants and councils on the operation of the *Act*. These documents contain significant policy guidance for councils and are designed to promote the uniform application of the law. Examples of these documents are outlined in Appendix C.

3.5.8 At least one local authority has supplemented this policy advice by producing their own policy document on high hedges which outlines how the council deals with complaints under the *Act* and the initial steps neighbours can take to settle the matter through negotiation or mediation.¹⁰⁶

Complaints procedure – remedial notice

3.5.9 The local authority is charged with determining whether the high hedge adversely affects the complainant's reasonable enjoyment of her or his property. This is coined as a subjective test in

⁹⁹ Ibid s 65(1)(a).

¹⁰⁰ Ibid s 65(1)(b). However provision is also made for a complaint to be made where the property is for the time being unoccupied and reasonable enjoyment of the domestic property by a prospective occupier would be affected: ss 65(2)–(3).

¹⁰¹ Ibid s 65(4).

¹⁰² Ibid s 66(1).

¹⁰³ The local authority is empowered to charge a fee for matters referred to it under these provisions: ibid s 68(1) (b).

¹⁰⁴ United Kingdom, Communities and Local Government, *Over the Garden Hedge* (May 2005) <<https://www.gov.uk/government/publications/over-the-garden-hedge>>.

¹⁰⁵ *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2).

¹⁰⁶ Stockport Metropolitan Borough Council, *High Hedges Policy and Guidance* (2005) <<http://www.stockport.gov.uk/services/environment/planningbuilding/planning/enforcementandhighhedges/highhedgespolicy>>.

relation to the individual complainant. If the authority determines that the complainant's enjoyment is so affected, it is required to serve a remedial notice specifying the immediate action that is to be taken to remedy the situation and any further action to prevent a recurrence.¹⁰⁷

3.5.10 There is a 28-day period before the remedial notice comes into operation ('the operative period') at the conclusion of which a compliance period commences during which the action specified in the notice must be undertaken. This length of this period is specified in the notice.¹⁰⁸

The remedial notice runs with the land

3.5.11 The remedial notice runs with the land in question. That is, it is not only binding on the current owner or occupier but also on subsequent owners or occupiers so long as the hedge is in existence.¹⁰⁹ This may have particular import when the notice contains ongoing requirements relating to the maintenance of hedges to alleviate ongoing problems. It is therefore given statutory recognition as a 'local land charge'. A local land charge is a restriction or prohibition on land which is binding on successive owners and occupiers.¹¹⁰ It is created by statute and operates under the provisions of the *Land Charges Act 1975* (UK). Local land charges are registered in a register maintained by local council authorities and include other charges relating to planning permissions, tree preservation orders, heritage orders, financial charges, notices relating to buildings or highways and other similar matters. The registers are searched by solicitors on the prospective transfer of property to ascertain any encumbrances on the land.

Withdrawal and relaxation of remedial notices

3.5.12 The authority can waive or relax the requirements of a remedial notice at any time after it is issued and, if it does so, is to serve notice on every complainant and every occupier and owner of neighbouring land.¹¹¹

Appeals against remedial notices

3.5.13 Appeal rights exist against the issue, failure to issue, withdrawal, waiver or relaxation of a remedial notice.¹¹² An appeal is made to an 'appeal authority' which for hedges situated in England is the Secretary of State and for hedges situated in Wales is the National Assembly for Wales.¹¹³ The appeal is to be lodged within the 28 days of the issue of a remedial notice or date of notification of a withdrawal, waiver or relaxation of a notice.¹¹⁴ The appeal authority can extend the time allowed to appeal.¹¹⁵

3.5.14 On determining an appeal, the appeal authority can allow the appeal or dismiss it in whole or in part.¹¹⁶ If the appeal is allowed, the appeal authority can:

- Quash a remedial notice or a decision to which one relates;
- Vary the requirements of a remedial notice;

¹⁰⁷ *Anti-social Behaviour Act 2003* (UK) c 38, ss 69(1)–(2).

¹⁰⁸ *Ibid* ss 69(5)–(6).

¹⁰⁹ *Ibid* s 69(8).

¹¹⁰ City of Westminster, *Local Land Charges and Searches* (2014) <<http://www.westminster.gov.uk/services/environment/planning/landsearches/>>.

¹¹¹ *Anti-social Behaviour Act 2003* (UK) c 38, s 70.

¹¹² *Ibid* s 71.

¹¹³ *Ibid* s 71(7).

¹¹⁴ *Ibid* s 73(2).

¹¹⁵ *Ibid* s 74(4)(b).

¹¹⁶ *Ibid* s 73.

- Issue a remedial notice, if no remedial notice has been issued.¹¹⁷

3.5.15 Defects, errors or misdescriptions in notices can be cured if the appeal authority is satisfied the correction will not cause an injustice to any person.¹¹⁸

3.5.16 Notice of decisions of the authority is to be provided to relevant persons.¹¹⁹

Failure to comply with a remedial notice

3.5.17 Failure to comply is an offence subject, on summary conviction, to a fine not exceeding level 3 on the standard scale of fines.¹²⁰ This currently amounts to a maximum penalty of £1,000.¹²¹ Additionally, if the court considers the failure to comply with a remedial notice is ongoing it may order that person to take steps to comply with the order.¹²²

Authority's action on failure to comply

3.5.18 Should a property owner fail to comply with a remedial notice, the local authority is empowered to enter the land and take the required action. Any expenses incurred in doing so remain a charge on the land and are binding on successive owners and occupiers.¹²³

The Appeal Process

3.5.19 The appeal process is governed by the *High Hedges (Appeals) (England) Regulations 2005* (the 'Regulations'). The Regulations specify the grounds of appeal against the issue of a remedial notice, withdrawal of a remedial notice and against an unfavourable decision. The grounds generally relate to an alleged error in the decision making process about the height of the hedge, the remedial action to be taken or the length of time provided to take the remedial action.

3.5.20 The Regulations also stipulate requirements relating to other matters including the lodgement and receipt of notices of appeals¹²⁴ and the notification of reasons for decision.¹²⁵

The Ombudsman

3.5.21 The role of the Ombudsman only extends to the conduct of the council in managing the complaint process and not to any objection to the decision of the council or the costs of the process.¹²⁶

3.5.22 The types of matters include: delay in responding to the request; lack of information during the process; giving wrong or misleading advice; and delay in managing the process following the issue of a remedial notice.

Issues with operation of the legislation

3.5.23 There are some indicators of early problems with the operation of the legislation. In July 2008, a publication of the Department for Communities and Local Government, *Matters Relating to*

¹¹⁷ Ibid s 73(2).

¹¹⁸ Ibid s 73(3).

¹¹⁹ Ibid s 73(4).

¹²⁰ Ibid s 75(1).

¹²¹ *Criminal Justice Act 1982* (UK) s 37.

¹²² *Anti-social Behaviour Act 2003* (UK) c 38, s 75(7).

¹²³ Ibid s 77(3). Where two or more persons are liable for the expense they are jointly and severally liable: at s 77(4).

¹²⁴ *High Hedges (Appeals) (England) Regulations 2005* regs 7–8.

¹²⁵ Ibid reg 13.

¹²⁶ Appeal rights against certain aspects of the decision are provided for in the Regulations (see 3.5.19–3.5.20 above).

High Hedges: Notes to Local Authorities,¹²⁷ sought to clarify some issues with the implementation of the legislation. Some of the initial issues appear to have included uncertainty relating to what constitutes a hedge; the status of a tree preservation order in relation to remedial notices; how hedge height is calculated; whether the *Act* covers remedial notices to prevent future obstruction; and protective measures for nesting birds.

United States

3.5.24 Only a cursory consideration of the law in the USA is made for the purposes of this review. Griggs and Low suggest that the law can be summarised as follows:

[A] United States citizen is entitled to construct a building on her or his own land to obstruct or deprive the adjoining landowner of light, air, or a view. However, a landowner cannot maliciously erect a structure with the purpose of depriving the view of the neighbour, particularly where no useful purpose is served by the structure. Legislative intervention has also followed, reflecting this common law development, which sees a statutory prohibition against the erection or maintenance of spite fences if done so with malice and intent to injure or annoy an adjoining landowner. The courts have liberally interpreted provisions such as this, so that plants that would not be considered horticulturally as a hedge plant can still be under the prism of common law interpretation of the legislation. Today, in the United States, “the spite fence doctrine is a well-established nuisance law rule ... Modern courts generally hold that a spite fence is a nuisance, for which the offended neighbour can obtain injunctive relief and damages.”¹²⁸

3.5.25 An example of legislative intervention is provided by amendments to the *California Civil Code*, § 841.4:

841.4. Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance. Any owner or occupant of adjoining property injured either in his comfort or the enjoyment of his estate by such nuisance may enforce the remedies against its continuance prescribed in Title 3, Part 3, Division 4 of this code.

3.5.26 The statute is construed broadly and includes ‘a row of trees planted on ... the boundary line between adjoining parcels of land’ within the definition of ‘fence or other structure’.¹²⁹ However, it remains the case that the dominant purpose must be to annoy the owner or occupier of the adjoining property.

3.5.27 Similarly, the California Court of Appeal has held that a row of trees grown by one property owner along a boundary line which blocked the neighbouring property owner’s ocean view could act as a fence-like structure and be subject to the statute.¹³⁰

The remedies available for this type of private nuisance include civil action or abatement. The person injured by a private nuisance may abate it without committing a breach of the peace.¹³¹

¹²⁷ Department for Communities and Local Government publication, *Matters Relating to High Hedges: Notes to Local Authorities* (July 2008)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7736/highhedgesnotes.pdf>.

¹²⁸ Griggs and Low, above n 2, 3–4, quoting James Charles Smith, ‘Some Preliminary Thoughts on the Law of Neighbours’ (2012) 39 *Georgia Journal of International and Comparative Law* 757, 772.

¹²⁹ *Wilson v Handley*, 119 Cal Rptr 2d 263, 271 (Ct App, 2002).

¹³⁰ *Vanderpol v Starr*, 194 Cal App 4th 385, (2011).

¹³¹ *California Civil Code*, § 3501–3503.

Part 4

Options for Reform

4.1 Introduction

4.1.1 This Part proposes four options for reform:

- Option 1: Make no change and rely on the existing law
- Option 2: Adopt the Victorian model of dispute resolution
- Option 3: Develop a statutory scheme
- Option 4: Extend the abatement notice provisions under the *Local Government Act 1993* (Tas)
- Option 5: An alternative or hybrid option

4.2 Option 1: Make no change and rely on existing law

4.2.1 As outlined in Part 2, existing legal options only provide remedies in a defined set of circumstances. In the vast majority of cases, neighbours disputing access to sunlight and/or a view will not have access to a remedy.

4.2.2 When, in 2009, the NSW government undertook a review of the *Trees (Disputes Between Neighbours) Act 2006* to determine whether to amend the *Act* to cover hedges that block sunlight or a view, a number of points were raised both for and against expanding the reach of the legislation.

*Arguments against extending the Act to cover sunlight or views*¹³²

- There could be a considerable loss of canopy across all urban areas of NSW which is undesirable due to the community benefits that trees provide such as:
 - absorbing noise
 - filtering toxic particles from the air
 - maintaining nutrient levels in the soil
 - reducing erosion, salinity and stormwater run-off
 - providing windbreaks
 - underpinning local ecosystems and providing a habitat for flora and fauna
 - removing carbon-dioxide from the atmosphere
 - moderating extremes of temperature in their immediate vicinity
- There are legitimate reasons why a property owner may wish to retain a tree on their property including privacy, shade and aesthetic considerations; and
- Requests for pruning for reasons of access to light or a view are vulnerable to abuse where they are used as an avenue for vexatious complaints about a neighbour.

¹³² Department of Justice and Attorney-General (NSW), above n 36, 29–30.

Arguments in favour of extending the Act to cover sunlight and views

- Severe loss of sunlight can lead to loss of amenity and enjoyment of a person's home, increase damp and reduce airflow;
- Some trees can be planted to form a row which effectively blocks the line of sight from a neighbour's home, however there is currently no avenue for a neighbour to have input into the nature of the hedge, its size or shape;
- The desire to retain amenity can be subject of many disputes between neighbours;
- The common law of nuisance provides little protection against loss of amenity in relation to sunlight and views;
- Planning controls only apply to landscaping matters and the planting of specific species as part of an initial development consent but not otherwise;
- Some submissions alleged neighbours had planted hedges to effectively negate view-sharing conditions in their development approvals;¹³³
- The Institute of Australian Consulting Arborists suggested disputes about hedges which restrict solar access or severely restrict a view from an adjoining property are an issue of increasing concern and frustration for the NSW community;
- A number of community groups including Problem Hedges Australia and HedgeWise¹³⁴ were formed to advocate the creation of a legal mechanism to address hedge disputes;
- The fact that there is no legal mechanism to resolve disputes means people may resort to illegal means such as poisoning trees. Currently the law provides little incentive for individuals to negotiate a resolution;
- Mediation through community justice centres is useful in resolving some disputes but is not suitable in a number of cases;
- The review received 127 submissions concerned about high hedges, 125 suggesting the legislation should be extended to remedy the blocking of sunlight by a neighbour's hedge, with 115 suggesting a similar approach where a view is impeded. The report noted that this was an extremely high number of individual responses for a statutory review process; and
- Local government expressed a view that there should be a dispute resolution mechanism and passed two resolutions at its 2006 Annual Conference to work with the State Department of Planning to resolve the issue.¹³⁵

4.2.3 Interestingly, peak bodies expressed a range of views about extending the *Act* to cover access to sunlight and to a view. Both the Environmental Planning and Development Law Committee and the Property Law Committee of the Law Society of NSW proposed that any extension be narrowly circumscribed with jurisdiction perhaps limited to hedges planted with malicious intent to remove a view or access to sunlight, (commonly known as spite hedges), or to instances where a neighbour's enjoyment of property is unreasonably or severely affected.¹³⁶

¹³³ Ibid 31. A council planning scheme usually specifies the minimum distance between the boundary of a property and the siting of a dwelling. Restrictions can also be imposed on the height of dwellings. Those restrictions become conditions of a development application. The conditions of a development application might also limit the height of a boundary fence. In some instances a property owner might plant a high hedge on a boundary line to protect privacy and in effect circumvent any conditions about maximum height of built structures on the land or boundary setbacks.

¹³⁴ See Problem Hedges Australia and HedgeWise <www.problemhedgesaustralia.com>.

¹³⁵ Department of Justice and Attorney-General (NSW), above n 36, 32.

¹³⁶ Ibid 33.

4.2.4 The Property Law Committee did not support the making of an order by the Land and Environment Court that ‘would run with the land and bind successors in title’¹³⁷ as such orders “‘would arguably confer on the land benefitted and burdened by the order quasi easement rights with the potential to affect the value and use of the land.’”¹³⁸

4.2.5 The Institute of Australian Consulting Arboriculturists (IACA) proposed courts be granted power to require the pruning and maintenance of a hedge provided the court ‘is satisfied that the hedge is likely to:

- “restrict solar access to a property causing undue shading or excessive damp, or impede the effective operation of existing solar devices” or
- “severely restrict or obliterate the amenity of an existing view from an adjoining neighbouring property”¹³⁹.

The Institute also recommended that the court ‘adopt a balancing approach between the relative amenity and privacy of the neighbours’.¹⁴⁰

4.2.6 After consideration of these views, the legislation was amended to provide remedies in certain circumstances where sunlight or a view is severely obstructed.

Academic review

4.2.7 The issue of problem hedges has not attracted significant academic debate in Australia, however Griggs and Low conclude that reform is necessary:

The suggestion the authors make is that intervention is necessary. Without some dispute resolution mechanism in play, the amenity that one enjoys in their locale is seriously undermined. We argue that the values the community attaches to amenity, the emotional and economic worth of an aesthetically pleasing view ... make it imperative that a dispute resolution mechanism be enacted. ... Fairness of outcome and intergenerational benefits across successors in title is what we seek to achieve.¹⁴¹

4.2.8 In addition Page and Brower suggest that the resistance of the common law to recognising a view as the subject matter of a grant is outdated in the modern context.¹⁴² They argue that political, cultural, social and economic values have experienced a major shift in the years since the law in this area was first developed¹⁴³ and, in particular, that ‘a wider environmental concern for landscape amenity’ and ‘[t]he pre-eminence of an ecological view of property ... [have] profound implications on the content of property rights.’¹⁴⁴

4.2.9 Most of the jurisdictions reviewed in Part 3 have developed statutory based models of dispute resolution which set out threshold criteria and which are premised on the inadequacy of the existing law for resolving disputes relating to problem hedges.

¹³⁷ Ibid 37.

¹³⁸ Ibid, quoting submission of NSW Law Society.

¹³⁹ Ibid, quoting submission of Institute of Australian Consulting Arboriculturists.

¹⁴⁰ Ibid.

¹⁴¹ Griggs and Low, above n 2, 10.

¹⁴² John Page and Anne Brower, ‘Scenic Amenity, Property Rights and Implications for Pastoral Tenure in the South Island High Country’ (Paper presented at the University of Canterbury School of Law, University of Canterbury, Christchurch, NZ, March 2008).

¹⁴³ *Aldred’s Case* was decided in 1610. See above n 12.

¹⁴⁴ Page and Brower, above n 142.

Question 2

Should there be additional remedies for property owners who are aggrieved by another property owner's high hedge that is blocking access to sunlight and/or a view or is the current law sufficient?

4.3 Option 2: The Victorian model

4.3.1 The Victorian dispute resolution model relies on the establishment of government funded dispute resolution centres. A property owner who wants to approach a neighbour about a problem hedge can talk to a Dispute Assessment Officer who can suggest options and strategies and provide advice on negotiation techniques. The Dispute Assessment Officer can also speak to each party individually over the phone with the aim of narrowing the issues in dispute and resolving the matter. If the dispute remains unresolved parties can be referred to mediation. The benefit of this type of model is that assistance is provided to resolve disputes within the existing legal framework, however, in the absence of mandatory participation requirements, resolution still depends on both parties' willingness to resolve the issue.

4.3.2 The Victorian model provides dispute resolution in a range of matters and is not solely limited to disputes over high hedges. If neighbours are unable to resolve the issue through assisted dispute resolution they can still access other legal remedies, limited as they are.

4.3.3 The model could be supported by policy statements, similar to those found in the UK model, covering matters such as: the types of hedges to grow; problems with shading neighbours' property; and suggested maximum heights for hedges. However these documents would have no legal force.

Question 3

Should the Victorian model of dispute resolution be adopted and if so:

- (a) what range of matters should it deal with; and
- (b) what key features should it possess?

4.4 Option 3: Develop a statutory scheme

4.4.1 There are a number of jurisdictions that have developed statutory schemes in response to the issue of neighbour hedges. These schemes exhibit various approaches to the provision of dispute resolution mechanisms. The questions in this section focus on the differences between the schemes. Even if you consider that there is no need to develop a statutory scheme, you may still wish to comment on the issues that follow.

The different statutory schemes

4.4.2 The statutory schemes examined above can be conceptualised as a series of distinct models. All jurisdictions have a threshold requirement that reasonable efforts have been made to resolve the dispute amicably. Failing this, a complainant may then apply to the relevant authority to resolve the matter. Affected property owners have subsequent appeal rights in relation to the authority's decision.

4.4.3 **Model One (United Kingdom):** the applicant applies to the local authority for a resolution. The local authority makes a decision on whether action is required. This decision is guided by statutory requirements. Having made a decision, the local authority serves notice or refuses to serve notice on the landowner to remedy the situation. The landowner and the applicant have appeal rights to a planning authority. In Tasmania, the equivalent process would be through initial application to the local council and appeal rights to the Resource Management and Planning Tribunal. Alternatively,

if the decision by the local authority is classified as administrative in nature the appropriate body for appeal is the Administrative Appeals Division of the Magistrates Court.¹⁴⁵

4.4.4 Model Two (Australian models): the applicant, having made reasonable attempts to resolve the dispute, applies directly to the court for resolution of the matter. This model is supported by the inclusion in the legislation of threshold requirements relating to an application. These include, the height of the vegetation, the nature of the vegetation, the zoning of the land and the degree of obstruction. The intent is that the codification of such requirements should assist in any mediation process and limit the involvement of the court to cases where these threshold requirements have been met and a satisfactory solution cannot otherwise be mediated.

4.4.5 Model Three: this reproduces the features of Model Two except that the application is made to a tribunal instead of a court.

Local government based system or court/tribunal based system

4.4.6 The UK models vest the initial decision making responsibility in the local authority. No doubt the reason for this is that local authorities already employ personnel with relevant expertise and opportunities exist for synergies in the decision making process. The same could be said of many Tasmanian councils, although there are likely to be disparities in how they are resourced. Larger councils have the advice of professionals such as planning officers and environmental officers at hand and can readily access information about development conditions attaching to land or such matters as Tree Preservation Orders or Heritage Listing of Trees. Some councils may have tree specialists as part of their normal workforce, either working as part of parks maintenance teams or having a more specialised role within the organisation.

4.4.7 On the other hand, a court/tribunal-based system is likely to benefit from the expertise of judicial officers who are familiar with the rules of evidence and the common law. This promotes consistency in decision-making so that like cases are treated alike. Where for instance, the issue is whether a hedge *unreasonably* interferes with the use and enjoyment of the neighbour's land, the court can refer to previous decisions as well as any statutory guidance, to determine how the question of unreasonableness should be resolved. Over time a body of law on the interpretation of problem hedge statutory provisions will develop and these decisions are likely to be informed by the contributions of expert witnesses on matters such as sunlight, shading, views, hedge growth and the effect of these matters on a neighbour's property. For example, the Planning Tribunal has expertise in assessing development application appeals which include issues dealing with landscaping; maintenance of amenity and visual impacts and the Administrative Appeals Division of the Magistrates Court is an established jurisdiction with expertise in determining a broad range of matters where disputes lie between local/state authorities and private citizens. Moreover, the public nature of the court's/tribunal's decisions will also guide preliminary assessments about whether an arguable case exists. Any appeal processes would be heard through superior courts where both the procedural and substantive law is well established.

4.4.8 Both the local government and the court/tribunal-based system will entail costs. It is likely that a local government model would enable a council to charge a fee for its service and that this would be on a full or partial user-pays basis. In a court-based system, the parties would be responsible for the legal fees of counsel, the cost of expert witnesses and any attributed court costs.

¹⁴⁵ For instance, the nuisance provisions in the *Local Government Act 1993* (Tas) prescribe appeal rights to the Magistrates' Court Civil Division whereas appeals against council determinations under planning schemes (which are developed in accordance with the *Land Use Planning and Approvals Act 1993* (Tas)) are heard by the Resource Management Planning Appeals Tribunal.

Question 4

If a statutory remedy is provided, which model should be adopted:

- (a) a model with a local council as the initial decision making authority with appeal rights to the Resource Management and Planning Tribunal;
- (b) a model with a local council as the initial decision making authority with appeal rights to the Administrative Appeals Division of the Magistrates' Court of Tasmania;
- (c) a model where application is made directly to the Court; or
- (d) a variant model?

Dispute resolution mechanisms

4.4.9 The domestic jurisdictions considered in this report, namely NSW, Victoria and Queensland have extensive, no cost community based dispute resolution mechanisms. In NSW and Queensland, where a statutory scheme is in place, the threshold requirement for accessing the statutory scheme is that complainants have first taken all reasonable actions to resolve the dispute. This is made easier by the existence of free community based dispute resolution bodies. There is no similar service in Tasmania.

4.4.10 The dispute resolution framework is also supported by policy documents which encourage early resolution and self-help by providing practical suggestions about how to approach neighbours to mediate the issue.

Question 5

Should the legislation include a requirement that an applicant makes all reasonable attempts to resolve the issue before recourse to the statutory remedy?

The degree of obstruction of sunlight or to a view

4.4.11 **Severe obstruction:** In NSW a complainant must establish that the degree of obstruction to sunlight or a view is 'severe'.¹⁴⁶ The courts have determined that this sets a high threshold for the exercise of jurisdiction. This is also the case in Queensland, where the complainant must establish that the degree of obstruction is severe.¹⁴⁷ The NSW legislation outlines the matters to be taken into account in determining the degree of obstruction that the hedge presents. The relevant provisions are set out in Appendix A.

4.4.12 **Severe, substantial, ongoing and unreasonable obstruction of the use and enjoyment of land:** In Queensland not only must the degree of obstruction be severe but there must also be 'substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land'.¹⁴⁸ This imports another jurisdictional test which reproduces the language of the law of private nuisance.¹⁴⁹ The *Act* itself contains an explicit statement that, unless otherwise expressly provided, it does not affect the operation of the common law.¹⁵⁰

¹⁴⁶ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14B.

¹⁴⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(3)(b).

¹⁴⁸ *Ibid* s 66(2)(b)(ii).

¹⁴⁹ To establish liability in nuisance, interference with either the condition of the land itself or the comfort of the occupants must be both substantial and unreasonable.

¹⁵⁰ *Ibid* s 5.

4.4.13 Reasonable enjoyment of the land: In the UK the degree of interference is assessed with reference to the complainant's *reasonable* enjoyment of their property. This sets a lower threshold than either the NSW or Queensland legislation but it still acknowledges that the right to light or a view is not unfettered. Although the statute does not stipulate the matters which are to be taken into account in assessing the adverse effect of a neighbour's high hedge, policy guidelines have been created for local authorities who are vested with the initial decision making responsibility. These guidelines suggest that the assessment of the level of interference with 'reasonable enjoyment' will *not* normally require consideration of:

- the effect of the hedge on the complainant personally such as depression or worry and associated health problems;
- the effect of the hedge on the complainant's activities such as light to a vegetable patch or access to television reception; or
- factors relating to the complainant's feelings about the hedge — for example, anxiety that it may fall.¹⁵¹

4.4.14 The guidelines also indicate that the words 'reasonable enjoyment' import a degree of objectivity into the test for interference. So, for example, obstruction to light should be assessed from the perspective of the amount of sunlight that might reasonably be expected to be available rather than the amount of sunlight to which the individual complainant expects to have access. Whilst this is not made explicit in the *Act*, it accords with the generally accepted understanding of the effect of a test expressed in terms of reasonableness. The policy document also suggests that the council will consider what is reasonable in the circumstances.¹⁵²

The subject property

4.4.15 Neither the NSW nor Queensland Acts provide a remedy in cases involving shading merely of the land or gardens themselves. In NSW the obstruction to sunlight must relate to a window of a dwelling situated on an applicant's land and the obstruction to a view must relate to a view from a dwelling on the applicant's land.¹⁵³ The courts have interpreted this to require the obstruction of the entire view and not merely parts of it.¹⁵⁴ In Queensland, unlike NSW, the obstruction to sunlight may also relate to the roof of a dwelling. Presumably this acknowledges the importance of sunlight access for solar panels installed on roofs. The UK *Act* refers to interference with 'domestic property'. 'Domestic property' is defined to include both a dwelling and grounds connected to the dwelling.¹⁵⁵ This is seemingly at odds with the common law regarding easements where, historically it was understood that an easement securing rights to light and air could only exist in respect of apertures in existing buildings. However, the High Court of Australia has held that a general easement of light benefiting the land as a whole and not confined to buildings already in existence could be acquired by express grant.¹⁵⁶ Logically there may be significant impact on the enjoyment and use of property by the shading of land on which the dwelling is situated and which is used for recreation or gardening pursuits.

¹⁵¹ Office of the Deputy Prime Minister, UK Government, *High Hedges Complaints: Prevention and Cure* (May 2005) 19–20 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11476/highhedgescomplaints.pdf>.

¹⁵² No support for this proposition appears in the natural and ordinary meaning of the legislation.

¹⁵³ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14B.

¹⁵⁴ See, eg, *Haindl v Daisch* [2011] NSWLEC 1145, [26].

¹⁵⁵ *Anti-social Behaviour Act 2003* (UK) c 38, s 67(1).

¹⁵⁶ *Commonwealth v Registrar of Titles for Victoria* (1918) 24 CLR 348, 355.

Question 6

How should the degree of obstruction be defined:

- (a) by reference to its severity; and/or
- (b) by reference to the owners' use and enjoyment of the land; and /or
- (c) by reference to a 'reasonable' person's use and enjoyment of the land; and/or
- (d) otherwise?

Question 7

Should the obstruction of sunlight only relate to the dwelling or extend to the land itself?

Malicious intent and balancing rights

4.4.16 As noted (see 3.5.24–3.5.26 above), the essence of US intervention is the malicious intent of one neighbour to block a view or access to sunlight to an adjoining property. This so-called 'spite fence doctrine' emerged in the late nineteenth century and is founded in the law of nuisance.¹⁵⁷ It emerged as an exception to the legal norm that a person has the right to build any structure on their land.¹⁵⁸

4.4.17 In recognising this legal norm the US courts required some factor to warrant the law's intervention where a property owner was exercising the right to do anything to, or build any structure on, her/his land, which affected a neighbour's land. The law therefore imported a requirement of malice — 'that a person should not make a change on her land solely for the purpose of injuring her neighbor'¹⁵⁹ — a requirement that has been extended beyond its traditional application to fences to include malicious planting of hedges as well.¹⁶⁰

Question 8

If legislation is enacted to respond to the issue of high hedges blocking sunlight or a view, should that legislation incorporate a requirement that:

- (a) there needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view before a remedy is provided; or
- (b) there needs to be malicious intent in the planting of a hedge or non-maintenance to obstruct sunlight or a view, and in resolving the issue the court must balance the rights of property owners to legally plant or do anything on their land that they desire; or
- (c) that in resolving the issue the court must balance the rights of property owners to plant or do anything on their land that they desire but that the legislation not require any consideration of whether a hedge was planted or not maintained for malicious reasons?

¹⁵⁷ James Charles Smith, 'Some Preliminary Thoughts on the Law of Neighbors' (2010–2011) 39 *Georgia Journal of International and Comparative Law* 757, 772–6. The US law has been codified in some states and there is a general threshold requirement that the fence (or fence-like structure) is constructed with malicious intent.

¹⁵⁸ Ibid 772–3.

¹⁵⁹ Ibid 773.

¹⁶⁰ Ibid. In a footnote Smith discusses the following germane authorities: '*Wilson*, 119 Cal Rptr 2d at 272 (remanding for trial court to determine whether "dominant purpose" for planting row of evergreen trees was to block plaintiffs' view of mountain or to enhance aesthetic value of defendants' property and to protect privacy); *Dowdell v Bloomquist*, 847 A2d 827 (RI 2004) (discussing a homeowner that sought a zoning variance to add second story to his home, which his neighbour opposed because it would partially block the neighbour's ocean views; homeowner then planted western arborvitae trees, which blocked ocean views; court found defendant planted trees with malicious intent). Both *Wilson* and *Dowdell* interpreted state spite fence statutes, but the same outcome can be reached in states that apply a common law spite fence doctrine.' at n 51. The fact that the doctrine traditionally applied only to fences is explained in an interesting, though for the most part unrelated article, see Wolfgang Mieder, "'Good Fences Make Good Neighbours': History and Significance of an Ambiguous Proverb' (2003) 114 *Folklore* 155. Mieder notes that '[h]edges are not common in the United States where fences are used to separate properties.' at 157–8.

Interference with sunlight and interference with a view

4.4.18 The statutory scheme in the UK limits interference to access to sunlight. The Australian based legislative schemes cover interference to sunlight and also to a view. The reason for this has not been revealed through research — a possibility is that the common law, in defined circumstances, has recognised the right to an easement of light; however, the right to a view has never been recognised. Therefore the UK model more closely follows the common law.

Question 9

If a statutory scheme is adopted should it seek to remedy an obstruction to sunlight, an obstruction to a view, or both?

Trees/hedges — the legislative definitions

4.4.19 Definition sections in the various statutory instruments establish threshold requirements in relation to both the nature of the impugned vegetation and minimum heights. The setting of minimum heights may also forestall potential conflicts by putting property owners on notice about acceptable hedge heights. Restrictions are also imposed in relation to the location of the vegetation and the type of land-use zones to which the legislation applies.

4.4.20 The NSW *Act* refers to ‘trees’ which are defined to include any woody perennial plant, any plant resembling a tree in form and size, a bamboo and any other plant other than a vine.¹⁶¹ The vegetation must consist of two or more trees which are planted so as to form a hedge. The minimum height before jurisdiction is engaged is 2.5 metres (approximately 8 feet 2 inches). The tree must be located on an adjacent property and on urban land.¹⁶² In Queensland, both the definition of ‘tree’ and the limits imposed on minimum heights are similar to NSW.¹⁶³ The tree must be located on adjoining land (or would be if not separated by a road).¹⁶⁴ There are no restrictions regarding the zoning of the land and no requirement that trees be planted so as to form a hedge. Thus, a single tree may be sufficient to block a view or access to sunlight. The UK legislation refers to a ‘high hedge’ defined as a barrier ‘formed wholly or predominantly by a line of two or more evergreens’.¹⁶⁵ The hedge must be a minimum height of 2 metres (approximately 6 feet 7 inches) before action can be taken.¹⁶⁶ Applications may only be brought by owners or occupiers of domestic property.¹⁶⁷

Discussion

4.4.21 The main differences between the jurisdictions lie in the height restrictions and the type of vegetation susceptible to a complaint. In most jurisdictions complaints may only be brought in relation to hedge like structures. Queensland is the exception, allowing action to be taken in respect of a single tree. Dr Goodwin’s consultation on ‘spite hedges’ unearthed issues involving shading and blockage of sunlight caused by single trees. From one perspective it is perhaps difficult to justify enacting principles which only apply to two or more plants, given that a single tree may cause as much interference as multiple trees planted to form a hedge. Legislating to allow complaints only for

¹⁶¹ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 3; *Trees (Disputes Between Neighbours) Regulation 2007* (NSW) reg 4.

¹⁶² *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14A.

¹⁶³ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) s 45, 66(3).

¹⁶⁴ *Ibid* s 46(b).

¹⁶⁵ *Anti-social Behaviour Act 2003* (UK) c 38, s 66(1)(a).

¹⁶⁶ *Ibid* s 66(1)(b).

¹⁶⁷ *Ibid* s 65(1)(a).

hedges or hedge-like structures will potentially leave some adversely affected property owners without recourse to a remedy.

4.4.22 On the other hand, there may be a good policy argument for restricting the legislation to trees which are planted to form a hedge-like structure. Local government planning controls already exist which govern the height of built structures and fences in order to protect access to light and in some instances a view. Trees planted to form a hedge have essentially the same effect and should therefore be subject to similar height controls. Creating legislation to govern the height only of trees that effectively serve as fences does not, therefore, extend rights or obligations beyond those which already exist under current planning laws.

4.4.23 All Australian jurisdictions require properties to be adjacent. The English and Welsh legislation does not contain this stipulation, instead requiring only that the applicant has to be the owner of domestic property. However, in the UK the legislation does not extend to a view, only to hedges which create a barrier to sunlight, thereby importing proximity considerations by default. If legislation is developed which provides a remedy where trees create a barrier to a view then proximity becomes relevant. For instance a property's view may be affected by trees growing on a property some distance away.

Question 10

What minimum height should apply to vegetation before a complaint can be brought and what justification is there for this?

Question 11

Should the legislation apply only to vegetation that is planted so as to form a hedge-like structure or to should it apply equally to single trees?

Question 12

Should there be any restriction regarding the zoning of property to which legislation applies?

Question 13

Should there be any requirement limiting applications to the owners of adjoining properties?

First in time

4.4.24 Of those jurisdictions examined in this Paper, it appears that NSW and Queensland are the only ones to explicitly address 'first in time principles'. 'First in time' in this context refers to whether the hedge/tree impeding the view or sunlight existed prior to the applicant's possession of the property; it is a principle that a court or tribunal in these jurisdictions must consider when making a decision. A first in time principle recognises that an owner who purchases property in the knowledge of an existing state of affairs should be bound by that existing state of affairs. In NSW the court is directed to consider a number of matters in determining if there is a severe obstruction including 'whether the trees grew to a height of 2.5m or more during the period that the applicant has owned (or occupied) the relevant land'.¹⁶⁸ In Queensland the Tribunal may consider 'whether the tree existed before the neighbour acquired the land'.¹⁶⁹ First in time principles do not arise in the USA since, in cases where the vegetation was planted before the neighbour acquired the land, the necessary malicious intent is absent. In the United Kingdom the statute provides no requirement for the consideration of any first in time principles.

¹⁶⁸ *Trees (Disputes Between Neighbours) Act 2006* (NSW) s 14F(c).

¹⁶⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) s 75(d).

Question 14

Should the decision maker be required to consider whether a hedge existed before the complainant acquired the land?

Orders binding on successors

4.4.25 Where the court or local authority makes an order relating to a hedge/tree and that order either has not been carried out or requires ongoing maintenance of a hedge, the degree to which that order binds successors in title must be considered.

4.4.26 Most of the jurisdictions reviewed have some mechanism to ensure that the order is registered so that a new or prospective property owner receives notice of it.

Question 15

Should an order requiring action by an existing property owner in relation to a hedge/tree be binding on successors in title and if so, to what extent?

Burden of costs

4.4.27 This discussion only relates to a system which involves applications made to a local council. In a system where the application for remedy is made directly to a court the usual process is to charge an application fee and for the court to ultimately allocate court costs between parties at its discretion. In the UK a council can charge an application fee and that fee cannot be set above a regulated maximum.

Question 16

How should the burden of costs resulting from an application be apportioned?

Interaction with planning law, heritage law and other law relating to wildlife, birds etc

4.4.28 In some cases trees or hedges may be subject to regulation by other branches of the law. They may be included in a council's register of significant trees, be subject to a heritage order, or they may provide habitat for birds or other wildlife. The various jurisdictions considered here deal with the interaction between branches of the law in different ways. Some are completely silent on the issue. Possible options include an explicit statement of the legislative hierarchy in the event of a conflict between different laws, the inclusion of a legislative requirement that the impact of other regulations to which a tree or hedge is subject must be considered by the decision maker, or a combination of the two.

Question 17

How should legislation deal with the potential conflict between orders to remedy barriers to sunlight/a view and other laws, regulations or by-laws such as tree preservation orders, heritage orders or where a hedge/tree provides a habitat for birds and/or wildlife?

4.5 Option 4: Extension of abatement notice provisions under the *Local Government Act 1993*

4.5.1 Part 12 div 6 of the *Local Government Act 1993* (Tas) provides councils with the power to issue abatement notices on property owners if satisfied that a nuisance, as defined under the *Act*, exists. The definition of nuisance is currently limited to five categories; something that causes harm to

the health, safety and welfare of the public; a risk to public health; excessive levels of noise or pollution; a fire risk; and unsightly articles or rubbish.¹⁷⁰

4.5.2 If the council is satisfied that a nuisance exists, the General Manager must serve a notice on the person responsible for the nuisance or the owner or occupier of the land, to take action as specified in the notice. The decision making power of the council and the General Manger are usually delegated to officer level. The person on whom the notice is served must comply with the notice. If they fail to do so the council can abate (or put an end to) the nuisance and the cost becomes a charge against the land. Appeal rights exist to a magistrate against the abatement notice and against any action taken by the General Manger to abate the nuisance for non-compliance with the notice.

4.5.3 It is possible that this system could be extended to include hedges that block access to sunlight and/or to a view. Under this model legislative provisions relating to trees would not be in a separate Act but, to a large extent, would adopt the notice provisions and appeal processes that already exist for abatement of nuisances under the *Local Government Act*.

4.5.4 This model has benefits as it has been established for some time, is familiar to councils and at least some residents, and the system for appeals is already operational. On the other hand, any amendments are likely to be more extensive than simply creating an additional category of nuisance and this would create two distinct processes within the one legislative provision. In addition, the current abatement notice provisions do not require an application by an affected property owner before council can take action. For example, councils monitor fire prone areas and issue abatement notices in relation to identified fire hazards. Similarly, a council officer on routine business may notice an unsightly accumulation of rubbish that has remained on land. In these circumstances an authorised officer can take action to have the nuisance abated.

4.5.5 If rules governing the height of hedges and related matters are incorporated within the nuisance provisions, the legislation would also need to set out the procedure for applying to the court/tribunal, particularly if there is a requirement that reasonable attempts have been made to resolve the dispute prior to application. There is no call for such a procedure in the abatement notice provisions as they are currently formulated. Additionally, the provisions would likely be limited to neighbours on adjacent land. No such restriction currently exists, nor would it be justified, in the context of the nuisance provisions in the *Local Government Act*.

Question 18

If a local government model is adopted should new legislation be developed or should provisions be incorporated in the abatement notice provisions of the *Local Government Act 1993*?

4.6 Option 5: A hybrid or alternative option?

4.6.1 The Institute welcomes submissions on alternative or hybrid options.

Question 19

Is there an alternative or hybrid model that should be considered?

¹⁷⁰ *Local Government Act 1993* (Tas) s 199. In only some instances is the interference specified with reference to the 'public'. The definition therefore appears to cover a mix of both public and private nuisance issues.

Appendix A: NSW Legislation

Trees (Disputes Between Neighbours) Act 2006 (NSW)

Section 14F Matters to be considered by Court

Before determining an application made under this Part, the Court is to consider the following matters:

- (a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application,
- (b) whether the trees existed prior to the dwelling the subject of the application (or the window or part of the dwelling concerned where the dwelling has been altered or added to),
- (c) whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned (or occupied) the relevant land,
- (d) whether interference with the trees would, in the absence of section 6 (3), require any consent or other authorisation under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977* and, if so, whether any such consent or authorisation has been obtained,
- (e) any other relevant development consent requirements or conditions relating to the applicant's land or the land on which the trees are situated,
- (f) whether the trees have any historical, cultural, social or scientific value,
- (g) any contribution of the trees to the local ecosystem and biodiversity,
- (h) any contribution of the trees to the natural landscape and scenic value of the land on which they are situated or the locality concerned,
- (i) the intrinsic value of the trees to public amenity,
- (j) any impact of the trees on soil stability, the water table or other natural features of the land or locality concerned,
- (k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees,
- (l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated,
- (m) anything, other than the trees, that has contributed, or is contributing, to the obstruction,
- (n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction,
- (o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost,
- (p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves,
- (q) the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view,
- (r) the part of the dwelling the subject of the application from which a view is obstructed or to which sunlight is obstructed,
- (s) such other matters as the Court considers relevant in the circumstances of the case.

Section 14D – Jurisdiction to make orders

- (1) The Court may make such orders as it thinks fit to remedy, restrain or prevent the severe obstruction of:
 - (a) sunlight to a window of a dwelling situated on the applicant's land, or
 - (b) any view from a dwelling situated on the applicant's land,if the obstruction occurs as a consequence of trees that are the subject of the application concerned
- (2) Without limiting the powers of the Court to make orders under subsection (1), an order made under that subsection may do any or all of the following:
 - (a) require the taking of specified action to remedy the obstruction of sunlight or of a view,
 - (b) require the taking of specified action to restrain or prevent the obstruction of sunlight or of a view,
 - (c) require the taking of specified action to maintain a tree or trees at a certain height, width or shape,
 - (d) require the removal of a tree or trees and the replacement of the tree or trees with a different species of tree,
 - (e) require the making of an application to obtain any consent or other authorisation referred to in section 6 (1) (a),
 - (f) authorise the applicant concerned to take specified action to remedy, restrain or prevent the obstruction of sunlight or of a view,
 - (g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land),
 - (h) require the payment of costs associated with carrying out an order under this section.
- (3) However, the power to make an order under subsection (1) does not extend to an order that requires the payment of compensation.

Appendix B: Queensland Legislation

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

Section 73 General matters to consider

- (1) QCAT must consider the following matters—
 - (a) the location of the tree in relation to the boundary of the land on which the tree is situated and any premises, fence or other structure affected by the location of the tree;
 - (b) whether carrying out work on the tree would require any consent or other authorisation under another Act and, if obtained;
 - (c) whether the tree has any historical, cultural, social or scientific value;
 - (d) any contribution the tree makes to the local ecosystem and to biodiversity;
 - (e) any contribution the tree makes to the natural landscape and the scenic value of the land or locality;
 - (f) any contribution the tree makes to public amenity;
 - (g) any contribution the tree makes to the amenity of the land on which it is situated, including its contribution relating to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke;
 - (h) any impact the tree has on soil stability, the water table or other natural features of the land or locality;
 - (i) any risks associated with the tree in the event of a cyclone or other extreme weather event;
 - (j) the likely impact on the tree of pruning it, including the impact on the tree of maintaining it at a particular height, width or shape;
 - (k) the type of tree, including whether the species of tree is a pest or weed (however described) or falls under a similar category under an Act or a local law.
- (2) For subsection (1) (c), the circumstances where a tree has historical, cultural, social or scientific value include where the tree—
 - (a) is, or is part of, Aboriginal cultural heritage under the *Aboriginal Cultural Heritage Act 2003*; or
 - (b) is, or is part of, Torres Strait Islander cultural heritage under the *Torres Strait Islander Cultural Heritage Act 2003*; or
 - (c) is, or is situated in, a registered place under the *Queensland Heritage Act 1992*.
- (3) For this *Act*, no financial value or carbon trading value may be placed on a tree.

There are additional matters that must be considered where the matter relates to the substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land:-

- (a) anything other than the tree that has contributed, or is contributing, to the interference; and
- (b) any steps taken by the tree-keeper or the neighbour to prevent or minimise the interference; and
- (c) the size of the neighbour's land; and
- (d) whether the tree existed before the neighbour acquired the land; and
- (e) for interference that is an obstruction of sunlight or a view—any contribution the tree makes to the protection or revegetation of a waterway or foreshore.

Additionally the *Act* specifies that a living tree should not be removed or destroyed unless the matter cannot otherwise be satisfactorily resolved.¹⁷¹

¹⁷¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 72.

Appendix C: Policy Documents Supporting English and Welsh Legislation

- *High Hedges Complaints, Prevention and Cure* (2005):¹⁷² This is an extensive 116 page document that sets out the government's policy advice on administering complaints about high hedges. Councils are not required to follow the advice nor is it intended to be a statement of the law. It also provides suggestions for avoiding issues relating to high hedges.¹⁷³ The document also includes sample forms and letters for use by local authorities.
- *Hedge Height and Light Loss* (2005):¹⁷⁴ The stated aim of this document is 'to provide an objective method for assessing whether high hedges block too much daylight and sunlight to adjoining properties, and to provide guidance on hedge heights to alleviate these problems.'¹⁷⁵ The procedure is intended to be simple enough for householders to use.¹⁷⁶
- *High Hedges: Complaining to the Council*:¹⁷⁷ Published in March 2005, this booklet outlines the types of complaints local authorities will consider and how they will deal with them.
- *Matters Relating to High Hedges: Notes to Local Authorities*:¹⁷⁸ This document provides clarification of the role of councils in appeal processes, the relationship between high hedges and trees protected under a tree preservation order, the role of the Ombudsman and a request for data collection for a proposed review of the legislation in 2010.¹⁷⁹
- *Appeals under Section 71 of the Anti-social Behaviour Act 2003: A Guide for Appellants (High Hedges)*:¹⁸⁰ This document outlines procedures for appeals against remedial notices and other decisions of local authorities relating to high hedges. Its language and focus are directed at the self-represented appellant.

¹⁷² Office of the Deputy Prime Minister, above n 151.

¹⁷³ Ibid 5.

¹⁷⁴ Office of the Deputy Prime Minister, *Hedge Height and Light Loss* (revised ed, October 2005) <<https://www.gov.uk/government/publications/hedge-height-and-light-loss>>.

¹⁷⁵ Ibid 4.

¹⁷⁶ Ibid.

¹⁷⁷ Department for Communities and Local Government, *High Hedges: Complaining to the Council* (March 2005) <<https://www.gov.uk/government/publications/high-hedges-complaining-to-the-council>>.

¹⁷⁸ Department for Communities and Local Government, *Matters Relating to High Hedges: Notes to Local Authorities* (July 2008) <<https://www.gov.uk/government/publications/matters-relating-to-high-hedges-notes-to-local-authorities>>.

¹⁷⁹ As yet, no review has taken place and the government currently has no plans to conduct one: United Kingdom, *Parliamentary Debates*, House of Lords, 12 June 2012, col WA 243 (Baroness Hanham).

¹⁸⁰ The Planning Inspectorate, *Appeals under Section 71 of the Anti-social Behaviour Act 2003: A Guide for Appellants (High Hedges)* (March 2013) <<http://www.planningportal.gov.uk/planning/countryside/highhedges>>.

Appendix D: Northern Ireland Legislation

High Hedges (Northern Ireland) Act 2011 (NI) c 21

History

In 2006 the Northern Ireland government reported the results of community consultation about the scale and geographical spread of nuisance high hedges in Northern Ireland.¹⁸¹ In total there were 641 responses (95% from individuals, 2% from local government and 3% from organisations or professionals) with 97% expressing concern over high hedges. The findings may be summarised as follows:

- 77% of the responses related to evergreens;
- almost 100% of respondents who had an issue indicated the hedge consisted of two or more trees or shrubs;
- the plant *Leylandii* was the subject of 327 complaints;
- 99% of respondents with high hedge issues indicated the hedge was two metres above ground level;
- in nearly all cases respondents indicated that while there were gaps in the trees, they were still capable of blocking sunlight and views;
- obstruction of light and overhanging branches was the most frequent cause of concern and over 50% reported that the hedge obstructed their view;
- other concerns related to roots causing damage, damp and the impact on reasonable enjoyment of their property;
- 97% of the properties affected were residential use and the majority were in private ownership;
- 81% who had a concern over a neighbour's high hedge believed it had adversely affected the value of their property;
- 65% who indicated they had a concern reported that they had attempted to resolve the issue with their neighbour but were unsuccessful;
- of those who made no attempt to resolve the issue the reasons given included: the neighbour was unapproachable; a general unwillingness to create ill feeling; and a belief that there was no point;
- 51% who indicated they had a problem said they had reported the complaint to a third party: 175 to local councils; 110 to elected representatives; 93 to a planning service and 72 to their solicitor;
- three respondents (0.5%) reported they had taken civil action;
- a very small number of respondents argued that high hedge legislation would lead to the removal of hedges and the loss of wildlife habitat in urban and rural areas;
- 13 local councils responded with some indicating that issues would arise with people from lower socio-economic areas being able to afford to pay fees and concerns about the interaction between existing planning laws and any proposed legislation.

¹⁸¹ Department of the Environment (UK), *Nuisance High Hedges Consultation: Summary of Findings* (April 2006) <http://www.planningni.gov.uk/index/news/news_policy/news_policy_archive/news-legislation-highhedges-summary-findings.pdf>.

The consultation revealed that concerns about high hedges were experienced by people living in every council area in Northern Ireland.¹⁸²

The legislation

As a result of the consultation, Parliament developed legislation to govern high hedge disputes between neighbours. As is the case in the UK, the Northern Ireland legislation is complaint based. Neighbours are expected to make every effort to resolve disputes before referral to council and the legislation adopts a remedial notice framework that very closely mirrors that in England and Wales. The main differences are:

- the fee for a complaint must be refunded if the remedial notice takes effect.¹⁸³ The council may then levy a fee for the reasonable investigative and administrative costs on the neighbour who has failed to respond to attempts to negotiate rather than the disaffected complaint;¹⁸⁴ and
- the appeal processes are managed through the Northern Ireland Valuation Tribunal¹⁸⁵ rather than through the planning authority.

Authorities anticipated that initially the legislation would mainly deal with a backlog of complaints and then its effect would be to encourage landowners to maintain hedges to the required height, resulting in a reduction in the number of new cases. This was the reported effect of the introduction of the equivalent legislation in the UK.¹⁸⁶

Northern Ireland has adopted a similar regime of supporting policy documents and guidelines as England and Wales which includes separate guidance documents for councils, hedge owners and complainants and a publication providing technical guidance.¹⁸⁷ Guidelines developed by government to assist councils include the following information:

- no time scale is specified in the *Act* for an investigation as the nature of each complaint will vary;¹⁸⁸
- the hedge owner does not break the law by growing a hedge higher than a specified height but only commits an offence where there is a failure to comply with a remedial notice;¹⁸⁹
- the complainant is required to pay a service fee to the council to investigate a complaint. The Regulatory Impact Assessment suggests the fee is not to have the effect of the imposition of a penalty nor is it to be a cost that should be borne by all ratepayers.¹⁹⁰ Councils have the discretion to set the fee subject to the maximum prescribed by the Regulations.¹⁹¹ However, if

¹⁸² Ibid 11.

¹⁸³ After any appeal processes have been concluded.

¹⁸⁴ Explanatory Note, High Hedges (Fee Transfer) Regulations (*Northern Ireland*) 2012 (NI) SR 2012/105.

¹⁸⁵ The Northern Ireland Valuation Tribunal is a tribunal established under the Northern Ireland Courts and Tribunals Service and primarily determines appeals against new capital values for property in Northern Ireland.

¹⁸⁶ Northern Ireland Assembly, *Parliamentary Debates*, Executive Committee, 10 May 2010, 176 (Mr Poots, Minister of the Environment).

¹⁸⁷ Department of Environment (Northern Ireland), *High Hedges Guidance* (2011) <http://www.doeni.gov.uk/index/protect_the_environment/local_environmental_issues/high_hedges_2/high_hedges_2-6.htm>.

¹⁸⁸ Department of Environment (Northern Ireland), *High Hedges Act (Northern Ireland) 2011: Guidance for Councils* (2011), 2 <http://www.doeni.gov.uk/guidance_for_councils-2.pdf>.

¹⁸⁹ Ibid.

¹⁹⁰ Department of Environment (Northern Ireland), *High Hedges Fee Legislation — Regulatory Impact Assessment* (November 2011) <http://www.doeni.gov.uk/high_hedges_fee_legislation_-_regulatory_impact_assessment.pdf>.

¹⁹¹ *High Hedges (Fee) Regulations (Northern Ireland) 2012* (NI) SR 2012/33, reg 2.

the complaint is substantiated and a remedial notice is issued, the fee has to be refunded and a fee can instead be levied on the landowner;¹⁹²

- the complaint is limited to access to light and does not cover access to a view;¹⁹³
- the hedge does not have to be located next door but can be located several properties away. That is, the location is secondary to the effect of the hedge as a barrier to light.¹⁹⁴
- the *Act* applies to Crown land;¹⁹⁵
- the high hedge must affect light to the living quarters of the domestic property or the garden of a domestic property;¹⁹⁶
- an indication from the affected property owner that the other landowner is unapproachable is insufficient grounds to lodge a complaint with council. At a minimum it is expected that there be at least an exchange of letters and evidence of this. In other cases an attempt at mediation would be required;¹⁹⁷
- in determining if the hedge unreasonably interferes with the enjoyment of property the council is to balance the competing rights of the hedge owner and the complainant and the right of the community in general given the amenity value of the hedge. Guidance is provided on factors that might be considered in this balancing exercise;¹⁹⁸

The remedial notice and title

The remedial notice runs with the land and is a statutory charge against the land.¹⁹⁹ In Northern Ireland, a Statutory Charges Register exists to enable prospective purchasers to check whether land is encumbered by statutory restrictions that would not otherwise be easily identified. This includes matters relating to planning permissions and to tree preservation orders.²⁰⁰ The Register has the effect of alerting prospective purchasers to any commitment they are taking on when purchasing the land. The responsibility for registering the remedial notice as an entry on the Statutory Charges Register vests with the local council who must submit the appropriate form, documentation and fee to the relevant government department.²⁰¹

The interaction of planning requirements and the Act

There is the potential that trees may be subject of a tree preservation order or heritage listing. In Tasmania, a number of councils have registers of significant trees, and the removal of trees may be covered under council by-laws.²⁰² In Northern Ireland it is recognised that the local planning officer

¹⁹² Explanatory Note, *High Hedges (Fee Transfer) Regulations (Northern Ireland) 2012* (NI) SR 2012/105.

¹⁹³ Department of Environment (Northern Ireland), above n 188, 5.

¹⁹⁴ Ibid 9.

¹⁹⁵ Ibid 10.

¹⁹⁶ Ibid 11.

¹⁹⁷ Ibid 12.

¹⁹⁸ Ibid 27.

¹⁹⁹ *High Hedges (Northern Ireland) Act 2011* (NI) c 21, s 5 (8).

²⁰⁰ Department of Finance and Personnel, Statutory Charges Register (2010) <http://www.dfpni.gov.uk/lps/index/land_registration-2/statutory_charges_register.htm>.

²⁰¹ Department of Environment (Northern Ireland), above n 188, 56.

²⁰² For example, Kingborough Council, Health and Environmental Services By-Law, By-law 3 of 2011, pt 7 prohibits the removal of certain trees including those listed on the register of significant trees. See Kingborough Council, Significant Tree Register (December 2012)

must give approval before the removal of any tree under a tree preservation order.²⁰³ Additionally a remedial notice would not override a requirement of a planning condition.²⁰⁴

This situation appears to be different to that in England and Wales where the guidelines indicate that the work required under a remedial notice will override the protection afforded a tree under a Tree Preservation Order.²⁰⁵

Wildlife and the Act

The *Act* does not override legislation protecting nesting wild birds. The guidelines specifically warn against conducting work during bird nesting seasons and to take care to avoid harming wild animals protected by domestic legislation.²⁰⁶

<<http://www.kingborough.tas.gov.au/webdata/resources/files/Significant%20Tree%20Register%20web%20document.pdf>>; Kingborough Council, Significant Tree Register Policy (October 2011)
<http://www.kingborough.tas.gov.au/webdata/resources/files/Policy_5_9_-_Significant_Tree_Register_Policy.pdf>.

²⁰³ Department of Environment (Northern Ireland), above n 188, 24.

²⁰⁴ Ibid.

²⁰⁵ Department for Communities and Local Government, above n 178, 6.

²⁰⁶ Department of Environment (Northern Ireland), above n 188, 53–4.

Appendix E: Scottish Legislation

Scotland has adopted the same statutory regime as England and Wales, and Northern Ireland, with adaptations to meet local circumstances.

In particular:

- remedial notices are referred to as ‘high hedge’ notices²⁰⁷ although the process under the legislation largely remains the same as the England and Wales;
- the high hedge does not have to be an evergreen, as is the case in England and Wales and Northern Ireland, but instead can also comprise deciduous trees;²⁰⁸
- there is discretion to refund fees of the complainant rather than an obligation;²⁰⁹
- the local authority must dismiss an application where the applicant has not taken all reasonable steps to resolve the complaint or where the complaint is considered vexatious or frivolous²¹⁰ (compared with discretion to dismiss in England and Wales);²¹¹
- the legislation imports an objective test of enjoyment rather than a subjective test in England and Wales and Northern Ireland. Therefore the test is one affecting the ‘enjoyment of the domestic property which an occupant of that property could reasonably expect to have’;²¹²
- the *Act* clearly stipulates that a Tree Preservation Order has no effect in relation to a high hedge notice.²¹³ However one of the things which a local authority has to consider in determining whether to issue a high hedge notice is whether the hedge is of cultural or historical significance to the amenity of the area.²¹⁴

The *Act* provides for a right of appeal against decisions of local authorities.²¹⁵ Where the initial decision making responsibility rests with a council official rather than the elected councillors, as is the case with more minor matters, the official’s decision is appealed to the council’s own review body. In other, large-scale cases, as a matter of practice, most appeals are decided by ‘reporters’ delegated by the Scottish Ministers although occasionally, in matters of genuine national interest, appeals may be heard by Scottish Ministers themselves on the recommendation of reporters.²¹⁶

²⁰⁷ *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 2.

²⁰⁸ *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 1(1), referring broadly to ‘trees and shrubs’ rather than specifically including the word ‘evergreen’. The initial Bill as tabled referred instead to ‘evergreens or semi-evergreens’. The Bill was amended after debate on the basis that deciduous trees form a considerable barrier to light even when they shed their leaves. Wildlife groups were opposed to the amendment, warning that widening the definition would lead to destruction of habitat for a wide range of wildlife: Simon Johnson, ‘High Hedge Laws Passed at Scottish Parliament’, *The Telegraph*, 28 March 2013.

²⁰⁹ *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 4(4).

²¹⁰ *Ibid* s 5.

²¹¹ *Anti-social Behaviour Act 2003* (UK) c 38, s 68(2).

²¹² *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 6(5)(a).

²¹³ *Ibid* s 11.

²¹⁴ *Ibid* s 6(7).

²¹⁵ *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 12.

²¹⁶ The Scottish Government, *A Guide to Planning Appeals in Scotland* (July 2013), 10 <<http://www.scotland.gov.uk/Resource/0042/00426741.pdf>>.

While the high hedge notice runs with the land and binds successive owners there appears to be no separate mechanisms of land charges or statutory charges as in England and Wales and Northern Ireland.²¹⁷

Where the landowner has failed to comply with a notice and the council has undertaken the work, costs are recoverable against the existing²¹⁸ and future owners provided the council has a 'notice of liability for expenses' against the land.²¹⁹ Any such charge remains recoverable by a new owner against the former owner.²²⁰

²¹⁷ *High Hedges (Scotland) Act 2013* (Scot) asp 6, s 9.

²¹⁸ *Ibid* s 25.

²¹⁹ *Ibid* s 26, 27.

²²⁰ *Ibid* s 28.