



CLIMATE BAR
COMHSHAOL

The Protection of Hedgerows Bill 2023

An Explanation

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The Protection of Hedgerows Bill 2023 has come about following a request for assistance from Alan Moore of Hedgerows Ireland (Tipperary) to the Climate Bar Association in the Spring of 2022. In response to the request to draft legislation to protect the native Irish hedgerow, a group of barristers formed the Hedgerows Legislation Project and collaborated with the members of Hedgerows Ireland (Tipperary) to produce this draft Bill.

Hedgerows play a very significant role in the protection of biodiversity and sequestration of atmospheric carbon, and for these and many other reasons, are a feature of the Irish landscape which should be preserved and valued. It is estimated that there are 689,000 km of hedgerows in Ireland¹. Ensuring the preservation of the native Irish hedgerow therefore has the potential to be an extremely important instrument in the battle against Climate Change. While some provisions are to be found within the statute book which provide limited protection for hedgerows, and for the hedgerow's role in biodiversity to be considered, these provisions do not go far enough to recognise the value of the native Irish hedgerow and to afford it the level of protection that is needed to ensure its preservation as unfortunately it is under threat.²

The primary purpose of this Bill is therefore to elevate the status of the hedgerow so that it is recognised as a feature of the landscape deserving of protection in its own right. From the perspective of the legislator, the question then arises as to how to identify the hedgerow that warrants protection.

There is no definition of hedgerows in the Irish statute book and yet there are several references to hedgerows. The Irish legislative approach assumes an understanding of what a hedgerow is and this approach is continued within this draft Bill. It is noted that in the United Kingdom, neither the Environment Act 1995 nor the Hedgerows Regulations 1997 made thereunder, define a hedgerow, nor does the the Habitats Directive. In the latter, the hedgerow is encompassed within the reference in Article 10 to "features of the landscape which are of importance for wild fauna and flora" which include "the traditional systems for marking field boundaries". Thus, in respect of this Bill there is no need to define a 'hedgerow' but the term is understood as meaning a linear feature between areas of land, whether internal or external to a property and whether continuous or otherwise, consisting primarily of woody vegetation and of ten metres or more in length.

¹ BRIAR report, Biomass Retrieval, Green et al 2014-2020 [BRIAR: Biomass Retrieval in Ireland Using Active Remote Sensing \(2014-CCRP-MS.17\) \(teagasc.ie\)](#)

² MacElwain, McAree & Douglas, *The Monaghan Hedgerow Appraisal Survey, 2021, a decade of change* [Monaghan Hedgerow report 2021.pdf](#)

The scope of the Bill applies to all hedgerows that have a continuous length of 10 metres and this includes any gap of up to three metres and gateways and other types of access points and any gap resulting from a contravention of the Bill (section 3(1) and (2)). This scope is relevant in relation to Part 5 of the Bill which amends provisions of other Acts that allow for interference with or removal of hedgerows whether expressly or implicitly. The main substantive provisions of the Bill prohibiting removal only apply to a category of hedgerow which is described as a ‘significant hedgerow’. 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 protection, maintenance and improvement of biodiversity. These factors are drawn from the Hedgerow Appraisal System by Foulkes et al.³ 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. In order to cater for uncertainty around whether a particular hedgerow falls into the category of ‘significant’ or not, the Bill provides for an additional category of hedgerow described as ‘a potentially significant hedgerow’ (section 3 (4)). The purpose of this is twofold: to enable an owner who is considering removing a hedgerow or part thereof to apply to the local authority for an assessment of the hedgerow in question if there is uncertainty as to whether it is a ‘significant hedgerow’; and to deter a person from removing a hedgerow which may warrant being designated as ‘significant’ without going through the regime under the Bill.

Section 4 of the Act sets out the basic prohibition on the removal of a significant hedgerow without a permission from the relevant authority. Section 4(2) extends the prohibition to a ‘potentially significant hedgerow’ unless a person has obtained a certificate from the relevant authority certifying that the hedgerow is not a significant hedgerow. The prohibition is subject to four exceptions which are listed in section 9. This recognises that there are occasions where it will be necessary to remove a significant hedgerow or potentially significant hedgerow, or part thereof, in circumstances where a requirement to apply for permission would be neither appropriate nor feasible such as in an emergency or for reasons of health and safety.

The requirement to apply for permission to the local authority to remove a significant hedgerow is set out in section 5. It is envisaged that the details of that process will be set out in the regulations. Section 6(1)(a) 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. The Planning and Development Act, 2000 and the Environmental Impact Assessment (Agriculture) Regulations 2011 (hereafter, the Regulations of

³ 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]

2011) are specifically referenced at s.(6)(1) (a) (iii) and (iv) respectively. This is because although the Planning and Development legislation contains provisions which allow for consideration of the important features of hedgerows without expressly referencing hedgerows, in practice the application of those provisions may not be sufficiently robust or the provisions specific enough to ensure that a significant hedgerow would be protected to the extent required under the Bill. Similarly where an activity involving the removal of a hedgerow has received a consent under the Regulations of 2011, and the activity will involve the removal of a significant hedgerow it is appropriate that that particular element of the proposal is subjected to the condition in s. 6 (1) (b) so as to avoid the unnecessary destruction of significant hedgerows. Where the removal of such a hedgerow has already been subjected to an analysis which applies the standard under the Bill, then the grant of permission under section 6(1) will follow and it is not considered that the obligation to apply for permission is an onerous one. As such the requirement acts as an additional layer of protection or a 'safety net'.

The regime under the Bill should make it clear that anyone wishing to remove a significant hedgerow has to apply for permission. However, because the Regulations of 2011 specifically concern activities that involve the removal of hedgerows and exempts from the need to apply for a consent subthreshold activities (currently below 500 metres in the case of a field boundary and 5 hectares) and applications that have received negative screening decisions, subsection (2) of section 4 specifically states, 'for the avoidance of doubt' that where any such activity involves the removal of a significant or potentially significant hedgerow the regime under the Bill is applicable. 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.

Part 3 of the Bill deals with compliance and enforcement and allows for the entry upon land, with the consent of the landowner, of an authorised officer in order to carry out any investigations or inquiries necessary for the purposes of enforcement of the new regime. Where consent is refused, entry is only possible with a warrant (section 13(3) and (6)). Where there is a risk that a significant hedgerow or a potentially significant hedgerow may be removed without permission, an application may be made to the District Court for an order prohibiting such removal (section 14).

Section 15 sets out the offences for anyone who breaches the provisions of the Bill or knowingly provides false information. The penalties are broadly in line with many of those applicable to offences under the Wildlife Act 1976, as amended, and the Forestry Act 2014. Insofar as the potential for a prison sentence is omitted in relation to some offences under s.74(4) of the Wildlife Act, for example the carrying out of works which destroy a feature on a designated natural heritage area, this has been the subject of criticism as "such offences could cause significant damage to habitats and animal populations, potentially more so than more direct offences such as hunting without a license" and similar offences on European Sites do carry the

potential for imprisonment.⁴ Therefore all of the offences under the Act carry the potential for a prison sentence. The Bill also provides for a corporate offence so that any actors of a corporate entity who are complicit in infringing the Act will be treated as having carried out the act or omission on behalf of the corporate entity and both are liable to the imposition of penalties (section 16).

Part 4 of the Bill sets out the civil law remedies that apply where a significant hedgerow is destroyed or removed otherwise than in accordance with the Act and these include the power of the local authority to require that a hedgerow be replanted. 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, and this will be registered as a burden on the land (sections 19 and 21). 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 detail as to the potential amount of such a payment would be contained within the regulations and, as it would be in addition to any penalty imposed, there is scope for such payments to be considerable. The monies received in any such payments are to be directly applied to climate mitigation measures as set out in subsection (4).

Part 5 of the Act sets out a number of consequential amendments to other statutes. These fall into two categories *viz.*, those relating to utility providers and the Roads Act and the Forestry Act. The amendments are drafted so as to require that due cognisance of the value of a hedgerow is taken by anyone needing to remove or interfere with it so that the least amount of cutting back or removal is undertaken to achieve the necessary objective. 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 for reasons of cost in relation to the management of land. Such management strategies and decision making fails to take into account the immense value which hedgerows provide to the ecosystems of local areas and therefore it is considered necessary to introduce tests of proportionality and necessity to counterbalance this approach. Under the auspices of the Roads Act indiscriminate annual cutting back of hedgerows takes place because of a misguided perception that this is required to ensure road safety, whereas trimming judiciously according to a cycle spread over a number of years may be sufficient to ensure that a hedgerow does not interfere with road safety. 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. It is noted that there does appear to be a growing understanding that nature conservation should be taken into account in this regard so the proposed amendments are timely and appropriate.⁵

⁴ William Quill, *Sanctions and Enforcement of Environmental Law: Current Sanctions and New Remedies*, Climate Bar Symposium 2022

⁵ The Heritage Council, *Conserving Hedgerows*. [conserving_hedgerows_2mb.pdf \(heritagecouncil.ie\)](https://www.heritagecouncil.ie/conserving-hedgerows-2mb.pdf)

Finally, sections 28 and 29 contain two 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 such period of time as appropriate. 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 hedgerows in the public domain.

It is our hope that this draft Bill will assist Hedgerows Ireland (Tipperary) in their work aimed at ensuring the preservation of hedgerows and elevating their status so that the importance of this valuable resource in the Irish landscape, and in the battle against Climate Change, can be recognised by everyone. The regime in the Bill endeavours to balance the interests of relevant stakeholders by providing for restrictions on the removal of only significant hedgerows. The justification for this level of protection will be apparent from the detail of the factors listed in section 10(4) of the Bill which will guide the Minister in enacting regulations. The use of regulations will enable the Minister to have flexibility to amend the scope of protection in accordance with changes to the environment. The restrictions take into account situations giving rise to unavoidable necessity and situations where the preservation of a significant hedgerow is disproportionately onerous to achieve. As such the level of restriction imposed on the owners of significant hedgerows is reasonable and justifiable given the extremely valuable role the hedgerow plays in the environment. The regime is underpinned by enforcement provisions including civil remedies and criminal penalties. Through the establishment of a register of significant hedgerows, landowners of significant hedgerows may be recognised for their role as custodians in safeguarding the native Irish hedgerow.

The Hedgerows Legislation Project members are Leesha O’Driscoll SC (Chair), Ruth A FitzGerald SC, Maurice Cunningham BL, Karen Kilrane BL, Ailbhe Lawless BL, David Leonard BL, Aoife McMahon BL, Neasa O’Callaghan BL, Tim O’Connor BL, Gavin Rothwell BL, Mariana Verdes BL, Donnchadh Woulfe BL. Alannah Shesgreen BA was a member from January to April 2023 carrying out research within the framework of the Environmental Law Clinic Module as part of her LLM in Environmental and Natural Resources Law in University College Cork under the supervision of Professor Owen McIntyre.