MEETING : CHESHIRE EAST LOCAL ACCESS FORUM
DATE : 13 March 2013

REPORT OF : Mike Taylor, Public Rights of Way Manager

CHANGES TO RIGHTS OF WAY LAW AND PROCEDURES:
Draft Deregulation Bill

1. At the December 2013 meeting, the Forum received a paper regarding the changes to Public Rights of Way (PROW) legislation which had taken effect as a result of the Growth and Infrastructure Act 2013.

2. A further set of proposals relating to other changes to PROW administrative processes concerning Definitive Map Modification Orders and Public Path Orders is in the Parliamentary process presently. This paper aims to summarise the main proposals contained in the draft Deregulation Bill.

3. The principal proposals deal with measures to bring the Definitive Map up to date and effectively "close it" to the addition of new routes based on historical evidence. To achieve this, the Countryside and Rights of Way Act 2000 introduced a cut-off date, 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.

4. However, during efforts to expedite completion of the historical record and close the Definitive Map to such routes, 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.

5. The Stakeholder Working Group reported in March 2010 and published a report entitled, "Stepping Forward" which contained a package of 32 proposals designed to improve the various processes associated with identifying and

recording historical public rights of way. These proposals were consulted upon in 2012 by DEFRA and are outlined below.

6. Following the consultation, the proposals were included within a Draft Deregulation Bill, the progress of which through Parliament can be followed at: http://services.parliament.uk/bills/2013-14/deregulation.html.

7. A second reading in the House of Commons was heard on February 3rd 2014. The Public Bill Committee in the House of Commons started meeting on February 25th and this Committee can receive submissions about the Draft Bill to take into consideration. The Committee will stop receiving written evidence at the end of the Committee stage by 25th March.

8. Members will note that most of these proposals are highly technical in nature and furthermore none of them make fundamental changes to the processes, rather they make minor incremental changes. It is officers views that they of themselves are unlikely to enable the Definitive Map to be 'closed' as originally hoped, certainly not by 2026.

9. It should be noted that critically if cases are merely registered with the Highway Authority they will be protected from being lost at the cut off date of 2026 and Highway Authorities will have the powers to process them after 2026. It is envisaged that many local authorities could be processing such cases many years after the cut of date and this will depend to a great extent on the energies of the public and user groups to register cases prior to 2026.

The Proposals

Summary of proposal	**Details and comments**
1 The 2026 "cut off" date should be implemented with protection for potentially useful rights of way.	
• Routes should be exempted if; they are identified on the list of streets or private streets carrying public rights, routes that can be shown to be in regular continuous use at the cut off date and routes that are already subject to DMMO applications.	• These are positive proposals that will contribute significantly to safeguarding routes that are clearly public but would otherwise be at risk of being extinguished.
• LAs should have the power to make their own applications for routes they believe carry public rights.	• This will allow potentially useful routes that can contribute to access development to be protected.
2 Proposals to improve the process for identifying and recording rights of way on the Definitive Map in order to speed up the process using less resources.	
• Transfer of ownership of applications, due to old age, infirmity etc.	• Many applicants come from the user groups, a significant number of whom are retired. This would therefore be a sensible change.

• Reduction in requirements for applicants to provide copies of common documents.	• This would significantly reduce the workload placed on applicants.
• Authority rather than applicant responsible for approaching landowners and then only after passing a basic evidential test.	• This proposal will reduce potential conflict between applicant and landowner, allowing the LA to act as an objective middleman.
• Minimising the requirement for newspaper advertising.	• This will significantly reduce costs but could be discriminatory against those who do not have internet. A simplified advert with order details and location and advice where further information can be found may be preferable.
• Orders successfully challenged at the High Court should remain the Secretary of State's allowing the original order to remain and be re-determined.	• This will allow challenged orders to continue to a conclusion rather than having to start cases again from scratch.
• If parts of orders are opposed then PINs should have the ability to split orders.	• Examining only the opposed element of an order will speed work flow and reduce timescales for PINs to deal with cases.
• Orders should be published in draft to allow minor technical corrections.	• This will provide for a more flexible response, rather than having to re-make orders from scratch.
• Objections that are made on the basis of new evidence which, if it comes to light was wilfully withheld should result in costs against the objector.	• This will prevent tactical manoeuvring by objectors and promote a much more open analysis of all available evidence.
• Reviews of cases based on documentary evidence should normally be by written representations rather than by a hearing.	• This will both reduce costs and improve timescales if hearings can be avoided.
• Authorities should be able to reject applications that do not meet a basic evidential test.	• This would allow LAs to reduce potential backlogs by dismissing at an early stage cases that are "no hopers" .
• Authorities should have powers to discount irrelevant objections.	• This is something that practitioners have long felt was needed to remove spoiling objections that often have nothing to do with the merits of a case but more to do with neighbour relationships or in the case of PPOs

	attitudes to permitted development.
• There should be provisions for basic factual corrections to the Definitive Map. • Landowners should be able to apply to erect new gates on restricted byways and byways open to all traffic. • Natural England should become a prescribed body on the list of consultees for DMMOs.	• This will allow simple changes to be made without the need for a full DMMO investigation. • The limitations on the installation of gates are currently very restrictive and this will allow more flexibility. • A sensible addition.
3 Persons can apply to the Secretary of State if their application has not been determined in 12 months. The order can subsequently be sent to the Secretary of State if there are objections. Thus a case may be sent to the S of S a number of times and it would speed the process if this could be limited to once. • In cases where an authority refuses to make an order no right of appeal at this stage would leave applicants with no means of redress. An alternative would be to require authorities to make an exhaustive assessment immediately, including landowner views and decide whether or not to determine the case on the balance of probability rather than the reasonably alleged test. There would be a right of appeal at this stage but if directed to make an order there would be no subsequent right of appeal. Alternately the S of S could make an order on appeal and re-charge the authority where it was judged that the authority should have made the order.	• Reducing the potential number of times that opposed orders can return to the S of S will be a positive change to speed up and reduce the costs of processing such cases. However the current system was developed to ensure that checks and balances were put in place to provide applicants with a reasonable means of redress. Work will need to be done to ensure that this is not lost. Requiring LAs to determine cases on the balance of probabilities rather than the weaker reasonably alleged test should reduce the number of cases going forward that are opposed and have to be determined by PINs. However the notion of undertaking this work to this level immediately is unrealistic as this evidential test is best made after a thorough investigation to tease out witness and documentary evidence.The consideration that PINs may re-charge LAs if it was believed the LA avoided determining an order would introduce too much uncertainty in budget management.

• Applicants should be able to appeal to Magistrates Court against authorities who do not determine cases in a reasonable timescale in a similar way that members of the public can appeal to Magistrates Court for an order to direct the authority to remove obstructions.	• This would bring the order making process into line with the current provisions for the protection of the network. However it would create greater workloads for LAs defending themselves at court.
5 It is proposed to introduce a single set of guidance relevant to all parties in order to help make the processes work. • It is proposed to set up a further stakeholder working group to develop the guidance rather than imposing it from government downwards.	• This would be a very positive measure increasing the potential to work from a consensus position.
6 The Stakeholder Working Group proposed that a similar group be constituted to monitor progress towards the cut off date. • It is intended to implement a review group with an initial reporting date of 2015. • A baseline survey of authority back logs should be completed. • Close monitoring of authority performance leading up to the implementation of the cut off date should be introduced.	• As above this would be a positive step forward. • Performance monitoring in any way is positive and should be encouraged. • This is already available under CROW Act 2000 S 71 whereby the S of S can require authorities to report on any aspect of their functions.
7 Minor additional suggestions. • Consideration be given to a national data management system for DMMO admin work. • DEFRA and DfT should work with stakeholders to review greater integration of the management and administration of the highway network. • Review how routes for cyclists could best fit into the network hierarchy.	• It is felt that it is best that individual LAs develop their own data management systems that they feel serves them best. Additionally, implementing a new system could cause a high degree of redundancy in existing systems. • This is already happening through a stakeholder working group discussing how best to modify changes to the way the List of Streets is maintained. • This would be positive because at the moment whilst a Cycle Track Order can be made it cannot be added to the Definitive Map.

8 Extending some of the proposals to Public Path Order processes. • Minimising the requirement for newspaper advertisements. • LAs should be able to discount irrelevant objections. • Review of cases based on documentary evidence should be by written representations. • The S of S should be able to split cases, reviewing only the objected aspect of the case. • Orders should be published in draft allowing the flexibility to make minor technical alterations. • Where an order is successfully challenged in the High Court it is the S of S's decision that is quashed leaving the original to be re-examined.	• This is a positive cost and time saving proposal but see above at 2. • This will allow staff to progress cases when spoiling objections are made that would normally have to be sent to PINs. • This is ambiguous as PPO objections are invariably not based on documentary evidence. • This will become an additional administrative burden and should be discounted.. • This will allow a more rapid conclusion of cases without having to re start cases from the beginning.
9 There is currently no duty placed on LAs to make Public Path Orders, similarly there is no right to apply for a PPO and as a consequence no right of appeal if an LA refuses to make a PPO. The CROW Act 2000 made provision for a right to apply and a right of appeal however the process had flaws and was not implemented. That is now being reconsidered to bring PPO processes closer to DMMO processes. • Provide for LAs to recover all costs including dealing with opposed orders as an incentive to process PPOs. • Charges to cover but not exceed the LA costs. • The cost structure to be publically available. • A publicly available framework of service standards including	This set of proposals does not apply to CEC as we have an effective system in place for dealing with PPO applications. However some of the proposed provisions can be of benefit to CEC and we should support them. • This would be beneficial as at the moment we cannot recover costs for dealing with opposed orders. • CEC has systems in place to do this and they are currently under review to ensure that we recover full cost. • This is made available to potential applicants. • Timescales are discussed with applicants but we could add to this.

timescales. • Splitting charges into stages. • A requirement to waive costs for orders in the public interest. • If this set of proposals were adopted then a right of appeal to the S of S for non determination would be introduced.	 • CEC already do this. • CEC already do this. • This would be a sensible addition.

RECOMMENDED:

That Members note the proposed changes to PROW legislation and consider a submission to the Joint Committee, if appropriate.