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Suzie Cave

Japanese knotweed

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1. Introduction

The following paper considers legislation in Northern Ireland (NI) across GB and the Republic of Ireland (ROI) surrounding Japanese Knotweed from two perspectives: as an invasive species and the control of it spreading to neighbouring properties. It also gives detail on a new EU Regulation on invasive alien species. In considering the legislative differences, the paper highlights the use of anti-social behaviour legislation in England to deal with problems concerning Japanese knotweed. It also explores the anti-social behaviour legislation in NI including legislation for statutory nuisance.

The Department of the Environment's Invasive Species Strategy NI describes Japanese knotweed as an invasive plant which spreads from site to site via vegetative means.¹ According to Invasive Species Ireland² it was introduced from Japan to the Island of Ireland in the 19th Century as an ornamental plant. Since its introduction it has

¹ DOE Invasive Species Strategy NI (2013) p.2 http://www.doeni.gov.uk/invasive_species_2013_4- web.pdf

² A joint venture between the Northern Ireland Environment Agency and the National Parks and Wildlife Agency. For more information see <http://invasivespeciesireland.com/background/about/>

spread throughout the island particularly along watercourses, transport routes and waste grounds. It out-competes native plants and can damage buildings, hard surfaces and infrastructure. Its ability to produce a new plant from tiny amounts of cut stem, crown or rhizome make its growth and spread difficult to control.³

According to the Invasive Species Strategy NI, Japanese knotweed costs the GB economy £179 million per year. The Strategy emphasises that the cost per year to the construction, development and infrastructure sector alone is £227 million, most of which is due to Japanese knotweed.⁴

2. Current situation in NI

Japanese knotweed is classed an invasive species under Schedule 9 of the Wildlife (Northern Ireland) Order 1985⁵ as amended by Section 27 Schedule 1 of the Wildlife and Natural Environment Act (Northern Ireland) 2011⁶. Under Schedule 9 of the Order it is an offence to plant or grow in the wild any invasive plants listed.

In response to an Assembly Question, the Environment Minister (September 2014) stated that there is currently no legal requirement for a landowner to control or remove existing established areas of Japanese Knotweed from their own land.⁷

According to the Biodiversity Unit of the DOE, the issue of Japanese knotweed spreading from one property onto another property is a civil matter between the two landowners.⁸ In common law, a duty of care exists between neighbouring landowners and it is possible that a landowner who allows the spread of Japanese knotweed from their property could be sued for relevant costs and damages. It is also possible that a court would consider the duty of care to be a positive one and require a landowner to intervene where such an encroachment has not yet but is likely to occur.

If excavated and removed from land, however, Japanese knotweed becomes a 'waste'. As a waste, a duty of care (under the Controlled Waste (Duty of Care) Regulations 2002) is placed on the land owner to ensure the control of the spread of Japanese knotweed to adjacent land,

The current Northern Ireland Environment Agency policy on the disposal of Japanese knotweed material and contaminated soils off site follows the [Environment Agency \(UK\) guidelines](#) and places a duty of care on all waste producers to ensure Japanese knotweed is disposed of at a licensed landfill site and that the site operator is notified that the waste material contains Japanese knotweed. There is also a duty of care to prevent its spread to

³ For more information see Invasive Species Ireland [online] *Japanese Knotweed*

<http://invasivespeciesireland.com/toolkit/invasive-plant-management/terrestrial-plants/japanese-knotweed/>

⁴ DOE Invasive Species Strategy NI (2013) http://www.doeni.gov.uk/invasive_species_2013_4- web.pdf

⁵ <http://www.legislation.gov.uk/nisi/1985/171/article/15>

⁶ <http://www.legislation.gov.uk/niia/2011/15/contents/enacted>

⁷ Assembly Question (01/09/2015) [AQO 6531/11-15](#)

⁸ Telephone correspondence with Biodiversity Unit DOE (05/12/2014)

*adjacent land or by failing to dispose of Japanese knotweed by following the correct guidelines.*⁹

According to *Invasive Species Ireland*, (a joint venture between the Northern Ireland Environment Agency and the National Parks and Wildlife Service), the Waste Management Regulations (NI) 2006 (as amended) also require the occupier of domestic properties to ensure that any transfer of waste from their household is only to an authorised person or to a person for authorised transport purposes.¹⁰

2.1 New EU Regulation to address invasive alien species and protect biodiversity

The new Regulation to address invasive alien species and protect biodiversity entered into force on 1 January 2015. The new Regulation builds on existing instruments and measures already taken by Member States, and aims to fill any policy gaps to ensure a coherent legal framework to address the problem of invasive alien species, at a national, regional and EU wide level.¹¹

A list of invasive alien species of 'Union concern' will be drawn up by the Commission and managed with Member States using risk assessments and scientific evidence.¹² A Standing Committee of experts, nominated by the Member States and the Commission will evaluate each risk assessment and decide on whether the species should be included in the list.¹³

Species on the list will be effectively banned, and Member States will be able to lay down more stringent national rules to prevent the introduction, establishment and spread of invasive alien species¹⁴. For those species listed, Member States will have to draw up management plans aimed at their eradication, population control or containment.¹⁵

This may create an opportunity to cover current gaps in the management of Japanese knotweed in NI, including any ambiguity around home owner's powers and responsibilities.

The Commission is to present the list before the end of 2015. However, according to Minister Durkan,

⁹ Invasive Species Ireland [online] <http://invasivespeciesireland.com/toolkit/invasive-plant-management/legislation-ni/>

¹⁰ Invasive Species Ireland [online] <http://invasivespeciesireland.com/toolkit/invasive-plant-management/legislation-ni/>

¹¹ EC (November 2014) Brochure on LIFE and Invasive Alien Species p.6. Available from http://ec.europa.eu/environment/nature/invasivealien/index_en.htm

¹² EC [online] Invasive Alien Species http://ec.europa.eu/environment/nature/invasivealien/index_en.htm

¹³ EC (2014) Brochure on Invasive Alien Species: A European Response p.16/17. Available at http://ec.europa.eu/environment/nature/invasivealien/index_en.htm

¹⁴ Ibid and Article 23 of the Regulation

¹⁵ Article 19 of the Regulation

Until the Commission formally submits the draft list to Member States for consultation, it is too early to specify what species will be proposed for inclusion in the Union list.

The Department is developing subordinate legislation to administer and enforce the EU Regulation.¹⁶

3. Comparison of legislation across NI, GB and ROI

The following section explores legislation in other jurisdictions and highlights the main differences with legislation in Northern Ireland. Table 1 gives a description of legislation in NI, England and Wales, Scotland and the ROI. The table identifies two common legislative themes regarding Japanese knotweed: as an invasive species, and the control of its spread to neighbouring properties mainly as a waste. However, England has gone a step further by including it under anti-social behaviour legislation.

3.1 Summary of differences

In NI, England and Wales it is not illegal to have Japanese knotweed on your land; however, owners disposing of it illegally may be prosecuted through waste duty of care legislation. Disputes surrounding the spread of Japanese knotweed from one property to another are considered a civil matter between landowners. However, new legislation introduced in England in 2014 and 2015 has been described in guidance as having the potential to address problems surrounding Japanese knotweed).

In Scotland, legislation is aimed at preventing non- native species, including Japanese knotweed, spreading into the wild, but it does not require people to control invasive species on their land.

Legislation in the Republic of Ireland (ROI) is not just as limited compared to NI. The ROI extends the offence beyond growing it in the wild, to including its spread or dispersal anywhere in the ROI. However, it does not explicitly state that it is an offence to allow it to spread to a neighbouring property.

¹⁶ Assembly Question to Minister Durkan (01/07/2015) AQW 48045/11-15 9
<http://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=240782>

			<p>outwith its native range²⁴</p> <ul style="list-style-type: none"> This includes moving locally native animals and plants to parts of the country that are outwith their native range, such as offshore islands.²⁵ <p>A Code of Practice on Non-Native Species, which applies to plants and animals, outlines the law and how due diligence may be exercised – it gives practical guidance on what reasonable steps might be taken.²⁶</p>	not for development between these dates. ³⁰
<p>The control of spread to neighbouring properties</p>	<p>There is currently no legal requirement for a landowner to control or remove existing established areas of Japanese Knotweed from their own land.³¹</p> <p>As waste</p> <p>According to Invasive species Ireland³², the spread of Japanese Knotweed from one property to another is a civil matter between landowners³³.</p>	<p>According to the Environment Agency's <i>Knotweed Code of Practice</i>, landowners allowing Japanese knotweed to spread to other properties may be prosecuted under common private nuisance laws.³⁴</p> <p>As waste</p> <p>The Duty of Care Regulations (1991) under Part II of the Environmental Protection Act 1990 (1990)³⁵ class Japanese knotweed material and soil or plant material containing Japanese knotweed as a 'controlled waste'.</p>	<p>According to SNH, legislation is aimed at preventing non-native species spreading into the wild, but it does not require people to control invasive species on their land.⁴⁰</p> <p>As waste</p> <p>The Environmental Protection Act 1990 applies to Scotland as it does to England and Wales. According to the Scottish Government, soil infected by Japanese knotweed, or plant material to be discarded is</p>	<p>Regulation 50 of the European Communities (Birds and Natural Habitats) Regulations 2011 makes it an offence to or intend to: import, buy, sell, breed, reproduce or propagate, advertise, offer or expose for sale, publish a price list, transport or distribute; any animal or plant species or vector material listed in the Third Schedule. Under the Third Schedule, Part 3, two vector materials are referred to. One is blue mussel seed and the second is:</p> <p><i>Soil or spoil taken from places infested with</i></p>

²⁷ European Communities (Birds and Natural Habitats) Regulations 2011 <http://www.irishstatutebook.ie/eli/2011/si/477/made/en/print>

²⁸ Wildlife (Amendment) Act 2000 Section 46 <http://www.irishstatutebook.ie/eli/2000/act/38/section/46/enacted/en/html>

²⁹ *ibid*

²⁴ For more information see Scottish Natural Heritage *Non-native species – Scotland changes its law – Frequently asked questions* <http://www.snh.gov.uk/docs/B1113471.pdf>

²⁵ Scottish Natural Heritage *Non-native species – Scotland changes its law – Frequently asked questions* <http://www.snh.gov.uk/docs/B1113471.pdf>

²⁶ The Scottish Government [online] Non-Native Species Code of Practice <http://www.gov.scot/Publications/2012/08/7367>

³⁰ Invasive Species Ireland [online] <http://invasivespeciesireland.com/toolkit/invasive-plant-management/legislation-roi/>

³¹ Environment Minister (September 2014) Response to Assembly Question (01/09/2015) [AQO 6531/11-15](http://www.assembly-ni.gov.uk/assembly-question/2015/09/01/01-09-2015-01)

³² Invasive Species Ireland is a joint venture between the Northern Ireland Environment Agency and the National Parks and Wildlife Agency. For more information see <http://invasivespeciesireland.com/background/about/>

³³ Invasive Species Ireland [online] Legislation NI <http://invasivespeciesireland.com/toolkit/invasive-plant-management/legislation-ni/>

	<p>Should a land owner wish to excavate or remove Japanese Knotweed then the removal and disposal of this 'controlled non-hazardous waste' is regulated under the Waste and Contaminated Land (NI) Order 1997 articles 4 (1a) and 4 (1b) and by the Waste Management Licensing (NI) Regulations 2003 schedule 2.</p>	<p>Therefore it must be disposed of at a licensed landfill, or buried/incinerated at an appropriate facility. Failure to do so can result in criminal prosecution, an unlimited fine and imprisonment.³⁶</p> <p>Anti-social behaviour legislation In England new powers have been introduced through the Anti-Social Behaviour, Crime and Policing Act 2014.³⁷ These have been identified in official guidance from the Home Office as having the potential to address the problem of Japanese knotweed, including neighbour disputes surrounding its growth³⁸ (see section 4 for more detail)</p> <p>Infrastructure Act 2015 Powers under this Act came into effect in April 2015 and introduced two new measures to tackle Japanese knotweed. These allow environmental authorities in England (the Secretary of State, Natural England, the Environment Agency, and the Forestry Commissioners³⁹) to enter</p>	<p>classed as controlled waste. Such material must be removed from a site for disposal by a SEPA licensed haulier and disposed of in a licensed or permitted landfill site.⁴¹</p>	<p><i>Japanese knotweed, Giant knotweed, or their hybrid Bohemian knotweed.</i> Regulation 50 is not in effect until the date on which the Minister gives public notice. A license can be granted to allow activities under Regulations 49 and 50 to be undertaken.</p> <p>As waste According to Invasive Species Ireland, to move soil in the Republic of Ireland that contains Japanese knotweed will require a license from National Parks and Wildlife Service (NPWS).⁴²</p>
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³⁴ See Environment Agency (2013) *The knotweed code of practice: Managing Japanese knotweed on development sites* p.33.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296930/LIT_2695_df1209.pdf

³⁵ Part II Section 33 Environmental Protection Act 1990 <http://www.legislation.gov.uk/ukpga/1990/43/contents>

⁴⁰ Scottish Natural Heritage *Non-native species – Scotland changes its law – Frequently asked questions* <http://www.snh.gov.uk/docs/B1113471.pdf>

³⁶ Environment Agency (2013) *The knotweed code of practice: Managing Japanese knotweed on development sites* p.6.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296930/LIT_2695_df1209.pdf

³⁷ Under Part 4 (Community Protection) Section 43 <http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>

³⁸ Home Office information note https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364846/Japanese_Knotweed_information_note.pdf

³⁹ Section 23 (3) of Infrastructure Act 2015 <http://www.legislation.gov.uk/ukpga/2015/7/contents/enacted>

⁴¹ Scottish Government [online] *Control of invasive non-native species – Japanese knotweed* <http://www.gov.scot/Topics/farmingrural/SRDP/RuralPriorities/Options/Controlofinvasivenon-nati/Japaneseknotwood>

		into species control agreements (SCAs) with landowners, and if necessary, to impose species control orders (SCOs). For more detail see section 4		
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⁴² Invasive Species Ireland [online] <http://invasivespeciesireland.com/toolkit/invasive-plant-management/terrestrial-plants/japanese-knotweed/>

4. Legislation in England

The following section explores in more detail the use of anti-social behaviour legislation and the new Infrastructure Act in England to deal with problems of Japanese knotweed.

4.1 Anti-Social Behaviour, Crime and Policing Act 2014

The Anti-Social Behaviour, Crime and Policing Act 2014 introduced Community Protection Notices which are intended to deal with unreasonable, ongoing problems or nuisances which negatively affects the quality of life of a community (Section 43).

Japanese knotweed is not explicitly referred to in the 2014 Act. A Home Office information note, however, indicated that Community Protection Notices could possibly be used to require someone to prevent or control the growth of Japanese knotweed or other plant that is capable of causing serious problems to communities.⁴³

A Community Protection Notice deals with 'ongoing' or 'persistent' problems. However if something is regarded as a potential issue, a community trigger may be used. The Home Office advises that a 'community trigger' can be activated by an individual (or someone on their behalf with their consent) or an organisation to get agencies to deal with a persistent or previously ignored anti-social behaviour problem. This trigger may possibly apply to Japanese knotweed or other invasive plants. When someone activates the trigger, the agencies including local authorities and the police will have to undertake a case review to consider what action they can take to resolve the problem, and whether the case meets a locally defined threshold. If the threshold has not been met, agencies can still carry out a case review based on factors such as persistence of the problem **or potential harm caused** or the adequacy of response from agencies.⁴⁴

The provisions relating to Community Protection Notices came into effect on 20 October 2014. It may, therefore, be too early to assess to what extent notices have been issued to deal with Japanese knotweed.⁴⁵

4.2 Infrastructure Act 2015

New powers have been introduced in England under the Infrastructure Act 2015. The powers came into effect in April 2015 and introduced two new measures to tackle Japanese knotweed. These allow environmental authorities in England (the Secretary of State, Natural England, the Environment Agency, and the Forestry Commissioners⁴⁶) to enter into species control agreements (SCAs) with landowners, and if necessary, to impose species control orders (SCOs).

⁴³ Home Office information note https://www.gov.uk/.../364846/Japanese_Knotweed_information_note.pdf.

⁴⁴ Home Office information note https://www.gov.uk/.../364846/Japanese_Knotweed_information_note.pdf.

⁴⁵ See SI 2014/2590, art 3(c). http://www.legislation.gov.uk/uksi/2014/2590/pdfs/uksi_20142590_en.pdf

⁴⁶ Section 23 (3) of Infrastructure Act 2015 <http://www.legislation.gov.uk/ukpga/2015/7/contents/enacted>

SCAs – these encourage environmental authorities to seek to agree a voluntary arrangement with landowners to take steps to control Knotweed present on the land.⁴⁷

SCOs – should the owner refuse to enter into an SCA, breach the terms of an SCA, or where immediate action is required, an environmental authority can impose an SCO on the owner.⁴⁸

The SCO is used to compel the owner to take particular steps to control the knotweed, or alternatively it gives power to the environmental authority to enter onto the land and undertake the steps required.⁴⁹ Where the environmental authority performs the works itself, the Act enables authorities to recover their reasonable costs from the owner.⁵⁰

5 Anti-social behaviour and statutory nuisance legislation - NI

So far this paper has explored the control of Japanese knotweed in Northern Ireland as an invasive species and waste. However, this control does not appear to address encroachment of Japanese knotweed from one private property to another. Legislation in NI does though give local councils powers to intervene to address statutory nuisances or anti-social behaviour. The DOE Biodiversity Unit informed in December 2014 that this legislation has not been used to deal with Japanese knotweed.⁵¹ However, if it was established that Japanese knotweed could be classed as either one, it may provide a potential avenue for legal redress. The following section considers anti-social behaviour legislation in NI and whether there is potential for Japanese knotweed to be considered a nuisance.

5.1 The Anti-Social Behaviour (Northern Ireland) Order 2004

The Anti-Social Behaviour (Northern Ireland) Order 2004 enables a relevant authority including a district council, the Chief Constable of the Police Service or the Northern Ireland Housing Executive to apply to the Magistrates' court for an Anti-Social Behaviour Order (ASBO) to be made in respect of any person aged 10 and over, provided certain conditions are fulfilled.⁵² The conditions are set out in Article 3 of the 2004 Order and include:

- That the person acted in an anti-social manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
- That such an order was necessary to protect relevant persons from further anti-social acts.

⁴⁷ Ibid Section 23 (6)

⁴⁸ Ibid Section 23 (10)

⁴⁹ Ibid Section 23 (11)

⁵⁰ Ibid Section 23 (13)

⁵¹ Telephone correspondence 04/12/2014

⁵² The Anti-Social Behaviour (Northern Ireland) Order 2004 <http://www.legislation.gov.uk/nisi/2004/1988/contents>

The Order, however, doesn't explicitly link anti-social behaviour to the growing or encroachment of Japanese knotweed. Nor is there guidance linking the Order to the issue of Japanese knotweed.

5.2 The Clean Neighbourhood and Environment Act (Northern Ireland) 2011

Potential as a statutory nuisance

According to DOE guidance⁵³, there are two ways of addressing a nuisance in NI: either through common law or, if applicable, through the 2011 Clean Neighbourhoods and Environment Act (2011 Act) which gives councils the powers to intervene. Nuisance tends to entail a form of damage to, or unreasonable and substantial interference with a person's use or enjoyment of property. However, only certain matters may constitute a statutory nuisance under the 2011 Act Section 63, and these must be a nuisance in their own right or be prejudicial to health.

The legislation and associated guidance does not list Japanese knotweed as a nuisance. This being said, the regime outlined in the 2011 Act, which gives powers to councils to deal with a nuisance, now applies to:

“Any premises in such a state as to be prejudicial to health or a nuisance” (subsection 63(1)(a))

This provision deals mainly with conditions at dwellings, industrial, trade and business premises, and is based on the physical condition and not how the premises are used. The guidance states that it is the condition of the premises as a whole, not individual defects, that confer a nuisance, and may include the cumulative impact of a number of minor defects or one major defect.

However, further legal advice should be sought on this.

⁵³ DOE, Statutory Nuisances: Guidance to District Councils on Part 7 of the Clean Neighbourhoods Act. Available at http://www.doeni.gov.uk/index/protect_the_environment/local_environmental_issues/clean_neighbourhoods.htm