

Consultation comments on the NTSG draft  
*Bringing common sense to tree management*

BTC/46/2010



Ms J Webb  
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Your Ref: NTSG Comments  
Our Ref: NTSG-DraftComments-200610-JB

20 June 2010

Dear Ms Webb

**Re: Comments on the NTSG Consultation Draft**

Further to my joint letter with Mr Lawson and Dr O'Callaghan of 14 June 2010, I write to set out my brief comments on the above draft.

I found the consultation process awkward and inhibitive in the sense that it was not sufficiently flexible to allow me to make the comments I wanted. More specifically, I make the following points:

- **Consultation period:** This is an important project and to only provide a one month consultation period is not enough, considering the potential for group comments and the busy nature of people likely to want to comment. I have not had enough time to review the document carefully and put down all my comments, so I have just had to briefly set out the main points. I was asked by the LTOA to join their group to comment and just could not fit it in, which was disappointing. For comparison, the BSI period for consultation on drafts is two months.
- **Consultation mechanism:** The document has many typos and inconsistencies. These need to be highlighted and yet this was not possible in the electronic process. Furthermore, there was no advice on how to do this or who to contact and I had to find out your contact details to follow this through. I was not sure how to identify these and have had to guess at what will be best to facilitate processing, which is not helpful or engaging.
- **Limitation on length of comments:** Limiting the number of words to comment was restrictive and prevented full comments. Although this may have made it easier for the NTSG agent to process, it certainly made it harder for me to comment.
- **Leading and pointless nature of some questions:** I found some of the questions leading and pointless. I found it hard to grasp why opinions were solicited on facts that cannot be changed. All the way through the process I felt simplistic questions were being asked to deal with complex points and that this was a hunt for supporting statistics rather than a genuine search for useful contributions.

- **Limited circulation and the label of wide stakeholder support:** This has been a passive consultation and there seem to be some obvious stakeholders that were not actively engaged, insurance companies being one. I can't help but feel that this has been a consultation of convenience rather than a serious effort. As such, it seems an exaggeration to afford it the credibility that the label of widely consulted implies. Certainly, the biggest stakeholder group of all, the general public, have not been actively engaged. In that context, to claim that this document has wide stakeholder support is a little misleading and I would expect that point to gain some support in the courts when challenged.
- **Obvious vested interest influence:** As I have noted in my detailed comments, the influence of stakeholders with vested interests is blatant. It is obvious that the starting point of some stakeholders is that no inspections at all are necessary. It is a little naive to expect the courts to miss this. If this is not regulated before publication, then I doubt if the document will get the acclaim that it seems is an aspiration from the text.

Turning to the typos and inconsistencies in the text, they were numerous and I have highlighted their first occurrence on the attached annotated version. The document was not competently proofed before release, which causes me great anxiety. If the basics are not right, then it is difficult to have confidence in the rest of the process. This is not an onerous or unusual requirement; for an example, take any recent government consultation. They set a reasonable standard and this document did not come anywhere close to that standard, which taints its pedigree.

Other general comments are that it would benefit from a glossary. There is a limit to how much technical words and phrases can be dumbed down and the balance is not quite right at the moment. It is not helpful to have all the references at the end of the document, with new sets of numbers for each chapter. It would be much more intuitive and helpful to have them at the end of each chapter, or as footnotes. This document is obviously expected to be used in proceedings and as a regular source of reference, but there is no numbering regime for the paragraphs. Such an omission demonstrates a lack of vision and understanding of how these sorts of documents are used and cross referenced. Furthermore, there is no built in navigation within the pdf; how old fashioned!

More specifically on the content, I have commented in the attached document and make the following summary points. I liked the layout (apart from the absence of numbering), but felt it would have benefited from more conceptual diagrams, which can significantly enhance the comprehension of the written text. Although I do not agree with all of the detail, I felt the first five chapters were useful, and well reasoned and constructed. However, I had an overwhelming sense that it was trying to create a scenario that does not exist, i.e. that there is great pressure on trees because of recent court judgments. This is not the case; *Poll* is the only one that caused any widespread anxiety and that was primarily because it was misinterpreted, not because it was flawed in any way. Firstly, where is the real evidence beyond the anecdotes that it resulted in widespread tree removals? Secondly, it costs much more to remove trees than have them inspected, so it does not make economic sense to fell before checking. This

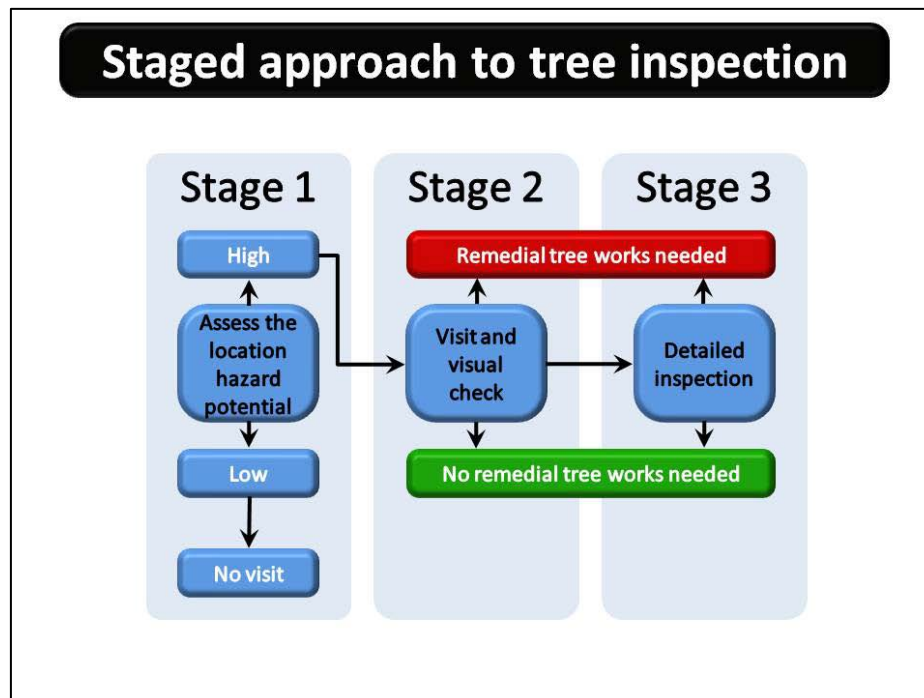
is more a problem with advisors, not so much with the judgment, and that is not made clear, probably because it is not convenient and does not fit in with the artificial construct that is being promoted. This obvious exaggeration is not necessary and does not enhance the credibility of the document.

The main problem for me arises in chapter six. I found it complicated and poorly reasoned, with little hope of it being easy to understand or implement. I believe the proposal that there are three levels of inspection is unnecessarily convoluted, is going to be very difficult for duty holders to implement, does not accord with the published HSE position and is unlikely to find favour with the courts. This last point is important because every judgment that finds against the thrust of this document will be another nail in its coffin. The stakeholders can have whatever views they want, but if they are not well reasoned, then they will be dismissed by the courts and all the good work of the NTSG on the issue of balancing benefit against risk will be diminished in value.

It is hard to fathom the relevance and importance of this idea of imminency. It is effectively impossible to place any simplistic boundaries to it and it is not a determinant issue. The main issues are firstly, is an inspection necessary and secondly, what is the nature of that inspection, i.e. a quick visual check or a detailed inspection. With three possible inspection types and at least two options for imminency, this all starts to get rather complicated and beyond the capacity of most duty holders to understand, let alone implement. It is detail that is not appropriate, not useful and not needed in this document.

Another aspect that must be specifically mentioned is this notion that, somehow, risk management is an informal process that can reasonably occur as a side show in our daily lives. There is a clear legal duty of care for all duty holders, which is not an informal obligation. To imply that this can be casually discharged by leaving it to the public and other non-duty holders is an excellent example of the vested interests of stakeholders at work in the formulation of this document. Even if this point is ignored in any redrafting, I doubt if it will be missed by the courts, who will be well aware that a duty of care is assigned to the duty holder and not vaguely to some third party. This idea of an informal inspection as a credible part of a management framework is unlikely to be sustainable.

However, rather than spend too much time on the shortcomings of the advocated approach to inspection, I feel it is likely to be more helpful to set out an alternative. There is one, it works, it is easy to understand, and it fits in with existing HSE guidance and the emerging position of the courts. I introduce it visually in the following diagram.



Duty holders want to know how to best demonstrate that they have met their duty of care in the event of an accident. Although duty holders would like to know the precise requirements, i.e. what is the standard they should meet and what is reasonable, that is not possible to provide within the UK legal framework. The standard of the duty of care varies with land holding size and the courts are the only body that can decide on what is reasonable. The highest level of guidance it is possible to provide is a framework for action, which individual duty holders interpret for their particular circumstances, and the courts make judgment on that interpretation in the event of legal action. For that framework to be useful to both duty holders and the courts, it must be simple and it must avoid attempting to define detail that only the courts can decide on. It is the framework that matters most in this guidance context, not the detail, which has confused this document.

More specifically:

- **Stage 1** is the zoning exercise; is it even necessary to look for trees, let alone inspect them? If the level of use is low, there is no need to do any more. If it is high, then there is a need to actively manage. The threshold for action can only be precisely identified by the courts.
- **Stage 2** only becomes necessary if duty holders assess that a location has sufficient access/use to warrant active management. It is their decision and they will be judged on their action if there is harm and it goes to court. The first action is a quick visual check as set out in the HSE SIM. A quick visual check is not an onerous burden; it is not hard to do and so it seems reasonable that all duty holders should do this, irrespective of their land holding size or knowledge of trees. The courts have made it clear that the larger landholders have the highest standard to meet and it seems this is being interpreted as the type of tree problems that will be expected to be observed. Smaller land holders will still be expected to look at their trees, but would only be expected to react to obvious problems, whereas larger land holders are likely to be expected to react to subtler indications of hazard. The

obvious implication is that inspectors acting for larger land holders are likely to be expected to have higher levels of competence than householders doing a quick visual check themselves.

- **Stage 3** is only necessary if the visual check reveals any concerns.

This staged approach is easy to understand, which is particularly important for the biggest stakeholders of all, the general public. It avoids all the complications of introducing imminency, which is detail that does not sensibly fit into a framework that all parties need to understand. Imminency only applies to stage 3, which is the domain of specialists who will be best placed to assess it. Furthermore, this approach fits in perfectly with the HSE guidance already published and the emerging wisdom from the most recent court judgments. It is proportionate, reasonable and defensible because it is a risk assessment process in its simplest form that limits the need to use specialists.

I also want to mention the balance between principles and detail, which has been misjudged in chapter six. Relating to managing tree defects, this document tries to both set out a framework for action and then the details of what should be looked for. Firstly, as I point out in my document comments, there are some blatant inconsistencies between what have been identified as 'obvious' and what recent court judgments have indicated on this matter. This perfectly demonstrates the lack of depth of the reasoning and understanding of the issues, and the complications that arise from the artificial tree inspection framework proposed. Secondly, this document is not the place for that sort of detail because it directly relates to the standard of the duty, which is for the courts to decide, not the NTSG. I accept this is difficult, but the boundary must lie at reviewing what the courts have come up with so far for 'obvious' and leave the technical issues for the detailed inspection.

Turning to the examples, I think these are useful as far as they go, but actually, they really do deal with the simple cases where the duty holders have met their duty of care. It is fairly clear what the duty holders at the larger end of the land holding scale should be doing. The need is more pressing at the householder end and what the standard of the quick visual check is likely to be. These are difficult concepts to get across and widely misunderstood. A challenging example would be to consider a large tree in a small property hanging over a busy car park or road, with some subtle indications of serious structural problems, i.e. an included bark union or perhaps fungal brackets out of sight or hidden by ivy. Analysing that where, in one instance the property is owned by an individual, and in the other where it is part of a big estate, would be useful. Exactly the same tree, different land holding size and a different standard of duty of care. On the one hand, the householder is unlikely to be expected to pick up subtle indications of hazard and in the other, there is likely to be an expectation that the estate owner should be aware of such indicators and have a regime in place capable of identifying them. Anyway, I still felt they were useful, although an example where the duty of care had not been met would balance the approach.

In closing, my experience is that the most effective problem solving results from starting with a blank sheet and working towards a solution by a group of people who have no preconceived positions and open minds. From this document, my impression is that there has been a different process at work; each

stakeholder had a starting position and a priority objective was to minimise concessions. The result is not a well-considered solution, it is a compromise promoted as a solution.

Perhaps most astonishing is how the combined strength of all the participants has resulted in such a weak result. It seems to be a perfect example of negative synergy! It may be worth taking a step back and thinking a bit harder about what has been produced. Everyone should have done better; this is a disappointment.

Yours sincerely

Jeremy Barrell