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# Improvements to the policy and legal framework for public rights of way

## A public consultation

**May 2012**

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Department for Environment
Food and Rural Affairs

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## Contents

# Scope of consultation & basic information

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| Topic of consultation | Improvements to the policy and legal framework governing public rights of way. |
| Scope of consultation | The aim is to seek the views of consultees on a proposed package of changes to the processes for recording, diverting and extinguishing of public rights of way, to inform Government decisions on whether and how to Implement the various proposals. |
| Geographical scope | England. |
| Impact assessment | Three consultation stage impact assessments on the proposals for improvements have been prepared — they are published alongside this consultation paper. |
| To | All stakeholders with an interest on public rights of way, including: landowners, local authorities, rights of way user representative bodies and conservation bodies. |
| Body responsible for the consultation | This consultation is being managed by the Reform Projects Team within the Department for Environment, Food and Rural Affairs |
| Duration | This consultation will run for 12 weeks. It begins on 14 May 2012 and ends on 6 August 2012. |
| Enquiries | Please contact the Reform Projects Team in Defra: rightsofwayreforms@defra.gsi.gov.uk |
| How to respond | Please send your response to: Reform Projects Team, Defra, Zone 1/09, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6EB]<br>E-mail: rightsofwayreforms@defra.gsi.gov.uk |
| Additional ways to become involved | This will be a largely written exercise, though we intend to hold informal meetings with interested groups. |
| After the consultation | A summary of responses to the consultation will be made available by the Department within three months of the end of the consultation period. |
| Compliance with the code of practice on consultation | This consultation complies with the Government's code of practice on consultations. |

# Ministerial Foreword

Our extensive rights of way network is a unique and valuable resource. Public rights of way remain the primary means of gaining access to the countryside and provide the opportunity to experience the immense variety of English landscape and the cities, towns and villages within it.

In 1949 there began a process to make a legal record of public rights of way so they would not be lost for ever. That process proved far more difficult than originally envisaged and remains unfulfilled to this day. How to make it easier to complete the record of historical rights of way (those rights of way that were already in existence in 1949), was the challenge given to the Stakeholder Working Group on unrecorded rights of way set up by Natural England. The Group rose to the challenge and produced a package of proposals that they agreed would offer benefits to all concerned.

The recommendations of the Stakeholder Working Group form the basis of the changes proposed in this consultation document. The Group's recommendations, which relate solely to the recording of rights of way, have been broadly endorsed in the wider rights of way stakeholder community and it would seem sensible to apply similar principles, where possible, to other rights of way processes, such as a diversion.

The Stakeholder Working Group made closure of the historical record through implementation of the 2026 'cut-off' date (introduced by the Countryside and Rights of Way Act 2000) a core principle. But just as there was agreement that redundant unrecorded historical routes should be extinguished from that date, there was also consensus that useful or potentially useful historical routes, including all of the rights of way that are currently in regular use, must be preserved.

In recognition of the difficulties that can arise when historical rights of way conflict with current land uses, the Stakeholder Working Group proposed that local authorities be given clearer powers to work with landowners towards changing their alignment where necessary. But there are still many instances of existing rights of way that are incompatible with current land uses and this consultation document also considers how the prospects of securing a diversion in such circumstances could be improved.

This document also looks at how, in the context of The Growth Review, changes to the rights of way network could be better integrated into the planning process.

The publication of this consultation sets out the Government's response to the Stakeholder Working Group proposals. It seeks the views of the wider public on those proposals and looks at other ways in which the legislative and policy framework might be improved. We plan to announce our conclusions on how we intend to take forward any changes later this year.

Richard Benyon
Minister for the Natural Environment
and Fisheries

# Introduction

"*The Natural Choice: securing the value of nature*", the Government's natural environment white paper[1] contained a commitment to consult on simplifying and streamlining the processes for recording and making changes to public rights of way, based on proposals made by Natural England's Stakeholder Working Group on unrecorded rights of way. This will make it easier to claim public rights of way and to make changes to them in order to create a network that meets the needs of local people.

The Working Group's package as a whole is deregulatory. It has the key advantage that it has agreement across the full range of interests in rights of way. A core proposal made by the Working Group is that the statutory provisions in the CROW Act 2000 that will, on 1 January 2026 (the 2026 cut-off date), extinguish (subject to certain exceptions) all rights of way in existence before 1 January 1949 should be brought into force, as long as the package as a whole is implemented.

The package also contains measures to: protect useful or potentially useful rights of way from extinguishment; give local authorities more scope to use their judgement in dealing with insubstantial or irrelevant applications and objections; enable negotiated solutions; and make procedures more streamlined, flexible and light-touch. They all fit broadly with the Government's over-arching aims of reducing regulation, of smaller government and of giving more power to local authorities and local people to develop solutions.

The Stakeholder Working Group's proposals are concerned with the legal processes for recording historical public rights of way. However, this consultation document also looks at the scope for a wider package of improvements in three key areas not within the Working Group's terms of reference, these are as follows

- Considering whether improvements, similar to those identified by the Working Group for recording rights of way, should be applied to procedures creating rights of way and for diverting or extinguishing them. This would make these processes less burdensome and more responsive to local needs and would maintain consistency across the rights of way legislative framework.
- Given that the outcome of an earlier Defra consultation was that the current 'right to apply' provisions[2] were unworkable, looking at how it could be made easier for landowners to progress proposals for the diversion or extinguishment of rights of way crossing their land, while maintaining the existing checks and balances that ensure that the interests of the public are safeguarded.
- Proposing options for improving the way that changes to rights of way are dealt with in relation to applications for planning permission. This is one of the ways in which the Government will be addressing barriers to growth which result from consents, other than planning consents, that have to be obtained before a planning permission can be implemented – as highlighted in the 2010 Penfold Review.

[1] http://www.defra.gov.uk/environment/natural/whitepaper/

[2] In Part II of the Countryside and Rights of Way Act 2000.

# Background

Rights of way are public highways that exist for the benefit of the community at large, in much the same way as the public road network. But, apart from byways open to all traffic, they generally only have rights for the public to use them on foot, horseback or bicycle or other non-motorised vehicles, depending on their status. England's network of public rights of way is a part of the nation's heritage, typically providing ways for people to enjoy and pass through areas of green space and the countryside around where they live or which they visit. It is an ancient network comprising a mix of age-old routes, including those created statutorily as part of the process of inclosing the old common lands land into private occupation and those created more recently, either through long public use, or under statutory powers, or through dedication by the landowner.

In England there are estimated to be some 188,700 kilometres of recorded public rights of way. These are made up of:

- Footpaths – (146,600 km) over which the right of way is on foot only;
- Bridleways – (32,400 km) for pedestrians, horse riders and bicyclists;
- Restricted byways – (6,000 km) carriageways over which the right of way is for all types of traffic except mechanically-propelled vehicles.
- Byways open to all traffic – (3,700 km) carriageways over which the right of way is on foot, on horseback and for all vehicular traffic.

There is also an extensive network of unsealed minor roads, which are important components of public access to the countryside.

Surveying authorities (usually county councils or unitary authorities) are required by legislation[3] to maintain a definitive map and statement, which is a legal record of the rights of way that exist in their area[4]. The authority has a statutory duty to keep these maps up to date and to investigate any evidence it discovers or that is presented to it that suggests a way has been left off the map, has been recorded incorrectly, was included on the map in error or has come into existence since the map was prepared or last updated. The authority does this by making definitive map modification orders (or DMMOs).

Local authorities also have powers[5] to make changes to the rights of way networks in their area. They can create new routes, or divert or extinguish existing routes. Orders that make such changes are normally referred to as "public path orders". Anyone may ask their local authority to make a public path order, but, unlike definitive map modification orders, as it is a power, rather than a duty, local authorities have some discretion on how to respond. Local authorities may also enter into agreements, whereby a landowner may dedicate a right of way for public use.

Highway authorities (usually synonymous with surveying authorities) have a duty to assert and protect the rights of the public to the use and enjoyment of any highway[6]. In this instance,

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3 Part III of the Wildlife and Countryside Act 1981.

4 The existence of a right of way does not depend upon it being recorded on the definitive map and statement.

5 Under the Highways Act 1980 and Town & Country Planning Act 1990.

6 Section 130 of the Highways Act 1980.

'highway' includes rights of way. This means they are obliged by law to keep rights of way open and usable.

Although often perceived as 'free', rights of way are not without cost. Under the current legislative and policy framework, adding existing rights of way to the definitive map and statement can be a lengthy, uncertain and costly legal process; on average each right of way costs from £4.5k (for an unopposed order) to £9.1k (for an opposed order)[7], albeit many will cost much less. Similarly, orders to divert or extinguish rights of way can be costly, with a typical unopposed order costing something like £2,500[8]. With rights of way there are ongoing costs in maintenance and enforcement; most public rights of way are maintainable at public expense. In cases where responsibility for maintenance lies elsewhere, highway authorities still have a duty to ensure the necessary maintenance work is undertaken.

## The value of the rights of way network

Our ambition is to strengthen the connections between people and nature. We want more people to enjoy the benefits of nature by giving them freedom to connect with it. Everyone should have fair access to a good-quality natural environment. Clear, well-maintained paths and byways are important to give people access to the natural environment and can be enjoyed by cyclists, walkers, horse riders and carriage drivers. The access network enables people to get away from roads used mainly by motor vehicles and enjoy the beauty and tranquillity of large parts of the countryside to which they would not otherwise have access.

People make more than 57 million visits to our National Parks each year and these special places, together with our collection of 34 Areas of Outstanding Natural Beauty and 224 National Nature Reserves, form a rich and diverse set of national treasures. We want to see a shift away from people using cars to get to these places, with more people choosing public transport, cycling, riding or walking. Not only do these transport methods have a lower environmental impact, but there is evidence that cyclists, riders and walkers spend more in the local economy than visitors by car, benefiting local communities.

## Why is change needed?

The 1949 National Parks & Access to the Countryside Act introduced the definitive map and statement of public rights of way. The aim was for local authorities to create a legal record of all public rights of way (except for those that were part of the 'ordinary roads' network) to ensure that they were not "lost for ever".

Although it was originally envisaged that this process would be completed within five years or so, completion of the legal record of historical rights of way (those that came into existence before 1949) has remained a significant challenge, despite several subsequent attempts to improve the legislative framework.

[7] From figure 3.6 of *Countryside and Community Research Unit (2002) Discovering Lost Ways, University of Gloucestershire*. The table shows the averages across all authorities and the prices have been updated from 2002 to 2010 prices. As indicated in Part 5 of this consultation paper, views are invited on whether these figures are a fair assessment of the costs.

[8] Public consultation on the 'right to apply', 2007.

To resolve this, the Countryside and Rights of Way Act 2000 introduced a cut-off date[9], whereby after 25 years (i.e. in 2026) all rights of way already in existence in 1949 and not recorded on the definitive map and statement by 2026 would be extinguished, subject to the exceptions already provided for in the Act. In practice this means that a right of way that could be shown to have existed before 1 January 1949 could not be added to the definitive map and statement (the local authority's legal record of public rights of way) and would cease to exist. The intention was that this would:

- remove uncertainty for landowners, who might otherwise have a 'lost' right of way discovered on their land at any point in the future;
- provide an incentive to complete the definitive map and statement before the 2026 deadline.

However, during efforts to expedite completion of the historical record, it has become clear that neither a volunteer-led, nor a centralised, systematic approach to gathering evidence and making applications, has been shown capable of delivering the required number of applications within the required timeframe within the current legislative framework. Therefore completion of the definitive map and statement by 2026 would not be a viable proposition unless a streamlined approach to recording public rights of way was adopted. In order to develop such an approach Natural England established an independently-chaired Stakeholder Working Group to develop a consensus among stakeholders, representing landowners, rights of way users and local authorities, about the best way forward.

In March 2010 the Stakeholder Working Group published a report, entitled 'Stepping Forward'[10] containing a package of 32 proposals aiming at improving the processes for identifying and recording historical public rights of way. This consultation document sets out how the Government proposes to respond to the Group's report and should be read in conjunction with that report.

However, this consultation also sets out proposals for a wider package of improvements in three key areas not within scope of the Working Group's terms of reference. These include: whether similar improvements should be applied to procedures for extinguishing or diverting rights of way and for creating new ones; looking at how it could be made easier for landowners to progress proposals for the diversion or extinguishment of rights of way crossing their land (subject to the current public interest tests); and addressing barriers to growth which result from non-planning consents, as highlighted in the 2010 Penfold Review.

In developing these proposals, the Government has noted that the Group's recommendations present a balanced package for reform such that a 'cherry picking' approach to implementation would rapidly dismantle the consensus amongst stakeholders that has now been established. While accepting this broad principle, there are certain aspects of the proposals where their strategic nature means that they need further development and others where we feel there may be practical difficulties in implementing them. Views on how these difficulties may be overcome are invited in response to this consultation. We also think it important to make progress on improvements in other areas, particularly where legislative change will be needed.

[9] These provisions have not yet been implemented.

[10] http://www.naturalengland.org.uk/ourwork/enjoying/places/rightsofway/swgrow/default.aspx

# Part 1 - Recommendations of the Natural England Stakeholder Working Group on unrecorded rights of way

1. Parts 1 and 2 of this consultation should be read in conjunction with the Stakeholder Working Group's report[11]. In some cases the proposals as set out below are paraphrased; where they are quoted verbatim they are enclosed in quotation marks.

## Implementing the 2026 'cut-off' provisions

2. The Stakeholder Working Group's first recommendation is that the 2026 'cut-off' provisions should be implemented. ***"Implementation of the cut-off is an integral part of the agreement reached by the Group. The statutory provisions for pre-1949 rights of way to be extinguished if unrecorded at the cut-off should be brought into force, with effective protection for useful or potentially useful rights of this kind given in accordance with the Group's other proposals."*** (Proposal 1). Implementing the 'cut-off' provisions can readily be achieved through a commencement order, but the Group's report makes it clear that the Group's agreement to this principle is contingent on the whole package of proposals described in the report being implemented.

## Protection for useful or potentially useful rights of way from extinguishment under the 2026 'cut-off' provisions

3. Many unrecorded historical rights of way are already key links in the off-road network of paths and tracks, which are used on a daily basis by local communities and the wider public – they are not all undiscovered, obscure or unused as is often thought to be the case. Others have the potential to be useful routes, even though they are currently not available on the ground. If not recorded by the cut-off date they would be lost to the public for ever.

4. Section 54 of the Countryside and Rights of Way Act 2000 provides for certain rights of way to be excluded from extinguishment and for regulations to be made to enable further categories of rights of way to be excluded. The Stakeholder Working Group made a number of recommendations for certain categories of rights of way to be excluded in this way. These are as follows.

   4.1. ***"Routes identified on the list of streets/local street gazetteer as publicly maintainable, or as private streets carrying public rights, should be exempted from the cut-off."*** (Proposal 25). A similar legal device was used in Part 6 of the Natural Environment and Rural Communities Act 2006 to ensure that people could continue to use publicly maintainable routes. We consider that it would be appropriate to ensure that routes that are maintained by public money can be preserved for use by the public, in accordance with the rights that can be shown to exist.

   4.2. ***Rights of way for which evidence can be produced to show that they were in regular, continuous use at the time of the cut-off date should be preserved.*** This is the essence of Proposal 26, which is intended to address the fact that the 'cut-off' date provisions, as currently framed, indiscriminately extinguish all unrecorded rights of way; they do not distinguish between those that are obscure and unused and those that are in current, regular use. Proposal 26 goes on to stipulate that it should not be possible to

[11] http://www.naturalengland.org.uk/ourwork/enjoying/places/rightsofway/swgrow/default.aspx

enable rights to be preserved, over and above those for which there was evidence of use. In other words, it should not be possible to use pre-1949 documentary evidence after the 'cut-off' to claim that the status of the route is of higher status than that for which there was recent user evidence.

4.3. It seems clear that the original intention behind the 'cut-off' date proposals was to reduce uncertainty for landowners caused by the discovery of obscure historical rights of way that were disused and not evident on the ground. The Stakeholder Working Group agreed that unrecorded rights of way in regular current use were not ones at which the extinguishment provisions should be aimed. We agree and believe that rights of way that are in regular, continuous use should not be extinguished just because they came into existence before 1949.

4.4. There are two legal points to be addressed in order to create a mechanism to achieve this. The first is that the 'cut-off' provisions in the Countryside and Rights of Way Act 2000 take no account of past or current use, being concerned only with whether the right of way existed in law in 1949 and whether it had been recorded by the 'cut-off' date. The second (as set out in footnote 14 of the Stakeholder Working Group report) is that, as the law currently stands, a claim for a right of way based on use would have to show that the use was 'as of right' (i.e. without permission, force or secrecy). In other words, as the law stands use by the public cannot give rise to a right where a right can be shown to already exist.

4.5. ***Rights over routes that are subject to applications recorded on the Register maintained by local authorities under section 53B of the Wildlife and Countryside Act 198 should be preserved until the case is substantively determined*.** (Proposal 24). The recommendation goes on to suggest that there should be an appropriate period after the 'cut-off' to enable applications to be registered[12]. Where legislative processes change, the convention is to introduce transitional provisions to enable unresolved cases to be seen through to a conclusion under the existing arrangements. We accept that there is a particular case for doing so here, given that applications would take a significant time to be processed. We also accept that there is a risk of rights of way being lost for ever because of the time taken to register applications and that the legislative provisions should therefore include the additional safeguard of an appropriate period after the 'cut-off' to enable applications to be registered.

4.6. ***Surveying authorities should be able to make an application for a definitive map modification order.*** (Proposal 27). Providing for local authorities to make applications (effectively to themselves) would enable such applications to be registered and therefore any rights subject to those applications to be preserved. This would give local authorities a mechanism to exclude from extinguishment rights of way that an authority believed to exist but had not yet managed to record through lack of time or resources. This proposal also recommends that Defra consult on whether, during the period proposed above to allow the registration of outstanding applications, local authorities should be able to register rights of way by self-application, the aim being to enable them to preserve any important routes that might otherwise be overlooked. This would mirror the comparable final window for registration of commons and greens that was provided under the Commons Registration Act 1965.

[12] Added to the register of definitive map modification order applications that local authorities are required to maintain under section 53 of the Wildlife and Countryside Act 1981.

4.7. ***"It should not be possible after the cut-off date for recorded rights of way to be downgraded or deleted based on pre-1949 evidence, just as there will be no scope for them to be upgraded or added because of such evidence".*** (Proposal 20). The 'cut-off' date prevents rights of way from being discovered and recorded after 2026 on the basis of pre-1949 documentary evidence. This proposal is that after 2026 there should equally be a mechanism to prevent existing rights of way being downgraded on the basis of pre-1949 documentary evidence. This is already the case for bridleways by virtue of section 55(1) of the Countryside and Rights of Way Act 2000, but there is scope to extend this to other rights.

Question 1. Do you agree that there should be a brief, post cut-off period during which applications that pass a '*basic evidential test*' (paragraphs 5.9 and 5.10) can be registered?

Question 2. Do you agree that during this period, local authorities should be able to register rights of way by self application, including any self applications made in the past, subject to the same tests and transparency as for any other applications?

Question 3. Are there are any other categories of rights of way that need to be protected by exceptions set out in regulations?

## Streamlining the procedures for recording public rights of way

5. The Stakeholder Working Group proposed a number of incremental improvements to the procedures for identifying and recording a right of way on the definitive map and statement. The Group believes that as a package, these measures would bring about a notable improvement in the processes for recording rights of way, saving both time and money. The proposals are intended to improve the administrative and legal procedures rather than reduce the evidential threshold for recording rights of way. We agree that each one of the following changes would bring about improvements to the processes for recording rights of way, for the reasons set out below.

5.1. ***"It should be possible to transfer ownership of an application for a definitive map modification order".*** (Proposal 19). Some applications take many years to process and applicants may be unable to sustain the process. This would enable others to take up an application on their behalf, enabling any rights associated with the role of applicant to be transferred.

5.2. ***"Applicants should not need to provide copies of documents that are held by the surveying authority or are readily available in a public archive".*** (Proposal 4). This addresses a potential adverse consequence of the Court of Appeal judgement in the case of *R (Warden and Fellows of Winchester College and Humphrey Feeds Limited) v. Hampshire County Council and SoSEFRA*, and would ensure that applicants do not have to submit, in support of an application, copies of documents that a local authority already has in its possession and that applications would not be rendered invalid because such documents had not been submitted.

5.3. ***"It should be the surveying authority and not the applicant that approaches landowners – and then only if the application passes the Basic Evidential Test[13]. The authority should informally explain at an early stage the process and how the case will be dealt with".*** (Proposal 5). The intention with this proposal is to avoid the potential for conflict by making the current process[14] less adversarial in nature. It aims to promote constructive dialogue between local authorities and landowners over potential rights of way at an early stage, as opposed to an applicant effectively 'serving notice' on a landowner. It would also avoid needless contention or concern resulting from owners being approached with insubstantial claims. We agree that this should result in fewer applications escalating into costly disputes and would reduce the risk that routes that are not rights of way coming into public use as a consequence of being claimed as such.

5.4. ***"The requirement for newspaper advertisements relating to surveying authority notices of all types should be minimised by referring those interested to details online or at the surveying authority's offices".*** (Proposal 10). Some of the requirements for advertising orders under schedule 15 to the Wildlife and Countryside Act 1981 are outdated, ineffective and costly. There is scope for reducing costs while maintaining effectiveness by making more use of new technology.

5.5. ***"Where an order is successfully challenged in the High Court, it is the Secretary of State's decision rather than the surveying authority's order that should be quashed – leaving the original order to be re-determined by the Planning Inspectorate as necessary".*** (Proposal 16). This would correct an anomaly whereby if a decision by a rights of way Inspector is quashed, the local authority has to start the order-making process all over again from scratch; it would make more sense for the Inspector to make a fresh decision – provided that the order is capable of being re-determined as it stands.

5.6. ***"The Secretary of State should be able to split a case such that only aspects that are objected to need be reviewed".*** (Proposal 14). We agree there is a need to avoid resource going into reviewing and confirming part of an order that is not in dispute.

5.7. ***"Orders should be published in draft and there should be flexibility for surveying authorities to correct technical errors in them".*** (Proposal 15). The current procedures are based on local authorities *making* legal orders, publicising them and then *confirming* them provided they are not disputed or have not been modified, in which case they would have to be submitted to the Secretary of State for confirmation. There is scope for a mechanism, whereby a draft order is publicised to enable any technical or factual errors to be identified and corrected before the order is made, to avoid the need for the correction to be done by the Secretary of State.

5.8. ***"Where objections to the surveying authority's determination are made on the basis of new evidence, an award of costs against the objector should be considered if it is clear that the evidence has been wilfully withheld. This should be possible regardless of the outcome of the case".*** (Proposal 9). This proposal would ensure that objectors to rights of way orders cannot withhold information for tactical reasons. It is possible that this may already be covered by the existing costs provisions (in the Local Government Act 1972). Although it may be that in order for this to be an effective deterrent, the costs regime for rights of way orders would have to be

[13] See paragraphs 5.9 and 5.10.

[14] In paragraph 2 of schedule 14 to the Wildlife and Countryside Act 1981.

extended from cases conducted by inquiries and hearings to include cases conducted by written representations, particularly if this procedure is to become the default mechanism for dealing with disputed orders (see proposal 13). This would need to be done through a statutory instrument.

5.9. ***"Review of cases based on documentary evidence should normally be by means of written representations, but with the discretion to hold a hearing or inquiry if in all the circumstances it is likely to add value".*** (Proposal 13). The aim with this proposal is to make it the norm to decide opposed rights of way orders by means of a procedure based upon the exchange of written representations and to make it an exception to hold a public inquiry or hearing to decide such cases. We agree that where a case is based on whether the historical documentary evidence does or does not show that a public right of way exists, there is less justification for a public inquiry, or even a hearing, than with claims based on the witness evidence of those who have used or known the route, provided there is adequate provision for the exchange and discussion of legal submissions. Retaining the discretion for either to be held will ensure sufficient flexibility in all circumstances.

***"Surveying authorities should have a new power to reject without substantive consideration applications that do not meet a Basic Evidential Test, on the understanding that they may be resubmitted if more convincing evidence can be found".*** (Proposal 3).

***"The surveying authority should be allowed to discount summarily any irrelevant objections. It should be required to treat both these and representations made in support as registrations of interest in the outcome of the case".*** (Proposal 11).

***"There should be provision for basic factual corrections and clarifications of the definitive map and statement, even after the cut-off, subject to clear guidance and appropriate safeguards".*** (Proposal 29).

5.10. The Government believes that local authorities should have greater scope to exercise their discretion to avoid going through burdensome procedures where there is little or no justification. Under these proposals authorities would be able to disregard unsound or inadequate applications to record rights of way and to disregard vexatious or irrelevant objections to definitive map modification orders, rather than submit them to the Secretary of State for determination. There also seems no reason why local authorities should not make factual corrections to the definitive map and statement without the need for lengthy complex legal procedures. A key complexity with these proposals would be defining the scope of the authority's discretion.

5.11. ***"It should be possible for an owner to apply to a highway authority for authority to erect new gates on restricted byways and byways open to all traffic in line with existing provisions for their erection on footpaths and bridleways".*** (Proposal 32). The lack of provision for byways to be gated is often a reason for claims being disputed by landowners, particularly where the right of way is at odds with the current land use patterns and this causes difficulty with livestock control. Currently, section 147 of the Highways Act 1980 empowers local authorities to approve the installation of gates on any footpath or bridleway, provided the right of way can be used without undue inconvenience to the public. Similar provision could be made for byways, but the concept of 'undue inconvenience to the public' may need to be redefined for this context.

5.12. ***"Natural England should be added to the list of prescribed bodies consulted when a definitive map modification order is being considered".*** (Proposal 8). In cases where a right is found to exist and action is needed in order to avoid damage to an exceptionally sensitive environment, this minor amendment would enable Natural England to advise the surveying authority or highway authority to take action, or to take action itself.

Question 4. Do you agree that these proposals would be effective in improving the process of recording rights of way?

Question 5. Do you think that more use could be made of electronic communications, for example, to make definitive map modification order applications online and to serve notice of rights of way orders?

Question 6. Are there any particular issues associated with these proposals which have not been captured and which we should consider?

## Referral of disputed cases to the Secretary of State.

6. Currently a person making an application to a local authority for an order to record a right of way can appeal to the Secretary of State if the local authority fails to determine the application within 12 months or refuses to make an order. If the local authority is directed to make an order, the order can go before the Secretary of State again if there is an objection. There is the potential for any given case to be referred to the Secretary of State several times before a final decision is made. The Stakeholder Working Group made the general proposal that:

6.1. ***"Cases should only ever be referred to the Secretary of State once".*** (Proposal 12). This proposal is concerned with the appeal mechanism that deals with cases where an authority decides not to make an order; cases where the authority fails to determine the application within 12 months are considered in the next section (proposals 17 & 18). Whilst there are clearly gains to be made here in terms of process efficiency, the Group's report does not set out how this would be achieved. Simply removing the right to appeal under schedule 14 of the Wildlife and Countryside Act 1981 would leave aggrieved applicants with no means of redress. If the onus was put on the Secretary of State to make an order on appeal, then it would be in a local authority's interests to decline to make an order in the first place, and so pass the costs of making an order to the Secretary of State.

6.2. One possible solution is to amend the current procedures to ensure that a comprehensive and exhaustive assessment of a definitive map modification order application – including landowner views and evidence – is undertaken by the surveying authority at an early stage, equivalent to the current schedule 14 stage, at which the surveying authority would make a decision based on the 'balance of probability' that the right of way subsists, rather than the current test of 'reasonably alleged to subsist'. This would be provided the application passes the *Basic Evidential Test*. There would be a right of objection at this stage, should the authority decide to make a definitive map modification order. But if the authority declined to make an order, but was directed to make an order as the result of an appeal against that decision, there would be no subsequent right of objection to the order that the authority had been directed to make on the basis that all views and evidence had been comprehensively considered both by

the Secretary of State at the appeal stage and by the surveying authority at the earlier decision stage. A schematic diagram of this process is at Annex B.

Question 7. Do you think that the mechanism set out above, would work effectively?

Question 8. Do you think that there would be a residual risk that it would be in a local authority's interests to decline to make an order in the first place?

6.3. An alternative solution might be to enable the Secretary of State to make an order on appeal but then recharge the local authority, where it was judged that the local authority should have made the order. This would result in orders going before the Secretary of State only once, but would also negate any incentive for a local authority to decline to make an order simply to pass the order-making costs on to the Secretary of State. The Secretary of State would have a power, like that proposed for local authorities, to reject without substantive consideration applications that do not meet a Basic Evidential Test.

Question 9. Do you think that the alternative mechanism set out above, would work effectively?

Question 10. Do you have any other suggestions for ensuring that cases go to the Secretary of State only once?

***Surveying authorities should determine applications and make any consequent definitive map modification order in a reasonable timescale. Where they do not, both applicants and affected owners should be able to seek a [Magistrates] court order requiring the authority to resolve the matter".*** (Proposal 17).

***"The court should allow surveying authorities a reasonable amount of time to do their job taking account of the local circumstances and the authority's current efforts".*** (Proposal 18).

6.4. Proposals 17 and 18 set out the Stakeholder Working Group's recommendation for dealing with appeals where the local authority fails to determine a definitive map modification order application within 12 months. A similar mechanism was introduced by section 63 of the Countryside and Rights of Way Act 2000, to ensure local authorities deal with obstructions of rights of way and it has proved successful with most cases being resolved before reaching the courts.

Question 11. Do you agree that applicants and affected owners should be able to seek a court order requiring the authority to determine an outstanding definitive map modification order application?

Question 12. Do you think this is an appropriate way to resolve undetermined definitive map modification order applications?

Question 13. Do you have any suggestions for alternative mechanisms to resolve undetermined definitive map modification order applications?

## Mitigating any adverse effects of previously undiscovered rights of way

7. There are a small but significant number of cases where rights of way are discovered that have been unused for many years or perhaps never used, but for which clear documentary evidence exists. Such rights may well conflict with current land uses and in some cases with important nature conservation designations. Current procedures for recording rights of way on the definitive map and statement do not allow any considerations other than the existence of the right of way to be taken into account.

    ***"A surveying authority should be able to make an agreement with one or more affected landowners recognising the existence of a previously unrecorded pre-1949 right of way, but allowing it to be recorded with appropriate modifications on the definitive map and statement, where justified to avoid significant conflicts with current land use. This power should be subject to the public interest protections mentioned later in this report".*** (Proposal 6).

    ***"It should not be possible for objections to block an agreement between the surveying authority and the landowner about the recording of rights, although the surveying authority should be required to have due regard to representations about the proposed agreement or the status of the route".*** (Proposal 7).

7.1. We accept that there is scope to establish, on a formal basis, an approach which is already sometimes used to good effect by some local authorities, whereby the existence of a right of way is recognised, but an appropriate diversion is agreed and put into effect before the way is recorded and brought into use. The Working Group proposals would prevent vexatious or unreasonable objections impeding such arrangements. The Group have sketched out a procedure for such a process, but further work is needed to determine exactly how such a procedure would work in practice and the Government proposes to do this through this consultation process with a the help of a group of rights of way practioners. However, your ideas on how such procedures would work would be welcomed as part of this consultation.

Question 14. Do you have any suggestions on how a process might work, which would enable an appropriate diversion to be agreed and put into effect before the way is recorded and brought into use?

## Government guidance

8. ***"A single source of clear and authoritative guidance, relevant to all parties involved in the process, will be needed".*** (Proposal 2). We accept that a single source of good practice guidance would be needed to make the Stakeholder Working Group proposals work as a coherent package. We believe that this guidance should be developed in partnership with stakeholders, rather than being imposed from the top down. It would be developed through a separate consultative process.

## Reviewing progress

9. The Stakeholder Working Group recommended that some measures be put in place to enable stakeholders to review progress and advise whether further measures might be necessary. The Government recognises that the Group's agreement to implementation of the 2026 'cut-off' provisions is contingent on the whole package of proposals being implemented, and their effectiveness being monitored. Nonetheless, as the Stakeholder Working Group report makes it clear, the proposals it contains are intentionally strategic in nature. There is some scope for adaptation and to ensure that the proposals can be made to operate effectively within the overall Government policy framework.

    ***"A stakeholder review panel should be constituted after implementation of the Group's proposals to review progress with recording or protecting useful or potentially useful pre-1949 rights of way before the cut-off. The panel should make an initial report in 2015".*** (Proposal 21). It is envisaged that Natural England will ask the Stakeholder Working Group to advise on this process and to reassess the timing of such a review.

    ***"A baseline survey of backlogs and cases already in the 'pipeline' will be needed so that progress can be assessed against it".*** (Proposal 22).

    ***"Regulations should be made to ensure close monitoring of surveying authority performance in preparing for the cut-off".*** (Proposal 23).

    9.1. The report points out that there is a power to make such regulations under section 71 of the Countryside and Rights of Way Act 2000. Section 71 provides that the Secretary of State can require local highway authorities to publish reports on the performance of any of their functions so far as relating to local rights of way. Although it is understood that this is one element of the Group's package, which taken as a whole is deregulatory, the Government believes that using regulations to impose an additional reporting burden would be contrary to the current Government policy of removing central reporting requirements. However we would expect local authorities to make such information available to local communities in the spirit of promoting transparency as indicated in '*Making Open Data Real: A Public Consultation*'.

## Other Stakeholder Working Group Proposals

10. ***"Consideration should be given to the data management systems needed to support administration of the definitive map and statement".*** (Proposal 28). Whilst Defra is willing to support the process, we believe that the development of data management systems is best undertaken by practioners. We would welcome views on what issues need tackling and how best to approach the development of solutions.

Question 15. What aspects of data management systems for recording public rights of way need to be tackled?

Question 16. What are the key outcomes that need to be achieved in terms of data management systems?

11. ***"Defra and DfT should jointly work with stakeholders to review the possible long-term benefits of greater integration of the management and administration of the highways network".*** (Proposal 30). Defra already engages with the Highways Records Working Group, which was formed by local authority practioners with a view to promoting best practice guidance on better integrating the definitive map and statement with other highways records. Defra will continue to support the Highways Records Working Group in developing its own approach.

12. **"*A review should be carried out of how routes for cyclists could best fit in with the highways network to form an integrated whole, and provide for usage by all non-motorised users*"**. (Proposal 31). Defra proposes to collaborate with all relevant stakeholders to look at the best way of providing 'off-road' routes that benefit all types of non-motorised traffic, including both cyclists and equestrians, and that also improve the cohesiveness of the network.

## Implementing the Stakeholder Working Group proposals

13. The Stakeholder Working Group report makes it clear that the proposals it contains are deliberately kept strategic and that much further development work and consultation by the Government would be needed to design the detailed solution to give effect to the Group's strategic proposals. This consultation document does not attempt to provide that level of detail at this stage, but sets out the Government's response as an opening stage in a consultation process that seeks the views of the wider public on these proposals for rights of way reform and how they might be implemented.

14. The objective of this consultation therefore is to develop a clear set of policy proposals to enable the rights of way improvements to be put into effect as a comprehensive package. Where new or revised processes have been proposed by the Stakeholder Working Group in principle but the mechanisms have not been defined, those mechanisms will be developed as part of the consultation process.

15. There are essentially three means by which the agreed policy proposals will be put into effect:

    - Changes to existing primary legislation – by means of a Government Bill or Legislative Reform Order;
    - Secondary legislation – regulations and commencement orders, using the negative resolution procedure[15];
    - Published guidance.

16. Proposal 1, *implementation of the 2026 'cut-off' date*, and proposals 20 & 24-27, *protection for useful or potentially useful rights of way from extinguishment* would be implemented by means of regulations made under section 55 of the Countryside and Rights of Way Act 2000.

17. Of the *streamlining the procedure* proposals, ten out the 12 proposals would require changes to primary legislation, as would all three proposals on *referral of disputed cases to*

[15] 'Negative resolution procedure' refers to statutory instruments which are laid before Parliament and automatically become law unless there is an objection from either House. Conversely 'affirmative procedure' refers to statutory instruments which must be approved by a debate in both the House of Commons and the House of Lords to become law.

*the Secretary of State*. Three of the four proposals under '*mitigating any adverse effects*' also require primary legislation and the fourth regulations. Only one of the three *reviewing progress* proposals – if adopted – would require legislation and this would be through negative resolution procedure regulations. The remaining proposals could all be implemented without the need for legislation.

18. Of the whole thirty-two proposals: sixteen would require changes to primary legislation; eight would require regulations under existing primary legislation, six could be implemented without the need for legislation and the remaining two may require regulations depending on the outcome of this consultation.

19. In their report, the Working Group suggests that there is scope for using a Legislative Reform Order to effect the changes to primary legislation since the proposals are deregulatory, when taken as a whole, and are likely to be uncontroversial, having been agreed by the full range of rights of way interest though the Stakeholder Working Group. We agree that there may well be scope for implementation through a Legislative Reform Order and will review the options in light of the outcome of this consultation.

# Part 2 – Extending the Stakeholder Working Group proposals from definitive map modification orders to public path orders

20. The Stakeholder Working Group's recommendations seek to simplify and streamline the processes for recording existing public rights of way. Given that these recommendations are intended to make the processes work more effectively and to bring about efficiency and cost savings, a logical extension of this initiative would be to apply comparable changes to the legal and policy framework governing the creation, extinguishment and diversion of public rights of way, collectively known as 'public path orders'.

21. Among the changes advocated by the Stakeholder Working Group, obvious candidates for application to the public path orders regime are as follows.

*Proposal 10 – The requirement for newspaper advertisements relating to surveying authority notices of all types[16] should be minimised by referring those interested to details online or at the surveying authority's offices.*

*Proposal 11 – The surveying authority should be allowed to discount summarily any irrelevant objections. It should be required to treat both these and representations made in support as registrations of interest in the outcome of the case.*

*Proposal 13 – Review of cases based on documentary evidence should normally be by means of written representations, but with the discretion to hold a hearing or inquiry if in all the circumstances it is likely to add value.*

*Proposal 14 – The Secretary of State should be able to split a case such that only aspects that are objected to need be reviewed.*

*Proposal 15 – Orders should be published in draft and there should be flexibility for surveying authorities to correct technical errors in them.*

*Proposal 16 – Where an order is successfully challenged in the High Court, it is the Secretary of State's decision rather than the surveying authority's order that should be quashed – leaving the original order to be re-determined by the Planning Inspectorate as necessary.*

Question 17. Do you agree that the proposals identified in the section above should be applied to the policy and legislation governing public path orders?

Question 18. Do you think that more use could be made of electronic communications for public path orders, in similar ways to those suggested for definitive map modification orders in Question 5?

[16] If extended to apply to public path orders, the relevant notices would be those given under schedule 6 to Highways Act 1980

# Part 3 – An alternative approach to the 'right to apply' for public path orders

22. The legislative provisions for definitive map modification orders include a process whereby a person may apply to the local authority for a definitive map modification order; and if the authority either fails to act within 12 months, or decides not to make an order, the applicant may appeal to the Secretary of State to direct the authority to (respectively) make a decision, or make an order. The legislative provisions for public path orders provide a power for local authorities to make a public path order, but do not include a process for applying for an order and do not place a duty on local authorities to make such orders; consequently there is no provision for appeal.

23. Local authorities currently have powers to make public path orders "in the interests of the owner, lessee or occupier...or of the public". But these powers are discretionary and it may be difficult for landowners to persuade authorities to act, even where strong land management reasons exist. Authorities may refuse to consider requests, or decline to make orders that they suspect might be controversial.

24. In an attempt to overcome these difficulties, a statutory right to apply was introduced by the Countryside and Rights of Way Act 2000. Provision was made for an application process and a right of appeal to the Secretary of State. However, the implementation process and public consultation highlighted fundamental flaws in the new provisions. These flaws, which would require primary legislation to address, are as follows.

    - If an applicant were to appeal against a refusal to make a public path order, the Secretary of State would be required to make an order and offer a public inquiry, even where an order clearly has no prospect of success (because the statutory criteria for confirming an order could not be met). Local authorities could therefore readily shift the burden and cost of order-making onto the Secretary of State simply by refusing all applications.

    - The application charges would have to be prescribed by the Secretary of State and there is little or no scope to take account of local circumstances or for local authorities to use discretion in charging. There is a high risk of fees being set either too high for a particular locality, generating financial surpluses for a local authority, or too low, leading to under-funding and adverse effects on service levels.

    - The rights of application and appeal would be limited to certain types of land, which are: land used for agriculture, forestry, or the breeding or keeping of horses and school premises. They would not apply to rights of way through gardens, or to orders made under Town & Country Planning legislation.

25. There are further drawbacks as follows – although these are also inherent in the existing arrangements.

    - There would be no guarantee of the outcome of an application, only that the local authority would consider the application fully and within a certain timescale, this could lead to unrealistic expectations by applicants and injudicious outlay on proposals that were not viable.

    - Any application could result in a public inquiry if it receives just a single objection – regardless of how minor or misplaced the objection proves to be.

## Proposed approach

26. In enacting the right to apply provisions, Parliament has made clear its intent to find a way around the problem of local authorities failing to pursue public path orders, where the statutory tests that ensure that the interests of the public are safeguarded are met and the landowner or manager is prepared to meet the cost. Moreover, we are keen to find a viable way of improving the situation for landowners and managers who have a legitimate need to effect a change to a public right of way but have no leverage to encourage the local authority to act.

27. For these reasons, simple non-implementation or repeal of the existing provisions without alternative arrangements are not acceptable options. Equally, implementation of the provisions as they stand is not an acceptable option for the reasons that emerged from the earlier public consultation.

28. One way forward might be to develop an alternative solution based on a statutory right of appeal. It is conceivable that a workable package of legislative measures could be arrived at, through consultation and a working group of practioners and other stakeholders. However, there are some drawbacks that cannot be overcome by this approach. It has become evident, from experience with definitive map modification orders, that it is difficult for the Secretary of State to compel local authorities to act. And even where authorities make orders against their will, this often results in authorities taking a neutral stance with opposed orders, which causes problems for the Planning Inspectorate in processing these cases. Having the Secretary of State make orders instead is not viable because it provides an incentive for authorities to avoid taking action.

29. Furthermore, this approach would inevitably result in greater involvement by the Secretary of State in directing local authorities and in making and confirming orders. This would come at a greater cost to the public purse and would run contrary to the underlying Government aim (reflected in Defra's Business Plan[17]) of relinquishing power to local level.

30. Realistically, there is no solution that would guarantee that a local authority would make and confirm an order and consequently there is not going to be a flawless solution to this issue. Any viable solution needs to focus on the desired outcome that was the driver for introducing the right to apply in the first place

31. This outcome would be that local authorities are incentivised to make public path orders on request, where these meet the statutory criteria. The existing provisions are based on compelling the local authority to act or taking the matter out of their hands. The Government believes that a better approach would be one based on removing the barrier to local authorities acting, which is essentially that of cost, particularly the cost of dealing with contentious cases.

32. Because of the benefits to landowners and managers, in terms of the enhanced value of the land and increased security, we believe that in most circumstances they would be willing to bear in full the administrative costs of processing a public path order if it meant a local authority were more likely to act on their request to make a diversion or extinguishment. Indications are that local authorities would be better placed and more likely to pursue proposed diversions of rights of way if they could recover the full costs; this would include the cost to local authorities of submitting an opposed order to the Secretary of State. Such an arrangement would enable them to retain staff with rights of way expertise, who might be

[17] http://www.number10.gov.uk/wp-content/uploads/DEFRA-Business-Plan1.pdf

otherwise under threat from current spending constraints; alternatively, the work could be outsourced by local authorities if there was insufficient resource in-house.

33. Under the current arrangements, authorities are entitled to levy charges in accordance with the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993, SI 1993 No 407. Charging is governed by Defra guidance in sections 5.34 to 5.41 of the Defra Rights of Way Circular (1/09). Under the current arrangements, when making a public path extinguishment or diversion order on behalf of a landowner, lessee or occupier, charges may be made to recover the costs of making and advertising orders including any pre-order consultation. However authorities cannot recover any costs incurred where it is decided not to make an order, cannot recover additional costs involved in pursuing an opposed order and are required to refund any charges where an order is made but not confirmed.

34. Providing local authorities with flexibility to set a charge for public path orders that would enable them to recover (but not exceed) their costs could well provide a viable way of incentivising local authorities to respond positively to requests for public path orders. It could also have the benefit of applying to all types of land, not just land used for agriculture, forestry, or the breeding or keeping of horses.

35. Under such arrangements there would need to be clearly established principles and safeguards for cost recovery. These should include:

- transparency about what services had been provided and charged for – particularly in cases where, for whatever reason, it does not prove possible to pursue the diversion or extinguishment through to a successful conclusion;
- a means of ensuring charges do not exceed the cost price, given the variable nature of the costs involved;
- a requirement to make the cost structures publicly available at the outset, so that anyone considering asking the local authority to make a public path order has an indication of likely charges;
- a publicly available framework of service standards, including timescales, to ensure that the service reflects the costs being charged;
- Splitting the charges into stages, covering (at the least) one stage purely for the administration of a request and another for the successful delivery of a public path order;
- an explicit requirement for local authorities to waive the costs of a public path order that is in the public interest.

36. On the basis that full cost recovery would incentivised sufficiently to obviate the risk of local authorities shifting the burden and cost of order-making onto the Secretary of State, we propose to work with stakeholders to develop an approach that would combine full cost recovery with retention of a right of appeal to the Secretary of State.

37. The Impact Assessment for alternative to the ‘right to apply’ indicates that the overall impact of the policy is negative. There are two reasons for this. The first is that there would be additional costs on the statutory undertakers and highways authorities and other stakeholder groups who would have to deal with engaging with requests to local authorities for diversions which are additional to business as usual. The second and more significant is because it has not been possible to assess the value of the benefits to landowners of having an application approved. Although it is not possible to quantify all the benefits it is anticipated that, although the quantified impacts show a negative net present value, in practice the options will be welfare enhancing. The extent to which the option is cost beneficial depends on the

magnitude of the benefit to landowners from successful applications compared to the deadweight cost to landowners of unsuccessful applications.

Question 19. Do you agree that enabling local authorities to recover their costs in full would incentivise them to pursue public path orders requested by landowners or managers?

Question 20. Would local authorities be incentivised sufficiently to enable retention of a right of appeal to the Secretary of State without the risk of local authorities shifting the burden and cost of order-making onto the Secretary of State?

Question 21. Should the proposed arrangements apply to all public path orders and not just to land used for agriculture, forestry, or the keeping of horses?

Question 22. How could it be made clear what charges are levied for each stage of the public path order-making process and that the charges reflect the costs actually incurred?

Question 23. Do you think that landowners should have the option of outsourcing some of the work once a public path order is made in order to have more control over the costs?

Question 24. Might this have an impact on other aspects of rights of way work?

Question 25. Are there any alternative mechanisms that should be considered?

# Part 4 – The Penfold Review of non-planning consents

38. The Penfold Review on non-planning consents was published in July 2010[18].The Review was concerned with consents that have to be obtained alongside or after, and separate from, planning permission in order to complete and operate a development. The report found that while non-planning consents play an important role in achieving a wide range of government objectives, such as protecting the health and well-being of local communities, they also have a serious impact on how efficiently and effectively the end-to-end development process operates.

39. The Review recommended delivering greater certainty for developers and removing duplication by improving the way planning and non-planning consents operate together. Rights of way consents were seen as a significant source of risk and cost from delay because they are normally dealt with after planning permission has been granted and because there is no timetable set for decision makers' consideration of applications. The Review specifically recommended that "Government should...[ensure] that the impact of a planning application on rights of way is considered as part of the planning process to reduce the risk of delay arising from challenge to any subsequent diversion (or other) order".

40. Under the existing processes, for cases where developments necessitate the diversion or removal of public rights of way, there is legislative provision for a right of way diversion or extinguishment order to be made to enable a development to be carried out in accordance with a planning permission that has been granted. This means that the rights of way order can only be made after the planning application is approved. The rights of way order is subject to public consultation and, if there are objections, the order must be referred to the Planning Inspectorate.

41. The Review commented that at its simplest, this difficulty would be addressed by ensuring that advice to planners from the Department of Communities and Local Government is consistent with Defra's advice to rights of way officers in emphasising that public rights of way should be considered as part of the process of deciding the planning application and encouraging early liaison between the developer, planning and highway authorities, local amenity groups, prescribed organisations and affected individuals. The Review went on to say that the current constraint that diversion orders for public rights of way have to follow planning permission could usefully be lifted in order to facilitate the early consideration of rights of ways issues.

42. The key conclusions of the Government's response included a commitment to consider how consents might be streamlined and simplified to make the process simpler and reduce the red tape on businesses. In response to the Penfold Review, and based on its findings, the Government is considering three options for improving the way planning and non-planning consents operate together. Options B and C would require new primary legislation.

[18] http://www.bis.gov.uk/policies/better-regulation/policy/simplifying-existing-regulations/penfold-review-for-non-planning-consents

## The options for change

**Option A – Retain the existing legislative framework, but encourage wider adherence to existing guidance to ensure that rights of way issues are addressed at an early stage as an integral part of determining planning applications.**

43. Under this option developers would still need to wait, after the planning permission has been granted, for a rights of way order to be issued and consulted upon. But delays could be reduced and the number of public objections minimised, by early dialogue with interested parties. This should enable any potential problems to be identified and resolved at an early stage in the overall process and to save time at the order-making stage. Existing Government guidance on rights of way[19] already advocates this approach, but this guidance is not always evident to developers and local planning authorities. Better adherence to existing guidance would help ensure that development proposals take account of local needs in accommodating rights of way.

**Option B – Retain the existing rights of way order-making process, but allow it to run concurrently with determination of the planning permission, rather than afterwards (as at present).**

44. Allowing the rights of way process to run concurrently with the planning process would make the overall process shorter. However, the rights of way process may lag behind the planning process, particularly if there are objections. Orders may require further consultation if new planning conditions were placed upon the development that affected rights of way. Also the rights of way order-making process would prove abortive where planning permission was refused. In both cases, developers would still be expected to pay for all stages, including any redundant or additional stages. Any such arrangements would need to ensure that changes to rights of way are properly considered against the planning application and are made in light of any conditions placed upon the development. There should be provision for developers to have the option of pursuing consecutive procedures in order to minimise their costs.

**Option C – Create a new integrated process that would require the local planning authority to consider and decide upon the development proposals and any changes to rights of way as a single package.**

45. Under this option the existing provisions would be replaced by a combined application for planning permission and rights of way consent, comprising a planning application and a draft agreement which: (i) defines the existing public rights of way on or adjoining the site; (ii) defines the proposed rights of way when the development is complete (with status, width, etc); and (iii) provides a schedule of any intended temporary changes to highways on the site during the construction process**.**

46. The draft agreement would be made available for public inspection and any comments on the rights of way aspects would be considered, along with the other aspects, by the local planning authority when it considered the planning application. The local planning authority would have power to approve the agreement. But as with the current arrangements, the rights of way element would be subject to a right of objection by the public. An objection to proposed changes to public rights of way would trigger the process set out in schedule 14 of

[19] in Defra Rights of Way Circular 1/09.

the Town & Country Planning Act 1990, under which the objector would be given the opportunity to be heard by a person appointed by the Secretary of State. An objection from the public to the *planning* elements of the proposed application would continue to be assessed in the same way as it is at present: responses from any objectors during the determination period, which are material to the planning decision, would be taken into account by the decision-making body. No new third party right of appeal would be introduced.

47. This would remove the risk of duplication, and could make the application process shorter overall. It would also be more transparent to users of rights of way because all the temporary and permanent changes would be apparent from the outset and a second round of consultation would be unnecessary.

**Use of the Planning Portal for applications involving changes to public rights of way**

48. Under options B or C, there is the additional option of enabling anyone seeking planning permission involving changes to public rights of way to submit a concurrent or combined planning and rights of way consent form to the local planning authority online through the Planning Portal website. This would require a national standard application form. A single centralised form would be simpler for applicants. It would also help to ensure that applicants and other interested parties are clear about what is expected; this would lead to more thorough consideration of rights of way issues and better consistency of approach by developers and local planning authorities.

Question 26. Under Option A, how do you think wider adherence to existing guidance might be achieved?

Question 27. What do you think would be the best option to minimise the cost and delay to developers while safeguarding the public interest on public rights of way?

Question 28. Are there other options that should be considered?

Question 29. Do you think that enabling a single application form to be submitted through the Planning Portal website would improve the process?

# Part 5 - Impact assessments (and related questions)

49. Three impact assessments are published to accompany the proposals in this consultation paper. The key findings from the impact assessments are as follows.

**Part 1 - Stakeholder Working Group proposals**

50. The impact assessment shows a positive quantified impact of these proposals (net present value of £15.1m). The main quantified costs arise from development of new guidance and a cost to applicants of being able to seek court orders where local authorities take too long to decide applications. The quantified benefits arise from savings to central government and local authorities through the streamlined processes, for example: a reduction in the number of cases going to the Secretary of State for appeal and a reduction in costs from no longer having to pay for lengthy newspaper adverts. There are also a number of cost savings to central and local government for which qualification is not possible.

**Part 2- Extending the Stakeholder Working Group proposals from definitive map modification orders to public path orders**

51. The impact assessment for the Stakeholder Working Group proposals includes a section which shows some initial analysis for public path orders. This shows an initial finding of positive impacts (net present value of £12m). Further evidence is sought through the consultation on this proposal.

**Part 3 – An alternative to the 'right to apply' for public path orders**

52. The impact assessment shows that there is a clear economic rationale (missing markets) behind the proposed option to allow cost-recovery charging by local authorities for applications for rights of way extinguishment and diversion. It further shows that the proposed cost-recovery options would be the most cost effective way of enacting the relevant provisions in the Countryside and Rights of Way Act 2000 as they would help ration applications to more efficient levels (i.e. rational applicants would only apply if they were reasonably certain they would be successful and where they are more likely to pass a public interest test) and eliminate the burden of Secretary of State appeals. At this stage there are significant gaps in the quantified evidence on impacts, costs and benefits and so further evidence is sought through this consultation exercise.

**Part 4 – The Penfold Review of non-planning consents**

53. At this stage evidence is not available to quantify the impacts of the options relating to the Penfold review – this is sought through this consultation. The impact assessment sets out in qualitative terms the impacts on developers, local authorities, other stakeholders (public, parish councils, local amenity groups and national voluntary organisations) and central government. It is anticipated that the benefits will be: a shorter process for developers and local authorities; consideration of rights of way issues earlier in the process; and less orders determined by Secretary of State (as early consideration leads to less objections). Costs are anticipated to be to developers who have to pay fees up front to apply to change a right of way even if the planning permission is then refused – this is an additional cost to business-as-usual as the fee would currently be incurred only after planning permission has been approved. There may also be costs associated to local authorities associated with this.

54. In order to improve the impact assessments and fill the current gaps in them, we would welcome evidence from consultees that would improve our understanding of the costs and benefits. We would particularly welcome feedback on the questions set out below.

55. If you are able to supply evidence of this kind, please say whether you are willing to have your evidence quoted, and if so, whether you wish it to be attributed to you. Such evidence will improve our assessment of the costs and benefits of the proposals set out in this consultation paper, and help inform the Government's decision on how to proceed in the light of the consultation.

**Part 1 – Stakeholder Working Group proposals**

(i) Is the estimate for the number of unrecorded rights of way a fair estimate (20,000) and is the rate at which local authorities record them (1,200 per year) a fair reflection of what is anticipated to take place over the next 10 years?

(ii) Are the 'typical costs' used in the impact assessment a fair assessment of the costs? (as shown in table 1 of the impact assessment)

(iii) Are the assumptions used to calculate the impacts (as found in the final column in the tables in annex 4 of the impact assessment) a fair assessment of the likely impacts of the proposals?

(iv) Is it a fair assumption that the familiarisation cost is negligible to both local authorities and landowners – if not how long do you think familiarisation would take?

(v) Are there any other impacts that have not been quantified (or identified) which you think could be quantified (or identified)? Please provide evidence.

(vi) Is the assumption that the cost of putting the new guidance into operation will be negligible a fair assumption?

(vii) Are there any impacts on business/landowners that have been overlooked?

(viii) For Proposal 28 ("*Consideration should be given to the data management systems needed to support administration of the definitive map and statement*") the consultation asks what aspects of data management systems for recording public rights of way need to be tackled and what are the key outcomes that need to be achieved? Information received as a result of this question will be used in the final impact assessment.

(ix) When and how should these reforms be reviewed[20]?

**Part 2 – Extending the Stakeholder Working Group proposals from definitive map modification orders to public path orders**

(x) Are the assumptions and data used for the assessment of impacts on definitive map modification orders also applicable to public path orders? If not, what evidence do you have on the cost of the process?

(xi) Are there any impacts that have been overlooked?

[20] The Stakeholder Working Group's proposal 21 says: "A stakeholder review panel should be constituted after implementation of the Group's proposals to review progress with recording or protecting useful or potentially useful pre-1949 rights of way before the cut-off. The panel should make an initial report in 2015".

**Part 3 – The 'right to apply' for public path orders**

(xii) The impact assessment assumes that the number of applications per year would be 2,630 – is this a reasonable assumption?

(xiii) Will local authorities, as a result of being able to recover their costs, provide a service to landowners for extinguishing or diverting rights of way on their land?

(xiv) How much would applicants be willing to pay to have their application considered?

(xv) How would the number of applications vary with the cost of the application? How would the number of applications change in moving from option 1 to option 2?

(xvi) What evidence is there on the value of the benefits to landowners of having their application considered and accepted?

(xvii) The impact assessment assumes that that, because of the public interest tests in the current order making process, public goods would not be affected by the policy – is this a fair assumption?

(xviii) Are the assumptions that the impact assessment calculations have been based on reasonable?

(xix) Are the costs and benefits identified a reasonable estimation?

(xx) Have any costs or benefits been overlooked – for example, any impacts on businesses?

(xxi) When and how should this policy be reviewed?

(xxii) Do the proposals strike a fair balance between public and private costs and benefits? If not, how could a better balance be obtained?

**Part 4 – The Penfold Review of non-planning consents**

***Information on current system***

(xxiii) Are the figures derived from the Ramblers data on the number of rights of way orders that are required as a result of planning permission a fair assumption to use (between 413 and 489 a year)?

(xxiv) Is an assumption that 10% of the applications will be referred to the Secretary of State because they are subject to objections a fair assumption to use? If not, what proportion of applications for rights of way orders are objected to and what proportion of these result in an inquiry?

(xxv) What evidence is there on how many planning applications have an impact on rights of way but are refused?

(xxvi) What is the current cost to local authorities of dealing with objections?

(xxvii) What is the current charge for applying for a rights of way change following planning permission being granted?

(xxviii) What are the costs to other stakeholders of having to respond to consultations on rights of way?

(xxix) How much time does the additional rights of way process add to development processes? Both in actual time and time planned into the project? Is there any evidence on the cost of these delays?

***Information on each of the options***

(xxx) For each option how long would it take developers, local authorities and other stakeholders to familiarise themselves with the guidance? What level of staff would be responsible for this?

(xxxi) All the options should lead to consideration of rights of way earlier in the process as well as earlier engagement with other stakeholders. It is assumed that this will lead to a reduction in the number of objections. Under business as usual it is assumed that 10% of cases go to the Secretary of State because of objections. By considering rights of way early on in the process do you think the percentage will change? If so to what? (for each option).

(xxxii) To what extent would the consideration of applications concurrently lead to a streamlining of the process?

(xxxiii) Would an integrated system increase or reduce costs (to local authorities, developers and other stakeholders)? If so why and by how much?

# Annex A – List of questions on the consultation proposals

1. Do you agree that there should be a brief, post cut-off period during which applications that pass the basic evidential test can be registered?
2. Do you agree that during this period, local authorities should be able to register rights of way by self application, including any self applications made in the past, subject to the same tests and transparency as for any other applications?
3. Are there any other categories of rights of way that need to be protected by exceptions set out in regulations?
4. Do you agree that the [Stakeholder Working Group's] proposals [in paragraphs 5.1-5.12] would be effective in improving the process of recording rights of way?
5. Do you think that more use could be made of electronic communications, for example, to make definitive map modification order applications online and to serve notice of rights of way orders?
6. Are there any particular issues associated with these proposals which have not been captured and which we should consider?
7. Do you think that the mechanism [proposed in paragraph 6.2 and annex B], would work effectively?
8. Do you think that there would be a residual risk that it would be in a local authority's interests to decline to make an order in the first place?
9. Do you think that the alternative mechanism set out [in paragraph 6.3] would work effectively?
10. Do you have any other suggestions for ensuring that cases go to the Secretary of State only once?
11. Do you agree that applicants and affected owners should be able to seek a court order requiring the authority to determine an outstanding definitive map modification order application?
12. Do you think this is an appropriate way to resolve undetermined definitive map modification order applications?
13. Do you have any suggestions for alternative mechanisms to resolve undetermined definitive map modification order applications?
14. Do you have any suggestions on how a process might work, which would enable an appropriate diversion to be agreed and put into effect before the way is recorded and brought into use?
15. What aspects of data management systems for recording public rights of way need to be tackled?
16. What are the key outcomes that need to be achieved in terms of data management systems?

17. Do you agree that the proposals identified in [Part 2] should be applied to the policy and legislation governing public path orders?

18. Do you think that more use could be made of electronic communications for public path orders, in similar ways to those suggested for definitive map modification orders in Question 5?

19. Do you agree that enabling local authorities to recover their costs in full would incentivise them to pursue public path orders requested by landowners or managers?

20. Would local authorities be incentivised sufficiently to enable retention of a right of appeal to the Secretary of State without the risk of local authorities shifting the burden and cost of order-making onto the Secretary of State?

21. Should the proposed arrangements apply to all public path orders and not just to land used for agriculture, forestry, or the keeping of horses?

22. How could it be made clear what charges are levied for each stage of the public path order-making process and that the charges reflect the costs actually incurred?

23. Do you think that landowners should have the option of outsourcing some of the work once a public path order is made in order to have more control over the costs?

24. Might this [full cost recovery for public path orders] have an impact on other aspects of rights of way work?

25. Are there any alternative mechanisms [to full cost recovery for public path orders] that should be considered?

26. Under Option A [in Part 4], how do you think wider adherence to existing guidance might be achieved?

27. What do you think would be the best option to minimise the cost and delay to developers while safeguarding the public interest on public rights of way?

28. Are there other options that should be considered [to minimise the cost and delay to developers while safeguarding the public interest on public rights of way]?

29. Do you think that enabling a single application form to be submitted through the Planning Portal would improve the process?

# Annex B – Stakeholder Working Group Proposal 12 – Schematic