

NSW Law Reform Commission

REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

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REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

Terms of Reference and Participants

New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC

Attorney General for New South Wales

Dear Attorney

Neighbour and neighbour relations

We make this final Report pursuant to the reference to this Commission dated 23 December 1987.

Professor Michael Tilbury

Commissioner

Professor David Weisbrot

Commissioner

Judge John Goldring

Commissioner

Mr Craig Kelly

Commissioner

November 1998

Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, referred the following matter to the Law Reform Commission:

The Law Reform Commission is to inquire into and report on:

1. The laws which define and regulate relationships between people who live on neighbouring land with particular reference to:

(a) access to neighbouring land for the purposes of maintaining fixtures and services required by an adjoining property;

(b) easements for joint services, including joint connections for sewerage and drainage;

(c) problems caused by trees; and

(d) noise control as it affects neighbours.

2. Any related matter.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Professor Michael Tilbury*

Professor David Weisbrot

Judge John Goldring

Mr Craig Kelly

(* denotes Commissioner-in-Charge)

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REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

List of Recommendations

Recommendation 1

That the operation of the common law right to abate a nuisance by cutting off overhanging branches and roots be modified as follows:

A person who intends to abate the nuisance should be required to give the tree owner 28 days written notice before doing so.

The requirement that the branches or roots removed from the tree be placed on the tree owner's property should be abolished.

Recommendation 2

That the Minister for Urban Planning and the Environment makes a State Environmental Planning Policy which provides that listed non-native trees that are undesirable because they are highly likely to cause damage to property are exempt from the operation of tree preservation orders.

Recommendation 3

That tree preservation orders should not require the consent of the tree owner to allow a neighbour to trim overhanging branches to abate a nuisance.

Recommendation 4

That s 124 of the *Local Government Act 1993* (NSW) be amended to give councils the power to order an owner or occupier of land or premises to do or refrain from doing such things that are specified in the order to prevent a tree which has caused physical damage to property from causing further damage, or to prevent physical damage in the future in cases where, because of the species of tree or its location, physical damage is highly likely to occur in the future.

Recommendation 5

That legislation should be enacted which provides a new simple, inexpensive and accessible process in the Local Court, similar to the model under the *Dividing Fences Act 1991* (NSW) for the resolution of disputes about trees. The legislation should state:

- (1) the responsibilities of tree owners, specifically that tree owners are responsible for ensuring that their trees do not cause damage to neighbouring property or interfere unreasonably with the neighbour's enjoyment of land; and
- (2) that the tree owner must bear any costs associated with preventing tree-caused damage to neighbouring property and must compensate neighbours for any damage the owner's tree causes.

Recommendation 6

That a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out sunlight should be able to apply to the Local Court under the proposed new procedure.

Recommendation 7

That a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out a view should be able to apply to the Local Court under the proposed new procedure.

Recommendation 8

That the EPA prepare guidelines about the drafting of noise control notices and the kind and amount of evidence needed to establish that noise is 'offensive' for the purposes of the noise provisions of the *Protection of the Environment Operations Act 1997* (NSW).

REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

1. Introduction

THE REFERENCE

1.1 On 23 December 1987 the Commission received a reference from the then Attorney General, the Hon R J Mulock MP, to inquire into and report on:

1. The laws which define and regulate relationships between people who live on neighbouring land with particular reference to:

- (a) access to neighbouring land for the purposes of maintaining fixtures and services required by an adjoining property;
- (b) easements for joint services, including joint connections for sewerage and drainage;
- (c) problems caused by trees; and
- (d) noise control as it affects neighbours.

2. Any related matter.

1.2 This reference on neighbour and neighbour relations arose out of consultations the Commission held to identify matters to be included in its Community Law Reform Program. To find out what aspects of the law might need changing or modifying, the Commission held a conference which was attended by representatives of Chamber Magistrates, Community Justice Centres, the Public Solicitor's Office and four Community Legal Centres. It also distributed a Community Law Reform pamphlet to community and interest groups to get their views and suggestions. These consultations identified a number of kinds of disputes between neighbours as needing attention. These were disputes about dividing fences, joint use of services available to adjoining properties, and the problems caused by large trees and noise. The Commission received a reference on dividing fences and has reported on this issue.¹ The remaining issues were combined into the current reference.

1.3 After releasing a discussion paper on *Neighbour and Neighbour Relations*² (DP 22), analysing the responses and doing more research the Commission decided to publish two reports. The first, *Right of Access to Neighbouring Land*³ (the "Access Report"), focussed on the law relating to the private rights of access to neighbouring land to maintain and repair fixtures on one's own property and the private rights of access to neighbouring land to carry out work on utility services on that neighbouring land. To overcome the problem that common law rights of access were too limited for modern living conditions the Commission recommended statutory reform to allow a person to apply to a Local Court for access over an adjoining or adjacent property to carry out work (for example, repair or demolition work) on his or her own property or for a person to carry out work on a utility service (for example, a sewerage service) on neighbouring land where the applicant is entitled to use that service (utility services order).

CONSULTATIONS AND SUBMISSIONS

Consultations

1.4 The Commission sought submissions from both the general public and specific interest groups. Departments and organisations, including the Council for Community Justice Centres, the Home Unit Owners Association of New South Wales, Council of the City of Sydney, the Department of Local Government and the Australian Dispute Resolution Association, responded to the discussion paper. A list of submissions is at Appendix "A". The Commission also held meetings with Chamber Magistrates and officers of various Community Justice Centres, Legal Aid, the Strata Titles Board, the Department of Urban Affairs and Planning, the Department of Local Government, the Environment Protection Authority, Parramatta City Council and the Local Government and Shires Association of New South Wales.

Hotline

1.5 The Commission also set up a neighbourhood disputes hotline on 18 October 1991. The Commission received nearly 300 calls on the day and the number of follow-up calls and submissions was overwhelming. The results of the hotline provided the Commission with valuable information about the range of problems occurring within the community and the varied experience of those seeking resolution of these problems both inside and outside the legal system. A summary of the results of the hotline is at Appendix "B".

THIS REPORT

Disputes about trees and noise

1.6 This Report is the second report dealing with disputes between neighbours. It focuses on disputes about trees and noise. It considers the existing law regulating trees and noise and makes recommendations for reform.

Focus on residential neighbours

1.7 DP 22 centred primarily on disputes between residential neighbours. The Access Report included commercial and industrial neighbours for the purposes of its recommendations. However, as the vast majority of disputes about trees and noise reported in submissions and during consultations concerned disputes between residential neighbours, this Report will focus on residential neighbours.

New noise control law

1.8 In December 1997, the New South Wales Parliament passed the *Protection of the Environment Operations Act 1997* (NSW). When the Act becomes operational,⁴ it will replace the *Noise Control Act 1975* (NSW). The legislation makes some important changes to noise control laws. The new law is discussed in Chapter 3, and the Commission's recommendations take these changes into account. New regulations are being drafted and will become operational when the new Act comes into force.

IMPORTANCE OF COMMUNITY AWARENESS

1.9 Neighbourhood disputes about trees and noise affect a significant number of people. Submissions and consultations, including responses to the hotline, indicate that these disputes can tie up a considerable amount of community resources, for example, police, local council and court resources.

The first and most fundamental step in achieving change is to address community attitudes and awareness. Those people who telephoned the Commission's hotline strongly supported community awareness programs.

Community education about noise

1.10 The Community Mediation Division of the Australian Dispute Resolution Association stated that community education is vital. In relation to noise it said that the goals should be to encourage people to create a quieter environment and to tell people where they can get help to resolve noise problems.⁵

1.11 There is no doubt that community awareness programs have in the past been very successful in changing both attitudes and behaviour, for example, drink driving and anti-smoking campaigns. As the urban landscape becomes more built up and the average household size decreases, more people than ever live in very close proximity to their neighbours in home units, townhouses or terraces, and quarter acre blocks are increasingly used for dual occupancy. More people than ever before own noisy products, including cars, motor bikes, power tools and sophisticated sound systems. Most people do not set out deliberately to make their neighbours' lives unpleasant and would appreciate information on how to limit any detrimental effect their activities might have on their neighbours. For people who are affected by neighbourhood noise, easy to understand information about their rights, the remedies available to them and how to go about resolving the problem is vital. The Environment Protection Authority (the EPA) has an education section whose role is to encourage change. The EPA produces a range of manuals and brochures, including brochures on how to deal with a noisy dog, how to reduce the noise impact of air conditioners, trucks, cars and motor cycles and traffic noise. The Commission strongly supports and encourages these approaches.

Need for community education about trees

1.12 There is also a clear need to educate the community about tree planting. This has become increasingly important because values about conservation and measures used to maintain the natural environment may conflict with the amenity, safety and property interests of people living in a closely built up urban environment. As with noise, most people do not set out deliberately to make their neighbours' lives unpleasant and would make use of information on how to prevent and limit any detrimental effect that planting trees might have on their neighbours. Giving people clear information about their rights and the procedures they can follow if a tree is causing a problem would increase the chances of neighbours resolving difficulties quickly and easily between themselves.

RESOLVING DISPUTES BETWEEN NEIGHBOURS

1.13 The remedies proposed in this Report should be regarded as remedies of last resort. Talking to the neighbouring land owner and trying to find a mutually acceptable solution should be the first step when a dispute arises. If this fails, an aggrieved neighbour should, whenever possible and appropriate, seek the help of a Community Justice Centre to mediate an agreed solution. A solution arrived at using these approaches is more likely to enable the parties to continue to live next to each other in reasonable harmony. These methods also avoid the possible delay and the stress and expense of a court imposed solution.

1.14 However, submissions and consultations demonstrate that these methods do not work in a significant number of cases. A considerable number of those making submissions had tried talking through the problem with their neighbours or had attempted mediation without success. There are a number of reasons for this. The level of hostility between the parties may be too high. The issues may be too complex. The Commission considers that another reason is that the law governing these disputes is outdated and does not provide forums for final resolution that neighbours can realistically use if all

else fails. This may reduce the incentive for neighbours to negotiate. Where appropriate, the Commission makes recommendations that address these defects in law and procedure. In particular, the Commission recommends that Local Courts, rather than the Supreme Court, should be the forum for dealing with neighbourhood disputes about trees.

OUTLINE OF THIS REPORT

1.15 Chapter 2 of this Report discusses the law regulating trees and makes recommendations for reform. Chapter 3 examines the laws regulating noise, including the recent changes to the law, and makes recommendations for reform.

FOOTNOTES

1. New South Wales Law Reform Commission, *Dividing Fences* (Report 59, 1988).
2. New South Wales Law Reform Commission, *Neighbour and Neighbour Relations* (Discussion Paper 22, 1991).
3. New South Wales Law Reform Commission, *Rights of Access to Neighbouring Land* (Report 71, 1994).
4. It is proposed to become operational by December 1998.
5. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).

REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

2. Trees

REGULATION OF TREES

2.1 Generally, there are no restrictions on the type or number of trees that land owners or occupiers may plant or allow to grow on their land. The law provides for the control and eradication of noxious plants, but apart from this the main aim of regulation has been to preserve trees.

Regulation of noxious plants

2.2 The *Noxious Weeds Act 1993* (NSW) regulates noxious weeds by providing a mechanism for identifying noxious weeds requiring control measures, specifying what control measures are needed and specifying the duties of public and private land holders for controlling those weeds.

2.3 It provides a framework for State-wide control of noxious weeds by the Minister and local control authorities.¹ The Minister may declare, by order published in the Gazette, a plant to be a noxious weed for the whole or a part of the State.² Depending on the control category on declaration, specified forms of control measures must be taken in relation to the weed. Measures may include notifying the local council, full and continuous repression and destruction, spread prevention and reduction in distribution and numbers or whatever is specified in the declaration.³ An occupier of land must control noxious weeds on the land, as required under the control category or categories specified for the weeds concerned.⁴

2.4 Local councils are responsible for the control of noxious weeds in their local government area and may, by giving an occupier a “weed control notice”, require him or her to carry out relevant control obligations in a specified manner.⁵ Councils have other functions under the Act, including developing, implementing, coordinating and reviewing noxious weed control policies and noxious weed control programs and inspecting land within the local area in connection with its weed control functions.⁶ A council may appoint an inspector to inspect land or premises for noxious weeds and to advise about whether a plant is noxious and how to control it.⁷ Weeds declared noxious under the Act are those which pose a threat to agriculture, the environment or the community. The potential to spread to other areas is the main, but not the only, basis for determining the level of threat a weed poses and the action to be taken to control it. The Minister cannot make an order applying to an Australian native unless the Minister for National Parks and Wildlife has consented.⁸

Tree preservation

2.5 Councils have the power to make an order protecting trees in their local government area. These orders are Environmental Planning Instruments (EPIs) made under the *Environmental Planning and Assessment Act 1979* (NSW).⁹ EPIs can be made regarding a number of matters, including protecting or preserving trees or vegetation and controlling any act, matter or thing relating to this.¹⁰ Model provisions made by the Minister¹¹ provide that where a council thinks it is necessary to “secure amenity or preserve existing amenity” it may, by resolution, make a “tree preservation order” (TPO). TPOs may prohibit, unless the council has consented, the ring barking, cutting down, lopping, removing, injuring or wilful destruction of any tree or trees specified in the TPO. The council may impose any conditions it thinks fit on giving that consent.¹² TPOs may cover any tree or trees or any specified class, type or description of trees on land in the local government area or divisions of it.¹³ The council must publish TPOs in the Gazette and publicise them in the local newspaper.¹⁴ Disobeying a TPO is an offence.¹⁵

2.6 Many councils have provisions about tree preservation as part of their Local Environmental Plans. Some have quite detailed provisions about application for consent and the matters a council must consider before giving it;¹⁶ others simply provide for when the powers given to the council by the model provisions do not apply.

WHEN TREES INTERFERE WITH NEIGHBOURS

Nuisance

2.7 The common law of nuisance may provide a remedy to a person who suffers damage or interference as a result of problems caused by trees. Generally, a remedy is only available once damage or substantial interference has already occurred or where it is apparent that substantial damage or interference is a virtual certainty or is imminent.¹⁷ The law of nuisance attempts to strike a balance between the interests of occupiers: between the right to use one's own land as one sees fit and the right of one's neighbours to enjoy their land without unwarranted interference.¹⁸ Nuisance protects physical damage to land or buildings and also the less tangible interest of "the pleasure, comfort and enjoyment which a person normally derives from occupancy of land".¹⁹

Tangible damage caused by trees

2.8 Nuisance provides a remedy particularly where trees cause physical damage to a neighbour's property. For example, legal action was successful where tree roots spread across a boundary and caused subsidence and damage to houses by drying out the soil on which the houses were built,²⁰ and where overhanging branches caused fruit trees to be stunted.²¹

Where trees block out sunlight

2.9 The law gives very little protection to neighbours who find that trees interfere with their enjoyment of occupancy by blocking out sunshine from their land. The common law is uncertain about whether and, if so, in what circumstances a person has a remedy in nuisance against a neighbour for blocking out sunlight to his or her property. The common law does not generally recognise access to light as an interest it will protect unless the person's access to the sun is protected by an easement. However, few people are likely to take the legal steps necessary expressly to protect their access to sunlight by easement and the neighbour would have to agree before it could be done. In any case, even if there is an easement, the interference must reduce the amount of light below the amount which is reasonably necessary for the ordinary use of the plaintiff's land.²² The ability to get an easement through 20 years continuous and uninterrupted user (the doctrine of ancient lights) has been abolished in New South Wales if access is merely for enjoyment.²³

2.10 The common law of nuisance does not protect unusual or sensitive use of land. This is likely to make it difficult for a person seeking to protect access to sunlight for a solar collector to succeed in an action for nuisance.²⁴ This is particularly so while the number of people using solar collectors remains relatively low.²⁵ If a neighbour has blocked the sunlight purely out of malice, and assuming the court holds that access to sunlight is an interest deserving of protection, the person with the solar collector may have a greater chance of success in an action for nuisance. However, it appears that this argument will only succeed if the tree casting the shade has no utility value to the tree owner.²⁶ A further concern is that even if the action succeeds, there is no guarantee that the court will grant an injunction, which is what a person needing access to sunlight needs, rather than damages.²⁷ In the United States, there is

some movement towards courts recognising that blocking sunlight to a solar collector may be a nuisance,²⁸ but it seems unlikely that Australian courts will follow this lead.²⁹

Where trees block out a view

2.11 The law of nuisance does not provide a remedy where trees block out a neighbour's view. The common law of nuisance has consistently refused to protect a right to a view.³⁰ The reasons appear to be that the interference with aesthetics is too subjective and that while obstruction of a view may cause annoyance and loss of property value, it will rarely, if ever, result in the complete loss of enjoyment of land.³¹

Remedies

Injunctions

2.12 Where a tree causes damage, the courts tend to favour granting an injunction requiring the tree owner to cut down a tree causing a nuisance or to take some other action to prevent the tree causing further nuisance. Where damage has not yet occurred, the courts will only grant an injunction to prevent future injury in a very narrow set of circumstances which do not include likely damage due to encroachment of roots.³²

Damages

2.13 A court can award damages to compensate a person affected by trees causing a nuisance. To get compensation the person must suffer actual physical damage.³³ The law is more complicated where there is a continuing nuisance. The common law does not compensate a person for damage that will occur in the future. To avoid bringing repeated claims each time more damage occurs, a person can claim damages in equity and the appropriate court will assess damages taking into account future damage as well.³⁴

Abatement

2.14 The common law allows a person to cut off overhanging branches and roots intruding onto his or her property. This is known as the right of abatement.³⁵ The person does not need the court's permission or to notify the owner of the tree although notice is probably prudent. The encroaching branches or roots do not have to cause actual damage before a person can exercise the right of abatement. However, the person may open themselves to legal action, namely trespass, if he or she goes onto the tree owner's property to trim the branches or roots unless the branches or roots have actually caused a nuisance or are a danger to life and health.³⁶ The common law also requires that the person removing overhanging branches must place them on the tree owner's property.³⁷

ISSUES RAISED IN SUBMISSIONS

People plant trees without concern for the trouble they might cause

2.15 One submission was concerned that a person can plant as many trees as he or she likes without concern or responsibility for the trouble they might cause neighbours.³⁸ One submission reported that a neighbour had planted 11 eucalypts in a small house block.³⁹ In other cases, a fig tree had been planted next door and had roots 60 feet long,⁴⁰ and forest trees had been planted right against a boundary.⁴¹

Kinds of damage

2.16 Other submissions noted that trees cause a range of problems and concerns for neighbours including:

damage to houses caused by falling branches⁴² or trees⁴³ which can result in increased insurance premiums;⁴⁴

damage to walls and paving from tree growth and roots;⁴⁵

huge amounts of leaf and tree litter blocking guttering;⁴⁶

roots interfering with drainage;⁴⁷

hay fever;⁴⁸

interfering with TV reception;⁴⁹

blocking out light⁵⁰ and making the house and yard cold and damp;⁵¹ and

blocking out a view.⁵²

Person suffering bears the cost

2.17 Submissions confirm that, in practice, the person who suffers from the problems caused by the neighbour's tree ends up bearing the cost of preventing damage or remedying damage it has caused.⁵³ They say that tree owners will not pay these costs.⁵⁴ Older people may be unable to clean up mess caused by a tree or to pay for someone else to do it.⁵⁵ The costs can be considerable⁵⁶ and may be recurring.⁵⁷ The unfairness of this is pointed out in a number of submissions, for example:

There are many disputes between neighbours such as noise, dogs, cats, etc but this is the only one where the neighbour with the complaint has to pay.⁵⁸

The rules are weighted in favour of the person who recklessly planted the tree.⁵⁹

Conflict with tree preservation orders

2.18 A number of submissions say that TPOs can create more conflict in relation to a nuisance tree.⁶⁰ They say TPOs make the right of abatement even more burdensome for the person affected because he or she must apply to the council for permission to trim the tree.⁶¹ One submission says that if the owner will not ask for permission, or consent, to trim the tree the victim is stuck with the problem.⁶² Some councils will not give permission to lop or cut down unless the owner consents and owners impose all kinds of conditions on consent, for example, that the costs be borne by the person affected or that the trimmings not be placed on the owner's land.⁶³

Rights hard to enforce

2.19 Submissions argue that the rights of a person suffering from a neighbour's nuisance tree are hard to enforce. Many say that they had approached their neighbours about the nuisance tree, but to no avail.⁶⁴ Other problems identified include that: going to the Supreme Court to enforce rights is too expensive for most people;⁶⁵ it can take a number of years to enforce a right;⁶⁶ and councils generally will not help and have only limited powers.⁶⁷

Conclusion

2.20 Trees on private property are a substantial cause of neighbourhood disputes. Neighbours seeking resolution of problems caused by a neighbour's trees must rely on common law remedies, but submissions and consultations show that the common law is inadequate. The law of nuisance is only likely to provide a remedy where a tree actually causes physical damage. Common law nuisance rights in relation to the less tangible impact of trees on the enjoyment of property are so unclear and uncertain that few people are likely to pursue them in a court. People are also unlikely to be able to resolve a dispute between themselves on the basis of such laws.

2.21 The common law does not reflect the evolving importance to society of access to sunlight and views. The common law of nuisance is of very little use to a neighbour trying to prevent a tree from causing damage. This means that a minor dispute that could be resolved by the inexpensive removal of a small tree is likely to become a major dispute in which property damage has occurred and will continue to occur unless huge amounts are spent to remove what has become a very large tree.

2.22 The right of abatement has been considerably modified by TPOs and, in any case, the costs involved in removing overhanging branches prevents many people from exercising it. The common law requirement that a person removing overhanging branches must place them on the tree owner's property is totally out of touch with the circumstances in which abatement is likely to occur in modern times. A person complying with this requirement runs a high risk of escalating a dispute. The Commission recommends that the common law right of abatement be modified in two ways. First, a person who intends to exercise the right of abatement should be required to give the tree owner 28 days written notice before removing the overhanging branches or roots causing the nuisance. Secondly, the requirement that the branches or roots removed from the tree be placed on the tree owner's property should be abolished.

Recommendation 1

That the operation of the common law right to abate a nuisance by cutting off overhanging branches and roots be modified as follows:

A person who intends to abate the nuisance should be required to give the tree owner 28 days written notice before doing so.

The requirement that the branches or roots removed from the tree be placed on the tree owner's property should be abolished.

2.23 The inadequacy of the common law and the legal process leaves a legal vacuum for neighbours in dispute about trees. Mediation using Community Justice Centres is useful for some of these disputes but is not successful or appropriate for a considerable proportion of cases. The current law provides little incentive for a neighbour whose trees are causing problems to negotiate. Traditionally, these disputes are characterised as being disputes between private citizens in which public authorities should not become involved. However, the legal vacuum has meant that considerable amounts of public resources are spent managing, or dealing with the consequences of, these disputes. Conflicts over trees occupy considerable resources of local councils, chamber magistrates, members of Parliament, legal aid and the police. It is clear that most of those making submissions had sought help from all these bodies. However, local councils lack the necessary powers to deal with such problems and, in any case, are often unwilling to intervene in what they regard as a private dispute.

PREVENTING OR REDUCING PROBLEMS WITH TREES

2.24 One way of reducing disputes about trees is to prevent inappropriate planting of trees. DP 22 asked whether there should be some limitation or regulation on the planting of trees. Possible limitations it suggested were on the type and height of the tree and on where the tree can be planted in relation to a boundary.

Regulation of tree planting

2.25 One option to prevent inappropriate planting of trees is to have regulations governing such matters as:

- the numbers of trees that can be planted in a particular space;
- the height of trees that can be planted in a built up area;
- the type of trees that can or cannot be planted; and
- where trees can be planted on the land.

There was some support in submissions for this approach.⁶⁸ The regulations would be monitored by council inspectors.⁶⁹

Approval process for planting

2.26 A number of submissions suggested that the best way to regulate planting would be to require people wanting to plant trees to get approval from the council in the same way that a person wanting to build must get approval.⁷⁰ This would overcome problems that could arise from rigid blanket regulation.⁷¹ Several submissions point out the inconsistency in approach to buildings and trees. They say that there are restrictions on the height of buildings and on their position on a block, including balconies, but no restrictions on the position or the height of trees that can be planted.⁷² Some submissions suggest that planting restrictions could be incorporated into the existing process for

approving new building applications.⁷³ Others said that a compulsory system for planting would result in unnecessary bureaucracy and expense for most councils.⁷⁴

Community education

2.27 There is some support in submissions for education rather than regulation. Many submissions favour the involvement of councils in preventative strategies including advising about tree planting and producing reliable information about the habits of trees.⁷⁵ For example, pamphlets could be included in rates notices.⁷⁶ The Environmental Defender's Office says that any education program must be in the context of an ecologically sustainable development strategy which stresses the need for trees as well as the need to prevent possible nuisance to neighbours from their growth.⁷⁷

The Commission's recommendation

2.28 The Commission does not favour a general scheme regulating all planting of trees. Whether a tree is likely to cause damage or affect neighbours' enjoyment of land depends on many factors including some which are not necessarily predictable. Providing for every variable would be too restrictive. It would discourage planting of trees when the general policy is to encourage it. In addition, inspection and enforcement would be expensive. Neither does the Commission favour a building application type approval process for all tree planting. The process would be expensive for councils and for people wanting to plant trees. It would also discourage people from planting trees.

2.29 The least intrusive approach to prevent inappropriate planting of trees is to educate the community on an ongoing basis. The Department of Urban Affairs and Planning, the Department of Local Government and local councils could work together to develop material about responsible tree planting. This material could be distributed with rates notices on an annual basis. The brochures should include information about:

trees that are particularly unsuitable for small suburban blocks and likely to cause damage, for example, camphor laurels, liquid ambers and willow trees;

where to locate trees to prevent trouble, for example, distance from fences, buildings;

how to trim trees to minimise overhang;

trees that are particularly suitable for small blocks; and

where people can get advice about tree planting.

Minimising conflict with tree preservation orders

2.30 Measures should be taken to minimise the problems caused by TPOs in resolving disputes about trees. A TPO may prevent a neighbour from abating a nuisance caused by overhanging branches. Most councils will give consent to trim a tree causing a nuisance but some require the consent of the tree owner before allowing the neighbour to abate the nuisance. The consent of the owner may not necessarily be forthcoming or the owner may give consent but impose conditions that further distort the common law right. For example, the owner may require the neighbour to bear the cost, or insist that the trimmings not be placed on the owner's property.

2.31 To minimise these problems the Commission recommends that the Minister for Urban Planning and the Environment makes a State Environmental Planning Policy (SEPP)⁷⁸ to provide that listed

non-native trees that are undesirable because they are highly likely to cause damage to property are exempt from the operation of TPOs. The SEPP would provide that TPOs should not require the consent of the tree owner to allow a neighbour to trim overhanging branches to abate a nuisance.

Recommendation 2

That the Minister for Urban Planning and the Environment makes a State Environmental Planning Policy which provides that listed non-native trees that are undesirable because they are highly likely to cause damage to property are exempt from the operation of tree preservation orders.

Recommendation 3

That tree preservation orders should not require the consent of the tree owner to allow a neighbour to trim overhanging branches in order to abate a nuisance.

A DISPUTE RESOLUTION PROCESS

2.32 The Community Mediation Division of the Australian Dispute Resolution Association emphasised the need to have a clearly defined and well known dispute resolution process. It said:

If neighbours are encouraged, through a coordinated education program, to view dispute resolution as an orderly and prescribed process where their interests are defined and dealt with, they are less likely to allow their frustration and anger to build to the point where future neighbourly relations — and community harmony — are severely damaged.⁷⁹

The Community Justice Centres Council also emphasised the need for the procedure to be well known to enable people to make informed choices about the options.⁸⁰

2.33 Submissions argue that the dispute resolution mechanism for disputes about trees should be inexpensive, informal and easily accessible.⁸¹ They also said the process should be quick as delay inevitably leads to escalation of the dispute.⁸²

2.34 There was no support for a specialist neighbourhood tribunal in the submissions received by the Commission largely because:⁸³

it is not cost effective;

adequate options already exist, they just need to be more widely linked and publicised;

adding another service would create duplication and add more bureaucracy; and

it offers nothing more than the Local Courts which are already the most accessible community forum. Local Courts are close to other community services such as police and council chambers, and are present throughout urban and rural areas.⁸⁴

2.35 Organisations associated with mediation and alternative dispute resolution emphasised the importance of the parties attempting to negotiate or attending mediation before they resort to adjudication or going to court.⁸⁵ The Community Justice Centres Council favoured encouraging people to negotiate or to use mediation but considered that people should be free to choose a court process if they wish.⁸⁶ One submission said that mediation has little effect in strata title disputes as it favours

those who can most afford to compromise, rather than ensuring justice is done.⁸⁷ A number of submissions said that mediation had been of no effect in their case.

2.36 A number of submissions favoured involving councils in adjudicating disputes about trees.⁸⁸ However, the Local Government and Shires Association of New South Wales said that councils are not appropriate bodies to mediate or adjudicate disputes because they do not have the required specialist skills. It also said that the regulating body should not mediate or adjudicate.⁸⁹ The Community Justice Centres Council favoured the Local Courts as the appropriate forum because they have knowledge of local community issues and local bodies or agencies.⁹⁰ The Local Government Tree Resources Association said that local councils should have the power under s 124 of the *Local Government Act 1993* (NSW) to order an owner or occupier to do or refrain from doing such things as are specified in the order to ensure that, on land or premises, trees are pruned or removed to prevent real, physical damage or injury to people or property now or in the future.⁹¹

Should councils have a role in disputes about trees?

2.37 There are a number of good reasons why councils should play some role when disputes about trees arise. Submissions, consultations and surveys show that many people in the community see the local council as the logical body to approach if they experience problems with a neighbour's tree. In many cases, a TPO will require the neighbour suffering a nuisance to approach the council for permission to abate a nuisance caused by a tree. Councils have the power to require a person to remove or take other action in relation to a tree to keep land or premises in a safe or healthy condition.⁹² As councils are involved in tree management on public land in the local area, they usually have staff with considerable expertise and knowledge about trees.

2.38 However, the Department of Local Government and the Local Government and Shires Association argue that public authorities such as councils should not become involved in disputes between neighbours about trees as these are private disputes. Also, as mentioned previously, they argue that regulators should not be arbitrators. Another reason for their opposition is that councils simply do not have the resources to deal with disputes about trees.

2.39 The Commission is not persuaded by the argument that disputes about trees are private disputes in which public authorities should not become involved. Public authorities and indeed, councils, already become involved in disputes that could be characterised as private. The issue is at what point does it serve the public interest for public authorities to become involved in what might otherwise be regarded as a private dispute. While councils may not generally have been involved in disputes between neighbours, there has always been potential for them to do so by virtue of the power given councils to act in relation to private land where safety or health is at risk.⁹³ Councils are very likely to be called upon to exercise this power in the context of a private dispute.

2.40 Councils now have a clear responsibility to act in relation to disputes between neighbours about noise.⁹⁴ In exercising this responsibility they have both regulatory and dispute resolution roles. The Commission agrees that councils should not become embroiled in mediating or arbitrating complex disputes about trees. They do not have expertise in mediation or arbitration processes. However, there is an urgent need for a non-legalistic process whereby in clear-cut cases, a body can order a tree owner to prevent inevitable damage to property or to stop a tree from causing further, clearly apparent, damage to property. Councils are the most appropriate body to do this. It would not be a mediation or adjudication process. It would simply be making an order where a set of facts exists. It is the same process used when a council makes other orders under s 124 of the *Local Government Act 1993* (NSW) or issues a noise abatement direction under s 276 of the *Protection of the Environment Operations Act 1997* (NSW).

2.41 It is not in the public interest for neighbourhood disputes to remain unresolved. Such disputes can affect the health of members of the community; they may result in assaults and end up involving the public resources of the police and the criminal justice system. Failure to prevent tree damage may result

in increased insurance premiums. Where a tree has clearly caused damage, or damage is inevitably going to occur, the responsibility of the tree owner is apparent. The person suffering the damage should not be required to go through a mediation process in relation to that responsibility. Nor is it in the public interest to require a person to take the matter to court in order to enforce the tree owner's responsibility. Taking a case to court, including a Local Court, is too onerous for many people. The owner of a tree causing damage has less incentive to resolve a dispute if he or she knows that the person is unlikely to take them to court.

2.42 An order from a council requiring a tree owner to act to prevent or abate damage is a direct and quick way of resolving the problem before it escalates into a potentially major dispute. The Commission recognises that councils have tight budgets and that enabling them to make such orders may place further pressure on council resources. However, this does not justify a decision not to give councils this power if they are the most appropriate body to exercise it. Other public bodies, including courts, also have limited resources. This measure may prevent the far greater expenditure of public resources that occurs when unresolved neighbourhood disputes get out of hand. The Commission recommends that s 124 of the *Local Government Act 1993* (NSW) be amended to give councils the power to order an owner or occupier of land or premises to do or refrain from doing such things that are specified in the order to prevent a tree which has caused physical damage to property from causing further damage, or to prevent physical damage in the future in cases where, because of the species of tree or its location, physical damage is highly likely to occur in the future.

Recommendation 4

That s 124 of the *Local Government Act 1993* (NSW) be amended to give councils the power to order an owner or occupier of land or premises to do or refrain from doing such things that are specified in the order to prevent a tree which has caused physical damage to property from causing further damage, or to prevent physical damage in the future in cases where, because of the species of tree or its location, physical damage is highly likely to occur in the future.

Court procedure

2.43 In addition to giving councils the power outlined in paragraph 2.42, a simple, inexpensive and accessible local court process is needed. There is very strong support among those consulted for a new simple process in the Local Courts. The Commission considers that the *Dividing Fences Act 1991* (NSW) provides an appropriate model.

2.44 Legislation should be enacted establishing the procedure. The legislation should set out the responsibilities of tree owners and should state specifically that tree owners are responsible for ensuring that their trees do not cause damage to neighbouring property or interfere unreasonably with the neighbour's enjoyment of land. The law should state that the tree owner must bear any costs associated with preventing tree-caused damage to neighbouring property and must compensate neighbours for any damage the owner's tree causes. The legislation should also set out the following procedural matters.

Notice to owner or occupier of land

2.45 Where a person's land or property is being damaged by a tree, or is likely to be damaged by a neighbour's tree, or a person's enjoyment of his or her land is being unreasonably affected by a tree, the person should write a letter to the neighbour telling him or her what problems the tree is causing and asking him or her to abate the problem. If the person has suffered damage, he or she should ask the neighbour to pay the amount needed to compensate for the damage caused.

Enforcement

2.46 If the neighbour does not respond to the notice within one month, the person should be able to apply to a Local Court for a declaration that a tree has caused or is likely to cause damage or that it unreasonably interferes with the person's enjoyment of his or her land. The Court should have the power to adjourn a case if it considers that the parties would benefit from attending mediation. Where loss of enjoyment rather than damage or likely damage is the issue, the Court should require the parties to attend mediation unless the relations between the parties are such that mediation appears to be inappropriate.

2.47 In determining whether a tree unreasonably interferes with a person's enjoyment of their land, the Court should consider, among other things:

the location of the tree in relation to the boundary and in relation to any premises;

the size of the land involved;

when the trees causing loss of enjoyment were planted, that is, whether they were planted before or after the affected owner acquired the property;

whether there was any malice involved in planting the trees;

whether the tree is planted in accordance with the local council's tree planting policy, if any;

whether the trees are well known for causing problems;

whether the loss of enjoyment the tree causes will be ongoing; and

the nature and pattern of vegetation in the area, for example, whether there are many others of the kind in the area.

2.48 A court should only make a declaration that a tree has unreasonably interfered with a person's enjoyment of land if:

the loss of enjoyment is severe and it outweighs any loss of enjoyment (and any financial loss) the tree owner would experience as a result of the court order and any detrimental impact on the natural environment; or

the loss of enjoyment is severe and the court finds on the balance of probabilities that the trees were planted with the intention of causing loss of enjoyment.

2.49 In determining whether a tree is likely to cause damage, the Court should consider the species of the tree and its characteristics and the tree's position in relation to the property likely to be damaged.

Orders the court could make

2.50 If the Court makes a declaration, it would have the power to make a range of orders including an order to:

lop or trim a tree's branches or roots;

remove a tree entirely;\

take any other action necessary to prevent further damage;

take any other action necessary to prevent future damage in a case where damage has not yet occurred but is highly likely to occur if action is not taken;

compensate the owner for the costs of repairing the damage where damage has occurred; and/or

state who should bear the cost of abating the loss of enjoyment and, in appropriate circumstances, how the cost should be shared between the parties.

2.51 In making an order the Court may consider among other things:

whether the tree is subject to a TPO;

whether the tree is an Australian native;

the reasonableness or otherwise of the behaviour of the parties;

the costs involved in carrying out the order; and

the means of the parties involved.

Disobeying an order would be an offence.

Recommendation 5

That legislation should be enacted which provides a new simple, inexpensive and accessible process in Local Courts, similar to the model under the *Dividing Fences Act 1991 (NSW)* for the resolution of disputes about trees. The legislation should state:

(1) the responsibilities of tree owners, specifically that tree owners are responsible for ensuring that their trees do not cause damage to neighbouring property or interfere unreasonably with the neighbour's enjoyment of land; and

(2) that the tree owner must bear any costs associated with preventing tree-caused damage to neighbouring property and must compensate neighbours for any damage the owner's tree causes.

Should access to sunlight be protected?

2.52 Trees that cast shade on a neighbouring property can have a major impact on a person's enjoyment of land. If a tree totally blocks out sunlight from the house and yard the house may become damp and mouldy and require more heating. It may make washing harder to dry, make it difficult to grow plants in the yard and block sunlight from a solar powered heater. A person may be denied the chance to "bask in the sun" on his or her property. There are also potential financial consequences. The impact of a building on access to sunlight is becoming of increasing concern in building and development applications. As part of their local policies, some councils have detailed provisions which aim to maximise the use of solar energy in new buildings and developments.

2.53 However, whether tree shading might be regarded as unreasonably affecting a neighbour will depend on the circumstances. Trees that have been growing on a property without causing a problem could suddenly interfere with enjoyment if the person next door installs a solar panel. Shading may occur because of the gradual growth of trees over a very long period. Alternatively, the tree or trees may be growing in a heavily forested suburb where the shading of houses is inevitable. It may be unreasonable in these circumstances for the law to require the tree owner to cut the trees down.

2.54 On the other hand, the loss may be unreasonable if the trees were planted with the deliberate intention of affecting the neighbour's enjoyment of his or her land. It is also a matter of weighing up whether the loss of enjoyment the tree shading causes outweighs the loss of enjoyment the owner might suffer from cutting down or trimming the tree and the detrimental impact on the natural environment. Despite these difficulties and because of the potential for shading to cause severe and unreasonable loss of enjoyment, the Commission recommends that a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out sunlight should be able to apply to a Local Court under the proposed new procedure. The matters to be considered should be the same as for any other kind of intangible loss of enjoyment caused by trees.

Recommendation 6

That a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out sunlight should be able to apply to a Local Court under the proposed new procedure.

Should access to a view be protected?

2.55 Loss of access to a view can affect the enjoyment of property as well as substantially affect the value of a property. The effect of a new building on access to a view is becoming an important consideration in building and development applications and at common law.⁹⁵ The Commission has been advised that it is increasingly becoming a cause of disputes between neighbours. However, as with access to sunlight, whether the loss of access to a view caused by trees is unreasonable depends on the circumstances.

2.56 Generally, the social and environmental benefit to the community of maintaining the natural environment should outweigh an individual's interest in preserving a view. When a person buys a property with a view, it is reasonable to expect the buyer to take into account and to accept the fact that trees growing naturally in the area may, over time, block the view. On the other hand, the Commission has been informed of cases where a person, who was refused planning permission to build on a property on the grounds that the building would block a view, planted trees on the property with the aim of blocking the view by other means and so removing the barrier to planning approval. The balance may also shift if trees are planted after the owner buys the property, particularly if the trees planted are out of keeping with the naturally occurring vegetation or are inappropriate for the density of occupation in the area.

2.57 The Commission recommends that a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out a view should be able to apply to a Local Court under the proposed new procedure. The matters to be considered should be the same as for any other kind of intangible loss of enjoyment caused by trees.

Recommendation 7

That a person whose enjoyment of property has been severely affected by a neighbour's trees blocking out a view should be able to apply to a Local Court under the proposed new procedure.

FOOTNOTES

1. *Noxious Weeds Act 1993* (NSW) s 3.
2. *Noxious Weeds Act 1993* (NSW) s 7.
3. *Noxious Weeds Act 1993* (NSW) s 9.
4. *Noxious Weeds Act 1993* (NSW) s 12.
5. *Noxious Weeds Act 1993* (NSW) s 18.
6. *Noxious Weeds Act 1993* (NSW) s 36.
7. *Noxious Weeds Act 1993* (NSW) s 39 and s 41.
8. *Noxious Weeds Act 1993* (NSW) s 7(4).
9. *Environmental Planning and Assessment Act 1979* (NSW) s 24.
10. *Environmental Planning and Assessment Act 1979* (NSW) s 26(e) and (f).
11. *Environmental Planning and Assessment Model Provisions 1980* cl 8. The model provisions are made under the *Environmental Planning and Assessment Act 1979* (NSW) s 33.
12. *Environmental Planning and Assessment Model Provisions 1980* cl 8(2).
13. *Environmental Planning and Assessment Model Provisions 1980* cl 8(3).
14. *Environmental Planning and Assessment Model Provisions 1980* cl 8(4).
15. *Environmental Planning and Assessment Model Provisions 1980* cl 8(5).
16. See eg *Armidale Local Environmental Plan 1988*.
17. R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 446-447; R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 46-47.
18. R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 455; R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 46-47.
19. J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 465.
20. R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 46-47. See eg *Butler v Standard Telephone Cables Ltd* [1940] 1 All ER 121.
21. *Smith v Giddy* [1904] 2 KB 448.
22. R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 34-37; *Colls v Home and Colonial Stores* [1904] AC 179 (HL).
23. See *Conveyancing Act 1919* (NSW) s 179 which gives effect to the *Ancient Lights Declaratory Act 1904* (NSW).
24. A Bradbrook, *Solar Energy and the Law* (Law Book Company, Sydney, 1984) at 96.
25. A Bradbrook, *Solar Energy and the Law* (Law Book Company, Sydney, 1984) at 98.

26. A Bradbrook, *Solar Energy and the Law* (Law Book Company, Sydney, 1984) at 100.
27. A Bradbrook, *Solar Energy and the Law* (Law Book Company, Sydney, 1984) at 103-104.
28. See eg *Prah v Maretti* (1981) 2 Solar Law Reporter 1013 (Circuit Ct); 108 Wis, 2d 223, 321 NW 2d 182 (Wisconsin Sup Ct).
29. A Bradbrook, *Solar Energy and the Law* (Law Book Company, Sydney, 1984) at 105.
30. R A Buckley, *The Law of Nuisance* (2nd edition, Butterworths, London, 1996) at 37; *Aldred's case* (1610) 9 Co Rep, 77 ER 816 (KB); *Harris v De Pinna* (1885) 33 ChD 238 (CA); *Chastey v Ackland* (1895) 11 TLR 460; *Kent v Johnson* (1973) 21 FLR 177 at 209-213; *Bathurst City Council v Saban (No 2)* (1986) 58 LGRA 201 at 205-206; *Gartner v Kidman* (1962) 108 CLR 12 at 46.
31. J Gillespie, "Private Nuisance as a Means of Protecting Views From Obstruction" (1989) 6 *Environmental and Planning Law Journal* 94 at 100 and 105.
32. R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 446-447; *Lemmon v Webb* [1894] 3 Ch 1 at 11.
33. *Young v Wheeler* (1987) *Australian Torts Reports* 80-126.
34. Also *Supreme Court Act 1970* (NSW) s 68 which provides that a court may grant damages instead of an injunction for future damages.
35. See eg *Lemmon v Webb* [1894] 3 Ch 1 at 14.
36. See J G Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 497.
37. *Mills v Brooker* [1919] 1 KB 555.
38. P Hendricks, *Submission* (12 May 1993) (Also referred from Department of Local Government).
39. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government).
40. T W Smyth, *Submission* (24 February 1992).
41. J Marden, *Submission* (23 October 1991).
42. See eg A T Martin, *Submission* (10 November 1994); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); H J Sweeney, *Submission* (15 June 1983); F Adams, *Submission* (16 October 1991); F Burrows, *Submission* (14 September 1998).
43. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government).
44. S Manning, *Submission* (23 May 1994).
45. N T Rogers, *Submission* (24 October 1991).
46. M Chiswick, *Submission* (30 July 1991) (Referred from Department of Local Government); H J Sweeney, *Submission* (15 June 1983); F Adams, *Submission* (16 October 1991); O H Batchelor, *Submission* (24 October 1991).
47. Combined Pensioners' Association, *Submission* (10 June 1989) (Referred from Department of Local Government); E Valerio, *Submission* (26 January 1989) (Referred from Department of Local Government); M Wright, *Submission* (10 July 1992); R S Phillips, *Submission* (21 October 1991); S and G Trathen, *Submission* (30 March 1990).

48. K Singer, *Submission* (24 March 1992) (Referred from Department of Local Government).
49. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government).
50. D and J Samuel, *Submission* (24 April 1989) (Referred from Department of Local Government).
51. S and G Trathen, *Submission* (30 March 1990); W H Westley, *Submission* (24 August 1989) (Referred from Department of Local Government); E and D Elliot, *Submission* (17 June 1987); B M Brooke, *Submission* (27 August 1983); J Murray MP on behalf of T Wachala, *Submission* (14 April 1994); F Adams, *Submission* (16 October 1991).
52. A Walker, *Submission* (31 March 1990) (Referred from Department of Local Government); J M Frame, *Submission* (25 October 1991); M Gulson, *Submission* (11 June 1991) (Referred from Department of Local Government).
53. S Manning, *Submission* (23 May 1994); Home Unit Owners Association of New South Wales, *Submission* (30 August 1991); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); M Wright, *Submission* (10 July 1992); P Hendricks, *Submission* (12 May 1993) (Also referred from Department of Local Government); W Betfort, *Submission* (3 March 1992); O H Batchelor, *Submission* (24 October 1991); N T Rogers, *Submission* (24 October 1991); F Burrows, *Submission* (14 September 1998).
54. M Wright, *Submission* (10 July 1992); O H Batchelor, *Submission* (24 October 1991).
55. S Manning, *Submission* (23 May 1994); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); M Chiswick, *Submission* (30 July 1991); (Referred from Department of Local Government); J Murray MP on behalf of T Wachala, *Submission* (14 April 1994); S and G Trathen, *Submission* (30 July 1991); F Burrows, *Submission* (14 September 1998).
56. See eg S Manning, *Submission* (23 May 1994), who suffered \$5,000 worth of damage and had insurance premiums increased by 35%; F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); P Hendricks, *Submission* (12 May 1993) (Also referred from Department of Local Government); F Burrows, *Submission* (14 September 1998).
57. M Wright, *Submission* (10 July 1992).
58. P Hendricks, *Submission* (12 May 1993) (Also referred from Department of Local Government).
59. M Wright, *Submission* (10 July 1992).
60. See eg Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991); S Manning, *Submission* (23 May 1994); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); D J Fraser, *Submission* (12 February 1992).
61. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); S Manning, *Submission* (23 May 1994).
62. W Betfort, *Submission* (3 March 1992).
63. See eg O H Batchelor, *Submission* (24 October 1991).
64. J H Westley, *Submission* (24 August 1989) (Referred from Department of Local Government); D and J Samuel, *Submission* (24 April 1989) (Referred from Department of Local Government); E and P Kofler, *Submission* (18 July 1989) (Referred from Department of Local Government); E Valerio, *Submission* (26 January 1989) (Referred from Department of Local Government); E and D Elliot, *Submission* (17 June 1987); H J Sweeney, *Submission* (15 June 1983); M Wright, *Submission* (10 July 1992).

1992); P Hendricks, *Submission* (12 May 1993) (Also referred from Department of Local Government); E F Hale, *Submission* (20 January 1993) (Referred from Department of Local Government); S Reid, *Submission* (14 August 1992) (Referred from Department of Local Government); T W Smyth, *Submission* (24 February 1992).

65. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991); Home Unit Owners Association of New South Wales, *Submission* (30 August 1991);

S Manning, *Submission* (23 May 1994); Combined Pensioners' Association, *Submission* (10 June 1989) (Referred from Department of Local Government); W Betfort, *Submission* (3 March 1992); F Adams, *Submission* (16 October 1991); R S Phillips, *Submission* (21 October 1991); K Szabo, *Submission* (12 February 1992); Community Justice Centres, *Submission* (11 July 1991).

66. K Szabo, *Submission* (12 February 1992).

67. N T Rogers, *Submission* (24 October 1991); Ryde Council, *Letter to Andrew Tink* (14 November 1994); Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991); Combined Pensioners' Association, *Submission* (10 June 1989) (Referred from Department of Local Government); F Burrows, *Submission* (14 September 1998).

68. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); M Gulson, *Submission* (11 June 1991) (Referred from Department of Local Government); J T Turner MP on behalf of Mr Harley, *Submission* (15 February 1991) (Also referred by Department of Local Government); J Marden, *Submission* (23 October 1991); W Betfort, *Submission* (3 March 1993).

69. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government).

70. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); D J Fraser, *Submission* (16 October 1991); Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).

71. D J Fraser, *Submission* (16 October 1991).

72. D J Fraser, *Submission* (16 October 1991); M Gulson, *Submission* (11 June 1991) (Referred from Department of Local Government).

73. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991); Local Government and Shires Association of NSW, *Submission* (22 August 1991).

74. Local Government and Shires Association of NSW, *Submission* (22 August 1991).

75. See eg Community Justice Centres, *Submission* (11 July 1991); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); Environmental Defender's Office, *Submission* (28 October 1991).

76. F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government).

77. Environmental Defender's Office, *Submission* (28 October 1991).

78. *Environmental Planning and Assessment Act 1979* (NSW) s 37.

79. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).

80. Community Justice Centres, *Submission* (11 July 1991).

81. See eg Community Justice Centres, *Submission* (11 July 1991).
82. Community Justice Centres, *Submission* (11 July 1991).
83. Community Justice Centres, *Submission* (11 July 1991); Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
84. Community Justice Centres, *Submission* (11 July 1991); Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
85. Community Justice Centres, *Submission* (11 July 1991); Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
86. Community Justice Centres, *Submission* (11 July 1991).
87. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).
88. See for example, D J Fraser, *Submission* (16 October 1991); F I Wilson, *Submission* (19 August 1991) (Also referred from Department of Local Government); Home Unit Owners Association of New South Wales, *Submission* (30 August 1991); Combined Pensioners' Association, *Submission* (10 June 1989) (Referred from Department of Local Government); M Wright, *Submission* (10 July 1992).
89. Local Government and Shires Association of NSW, *Submission* (22 August 1991).
90. Community Justice Centres, *Submission* (11 July 1991).
91. Local Government Tree Resources Association, *Submission* (11 November 1997).
92. *Local Government Act 1993* (NSW) s 124 order 21.
93. *Local Government Act 1993* (NSW) s 124 order 20.
94. See para 3.18, 3.20 and 3.46.
95. See eg *Freeman v Shoalhaven Shire Council* [1980] 2 NSWLR 826.

REPORT 88 (1998) - NEIGHBOUR AND NEIGHBOUR RELATIONS

3. Noise

3.1 Disputes between neighbours about noise are regulated under the common law of nuisance and by legislation. Some legislation is directed towards reducing the likelihood of disputes about noise. For example, building regulations set standards which designers and builders must meet to reduce the impact of noise in buildings, while regulations under the *Strata Schemes Management Act 1996* (NSW) provide model by-laws for strata schemes which include provisions regarding the creation of noise and appropriate noise reducing floor coverings.

3.2 Provisions of the *Protection of the Environment Operations Act 1997* (NSW) which replaces the *Noise Control Act 1975* (NSW) (and regulations made under that Act) provide remedies for people who are affected by noise.¹ They give prescribed authorities the power to regulate the emission of noise from certain premises. They also aim to reduce the likelihood of disputes about noise by regulating noisy articles.

COMMON LAW OF NUISANCE

3.3 The common law of nuisance provides very little help to a person affected by a neighbour's noise. The case must be heard in the Supreme Court. This is very expensive and tends to involve long delays during which the noise may continue and tensions between neighbours may escalate.

PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997 (NSW)

3.4 The *Protection of the Environment Operations Act 1997* (NSW) was passed in December 1997. It repeals the *Noise Control Act 1975* (NSW) and regulations. However, at the time of writing this Report, the new Act is not yet operational and new regulations have not been drafted.² The EPA has advised the Commission that the new regulations are likely to be very similar to the regulations under the *Noise Control Act 1975* (NSW).

3.5 The *Noise Control Act 1975* (NSW) was a comprehensive attempt to control noise in the community. Its provisions have been largely incorporated into the new *Protection of the Environment Operations Act 1997* (NSW). This Report will consider only those parts of the new Act and regulations made under the *Noise Control Act 1975* (NSW) which deal with noise that gives rise to disputes between residential neighbours, namely:

the regulation of the sale of noisy machinery and equipment;

the issuing of noise control notices relating to premises, use or operation of articles, carrying out of activities, and times;

the issuing of noise abatement orders; and

the issuing of noise abatement directions.

3.6 The new Act sets out the powers of authorised officers and provides for appeals against noise control notices and noise abatement orders.

Time restrictions on domestic noise

3.7 As previously mentioned, regulations made under the *Noise Control Act 1975* (NSW) are likely to be replicated in the new regulations to be drafted under the *Protection of the Environment Operations Act 1997* (NSW). These regulations prohibit the use on residential premises of specified articles “in such a manner that it emits noise that can be heard in a room within any other residential premises” at specified times. For example:

power tools must not be used between 8 pm and 8 am on Sundays and public holidays and between 8 pm and 7 am on other days;³

swimming pool and spa pumps must not be used between 8 pm and 8 am on Sundays and public holidays and between 8 pm and 7 am on other days;⁴

musical instruments must not be played between midnight and 8 am on any day;⁵

amplified sound equipment, including radios, televisions, tape recorders, record players, CD players or public address systems must not be used between midnight and 8 am on any day;⁶ and

air conditioners must not be used between 10 pm and 8 am on Saturdays, Sundays and public holidays and between 10 pm and 7 am on other days.⁷

3.8 In each case, failure to comply with the regulation is an offence with a maximum penalty of 5 penalty units (\$550). However, a person is not guilty of an offence unless he or she has been warned not to use the article in the prohibited way and then does so within 28 days of being issued with the warning.

Regulation of inherently noisy machinery and equipment

Sale of inherently noisy articles

3.9 The *Protection of the Environment Operations Act 1997* (NSW) prohibits the retail sale of specified articles, if new, that exceed a prescribed noise level.⁸ Regulations can cover plant, motor or other vehicles, vessels or other things of any description.⁹ The penalty for committing this offence is a maximum of \$60,000 for corporations and a further penalty of \$6,000 for each day the offence continues or \$30,000 for individuals with a further penalty of \$600 for each day the offence continues.¹⁰

3.10 Existing regulations under the *Noise Control Act 1975* (NSW) include various kinds of grass cutting equipment, including lawn mowers, ride-on mowers, edge cutters and string trimmers.¹¹ They also include motor vehicles and accessories, including horns and intruder alarms.¹² It is an offence to sell specified articles, including chainsaws, domestic air conditioners, mobile air compressors, pavement breakers and mobile garbage compactors unless they have a label attached that states the article's maximum noise level.¹³ It is also an offence to sell a building intruder alarm unless it automatically turns itself off within 5 minutes after being activated and cannot be reactivated by the same detection device until it has been manually reset.

Use of building intruder alarms

3.11 An occupier must not use a building intruder alarm if it makes a noise that can be heard in other residential premises unless:

if installed before 1 September 1997 — it stops automatically within 10 minutes after being activated and cannot be reactivated by the same detection device until it has been manually reset; or

if installed on or after 1 September 1997 — it stops automatically within 5 minutes after being activated and cannot be reactivated by the same detection device until it has been manually reset.

The penalty for failure to comply with this regulation is 50 penalty units (\$5,500) for a corporation and 5 penalty units (\$550) for anyone else.¹⁴

Use of motor vehicles and accessories

3.12 Regulations made under the *Noise Control Act 1975* (NSW) create a number of offences arising out of the use of motor vehicles and motor vehicle accessories. Offences relevant to residential neighbours that prohibit offensive noise include causing or permitting a motor vehicle to be used in a place, other than a public place, in such a way that it emits offensive noise¹⁵ and causing or permitting a motor vehicle's sound system to be used in such a way that it emits offensive noise.¹⁶ The maximum penalty for the offences is 5 penalty units (\$550).

3.13 Other offences prohibit the use on residential premises of a motor vehicle or a refrigeration unit fitted to a motor vehicle "in such a manner that it emits noise that can be heard in a room within any other residential premises" at specified times. For example, motor vehicles must not be used between 8 pm and 8 am on Sundays and public holidays and between 8 pm and 7 am on other days, except when entering or leaving the premises¹⁷ and refrigeration units fitted to motor vehicles must not be used between 8 pm and 8 am on Sundays and public holidays and between 8 pm and 7 am on other days.¹⁸ In each case, failure to comply with the regulation is an offence with a maximum penalty of 5 penalty units (\$550). However, a person is not guilty of an offence unless he or she has been warned not to use the article in the prohibited way and then does so within 28 days of the warning being issued.

Use of motor vehicle intruder alarms

3.14 The use of motor vehicle intruder alarms is also regulated. It is an offence to cause or permit the use of an alarm that can be triggered, while the engine is running or the ignition is turned on, by means of a panic or override switch.¹⁹ It is an offence to cause or permit an alarm to sound for more than 90 seconds if the vehicle was manufactured before 1 September 1997; or for more than 45 seconds if the vehicle was manufactured on or after 1 September 1997. However, it is not an offence if the alarm sounds for more than 90 or 45 seconds because a window or windscreen is broken or removed; or the vehicle is involved in an accident; or the vehicle is illegally broken into or there is an illegal attempt to break into it.²⁰ In the case of motor vehicles manufactured on or after 1 September 1997, it is also an offence to cause or permit an alarm to be sounded unless the alarm has a maximum noise level of not more than 115dB (A) and it cannot be reactivated until it has been manually reset.²¹

3.15 The maximum penalty for each offence is 50 penalty units (\$5,500) for corporations and 5 penalty units (\$550) for everyone else. In addition, authorised officers have the power to:

stop vehicles and to do what is necessary to have the vehicle or accessories tested or inspected;²²

require vehicles and accessories to be presented for further testing;²³

seize accessories;²⁴ and

issue a defective vehicle notice.²⁵

Remedies

3.16 The *Protection of the Environment Operations Act 1997* (NSW) provides three ways to deal with noise:

noise abatement directions for one-off noise, for example, a late night party;

noise control notices for ongoing noise, such as a barking dog or a noisy air conditioner; and

noise abatement orders for ongoing noise problems that are difficult to resolve.

Offensive noise

3.17 “Offensive noise” is the key to most remedies provided by the *Protection of the Environment Operations Act 1997* (NSW). The Act provides that noise includes sound and vibration.²⁶ Offensive noise is defined as:

(a) noise that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances,

(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted;

(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted; or

(b) that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.²⁷

What is an “unreasonable” interference with comfort and repose will depend on all the circumstances, for example, the time and location of the noise.

Noise abatement directions

3.18 Noise abatement directions are a remedy for a person affected by isolated incidents of offensive noise, such as a late night party. The Act empowers authorised persons, including police officers and employees of local councils, to issue a noise abatement direction where it appears to the authorised person that offensive noise is being, or has at any time during the preceding seven days been, emitted from a premises. The noise abatement direction may direct the person whom the authorised person believes to be the occupier of the premises to cause the emission of the noise to cease and/or direct any person whom the authorised officer believes to be making, or contributing to the making of, the noise to cease doing so.²⁸ It is an offence if the person to whom a noise abatement direction has been given, without reasonable excuse fails promptly to cease making or contributing to making the offensive noise or makes or contributes to making the offensive noise within 28 days (or other specified time) after the direction has been given.²⁹

3.19 The penalty is 30 penalty units (\$3,300). If necessary to enforce, or to investigate whether there has been a breach of, a noise abatement direction, the police may apply for a warrant to enter the premises from which the noise is coming.³⁰ The *Protection of the Environment Operations Act 1997* (NSW) gives police a new power. If a person is contravening a noise abatement direction the police may seize or secure any equipment that is being used to contravene the direction. Before they do so the police must warn the person in charge of the equipment that the continued use of the equipment may lead to its seizure.³¹ The police must release or return the equipment within 28 days.

Noise control notices

3.20 A noise control notice is a remedy for a person affected by continuing noise, such as a dog that barks all day or very loud music all night. He or she may apply to the local council to issue a noise control notice to the occupier of residential premises. The notice may prohibit the occupier of premises from causing, permitting or allowing, between specified times or at all times, or on specified days or on all days, any specified activity to be carried on at those premises or any specified article to be used or operated at those premises in a way which causes noise in excess of specified levels to be emitted from those premises.³²

3.21 The council or the EPA may prosecute the occupier for an offence against the *Protection of the Environment Operations Act 1997* (NSW) if he or she fails to comply with the notice and the contravention results in noise emission from the premises that can be detected or perceived outside the premises without the aid of an instrument, machine or device. The penalty for an individual is \$30,000 and for a continuing offence a further penalty of \$600 for each day the offence continues.³³

Noise abatement orders

3.22 A householder affected by offensive noise can complain to a justice of the peace that his or her occupation of the premises is affected by offensive noise.³⁴ The justice may summon to appear before the Local Court either the person alleged to be making, or contributing to the making, of the noise or the occupier of the premises from which the noise is alleged to be coming.³⁵

3.23 If the Court is satisfied on the balance of probabilities that the alleged offensive noise exists, or, although abated, is likely to recur on the same premises, it can make an order directing the person to abate the offensive noise within the time specified in the order and/or to prevent a recurrence of the nuisance.³⁶ It is an offence to contravene a noise abatement order.³⁷ The penalty is 30 penalty units (\$3,300).³⁸ The order can be varied or revoked by a Local Court.³⁹

Exemptions

3.24 There are limitations on noise abatement directions, noise control notices, and noise abatement orders. A noise abatement direction or order has no force in so far as it:

(i) is directed to the State (or a person acting on its behalf), a public authority (or a person in his or her capacity as a member, officer or employee of a public authority) or a person or body prescribed by regulation;⁴⁰ or

(ii) would have the result of affecting:

an activity carried on by or for the State or a public authority;

any scheduled activity (for example, a rock concert or a major sporting event) or any other activity or work that is the subject of an environment protection licence; or

any activity of a class or description prescribed by regulations.⁴¹

SUBMISSIONS

3.25 Of the 287 people who phoned the Commission's neighbourhood dispute hotline, 104 complained of various types of noise. These included barking dogs, cars and trucks, loud music, musical instruments, voices including shouting, children playing, alarms and pool motors. Written submissions identified dogs, household equipment, vehicles and car alarms as the main sources of offensive noise. Some also suggested ways to address the problem.

Dogs

3.26 A number of submissions identified barking dogs as the source of neighbourhood noise that affected them. Barking dogs were described as the most irritating feature of urban life.⁴² One submission described a neighbour's three Alsatian dogs barking repeatedly within a metre of the bedroom window for three or four hours a night;⁴³ another told of barking dogs disturbing sleep for two years;⁴⁴ yet another noted that the problem of a barking dog is at its worst when the owner is not at home.⁴⁵ A positive note was sounded by one submission that said that, with training, the problem of barking dogs can be overcome and suggested that training programs should be compulsory.⁴⁶ On the other hand, a submission suggested that dogs should be banned altogether in urban areas.⁴⁷

Equipment

3.27 In its submission, the Home Unit Owners Association of New South Wales stated that of noise complaints made to it (8% of all complaints), half were about loud music.⁴⁸ Another submission concerned with loud music suggested that more attention should be paid to sound proofing.⁴⁹ A noisy pool pump was also identified as a problem.⁵⁰

Vehicles

3.28 Submissions complained about jet ski noise starting before 8 am, noting the inconsistency between laws regulating the use of lawn mowers and jet skis,⁵¹ noisy trail bikes⁵² and revved up motor bikes and cars roaring up and down the street repeatedly, especially on Sundays.⁵³

Alarms

3.29 One submission noted the poor quality and unreliability of car alarms and stated that manufacturers should be legally obliged not to provide bleeps to show arming and disarming of car alarms and to ensure that the alarm functions properly.⁵⁴ Another submission complained that alarms in cars parked near the Hawkesbury River were activated while their owners were boating all weekend. The boaters ignored police telephone requests to come back and turn off the alarm, regarding the fine as a joke. The submission suggested that the police should have the power to break into the car to turn off the alarm just as they have the power to break into a house for that purpose.⁵⁵ The Community Justice Centres

Council suggested that the problem of car alarm noise could be overcome by authorising someone to stop the alarm or to tow the car away to a suitable place.⁵⁶

Other issues

3.30 Responses in submissions to the issues raised and questions asked in DP 22 will be discussed in the next section of this Report.

OPTIONS FOR REFORM

Recent changes to the law

3.31 Since the publication of DP 22 in 1991, there have been a number of changes to noise control legislation. In particular, the *Noise Control Regulation 1975* was repealed on 1 September 1995 and replaced by the:

Noise Control (General) Regulation 1995;

Noise Control (Miscellaneous Articles) Regulation 1995; and

Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995.

On 4 October 1996, the *Noise Control (Marine Vessels) Regulation 1996* was gazetted. The *Protection of the Environment Operations Act 1997* (NSW), passed in December 1997 and expected to be operational in December 1998, repeals the *Noise Control Act 1975* (NSW). The changes to noise control regulations and the new Act address many of the problems identified in submissions.

Should the definition of “offensive noise” be amended?

3.32 In DP 22 the Commission stated that even if a noise abatement order has been breached it is difficult to get a conviction because the definition of “offensive noise” is ambiguous.⁵⁷ It includes the concepts “offensive” and to “interfere unreasonably”. The Discussion Paper said the use of the concept of unreasonableness has cast courts back onto the common law. It suggested that “offensive noise” could be defined more clearly to make explicit the considerations available to a court and asked for submissions on the issue.

3.33 Of the submissions that addressed this issue, more favoured the suggestion than did not. Council of the City of Sydney, for example, supported the idea of defining “offensive noise” to make it objective and scientifically provable on the basis of its experience in trying to get a conviction for breach of a noise control notice. It stated that evidence from council and noise experts is not enough; one needs evidence of people who live or work nearby and this is difficult because people are often reluctant to give evidence against neighbours. In the Council’s view, the legislation must also specify the measurement place.⁵⁸ Other submissions agreed. One stated that the subjective nature of “offensive” is a problem as the effect of a particular noise can vary from a mild irritant to an unbearable or painful experience; the legislation should use universal measures relating to levels acceptable to the majority of the population.⁵⁹ Based on its experience, the Community Mediation Division of the Australian Dispute Resolution Association stated that noise that can be measured, for example, noise from small

businesses, is less of a problem than the subjective term “offensive”.⁶⁰ One submission stated that the definition should include the intensity of the noise, the time (or times) it occurred, its frequency and duration and the normal background noise at the time of the alleged offence and noted that it helps if these can be measured.⁶¹

3.34 On the other hand, while favouring clarification of the concepts of “offensive” and “reasonable”, the Community Mediation Division of the Australian Dispute Resolution Association acknowledged that what is reasonable in relation to noise from children, domestic animals and small domestic appliances cannot be defined, it must be negotiated.⁶² The Community Justice Centres Council rejected the proposal on the ground that clarifying the terms focuses on the problem rather than the underlying issues and that a system based on rights rather than needs fosters confrontation.⁶³

3.35 The noise control provisions of the *Protection of the Environment Operations Act 1997* (NSW) have addressed these concerns. The definition of “offensive noise” has been redrafted. Noise is offensive if it is harmful to someone or interferes unreasonably with their comfort or repose. The definition also includes the possibility of setting, by regulation, an objective standard for “offensive noise”. It does this by including in the definition, noise:

that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.⁶⁴

3.36 The Commission endorses this approach. It provides an appropriate balance between the scientific and subjective approaches. It keeps the flexibility needed for proving that a noise is offensive in cases where scientific measurement is not possible, while leaving open the possibility for objective and scientific measures to be provided for where practical and appropriate. The Commission suggests that the EPA gives priority to investigating the circumstances in which it may be practical and appropriate to prescribe objective measures for offensive noise in regulations under the new Act. The investigation should give particular attention to the circumstances in which neighbour disputes about noise are likely to arise and take into account the extent to which neighbours are likely to have access to the means of establishing whether those objective measures have been exceeded.

Establishing offensive noise

3.37 During consultations, the Commission was informed that individuals or local councils may have trouble establishing in court that noise is “offensive” not because of the subjective nature of the definition but because they lack experience in putting together the necessary evidence. The EPA advised that prosecutions for breaches of noise control notices is easier if, where possible, they specify the level of noise that is not to be exceeded. The Commission recommends that the EPA prepare guidelines about the drafting of noise control notices and the kind and amount of evidence needed to establish that noise is “offensive” for the purposes of the noise provisions of the *Protection of the Environment Operations Act 1997* (NSW). The EPA should publish the guidelines and give information about them to police and local authorities and include it in brochures about noise they prepare for community information purposes.

Recommendation 8

That the EPA prepare guidelines about the drafting of noise control notices and the kind and amount of evidence needed to establish that noise is “offensive” for the purposes of the noise provisions of the *Protection of the Environment Operations Act 1997* (NSW).

Making offences easier to prosecute

3.38 The *Noise Control Act 1975* (NSW) created a number of offences. At least one submission said that they were very difficult to prosecute.⁶⁵ The elements that the prosecution had to prove to establish that a person had breached a noise control notice under s 41 of the *Noise Control Act 1975* (NSW) were that:

- (i) a noise control notice was served on the occupier of the premises; and
- (ii) if the notice does not include a condition, while the notice was in force, the occupier caused, permitted or allowed in or on the premises:
 - the step in a trade, industry or process specified in the notice to be carried on; or
 - the article specified in the notice to be used or operated; or
 - the activity specified in the notice to be carried on; or
 - the animal specified in the notice to be kept;⁶⁶ and
- (iii) if the notice does include a condition, while the notice was in force, the occupier caused, permitted or allowed in or on the premises, the carrying on of the step in the trade, industry or process, the use or operation of the article, the carrying on of the activity or the keeping of the animal in contravention of the condition;⁶⁷ and
- (iv) the alleged offence “resulted in” the emission of noise from the premises;⁶⁸ and
- (v) the noise emitted was offensive.⁶⁹

3.39 The *Protection of the Environment Operations Act 1997* (NSW) greatly simplifies the noise control notice provisions. The provisions about the content of a noise control notice have been simplified and redrafted in plain English. There is no longer a distinction between public and private premises. The complex provisions about conditions have been removed.⁷⁰ The new Act provides that:

A person who contravenes a noise control notice is guilty of an offence.⁷¹

3.40 The prosecution must establish that the alleged offence resulted in the emission of noise from the premises that can be detected or perceived outside those premises without the aid of an instrument, machine or device.⁷² The prosecution does not have to prove that the noise emitted as a result of the alleged breach is offensive. The Commission endorses this approach. The new provisions should make prosecuting this offence much simpler and easier.

Better enforcement of existing legislation

3.41 There is general consensus that even if perceived problems with legislation were ironed out, the main problem, namely enforcing it, would not be resolved. Very few submissions addressed the question in DP 22 about the effectiveness or otherwise of the *Noise Control Act 1975* (NSW). Submissions stated:

- the value of the *Noise Control Act 1975* (NSW) is limited by the very poor acoustical standard and lack of vibration dampening features in most multiple residential dwellings;⁷³
- infringement notices might resolve some problems;⁷⁴ and

responsibilities of enforcement agencies should be clarified.⁷⁵

Penalty notices

3.42 At the end of 1990, amendments to the *Environmental Offences and Penalties Act 1989* (NSW) were enacted. They included a penalty notice system, under which an alleged offender has the option of paying a fine instead of defending the matter in court and taking the risk of a larger fine and liability for court costs, as well as enduring the inconvenience of a court appearance. From the point of view of the council responsible for the prosecution, this is an easier and cheaper way of enforcement. The Commission was advised during consultations that councils make considerable use of penalty notices for pollution offences, but that they are not so often used for noise offences. The EPA finds them a useful tool where there has been a technical breach of the law and has guidelines about when penalty notices are appropriate.

Who should be responsible for enforcement?

3.43 Under the *Noise Control Act 1975* (NSW), the body responsible for enforcement varies. Noise abatement directions can be made by:

- (i) a person authorised in writing by the EPA;
- (ii) a police officer; or
- (iii) if related to a sporting activity involving boats, and if authorised by the Waterways Authority, an officer or employee of:
 - the Waterways Authority;
 - a local council; or
 - any other statutory authority.

3.44 Noise control notices in relation to domestic premises can be issued by the local council or, if involving boats, the Waterways Authority. Justices of the Peace have the power to summon a person to court so that a noise abatement order may be made. In DP 22, the Commission asked who should be responsible for enforcing the legislation and whether more bodies should share the responsibility. Views expressed in submissions ranged from reducing the number of enforcing agencies to increasing it. One submission suggested the State Pollution Control Authority, not the Waterways Authority, should take responsibility for noise on waterways;⁷⁶ another that Consumer Affairs inspectors seem to have the powers and experience necessary to deal with this sort of community problem.⁷⁷

3.45 On the other hand, some submissions rejected the suggestion that the enforcing authorities should be expanded on the ground that this would exacerbate the confusion that already exists about who is responsible for enforcement.⁷⁸ One submission suggested that, to avoid confusion, only the police and local councils should be able to take enforcement action.⁷⁹ Callers to the Commission's neighbourhood disputes hotline were frustrated at having had "the run around" from responsible agencies. They said that no one seemed willing or able to help them.

3.46 The *Protection of the Environment Operations Act 1997* (NSW) has clarified the responsibilities of the various agencies for the enforcement of the noise provisions. Under the new Act, the Waterways Authority is responsible for regulating noise occurring on water ways. Councils are responsible for issuing noise control notices in relation to all noise occurring in a local area except for noise caused by a public authority or its activities, or caused in circumstances listed in the Act or regulations. The EPA has

responsibility for issuing noise control notices in relation to noise caused by public authorities or their activities (for example, council garbage trucks, road building) and activities listed in the Act or regulations (for example, rock concerts, the Sydney Cricket Ground, helicopters, cars and trucks). Councils and police have responsibility for giving noise abatement directions with the same exceptions that apply for noise control notices. Police, councils and the EPA can prosecute offences under the noise control provisions.

3.47 The Commission endorses this approach. The division of responsibility between councils, the Waterways Authority and the EPA at least prevents agencies from justifying failure to take action on the basis that some other authority could or should take action. Some confusion may remain in the community about who should be approached about noise issues. The Commission recommends that the bodies that have a responsibility to enforce the legislation should ensure that local communities are informed of the body's role and, if relevant, the name (or job description) and telephone number of the appropriate person to contact in the organisation.

Concern that agencies are unwilling to act

3.48 In DP 22, the Commission asked if the remedies provided by the *Noise Control Act 1975* (NSW) were adequate. Of the submissions that responded to the question, one gave a qualified yes, stating the remedies for noise from industrial premises are effective.⁸⁰ Most, however, stated that the remedies were not adequate because, among other reasons, the police and councils are reluctant to act. Examples in the submissions include:

letters sent to the council and the mayor elicited a polite response and a visit from a council officer that had no effect;⁸¹

a council was not prepared to take action unless three other neighbours also complained;⁸²

although five people had complained about a noisy pool pump and council negotiated with the owners of the pool resulting in the installation of a cover on the pipe, the noise continued;⁸³

the police told a caller that it was no use ringing them as the police have higher priorities and the noise may have ceased by the time they arrive;⁸⁴ and

the police told a caller that all they could do about music at a party was to ask the revellers to turn it down.⁸⁵

3.49 In the view of the Community Mediation Division of the Australian Dispute Resolution Association, although police can provide a 24 hour service, noise issues may take a low priority; local councils should therefore employ more rangers to respond to noise complaints as an important priority.⁸⁶ Council of the City of Sydney stated that it had difficulty enforcing that part of the Act dealing with non-scheduled premises which includes residential premises.⁸⁷

3.50 Submissions show that a factor in the failure of police to act was the ineffectiveness of the remedies under the *Noise Control Act 1975* (NSW). Changes made in the *Protection of the Environment Operations Act 1997* (NSW) address some of these problems. Under the *Noise Control Act 1975* (NSW), police could only issue a noise abatement direction if it appeared to them that offensive noise was emitted or had been emitted within the preceding 30 minutes.⁸⁸ This meant that unless the police arrived very promptly on being called they would be unable to act. The new provisions extend the period within which the noise must have occurred to seven days.⁸⁹ This gives police much more flexibility and a much better chance to fit a response to a complaint about noise into a busy schedule. In addition, the new provisions extend police powers beyond asking the person to turn the music down. If a person disobeys a noise abatement direction and the appropriate warnings have been given, the police can seize the offending equipment for a maximum of 28 days.⁹⁰

3.51 The new provisions provide an immediate and effective way of stopping noise. The Commission endorses this approach. It addresses a number of the concerns raised in submissions and provides a framework which enables police and local councils to enforce the law. There is a huge potential for unresolved or unaddressed disputes between neighbours to escalate and consume community resources. For this reason the Commission considers it desirable that police and councils give greater priority to enforcing the law when they receive legitimate complaints about noise. However, it does not make a recommendation about the priority these agencies should give to enforcement. The Commission recognises that police and local councils have a wide range of responsibilities and will inevitably set their own priorities depending on the resources available and the pressing needs of the time.

Community awareness programs

3.52 In DP 22, the Commission drew attention to the *Environmental Noise Control Manual*⁹¹ which points out a number of matters that should be considered to reduce disputes about noise, including carefully choosing the location of noisy equipment, thinking about the time for engaging in noisy activities and taking account of the noise levels of equipment in the purchase decision. It asked if community awareness programs would be a useful mechanism in reducing the problem of neighbourhood noise. Not many written submissions addressed this issue but callers to the Commission's neighbourhood disputes hotline supported community awareness programs. Of the written submissions, one conceded that community education programs might be useful if penalties were increased but expressed the view that they would not change the behaviour of regular offenders.⁹² On the other hand, the Community Mediation Division of the Australian Dispute Resolution Association stated that community education is vital and should be carefully coordinated, involving all agencies likely to be approached about noise, for example, local councils, police, community health centres, neighbourhood centres, neighbourhood watch groups, the EPA and community mediation agencies. It identified two goals:

to encourage people to create a quieter environment; and

to tell people where they can get help to resolve noise problems.⁹³

3.53 Suggested vehicles for community awareness programs included schools, community meetings, local newspapers, leaflets, neighbourhood watch bulletins and local councils.

FOOTNOTES

1. The new Act and regulations are proposed to become operational by December 1998.
2. The new Act and regulations are proposed to become operational by December 1998.
3. *Noise Control (Miscellaneous Articles) Regulation 1995* cl 19.
4. *Noise Control (Miscellaneous Articles) Regulation 1995* cl 19.
5. *Noise Control (Miscellaneous Articles) Regulation 1995* cl 20.
6. *Noise Control (Miscellaneous Articles) Regulation 1995* cl 20.
7. *Noise Control (Miscellaneous Articles) Regulation 1995* cl 21.
8. *Protection of the Environment Operations Act 1997* (NSW) s 136(1).

9. *Protection of the Environment Operations Act 1997 (NSW) s 136(2).*
10. *Protection of the Environment Operations Act 1997 (NSW) s 141.*
11. *Noise Control (Miscellaneous Articles) Regulation 1995 cl 6-12.*
12. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 4-10.*
13. *Noise Control (Miscellaneous Articles) Regulation 1995 cl 13-17.*
14. *Noise Control (Miscellaneous Articles) Regulation 1995 cl 22.*
15. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 12.*
16. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 15.*
17. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 13.*
18. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 14.*
19. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 21.*
20. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 22.*
21. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 23.*
22. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 26.*
23. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 27.*
24. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 28.*
25. *Noise Control (Motor Vehicles and Motor Vehicle Accessories) Regulation 1995 cl 29.*
26. *Protection of the Environment Operations Act 1997 (NSW) Dictionary.*
27. *Protection of the Environment Operations Act 1997 (NSW) Dictionary.*
28. *Protection of the Environment Operations Act 1997 (NSW) s 276.*
29. *Protection of the Environment Operations Act 1997 (NSW) s 277.*
30. *Protection of the Environment Operations Act 1997 (NSW) s 280.*
31. *Protection of the Environment Operations Act 1997 (NSW) s 282.*
32. *Protection of the Environment Operations Act 1997 (NSW) s 264.*
33. *Protection of the Environment Operations Act 1997 (NSW) s 265(2).*
34. *Protection of the Environment Operations Act 1997 (NSW) s 268(1).*
35. *Protection of the Environment Operations Act 1997 (NSW) s 268(2).*
36. *Protection of the Environment Operations Act 1997 (NSW) s 268(3).*
37. *Protection of the Environment Operations Act 1997 (NSW) s 269.*

38. *Protection of the Environment Operations Act 1997* (NSW) s 269.
39. *Protection of the Environment Operations Act 1997* (NSW) s 272.
40. *Protection of the Environment Operations Act 1997* (NSW) s 270(1) and 278(1).
41. *Protection of the Environment Operations Act 1997* (NSW) s 270(2) and 278(2).
42. P Robinson, *Submission* (21 October 1991).
43. L N Newhouse, *Submission* (6 May 1992).
44. J F Cox, *Submission* (21 October 1991).
45. D J Fraser, *Submission* (16 October 1991).
46. F Cox, *Submission* (21 October 1991).
47. P Robinson, *Submission* (21 October 1991).
48. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).
49. M Drake, *Submission* (22 October 1991).
50. S Bacsi, *Submission* (27 September 1991).
51. J and F Sara, *Submission* (24 October 1991).
52. D Bremner, *Submission* (28 October 1991).
53. Anonymous, West Pennant Hills, *Submission* (22 October 1991).
54. Pacific Research Pty Ltd, *Submission* (2 October 1991).
55. L F Keatinge, *Submission* (23 September 1991); see also Pacific Research Pty Ltd, *Submission* (2 October 1991).
56. Community Justice Centres, *Submission* (11 July 1991).
57. The definition is outlined in para 3.17.
58. Council of the City of Sydney, *Submission* (5 September 1991).
59. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).
60. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
61. D J Fraser, *Submission* (16 October 1991).
62. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
63. Community Justice Centres, *Submission* (11 July 1991).
64. *Protection of the Environment Operations Act 1997* (NSW) Dictionary para (b).
65. Council of the City of Sydney, *Submission* (5 September 1991).

66. *Noise Control Act 1975* (NSW) s 41(1)(a).
67. *Noise Control Act 1975* (NSW) s 41(1)(b).
68. *Noise Control Act 1975* (NSW) s 41(2).
69. *Noise Control Act 1975* (NSW) s 41(2).
70. See para 3.20.
71. *Protection of the Environment Operations Act 1997* (NSW) s 265.
72. *Protection of the Environment Operations Act 1997* (NSW) s 265(2).
73. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).
74. Local Government and Shires Association of NSW, *Submission* (22 August 1991).
75. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
76. J and F Sara, *Submission* (24 October 1991).
77. D J Fraser, *Submission* (16 October 1991).
78. Community Justice Centres, *Submission* (11 July 1991).
79. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
80. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
81. J F Cox, *Submission* (21 October 1991).
82. L N Newhouse, *Submission* (6 May 1992).
83. S Bacsi, *Submission* (27 September 1991).
84. Anonymous, West Pennant Hills, *Submission* (22 October 1991).
85. M Drake, *Submission* (22 October 1991).
86. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).
87. Council of the City of Sydney, *Submission* (5 September 1991).
88. *Noise Control Act 1975* (NSW) s 58.
89. See para 3.18. *Protection of the Environment Operations Act 1997* (NSW) s 276.
90. See para 3.19. *Protection of the Environment Operations Act 1997* (NSW) s 282.
91. New South Wales, State Pollution Control Commission, *Environmental Noise Control Manual* (1985).
92. Home Unit Owners Association of New South Wales, *Submission* (30 August 1991).

93. Community Mediation Division, Australian Dispute Resolution Association, *Submission* (28 November 1991).

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Appendix A - List of Submissions

Adams, F (16 October 1991)
Andrea, B M (20 March 1996)

Anonymous (23 August 1984) (Oral Submission) (no address given)
Anonymous (29 August 1984) (Oral Submission) (no address given)
Anonymous, Castlecove (20 March 1996)
Anonymous, Melbourne (26 August 1983)
Anonymous, West Pennant Hills (22 October 1991)
Armstrong, I M (30 September 1991)
Armstrong, V (3 March 1997) (Oral Submission)
Bacsi, S (27 September 1991)
Barden, E (29 August 1997) (Oral Submission)
Batchelor, O H (24 October 1991)
Betfort, W (3 March 1992)
Board of Surveyors of New South Wales (5 September 1991)
Bremner, D (28 October 1991)
Brooke, B M (27 August 1983)
Brooke, B M (23 March 1984) (Oral Submission)
Burrows, F (20 August 1997)
Burrows, F (11 September 1997)
Burrows, F (14 September 1998)
Burrows, F (2 October 1998)
Byrnes, A and J (20 October 1991)
Callaway, C R (27 January 1989)
Chiswick, M (30 July 1991) (Referred from Department of Local Government)
Combined Pensioners' Association (10 June 1989) (Referred from Department of Local Government)
Community Justice Centres (9 July 1991)
Community Mediation Division, Australian Dispute Resolution Association (28 November 1991)

Cox, J F (21 October 1991)

Council of the City of Sydney (5 September 1991)

Department of Chamber Magistrates (13 September 1991)

Drake, M (22 October 1991)

Elliot, E and D (17 June 1987)

Environmental Defender's Office (28 October 1991)

Faulkes, W (19 April 1983)

Ferris, D P (7 April 1994)

Frame, J M (25 October 1991)

Fraser, D J (16 September 1991)

Fraser, D J (12 February 1992)

Grice, J S (5 June 1991)

Griffiths MP, T (25 October 1991)

Gulson, M (11 June 1991) (Referred from Department of Local Government)

Hale, E F (20 January 1993) (Referred from Department of Local Government)

Hendricks, P (12 May 1993) (Also referred from Department of Local Government)

Home Unit Owners Association of New South Wales (30 August 1991)

Irons, H R W (18 April 1996)

James, R (4 November 1994) (Oral Submission)

Keatinge, L F (23 September 1991)

Kerkyasharian, S (11 July 1991)

Kofler, E and P (18 July 1988) (Referred from Department of Local Government)

Lawrence, D C K (11 July 1990)

Lawrence, D C K (31 October 1991)

Law Society of New South Wales (26 June 1989)

Law Society of New South Wales (26 July 1989)

Law Society of New South Wales (November 1991)

Local Courts Administration, Department of Courts Administration (19 May 1992)

Local Government and Shires Association of New South Wales (22 August 1991)

Local Government and Shires Association of New South Wales (9 June 1992)

Local Government and Tree Resources Association (November 1997)

McMartin, A (20 October 1994) (Referred from Department of Local Government)

Manning, S (23 May 1994)

Marden, J (23 October 1991)

Marsden-Ballard, D (25 October 1995) (Oral Submission)

Martin, A T (10 November 1994)

Mason, A and A (30 October 1991)

Milthorpe, A D (27 August 1983)

Murray MP, J on behalf of Wachala, T (14 April 1994)

Newhouse, L N (6 May 1992)

Pacific Research Pty Ltd (2 October 1991)

Phillips, R S (21 October 1991)

Reid, S (12 August 1992) (Referred from Department of Local Government)

Reid, S R Y (24 February 1997)

Richards, R (8 May 1994) (Oral Submission)

Robinson, D (20 October 1991)

Robinson, P (23 October 1991)

Rogers, N T (24 October 1991)

Romot, A A (12 April 1996)

Samuel, D and J (24 April 1989) (Referred from Department of Local Government)

Sara, J and F (24 October 1991)

Searle, J and P (22 February 1989) (Referred from Department of Local Government)

Singer, K (24 March 1992) (Referred by Department of Local Government)

Smyth, T W, (24 February 1992)

Steele, M (10 July 1996)

Svehla, P (14 January 1987) (Oral Submission)

Sweeney, H J (15 June 1983)

Szabo, K (12 February 1992)

Trathen, S and G (30 March 1990)

Turner MP, J T on behalf of Mr Harley (15 February 1991) (Also referred from Department of Local Government)

Valerio, E (26 January 1989) (Referred from Department of Local Government)

Walker, A (31 March 1990) (Referred from Department of Local Government)

Westley, W H (24 August 1989) (Referred from Department of Local Government)

Wilson, F I (31 January 1989)

Wilson, F I (19 August 1991) (Also referred from Department of Local Government)

Wilson, I (19 August 1991) (Referred from Department of Local Government)

Wilson, I (5 September 1997)

Wilson, R L (21 June 1989)

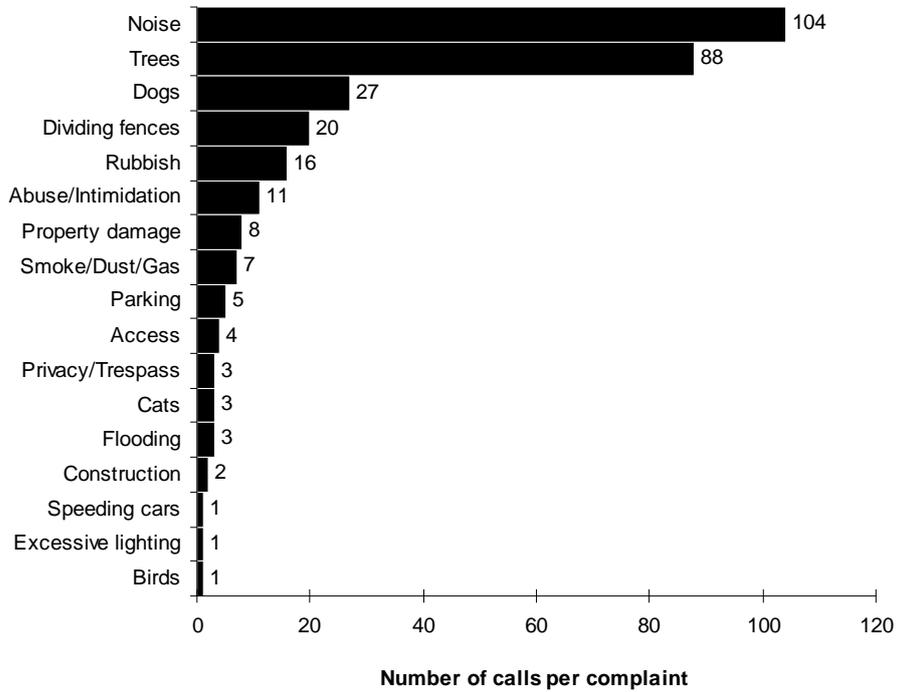
Woodward, R L (10 September 1996) (Oral Submission)

Woodward, R L (12 September 1996)

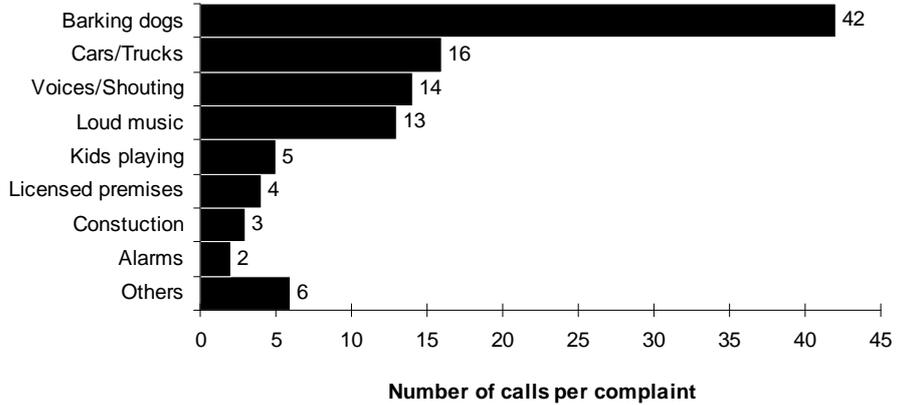
Wright, M (10 July 1992)

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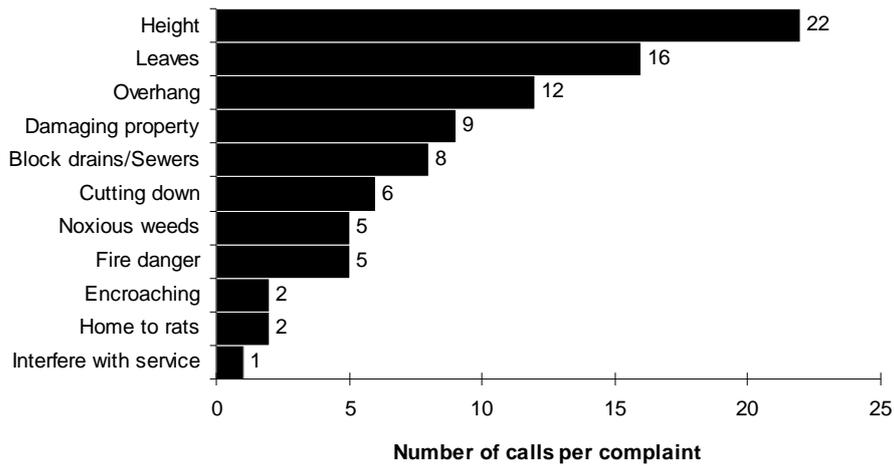
Type of Problem



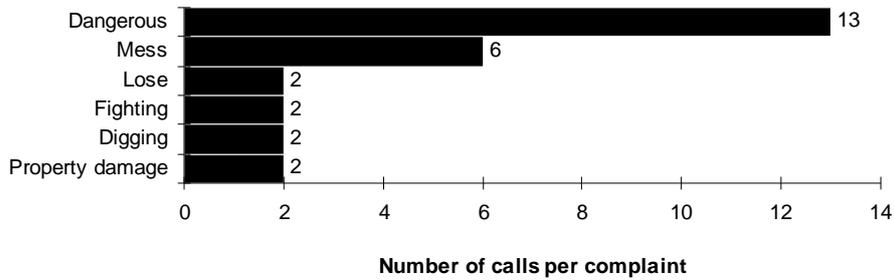
Noise



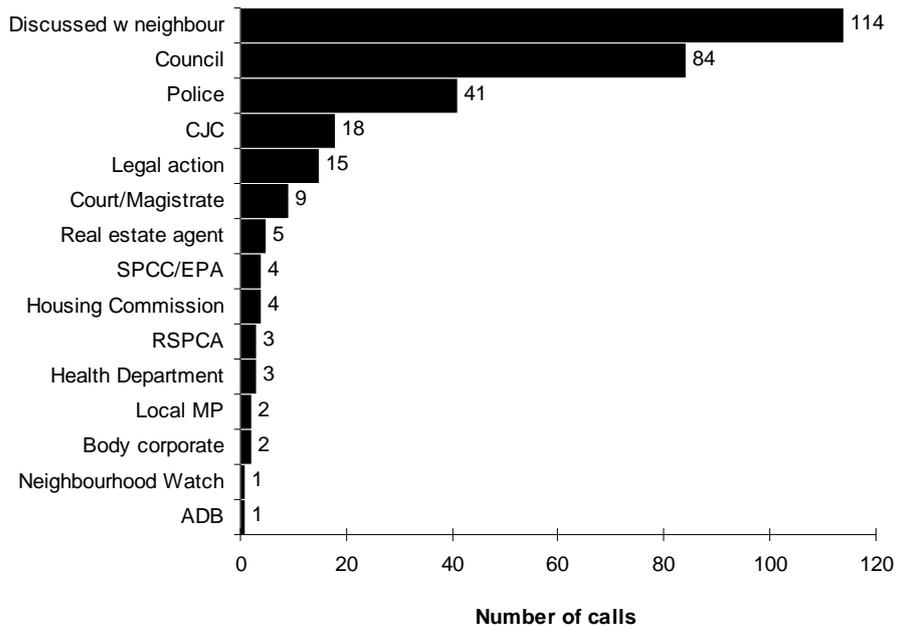
Trees



Dogs



Resolution Attempts



Notes

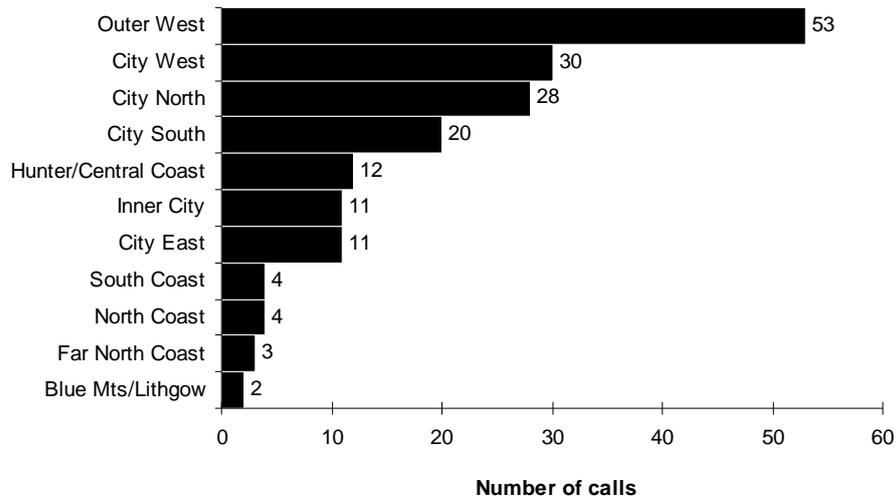
80 callers favoured the establishment of a Neighbourhood Tribunal

55 callers favour providing Authorised Officers with powers to intervene in cases of noise

28 callers feared or had been retaliated against for making complaints

9 callers made Racial or Ethnic references during their call

Location



Type of Residence

