

Report on
Review of Proposed Amendments
to the
Hedgerow Regulations 1997

For

The National Association of Tree Officers

By
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1.0 Introduction

This report was commissioned by The National Association of Tree Officers to provide a review of the proposed amendments to the Hedgerows Regulations 1997 and supplementary guidance that has been released for consultation, and a Partial Regulatory Impact Assessment.

The proposed amendments follow on from the Hedgerows Review Group report of June 1998 and the setting up of a steering group under DEFRA (formerly DETR) to further consider the regulations. In addition to re-considering the existing criteria it was thought necessary to investigate if an assessment was needed of the extent that hedgerows were considered to be of landscape value.

The main consultation sets out in bold the recommendations of The Review Group, this is followed by discussion of the proposal and ends with the Government's / Steering Groups proposal for amendments or not of any new regulations.

The Draft Guidance and Best Practice document is in the form of 14 Chapters; the first two provide an overview and the remaining go through the individual aspects of the 1997 Regulations.

The Partial Regulatory Impact Assessment was undertaken by ADAS on behalf of the Steering Group to assess what the implications would be of the Review Groups recommendations.

All three documents are related to each other to some extent. This report will seek to analyse them together to consider how each of the proposals, to make or not to make amendments in the context of the practicality of any amendments, to the procedures or criteria to those officers who would have to apply them in the field.

2.0 Amending the Regulations

2.1 Part One

This part of the draft consultation sets out the background to the review, the legislative framework, survey data from the Countryside Survey 2000, government initiatives such as the Biodiversity Action Plans (BAP), select committee reports, recommendations from the Better Regulations Task Force (BRTF) and a survey of local authorities that requested information on their thoughts on improving the Hedgerows Regulations 1997.

2.2 Part Two

This forms the main body of the consultation and each 'consultation question' will be considered as it appears in the document. The first question is "can the existing regulations be amended or will new primary legislation be required"

2.2.1 Amending the Primary Legislation

Section 97 of the Environment Act 1995 is reproduced in Annex B of the consultation and the need for a 'definition of a hedgerow' is identified (a similar problem arises in the High Hedges Bill). The draft, Guide to the Law and Best Practice (GLBP), proposes that a definition "a row of bushes forming hedge, with trees etc growing in it" is to be used.

It is noted that in this case no 'government proposal is highlighted' and therefore it would appear that the above definition is going to be used. Clearly, from the House of Lords debates on the High Hedges Bill, such a 'loose' definition is bound to lead to ambiguity because it would be open to a wide interpretation. What is a 'bush'? What if there are no trees?

A 'simple' definition has value at a legislative level providing the legislation also allows for 'defining' of hedge types within the administrative area of a local authority. This may seem to be either on 'un-acceptable burden' or 'unachievable' concept, however, the majority of local authorities already have landscape character assessments for their areas and most have BAPs directly or indirectly through the counties. It is noted that hedgerow types are included in the draft regulation; *it would not take a major exercise for each local authority to review these hedge types and the landscape character assessment and produce, along with photographic examples of the different hedge types within a local authority area, a 'Hedgerows Profile' for that authority.* These documents would then be part of the 'Hedgerows Regulations System' within the local authority. This would also cover the first and second of the 'highlighted' consultation questions. "The government would welcome views on other types of boundary features..." and "The government proposes to take account of local distinctiveness of hedgerows by changes to the 1997 Hedgerows Regulations etc.

2.0 Amending the Regulations (Continued)

2.2.2 The Relevant Date Problem

This relates to the problem of ‘records’ being in place prior to 1997. This is a major problem in that many authorities have no such records or if they have they are not held in the format required. The proposed amendment would be very beneficial to take account of survey data as it is collected, although the need to have these for 5 or 10 years prior to a notification is still a ‘loophole’ until such time as all authorities have the data in place. *The proposed amendments are, therefore, welcomed but the period for the records being in place should be reduced to 3 and 5 years respectively.*

2.2.3 Level of Fines

The proposal is not to change the level of fines based on the ‘idea’ that because local authorities can require replacement planting of the hedgerow this is a deterrent. This approach appears to neglect:

- a) The fact that a hedgerow could have significant biodiversity value and no replacement planting could possibly replace the biodiversity lost.
- b) That after 30 years the hedgerow can be removed because the reason it was ‘important’ no longer exists.

Both of these are clearly not in keeping with government policy on sustainability and biodiversity or the objectives of the regulations.

The level of fines, therefore, should be brought in line with those for Tree Preservation Orders. It is considered that this would give a clear message that the government were serious regarding the protection of biodiversity and protection of our cultural heritage. It should be noted that very few prosecutions of contraventions of Tree Preservation Order Regulations result in fines of anything like the maximum.

2.0 Amending the Regulations (Continued)

2.3 Part Three: Amending the Regulations

2.3.1 Which Hedgerows?

The current exclusion of having an ‘important’ hedgerow adjoining a private dwelling etc. does neglect the pressures that are occurring on the edges of settlement boundaries. The government’s planning guidance on housing, PPG 3 requires that development on greenfield sites be on the edge of existing settlement boundaries. This is bound to bring more ‘important’ hedgerows into this area of difficulty. *Either the regulations need to be changed to allow such ‘important’ hedgerows to be protected or PPG 3 needs to be amended to take this problem into account.*

2.3.2 Gaps in Hedgerow Length and Access Exemptions

2.3.3 The Review Group recommended that the GLBP should include explicit references so that any gap less than 20m should be treated as part of a hedgerow. The new GLBP at Annex A shows a diagram with <20m inserted in gaps in the hedgerow and this is accompanied by text to explain the figure. This proposal is welcomed, however, should the GLBP be given more weight by making it a Circular.

The Review Group propose the introduction of a 9m limit to exemptions to create a new access or widen an existing access to land, and this would not need a notification to the local authority. The difficulty that arises in this case is the need to keep track of changes over time if there are no records of what has been removed or replanted? Would it be too onerous if landowners / occupiers were required to notify the local authority of such changes and it would fall on the local authorities to keep the records and update maps?

2.3.4 Field Visits and Completion of Hedgerow Retention or Removal Notices

The proposal is to amend the guidance to say that:

- a) It is not necessary to make field visits if it is known that certain criteria exist before issuing a Hedgerow Retention Notice.
- b) It is necessary to make a field visit if a Removal Notice is going to be issued.

These proposals would reduce the administrative burden in those areas that had access to good documentation, but is likely to have little impact on reducing workloads in most local authorities at the present time.

2.0 Amending the Regulations (Continued)

2.3.5 Landscape Character and Local Distinctiveness

Following the Review Group's report and research into hedgerow types, a list of 36 locally distinct hedgerow types was produced; these are shown in Annex E of the consultation.

The government have accepted that some 28 of the 35 are acceptable, those eliminated related to trees and hedgebanks and according to the document could not be protected using the 1997 Hedgerows Regulations. The government identify that introduction of the schedules may cause problems if the hedge types are not clearly defined but recognise the value of having such a schedule.

Referring back to item 2.1.1 and Hedgerow Profiles it is strongly suggested that the schedule should be included. As stated in 2.1.1 this should not be difficult to put in place.

2.3.6 Amenity Value

The proposal is to amend the regulations so that a hedgerow is important if it marks the boundary of a highway (i.e. any road or public right of way). This proposal is welcomed, however, it does mean that many more authorities will now have to put a 'proper administrative system' in place for hedgerows because this will apply to all areas of the country not just a few.

2.3.7 Historic and Archaeological Value

To simplify the identification of such criteria and reduce the 'relevant date' issue the Review Group proposed a number of changes based on the ADAS research.

- a) A pre-1850AD historic administrative unit (parish, township, hundred, wapentake, cantref or maerdref, or
- b) A pre-1600 AD manorial estate, ecclesiastical estate, or other limits of field systems, parks, woods or common land.

It is noted that in regard to woodland that this would relate directly to 'ancient woodlands' because of the date.

On the whole this amendment is welcomed, however, it would be beneficial to have access to a website that provided sources of information on these issues, e.g. glossary of terms and their meaning.

2.0 Amending the Regulations (Continued)

2.3.7 Historic and Archaeological Value (Continued)

The criterion for identification of hedgerows with archaeological value is not being changed, but a simplification of the wording is accepted. This change is welcomed.

2.3.8 Field Systems and Enclosure Field Systems

The existing criteria are to be amended so that the cut off date would be 1845 rather than 1800 for field systems. This change is welcomed because of the greater availability of documents and maps. Also the removal 'substantially complete' is also welcomed.

2.3.9 Species Richness

The introduction of reference to Habitat Action Plans (HAP) under BAP and hence the reduction in the required number of species from 7 to 5 woody species (4 in northern England) is very much welcomed.

The duty under the Countryside and Rights of Way Act 2000 for biodiversity and HAP is perhaps something that the government and local authorities need to have far higher in their priority list of monitoring of environmental indicators.

2.3.10 Woody Species List

The inclusion of some naturalised species, i.e. Sycamore, Scots Pine (in England), Sweet Chestnut and Barberry are welcome. The exclusion of woody climbers such as Honeysuckle and Ivy is understood in terms of the speed at which they can colonise a hedgerow but this approach seems to neglect their habitat value?

2.3.11 Ecological Value

The proposed change to the criteria for acceptable records being related to the UK BAP is welcomed and the 'relevant date' being from when the Removal Notice was served. However, it is still felt that the periods of 5 years for animals and 10 years for plants is over cautious and that this should be 3 years and 5 years respectively.

2.0 Amending the Regulations (Continued)

2.3.12 Hedgerow Connectivity

The Review Group considered if hedgerows connected between other ‘countryside features’ should be classed as important. The ADAS research suggests that some of the options would result in between 32% and 79% of hedgerows meeting the criteria. ***This proposal is supported because the criteria would apply in many situations and therefore give rise to confusion.***

2.3.13 The Thirty Year Rule

The proposal is to retain the thirty-year rule on the basis that a shorter period would lessen the incentives for planting new hedgerows. The government cite the increase in hedgerow planting since 1993. While there may be some truth in the latter it is more likely that it is changes in farming subsidies that have resulted in more hedgerows being planted rather than any real change in ‘sustainable landuse management’. Thus it is probable that there will be a change in subsidies that will result in a loss of hedgerows. It is only recently that field headlands, which farmers had left un-cultivated for biodiversity reasons, through one farming grant were re-cultivated when another (and more lucrative) farming grant required them to be so. This is also identified at item 2.8 of the Partial Regulatory Impact Assessment.

Irrespective of the above the rule is a serious problem in some areas that have poor or no aerial photograph coverage until the 1980s. The rule should be changed to allow local authorities a realistic chance of being able to ‘identify’ a hedgerows age. If the rule was changed to 20 years this would mean:

- ‘Direct evidence’ in the form of aerial photographs would be available.
- The test would be fair to both the landowner and the local authority.
- There would be less time spent on trying to find evidence of the hedgerow’s existence.

It is considered that the change to 20 years would have little impact on the planting of hedgerows, given the current incentives, and would mean the regulations could be operated more efficiently.

2.0 Amending the Regulations (Continued)

2.3.14 Amending the Relevant Date

The proposal to ‘roll forward’ the relevant date is supported.

2.3.15 Response Period to Removal Notice

The Review Group considered the problem of trying to verify some of the criteria during the winter months and / or undertake some of the detailed research that could be needed in regard to historical factors. While the government consider that the current 42 days is too short they propose only to move to an 8 week or 56 day period of notification. While this may ‘fit in’ with existing Key Performance Indicators’ (KPIs) for planning applications it disregards the issues identified above.

It is clear that the process cannot be open-ended and the local authority must make a decision within a reasonable time. However, it must also be clear that the problems of:

- Lack of a decent national database for many of the criteria.
- Experience and trained staff resources.

are the main causes of delays in reaching decisions within the existing 42-day period. It is unlikely that the extra 14 days is going to make any difference to these issues and certainly even more unlikely during the winter months.

It is suggested that government re-consider some of the other proposals for dealing with this problem, either in terms of a change from notification to application and / or review of access to trained staff.

2.0 Amending the Regulations (Continued)

2.4 Part Four: Discretion for Local Authorities and Long-term Protection

2.4.1 Greater Discretion for Local Authorities

The Review Group recommended that the GLBP should allow local authorities to have a greater discretion, particularly in cases when it may benefit the wider public interest, on allowing removal of important hedgerows. The ‘additional discretion’ is to give the local authorities the ability to ‘weigh the balance’ between retention and allowing removal. The government agrees and the draft GLBP that accompanies the consultation sets this out at items 8.12 to 8.19 of the GLBP.

The BRTF also wanted a more flexible approach to allow ‘mitigation’ in the form of action by the farmer elsewhere on the farm that promoted biodiversity. This was turned down because it was considered that this would require the local authorities to put ‘values’ on biodiversity. It is difficult to see why the same need to ‘value’ biodiversity does not apply to the proposed change to the GLBP!

The existing regulations already allow discretion in this matter and the ‘improved’ GLBP does not substantially change this. However, the identification of the need to balance biodiversity values is a critical issue and is central to these regulations. Given that there is No Accepted valuation method in terms of a scoring system, and the existing regulations and GLBP provide for the ‘discretion, *it is suggested that the GLBP should provide a detailed worked example, i.e. case study, to show how the ‘balancing’ is to be carried out.*

2.4.2 Long-term Protection

The government’s recent biodiversity policy document ‘Working with the Grain of Nature’ is a significant step in putting in place the policy framework for protection of the environment. However, if we are to seek protection, enhancement and restoration of our heritage of hedgerows we need (as always) to look at history to see why hedgerows have disappeared from our landscapes. This means ‘thinking through’ new policies and strategies to see what their environmental impact will be before implementing them. A critical element in being able to analyse these issues will be a way of determining biodiversity value.

2.0 Amending the Regulations (Continued)

2.4.2 Long-term Protection (Continued)

The fragmentation of the landscape is perhaps the most serious threat to biodiversity and while it is not difficult to ‘see’ it happening we seem unable to reverse or resolve bad or conflicting policy until serious losses occur. The problem is the lack of linkage between those working in the field and those making policy.

It is time that we took a leaf out of nature’s book and made it possible for those at the boundaries (in the field) to have access to each other’s experiences, i.e. more effective networks of communication on Best Practice and Policy. Only then can resources be directed to problems as they occur rather than waiting for serious dysfunction of our ecosystem.

It is suggested that for this to occur two things are needed:

- Those people in the field need to be more highly trained so as to be able to recognise the impact on key environmental indicators.
- The trigger for action on policies and objectives is not down to individuals (or committees) but is brought about by changes in the balance of the environmental indicators.

3.0 Draft Guide to the Law and Best Practice

3.1 The draft GLBP gives more detailed advice on procedures, sources of information and explanations of the criteria than the previous guide. The advice is aimed at local authorities and this should be welcomed. The guide deals with a number of particular issues that have caused problems in the past, i.e. permitted works and exemptions, form of notification and information provided by the applicant. The GLBP has no legal force, however, at appeal or in court it is likely that the GLBP will be seen as the benchmark against which procedures and actions will be tested.

Comments are made on some aspects of the guide as follows.

3.2 Scope of the Regulations

3.2.1 Application Tests: The GLBP states that the applicant should carry out a number of tests to see if the local authority need to be notified and that local authorities, if they provide guidance, should provide this by the use of a ‘written’ explanation. In such explanations they should make it clear what action is necessary and why. It would clearly be of benefit for local authorities to have procedures, guidelines and templated letters / notices in place to give effect to this guidance.

3.2.2 Countryside Hedges: At item 3.8 the pressure on urban hedgerows from development pressure is identified. Although it refers to the use of planning condition to retain hedgerows it does not deal with the practicalities of such conditions, i.e. very few people wish to retain ‘untidy’ hedges and certainly not the ditches that accompany them. The best way to retain such hedgerows is to keep them outside any residential property and this guidance should be included in the BLGP.

3.2.3 Length of Hedgerows: This guidance remains unchanged and still fails to state from which part of the hedge the measurements should start, i.e. the stem. In addition there is no guidance on the methods that should be used, i.e. how accurate are the measurements supposed to be? Within 1m? If an important hedgerow is 19.9m long then the means of measurement could be crucial to its retention. Some guidance is essential on this matter.

3.2.4 Crown Land: The clarification that providing the hedgerow meets requirements of Regulation 3 it is covered by the Regulations is welcomed.

3.0 Draft Guide to the Law and Best Practice (Continued)

- 3.2.5** Removal and Proper Management: At items 3.15 and 3.16 the problem of acts that result in destruction, such as by removal of woody species or features is clearly stated to be the same as ‘removal’. This is related to items 4.16 to 4.19 on management which states that coppicing can be ‘normal management’ for some hedges. The guide should go on to include guidance to local authorities to have in place a Good Hedgerow Management Guide, which is based on the traditional hedgerow management for the hedgerow ‘types’ in their area.
- 3.2.6** Pre-notification: The guide sets out this procedure clearly but does not identify the benefits of it to the applicant or the local authority, i.e. it saves time. In addition it is suggested that local authorities keep a record of all such ‘enquires’. This would help, even if an application is not made or did not need to be made, so that there would be some means of checking the ‘activity’ associated with hedgerows.
- 3.2.7** Removal Notice: Model Notices are provided at Annex B and in Schedule 4 of the Regulations. The guide makes clear that these forms do not have to be used and that there is no charge for making applications (although the latter is likely to change with the introduction of the Planning and Compulsory Purchase Act) providing the information supplied meets that set out in Regulation 5(1)(a) and item 5.8 of the guide. Bullet point 4 of the guide at 5.8 states that the applicant needs to provide evidence of the hedgerow’s age if they consider it is less than 30 years old (item 5.11 sets out the type of evidence). This guidance is welcomed.
- 3.2.8** Receipt of Notice: The guide identifies that the Notice is not valid if all the information is not supplied; therefore, it is essential that local authorities evaluate notifications before registering them. If they accept the notification then the 56-day period starts from that time. At 5.13 the guide informs that the 56-day period can be re-started if further information is subsequently supplied. See also item 5.20.
- 3.2.9** Who Can Notify: At 5.14 those who can notify does not include agents! This would seem to be an unnecessary restriction.
- 3.2.10** Felling Licence: If a notification includes removal of sufficient volume of timber to require a felling licence under the Forestry Act 1967 the local authority must consult with the Forestry Commission.
- 3.2.11** Hedgerow Register: Regulation 10 and at item 6.9 the guide states that “local authorities are required to keep a register for public inspection, containing a copy of all hedgerow removal; notices among other items (see item 14.1)”. Very few authorities even keep proper registers for Tree Preservation Orders or Trees in Conservation Areas and the maintenance of a register should be a Best value KPI.

3.0 Draft Guide to the Law and Best Practice (Continued)

3.2.12 Evaluation: Chapter 7 of the guide goes through the criteria in detail and this information is welcomed, although there is one small worked example at item 7.24; some case studies from the ADAS survey as an Annex or possibly available on a web site would be useful.

3.2.13 Prosecutions: At item 10.7 the guide identifies that cases are brought under section 222 of the Local Government Act 1972.

4.0 Partial Regulatory Impact Assessment (PRIA)

4.1 Percentage of Hedges Protected by Existing Regulations

At 3.5 of the PIRA it is proposed that the latest ADAS research identifies that the current regulations cover some 70% of all hedgerows. This appears contrary to most local authority experience and given the relatively low number of 'important' hedgerows that have been protected. If the 70% is correct then it would suggest that most local authorities are either not investigating applications correctly (technically or procedurally) or the existing criteria are too difficult to evaluate except by highly qualified researchers.

4.2 Costs

The PIRA also provides some valuable information on the costs to landowners etc. associated with the process, maintenance of hedgerows and lost opportunity costs. These costs may be amended following the consultation stage. However, at the present time such costs are useful indicators to those in the field.

The PIRA does consider that the proposed amendments would, because the criteria are easier to check, mean no increased costs to local authorities. This seems to neglect the fact that, if the criteria are easier to check and the addition of hedgerows adjacent to a Public Highway as being one of the identified criteria, then more hedgerows will be identified as important. If that is the case (even if the numbers of notifications remain the same) then there is more 'work' associated with an important hedgerow, i.e. records, land charges, updating maps etc. than one that is not important.

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