

Review of neighbourly relations

Discussion paper

 Trees



Queensland Government

Department of Justice and Attorney-General

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1. Introduction

The Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland has called for a review of the laws governing neighbourly relations. This review will look at common causes of disputes between neighbours such as overhanging, intrusive and dangerous trees and dividing fences. The nuisance caused by noise, particularly from barking dogs, pool pumps and air conditioners also create concern for neighbours. The laws on these noises and other nuisances are contained in some council local laws and Part 2A of the *Environmental Protection Regulation 1998*. The Environmental Protection Agency has consulted publicly on proposed changes to the environmental nuisance provisions which are currently contained in Part 2A of the *Environmental Protection Regulation 1998*. Public consultation has now closed.

The aim of the Review of Neighbourly Relations is to find more efficient ways of assisting neighbours to resolve their disputes. This might be accomplished by improving processes for the resolution of common neighbourhood disputes, providing better access to information and achieving more efficient alignment of the role of relevant agencies.

The law in relation to the nuisance of trees is a source of much confusion for many Queensland neighbours. There are landowners and neighbours who are unaware of what laws, if any, exist. This lack of knowledge can have an adverse effect on neighbours and on their ability to resolve any disputes that arise with regard to trees. This paper will examine the current laws which apply to the nuisance of trees and explore those areas which create uncertainty for neighbours.

2. Dealing with the nuisance of trees

2.1 What is the current law in Queensland?

There is currently no specific statutory law in Queensland which addresses the nuisance of trees. There are also no specific requirements for Queensland local government bodies to have laws relating to the issue of trees either.

Many local councils prior to amalgamation had local laws regulating the nuisance of trees. Following amalgamation local councils have until 31 December 2010 to review their local laws. As a transitional device, amalgamated councils may adopt the local law of a constituent former council or a model local law. However it is likely that amalgamated councils will rationalise local laws as a matter of priority. Rationalisation and review of local laws will provide greater clarity about the status of local laws regarding the nuisance of trees.

- **Who should be responsible for the nuisance created by dangerous and intrusive trees— the person who owns the tree or some other person or entity?**
- **Is it reasonable to expect that taxpayers funds be used to introduce and enforce laws which regulate nuisance trees? If so, is it reasonable to expect this response to come from the state government or should it be the domain of local councils?**
- **Does the absence of state legislation about the nuisance created by intrusive and dangerous trees have the potential to affect neighbourly relations in Queensland?**
- **Would it assist neighbours if all Queensland local councils introduced a local law about dangerous and intrusive trees?**
- **If all local governments were to introduce a local law about nuisance trees, should these laws be the same throughout the state or should they depend on the area in which the neighbour lives?**

2.2 What happens when a neighbour lives in an area where there are no local laws?

Neighbours who are affected by another neighbour's intrusive or dangerous tree and who live in an area which does not have local laws on trees have three avenues available to them to resolve the issue – negotiation with their neighbour, formal mediation or legal recourse through the courts under the common law of nuisance.

- **Would it assist neighbours if participation in mediation was a compulsory step before attending court for issues relating to intrusive, overhanging or dangerous trees?**
- **Is there a risk that in a mediation a neighbour may agree to something less than they would be entitled to under the common law and does this matter?**
- **Should an agreement about a tree dispute which was reached at mediation be enforceable in a court or tribunal?**

3. The common law

3.1 What is the law of nuisance?

Nuisance occurs when one neighbour's activities cause damage or interfere with another's enjoyment of their land to an unreasonable extent. In order for there to be a nuisance there must be:

- an invasion of a neighbour's use and enjoyment of their land; and
- a harmful interference.

The harmful interference can consist of physical damage to the land or structures on it, or a disturbance of the comfort, health or convenience of the neighbour. This will occur, for example, where tree roots are causing structural damage to neighbouring property, or overhanging tree branches pose a danger to a person and property.

The common law does not generally recognise a neighbour's right to light unless access to the sun is protected by an easement. This could have implications for neighbours with solar panels on their roof.

The law of nuisance also does not provide a remedy where trees block out a neighbour's view. This could have implications for loss of value of the property.

- **The common law is that neighbours have to wait until damage actually occurs to their property before they have an action in nuisance caused by trees. Is this a realistic approach to deal with nuisance trees?**
- **Is it practical that an affected neighbour has to wait until the risk of danger to their person or property is imminent before they can take action?**
- **Is it reasonable to expect that a neighbour should have a legal right to sunlight?**
- **Should a neighbour have a legal right to protect or maintain a view particularly if a tree has grown large since the purchase of the land?**

3.2 Can a neighbour be liable if their tree intrudes onto their neighbour's property?

If a neighbour allows a tree to overhang onto, or tree roots to intrude into their neighbour's property they may be liable for an action in nuisance. Usually having trees that overhang or intrude onto a neighbour's property will be considered an invasion of their use and enjoyment of the land. However, this invasion must be to such an extent that it is considered substantial and unreasonable.

If an action in nuisance exists the neighbour can be taken to court. The court can grant an injunction requiring that the neighbour cut down the tree/branches, remove the roots, award damages to compensate the neighbour and allow the neighbour to abate the nuisance by cutting back the branches or roots. The court process is expensive and not a practical option for most neighbours.

- **Is it practical that an affected neighbour has to wait until the risk of danger to their person or property is imminent before they can take action?**
- **Who should pay to cut back and remove trees, branches and tree roots before they become a serious nuisance – the owner of the tree or the affected neighbour?**

3.3 What happens when a neighbour 'inherits' the nuisance?

There are circumstances where a nuisance originates from a neighbour's property, although they did not cause it to occur. The most common example of this is when the neighbour buys the property from someone else and the overhanging branches or intruding tree roots already exist. The new owner has, in effect, 'inherited' the nuisance.

Usually a new owner will not be liable in nuisance for trees on their property unless they are made aware of the nuisance and then take no action to prevent it from occurring. They must know or ought to have known of the nuisance but allow it to continue. An owner will be considered to 'ought to have known' of the nuisance if a reasonable inspection of the property would have revealed the existence of the overhanging tree branches or intruding roots.

The damage that has occurred to a neighbour's property must be a reasonably foreseeable consequence of the nuisance. This means that the harm suffered by the neighbour must be a logical consequence of the overhanging tree branches or intruding tree roots. While there does not need to be negligence on the part of the owner, some degree of fault is required.

- **If a neighbour is made aware that their tree is causing a nuisance, or has the real potential to cause a nuisance to the private property of another neighbour, should they be liable, or responsible for the costs of trimming, cutting and removing the tree/branches/roots?**
- **If the owner of the nuisance tree is responsible for removing and paying for abating the nuisance, how and who should organise this process?**
- **Do you agree with the circumstances in which an owner can be liable for damage caused by trees planted by their predecessors?**

3.4 Can a neighbour recover the cost of removing a nuisance tree which is causing damage to their property?

If a neighbour removes tree roots which are intruding onto their land they are unable to recover the costs of abatement unless damage has occurred. However, a neighbour may be able to claim any damages that accrued to them or their property prior to removing the nuisance tree.

The costs of abatement can be recovered, where damage has occurred, only if it can be demonstrated that the abatement constituted a reasonable step taken in mitigation of damages. The abatement must not have taken the neighbour onto his neighbour's land or caused any damage to the land or property on it.

4. Nuisance trees and local councils

4.1 What can a neighbour do when a tree is a nuisance and there are local laws on trees?

Local council local laws on dangerous and intrusive trees are generally found to contain a series of standard clauses which outline the circumstances and procedures for rectifying the problem.

The laws give “authorised persons” the authority to require the occupier of land on which the dangerous or intrusive tree grows to remove the tree or cut it back to the extent specified in the notice. The relevant sections describe dangerous trees as those trees which give rise to a risk of personal injury or damage to property. Intrusive trees are defined as those trees where branches overhang into another allotment or roots intrude to a significant extent into the adjoining allotment.

In situations where the trees gives rise to personal injury or damage to property and the danger is serious and imminent, the “authorised person” may enter the land with assistants to remove the danger. Notice to the owner in these circumstances is not required and the cost of carrying out the work may be recovered as a debt against the owner of the tree. Local governments will only intervene where there is an imminent threat to property or public safety. In all other cases a notice will be issued to require the owner to perform the necessary work.

- **Should there be an obligation to contribute to the removal of the nuisance if the owner of the tree has not been given notice about the work?**
- **In council areas where there are local laws relating to trees, would it assist neighbours if there were also guidelines as to the type of trees to be planted in the area? If so, who should decide on what are appropriate trees?**

4.2 Trees on council or private land which affect the public or public property?

Local councils are generally responsible for the problem of dangerous and intrusive trees on council land where the tree is likely to pose a risk to persons and property. This is a risk management issue for council officers and staff.

Although tree varieties used for footpath beautification are selected by council botanists to be non-intrusive, it is possible for the roots of a tree growing on council land i.e. a park or footpath to dry out the ground beneath privately owned land thus causing structural cracking to the house. The issue in these cases is whether the private landowner can recover the costs of carrying out this remedial work from the local council and how can this occur without incurring expensive legal costs.

The case law indicates that where there is a continuing nuisance of which the council knew or ought to have known then it is reasonable that remedial expenditure could be recovered by the owner who had to incur it. However, a neighbour cannot carry out remedial work without first giving the council notice of the damage and the opportunity of avoiding further damage by removal of the trees. This would not be in line with the principle of reasonableness.

Under the common law, councils can be liable for damage caused by dangerous and intrusive trees growing on council land if they had knowledge of the problem tree for some time and had failed to do anything. This is a matter of negligence more than nuisance. They may be civilly liable for damage or harm if found to be negligent in addressing the nuisance.

- **Who should be responsible or liable for injury to persons or property by trees growing on council land?**
- **Does it make any difference if the tree growing on council land that caused the injury had been privately planted?**
- **Should responsibility/ liability apply even if there was no knowledge of the nuisance being caused by the tree and therefore no opportunity to take remedial action?**
- **Who should be responsible or liable for injury caused to persons or property on council land by trees growing on private land?**
- **If the tree that caused the injury to the public, person or property was growing on private land should it make any difference who is liable if the local council had knowledge of the potential danger, but failed to take remedial action?**

4.3 Tree protection and tree preservation order

Many councils, including Brisbane City Council, Gold Coast City Council and Cairns City Council have adopted local laws and codes to protect and manage the trees and vegetation on public and privately owned land.

It is the usual practice under these laws and codes that if any land owner wishes to remove or prune a tree of a particular size or species located on their land they must make an application to council for approval to carry out the work on the tree.

If a tree is placed under a tree preservation/protection order then it is an offence to cut or prune without permission from the council. Usually the resident is required to engage an arborist for an opinion on the tree before submitting an application to council for work to be carried out.

Local councils are reluctant to give approval to prune or remove a tree to anyone but the owner of the tree. Approval might be given to a landowner for the pruning or removal of a protected/preserved tree on the landowner's property if:

- the tree is dead or damaged and likely to cause damage to property or a person
- the roots of the tree are blocking sewerage or other pipes
- the tree is on a boundary and may cause problems with the erection of a dividing fence
- the overhanging branches are causing a nuisance and are damaging structures.

Where the protected/preserved tree is on an adjoining neighbour's property and causing a nuisance, the council may require the affected neighbour to seek permission from the owner of the tree to prune or remove the tree subject to council approval of the work. If there is no agreement between the neighbours, and the owner of the nuisance tree will not give permission to prune or remove it, then in the absence of local laws, the affected neighbour may have no other option but to commence expensive court proceedings to protect people and property.

- **Do tree protection/preservation orders have the potential to cause escalation of a dispute between neighbours over trees?**
- **Is it fair to the affected neighbour if a neighbour can "hide behind" the requirements of the tree protection/preservation orders and thus avoid addressing the problem?**
- **Should councils have the power to order abatement of a nuisance caused by a protected/preserved tree?**
- **If the tree owner gives permission and the council gives permission, who should pay for the arborist and the tree lopper?**

5. Conclusion

There are essentially two competing views about ownership of property. One emphasises 'freedom of property' and the rights associated with property ownership. The other suggests that property ownership entails social obligations as well as rights.

The nuisance of trees on private property presents a special challenge to state and local government and other public authorities in terms of issues of access, abatement costs, resources, liability, responsibility and balancing the rights of parties and the community.

- **Does the issue of nuisance trees require effective law reform or regulation to provide 'precautionary standards' as a baseline to be used in combination with other less coercive measures such as dispute resolution?**



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