

PRESENTATION FOR THE LAUNCH OF THE NATURAL JUSTICE CAMPAIGN,

BAR OF IRELAND, DISTILLERY BUILDING, 4TH DECEMBER 2023

The protection of Hedgerows Bill 2023.

“To stand close to a hedge on a warm spring day feels like standing on a balcony overlooking a vast orchestra busily rehearsing. There is an audible hum from the movement of aerial insects and the incessant movement of life all around. It is in the hedgerow that robins and blackbirds build their nests, that badgers dig their setts and trees from oak to apple send their gnarly roots into the rich soil. With no great areas of native woodland left in Ireland the hedgerow has become the new home to the vast majority of our wildlife.”¹

The above description by Pádraic Fogarty gives a snapshot of the life that lies within the humble hedgerow. Hedgerows are an immensely important feature of our landscape and natural heritage. Not only do they act as refuges and corridors for wildlife, while reducing flooding and soil degradation, they play a valuable role in the sequestration of atmospheric carbon and provide sanctuary for our threatened biodiversity. As 2023 draws to a close, there are calls to recognise that climate change and biodiversity loss are ‘one indivisible crisis’ which should be treated as a global health emergency.² At this critical time of change we are fortunate to have the natural wealth of the hedgerows network in our country, but it is being eroded and that is why we are here today to launch The Protection of Hedgerows Bill.

Why legislate?

“There is no need of legislation so long as things work well without it, ...”³

When in the late Spring of 2022 Alan Moore of Hedgerows Ireland (Tipperary) approached Comhshaol – The Climate Bar Association asking if we might assist in drafting legislation to protect hedgerows, we – the barristers who formed the Hedgerows Legislation Project – had to first ask the question whether legislation was necessary. A first joint working group session with Hedgerows Ireland (Tipperary) in September 2022 left us more informed and educated about the real and tangible benefits that native Irish hedgerows provide to our environment

¹ Pádraic Fogarty, *Whittled Away, Ireland’s Vanishing Nature* (The Collins Press, 2017) p.273.

² [Time to treat the climate and nature crisis as one indivisible global health emergency - PubMed \(nih.gov\)](#) Over 200 health journals call on the UN, political leaders and health professionals to recognise that climate change and biodiversity loss are one indivisible crisis which must be tackled together to preserve health and avoid catastrophe. (Published in The Lancet online in October, 2023)

³ The quote is by Niccolo Machiavelli, source Brian Hunt, *The Irish Statute Book, a Guide to Irish legislation* (First Law Limited, 2007) p. 10.

and the threats they are facing and, as you hear from Alan Moore and Neil Foulkes this evening, you will see that the evidence supporting the case for protection of hedgerows is compelling. I will leave it to them as the experts in the field to make that case. From our perspective, as lawyers, we still had to explore the current state of the law in order to see if new legislation could be justified. There followed a three step process.

Step 1) Investigate what protection there was under the existing legal framework and whether it was sufficient.

Step 2) Consider what protection was needed and could be justified and how this could be achieved.

Step 3) Draft a law that would provide a workable, effective regime that ensures the protection of the hedgerows that warrant protection while balancing the rights of landowners and other competing interests with the needs of our environment and wider society.

But first, what do I mean when talking about “hedgerows”? We have employed a working definition of a linear feature between areas of land, whether internal or external to a property and whether continuous or otherwise, consisting primarily of woody vegetation. We have set a minimum length of ten metres for the inclusion of a hedgerow within the scope of the Bill but have not defined the term in the Bill and I shall explain why in due course. In terms of the new regime of protection that would be introduced by the Bill, this would apply to ‘significant hedgerows’. These are hedgerows that have a significance in terms of the impact of the services they provide to ecosystems, biodiversity, agricultural systems, and contribution to the value or integrity of our archaeological, historical, heritage or cultural sites.

Current legal framework

Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)

Hedgerows are implicitly covered in the Habitats Directive by the references in Article 10 to “features of the landscape of major importance for wild flora and fauna” such as “those which, by virtue of their linear and continuous structure ...are essential for the migration, dispersal and genetic exchange of wild species.” This recognises a key service provided by hedgerows which is as corridors of connectivity for wildlife across otherwise hostile land. However Article 10 does not impose a specific obligation on member states, rather it is stated that, “with a view to improving the ecological coherence of the Natura 2000 network” they should endeavour in their land use and development policies to encourage the management of those features. They are frequently mentioned in development plans but this does not guarantee their protection. The system of legal protection for habitats and species required by the Directive as implemented in national law ought to ensure that the ecological value of hedgerows to the landscape where they are on or near a Natura 2000 site would be protected

from destruction. In practice this is not always the case unless one can point to a specific connection between the designated annex I or II habitat, animal or plant species and the hedgerow.

Council Directive 2011/92EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52 (Environmental Impact Assessment Directive)

Aside from plans or projects that may affect a Natura 2000 site, where any other development that requires an application under the planning legislation is likely to have any significant effect on the environment, it should be the subject of an environmental impact assessment by means of the transposition of the Directive in the Planning and Development Act 2000 and Planning and Development Regulations 2001. Some of the criteria against which the environmental impacts of a plan or project are to be assessed would encompass some functions which hedgerows fulfil. For example it is necessary to consider the environmental sensitivity of a geographical area, effect on biodiversity and landscapes and sites of historical, cultural, or archaeological significance. However, hedgerows are not directly referenced and thus their consideration in the assessment is not guaranteed or consistent across all decision making bodies.

With regard to agricultural activity that can have significant effects on the environment, the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (hereafter, the Regulations of 2011), provide that in the case of the proposed removal of 500 metres or more of a field boundary or rural restructuring of over 5 hectares of land involving the removal of field boundary, screening for environmental impact assessment is required. The Regulations of 2011 came about following *Case C-66/06 Commission -v- Ireland* where Ireland was found to be in breach of implementation of the Environmental Assessment Directive because the previous thresholds were too high. Under the current regulations (which are under review) subthreshold projects can involve the removal of an extensive amount of hedgerow. Where subthreshold activity is likely to have a significant effect on the environment it should be the subject of an application for consent under the regulations but compliance with this obligation is considered to be poor. If you consider, for example, that in England and Wales the Hedgerows Regulations 1997⁴ require an application to remove 20 metres or more of hedgerow, the removal of up to 500 metres without screening being mandatory has the potential to have a detrimental effect on the hedgerow network. The effects on biodiversity cannot be understated.

The potential impact can be illustrated by a study carried out by ecologist Dr. Robert Wolton who counted the species found in a single Devon hedge of 85 metres length on his farm in Devon, England, over a two year period from 2011 to 2013.⁵ Dr. Wolton identified 2,070 species in that 85 metre length of hedgerow and he later suggested that this was probably a conservative estimate and that 3,000 might be nearer the mark. He still had many species

⁴ 1997 No. 1160, regulations 3(1) and 5(1).

⁵ Dr. Robert Wolton, *Life in a Hedge*, British Wildlife, June 2015, volume 26, issue 5, pp. 306 – 317.

waiting identification in bottles and cardboard boxes.⁶ While England may have more diversity of species compared to Ireland because we are a relatively small island, this is nonetheless a reasonable comparator and an impressive figure.⁷ An array of research points to the role of hedgerows as connectors of semi-natural habitats sometimes providing the only refuge for wildlife in otherwise hostile areas of agriculturally improved land. When viewed in that context, the construction of a large housing development without preserving the hedgerow network or the removal of 500 metres of hedgerow field boundary is to the wildlife of the area probably equivalent to taking out the Piccadilly line of the London metro in human terms!

Directive 2009/147EC on the conservation of wild birds (Birds Directive)

Article 5 of the Birds Directive prohibits the deliberate destruction of nests and eggs and the disturbance of all birds during the period of breeding and rearing and permits certain derogations set out in Article 9. Section 22 of the Wildlife Act 1976 implements the EU law prohibition and section 40 includes an elevated layer of protection whereby it is prohibited to “cut, grub, burn or otherwise destroy, during the period beginning on the 1st day of March and ending on the 31st day of August in any year, any vegetation growing on any land not then cultivated”. This is also subject to a wide range of derogations. Thus, the indirect protection afforded to hedgerows through this legislation is not extensive and in any event is temporal so it is insufficient to prevent their destruction.

Conclusion on current legal framework

This whistlestop tour of relevant legislation demonstrates that, although some protection is afforded to hedgerows in current legislation, it is limited and much of it is indirect. The absence of a specific requirement to consider the hedgerow and its multiple functions, and criteria according to which a qualitative assessment can be made, when removal is proposed, are substantial gaps. In addition, for all of the projects that fall into the category of ‘exempted development’ under the planning laws and into the ‘subthreshold’ category in the Regulations of 2011, there is no real protection.⁸

It is estimated that hedgerow, scrub and non-forest trees cover approximately 6.4% of the country.⁹ The conclusions of an EPA research programme between 2014-2020 estimated that the net removal of hedgerows in the last 20 years equates to 3.2% i.e. 0.16% per annum.¹⁰ The *Monaghan Hedgerow Appraisal Survey* from 2021 concluded that between 0.5% and

⁶ John Wright, *A National History of the Hedgerow and Ditches, Dykes and Drystone Walls* (Profile Books Limited, 2016), page 134.

⁷ Pádraic Fogarty, *Whittled Away, Ireland's Vanishing Nature* (The Collins Press, 2017), p.15 notes that islands tend to have fewer species than continents and this is a basic law of biogeography. “Britain, being a bigger island, has a far greater number of species across nearly all groups than Ireland.” The author also refers at p.274 to Dr. Wolton’s research providing support, in my view, for using this as a comparator.

⁸ David Browne, *Simons on Planning Law*, (Roundhall, 3rd ed. 2021) comments at p.1361 that “the employment of the planning legislation as the principal vehicle through which to implement the Directive is not entirely satisfactory.”

⁹ Green, Martin, Gharechelou, Cawkwell & Black, *BRIAR: Biomass Retrieval in Ireland Using Active Remote Sensing* (2014-CCRP-MS.17), prepared for the Environmental Protection Agency by Teagasc. p.2

¹⁰ *Supra*, p.35.

0.88% of hedgerow length per annum had been removed in the last decade in that county, that is at least 0.2% higher than the national average, “[Y]et, no screening applications for an EIA have been made in Monaghan to date”.¹¹ Those statistics tell the story that the limited level of protection that is there is not enough to stop the erosion of the hedgerows network. The absence of specific protection allows significant hedgerows to be removed just because it may be convenient or considered cheaper than maintaining them. The regime that would be put in place under this Bill would establish the principle that significant hedgerows are protected and can only be removed in specified circumstances where there is no viable alternative.

In a recent edition of *The Law of Trees, Forests and Hedges*, the authors remark that the loss of hedgerows appears to have largely stopped in England and Wales and that the position had more or less stabilised within the first ten years of the passing of the Hedgerows Regulations there.¹² In the context of climate change and biodiversity loss, the argument in favour of providing specific direct protection in legislation for the native Irish hedgerow is irrefutable.

The Bill

In order to be effective, legislation needs to be respected. If the level of regulation and interference with individual’s rights is proportionate and justifiable in the context of the purpose to be achieved, it should gain the respect of the majority. The centrepiece underpinning the Protection of Hedgerows Bill is that only significant hedgerows are prohibited from removal without permission, and permission may be granted in certain specified circumstances subject to fulfilling criteria of necessity and proportionality.

At the outset I referred to a working definition of hedgerows however they are not defined in the Bill. This is because although hedgerows are referred to in the Irish Statute book in a number of places this is without them being defined and we have opted to continue this approach.¹³ One may then ask how is a regime of protection for hedgerows to be established in law without defining them. The solution lies in the concept of the ‘significant hedgerow’. While the scope of the Bill applies to all hedgerows that have a continuous length of 10 metres (including any gap of up to three metres and access points), the provisions prohibiting removal except with permission or in other limited circumstances apply only to this category of hedgerow. The wider scope is relevant in relation to miscellaneous amendments to other statutes and I shall return to that later.

The significant hedgerow will be identified by reference to its contribution to a number of factors which are set out at section 3(3) of the Bill, *viz.* ecosystem services, the integrity of archaeological, historical, heritage or cultural sites or features, agricultural systems and the

¹¹ MacElwain, Mc Aree & Douglas, *Monaghan Hedgerow Appraisal Survey, 2021. A decade of change.* pp.80 and 88.

¹² Mynors, Hall and Nicholls, *The Law of Trees, Forests and Hedges* (3rd ed. Sweet & Maxwell, 2022), para. 30-50

¹³ It is noted that in England there is no definition of hedgerow in the Hedgerows Regulations 1997 made under the Environment Act 1995.

protection, maintenance and improvement of biodiversity. These elements are drawn from the *Hedgerow Appraisal System* by Foulkes et al.¹⁴ Regulations are the most appropriate legal instrument to use to set out the technical details as to how the contribution of a hedgerow to each of these factors is to be measured and appraised. The power for the Minister to pass such regulations is set out in section 10 of the Bill along with the principles and policies to guide the drafting of the regulations. The use of regulations will enable the Minister to have flexibility to amend the criteria relating to significant hedgerows in accordance with changes to the environment and the state of scientific knowledge. The regime of permissions will be administered by local authorities and the details of the application process will be provided under regulations.

The Bill also refers to the term ‘potentially significant hedgerow’. This is intended to cater for any uncertainty a landowner may have as to whether a particular hedgerow falls into the category of ‘significant’ or not. Where there is any uncertainty a landowner who is considering removing a potentially significant hedgerow or part thereof must apply to the local authority for a certificate to say that it is not a significant hedgerow. This requirement acts as a deterrent on a person from removing a hedgerow which may warrant being designated as ‘significant’ without going through the regime under the Bill.

The prohibition on removal of a significant or potentially significant hedgerow is subject to four exceptions which recognise that there are situations where removal could be necessary and a requirement to apply for permission is neither feasible nor appropriate eg. to gain access to land in an emergency or to control or prevent the spread of fire.

Section 6(1)(a) of the Bill sets out the situations in which removal of a hedgerow or part thereof may be permitted subject to the overriding condition, in subparagraph (b), that there are no other means of achieving the purpose or that any other means of achieving the required purpose are disproportionate or excessively expensive. Under section (6)(1) (a) (iii) and (iv) respectively, permission may be granted for carrying out a development for which planning permission has been granted under the Planning and Development legislation or for carrying out an activity in respect of which consent has been given under the Regulations of 2011. This is because although it is possible that a proposal to remove a significant hedgerow receives a sufficiently rigorous analysis by means of the EIA process under either the Planning and Development Regulations or the Regulations of 2011, as explained above, there are many situations where that analysis does not take place and the specific attributes of the hedgerow deserving of protection have not been given due attention. Where the analysis has been sufficient, the application to remove the significant hedgerow or portion thereof will receive permission under the Bill. However, for all of the cases where the requisite standard has not been applied, the regime under the Bill operates as a safety net if the condition under subparagraph (b) is fulfilled. A refusal of permission or refusal of a certificate can be appealed to the District Court with such decision being final save for the possibility of an appeal on a point of law to the High Court.

¹⁴ Foulkes N, Fuller J, Little D, McCourt S and Murphy P, *Hedgerow Appraisal System – Best Practice Guidance on Hedgerow Survey, Data Collection and Appraisal*. Woodlands of Ireland, Dublin (2013)

The regime is underpinned by enforcement provisions including civil remedies and criminal penalties. Part 3 allows for the entry upon land, with the consent of the landowner, of an authorised officer, or with a warrant where consent is refused, in order to carry out any investigations or inquiries necessary for the purposes of enforcement of the law. Provision is made for offences, including a corporate offence, for breaches of the Bill with penalties broadly in line with those applicable to offences under the Wildlife Act and Forestry Acts.

Civil law remedies include the power of the local authority to require that a hedgerow be replanted and a replacement hedgerow shall be treated as a significant hedgerow for the purposes of the Act so as to prevent someone benefitting from having removed a significant hedgerow. This will be registered as a burden on the land. In addition, section 20 allows for a court to impose a remedial payment on a person convicted of an offence of removing a significant hedgerow where the consequences of removal adversely affects the ecosystem of a local area by reducing the sequestration or storage of atmospheric carbon.

The miscellaneous amendments to other statutes are designed so as to require that due cognisance of the value of a hedgerow is taken before a decision is made to remove or interfere with it in the context of managing utilities infrastructure, forestry and health and safety. These provisions apply to all hedgerows of 10 metres in length or more. It is intended that these provisions will prevent the widespread removal or cutting back of hedgerows in general, which is often carried out for convenience and budgetary considerations in relation to the management of land. Such management strategies and decision making fails to take into account the value which hedgerows provide to the ecosystems of local areas and therefore it is considered necessary to specifically introduce tests of proportionality and necessity to counterbalance this approach. The amendments proposed to the Roads Act provide for the role of the hedgerow in nature conservation to be considered in relation to actions that may be taken under the Act.

Finally, sections 28 and 29 are provisions which will facilitate public participation and education about the new regime. First, each local authority must keep and make available for public inspection records of applications for permissions made under the Act, grants of permission, certificates given, and every prohibition order applied for and order granted. Second, each local authority shall put in place a mechanism to allow individuals or entities to notify it of any actual or potential infringement of the provisions of the Act and shall assess whether action is required by it pursuant to such information. Records of the notifications and determinations made on foot of same shall also be maintained for an appropriate period of time. The establishment of a register of significant hedgerows by regulations (as provided for in section 6(6)) will also assist in disseminating important information about significant hedgerows in the public domain.

The evidence for the introduction of a specific legislative regime to protect hedgerows is compelling. The Protection of Hedgerows Bill endeavours to balance the interests of relevant

stakeholders with the needs of our environment and in a way that is proportionate, justifiable and practicably enforceable. If enacted, the Bill will enshrine the principle that significant hedgerows are protected; this should be the default position which is needed to safeguard this natural heritage as we face the uncertain future.

Leesha O'Driscoll SC
The Bar of Ireland, 2023

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Postscript:

"This is the true tragedy of our time: the spiralling decline of our planet's biodiversity. For life to truly thrive on this planet, there must be immense biodiversity...The greater the biodiversity, the more secure will be all life on Earth, including ourselves. Yet the way we humans are now living on Earth is sending biodiversity into decline."

David Attenborough, with Jonnie Hughes, *A Life on Our Planet, My Witness Statement and A Vision for the Future.*