

CHESHIRE EAST COUNCIL

Public Rights of Way Committee

Date of Meeting: 7th December 2015
Report of: Public Rights of Way Manager
Subject/Title: Briefing Regarding the Deregulation Act 2015

1.0 Report Summary

1.1 This report is an informative item to brief members about the introduction of new legislation affecting the way many public rights of way processes operate.

2.0 Recommendation

2.1 No decision is required by Committee.

3.0 Reasons for Recommendations

3.1 N/A

4.0 Wards Affected

4.1 All.

5.0 Local Ward Members

5.1 All.

6.0 Policy Implications

6.1 Not Applicable

7.0 Financial Implications

7.1 Not Applicable

8.0 Legal Implications

8.1 None

9.0 Risk Management

9.1 None

10.0 Background

- 10.1 The origins of the Act stem from the last coalition government's "Red Tape Challenge" campaign. The Act has 14 parts and 116 sections dealing with a multitude of areas of legislation from reducing burdens on public authorities to changes in legislation controlling alcohol, sport and entertainment. The area concerning Public Rights of Way is the part relating to use of land, sections 20 to 26.
- 10.2 The package of measures only applies to England but the Welsh Assembly may consider adopting them. The package has evolved from a stakeholder working group set up to make proposals to simplify, speed up and reduce costs and administrative burdens associated with rights of way procedures. However not all the recommendations of the stakeholder working group have been included. It is intended that the implementation date for the package is 1st April 2016.
- 10.3 The sections affecting Public Rights of Way are;
20. Recording rights of way: additional protection.
 21. Unrecorded rights of way: protection from extinguishment.
 22. Conversion of public rights of way to private rights of way.
 23. Applications by owners etc for public path orders.
 24. Extension of powers to authorise gates at owner's request.
 25. Applications for certain orders under Highways Act 1980: cost recovery.
 26. Public rights of way: procedure.
- 10.4 Within those few sections are a multitude of changes in procedure and process which in brief intends to act as a package of legislative reform to set a start date for the operation of:
1. The provisions in CRWA 2000 (as amended by DA) for the 'cut-off' date for extinguishing certain public rights of way if they are not recorded on definitive maps.
 2. The provisions in WCA 1981 (as amended by CRWA 2000) to prevent any additional routes being added to definitive maps as BOATs.
 3. The provisions in HA 1980 (as amended by CRWA 2000 and further amended by DA) to provide a formal right to apply for certain PPOs, with associated rights of appeal.
 4. The provisions in HA 1980 (as amended by DA) to extend the power to authorise gates to apply to RBs and BOATs.
 5. The amendments being made by DA to other provisions in WCA 1981 relating to the procedure for DMMOs (e.g. removal of 'reasonably alleged', preliminary assessment procedure, new procedure for appeals, changes to publicity, disregarding certain objections).
 6. The amendments being made by DA to other provisions in HA 1980 relating to the procedure for PPOs (e.g. changes to publicity, disregarding certain objections).

7. The provisions in HA 1980 (as amended by CRWA 2000) to provide extended powers for farmers to make temporary diversions of rights of way.
- 10.5 Supplementary procedures are required for the commencement of the provisions referred to above and in order to implement those supplementary provisions statutory guidance (to which highway/surveying and other order-making authorities must have regard) will need to be provided. DEFRA state that their timetable for the production of the supplementary procedures and guidance will allow the legislation to meet its commencement target of 1st April 2016.
- 10.6 Because none of the supplementary procedures or any of the statutory guidance has so far been published it is not possible at the moment to relate how the various legislative reforms will operate. All that can be done at the moment is to relate what the new and revised reforms set out to achieve and raise questions where detail is absent with a view to bringing a more detailed paper when the supplementary provisions and statutory guidance has been made available to answer those questions.

11.0 Contents of the Legislation and Package of Reforms.

- 11.1 *The provisions in CRWA 2000 (as amended by DA) for the ‘cut-off’ date for extinguishing certain public rights of way if they are not recorded on definitive maps.*

The intention is that any footpath or bridleway not recorded on the Definitive Map but that was in existence on 1st January 1949 will be extinguished on the “cut off” date of 1st January 2026. It is also intended that any higher rights carried on those routes but also unrecorded on the Definitive Map will also be extinguished. There are exceptions, and regulations will quantify and clarify them but at the moment It would be perfectly lawful for the provisions to be applied so that any qualifying right of way not recorded on the definitive map at 1st January 2026 would be extinguished, regardless of whether any application had been made to record it, or whether it was in regular use, or whether it was recorded in the highway authority’s ‘list of streets’ as a highway maintainable at public expense.

- 11.2 *The provisions in WCA 1981 (as amended by CRWA 2000) to prevent any additional routes being added to definitive maps as BOATs.*

This proposal works in a much simpler way. The new provision would not extinguish any public rights, but instead prevent any more ways being added to the Definitive Map and statement as byways open to all traffic.

- 11.3 *The provisions in HA 1980 (as amended by CRWA 2000 and further amended by DA) to provide a formal right to apply for certain PPOs, with associated rights of appeal.*

The effect is to provide a formal right of application for diversion and extinguishment orders for paths across land used for agriculture, forestry or the breeding or keeping of horses and special orders for school security. There are powers to make regulations prescribing the format of applications and also to require applicants to undertake consultations prior to submitting their application. There are also rights of appeal to the Secretary of State in certain circumstances. These provisions will not replace existing ones but run parallel. Furthermore Government has indicated that it will

extend the land types to include others such as residential gardens. It is anticipated that applicants under these provisions would be able to appeal to the Secretary of State for a determination if the council has not determined their case within 4 months, or refused their case.

11.4 *The provisions in HA 1980 (as amended by DA) to extend the power to authorise gates to apply to RBs and BOATs.*

A relatively minor change that extends the power of councils to authorise barriers across vehicular highways to prevent the ingress and egress of livestock.

11.5 *The amendments being made by DA to other provisions in WCA 1981 relating to the procedure for DMMOs (e.g. removal of 'reasonably alleged', preliminary assessment procedure, new procedure for appeals, changes to publicity, disregarding certain objections).*

These provisions make many changes to the way DMMO cases are handled.

On receipt of an application the council will be required to undertake an initial assessment within 3 months to determine whether there is a "reasonable basis for the applicant's belief" that a DMMO is required.

There will be no requirement to record the application on a council's register until the completion of the initial assessment and the service of notice to that effect on the applicant and landowners.

If the council fails to notify the applicant at the expiry of the three month period the applicant may appeal to a Magistrates' Court. No such appeal exists if the council refuses the application.

The 'reasonably alleged' test in WCA 1981 s 53(c) (i) is removed. This is the test that councils apply to an application to trigger making an Order. The confirmation of the Order though, is dependent on the evidence being assessed on the balance of probabilities.

The existing provision for an applicant to ask the Secretary of State to give a direction to the surveying authority if an application has not been determined within 12 months will be replaced by a power to apply to a Magistrates' Court. There will also, as noted above, be a similar power to make an application in relation to non-determination of the preliminary assessment after three months.

New provisions are introduced in WCA 1981 s 54B which specifies what a surveying authority must do when it appears to the authority that "it might be requisite to make a modification" to the definitive map and statement. This applies whether or not an application has been made, but where an application has been made, the action is required after the authority has completed the preliminary assessment and served notice that it is considering the application. The action required is to ascertain whether every owner (but not occupier) of the land to which the modification relates either:

a) Consents to the making of a DMMO; or

- b) Would so consent if the authority made one or more of the following, referred to in the section as “special orders”:-
- i. A diversion order;
 - ii. An order altering the width of the path or way;
 - iii. An order imposing a new limitation or condition affecting the right of way such as gates or stiles. Diversion Orders made under these provisions are subject to similar tests as conventional diversions but there is no requirement to hold inquiries into objections, councils can overrule objections although representations can be made to the High Court.

New provisions are introduced to WCA 1981 s 53ZA that gives the Secretary of State power to make regulations applying in cases where it appears to a surveying authority necessary to make a modification Order due to;

- i. An administrative error.
- ii. The error and the modification needed to correct it are obvious.

New provisions are introduced to WCA 1981 Sch 13A paras 7 to 11 creating new procedure for appeals against decisions by surveying authorities not to make DMMOs on applications. The new procedure combines the decision on the appeal and any decision that would subsequently have been made if the appeal had been granted.

New provisions in Sch 14A para 5(2)(a) introduce changes to the publicity for DMMOs by dropping the requirement to advertise the notice in a local newspaper and in its place require the notice to be published on a website maintained by the authority.

New provisions in Schedule 14A para 6 which permit a council to disregard objections and representations to a DMMO if the council considers that none of them are relevant. The council must take heed of guidance and notify the objector of the reasons why the objection is being disregarded.

New provisions in Schedule 14A para 13(1)(b) will permit the Secretary of State to offer an objector only written representations rather than a hearing.

New provisions in Sch 13A para 12 will give an applicant the power, at any time before the application is determined, to give notice to the council their intention to transfer to another person named in the notice, and thereafter the other person is to be treated as the applicant.

11.6 *The amendments being made by DA to other provisions in HA 1980 relating to the procedure for PPOs (e.g. changes to publicity, disregarding certain objections).*

New provisions in HA 1980 Sch 6 para 1(3) & (3ZA). incorporates changes to the publicity for PPOs in a similar way to that for DMMOs by dropping the requirement to place the notice in a local newspaper and in its place substituting a requirement to publish the notice on a website maintained by the authority.

New provisions 2 (2ZA)-(2ZE) and 2(4) in HA 1980 Sch 6 give authorities and the Secretary of State powers to disregard objections that they consider would not be relevant to the Secretary of State in determining whether or not to confirm the order

were it submitted to him. As with the similar provision for DMMOs, the authority must have regard to any guidance given by the Secretary of State and notify the objector of the reasons why the objection is being disregarded.

New provisions 2(2ZB) and 2ZZA give authorities the power to split Orders between parts that are opposed and parts that are unopposed (or to which there have been only objections that the authority has determined to be irrelevant).

New provisions 2(5)&(6) give the Secretary of State power to offer an objector only written representations rather than a hearing.

11.7 *The provisions in HA 1980 (as amended by CRWA 2000) to provide extended powers for farmers to make temporary diversions of rights of way.*

New provisions in HA 1980 ss 135A and 135B which permit an occupier to make a temporary diversion of a FP or BW (but not a RB or BOAT) where works of a description to be prescribed in regulations which are likely to cause danger to users occur. There are restrictions placed in the section on where a temporary diversion may go, and a requirement to give prior notice to the highway authority, prior publicity by a local newspaper advert and site notices while a diversion is in place. There are also powers for the authority to take enforcement action and a right for anyone to prosecute if the diversion is not reasonably convenient or is not marked on the ground, and if the notice to the authority or in the press contains a false statement or a site notice falsely purports to relate to an authorised temporary diversion.

12.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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