# 22 LOCAL CONTROLS AND REMEDIES

## OVERVIEW

Chapter 11 looks at various private law actions that might be used to curb environmental pollution, with a brief mention of statutory variations including an outline of statutory nuisance law. And Chapter 12 shows how planning law tries to overcome some of the limitations of relying on nuisance law to regulate the harmful consequences of development, for example by taking a strategic approach to deciding 'how much of what goes where'. In this chapter we look at a range of other provisions which, like planning controls, are primarily exercised at the local level by local authorities. The first of these is statutory nuisance, followed by other local controls on noise, local air pollution controls, controls on traffic, and high hedges. (For some other local controls which we cover elsewhere, or simply cannot cover, see Box 22.1.) Before reading this chapter you may want to look again at the outline discussion of local authority functions and decision-making structures in Ch. 4 'Local authorities'.

At the end of this chapter you should be able to:

- understand what statutory nuisance law covers and how it is enforced by local authorities and individuals.
- understand other controls on noise, especially as these are exercised by local councils.
- understand local controls on air pollution (and in conjunction with Chapter 15 appreciate how these work alongside strategic and national controls).
- assess how adequate this range of controls is compared to common law actions, and how these controls operate alongside planning law.

**BOX 22.1 Other local controls, responsibilities, duties and powers**

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|---|---|---|
| Sustainability powers | Localism Act 2011, s.1 (England)[1]<br>Local Government Act 2000, s. 2 (Wales only; exercised in conjunction with local well-being plans under Well-being of Future Generations (Wales) Act 2015) | |
| Contaminated land | EPA 1990, Part 2A | **See Ch. 16** |
| Waste collection, disposal, recycling, and composting | EPA 1990, ss. 45–49 (as amended by the Household Waste Recycling Act 2003) | **See Ch. 18** |
| Preventing fly-tipping | Control of Pollution (Amendment) Act 1989, ss. 5–7 as amended by Anti-Social Behaviour Act 2003, s. 55 | |
| Litter control | EPA 1990, Part IV as amended by Clean Neighbourhoods and Environment Act 2005 (CNEA 2005), Part 3 | |
| Abandoned vehicles | Refuse Disposal (Amenity) Act 1978, s. 3(1) as amended by CNEA 2005, ss. 10–14 | |

## Statutory nuisance

[1] This provision allows local authorities generally to undertake activities and is not specifically linked to improving environmental well-being, as the Local Government Act 2000 powers refer to.



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The law of statutory nuisance represents a bridge between the private law of nuisance and the more characteristic statutory mechanisms. Like the various torts considered in Chapter 11, however, statutory nuisance really provides indirect protection for the environment, having developed as a public health mechanism. Nevertheless, there are many ways in which statutory nuisance can be used to combat environmental concerns such as air pollution or the deposit of sewage on beaches, and it is often used to deal with complaints about unacceptable noise levels. The main aim of the statutory nuisance provisions is to provide a quick and easy remedy to abate nuisances with which private law is too slow or too expensive to deal.

## History and development of controls

Statutory nuisance law goes back a long way, dating back to public health statutes from 1848, 1855, 1860 and 1875. What underpinned these Acts was a desire to control matters which, although nuisances in the private law sense, were thought to affect sanitation levels and thus public health. It is worth mentioning, however, that before the discovery that diseases like cholera were spread contagiously (mainly through the water supply), the early Victorians laid the blame on foul air, or 'miasms'. Accordingly, this focused attention on things like drainage and the removal of all kinds of refuse (often into the nearest watercourse).

The Victorian legislation was consolidated in the Public Health Act 1936, and updated again, and 'restated', in Part III of the Environmental Protection Act (EPA) 1990 (to which all references in this chapter relate unless otherwise indicated). This lineage means that even very old authorities may still be relevant, and in some cases even determinative (see, e.g. the meaning of 'premises'). It also means, however, that the boundaries of statutory nuisance tend to be fairly well settled; this can make it difficult for statutory nuisance to evolve from its public health background into a more genuinely environmental protection mechanism befitting its place within the EPA 1990. This is not to say that the basic mechanism used in statutory nuisance has not been evolving; indeed, recent controls ranging from contaminated land to problems associated with high hedges draw heavily on the idea of the local authority serving an abatement notice to prevent likely problems arising or stop problems recurring.

## The control of statutory nuisances

District councils, London borough councils and unitary authorities are under a duty periodically to inspect their areas for statutory nuisances. In addition, if an individual within an area complains of a statutory nuisance emanating from within that area then a district council is obliged to investigate: a more responsive duty (s. 79). The EPA 1990 implies that the level of the local authority's general inspection duty is only to take such steps as are reasonably practicable. Although the duty imposed is only that inspection be periodic, it is clear that if there is strong evidence to suggest that a statutory nuisance exists within an area, and a local authority refuses to inspect, then it is possible that the remedy of judicial review will lie to any aggrieved applicant. It is important, therefore, for any individual wishing to complain to a local authority to ensure that proper evidence is gathered (e.g. dates, times, and length of the nuisance if it has already occurred, or strong evidence to show that the statutory nuisance is about to occur). There are default powers under sch. 3, para. 4 which allow the Secretary of State to take action if local authorities are not carrying out their duty.

The general control of statutory nuisance is contained in section 80. This provides that where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, it is under a mandatory duty to serve an abatement notice on the person responsible for the nuisance or, if that person cannot be found, the owner or occupier of the premises on which the statutory nuisance is present. The nature of this duty was considered in the *Shelley* case (Case 22.1).



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**CASE 22.1** ***R v Carrick District Council, ex parte Shelley*** **[1996] Env LR 273**

The applicants were two residents of a Cornish village. They complained to the council about sewage which led to sanitary towels, condoms, and weed ending up on the village beach. The applicants asked the council to exercise its powers to deal with statutory nuisances. But the council resolved to do nothing, because the discharges, consented under the Water Resources Act 1991, were being appealed by the sewerage undertaker. The applicants challenged this refusal by judicial review. It was held that the council was under a duty to investigate its area for the existence of statutory nuisances. Once it was found that a statutory nuisance existed, the council was under a duty to serve an abatement notice. So the council could not simply resolve to do nothing pending the appeal. A decision has to be made on the state of affairs which are before the council at any given time and it was not possible to wait for any anticipated improvements before coming to a view on whether a statutory nuisance existed. Following the case, the local authority did in fact find that there was a statutory nuisance and served an abatement notice on the sewerage undertaker requiring screening, which was duly complied with. Note that before the local authority's original resolution, its environmental health officer had originally taken the view that no statutory nuisance existed. If this had been endorsed, then this would only have been challengeable as a matter of fact, not law, leaving the applicants without redress unless the officer's conclusion was one which no reasonable officer could have reached on the evidence.

In some situations, serving an abatement notice might be thought too blunt an instrument to resolve a situation which may have many underlying causes and involve other public bodies exercising their functions (see Case 22.2).

**CASE 22.2** ***R v Falmouth and Truro Port Health Authority, ex parte South West Water Ltd*** **[2000] Env LR 658**

Here, the statutory nuisance was sewage effluent being discharged by South West Water, the sewerage undertaker for the area. The undertaker was acting under a discharge consent (now, an environmental permit), and was also under a range of statutory duties concerning the environment and the adequate provision of sewerage services in its area. The wider problem was not one that could be resolved simply by turning the effluent pumps off and might have been thought a situation better resolved by cooperation rather than criminal enforcement. Nevertheless, the abatement notice requiring the nuisance to be abated was upheld. The Court of Appeal also refused to find that the enforcing authority needed to consult on possible abatement action. This might have been desirable as a matter of policy, but was not required as a matter of legal fairness. This decision further emphasises the duties that local authorities have to abate statutory nuisances, and the extent to which the law is intended to allow for a swift response to situations which may have an adverse effect on public health.

## The categories of statutory nuisance

There are a number of categories of statutory nuisance contained in section 79. These are supplemented by other statutes which declare specific categories to be a statutory nuisance and thus controlled under the provisions of the Act (s. 79(1)(h)). Much of the language used in section 79 is somewhat antiquated and difficult to reconcile with modern technology. The categories of statutory nuisance are listed in the headings below. The Act lays down certain activities or states of affairs which will amount to a statutory nuisance if 'prejudicial to health or a nuisance'.



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**'Prejudicial to health or a nuisance'**

The main criterion for the existence of a statutory nuisance is that anything complained of must be either 'prejudicial to health or a nuisance'. These are not to be read conjunctively. Showing that something is 'prejudicial to health' is likely to be more difficult; as the House of Lords held in *Birmingham City Council v Oakley* [2001] 1 All ER 385, it is 'something over and above what may be seen as a "nuisance"'.

**Prejudicial to health**

'Prejudicial to health' means injurious, or likely to cause injury, to health (s. 79(7); and see Case 22.3).

**CASE 22.3 *Coventry City Council v Cartwright* [1975] 1 WLR 845**

The Council owned a vacant site within a residential area on which it allowed people to dump all sorts of materials. These included not only normal household refuse, but also building and construction materials. Occasionally, the Council would move household materials. A nearby resident complained of a statutory nuisance under the Public Health Act 1936. The Divisional Court held that, where the accumulation complained of was inert rather than putrescible, the test was whether it was 'an accumulation of something which produces a threat to health in the sense of a threat of disease, vermin or the like'.[2] Note that the test to be used is preventive; it is the *threat* of a public health problem that matters.[3] Although there was a chance that physical injury could be caused to people who walked on the site, that did not amount to being prejudicial to health in the context of public health legislation. For the same reasons the visual impact of the site was also not a statutory nuisance.

This approach was confirmed in *R v Bristol City Council, ex parte Everett* [1999] Env LR 587, where steep stairs were held not to be prejudicial to the health of a tenant with a back injury. Most contentious in this context is *Birmingham City Council v Oakley* [2001] 1 All ER 385 where the House of Lords held (by 3-2) that a house, in which the occupants had to cross the kitchen to wash their hands after using the toilet, was not 'prejudicial to health'. One reason that this case is problematic is because, unlike *Everett*, the *type* of harm that could follow from the use of the premises - preventing disease through poor sanitation - is the same as that envisaged by the Victorian public health legislation. So, to argue that statutory nuisance should not cover circumstances like those in *Oakley* (as the majority in the Lords did) might actually be seen as a little disingenuous[4] and perhaps better explained by the majority of the judges being worried about the resource implications of local authority properties needing to be renovated. By contrast, there are other provisions of Part III which do not have this Victorian public health heritage – the provisions applying to noise only date back to the Noise Abatement Act 1960 (see below) – and it might not be appropriate to construe these from a narrow public health perspective.

Whether something is prejudicial to health must be judged objectively. So in *Cunningham v Birmingham City Council* [1998] Env LR 1 the claims that a property was hazardous to an autistic child failed, since the property was not a statutory nuisance for an 'ordinary' child. As with the common law of nuisance, however, if the state of affairs would be prejudicial to the health of an ordinary person, it is no defence that the person affected is more than usually sensitive, e.g. someone with

[2] Apocryphal stories tell of a market in dead rats for 'planting' purposes, reinforced by a storyline in the British television soap 'Eastenders'!

[3] Chartered Institute of Environmental Health (CIEH) guidance is that there must be something which is probably likely, rather than possibly likely, to cause injury to health. Note that in *Shelley* the risk to health there was sufficient.

[4] R. Malcolm and J. Fielding (2006) 18 JEL 37



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asthma suffering from dampness and mould.[5] In *R (Anne) v Test Valley Borough Council* [2002] Env LR 22 it was held that if spores from a lime tree had given rise to a neighbour's respiratory allergy, the tree would not have been 'prejudicial to health'. This decision purports to apply the objective approach in *Cunningham*. However, it fails to recognize that where health problems like allergies etc are actually *caused* by exposure to the thing complained of, and if an ordinary person would be so affected by such exposure, then an objective approach *is* being taken, albeit in two stages. So the *Test Valley* case must be treated with caution; it may not be good authority for saying that any sensitivity to a health problem will rule out a statutory nuisance action (e.g. where asthma has been brought on by dust or fumes etc).

## Nuisance

In defining the word 'nuisance', it is generally accepted that the word contained within the EPA 1990 has the same definition as that under the common law. In *National Coal Board v Thorne* [1976] 1 WLR 543, the nuisance complained of amounted to defective guttering and windows within premises. The complainant argued that the physical condition of the building amounted to a nuisance under the Public Health Act. Watkins J said that a 'nuisance coming within the meaning of the Public Health Act 1936 must be either a public or private nuisance as understood by common law'. Thus, when deciding on the point of whether or not a statutory nuisance could arise when it was the inhabitants of premises who were suffering, such a state of affairs could not amount to nuisance because it was not an interference with the use or enjoyment of neighbouring property. Recent cases, however, indicate a relaxation of this requirement, so that there may be a nuisance where there is no emanation from one property affecting others (see *Network Housing Association Ltd v Westminster City Council* [1995] 93 LGR 280 and especially *Carr v London Borough of Hackney* [1995] Env LR 372).

Some cases suggest that the nuisance must involve some kind of personal discomfort, rather than any interference to property or its enjoyment as private nuisance requires (*Salford City Council v McNally* [1976] AC 379). In *Wivenhoe Port Ltd v Colchester Borough Council* [1985] JPL 175 it was said that dust falling only on a car or a garden would not be a statutory nuisance. Other cases point more decisively to the test being the ordinary common law test (*Godfrey v Conwy County Borough Council* [2001] Env LR 38).[6] *Hounslow LBC v Thames Water Utilities Ltd* (considered below) is important here. Although the decision did not turn on this issue, the court did stress the transfer of the statutory nuisance provisions from the Public Health Acts to the EPA 1990. This may have the more general consequence that what is meant by 'nuisance' should now be given a wider meaning, and that there may be a move away from the stress on public health seen in cases like *Wivenhoe Port Ltd* (this was also discussed, without being decided upon, in the *Shelley* case, Case 21.1).

Finally (and unlike private nuisance) the person affected by an activity which comes within the 'nuisance' limb does not need to have an interest in land for there to be a statutory nuisance. Private nuisance is a tort protecting interests in land, but statutory nuisance is not. This seems to be reflected in a recent case in which it was said that a statutory nuisance was the same as a public nuisance without reference to the word "public" (*East Dorset DC v. Eaglebeam Ltd* [2007] Env LR D9), an interpretation which seems to imply that there does not need to be any damage to land-type interests per se (in the same case it was also noted that statutory nuisance does not preclude bringing an action in public nuisance).

The following subsections follow those found in s.79(1):

[5] See also *Southwark Borough Council v Simpson* [1999] Env LR 553.

[6] Note that the test for nuisance in Scots private law is different to that in English law and must be used for statutory nuisance; the leading case is *Robb v Dundee City Council* [2002] Env LR 33; damage to property, or mere discomfort would not amount to a nuisance; note that Part III applies to Scotland since 1996 and therefore the (English) case law applies also, though not in relation to the meaning of nuisance.



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### *(a) Any premises in such a state as to be prejudicial to health or a nuisance*

Section 79(1)(a) provides that where premises are kept in a state which is prejudicial to health or a nuisance then this will amount to a statutory nuisance. 'Premises' includes land and any vessel not powered by steam-reciprocating machinery.

The provision covers the physical *state* of premises rather than any use to which those premises are put. Therefore, where noise or dust etc. is emitted from those premises from a use, this is not covered by section 79(1)(a). The aim is to prevent situations where there are physical elements which are either prejudicial to health or a nuisance (though since nuisance usually requires some emanation from one plot of land to another, the 'prejudicial to health' limb will invariably be used here).[7] Sewers are not 'premises' under this subsection of the Act (but see Case 22.4).

Land, or water, in its 'natural' state is unlikely to amount to 'premises', so any nuisance caused simply by a natural build-up of, for example, stagnant water is unlikely to be a statutory nuisance where the category of nuisance must involve premises (although it might well be a nuisance under other heads; see section 79(1)(e) and (h) below).

Until recently the position was that exposure to traffic noise due to a lack of proper sound insulation of council-owned flats might be remedied by a statutory nuisance action (*Southwark London Borough Council v Ince* (1989) 21 HLR 504). But in *London Borough of Haringey v Jowett* [1999] NPC 52 it was held that the changes made under the Noise and Statutory Nuisance Act 1993 (see s.79(1)(ga), below) not only extended statutory nuisances to include noise from vehicles in the street but at the same time completely excluded traffic noise from being a statutory nuisance. This is a rather surprising outcome, and appears to be heavily influenced by policy factors, especially cost implications for local authorities and the fact that the premises were otherwise of an acceptable standard. It also means that noise from railways may still be a statutory nuisance, though the matter is unclear.[8]

The wider issue which is raised here is whether the statutory nuisance arises because of the state of the premises, or because of external factors. There is a clear reluctance – seen in cases like *Jowett*, and also in *Vella v. Lambeth London Borough Council* [2006] Env LR 33, a case about noise disturbance because of poor sound insulation in a block of flats – for courts to decide that the problem lies with the premises, because of the costs that might be imposed on social and private landlords. However, to say that the problem is the external source and not the premises is not always going to appear satisfactory (it seems a poor justification if the complaint was a leaking roof) and the resource reasons, and the courts dislike of imposing 'new' obligations, clearly influence decision-making.

### *(b) Smoke emitted from premises so as to be prejudicial to health or a nuisance*

Section 79(1)(b) replaced the Clean Air Act 1956, s. 16, which previously made separate provision for the control of smoke from premises. If smoke cannot be seen but only smelt, this may still constitute a nuisance (*Griffiths v Pembrokeshire County Council* [2000] Env LR 622). There are exemptions contained within section 79(3) so that the following will not be statutory nuisances:

(i) smoke emitted from a chimney of a private dwelling within a smoke control area;
(ii) dark smoke emitted from a chimney of a building, or a chimney serving the furnace of a boiler or industrial plant attached to a building, or for the time being installed on any land;
(iii) smoke emitted from a railway locomotive steam engine;
(iv) dark smoke emitted, otherwise than as mentioned above, from industrial or trade premises.

[7] At least in England; the position in Scotland may be different, see *Robb v Dundee City Council* [2002] Env LR 33.
[8] See the analysis in *R (Wakie) v. Haringey Magistrates' Court* [2003] EWHC 2217.



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Most of these exclusions prevent overlaps with the atmospheric pollution controls in the Clean Air Act 1993 (see below) and with other legal controls.

### *(c) Fumes or gases emitted from premises so as to be prejudicial to health or a nuisance*

Section 79(1)(c) and (4) controls fumes or gases emitted from private dwellings. Fumes are defined as 'any airborne solid matter smaller than dust, gases including vapour and moisture precipitating from vapour' (s. 79(7)). By analogy with *Griffiths v Pembrokeshire County Council* [2000] Env LR 622, smells from fumes or gases may also be covered.

### *(d) Any dust, steam, smell, or other effluvia arising on industrial, trade, or business premises and being prejudicial to health or a nuisance*

The meanings of dust, steam and smell are fairly well established. However, the term 'effluvia' was defined in *Malton Board of Health v Malton Manure Co.* (1879) 4 ExD 302. This case involved the production of manure by the defendant company which produced vapours. It could not be conclusively demonstrated that these vapours were prejudicial to healthy people in the locality, although the Board of Health did demonstrate that it had the effect of making people who were ill more ill. The court held that this effect could amount to effluvia which were prejudicial to health. It is suggested that the meaning of effluvia covers the outflow of harmful or unpleasant substances.

The meaning of 'premises' in this subsection of the Act—s. 79(1)(d)—was considered in a decision with important practical consequences (Case 22.4).

**CASE 22.4** ***Hounslow London Borough Council v Thames Water Utilities Ltd*** **[2004] Env LR 4**

The local authority served a notice against a sewerage undertaker (Thames) requiring certain odours at a sewerage works to be abated. Thames objected, claiming that sewage works were not 'premises'. The courts have always been reluctant to characterize sewers as 'premises'. This appears to have been for the policy reasons of not allowing magistrates, in effect, to make decisions relating to very expensive public infrastructure works, or because by their nature sewers may have caused nuisances in the interest of *preventing* the spread of disease (the very objective of the Public Health Acts). This approach, taken in *R v Parlby* (1889) LB 22 QBD 520, was upheld in a case concerning a public sewer (*East Riding of Yorkshire Council v Yorkshire Water Services Ltd* [2000] Env LR 113). However, these cases were under what is now section 79(1)(a) and, remarkably, it had never been decided whether sewerage works fell within premises for section 79(1)(d).

In *Hounslow*, the court decided that the legislative history of what is now section 79 meant that sewerage works were premises for this subsection of the Act. A distinction was drawn between section 79(1)(a)—which related simply to the *state of premises*[9]—and section 79(1)(d) which related to the emission of noxious substances *from premises* (and made no mention of their state). The court also held that any policy considerations in Victorian times that might have justified restricting the scope of statutory nuisance actions against public undertakings no longer applied. Since the court did not cast doubt on the decisions reached in *Parlby* and *East Riding*, however, an anachronistic consequence is that 'premises' now means different things depending on which subsection of the Act is at issue.

The case is important because undesired smells are the subject of increasing numbers of complaints. Many sewage treatment works, originally built on the edge of towns, are now surrounded by new development. Indeed, Government recognised the problem and was consulting on various options

[9] *Birmingham City Council v Oakley* [2001] 1 All ER 385.



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ranging from a voluntary code to various kinds of legal control. The *Hounslow* decision, however, means that the courts decided the issue. Even if statutory nuisance law does apply to smells etc. from sewerage works, however, note that it will still be a defence to show that the best practicable means of abating the nuisance has been used (see the discussion of best practical means as a defence, below).

### *(e) Any accumulation or deposit which is prejudicial to health or a nuisance*

To come within the 'prejudicial to health' limb of section 79(1)(e), the accumulation or deposit has to be *capable* of causing disease rather than injury (see the *Cartwright, Everett* and *Oakley* cases above). The wide range of accumulations or deposits covered by this section have included sheep dung (*Draper v Sperring* (1869) 10 CB 113), cinders which emitted offensive smells (*Bishop Auckland Local Board v Bishop Auckland Iron and Steel Co.* (1882) 10 QBD 138); collections of household and garden waste (*Stanley v London Borough of Ealing* [2000] Env LR D18; *R (Knowsley MBC) v Williams* [2001] Env LR 28); and discharges of sewage on beaches (*R v Carrick District Council, ex parte Shelley* [1996] Env LR 273, above).

The deposit does not need to be caused by human action, and the natural accumulation of a substance can amount to a statutory nuisance, so long as it causes illness; examples include seaweed (*Margate Pier v Town Council of Margate* (1869) 33 JP 437) and pigeon droppings could also be covered. What will be important in these cases is determining by whose 'default or sufferance' there has been the accumulation; will this be the landowner if a public body had a responsibility to prevent, say, the seaweed coming ashore and causing a nuisance?

### *(f) Any animal kept in such a place or manner as to be prejudicial to health or a nuisance*

The keeping of a large number of animals on premises can give rise to a number of different enforcement actions. First, the keeping of a large number of animals may amount to sufficient intensification of a use to give rise to a change of use, which could result in enforcement action under the Town and Country Planning Act 1990 (see *Wallington v Secretary of State for Wales* (1990) 62 P & CR 150). Secondly, there may be common law actions which could be brought for nuisance. Thirdly, there could be action taken by the local authority under by-laws passed under the Public Health Act 1936, s. 81(2), and finally, there could be action taken under the statutory nuisance provisions of section 79(1)(f). Because birds or animals in their natural state are not 'kept', this provision would not apply to things like pigeon droppings (though a public nuisance action might be taken, see *Railtrack v Wandsworth London Borough Council* [2002] Env LR 9). Although (f) applies both to smells and noise, excessively noisy animals are usually dealt with by the following provision.

### *(fa) Any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance*

This provision was added by the Clean Neighbourhoods and Environment Act 2005 (CNEA 2005). It excludes insects protected under national conservation law, and in effect agricultural land, woodland and water (in other words, it is a provision aimed at insects from places like sewage treatment works).

### *(fb) Artificial light emitted from premises so as to be prejudicial to health or a nuisance*

This is another provision added by the CNEA 2005, in this case prompted largely by concerns about high-wattage security lighting (often of the kind which is triggered by movement). Excluded from this are various premises such as airports and train and bus stations and other premises where high levels of lighting are deemed to be justified e.g. prisons.

One thing which is unclear is whether streets can be 'premises' in this context, which is critical for deciding whether the provisions of the 2005 Act apply to street lighting (arguably the biggest cause of



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lighting problems). In Case 22.4, in discussing the *Hounslow* sewage case, we saw that 'premises' can mean different things depending on which category of statutory nuisance is being used. We also noted that, while some decisions on statutory nuisance can be rather backward-looking, emphasising the public health origins of Part III of the EPA 1990, others (like the *Hounslow* case itself) can be more progressive. Parliament deliberately refrained from stating clearly whether street lighting was, or was not, covered by the new provisions, and so the decision (which is obviously not without potentially significant cost implications) has been left to the courts.

### *(g) Noise emitted from premises so as to be prejudicial to health or a nuisance*

Noise here includes vibration (problematic issues in relation to quantifying noise nuisance are discussed below). Noise from model aircraft is included; otherwise aircraft noise is excluded (s. 79(6)). The difference between sub-section (g) and section 79(1)(a) is that the focus is on the premises where the noise comes from rather than the premises affected by noise. Also, the 'noise' sub-sections of section 79(1) do not have their origin in the Victorian Public Health Acts; this makes it easier to say that they should not carry a public health meaning and that 'nuisance' here should carry its normal common law meaning (the matter has yet to be ruled on).

Noise that does not exceed background levels may still be a statutory nuisance, as where the noise from a rural recording studio did not produce a measurement on a noise meter because of the background noise of haymaking (*Godfrey v Conwy County Borough Council* [2001] Env LR 38). It has been held (in the Crown Court) that if noise levels fall within advisory standards (e.g. BS 8233) then, despite well-founded complaints, the action was not well founded (*London Borough of Lewisham v Fenner* (1995) 248 ENDS Report 44). There seems to be no principled reason, however, why this should be taken as a general rule, especially in such a subjective area as noise control, and in *Cambridge City Council v Douglas* [2001] Env LR 41 noise which was in compliance with a public entertainments licence was held to be a statutory nuisance; the licence, in other words, could not authorize the nuisance.[10]

Whether noise amounts to a nuisance can, of course, be particularly subjective – on this see below on the evidence base needed for a successful statutory nuisance case. This helps explain why a local authority may choose to seek an alternative form of dispute resolution for this kind of statutory nuisance, before resorting to an abatement notice.

### *(ga) Noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery, or equipment in a street*

Section 79(1)(ga) was added by the Noise and Statutory Nuisance Act 1993 to deal with certain kinds of street noise. It has been applied to amplified busking in Leicester Square (*Westminster City Council v McDonald* [2003] EWHC 2698). It does not apply to noise made by road traffic (see *London Borough of Haringey v Jowett* [1999] NPC 52, discussed above), the armed forces or political or other demonstrations. Because it is not concerned with 'premises', slightly different procedures apply to things like identifying the person responsible, and the service of abatement notices.

### *(gb) Smoke, fumes, or gases emitted from any vehicle, machinery, or equipment on a street so as to be prejudicial to health or a nuisance*

This provision, which does not apply to any vehicle, machinery or equipment being used for fire brigade purposes, only applies in London boroughs (see s. 79(1)(gb), and the London Local Authorities Act 1996, s. 24). However, a significant exclusion is that it does not apply to smoke, fumes, or gases emitted from vehicle exhaust systems (s. 6B), which are regulated under specific statutory provisions (see Ch. 15).



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### *(h) Any other matter declared by any enactment to be a statutory nuisance*

This provision (s. 79(1)(h)) is to include any statutory nuisance provided for under future statutes. It also includes nuisances from mines, shafts and quarries under the Mines and Quarries Act 1954, s. 151, and various nuisances from the condition of ditches, ponds, etc. and certain watercourses (see further Ch. 17 'Overlapping controls').

## Statutory nuisances and overlapping controls

Many of the exceptions from the definition of statutory nuisance noted above ensure that there is no overlap between statutory nuisance law and more specialist regimes (e.g. local air pollution control). It should also be noted that while in the past statutory nuisance was occasionally used by local authorities in exceptional cases to deal with contaminated land, section 79(1A) excludes 'land in a contaminated state' from being a statutory nuisance. This is because the regime under Part 2A of the EPA 1990—closely modelled on statutory nuisance law—deals with contaminated land (although Part 2A only applies where contamination gives rise to *significant* harm and in trying to ensure that there is clear water between the two regimes the result is that some situations may 'fall between two stools'). Also, if premises are controlled under IPPC, or LAPC, then the Secretary of State must grant consent before proceedings for statutory nuisance can be instituted (s. 79(10)); again, this is to ensure a degree of consistency between regulatory systems (though the limitation only applies, in England, to paragraphs (b), (d), (e) and (fb)). In *R (Ethos Recycling Ltd) v Barking and Dagenham Magistrates' Court* [2010] Env LR 25 it was held that the Secretary of State's consent is required before court proceedings are begun rather than before the serving of an abatement notice (reflecting the summary nature of summary proceedings), so the Secretary of State's consent is only needed before any enforcement action is taken for breach of a notice and not for the serving of a notice to begin with. In some situations, however, there is no restriction on regulating either under Part III of the EPA or under another environmental law regime; an example is the control of waste deposits, which in addition to being subject to environmental permitting, and the controls in Part II of the EPA 1990, might also be a statutory nuisance under section 79(1)(e).

Under section 215 of the Town and Country Planning Act 1990 a local authority may require steps to be taken to remedy the condition of land which adversely affects the amenity of their area by serving an appropriate notice on the owner or occupier of land. These 'amenity notices' are designed to cover situations where the harm is not severe enough to amount to a statutory nuisance. The High Court has drawn a line between the use of such notices to protect amenity and to impose aesthetic judgements, eg about what colour a house should be painted (R (Lisle-Mainwaring) v Kensington and Chelsea RLBC [2017] EWHC 904). It is a defence to show that the state of the land has arisen in the ordinary course of events (s. 217(b)), e.g. under a planning permission. Section 215 can be an effective amenity provision, and examples of where amenity notices have been served include dilapidated houses, overgrown or squalid gardens, untidy scrap metal yards and land used for the storage of scrap cars. To encourage greater use of s.215, guidance has been published.[11]

## What is required to satisfy the local authority?

In practice, the local environmental health officer must decide whether or not a statutory nuisance is occurring or is likely to occur. As has been stated, the test is whether or not a statutory nuisance is prejudicial to health or a nuisance. An environmental health officer will visit the premises etc and make an objective decision as to whether or not the state of the premises or anything on those

[10] On the more general issue of the interplay between regulatory permissions and nuisance actions see Ch. 11.
[11] ODPM (2005), *Town and Country Planning Act 1990 Section 215 Best Practice Guidance*, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/11491/319798.pdf



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premises amounts to a nuisance. When reverting to the common law for the definition of nuisance, it is up to the environmental health officer to balance the many different factors used when deciding on whether or not a common law nuisance exists. The most important of these factors are:

(a) the nature and the location of the nuisance;
(b) the time and duration of the nuisance; and
(c) the utility of the activity concerned.

It also appears that commercial considerations, such as the ability to pay for abatement technology, or the impact of the abatement notice on profits, may also be relevant, because non-compliance with any abatement notice, if this is for commercial or financial reasons, can lead to criminal consequences (*Roper v. Tussauds Theme Parks Ltd* [2007] Env LR 31) Balancing all these factors together is the only way in which an environmental health officer can make an adjudication. If the complaint is about prejudice to health, then the environmental health officer will need to have suitable training in the relation between the conditions of premises and ill health, although this does not mean that a medical qualification is needed (*Southwark Borough Council v Simpson* [1999] Env LR 553). The summary nature of proceedings can also be seen from the fact that technical evidence may not be required. Thus in *Lewisham London Borough Council v Hall* [2003] Env LR 4, a noise nuisance case, acoustic measuring evidence was not required, and the professional judgement of the environmental health officer sufficed. (This might be contrasted with the Noise Act 1996, discussed below in respect of night noise.)

## What is required to satisfy the court?

Notwithstanding the role of environmental health officers, it is the magistrates' court which must determine whether there is a statutory nuisance. The courts have made clear that they do not have to accept uncritically the evidence given by any witness, even an environmental health officer. In *R (Hackney LBC) v. Rottenberg* [2007] Env LR 24, the council's environmental health officers had visited the premises on a number of occasions and considered that there was a noise nuisance (from a synagogue in one half of a semi-detached property), but the Court of Appeal held that it was for the court which determined the facts of the case (which will invariably be the magistrates' court) to decide, on the whole of the evidence, whether there was a statutory nuisance. The Court did note, however, that had the standard been an objective one – for example, one measured by some yardstick such as the level of decibels of noise at particular times of day - the case might have been very different.

Section 80(1) provides that for a local authority to act, the statutory nuisance must exist or be likely to occur or recur (there is no requirement for the notice to be corroborated by evidence of a particular occupier who has suffered unreasonable interference with the enjoyment of property; *Cooke v Adatia* (1988) 153 JP 129). Although statutory nuisance law has a criminal enforcement mechanism, the local authority must be satisfied only on the balance of probabilities. In the case of anticipated nuisances, however, there must be evidence that the forthcoming activity is likely to give rise to a statutory nuisance, which may be a high hurdle to overcome. However, where these problems can be overcome, such as in the case of a party where there is more than a suggestion that powerful audio equipment will be used, this may well be the only method of prohibiting certain types of nuisances in advance.

## Who is the 'person responsible'?

The enforcement of a statutory nuisance is normally against the 'person responsible', which is defined in section 79(7) as being 'the person to whose act, default or sufferance the nuisance is attributable'. This is a particularly wide definition and can include a local authority (many cases are taken against local authority landlords for the poor state of their housing stock), or a landlord who has allowed a



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tenant to carry on offensive activities, and can include those who fail to abate nuisances which arise naturally (*Margate Pier v Town Council of Margate* (1869) 33 JP 437). It can also include a tenant who has denied access to a landlord who wished to carry out works to abate a nuisance (see *Carr v London Borough of Hackney* [1995] Env LR 372). However, the courts will look to see whether there has been some failure to meet acceptable standards, e.g. sound insulation standards at the time of construction (see *Salford City Council v McNally* [1976] AC 379; *Vella v. Lambeth London Borough Council* [2006] Env LR 33). This is motivated by policy concerns, especially about resources, which would generally be irrelevant in a common law nuisance claim, unless the nuisance arose from the natural state of the land, see Ch. 11.

More than one person can be 'the person responsible' (s. 81(1)), though in cases like this it may be that the statutory nuisance arises because of one party's act or default and another party's sufferance (e.g. a child and its parent respectively regarding noise from the child's bedroom).[12] If there are any difficulties in locating the 'person responsible' for the existence of a statutory nuisance, section 80(2)(c) states that the definition of the person responsible can be extended to include the owner or occupier of the premises in question.

## Mediating disputes about noise from premises

In the case of s.79(1)(g) EPA 1990 (noise from premises), the Clean Neighbourhoods and Environment Act 2005 amended the law so that, instead of having to serve an abatement notice, a local authority can take such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence (s.80(2A) EPA 1990). However, if it appears that these steps will not work within 7 days, or have not worked by then, then an abatement notice must be served. This is a sensible development which recognises the particular characteristics that neighbour noise disputes may have, e.g. problems of subjective experience of noise, the wide range of ways in which noise problems can be abated, and perhaps also that complaints about noise sometimes mask other poor neighbour relations (see further below).

## The abatement notice

Once the local authority, through its environmental health officers, is satisfied that a statutory nuisance exists (and subject to the above regarding noise from premises), it is under a duty to serve an abatement notice which must require any or all of the following:

(a) the abatement of the nuisance or the prohibiting or restricting of its occurrence or recurrence;
(b) the execution of works or other steps necessary to comply with the notice.

There has been some uncertainty about precisely what this provision means. It has always been clear that there are some kinds of statutory nuisances where the local authority can, in the abatement notice, simply require the cessation of the nuisance. For example, an abatement notice can simply state that the nuisance is 'dogs barking', and leave it to the recipient of the notice to choose the most desirable manner of abatement (*Budd v Colchester Borough Council* [1999] Env LR 739). In noise nuisance cases, for example, the abatement notice does not need to specify maximum noise levels (see *East Northamptonshire District Council v Fossett* [1994] Env LR 388) and even if it does, this does not necessarily amount to specifying 'steps' which need to be taken (*Sevenoaks District Council v Brands Hatch Leisure Group Ltd* [2001] Env LR 5). On the other hand, it is clear that if works *are* specified in the abatement notice, the requirement must be clear and precise as the recipient needs to know what must be done to comply. This is because criminal sanctions apply if the notice is

[12] In a similar vein, more than one person may 'cause' an environmental pollution offence, see, e.g., Ch. 17 'Water pollution offences'.



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breached (see *Sterling Homes v Birmingham County Council* [1996] Env LR 121). The notice should specify the time within which compliance is required.

However, certain cases suggested that there could be situations where the notice would have to stipulate the works required. Thus in *Kirklees Metropolitan Council v Field & Others* [1998] Env LR 337, a case about a rock-face and wall which were in imminent danger of collapsing on to a row of cottages, the Court of Appeal held that by not specifying the necessary works the abatement notice was invalid. In contrast to cases like *Budd*, where the nuisance could be abated by some activity being stopped, in *Kirklees* it was obvious that major works of a positive nature were necessary, and the Court held that these should have been specified. The same approach was originally taken in *R v Falmouth and Truro Port Health Authority, ex parte South West Water Ltd* [2000] Env LR 658 (Case 22.2), where the High Court held that the abatement notice had to say what the sewerage undertaker should do to abate the nuisance because the problem could not be abated simply by turning off the effluent pumps. In the Court of Appeal, however, the *Kirklees* case was overruled and it was held that local authorities did not as a rule have to specify works where work was needed. Instead, as where works did not need to be undertaken, the recipient of the notice should be free to choose their own course of action, so long as in doing so they would comply with the abatement notice.

The Court of Appeal did indicate, however, that there might be extreme cases where this general principle might not be appropriate. The recipient will, of course, always be best placed to choose the method of abatement on grounds of cost and convenience. However, it is at least arguable that where works require considerable technical expertise, then it might be a relevant factor whether the recipient can reasonably be expected to have knowledge of this, or know where to obtain it. In cases like *Kirklees*, therefore, knowledge of what was needed to abate the nuisance might be seen as beyond the reach of the residents of the cottages, and therefore something on which they should properly be advised by the local authority. Thus, it might still be appropriate to distinguish between cases according to the relative degree of awareness and technical expertise as between the local authority and the recipient. But it does not seem that a body acting under statutory duties must be told which steps to take (see the *Falmouth* case, Case 22.2).

Where an individual has been served with an abatement notice, the contravention of that notice, without reasonable excuse, makes that person guilty of a criminal offence under section 80(4). (This should be compared with an abatement order, which immediately triggers a criminal sanction.) The criminal nature of statutory nuisance is an obvious contrast with the civil law of private nuisance. It means that the criminal standard of proof applies at the enforcement stage, and also that compensation payments under criminal law may be payable, although they are rarely ordered (but see *Botross v London Borough of Hammersmith and Fulham* [1995] Env LR 217; *Davenport v Walsall Metropolitan Borough Council* [1997] Env LR 24). Once a notice is served it takes effect in perpetuity.

This criminal aspect to statutory nuisance means that Article 7 of the European Convention on Human Rights—one aspect of which is that criminal offences must be formulated sufficiently clearly—is potentially relevant. However, in statutory nuisance cases where an 'abatement', rather than 'works', notice has been served, its relevance has been rejected; see the requirement to abate the noise in *Godfrey v Conwy County Borough Council* [2001] Env LR 38 (above) which was held to be human rights-compliant.[13] Conceivably, Article 7 might have some application to the very limited cases where a works notice might have to be served, but existing law seems adequately to protect the interests of the nuisance-causer.

## 'Reasonable excuse'

[13] See also *Westminster City Council v McDonald* [2003] EWHC 2698.



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Part III of the EPA 1990 is somewhat unusual in that having a 'reasonable excuse' for carrying out the activity which results in the contravention is not a *defence* to an offence committed under section 80(4) but rather a component part of the offence itself. If there is a reasonable excuse, the offence is simply not made out. The importance of this is that if the defendant puts forward an excuse, the burden is on the local authority to show, on the criminal standard, that it is not reasonable (see *Polychronakis v Richards and Jerrom Ltd* [1998] Env LR 346).

The test laid down for this would seem to be an objective one, i.e. 'would a reasonable person think that the excuse given was consistent with a reasonable standard of conduct?' The defence is not available where an abatement notice has been contravened deliberately and intentionally in circumstances wholly under the control of the defendant. Thus, a defendant could not argue that because there had been a three-year gap between the service of an abatement notice and its breach and no one had complained about the breach as it was of minimum inconvenience, there was a 'reasonable excuse' (*Wellingborough Borough Council v Gordon* [1993] Env LR 218, where the Court, with some reluctance, effectively held that there does not need be any 'victim' in a statutory nuisance case). It is not sufficient to say that there would be a defence to a private law action in nuisance. Indeed, in *A. Lambert Flat Management Ltd v Lomas* [1981] 1 WLR 898, it was said that COPA 1974, s. 58(4) was designed to provide a defence to a criminal charge where an individual had some reasonable excuse, such as some special difficulty in relation to compliance with the abatement notice. It was not an opportunity to challenge the notice; that should only properly be done on an appeal (see, in relation to the EPA 1990, *AMEC Building Ltd v London Borough of Camden* [1997] Env LR 330).

## Defences

The EPA 1990 does contain some defences where there is an offence under section 80(4).

### *(a) Best practicable means*

Where an abatement notice is served on trade or business premises and the nuisance complained of is caused in the course of the trade or business, it is a defence under certain heads of section 79(1) to show that the best practicable means have been used to prevent or counteract the nuisance (s. 80(7)). This does not apply to fumes or gases emitted from premises (s. 79(1)(c)), to the provision under s.79(1)(fa) relating to insects, or to the provision under section 79(1)(h) relating to nuisances in other statutes. In relation to artificial light from premises (s.79(1)(fb)) the defence is excluded unless from industrial, trade or business premises or certain specified sports facilities i.e. floodlighting of outdoor sports grounds..Although there is not any complete definition contained within the EPA 1990, certain elements must be taken into account under section 79(9). These include local conditions and circumstances, the current state of technical knowledge, the financial implications, and the design, installation, maintenance, manner and periods of operation of plant and machinery.

The defence has to be established on a balance of probabilities, and the burden of proof lies on the defendant to show that it had taken reasonable steps to prevent or counteract the nuisance. Thus, where a defendant had submitted a planning application for noise reducing bunding to counteract a noise nuisance, but failed to answer the local planning authority's request for further information, it failed to discharge the burden of proof that it was using best practicable means to prevent or counteract the nuisance (*Chapman v Gosberton Farm Produce Co. Ltd* [1993] Env LR 191).

**BOX 22.2 The best practicable means defence and the duty to serve an abatement notice**



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Should a 'BPM' defence be taken into consideration before an abatement notice is served? On a strict reading of the Act, and following *Shelley* (see Case 22.1), it probably should. There is also the practical point that deciding at this stage whether the defence has been made out will delay the serving of notices for weeks or months. On the other hand, even if the defence was made out then the local authority would have to serve another abatement notice, since there would still be a statutory nuisance. There is no authoritative ruling on this point. The answer probably depends partly on what period of time it would be reasonable for the local authority to decide whether BPM applies, and partly on the standard of proof needed (i.e. whether it must be satisfied that BPM applies, or whether the defence is only a possibility). In practice environmental health officers may look to the factors that would justify the defence when they consider whether premises are operating unreasonably in a nuisance sense.

The extent of the defence, and thus a limitation of statutory nuisance, is illustrated in *Manley v New Forest District Council* ([2000] EHLR 113) where an abatement notice was served against kennels following complaints about noise. The best practicable means were already being used at the premises to restrict noise levels, but the Crown Court thought that moving the establishment to a non-residential area could be included within best practicable means. The High Court disagreed, in effect holding that statutory nuisance law is intended to regulate existing trade or business premises, and not to engage in industrial relocation (an approach which reflects the general approach to deciding amenity nuisance cases, see Ch. 11).

### *(b) Special defences*

There are specific defences available in relation to noise and nuisances on construction sites and in areas where there are registered noise levels under the noise abatement zone procedure (see EPA 1990, s. 80(9) and COPA 1974, ss. 60, 61, and 65–67, discussed further under 'noise from specific sources', below).

## Appealing against an abatement notice

Where an individual is served with an abatement notice there is a right of appeal against the notice to a magistrates' court. One advantage of the appeal system over a defence to a prosecution under contravention proceedings is that it allows for a far greater range of appeal grounds and therefore provides a greater scope for disputing the nuisance. An appeal normally lies within 21 days of the service of the notice. The grounds of appeal are set down in the Statutory Nuisance (Appeals) Regulations 1995, made under the EPA 1990. These include that:

(a) the abatement notice is not justified in the terms of section 80;
(b) there has been a substantive or procedural error in the service of the notice;
(c) the authority has unreasonably refused to accept compliance with alternative requirements, or that its requirements are unreasonable or unnecessary;
(d) the period for compliance is unreasonable;
(e) the best practicable means were used to counteract the effect of a nuisance from trade or business premises (see above).

Furthermore, the regulations allow an abatement notice to be suspended pending the Court's decision, unless the local authority overrides the suspension in the abatement notice with a statement to the effect that the notice is to have effect regardless, and that:

(a) the nuisance is prejudicial to health;
(b) suspension would render the notice of no practical effect (e.g. where nuisances are to cease before the action can be heard in court); or
(c) any expenditure incurred before an appeal would not be disproportionate to the public benefit.



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**BOX 22.3 Third party rights**

Unlike the person on whom an abatement notice is served (see above), third parties have no right to appeal notices, e.g. if they think that the notice does not go far enough in combating a nuisance. Their remedies are either (i) to seek a judicial review of the notice (expensive); (ii) complain to the Local Government Ombudsman (slow); or (iii) complain under section 82, effectively asking the magistrates' court to serve an abatement order in stronger terms than the original abatement notice served by the local authority. In practice, this cheaper and quicker option is the one most relied upon.

## Individual action

It is often the case that local authorities' environmental health departments are overworked and understaffed and have neither the resources nor sometimes the inclination to deal with disputes regarding statutory nuisances. Section 82 allows a complaint to be made to a local magistrates' court by any person who is aggrieved by the existence of a statutory nuisance. This procedure allows for any person within an area to bring a more affordable and expeditious proceeding than a private law action. Ironically, complaints are most frequently made *against* local authorities about the poor state of their housing. One particular limitation upon this procedure is that the nuisance must be in existence and therefore it cannot be used to anticipate problems. Therefore, a person has no right of action under this section to stop a nuisance which is likely to occur in the future (e.g. loud parties). If the person can satisfy the magistrates that there is an existing nuisance, or that there is likely to be a recurring nuisance, the court must issue an abatement order requiring the defendant to abate the nuisance within a specified time, and to execute any works necessary for that purpose and/or prohibiting a recurrence of the nuisance, and requiring the defendant, within a specified time, to carry out any works necessary to prevent the recurrence. The magistrates may fine a defendant up to £5,000, and £500 per day thereafter, for non-compliance with an order (s. 82(8)). It is worth noting that under 82(2) a fine can also be imposed at the point that the order is served.

Section 82(12) provides that if a complaint is brought while the statutory nuisance exists then the person complaining is entitled to the costs of any expenses properly incurred (including the cost of establishing the existence of the nuisance), even if the nuisance is abated by the time of any hearing.

## Sentencing powers for contravening an abatement notice

As noted above, contravening an abatement notice is a criminal offence (s. 80(4)). Section 80(5) and (6) provide for the penalties that may be imposed. The matter is triable only in the magistrates' court and, if found guilty, a private offender is liable to a maximum fine of £5,000. If the offence continues after the conviction they are liable to a further maximum fine of £500 for each day the offence continues. For industrial, trade or business offenders, an unlimited fine may be imposed (though there is no provision for daily fines on top of this) (s.80(6) as amended).

In addition to these sanctions, the magistrates have a 'discretion to award compensation' up to a maximum of £5,000. Obviously, if compensation in excess of this amount is being sought, then other remedies may have to be pursued; this may have been behind the decision of the local authority in *Wandsworth LBC v Railtrack* [2002] Env LR 9 to take a case in public and private nuisance, where there is no limit to the amount that a court can award in damages, rather than use its public health and statutory nuisance powers; see p 347). It is worth noting that civil sanctions do not presently apply to statutory nuisances.

## The use of injunctions and proceedings in the High Court



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In many cases the provisions of section 80 would not provide an adequate remedy in terms of either gravity or speed. Under section 81(5), a local authority may take court action to abate, prohibit or restrict any statutory nuisance. It may do this—by seeking an injunction in the High Court—where it considers that proceedings for an offence of contravening an abatement notice would not provide a sufficient remedy, and even where it considers that the abatement notice procedure would not be effective (*Vale of White Horse District Council v Allen & Partners* [1997] Env LR 212).

Injunctions have the practical advantage that breaching an injunction is a contempt of court, for which a two year prison sentence or an unlimited fine may be imposed. This is obviously far in excess of the penalties under the abatement notice procedure. This is one reason why, in *Barns (NE) Ltd v. Newcastle upon Tyne CC* [2006] Env LR 25, the Court of Appeal held that an injunction cannot be sought without the local authority having first served an abatement notice – the small stick should be used before the big stick – although other reasons are that the obligation to serve abatement notices is a self-standing duty (see the *Carrick* case, Case 22.1) which would have to be complied with in any event.

Injunctions are a discretionary remedy and will not be granted lightly. The activity complained of must be of sufficient gravity and/or urgency to justify stopping it; this might include deliberate breaches of the law in the past, or evidence that the nuisance offender will not be deterred by the abatement notice procedure.

## Community protection orders

Under Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014, community protection orders can be served by the police, police community support officers or local authorities (and potentially others given delegated powers) where the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and where this is unreasonable. The idea is that such orders might catch behaviour going beyond that which might be a statutory nuisance, though they could also be used where a statutory nuisance was suspected (for example, as emergency measures pending further investigation of whether there is a statutory nuisance). The notice is served on the person or body deemed to be responsible and must be preceded by a written warning. It is a criminal offence to breach a notice. Fines and fixed penalty notices apply.

## Local controls on noise

The most frequent use of the law relating to statutory nuisance, discussed above, is to control noise. However, as in other areas of environmental law, noise is controlled by a variety of standards, not just the flexible standards of nuisance law. This section considers some of these other mechanisms—which include a range of product and process controls, as well as controls on noise in particular areas or from particular activities—especially as they are controlled by local authorities. As with statutory nuisance, the legal controls discussed here are often found in controls relating to public health, but in some cases they come from the realm of public order legislation. In this sense they are not tailored environmental controls, but may indirectly regulate ambient noise levels more generally.

We do not outline in this chapter the whole range of controls on noise.[14] Some of these non-local controls are, however, mentioned below in passing, so that the local controls can be understood in their law and policy context. We also begin this section by considering noise in its wider environmental context.

## Noise as environmental pollution

[14] For a comprehensive, if now somewhat dated, overview see C. Penn (2002), *Noise Control*, Crayford, Shaw and Sons, 3rd ed.



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Most of the legal controls described in the following sections approach noise from a narrow anthropocentric perspective. In contrast, our understanding of the impact of noise on broader ecological interests is in its infancy. Although there is evidence of physiological changes, it has proven difficult to show that these give rise to adverse impacts on species. There are instances where noise has had a demonstrable impact on animals leading to successful legal action, as where the noise from a shotgun was maliciously used to interfere with the breeding of mink (*Hollywood Silver Fox Farms v Emmett* [1936] 2 KB 468). There are also examples where the courts have accepted that noise disturbance may affect wildlife. One example is where the High Court considered a challenge to the granting of oil exploration licences in the North-East Atlantic on the basis that seismic activity could adversely disturb cetaceans (whales and dolphins) (*R v Secretary of State for Trade and Industry ex parte Greenpeace (No.2)* [2000] Env LR 221). And the Court of Justice of the EU found that Austria had insufficiently protected the corncrake by not controlling various noisy activities associated with a golf course which posed a risk to its habitat (Case C-209/02 *Commission v Austria* [2004] ECR I-1211). But on the whole our understanding of the impact of noise on wildlife, although improving, remains quite limited, and precautionary controls have rarely been adopted.

## Noise and its perception

Noise, especially the rise in domestic noise complaints, is now regarded as a serious object of concern, although the 'true' extent of the problem is difficult to assess because figures about the levels of noise complaints made to local authorities (which over time have shown an increase) need to be looked at in the light of attitude surveys about how people experience and are affected by noise which show less of an increase, and longitudinal research which suggests a decrease in ambient noise levels.

As an object of regulation, 'noise pollution' poses some particular problems, the most important being as follows:

- Other than in severe cases, the effects of noise are experienced subjectively. The sound of music coming from a neighbouring property may be enjoyed or it may be suffered.
- *Why* noise is generated can be a factor in its perception; for some a wind turbine may be a noisy intrusion in the landscape, or it may be music to the ears of someone more concerned with reducing greenhouse gas emissions.
- What is important about noise levels is the level where the sound is heard, not where it is produced. (Indeed, 'noise' without a hearer is just vibration.) In this sense most noise standards are ambient standards, although some emissions standards regulate the sound made by objects like aircraft and lawnmowers.
- Noise will be experienced differently according to changing lifestyles. For example, as the 'rush hour' lengthens, the burden of noise pollution is increased, even though the area may not change in character and sound insulation levels remain the same. Noise which is normal for the daytime may cause disturbance to those who work at home or at nights. Banning smoking in pubs moves noise outside. The '24/7 society' undoubtedly creates noise problems.
- It is not simply the level of noise that may cause annoyance. Low whines and repetitive sounds may irritate as much as loud bangs or ill-tempered car horns.

All these features are captured by the non-statutory definition of noise as 'sound which is undesired by the recipient'.[15] It is this inherently subjective nature that means that any statistics about noise pollution must be handled cautiously. For example, in 1995/6 just less than 30 per cent of complaints

[15] *Final Report of the Parliamentary Committee on the Problem of Noise*, Cmnd 2056, 1963, the 'Wilson Committee'.



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were confirmed as nuisances, whereas in 2001/02 this percentage had fallen to just under 17 per cent, and in 2010/11 the figure was around 25%. Given the subjective nature of nuisance, and of changes in people's propensity to complain about things like this, it is difficult to draw any sort of firm conclusions.

What we can say is that there has been a relative rise in the number of complaints about domestic noise nuisance. In 1983/4 these were roughly equal to the number of complaints about industrial and commercial noise. By 1995/6, noise from domestic sources accounted for more than the number of complaints from all other recognised categories of noise combined. As Fitzpatrick remarks (see further reading), 'It would appear that it is less noise in itself that is the problem, but much more that it is coming from next door, or at least that it is more legitimate to complain about it'. The same care must be taken with statistics about the number of noise-related deaths, of which around 20 have been reported in recent years. There is a tendency to report a noise disturbance as the cause of such incidents, rather than as one aspect of much more bitter and tragic neighbour disputes. Finally, there is evidence to suggest that we tend to internalize some costs associated with noise. While we tend to complain to neighbours or the police about noisy neighbours, the response to road traffic and aircraft noise is usually to do nothing or to try to prevent the noise disturbing us, e.g. by double-glazing our houses, using ear plugs, or taking sleeping pills (hence often it is the victim, rather than the polluter, who pays for noise pollution).

## Policy approaches

A feature of noise pollution is that it is transient rather than persistent: noise does not accumulate in the environment the way that toxic chemicals do. This has consequences both for the setting and the enforcement of noise controls. Beyond simple tolerance, noise levels can be controlled at two main points:

- where it is produced, through preventive standards. These centre around standards for the decibel levels of manufactured goods; and
- *en route* to the hearer, by some form of barrier. This can be a physical barrier such as sound insulation, or a roadside embankment to muffle traffic noise. Or it may be a spatial barrier such as the separation of the source of the noise from those likely to be affected. This is the realm of planning controls, and planning guidance seeks to separate noise generating and noise sensitive developments.

The after-effects of noise pollution cannot be measured in quite the same way that the consequences of a water pollution incident can be. This also has an impact on the use of strategic mechanisms since, regardless of the subjective experience of noise, it is still much more difficult to categorise any particular area as 'noisy' than, e.g. to categorize a river as of 'poor quality' or land as 'contaminated'. Nevertheless, the general policy approach has been the use of environmental quality standards through nuisance-based controls. In relation to enforcement, this means measuring noise at the time and at the point at which it is experienced, or producing other evidence which attests to the nature of the noise. It also means that, in appropriate situations, emissions standards on machinery or products may be used. These reduce enforcement costs, but the tendency has been to use them selectively. In the last few years, 'noise maps' and the use of action planning have been seen as increasingly important strategic controls (see below). But there remains no national noise policy and tackling ambient noise levels is low on the present government's priorities.

## The development of statutory controls



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Statutory controls over noise emissions have been relatively late in coming. Noise nuisances were dealt with in some local Acts and in by-laws, but problems tended to be left to individually initiated action. Private law remedies were generally relied on, although in the case of civil aircraft noise these were *removed* quite early on under the Air Navigation Act 1920. The Noise Abatement Act 1960 was the first general Act on noise control, although this only added certain noise nuisances to the range of statutory nuisances controllable under public health law (and now regulated under Part III of the EPA 1990, see above). Following the report of the Scott Committee on *Neighbourhood Noise* in 1971, further controls on noise were introduced in Part III of the Control of Pollution Act 1974, which introduced provisions on street noise, noise from construction sites and noise abatement zone provisions.

Just as there is no national noise policy so there has never been consolidated legislation on noise, no doubt partly because noise controls are often one aspect of wider legislative provisions. This is certainly the case with a number of public order controls under general criminal justice and other 'behaviour control' legislation. But it also applies to quite a wide range of noise provisions in, e.g. the Civil Aviation Act 1978 and the Road Traffic Act 1988 (and to worker safety legislation and entertainment controls, which are outside the scope of this chapter). The impact of EU law has largely been in regulating the free movement of an odd assortment of goods under directives that contain what are in effect noise emission standards, though more strategic legislation has also been passed. The net result has been an incomplete, incoherent and unprincipled body of law, an 'ugly mosaic of separate legal controls'[16] which makes classification difficult. Often, noise emissions are assessed and regulated alongside other harm-causing factors, such as under the EIA, IPPC or Habitats Directive regimes.

## Domestic controls over noise

In addition to controls under statutory nuisance and under the common law of nuisance, there is a range of other national controls on noise. The approach taken here is to look first at the remaining provisions, other than those contained in the EPA 1990, that are most central to regulating neighbourhood noise, before considering controls on noise from specific sources; preventive and strategic controls; and overlapping controls.

### BOX 22.4 Mediating noise disputes

Resort to law is not the only way of dealing with noise. Increasingly, local authorities promote (and fund) mediation as an effective way of tackling noise disputes. Mediation can either be through face-to-face meetings of the parties, or indirectly through trained volunteers. Of the 16,000 requests in 2000/01 for the services of Mediation UK (the largest mediation service), 45 per cent related to noise problems, mostly from DIY, noisy children and music. The success rate of mediation—where agreement is reached or there is a substantial improvement in the situation—averages at least 50 per cent.

## Further controls on neighbourhood noise

There are a range of statutory provisions which govern neighbourhood noise. While some of these provisions relate to 'neighbour-type' disputes, there is an increasing tendency to regulate noise more generally.

[16] F. McManus and T. Burns, 'The Impact of EC Law on Noise Law in the United Kingdom', in J. Holder (ed.) (1997) *The Impact of EC Environmental Law in the United Kingdom*, Chichester: Wiley, p. 185.



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### *(a) Night noise*

The stated purpose behind the Noise Act 1996 is to make it easier to take action against night noise disturbances. To this end, a criminal offence is committed if, after a warning, a person is responsible for the emission of noise from a dwelling between 11 p.m. and 7 a.m. (and, if the local authority wishes, from licensed premises at any time) and the noise level (in the complainant's dwelling) is above prescribed levels. The test for whether a person is responsible is the same as that used in statutory nuisance. The prescribed levels are set out in a Circular[17], and provide that the noise level must be at least 35 decibels, if the underlying noise level is 25 decibels or less. Alternatively, if the background noise level is above 25 decibels, then the noise being emitted must be at least 10 decibels above that. To give an indication of how loud this is, the sound of an ordinary bedroom at night is around 25 decibels, and the sound of a library about 40 decibels. An increase of 10 decibels is approximately a doubling of loudness. The offence attracts a fine of up to £1,000 (an unlimited fine if involving non-residential premises), the option of a £100 on-the-spot fixed penalty notice (this limit may be increased by local authorities) and the summary seizure by the local authority of the sound equipment. There is a defence of proving there is a reasonable excuse for the noise.

There are three key features about the Noise Act 1996. First, it differs from nuisance law in that the determination of whether there is a nuisance is judged according to more or less objective standards. While the locality of the area is taken into account by reference to underlying noise levels, the way in which this is done is much less flexible. Many of the factors taken into account in nuisance law—such as duration and the nature of the activity causing the nuisance—are effectively ignored. Secondly, there is a clear break between an essentially civil (or civil-cum-criminal) law approach and the full use of criminal law sanctions. Third, the 1996 Act originally applied only in areas where the local authority adopted its provisions, with the local authority having an absolute discretion whether to do so. In this respect the Act was reminiscent of many of the early planning and environmental statutory provisions, and notably by 1999 only nine local authorities had adopted the powers. A central reason appeared to be that the 1996 Act really covers little that cannot be regulated under ordinary statutory nuisance law. It is also more draining on local authority budgets, since the duty to investigate complaints must be complied with immediately the complaint is made: authorities could not wait until the following day when environmental health staff are paid on ordinary rates. Nevertheless, section 42 of the Anti-Social Behaviour Act 2003 now provides that all local authorities in England and Wales *may* use the night-time noise provisions without first having to adopt them. Whether this will see a significant increase in their use remains to be seen; there must be a continuing question mark as to whether environmental health officers are any more enthusiastic about the use of inflexible standards in this area than they were when the 1996 Act was passed.

### *(b) Housing Act 1996*

Part V of the Housing Act 1996 makes it easier for both social and private landlords to evict tenants causing 'nuisance and annoyance' to neighbours. This extends to nuisance arising from a tenant's behaviour anywhere in the locality. As with the Noise Act 1996, a key approach is to amend the relevant procedural requirements. The Housing Act 1996 therefore makes it easier to seize noise-making equipment, and—as with statutory nuisance—provides for the use of 'professional' local authority witnesses, so that those affected do not need to give evidence. Amendments under the Anti-social Behaviour, Crime and Policing Act 2014 allow, amongst other things, for breach of a noise abatement notice under the EPA 1990 to be an absolute ground to take possession.

### *(c) Anti-social behaviour*

[17] Defra Circular NN/31/03/2004, *Noise Act 1996 (as amended by the Anti-social Behaviour Act 2003).*



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Anti-social behaviour orders (ASBOs) are no longer provided for, but under general public order and anti-social behaviour legislation, there are injunctions and crime behaviour orders which may be used to tackle anti-social behaviour, defined as conduct that has caused, or is likely to cause, harassment, alarm or distress to any person; conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises; or conduct capable of causing housing-related nuisance or annoyance to any person. See Anti-social Behaviour, Crime and Policing Act 2014.

## Noise from specific sources

There is a patchy collection of provisions that regulate noise from specific sources. These tend to control things like noise from outdoor sources such as construction sites and transport, or be reactions to public order concerns. There is no common approach taken. Controls include 'stop' and notice provisions, licensing, product and specification standards. Noise generally from industrial premises is not regulated as a specific object of control.

### *(a) Construction noise*

There are powers given to local authorities under COPA 1974 for the control of noise from construction and engineering works. Sections 59A, 60, and 61 allow councils to serve notices imposing requirements about the way that work is carried out. These may include quite prescriptive conditions about the type of plant and machinery used, but conditions about the time the noise is emitted and its level are more usually imposed. Although originally aimed at noise from construction sites etc, these provisions are worded widely enough to include noisy DIY works, and are apparently often used in this context.

It is a criminal offence to contravene such a notice without reasonable excuse, but it is a defence that the work was carried out under a consent issued under section 61. Such consents may be applied for in advance of construction work being carried out, which avoids changes to the work being needed because a notice is served after the work has begun. It is a criminal offence to carry out works or knowingly permit works to be carried out which contravene a consent. Such consents are, however, rarely sought, the fear being that stricter standards will be imposed in advance compared with those which might be imposed under notice once the work has begun,[18] an example of the law's reluctance to disturb activities on environmental grounds once wealth generation has begun.

### *(b) Transport noise*

Transport noise, especially from road traffic and from aircraft, has the capacity to cause noise levels which seriously damage quality of life and which are therefore incompatible with sustainable development.[19] Because of their mobile nature, specification and emission standards are often used, as with noise values for cars (generally set at EU level) and aircraft (generally set under international law and transposed into EU legislation). Over the years, these technical standards have seen noise 'emissions' from these sources fall. This is not to say, however, that there has been a concomitant reduction in actual noise levels; e.g. emissions from vehicles are estimated to have fallen by only 1 to 2dB(A) because of factors including the slow replacement of older vehicles, significant growth in traffic and questions over whether the test procedures reflect actual driving conditions. As a general point, then, vehicular or aircraft noise standards have no direct bearing on overall noise levels and can be rendered ineffective through increases in traffic levels.

Other source-based approaches used include things like speed restrictions and curbs on night flights, although a small number of 'barrier' or 'separation' controls are also used. In practice, planning controls are probably as important a mechanism as any in regulating traffic noise, since

[18] See *Report of the Noise Review Working Party* (1990).
[19] RCEP (1994) *Transport and the Environment*, Eighteenth Report, Cm 2674, paras. 4.4–4.17.



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these are crucial in determining exposure to noise. As a matter of planning policy, however, it appears that there is an emphasis on locating noise-sensitive developments away from noisy areas or activities. The following pages look at transport noise controls exercised at the local level, either by local authorities or highway authorities. We do not cover the numerous controls on specific sources of noise (such as cars or aircraft).

### *(i) Road traffic noise*

Road traffic noise comes mainly from engine noise and from the impact of tyres on the road surface. Noises from these sources are mainly tackled by a mixture of legislatively prescribed design standards and emission limits, often under EU law.

Where increased noise levels are caused by the construction or alteration of a highway, highway authorities must carry our noise insulation works to combat the effect of traffic noise on certain properties. Alternatively, they may provide grants for noise insulation to be fitted, a flexible means of implementing a specification standard rather than the use of economic tools. There are also powers under the Highways Act 1980 for highways authorities to undertake works to mitigate the adverse effects of constructing or improving highways, e.g. noise bunding (Highways Act 1980, s. 282). A similar scheme applies in relation to noise from railways and tramways.

The composition of the road surface also leads to significant differences in noise levels; for example, porous asphalt surfaces are quieter than conventional concrete surfaces by anything from 4 to 8 dB, although they also have environmental disadvantages such as greater use of quarried aggregates. However, there are so far no statutory controls governing road surfaces, and the composition of public road surfaces is determined only by Department for Transport practice in the case of trunk roads, and otherwise by local authorities. The impact of traffic noise can also be reduced by things like urban bypasses, although not all bypasses reduce traffic movements to the extent intended, as the controversial Newbury bypass illustrates. In any event, such policies have other environmental consequences.

The 'Cinderella' status of noise was emphasised by the low profile of noise issues in the White Paper, *A New Deal for Transport* (Cm 3950, 1998). Indeed, 'noise' as such was not mentioned so much as the need for preserving the 'tranquillity' of the countryside, at least as far as designated 'quiet roads' are concerned (see now s.268 Transport Act 2000). This suggests both an anti-urban policy focus, as well as an 'enclave' approach to noise control rather than a desire to reduce noise levels generally.

### *(ii) Aircraft and airport noise*

The main control on aircraft noise is under emissions standards which have been set under the framework of the 1944 Chicago Convention, in particular Annex 16. However, increases in the average size of aircraft over the years, and in the number of flights, have reduced the impact of improvements from the significant tightening of standards that has occurred (a phenomenon also experienced in relation to lorry movements). Even with the after-effects of 9/11, and the grounding of Concorde, noise levels around Heathrow still increased in 2001, an illustration of the inadequacy of relying only on emission control standards.

The general legal approach to airport and aerodrome noise is to give the Secretary of State a power to designate certain airports in order to subject them to specific controls on the frequency or time of aircraft movements (Civil Aviation Act 1982, s. 78), the perceived inadequacy of which was the basis for the unsuccessful human rights challenge in *Hatton v UK* (see ch 11).

### *(iii) Noise from boats*

It is briefly worth mentioning section 13(2) of the Countryside Act 1968 which allows a local authority to make by-laws, amongst other things, to prevent excessive noise nuisances in National Parks. Such



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by-laws may, e.g. regulate noise from boats or vessels by requiring the use of silencers or otherwise regulating noise or vibration levels. By-laws aimed at curbing noise and imposing a 10 mph speed limit on Lake Windermere, effectively ending high-speed power-boating and water-skiing there, came into force in 2005.

### *(c) Noise controls on other specific sources*

There are a number of other disparate provisions which regulate noise from specific sources. Directive 2000/14/EC, a product standard measure, regulates noise from various forms of outdoor equipment, including compressors and even lawnmowers.

At national level, regulations can be made to control noise from plant or machinery under section 68 of COPA 1974, but the policy preference has been to use codes of practice to minimise noise, which have been issued (under s. 71) in relation to various sources such as ice cream van chimes (SI 1981/1828) and model aircraft (SI 1981/1830). Although breach of a code of practice is not itself a criminal offence, codes may be taken into account in legal proceedings, for example in determining whether best practicable means have been employed.

Noise from loudspeakers and audible intruder alarms are regulated separately. It is generally an offence to use a loudspeaker in the street between 9 p.m. and 8 a.m., although exceptions are made for things like the emergency services and mobile grocers (COPA 1974, s.62). The Noise and Statutory Nuisance Act 1993 tempered this approach by introducing the right to obtain a consent from the local authority, although only where the local authority has adopted the powers in its area (s. 8 and sch. 2). A similar power to adopt noise control powers under the 1993 Act applies to audible intruder alarms (s. 9 and sch. 3). This power—which as yet is unused—gives local authorities the power to require alarms to comply with prescribed standards, coupled with obligations to notify the police and the local authority. There are also powers for local authorities to turn off alarms, if need be by getting the consent of a justice of the peace and entering by force. The Clean Neighbourhoods and Environment Act 2005, ss.69-81, gives powers for local authorities to designate intruder alarm notification areas, within which specific rules about notifying key-holders etc apply, and (even if an area has not been designated) give councils powers enhanced powers to control annoying alarms that have not been silenced within a reasonable time.

Under the Anti-social Behaviour, Crime and Policing Act 2014 a senior police officer the police or a local authority has the power, on the spot, to issue a closure order, generally for up to 24 hours only, if a public nuisance is being caused, or closure of the premises is necessary to prevent a public nuisance (s. 76).

There are other sources of noise where the police are the main enforcement body; these include music from raves (under the Criminal Justice and Public Order Act 1994) and the control of fireworks (the all year round use of which had become the most common source of noise complaint raised by constituents with their MPs, and on which see now the Fireworks Act 2003 and Fireworks Regulations 2003).

## General preventive and strategic controls

In addition to regulating specific sources of noise, there are a number of more general preventive and strategic mechanisms which might be used. In practice the town and country planning system has perhaps been the most important, but noise mapping and noise action planning is increasingly becoming a legal requirement.

### *(a) Noise abatement zones*

Under the Control of Pollution Act 1974 a local authority has a discretion to designate all or part of its area as a noise abatement zone (s. 63), although authorities must inspect their areas with the need



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for designating zones in mind (s. 57). When a noise abatement zone is in operation the local authority records the levels of noise from specified premises (see the Control of Noise (Measurement and Registers) Regulations 1976). These are usually trade and business premises, but places such as concert halls could also be covered. Recorded noise levels are then entered in a noise level register, which is open to public inspection. Once noise levels have been registered they can only be exceeded with the local authority's consent, in effect setting a ceiling on noise levels. There is, however, a right for affected premises to request the local authority's consent to exceed a recorded noise level. Consents can be made subject to conditions, and must also be recorded on the register. It is an offence to breach register levels or consent conditions (s. 65(5)). After conviction, the magistrates may make an order requiring works to be done, if the breach is likely to continue or recur. There is a power for the local authority to undertake such works itself and recover expenses from the person convicted (s. 69).

Noise abatement zones are therefore intended to control noise from premises in the long term by preventing an increase in noise levels, but under section 66, noise reductions can be sought if they would secure public benefit and are practicable at reasonable cost. However, a further qualification to this is that for trade and business premises there is still a best practicable means defence to any charge of breaching a noise reduction notice.

Where zones have been designated, relatively small areas such as industrial estates tend to be designated, while some zones govern single noisy industrial premises. However, the noise reduction provisions are generously worded to business, and the main use of zones is to avoid increases in noise levels. Of course, their restriction to premises makes them of little use in combating noise from mobile sources such as traffic, and thus general increases in noise levels. This, coupled with high enforcement costs and the statutory nuisance powers, may explain why, only about 86 zones have ever been designated in England and Wales. By the end of 2012 only 2 zones were in active use and the Government was consulting on abolishing the noise abatement zone powers of COPA.

### *(b) Other preventive approaches*

There is a range of other provisions that aim to control noise arising from states of affairs. Specification standards are used in the case of building design. Buildings must be constructed (or renovated) to prevent undue noise. These rules only apply to houses in buildings (such as flats) or to semi-detached or terraced properties: detached properties are not covered.

### *(c) Planning controls*

Planning controls will often be the principal, or only, means of regulating noise. This is certainly the case with things like wind turbines, which have no legal standards attached to their noise output. It is also true of general traffic noise from new road developments, where conditions can be imposed relating to things like earth banking, tree screening and proximity from housing. However, the planning system is of little use in regulating an increase in noise due to traffic growth, since this is not 'development'. (No matter how much the noise and traffic intensifies, the land is still a road: there cannot be a material change of use.) This illustrates the extent to which law is rather better at controlling new activities than regulating existing ones, especially incremental changes to existing uses.

Guidance on planning and noise is now contained in the National Planning Policy Framework, which needs to be read in conjunction (in England) with the Noise Policy Statement for England. This counsels the use of development plans and the development control system in separating new noise-sensitive developments from major sources of noise. Planning conditions are often used to minimise the impact of noise, e.g. by putting restrictions on the time when noisy activities may take place. A local planning authority can impose a planning condition which is more onerous than restrictions



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required under an abatement notice served under the statutory nuisance powers of the EPA 1990 (*R v Kennet District Council, ex parte Somerfield Property Co. Ltd* [1999] JPL 361). There is no legal requirement for planning officers and environmental health officers to reach the same decision about what level of noise is acceptable, although this might be thought desirable.

### *(d) Noise maps*

Statistics on noise complaints help understand the extent of noise pollution and its causes, but do not give an overall picture of the noise climate for an area. This is done by noise mapping, a technique which is much more advanced on the continent. Under Directive 2002/49/EC, Member States must complete 'noise maps' for all major conurbations above 250,000 people, roads, railways and airports by 2007. Smaller towns and roads need to be mapped by 2012. The results of this have been published by the European Environment Agency. The EEA estimates that "environmental noise causes at least 10 000 cases of premature death in Europe each year, with almost 20 million adults annoyed by it and a further 8 million suffering from sleep disturbance. In addition, an estimated 8 000 school children suffer learning impairment due to the effects of noise near to major airports in Europe."

The Directive also requires action plans to be produced to reduce high noise levels and protect quiet areas, by 2008 for the major areas and 2013 for the others. In England 23 agglomerations were identified for the first round of mapping. For airports in England, the Secretary of State is responsible for Heathrow, Gatwick and Stansted. For all other major airports the airport operators are responsible for drawing up action plans. The latest information is summarised in a UK country-wide fact sheet, at www.eea.europa.eu/themes/human/noise/sub-sections/noise-fact-sheets/noise-fact-sheets-1. This estimates that 4500 people annually are hospitalised, and 1500 prematurely die, because of noise levels. For further comment about the possible links between noise and premature death see http://www.bbc.co.uk/news/uk-england-london-33255542.

## Other environmental controls

With notable exceptions like those relating to aircraft noise, actions under private or public nuisance can still be taken despite the specific statutory provisions discussed above, although if a privately initiated remedy is sought it is more likely that statutory nuisance law will be used if this is possible. Leading cases on the interface between statutory and private law controls have involved noise; see *Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd* [1993] QB 343 and *Coventry v Lawrence* [2014] UKSC 13 (see Ch. 11).

As outlined in Chapter 14, noise emissions are a relevant factor in determining the proper application of the Industrial Emissions Directive (2010/75/EU). Environmental statements for developments requiring assessment under the Environmental Impact Assessment Directive (2011/92/EU, as amended) must include estimates of noise emissions. The need for an environmental statement to cover secondary and indirect impact means that noise from increased or altered traffic flows must also be considered.

# Local controls on air pollution

In Chapter 15 we describe the legal controls that regulate air pollution and the background to these. As noted there, a key driver has been a number of EU directives, which have set a range of quality standards, emission limits and product standards for things like motor vehicle exhausts. Some of these directives are specifically concerned with air pollution and air quality, while others deal with industrial processes which emit a range of polluting substances. For the more polluting processes the legal controls are mainly the responsibility of the Environment Agency implementing the IED, while



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local authorities control the less polluting processes. These controls, and the strategic context of the National Air Quality Strategy and Local Transport Plans within which they operate, are described in more detail elsewhere. However, there remain a number of national provisions with their origins in public health concerns which continue to apply and which are the responsibility of local authorities. Some of these controls, especially those which control smoke from industrial and domestic premises under the Clean Air Act 1993, are an important part of the National Air Quality Strategy, and are detailed below.

**The control of smoke, fumes, dust, and grit under the Clean Air Act 1993**

The control of smoke, dust and dirt from industrial and domestic fires was largely ineffective in dealing with the problems associated with such emissions in the early part of the 20th century (see Ch. 15). Although the Public Health (Smoke Abatement) Act 1926 attempted to control certain categories of industrial smoke, domestic smoke was prohibited only if it amounted to a 'nuisance'. The Clean Air Act 1956, later amended and supplemented by the Clean Air Act 1968, provided a comprehensive control mechanism for the protection of the environment from smoke, dust and fumes. These Acts were consolidated in the Clean Air Act 1993.

This Act constitutes a separate and distinct area of control. Essentially, it controls smoke, dust and grit from all fires and furnaces.

### *(a) Control of smoke from chimneys*

Section 1 of the 1993 Act prohibits the emission of 'dark smoke' from the chimney of any building. Any occupier who breaches section 1 will be guilty of a criminal offence. The section applies to all types of buildings, from domestic houses to industrial premises and crematoria. The mechanism of control specifically applies to chimneys from buildings. Although the definition of the word 'building' covers such structures as a greenhouse, it would have to be a part of a recognized structure (*Clifford v Holt* [1899] 1 Ch 698).

The prohibition applies only to 'dark smoke'; other types of emissions are covered either elsewhere in the Act or under different statutes. In attempting to determine whether smoke is 'dark', enforcement officers must make a visual assessment of the shade of the smoke emission by comparing the darkness of the smoke with a uniform chart known as a 'Ringelmann chart'. The chart contains five shades of grey by cross hatching black lines on a white background from clear (number 0) to black (number 4). The chart is rectangular in shape, measuring some 581 mm × 127 mm. The chart is used in accordance with certain guidelines laid down in British Standard 2742. It is held up by the operator and compared to the smoke from a distance of at least 15 metres and then comparisons are made between the colour of the smoke and the colour on the chart. If the colour of the smoke is as dark as, or darker than, shade 2 on the Ringelmann Scale it then qualifies as dark smoke (s. 3(1)). Where, however, an operator is experienced, section 3(2) allows for an assessment to be made independent of the Ringelmann chart, often by the use of a smaller, more portable smoke chart (129 mm × 69 mm). Some officers rely purely on their experience to assess whether or not the smoke is darker than shade 2 (for an example, see Case box 21.5).

The prohibition also only covers smoke emitted from chimneys. The definition of a chimney can be found in section 64 and is wide enough to cover all structures or openings through which smoke is emitted. Thus, smoke from outdoor fires or, for instance, burning straw or stubble is not covered by section 1.

### *(b) Strict liability*



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As in other environmental legislation, liability is strict, therefore prima facie *any* dark smoke emitted from a chimney would give rise to liability under section 1. The Act imposes liability on an occupier of a building from which smoke is emitted, irrespective of responsibility.

**(c) Exemptions and defences**

Section 1(3) provides for certain exemptions to be made by the Secretary of State. These exemptions are restricted by the duration of emissions. The Dark Smoke (Permitted Periods) Regulations 1958 allows three main exemptions for smoke from chimneys. First, there are time-limits imposed of anything between 10 and 40 minutes during any period of eight hours for emission of dark smoke depending on both the number of furnaces used and whether or not soot is blowing. Secondly, there is a limit of four minutes of continuous emissions of dark smoke where the cause is not owed to burning soot. Lastly, there is a limit of two minutes in each period of 30 minutes where smoke is black (that is, smoke as dark as, or darker than, shade 2 on the Ringelmann chart).

Furthermore, section 1(4) lays down three statutory defences. These defences are not absolute and require certain qualifying steps to be taken to ensure that the defences apply. The section provides that it is a defence to a charge under section 1(1) that the emission was:

(i) solely due to the lighting of a furnace, and that all practicable steps were taken to minimise or prevent emissions;
(ii) solely due to the failure of a furnace, and that the contravention of section 1(1) could not reasonably have been foreseen or provided against and prevented by action taken after the failure;
(iii) solely due to the unavoidable use of the least unsuitable fuel available when suitable fuel was unavailable, and practicable steps were taken to minimise or prevent emissions;
(iv) any combination of (i), (ii), and (iii).

### *(d) Enforcement and offences*

An important prerequisite of bringing a prosecution is that the enforcement authority is under a duty to notify occupiers of the existence of the offence 'as soon as may be'. The relevant enforcement officer will normally give this notification orally. If such oral notification is given, it must be confirmed in writing within four days of the date on which the officer became aware of the offence. In any event, written notice of the offence must be given within that time. If notification is not given, it is a defence to charges under sections 1, 2, or 20 of the Act (s. 51(3)). The offence is only triable in the magistrates' court. There are different maximum levels of fine for emissions from private dwellings (level 3 on the standard scale, ie £1000) and for any other case (level 5 on the standard scale, ie unlimited) (s. 1(5)).

### *(e) Emissions of dark smoke from industrial plants*

Section 2 of the Act prohibits the emissions of dark smoke from industrial trade premises other than from a chimney of a building (which is covered under s. 1). 'Premises' include the grounds of factories and open areas such as demolition sites (*Sheffield County Council v ADH Demolition Ltd* (1983) 82 LGR 177). Section 2(2)(b) gives the Secretary of State power to pass regulations giving an exemption to the burning of prescribed matter which emits dark smoke in the open. The Clean Air (Emission of Dark Smoke) (Exemption) Regulations 1969 exempt certain material such as timber, explosives, tar, and waste from animal or poultry carcases. Section 2(6) provides that industrial or trade premises include premises not used for industrial or trade purposes but on which substances or matter are burnt in connection with such processes. Thus, open areas without any connection to industrial activities would fall within control under this section.

## CASE 22.5 O'Fee v Copeland Borough Council [1996] Env LR 66



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O'Fee lit a bonfire on his farm. An environmental health officer judged that the smoke was 'dark smoke' and O'Fee was prosecuted under section 2 of the 1993 Act. At the trial no evidence was given as to the shade of the smoke when it crossed the boundary of O'Fee's farm 660 metres away. O'Fee appealed on the ground that there was no 'emission from land' (as required by s. 2, because 'premises' includes 'land'). This was rejected. What mattered was that there was an emission into the air, not whether any neighbour's land was affected. This makes practical sense, making enforcement easier. But it also means that the right to pollute the air does not depend on the size of one's property. The decision also shows that the Act is about atmospheric pollution per se, and the rights to the air above one's property are irrelevant.

Section 2(3) refers to the burden of proof required when attempting to show the causation of dark smoke. On trade or business premises, where the burning of material would be likely to give rise to an emission of dark smoke, such an emission can be taken as proved unless the occupier or person accused of the offence can show that no dark smoke was actually emitted. When fires have been extinguished but dark smoke has already been emitted there has often been difficulty in proving the source of the dark smoke. This section allows environmental health officers to act against smoke pollution even though there is no smoke emanating from the premises. The prohibition under section 2 applies not only to occupiers but also to any person who causes or permits the emission of dark smoke from industrial or trade premises.

There is a statutory defence under section 2(4) that the emission of dark smoke was 'inadvertent'. This would suggest that although the offence has an absolute liability, some degree of blameworthiness is necessary for an action to be successful. If the emission was inadvertent, it is also necessary to show that all practicable steps have been taken to prevent or minimise the emission of dark smoke. Practicability is defined in section 64 as meaning reasonably practicable having regard to local conditions and circumstances, to the financial implications and to the current state of technical knowledge. An offence under section 2 is triable only in a magistrates' court, the maximum fine being set at level 5 on the standard scale (s. 2(5)).

### *(f) The control of grit, dust, and fumes*

The Act does not only cover smoke. Emissions from furnaces can also contain particulate matter and the Act extends to cover such particulate matter, ranging from the largest (being grit as defined in the Clean Air (Emission of Grit and Dust from Furnaces) Regulations 1971), through dust and small solid particles between 1 and 75 Bm in diameter (as defined in BS 3405), to fumes (which are defined as any airborne solid matter smaller than dust) (s. 64). There are proactive measures for preventing smoke, dust, grit, and fumes being emitted from furnaces. Section 4 provides that furnaces over a certain energy value (excluding domestic boilers) should, as far as practicable, be smokeless when using a fuel for which it was designed. This control is implemented by section 4(1), under which anyone wishing to install a furnace has to notify the local authority before doing so. Where the local authority is notified and authorization has been given, then the furnace is deemed to comply with the provision. This, however, does not exempt the furnace from being subject to the prohibition on dark smoke under section 1. Where a furnace is operated without such an approval then the person who installed the furnace will be guilty of an offence (s. 4(4)).

This proactive approach is further strengthened by the requirement for grit and dust arrestment plant to be fitted to furnaces. This power is extended by sections 6 and 7, which control all furnaces partly installed or for which there is an agreement to install after 1 October 1969. Again, details of the type of arrestment plant must be given to the local authority. These powers extend to include all furnaces in which solid, liquid or gaseous matter is burnt as well as reducing the rate of the use of



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solid matter to a minimum 100 pounds per hour. The statutory requirements are fleshed out by the Clean Air (Emission of Grit and Dust from Furnaces) Regulations 1971, which contain information as to the quantities of grit and dust which may be emitted by reference to either the heat put out by the furnace or the heat taken in by the furnace.

### *(g) Exemptions*

There are exemptions to the requirement to supply details of plant to the local authority under section 6; section 7 gives two main areas of exemption. First, the Secretary of State can exempt certain furnaces by way of the Clean Air (Arrestment Plant) (Exemption) Regulations 1969, which exclude mobile or transportable furnaces, and certain other furnaces. Secondly, the local authority may exempt a specific furnace if it is satisfied that the emissions from the furnace will not be prejudicial to health or a nuisance.

### *(h) Monitoring provisions*

To enable the local authority to enforce its responsibilities effectively, section 10 allows the Secretary of State to make regulations which allow the local authority to monitor the emission of grit and dust from furnaces. This provision does not apply to fumes unless they are controlled specifically under other legislation.

The provisions regulating the measurement of grit and dust are contained in the Clean Air (Measurement of Grit and Dust) Regulations 1971 and the Clean Air (Units of Measurement) Regulations 1992. Under these regulations, the local authority has to give occupiers of premises not less than six weeks' notice in writing requiring them to make adaptations to any chimney serving a furnace to allow for plant and machinery to be installed to monitor the dust and grit from the furnace. Thereafter the local authority must give at least 28 days written notice requiring a test to be carried out in accordance with the procedure specified in an otherwise obscure book.[20] Then, after giving at least 48 hours written notice of the date and time of the tests, the occupier must send to the local authority within 14 days the report of the results of the test, results in terms of pounds of grit and dust emitted per hour.

These provisions apply only to a number of specific types of furnace including those that burn pulverised fuel or any other solid matter at a rate of 45 kilograms or more per hour.

### *(i) The control of height of chimneys*

As one of the main mechanisms for the control of environmental pollution into the atmosphere was to increase the height of chimneys to disperse the pollutant over a wider area, there is specific legislation to control the height of chimneys. The argument used by many scientists has been that the higher the chimney the higher the emission point, and thus the more diluted any emissions will be when they eventually come back down to the ground.

Under sections 14 and 15, an application for chimney height approval is required to enable the local authority to assess the height required, taking into account the geographical features and the constitution of the emissions, so as to avoid localised pollution. If approval is not obtained, it will only be an offence if the chimney is used once it has been constructed. The application form is prescribed by the Clean Air (Height of Chimneys) (Prescribed Form) Regulations 1969. An application must be made in the following circumstances:

- where a new chimney is erected;

[20] P.G.W. Hawksley, S. Badzioch, and J.H. Blackett (1961), *The Measurement of Solids in Flue Gases*, Leatherhead: The British Coal Utilization Research Association.



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- where the combustion space of a furnace serving an existing chimney is enlarged by adding a new furnace to an existing number of furnaces all serving the same chimney;
- where a furnace is removed, or replaced, but only where a furnace burns pulverised fuel, or burns solid matter at a rate of 100 pounds or more per hour, or burns more than 1.25 million BTU per hour of any liquid or gas.

In addition to these controls, planning permission must also be applied for.

When deciding whether or not to grant chimney height approval, the local authority must be satisfied that the chimney height will be sufficient to prevent, so far as is practicable, the smoke, grit, dust, gases, or fumes emitted from the chimney from being prejudicial to health or a nuisance when taking into account (s. 15(2)):

- the purpose of the chimney;
- the position and descriptions of buildings near it;
- the levels of the neighbouring ground;
- any other matters requiring consideration in the circumstances.

If the local authority decides to grant approval, it can grant it with or without conditions, but these must relate only to the rate and quality of emissions from the chimney (s. 15(3)). If the local authority turns down an application, it must do so giving written reasons and an indication as to what it thinks the lowest acceptable height would be. There is a right of appeal to the Secretary of State (s. 15(6)).

As in other areas of control in the Clean Air Act, the Secretary of State may exempt certain boilers or plants from this control for chimney height approval. These exemptions can be found in the Clean Air (Heights of Chimneys) (Exemption) Regulations 1969. The regulations specifically relate to the need for approval to construct a chimney under section 10 and include mostly temporary or mobile boilers or plant.

The guidelines on assessing chimney heights are contained in the *Third Memorandum on Chimney Heights*, published by HMSO issued with joint Circular DoE 25/81, Welsh Office 12/81. This provides specific mathematical calculations which take into account background levels of pollution. Where pollution levels are higher then a chimney must be higher as well. The memorandum indicates that the chimney height required should vary according to the type of area concerned among other factors. It identifies the following types of areas:

- an undeveloped area where development is unlikely;
- a partially developed area with scattered houses;
- a built-up residential area;
- an urban area of mixed industrial and residential development;
- a large city or an urban area of mixed heavy industrial and dense residential development.

By assessing the level of pollution in the atmosphere in these generalized ways, it is hoped to achieve an idea of the required height for a particular chimney. In a large city or urban area it will be a requirement that chimneys should be at their highest.

### *(j) Miscellaneous controls*

Aside from chimneys serving a furnace, section 16 applies similar restrictions on chimneys serving a non-combustion process. There is a much simpler procedure for obtaining approval by submitting building regulation plans. The local authority may reject the plans if the chimney is not adequate to



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prevent emissions from becoming prejudicial to health or a nuisance. There is a right of appeal against refusal.

The Building Regulations 2010 apply not only to non-combustible furnace chimneys but also to those controlled by section 15. Building regulation approval is therefore required for all chimneys.

### *(k) Smoke control areas*

To improve conditions over wide areas and to control non-dark smoke, section 18 allows local authorities to designate smoke control areas. As there are difficulties in defining areas in relation to land, two or more authorities are entitled to join together and declare that a larger area than their own area is a smoke control area (s. 61(3)). Most smoke control areas were designated soon after the introduction of the Clean Air Act 1956. Although the process has slowed down since then, the number of smoke control orders continues to rise. By 1990 nearly 10 million premises were subject to control, and the success of the orders was a major factor in achieving compliance with EU Directive 80/779 setting quality standards for smoke and sulphur dioxide.

The effect of designating a smoke control area is to make it an offence for occupiers of premises to allow any smoke emissions from a chimney.

The Act exempts both authorized fuel and certain fireplaces from control. The Smoke Control Areas (Authorized Fuels) Regulations 1991 include all the types of material which can be burnt without emitting smoke. Fireplaces are exempted under various Smoke Control (Exempted Fireplaces) Orders. Therefore, either authorized fuel can be used per se or unauthorized fuel can be used on exempted fireplaces, and the use of either could amount to a defence to a prosecution under section 20. The burden of proof for showing that such exemptions apply falls upon the occupier. These provisions have particular impact on the many who have, or might be looking to install, wood burning stoves. Such is the extent to which these are now being used (more than a million homes) that they are the most significant source of the most harmful particulate emissions.

The local authority may under section 18(2) exempt specified buildings, classes of building or fireplaces from the smoke control area. It may make different provision for different parts of the area or limit their operation to specified classes of buildings in the area, such as factories rather than houses.

The process for making an order designating a smoke control area is contained in schedule 1.

## Statutory nuisances and the Clean Air Act 1993

Smoke, dust, and other emissions from a chimney (industrial or domestic) are excluded from the definition of a statutory nuisance found in the EPA 1990 (s. 79(7)). In addition, under section 79(10) of the EPA 1990, statutory nuisance actions cannot be taken in respect of emissions which could be the subject of enforcement action under Part I of the EPA 1990 (though see discussion of the *Ethos Recycling* case above on this point). In both cases, the rationale behind these provisions is that there are co-existing provisions which should be used to deal with the problems arising from the emissions (namely, the Clean Air Act 1993 and the air pollution control provisions of the EPA 1990). The provisions of the Clean Air Act 1993 do not apply to prescribed processes under environmental permitting (Clean Air Act 1993, s. 41A).

# Local authority controls on traffic pollution

In addition to the strategic management of traffic through Local Transport Plans (see Ch. 15), there are statutory powers available to control traffic under a number of different statutes. The Road Traffic Reduction Act 1997 places a duty upon local authorities to review the levels of traffic on local roads and to produce targets for reducing numbers. This will be supplemented nationally by the traffic



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reduction targets produced under the Road Traffic Reduction (National Targets) Act 1998. Under the Road Traffic Regulation Act 1984, local authorities have wide powers to regulate traffic under Traffic Regulation Orders (TROs) which can be used to restrict traffic in certain areas (e.g. pedestrianized areas of city centres) or even single roads. TROs can be made in order to achieve air quality objectives (s. 1(g) of the Road Traffic Regulation Act 1984). Further measures to reduce traffic and contribute to air quality improvements can be made by using traffic calming under the Highways (Traffic Calming) Regulations 1999 which allow local authorities to create narrow 'gateways' into urban centres. Traffic regulation conditions can now be applied not just to prevent danger to road users or curb congestion, but also to reduce or limit noise or air pollution (Transport Act 1985, s.7 as amended by Transport Act 2000, s.142). The Transport Act 2000 also makes provisions for restrictions on workplace parking.

## High hedges

A final local authority control that we should mention relates to high hedges. The height that some evergreen hedges can reach, and the speed with which they do so, have been an increasing source of neighbour disputes, because of the amount of light that they block out all year round. The legislative response is Part VIII of the Anti-Social Behaviour Act 2003, which in many ways mirrors Part III of the EPA 1990. A 'high hedge' is defined as two or more evergreens over 2 metres in height, which is a barrier to light or access (unless the hedge has significant gaps in it), and it must adversely affect the reasonable enjoyment of the neighbouring property. The test is an objective one—what would the impact on a prospective occupier be? As with statutory nuisance, the local authority is under a duty to investigate complaints, and under a duty to serve a remedial notice (which it must do so as soon as reasonably practicable), giving reasons.

There are, however, some keys differences which help explain why an initial proposed to add 'high hedges' to the list of prescribed statutory nuisances was not followed through. First, the local authority does not have to serve a remedial notice if it considers that the complainant has not exhausted informal ways of resolving the dispute; secondly, the remedial notice must describe both what initial action is needed *and* what preventive action must be taken (because hedges keep growing); thirdly (because there is not the public health imperative which justifies abatement notices coming into effect immediately), the notice cannot come into effect until the end of a compliance period, which itself can only begin 28 days after the notice is served; fourthly, the fine levels are lower (£1,000), and the court has a discretion not to fine but to re-order that the necessary steps are taken (if this second order is also breached, then a further fine of £1,000, plus £50 per day, is payable); and, finally, both parties to the dispute may appeal the issuing of a notice, or its withdrawal, to the Secretary of State or National Assembly for Wales. Obviously the hedge will not have to be reduced until the appeal is determined, which again distinguishes this area of local authority control from the speed and summary nature which is the essence of statutory nuisance law.

## CHAPTER SUMMARY

1. While many rules of environmental law have evolved from earlier public health law, local authorities continue to play an important role in controlling various forms of local environmental pollution problems such as noise, smoke and smells.
2. Part III of the EPA 1990 covers various listed activities where they are 'prejudicial to health or a nuisance'. Local authorities must investigate their areas for statutory nuisances, and serve an abatement notice where they find such nuisances.
3. As an important fallback, affected individuals can go to a magistrates' court and ask the court to serve an abatement order.



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**4** Local authorities (or courts) can either require the abatement of the nuisance, or notify the person responsible that certain works must be carried out.

**5** Statutory nuisance is intended to be a relatively quick and cheap mechanism, and considerable discretion is given to local environmental health officers in identifying nuisances and drafting abatement notices, though the court retains the final word on whether something is a statutory nuisance.

**6** Industry is given a defence of showing that it has used the best practicable means of counteracting the effect of the nuisance.

**7** Failure to comply with an abatement notice or order is a criminal offence punishable by a fine. In serious cases an injunction preventing the nuisance might be granted.

**8** Statutory nuisance is often used to control excessive noise, but other local controls also do this. Noise control is different from other forms of environmental pollution because of the inherently subjective nature of noise and because it is transient.

**9** Local authorities can designate areas as noise abatement zones (although few have been designated) and can control noise from construction sites, noise at night, and neighbour noise disputes. There is an increasing use of the criminal law to control neighbour noise.

**10** EU law has contributed to noise control in various ways. Traditionally this has been through product controls (e.g. noise from lawnmowers) and process standards (e.g. under IPPC) but noise maps for built up areas, and action plans for problem areas, are now required.

**11** Air pollution is a global problem, but many disputes are local in nature and local authorities have various control powers under the Clean Air Act 1993.

**12** The 1993 Act regulates dark smoke from chimneys and from industrial premises, and grit, dust and fumes from furnaces. It also regulates the height of chimneys in order to disperse atmospheric pollution. Smoke control areas can also be designated.

**13** Local authorities also have powers to regulate road traffic in order to improve air quality, and now noise pollution.

**14** A recent development is that local authorities now have obligations to curb problems associated with high hedges. The procedure is essentially the same as that for abating statutory nuisances, but there are some notable differences.

## QUESTIONS

**1** Which of the following might be a statutory nuisance? What further information would you need?

(i) A large pile of horse manure in a neighbour's back garden.

(ii) A wind turbine.

**2** Gill and Heather occupy adjoining properties. Gill looks after rescue dogs and usually has around seven dogs in her house (although they mostly live in kennels in the garden). As she works shifts, she often does DIY and uses her washing machine very late at night. Heather is bothered by the dogs' noise and smell, and by the noise and vibration of the washing machine. Heather is a part-time car mechanic and her front garden Is littered with car junk. There are also used and unused syringes amongst the rubbish. Occasionally Heather burns car tyres and other refuse at night. Gill complains about the noise from the car repairs and the ash which lands in her garden. As a screen against the sight of Heather's garden, Gill planted a short leylandii hedge which is now 3 metres high. Heather complains that the hedge prevents her growing sun-loving plants. Both Gill and Heather complain to the local authority. Advise the local authority.

**3** When dealing with environmental problems, what are the advantages and disadvantages of the various local controls described in this chapter compared to the remedies described in Chapter 11?



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## FURTHER READING

On local authorities generally, a good if increasingly dated general account of their functions is N. Hawke, B. Jones, N. Parpworth and K. Thompson (2007), *Pollution Control: the Powers and Duties of Local Authorities*, Crayford, Shaw and Sons (which goes well beyond the topics in this chapter).

In relation to statutory nuisance, R. McCracken *et al.*, *Statutory Nuisance* (London: Bloomsbury, 3rd ed,2012) provides the most detailed discussion, both of the law and of practical issues, and is not shy in offering views on how uncertain areas of the law ought to be resolved. Other comprehensive analyses of the law are R. Malcolm and J. Pointing, *Statutory Nuisance: Law and Practice* (Oxford: Oxford University Press, 2nd ed., 2011) and S. Tromans and M. Poustie's annotations to Part III of the EPA 1990 in *Environmental Protection Legislation 1990–2002* (London: Sweet & Maxwell, 2003), the latter including the law in Scotland. Good articles on statutory nuisance include M Morgan Taylor and D Hughes 'Exterior Lighting as a Statutory Nuisance' [2005] JPL 1131 (which considers the provisions added by the CNEA 2005 in this area, covers a wide range of possible policy approaches to this problem, and focuses on whether streets can be 'premises'); R. Malcolm and J. Fielding, 'Statutory nuisance: the sanitary paradigm and judicial conservatism' (2006) 18 JEL 37 (which questions the approach taken in cases like Oakley as being 'based on a somewhat whiggish view of history') and L. Etherington, 'Statutory Nuisance and 'Hybrid Orders': 'True Crime' Stories?' (2012) 33 Statute Law Review 390 (which makes some very incisive points about statutory nuisance when compared to other forms of part civil / part criminal orders like (as was) ASBOs)

On noise, a good way to get a feel for the area, and trends over time, is to look at the annual surveys produced by the Chartered Institute of Environmental Health (though note the change from 2006 in how the statistics are gathered and presented). The technical aspects of noise generation and monitoring, as well as a comprehensive survey of the law, albeit not one that discusses key EU measures such as the 2002 Directive, is found in C. Penn, *Noise Control: The Law and its Enforcement* (3rd edn Crayford: Shaw & Sons, 2002). Although increasingly out of date on the law, M. Adams and F. McManus, *Noise and Noise Law: A Practical Approach* (Chichester: Wiley Chancery, 1994) is an excellent short introduction to the law and policy. J. Fitzpatrick, 'A Quiet Life: Right or Duty', in I. Pardo (ed.), *The Morals of Legitimacy* (Oxford: Berghahn Books, 2000) is an insightful critique of the creeping use of law to regulate domestic arrangements like neighbour noise disputes. P. Bishop, 'Inadequate sound insulation: does the law of nuisance provide an effective remedy?'(2005) 7 Env. L. Rev 238 looks at the current limitations of pursuing cases based on nuisance, both in private law and statutory nuisance. On the international – and non-anthropocentric – side, see K. Scott 'International Regulation of Undersea Noise' (2004) 53 *International and Comparative Law Quarterly* 287.

On local air pollution controls D. Hughes, N. Parpworth, and J. Upson, *Air Pollution Law and Regulation* (Bristol: Jordans, 1998) is a straightforward (but dated) exposition of the statutory materials in the area and covers international, European and domestic sources of law. For sources on the historical background to local air pollution controls, as well as key sources on national air quality law, see the sources mentioned at the end of Chapter 15. At the time of writing (May 2017) the UK Government's draft air quality plan seemed to place emphasis, controversially, on the importance of local authority action as a means to ensure compliance with the EU Clean Air Directive.

## WEB LINKS

A good general portal on both noise and air quality is the website of Environmental Protection UK www.environmental-protection.org.uk. (On noise, it is worth noting the increasing reach of the Home Office, and arguably a slight diminution of the importance of Defra; but gov.uk web resources are not general kept up to date and are of little use.) The web site of the Chartered Institute of Environmental Health www.cieh.org includes a 2017 Policy Statement on Air Quality but annual statistics on noise



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complaints no longer appear. Comparative statistics on most local issues can no longer be found on *e-Digest of Environmental Statistics* www.defra.gov.uk/statistics/environment. On noise mapping for England, see https://www.gov.uk/government/publications/open-data-strategic-noise-mapping. Most local authority websites contain information about how statutory nuisance and noise complaints are handled. Finally, we don't cover measures covering only specific areas or regions, which means no coverage of things like the workings of the Greater London Authority Act 1999 and the various environmental policies and strategies of the Mayor of London.



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