Commentary on and analysis of the Defra “rights of way reform package”

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This paper is available from my website at www.rowtac.co.uk/news, as is a complementary document which sets out the relevant primary legislation as it will be amended by the Deregulation Act 2015 and the commencement of the 2000 Act provisions.

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March 2015

1 Introduction

1.1 This paper is a commentary on, and analysis of, the Defra "rights of way reform pacakage", which consists of amendments to legislation contained in the Deregulation Act 2015 (DA) currently before Parliament; the commencement of the 'cut-off' and 'right to apply' provisions contained in the Countryside and Rights of Way Act 2000 (in each case as amended by the DA), and associated secondary legislation and guidance (more detail in section 2 below).

1.2 The most recent date given by the government for the introduction of this package is April 2016 *["We are working towards implementation in April 2016", Lord de Maulley, Lords Hansard, 28 October 2014, col GC 412]*, which means that key decisions on its implementation, especially those relating to the all-important content of secondary legislation, will be taken after the general election in May 2015 by the new government. There will of course be no obligation on that new government to stick to any target date set by its predecessor, or indeed to implement any of the package at all. If the election results are such as to lead to a minority government or a further election, then the implementation date could easily be deferred : but even April 2016 is less than 10 years from the cut-off date of 1 January 2026, a far cry from the 25-year period envisaged when the Act was passed in 2000 (and with none of the additional resources promised then).

1.3 The package applies only to England, as rights of way legislation is among the matters devolved to the Welsh Assembly Government. Some of the legislative amendments in the DA rewrite the legislation so that there are separate provisions for England and for Wales, for example new WCA 1981 Sch 13A for England and existing Sch 14 for Wales. However the 2000 Act provisions were drafted before that devolution, so can potentially be commenced by the Welsh Assembly Government without further primary legislation should it choose to do so.

1.4 In this document [PCC] is used to refer to possible court cases that I consider may arise: these are summarised in Appendix 1. Appendix 2 is my assessment of the financial impact of the package, including commentary on the impact assessments for parts of the package published by Defra in 2012. Appendix 3 lists the requirements for publicity for changes to rights of way that will apply if the amendments made by DA are implemented, and Appendix 4 is a series of case studies on some local paths to illustrate some of the issues I foresee arising out of the cut-off provisions.

1.5 Abbreviations:

BOAT	byway open to all traffic
BR	bridleway
CRWA 2000	Countryside and Rights of Way Act 2000
DA	Deregulation Act 2015
DMMO	definitive map modification order
DMS	definitive map and statement
EN	Explanatory Notes to the Deregulation Bill (Notes to the Act have not yet been published)
FP	footpath
HA 1980	Highways Act 1980
IA	Impact assessment
LG	The "London Gazette"
MPV	mechanically-propelled vehicle
NERCA 2006	Natural Environment and Rural Communities Act 2006

para	paragraph
PPO	public path order
RB	restricted byway
s	section
Sch	Schedule
SWG	Natural England's Stakeholder Working Group on unrecorded rights of way
TCPA 1990	Town and Country Planning Act 1990
WCA 1981	Wildlife and Countryside Act 1981

1.6 Defra's pages on the government website contain no reference to the "rights of way reform package". What they do say is: *"To make sure no historic public rights of way are lost, we're simplifying the processes for recording and making changes to public rights of way."* [paragraph on webpage https://www.gov.uk/government/policies/protecting-and-improving-people-s-enjoyment-of-the-countryside#background, accessed 20 February 2015] without any further detail of those changes. The statement is questionable. Changing the process for making changes to public rights of way will have no effect on the possible loss of historic public rights of way, and it is far from certain that the changes to the processes for recording them (which I would dispute justify the description of "simplifying") will have any effect. What will have an effect on whether historic public rights of way are lost is whether, and if so how, the cut-off provisions in CRWA 2000 as amended by DA are implemented. On that issue Defra has said nothing since issuing a consultation paper in 2012.

1.7 Overall my views are (so far as conclusions can be reached at this stage, as so much depends on the detail of regulations for which no drafts have been issued):

a) The changes made by the reform package to the recording of rights of way make the process more complicated (and thus potentially more costly to administer), with the only clear financial saving to surveying authorities coming from no longer having to pay for newspaper advertisements

b) The implementation of the cut-off provisions will be a giant step into the unknown - unknown because there may be all manner of unforeseen consequences, and because there will be increased uncertainty over the status of all unrecorded rights of way, and unknown also because (despite Ministers' arguments that the SWG recommendations are being implemented in full) the government felt free to ignore the recommendations relating to ascertainment of the starting position and proper monitoring of the effect of implementation (and the SWG has let them get away with it). A project of this size and potential impact needs, in my view, to be managed by a project board comprised of those with responsibility - Defra and the surveying authorities - and given proper information, which means regular, consistent provision of information. None of that is going to happen.

c) The changes made to procedures for PPOs will have little impact overall. The new procedures have much greater involvement of central government, because of the alleged inefficiency of local authorities: it will be interesting to see how well central government performs, and how its charges compare.

2 The contents of the "rights of way reform package"

2.1 The package is expected to consist of:

a) Amendments to primary legislation contained in the Deregulation Act 2015 (DA)

b) Secondary legislation (orders and regulations) to do all or some of the following:

   i. Set a start date for the operation of:

      - 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 provisions in WCA 1981 (as amended by CRWA 2000) to prevent any additional routes being added to definitive maps as BOATs
      - 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 provisions in HA 1980 (as amended by DA) to extend the power to authorise gates to apply to RBs and BOATs
      - 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)
      - 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)
      - the provisions in HA 1980 (as amended by CRWA 2000) to provide extended powers for farmers to make temporary diversions of rights of way *[Note : these have not been mentioned in any Defra statements, but neither has any attempt been made to repeal them, so the assumption I make is that the government intends to implement this legislation]*

   ii. Supplement the commencement of the provisions referred to above by providing for:

      - the procedure for an application for a PPO including charges, consultation, appeals, registers (HA 1980 ss 118ZA, 119ZA, 119C, 121A, 121B, 121E)
      - prescribing the persons to whom notice of a determination in relation to an order made on an application for a PPO must be given (HA 1980 Sch 6 para 2ZA(2))
      - the application with modifications of WCA 1981 Schs 13 and 14 to the making of DMMOs to correct obvious administrative errors (WCA 1981 s 53ZA)
      - the requirement to record a DMMO application in a register not to apply in certain circumstances (WCA 1981 s 53B(4A))
      - the cut-off date for the cessation of recording of BOATs on the definitive maps to be a date later than 1 January 2026 (WCA 1981 s 54A)
      - transitional provisions relating to the cessation of recording of BOATs on the definitive maps at the cut-off date (WCA 1981 s 54A)

- the cut-off date for the extinguishment of unrecorded rights of way to be a date later than 1 January 2026 (CRWA 2000 s 56(2)(a))
- transitional provisions relating to recording of unrecorded rights of way on the definitive maps at the cut-off date (CRWA 2000 s 56(2)(b))
- extended provisions under s 56(2) related to designated rights of way (CRWA 2000 s 56A(1),(2) & (3))
- defining types of right of way that will be exempt from the cut-off provisions (CRWA 2000 s 54(1)(d)&(e), s 54(5)(c)&(d))
- extension of the period of 12 months provided for the making of a modification consent order (WCA 1981 s 54B)
- prescribing the form of application to be made for a DMMO under the revised procedure and the accompanying explanation (WCA 1981 Sch 13A para 1)
- prescribing the form of notice of intention to apply to the magistrates' court for an order requiring a surveying authority to make a preliminary assessment of a DMMO application (WCA 1981 Sch 13A para 3)
- prescribing the form of notice of intention to apply to the magistrates' court for an order requiring a surveying authority to make a decision on a DMMO application (WCA 1981 Sch 13A para 5)
- prescribing the form of notice of appeal against a decision of an authority not to make a DMMO (WCA 1981 Sch 13A para 7)
- prescribing the form of notice for publicising an appeal against a decision of an authority not to make a DMMO; and for prescribing the persons on whom such a notice has to be served (WCA 1981 Sch 13A para 7)
- prescribing the classes of appeal for which the decision will not be delegated to a person appointed by the Secretary of State (WCA 1981 Sch 13A para 9)
- prescribing the form of notice to be used when a DMMO application is transferred to another applicant (WCA 1981 Sch 13A para 12)
- prescribing the form of notice to be given when an order is made under the revised procedures for publicity; and for prescribing the persons on whom such a notice has to be served (WCA 1981 Sch 14A para 5) *[possibly including a new extra requirement to serve notice on Natural England - SWG recommendation 8]*
- prescribing the classes of DMMO for which the decision will not be delegated to a person appointed by the Secretary of State (WCA 1981 Sch 14A para 15)
- the content of and procedure for submission of DMMOs (WCA 1981 Sch 14A para 19)
- prescribing the types of 'dangerous' works that may give rise to temporary diversions (HA 1980 s 135A(1))
- prescribing the form and content of notice of temporary diversions, and where and when they must be displayed (HA 1980 s 135A(5)&(7))

c) Statutory guidance (to which highway/surveying and other order-making authorities must have regard) relating to:

- treating an objection to a PPO as irrelevant (HA 1980 Sch 6 para 2(2ZD)

- treating an objection to a DMMO as irrelevant (WCA 1981 Sch 14A para 6)
- making of DMMOs to correct obvious administrative errors (WCA 1981 s 53ZA)
- making of modification consent orders (WCA 1981 s 54B))
- the preliminary assessment test for DMMO applications (WCA 1981 Sch 13A para 2)
- whether to submit to the Secretary of State an appeal against refusal to make a DMMO (WCA 1981 Sch 13A para 7)
- severance of DMMOs (WCA 1981 Sch 14A para 8)

d) Non-statutory guidance relating to rights of way matters generally, and in particular a general circular to replace Defra circular 1/09 and revised Planning Inspectorate guidance and Advice Notes to reflect all the changes in legislation.

3 Changes to procedures for definitive map modification orders (DMMOs)

Application to give reasons

3.1 Detail : New WCA 1981 Sch 13A para 1(2) provides that regulations specifying the form of a DMMO application must provide “for an application to include an explanation as to why the applicant believes that a definitive map and statement should be modified in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c)”.

3.2 **Commentary** : The explanation required by the regulations (assuming that new regulations are made) is likely to be a key part of the preliminary assessment procedure (see para 9). As no draft regulations have been published, it is not possible to say whether they will specify any more detail than is provided for in the schedule. Will it suffice, for example, for an applicant to give as the explanation: “I consider that the evidence contained in the documentary evidence supplied with, or referenced in, this application, shows that there has been a discovery of evidence justifying a modification of the definitive map and statement to change the recorded status of the way from footpath or bridleway.”, or will the applicant be expected to provide an analysis of the evidential value of each document in turn, together with an overall assessment? [PCC]

3.3 The preliminary assessment, and thus the explanation, will also be affected by the removal of the ‘reasonably alleged’ test (see para 3.29), and the ‘cut-off’ provisions in NERCA 2006 (for rights for mechanically-propelled vehicles) and those in CRWA 2000 (see para 4.1).

3.4 It is not clear whether the failure (or refusal) to provide an explanation is grounds in itself for rejecting an application under the preliminary assessment procedure, on which more below, or whether the authority’s response to such a failure should be to regard the application as incomplete and thus not having been ‘received’ for the purposes of starting both the three-month period within which the preliminary assessment procedure must be completed and the twelve-month period for determining the application (unless it becomes subject to the modification consent order provisions). There is no provision in the legislation for an authority to be required to acknowledge receipt of the application or to inform the applicant of the date on which they considered it to have been received, and as the application will not be recorded in the register, there is no way for the applicant to check the position other than asking the authority to provide the information. [PCC]

Requirement to provide copies of documents may be waived

3.5 **Detail** : Addition to new WCA 1981 Sch 13A para 1(1)(b) on the requirement to supply copies of documents with an application provides an exception where “the authority have informed the applicant that the authority already have access to the evidence in question”.

3.6 **Commentary** : The intended procedure appears to be that an applicant wishing to refer to documentary evidence in an application has to notify the surveying authority, in advance of the submission of the application, of their intention to do so, and ask the authority to inform them whether “the authority already have access to the evidence in question”. There is no further definition of “have access to” [PCC]. It would seem reasonable to assume that an authority “has access” to its own definitive map and statement, but does it extend to assume that it has access to a document that is in the local record office, even if that office is only a short distance from the surveying authority’s offices? Does it also extend to documents accessible to the authority (e.g. by permission of the document’s owner), but not to the public?

3.7 Whether a document is copied to form part of an application or simply referenced has implications for those who may wish to examine the documents supporting an application as part of the order-making or appeal process. The benefit to an applicant may thus be offset by disbenefit to other parties.

3.8 As noted above in relation to the requirement to provide reasons with an application, it is not clear from the legislation what action the authority should take in response to an application where the requirement to provide copies of documents has not, in the authority's view, been complied with.

Preliminary assessment procedure and changes to registers and notification to landowners

3.9 **Detail** : The provisions are in new WCA 1981 Sch 13A paras 2 and 3, and new subsections (4A) and (4B) of WCA 1981 s 53B. Sch 13 para 2 requires the authority to undertake the preliminary assessment procedure and reach a decision within 3 months of the receipt of an application.

3.10 The preliminary assessment procedure requires the authority to decide "whether the application, and any documentary evidence which the applicant relies on in support of it, show that there is a reasonable basis for the applicant's belief that a definitive map and statement should be modified in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c)". In coming to that decision the authority must have regard to any guidance given by the Secretary of State [para 2(2)].

3.11 In respect of the recording of an application in the register required under s 53B, the new subsection (4A) provides that regulations may (but not must) state that the requirement to record an application does not apply unless the authority have served notice under Sch 13A paragraph 2(4)(b) following the preliminary assessment. However subsection (4B) makes it clear that an authority may, if it chooses, include the information in the register before undertaking the preliminary assessment.

3.12 If the authority decide that there is no reasonable basis for the applicant's belief, they must notify the applicant, giving their reasons, before the end of the 3-month period.

3.13 If the authority decide that there is a reasonable basis for the belief, they must notify, again before the end of the 3-month period, the applicant and also every owner and occupier of the land to which the application relates, in the latter case stating that the application has been made and the authority are considering it. There is a power to put the notice on the land if an owner or occupier cannot be identified "after reasonable inquiry has been made". [para 2(5)]

3.14 If the applicant has not been notified before the end of the 3-month period, he may give notice in a form to be prescribed by regulations of the intention to apply to a magistrates' court for an order. Such an application may be made at any time in a period between 1 and 6 months after that notice. The court has power to make an order requiring the authority to carry out its duty, and, in so doing, may extend the period of 12 months (see below) within which the authority has to make its final decision on the application. There is a right of appeal to the Crown Court against whatever decision the magistrates' court makes. [paragraph 3]

3.15 However there is no right of appeal against a decision by the authority that there is no reasonable basis for the applicant's belief.

3.16 **Commentary** : The requirements to give notice within the 3-month period, which in cases where the authority decide that there is a reasonable basis for the belief will also require the authority first to identify the owners and occupiers, mean that the actual

decision will have to be made within a rather shorter period than 3 months if the duty is to be complied with.

3.17 In practice, I think it highly unlikely that the duty will be complied with. There will of course be no way of knowing whether it has been complied with, as the applications that have not been assessed will be hidden from public view because they will not be recorded on the register (assuming the exercise of the power to make regulations to exclude them), unless there are systematic campaigns to obtain the data through FOI applications.

3.18 No draft guidance has been issued by Defra, so it is not clear what view they take of this test. However the IA assumes: (i) that 90% of applications will pass the test; and (ii) that there will be no cost to authorities in carrying out the test (because the overall saving is expressed as the saving in not undertaking the 10% of applications that will fail). So far as I am aware, these figures are pure guess-work, and no exercise has been undertaken on a sample of applications to see how easy (or otherwise) it is to decide whether an applicant has a reasonable belief, and how much work is involved, and thus whether it is reasonable to assume that no costs are involved.

3.19 In talking about the Bill at IPROW events, Dave Waterman of Defra has expressed the view that the test should be a simple, box-ticking exercise. I question whether it will be so simple. Whatever the Defra guidance may in due course say, I see the meaning of "reasonable basis for the applicant's belief" being likely to be the subject of a court case early in the implementation of the new legislation [PCC]. As it is clearly reasonable for the applicant to believe in his own application, "reasonable basis" must presumably be viewed objectively. But viewing it objectively implies taking into account evidence that may not have been submitted with the application, such as other documentary evidence, or, in the case of a user-based application, evidence of the actions of the owners in the relevant period (and indeed forming a view as to what that period was). And what if the application is to reduce the recorded status ("downgrade") or delete a way already shown on the definitive map? How much investigation does the authority have to undertake before it can decide whether there is a reasonable basis for the applicant's belief?

3.20 There is a further issue, which will apply only to some cases in the initial period, but to most, if not all, after the cut-off date. That is whether, at the relevant cut-off date, some or all public rights over the way the subject of the application were extinguished. The cases that will be affected in the first instance are those where the provisions of NERCA 2006 may have applied. If an applicant applies for the recording of a way as a BOAT (and therefore believes that NERCA did not extinguish rights for mechanically-propelled vehicles), his belief will presumably not have a "reasonable" basis if the authority believes there is evidence that those rights <u>were</u> extinguished in 2006.

3.21 That then leads on to another issue. Suppose someone applies for the recording of a way not presently shown on the map. On considering the evidence submitted with the application, the authority concludes that it appears to show that a public right of way subsists, but not on the alignment or of the status applied for. There is thus no reasonable basis for the applicant's view as expressed in the application, and it must be rejected, with reasons being given. But there is nothing to prevent the applicant from re-applying, or for the authority to act on its own initiative, since it has discovered the evidence that the map and statement require modification.

3.22 The process by which authorities determine substantive applications was considered by the courts in the *O'Keefe* case: I foresee a case brought on similar lines by an applicant in relation to the preliminary assessment test. [PCC]

3.23 I doubt whether there will be many applications to the magistrates' court under paragraph 3. The making of an application incurs a fee of £205. If the application is opposed by the

authority the applicant automatically incurs a further fee of £515. [The Magistrates' Courts Fees Order 2008 as amended by the Magistrates' Courts Fees (Amendment) Order 2009 and the Magistrates' Courts Fees (Amendment) Order 2014] But if the application is unsuccessful the applicant can expect the authority to seek an order for its costs, so the applicant's total bill for trying to get the authority to carry out its duty at preliminary assessment stage could run into four figures. Why bother applying at preliminary assessment stage when you can apply after 12 months under paragraph 5 (unless the application has become subject to the modification consent order process)?

3.24 The position of affected landowners and occupiers is also worth considering. Under the present system the applicant is required to notify them when submitting the application, although unless the surveying authority checks the accuracy or completeness of the applicant's actions, there is no certainty that they will in practice be notified. However they also have a secondary source of information in that the application should, if the authority carries out its duty, be recorded in the register of applications within a short time.

3.25 But under the preliminary assessment test there is no notification to owners and occupiers until, and unless, the authority decides that the test has been passed. That ought to happen within 3 months of the application being made, but what if it doesn't? What happens if the authority has failed to make a decision within that period, and some time later, before any decision is made, an owner sells an affected property, in genuine ignorance of the application. If the new owner is then notified that the preliminary assessment test has been passed, and that the authority will be considering an application made before the purchase of the property, is there a potential court case, either against the unsuspecting vendor or against the authority for the consequences of its failure to carry out its statutory duty? [PCC]

3.26 And if an owner or occupier discovers, through the above process or by some other means, that an application has been made affecting his land, and as a consequence demands to see the evidence, and have the right to make representations, what position will the authority be in? Can it reasonably refuse, on the basis that the owner will be notified, and given the opportunity to make representations, if the preliminary assessment test is passed? [PCC]

3.27 Further, what issues will arise with both applicants and landowners and occupiers when the authority informs them that the application has passed the preliminary assessment test? Will applicants assume that their application has been approved, and then be puzzled if subsequently a decision is not to make an order (and thus be more likely to appeal against that decision)? Will owners and occupiers be aggrieved that the authority appears to have made a decision on the application without even having had the courtesy to inform them that the application had been made (and thus be less likely to be willing to consent if the application is subject to the modification consent order processs)?

3.28 Readers of this text are likely to understand the legislation sufficiently well to know that such beliefs will on a strict reading legislation not be justified. They will also have had sufficient experience of applicants and landowners to know that the beliefs are nevertheless likely to be held. Many of them may also be on the receiving end of such complaints, the time spent dealing with which will eat into the saving that is supposed to arise from the adoption of this new procedure.

Removal of 'reasonably alleged' test

3.29 **Detail** : the 'reasonably alleged' test in WCA 1981 s 53(c)(i) is removed, but retained for Wales by the insertion of a new s 53(3)(c)(ia).

3.30 **Commentary** : The 'reasonably alleged' test gave rise to court cases, in particular *Emery*, so it seems plausible to suggest that the removal of the test, and the test to be applied as a consequence, will itself be the subject of a court case, either directly or through the appeal process. [PCC] Or is the answer simply that all definitive map issues will now be judged on the basis of balance of probabilities, with no discretion if there is uncertainty about, for example, how user evidence that appears strong on paper might be judged if tested at a public inquiry? Might a possible outcome be that surveying authorities have to undertake more thorough investigations than hitherto, for example by adopting a practice of interviewing witnesses when this has not previously been the case?

3.31 In some cases, and it has certainly been happening in Norfolk in recent years, authorities have agreed to make modification orders, but then have argued that as the basis for making the order has been that the way was only reasonably alleged to subsist, it should be for the applicant to make the case for the order at the public inquiry, thereby shifting the cost of so doing from the authority to the applicant. Will the change in the law mean that this option will no longer be open to authorities?

3.32 If the change means that more applications are rejected, that could in turn mean more appeals, which under the new system will cost authorities more (see para 3.87) when the final outcome is to reject the appeal because of the greater complexity of the new procedures.

Courts, rather than Secretary of State, to rule on delays

3.33 **Detail** : The existing provision in WCA 1981 Sch 14 para 3(2) for an applicant to ask the SoS 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 in new WCA 1981 Sch 13A para 5. 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.

3.34 The new para 5 power requires the applicant first to give notice, in a form to be prescribed, to the authority of the intention to apply to the court for an order. The application may then be made at any time between 1 and 12 months after the date of the notice. The power to give notice also applies to any owner or occupier of any land to which the application relates, which is a new provision. In the following paragraphs all these people are collectively referred to as "the application parties".

3.35 On the hearing of an application by the court, the application parties all have a right to be heard. Thus if the application to the court is made by the applicant for the order, the affected owners and occupiers also have a right to be heard.

3.36 So that they are aware of the application, para 6 of Sch 13A requires that notice be given by the applicant for the court order to the court of the names and addresses of the other parties, or notice that it is not reasonably practicable to ascertain such a name and address.

3.37 The court must then (para 6(3)) give to those other parties notice of the hearing, the right to be heard and the right to appeal against the court's decision.

3.38 The court, on hearing an application, may order the authority to take specified steps to discharge its duty to determine the application, and to do so with such reasonable period as may be specified (para 5(4)).

3.39 The authority may then in turn make one application to the court for an order extending by up to 12 months the period so specified (para 5(5)). On the hearing of such an application the application parties all have a right to be heard.

3.40 A decision by a magistrates' court, either on the initial application or on an application to extend the period for compliance, may be appealed to the Crown Court by the authority or the application parties (para 5(7)). There is standard provision, acknowledged in para 5(8)(b), for an appeal also to be lodged in the High Court way of case stated.

3.41 **Commentary** : According to the EN (para 541): "This new right of appeal to the magistrates' court will replace the existing right of appeal to the Secretary of State (in Schedule 14, paragraph 3(2)), which is widely regarded as ineffective. Appeals to the Secretary of State may result in a lengthy period of uncertainty for those with an interest in the outcome. The change will reduce the period of uncertainty. It is also designed to remove the burden on the Secretary of State …"

3.42 Where the evidence is for the claim that the existing procedure is "widely regarded as ineffective" I know not. It is of interest that since this proposal was first put forward, the arrangements for deciding these applications (not rights of appeal) have been changed so that Inspectors are now making the decisions: my impression is that they are being made more speedily than before, and with directions being made requiring authorities to act in certain cases. But it is not often that a Secretary of State admits to being ineffective, so such a rare admission perhaps ought to be welcomed.

3.43 More seriously, it is one thing to criticise an existing procedure as not working well: quite another to come up with an alternative that is likely to be more effective, and that, in my view, is a criticism that can be made of much of the rights of way reform package.

3.44 What evidence is there that transferring jurisdiction from trained and experienced rights of way professionals in the Planning Inspectorate to magistrates who, however well they may be trained, will encounter these cases only rarely and will not be familiar with rights of way issues?

3.45 What evidence is there applications will not be deterred by changing from a system where the applicant is not charged to one where the applicant faces fees likely to be at least £700 (see paragraph 3.23) plus possible costs if the application is unsuccessful?

3.46 The extension of the right to be involved from the applicant to the owners and occupiers is an interesting one. It could result in the applicant getting support from the owners, not least because they may be able to claim that they have rights under the Human Rights Act that are being infringed by the authority's failure to carry out its statutory duty. This is because Article 6 of the European Convention on Human Rights (compliance with which is required of public authorities by the Act) provides that "In the determination of his civil rights and obligations (…), everyone is entitled to a fair and public hearing within a reasonable time…"

3.47 The argument is that an application to record public rights over someone's land raises questions about the extent of that person's civil obligations (e.g. not to obstruct a highway). In the Paddico case in 2014 (download) the Supreme Court decided (paragraph 27) that the analogous process of registration of land as a village green registration amounted to the determination of a landowner's civil rights and obligations within the meaning of article 6. In a recent case (link) in the Planning Court Mr Justice Gilbart concluded (at paragraph 149) that planning appeals had not been determined 'within a reasonable time' [that planning appeals came within Article 6 was accepted by both sides in the case].

3.48 The determination of questions raised by a DMMO application must therefore be undertaken 'within a reasonable time' (that time to include the time spent on the preliminary assessment procedure). Part of that process is a decision on the application, and given that a time is specified in the legislation for the determination process, that must be assumed to be a 'reasonable time', not least as there may be further parts of the

process, e.g. reference to the Planning Inspectorate if the decision is to make an order, which is then opposed, or an appeal if the decision is not to make an order, before the landowner's obligations are finally 'determined'. [PCC]

3.49 Wealthy landowners making common cause with impoverished applicants against an authority may or may not happen, but it is a potentially intriguing prospect. However as there are, so far as I am aware, no requirements to keep any statistics of the numbers of applications made to magistrates' courts, we may never know how much use is made of this new procedure.

3.50 One detail is interesting. Under the preliminary assessment procedure (see para 9) the applicant is relieved of notifying the owners and occupiers, and the application is not recorded on the register unless and until it passes the preliminary assessment test.

3.51 It follows that if the authority has not made any decision under the preliminary assessment procedure after 12 months, and the applicant then gives notice and makes an application to the magistrates' court, the notice that the applicant is then obliged to give the owners and occupiers (whose details the applicant will have to research) will be the first the owners and occupiers have heard of the application. Their reactions could be interesting. In such cases the owners and occupiers will effectively be denied their right to make an application to the court, since how can they make an application to the court about an application for a modification order of which they are unaware? [PCC]

Modification consent orders

3.52 **Detail** : New WCA 1981 s 54B specifies the action that a surveying authority must take when it appears to the authority that "it might be requisite to make a modification" to a definitive map and statement in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c)(i) or (ii) (i.e. addition of a way to the map or change to the recorded status of a way already on the map either by the addition or removal of rights) and the basis for the authority's view that it might be requisite is documentary evidence of the existence of a right of way before 1949.

3.53 This applies whether or not an application has been made, but where an application has been made, the action is required only after the authority has completed the preliminary assessment and served notice that it is considering the application.

3.54 The required action is that the authority has 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.

3.55 If every owner consents to the making of a DMMO without a special order, the authority may make such an order, which must include a statement that it is made with the consent of every owner.

3.56 If an owner would consent to the making of a DMMO only if one or more special orders are made, and the other owners (if any) do not object to the making of such an order or orders, the authority may make the special order or orders in question and, if they do so, shall combine the special order or orders with the DMMO as well as including a statement that it is made with the consent of every owner.

3.57 A DMMO that includes a statement that it is made with the consent of every owner is known as a modification consent order (MCO).

3.58 As soon as reasonably practicable after an authority decides it has power to make a MCO, it has to give notice to each owner, that notice to include an explanation of the effect of subsection (9). That subsection requires the authority to determine whether to make a MCO within a 12-month period starting, in the case of a modification arising from an application, with the date on which notice was served on the owner that the authority were considering the application following the preliminary assessment test, and with the date of the subsection (9) notice in other cases. The SoS has power to extend the 12-month period by order.

3.59 A diversion order which forms part of a MCO has to comply with the following requirements:

a) the authority must be satisfied that the path or way will not be substantially less convenient to the public in consequence of the diversion [s 54B(6)(a)]

b) the authority must have regard to any guidance given by the SoS [s 54B(6)(b)]

c) the point of termination of a path or way may not be altered if it is not on a highway, or otherwise may only be moved to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public [s 54C(1)]

d) the path or way may not be diverted onto land of an owner whose consent had not been sought under s 54B(2), unless that owner has agreed to the diversion [s 54C(2)]

3.60 Any path or way contained in a MCO, including any path created by a diversion or width alteration contained in a special order will be maintainable at public expense. If the authority are satisfied that work is needed to bring the path or way into a fit condition for use by the public they may not confirm the order until they are satisfied that the work has been carried out (presumably by the authority, although that is not specified in the legislation) [s 54C(3) and (4)]

3.61 New WCA 1981 Sch 14A provides that MCOs are confirmed by the surveying authority [para 9]. This power exists whether or not any representations or objections are made, i.e. objections can be overruled by the surveying authority, and there is no requirement to hold a public inquiry or hearing. However a MCO may be confirmed with modifications (the scope of which is not defined in the Schedule) only if every owner of the land to which the order relates so consents. A MCO is subject to the same publicity requirements as other evidential DMMOs [paras 5 and 18], and there must be consultation with every other local authority before an order is made [para 3]. A MCO may be challenged in the High Court in the same way as a DMMO [para 19].

3.62 Where, following the making of an application and the serving of a notice that the preliminary assessment test has been passed and the authority are considering the application, an authority concludes under s 54B(1) that it should commence the process possibly leading to the making of a MCO, the duty to investigate the application, consult with other local authorities and then determine the application ceases to apply [Sch 13A para 4(2)]. However if no MCO is made or confirmed or the 12-month period (see para 3.58) expires without the authority having determined to make such an order, then the duty is re-applied and must be complied with as soon as reasonably practicable after the occurrence of the event [para 4(3)].

3.63 **Commentary** : MCOs bring in immediately to DMMO procedures elements of the cut-off provisions. In particular, they require an assessment to be made of whether the basis for a decision that a modification “might be requisite” is documentary evidence of the existence

of a right of way before 1949. This is not expressed in exactly the same way as the test for the cut-off provisions, where an unrecorded right of way will (unless otherwise excepted) be extinguished if it existed on 1st January 1949.

3.64 *Authority's discretion?* In particular it is not clear whether an authority has discretion as to the basis for its view. Suppose that an application is made to record a way, supported by user evidence. The authority finds that evidence sufficiently convincing to conclude that it "might be requisite to make a modification". The authority also concludes that as the use of the way had not been blocked or otherwise brought into question, the date of challenge for the purpose of the DMMO is the date of the application. As there was no evidence of an intention on the part of the owner not to dedicate, the authority decides not to spend money on documentary evidence research. Had it done so, it would have discovered evidence that strongly suggested that the way existed before 1949.

3.65 In the above example, the authority does not seek to ascertain whether the owners consent to the DMMO. But what if the authority had decided to research the documentary evidence? It would then have had user evidence sufficient to justify the making of a DMMO and also documentary evidence of the existence of the way before 1949. Would it be entitled to conclude that the former was the basis for its decision, especially if it had reasons for not wanting to go down the MCO route, for example because it knew that one of the owners would seek a diversion that would be unacceptable to the authority? [PCC]

3.66 *Meaning of "might be requisite"* The legislation requires the authority to form a view on whether "it might be requisite" to "make a modification". This is not expressed in the same terms as the existing legislation [WCA 1981 s 53(2)] where there is a duty on the authority "to make such modifications as appear to them to be requisite in consequence of the occurrence of an event", or in the case of an application, reaching a conclusion that "an order should be made" [WCA 1981 Sch 14] or "decide whether to make or not to make the order" [new WCA 1981 Sch 13A para 4(1)(b)]

3.67 Is the difference significant? I find it difficult to tell, but it seems to me that the vagueness of the wording ("might be requisite") has the potential to be the subject of a court case [PCC].

3.68 A further point is that once an authority has concluded that it might be requisite to make a modification (and thus by implication recognised that an event within the meaning of WCA 1981 s 53(3)(c) has occurred), is it effectively obliged to make a DMMO if it decides not to make a MCO, for example because consent of the owners is not forthcoming?

3.69 Conversely, what happens if, despite having concluded that a modification might be requisite, the authority then decides not to make a DMMO (again if no MCO is made)? If the applicant then appeals, will the authority's earlier decision count against it, possibly even to the extent of an award of costs? [PCC]

3.70 *Meaning of 'a right of way'* The test for whether the MCO provisions apply relates to "documentary evidence of the existence of a right of way before 1949". Is there significance in the use of 'a', and how should it be interpreted? Where the modification under consideration is the addition to the definitive map as a RB of a hitherto-unrecorded route, clearly the documentary evidence cannot be of the pre-1949 existence of the way as a restricted byway, as that category of right of way has existed only since 2006. Similarly the category of byway open to all traffic has existed only since 1981. So there is a certain logic in not insisting on the evidence showing evidence of the alleged current status. However in either of these cases, the authority's view that a modification 'might' be requisite must also rely on other evidence, such as the actual or likely use of the way (in the case of a BOAT)

or the application of the tests in NERCA 2006 s 67 to demonstrate that public rights for mechanically-propelled vehicles were extinguished (in the case of a RB).

3.71 Further what if the modification is to reduce ('downgrade') the recorded status of a route already shown on the map? Can evidence of the pre-1949 status be sufficient, or does not the post-1949 documentary evidence of its recording on the definitive map also have to be taken into account? [PCC]

3.72 *Meaning of 'owner'* The MCO provisions are contained within the 1981 Act. Thus the definition of 'owner' is the one that applies to that Act, not the 1980 Act as would be the case for a diversion order under s 119 of that Act. The terms 'land' and 'owner' are not defined in the 1981 Act, so reference has to be made to the Interpretation Act 1978, section 5 of which provides that "in any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule". Schedule 1 to the 1978 Act does not define 'owner', but it does define 'land' as including "building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land". It follows in my view that anyone who has an easement or private right of way over a route the subject of a DMMO application is an 'owner' for the purposes of the 1981 Act, and thus someone whose willingness to consent to a modification has to ascertained under the MCO procedure.

3.73 *No consultation with occupiers* If the authority concludes that it might be requisite to make a modification and that the basis for its decision is documentary evidence of the pre-1949 existence of the way, then it is under a duty to ascertain the views of all the owners of land crossed by the way. Interestingly, although occupiers of that land have to be notified, in the case of an application and following the preliminary assessment, that the authority is considering the application [WCA 1981 Sch 13A para 2(4)(b)], the views of the occupiers do not have to be sought on consultation about a MCO. The occupiers <u>do</u> have to be notified if an MCO is subsequently made [Sch 14A para 5(2)(b)(i)], but as the determination of any objections lies with the authority rather than the SoS, such objections can effectively be ignored. Is there potential here for conflict between owners and occupiers?

3.74 *No restriction on landowners* The requirement is to ascertain the views of the owner(s) of the land crossed by the way in question. There is no restriction placed on so doing (and the making a MCO) if the owner is the authority itself, or another local authority, government department or public body or a member of the authority, etc. So if an authority is planning a major development with a property company and there is an unrecorded right of way across that land, the authority can (provided it satisfies itself that there is evidence of the existence of the way before 1949) agree with the company to make a MCO that reduces the width of the way and/or diverts it and/or imposes limitations on it. As the authority will be responsible for making a decision on any objections, the only effective way to challenge a decision by an authority to confirm a MCO will be an application to the courts for quashing that confirmation. There is thus scope for what may appear to objectors to be dodgy deals by an authority or between an authority and another party: what effect might that have on relations between an authority and other parties?

3.75 *No test applied to partial extinguishment or imposition of limitations or conditions* Although tests are applied to a diversion contained within a MCO, there are no tests to be satisfied in relation to one that alters the width of the path or way or imposes a new limitation or condition. As any way that is the subject of a MCO will be maintainable at public expense, an authority might regard it as being in its interest to have its future maintenance liability reduced by extinguishment of part of the width of a way: would such a view be upheld by the courts, and more generally what tests (if any) might the courts consider to be implied? [PCC]

3.76 *Raising expectation among landowners* Suppose that under the MCO procedure an authority ascertains the views of a landowner about a modification that the authority considers might be requisite. The owner responds by seeking one of the changes covered by the special order provisions in s 54B(2). However the authority eventually concludes that it should not (or perhaps cannot if other owners do not consent) make a MCO containing the special order provision. It is then obliged to revert to the determination of the application (if there was one). Having concluded from its previous investigations that a modification might be requisite, the authority then decides that it should make a DMMO. The owner objects, the order and objections are referred to the Planning Inspectorate, and in his submissions to the Inspectorate the owner continues to seek one of the changes covered by the special order provisions, assuming (not unreasonably) that the Inspectorate has power to include such a provision in the order. Time is then spent telling the objector that this is not so.

3.77 A similar situation could arise if an application went to appeal after the exercise of the power to make a MCO had been rejected.

3.78 *Meaning of "power to make MCO"* Section 54B(7) requires the authority to notify each owner as soon as reasonably practicable after deciding that it has power under either subsection (4) or (5) to make a MCO. That situation arises after the consultation with the owners, including where necessary further consultation with owners when one (or more) of them responds to the initial consultation by saying they will consent to the modification only if the special order power is exercised, so this notification represents an additional requirement. The notice under subsection (7) has to explain the effect of subsection (9), which sets out the timescale within which the authority has to determine whether it is going to make a MCO. Authorities will therefore have to ensure that the date of any decision is recorded (e.g. if it is made under delegated powers rather than by a committee), in order to be able to prove, if challenged, that the timescale laid down by subsection (9) has been met. In the case of an application, the deadline is 12 months from the date on which the authority served notice, following the preliminary assessment procedure, that it was considering the application.

3.79 *Downgrading included in MCO power* The SWG's report discussing its proposed agreements given form in the legislation for MCOs, said (para 5.25): "Reduction in status would not be possible under such an agreement, as it would always be potentially against the public interest." Yet the legislation does allow (with apparently no objection from the SWG) for 'reduction in status', as s 54b(1)(a) refers to "events falling within section 53(3)(b) or (c)(i) or (ii)", and subsection (3)(c)(ii) covers changes to recorded status both by addition and deletion (commonly, if inaccurately, referred to as 'upgrading' and 'downgrading'). It will thus be possible for a landowner to apply for the recorded status of a route over his land that is already on the definitive map as a BR, RB or BOAT to be modified to a lower status, and then to consent to that modification, or even to consent to it if the route is diverted, reduced in width or subjected to an additional limitation or condition, provided the authority is willing to agree.

3.80 *Will applications to record RBs and BOATs deterred?* Ways that are not recorded on the definitive map but for which there is evidence sufficient to justify recording them as either RBs or BOATs will not have rights over them extinguished at the cut-off date (see para 4.11 below), although the ability to record BOATs on the definitive map will be removed. However if an application to record a hitherto-unrecorded way as a RB or BOAT is made, and the authority considers that the basis for thinking that the definitive map might be modified is documentary evidence of the existence of a right of way before 1949 (as will often be the case for a RB or BOAT), then the MCO process will be triggered, and it is possible that the outcome will be not the recording of the way as applied for, but rather its recording on a different route and/or with a reduced width and/or subject to additional

limitations or conditions, with the authority overruling any objection that the applicant or other parties have to those changes.

3.81 In such circumstances might potential applicants (I have in mind in particular user organisations) be wary of putting in applications? For unrecorded BOATs they will know that if they wait until the cut-off date the power to make changes via the MCO process will effectively cease because of the ban on recording BOATs after the cut-off date. They may prefer to have the width and alignment of the BOAT protected even though it will not be recorded on the definitive map.

3.82 Conversely might we see landowners applying for the recording of RBs and BOATs over their land, so that they can then seek to take advantage of the MCO provisions to reduce the width or change the alignment? Welcome to the topsy-turvy world of the rights of way reform package.

3.83 *How many MCOs will be made?* The underlying assumption behind the introduction of this new procedure appears to be that landowners will agree to modification orders if only they can be given something in return, such as permission to erect a gate across a restricted byway. But no statistical evidence has been produced to support this assumption, so it remains to be seen what the overall effect is. If a landowner consents unconditonally to the modification, the only difference from a 'normal' DMMO is that any objection froma party other than the owner can be rejected by the authority: how often do such objections arise? In the arguably more likely event that the owner's consent is conditional, the question arises how often the outcome of the authority's deliberations on the owner's requests will be accepted by all parties as fair? If the use of the procedure gives rise to mistrust between the authority and other parties, that is likely to lead to increased costs over time. More generally, I am sceptical that any savings that arise through not having to refer opposed MCOs to the SoS will outweigh the costs arising from the complexities of this additional element of DMMO procedures. As a decision on making a MCO has to be made within 12 months of notification to owners following the preliminary assessment made, or the power lapses, the chance to use the power may in many cases simply go by default because the authority cannot cope with the workload.

Correction of "obvious administrative errors"

3.84 **Detail** : New WCA 1981 s 53ZA gives the SoS power to make regulations applying Schs 13A and 14A in a modified form in cases where it appears to a surveying authority (whether or not on an application) that:

a) it is requisite to 'make a modification' of the definitive map and statement in consequence of an event in s 53(3)(c) (thus including deletions);

b) the need for the modification has arisen because of an administrative error;

c) both the error and the modification needed to correct it are obvious.

3.85 When such regulations are in force a surveying authority must have regard to any guidance given by the SoS in deciding whether they apply in any particular case.

3.86 **Commentary** : As no draft regulations or guidance have been published by Defra it is difficult to comment on how this procedure might work. A few points, though:

a) the test is different - it is requisite to make a modification, not 'might be' as for MCOs

b) none of the three terms "administrative", "obvious" and "error" are defined in the legislation [PCC]

c) how restrictive will the exercise of the powers be? Will it, for example, be possible to use the power to correct an error in such a way as to move the recorded route of a

right of way from one owner's land to that of another? How will the power conflict with the restriction on changes to 'protected rights' after the cut-off date imposed by CRWA 2000 s 55A?

Revision of appeal procedures

3.87 **Detail** : New WCA 1981 Sch 13A paras 7 to 11 set out a 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. It does this by requiring an appeal to be publicised as if it were a DMMO [paras 7(6)-(12)], and by allowing anyone to make representations or objections to the authority's decision not to make an order.

3.88 The Inspector (to whom decisions will normally be delegated [para 9]) may either:-

a) uphold the authority's decision not to make an order; or

b) direct the authority to make an order; or

c) make an order.

3.89 Nothing in the legislation provides any guidance as to the circumstances in which the Inspector will or should make the order himself rather than direct the authority to do so.

3.90 There is power to make, or direct the authority to make, an order that would differ in a material respect from that applied for, but only after advertising the proposal to do so, essentially as a proposed modification to a DMMO would be advertised. A difference in a material respect is defined [para 8(9)] as the same type of change that would require a modification to a DMMO to be advertised.

3.91 Provisions relating to objections judged to be irrelevant are included within these new procedures [paras 7(3)-(5), 8(2) and 8(8)] as they are in the provisions relating to DMMOs (see below).

3.92 **Commentary** : The intention behind the new procedure is that an issue will be referred to the SoS only once, whereas under existing procedures a successful appeal leads to the making of an order which, if opposed, will then be referred to the SoS. However, as with many of the changes in the reform package, it is questionable whether the solution is preferable to the 'problem' it is intended to solve.

3.93 A single reference to the SoS is achieved by a merger of the appeal procedure and the subsequent order-making procedure. However the equivalent to the order-making procedure contained within the new arrangements is not the same as the order-making procedure that it replaces. This is because there will not be an order, or draft order, that will be considered by the SoS: instead what will be publicised, with an opportunity given for objections, is the authority's decision not to make an order in response to the application.

3.94 I see three particular issues arising with this. The first is that there will now be two variants on the order-making process: the 'normal' one that will apply where the authority decides to make a DMMO; and the alternative one that will arise when there is an appeal against the refusal to make a DMMO. That is in itself a complication rather than a simplification.

3.95 The second is that an application for a DMMO, and the authority's subsequent decision on it, are not required to address all the detail that has to be included in an order, in particular matters such as position, width, limitations and the description of the route in the statement. All those are matters that can be, and often are, addressed in objections to an order. They also need to be included in any order that is made, so how will they be addressed in a process where what is under discussion is the authority's refusal to make an

order on an application, but where the outcome, if the Inspector considers that an order should be made, is either the making of an order by the SoS or a direction to the authority to do so, in either case with no further publicity and automatic confirmation? [PCC]

3.96 The third is that whilst the new procedure will achieve the aim of a single reference to the SoS in cases where both the appeal would have been successful and the subsequent DMMO would have been opposed, what it will also do is make the process considerably more complex (and thus expensive for surveying authorities) in those cases where the appeal would not have succeeded.

3.97 I undertook some research when preparing submissions to the Parliamentary Committees that considered both the draft Bill and the Bill at its Commons Committee stage. My conclusion was that the proportion of appeals that did not succeed was slightly under 50%. It is difficult to say whether that proportion will hold true for the future, as it could be influenced both by the introduction of the preliminary assessment procedure and by the abolition of the 'reasonably alleged' provision.

3.98 But if the proportion in future is broadly the same, there will thus be nearly as many cases where the new procedure costs more (because of the requirement to publicise the appeal that does not exist now) as where there is a saving by a single reference to the SoS. Add into the mix the extra cost caused by confusion among all parties by the introduction of a variation to the 'normal' order-making procedure, and where is the saving? See more on this in Appendix 2.

Changes to publicity for DMMOs

3.99 **Detail** : New Sch 14A para 5(2)(a) incorporates changes to the publicity 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 and on such other websites or through the use of such other digital communications media as the authority may consider appropriate".

3.100 **Commentary** : It is not clear whether the "or" relates to the whole of what goes before or just the "such other websites", i.e. whether an authority must publish a notice on its website (or one of its websites). A similar provision is included in the publicity for appeals in the new procedures described above (para 3.87).

3.101 These changes apply only to the publication of the notice in the local newspaper: they do not extend to making a copy of the order and notice available online with the notice (you will still have to ask - and pay - for a paper copy), nor are any changes made to the provisions for placing an order for paper copies of notices, or for sending notices and orders to prescribed organisations. Moreover these changes contrast with the view expressed during the passage of the Bill by the Secretary of State for Local Government:

"Speaking to council leaders at Local Government Association (LGA) annual conference, Local Government Secretary Eric Pickles today (9 July 2014) called for new technology and innovation to bring municipal statutory notices into the modern 21st century era.

Mr Pickles defended statutory notices as an important way of ensuring that local residents were informed of decisions that affect their property and lives. He also criticised the 'sterile debate' of the LGA arguing for the complete abolition of statutory notices replaced with nothing other than 'an obscure notice' on a council website.

Mr Pickles compared that approach to a passage from the Hitchhiker's Guide to the Galaxy: as Arthur Dent's house is demolished, he is told by planning officers that the notice has been in the council's "display department" for the last 9 months: "A department located… in the basement; in a disused lavatory; without a light; in the bottom of a locked filing cabinet; with a sign on the door, saying: 'Beware of the Leopard'."

[Extract from press release of speech by Rt Hon Eric Pickles MP, Secretary of State for Communities and Local Government, to Local Government Association, 9 July 2014 - https://www.gov.uk/government/news/innovation-to-bring-statutory-notices-into-the-21st-century]

and see below (para 6.2) for commentary on the similar changes being made to publicity for some, but not all, public path orders.

Dealing with irrelevant objections

3.102 **Detail** : New Schedule 14A para 6 permits an authority to disregard objections and representations to a DMMO if it considers that none of them are relevant. A 'relevant' objection is one where, if the order were to be submitted to the SoS, the objection would be relevant in determining whether to confirm the order (with or without modifications). An authority must have regard to any guidance given by the SoS, and, if it exercises the power, must notify the objector and give the reasons for the decision. The power to sever orders is extended (para 8) to encompass the severance of an order so that only a part containing the modifications to which relevant objections has been made is submitted to the SoS.

3.103 **Commentary** : No draft guidance has been published by the SoS, so it is difficult to comment. In cases where the only objection contains nothing of relevance, this power could be useful, but how many of those are there? An objection that disputes that the evidence justifies the modification being made by the order would appear to be relevant (although it may be a matter that will be tested by the courts) [PCC], so it would not seem difficult to prepare a 'relevant' objection.

Consideration of objections by the Secretary of State

3.104 **Detail** : New Schedule 14A para 13(1)(b) permits the SoS to offer an objector only written representations rather than a hearing.

Transfer of applications

3.105 **Detail** : New Sch 13A para 12 gives an applicant power, at any time before the application is determined, to give notice in a prescribed form to the surveying authority of transfer to another person named in the notice, and thereafter the other person is to be treated as the applicant.

3.106 **Commentary** : This provision does provide some flexibility. What is not clear is whether it can be used in circumstances where the applicant has died, or has ceased to be capable of making the decision to arrange the transfer themselves. In such cases, or where there is doubt about whether the notice has been given in the prescribed form, there could be additional work for the surveying authority in making a decision. [PCC]

3.107 However it does not apply after the application has been determined, so does not apply to appeal procedures or to anything subsequent to the making of an order. The 'applicant', for the purposes of the Inquiry Rules, will, in such cases, be whoever was the applicant immediately before the decision was made on the application.

Transitional provisions and existing applications

3.108 **Detail** : DB cl 26(7) gives the SoS power to make regulations to apply, possibly with modifications, the changes relating to MCOs and the revised procedures for applications and order-making to applications for DMMOs made before the legislative changes come into force.

3.109 Commentary : No draft regulations have been published so it is not possible to comment on what is intended. Any application of the new procedures to existing DMMO applications will both involve some variation to those procedures and will not apply to all such

applications, (e.g. those that have already reached a certain stage), so there is potential for additional confusion for several years about what provision applies to any particular application and how.

4 The cut-off provisions

The cut-off provisions as introduced in the 2000 Act

4.1 **Detail** : CRWA 2000 ss 53-56 and WCA 1981 s 54A constitute the cut-off provisions as introduced by the 2000 Act. However, it should be noted that no commencement order has ever been made for any of these provisions, so they remain legislation that is on the statute book but not in force.

4.2 The provisions in CRWA 2000 apply to public rights of way that were in existence on 1st January 1949 if:

a) the right of way is a footpath or bridleway and is not recorded on the definitive map at the cut-off date [s 53(1) & (2)]

b) a right of way is recorded on the definitive map at the cut-off date, but there are additional unrecorded rights of the following nature : [s 53(3) & (4)]

   i. a right of way on horseback, leading a horse or for vehicles over a bridleway, restricted byway or byway open to all traffic over a way recorded on the map as a footpath

   ii. a right to drive animals of any description along a bridleway, restricted byway or byway open to all traffic over a way recorded on the map as a footpath

   iii. a right of way for vehicles over a restricted byway or byway open to all traffic over a way recorded on the map as a bridleway

   iv. a right of way for mechanically-propelled vehicles over a byway open to all traffic over a way recorded on the map as a restricted byway.

4.3 The provisions also apply to any rights of way that have been diverted, widened or extended after 1st January 1949 as if that diversion, widening or extension had occurred before that date [s 53(6) & (7)].

4.4 However the provisions do not apply to any highway that comes within one or more of the categories of 'excepted' highway in s 54.

4.5 All rights of way in what was prior to 1st April 1965 the area of the London County Council are excepted [s 54(1)(b) & (5)(b): this corresponds with the provision in WCA 1981 s 58 whereby the provisions relating to definitive maps are optional in that area.

4.6 Other exceptions are applied to 'relevant' and 'retained' highways [s 54(2)-(4)].

4.7 There is also a power to except by regulation specific rights of way, or classes of right of way [s 54(1)(d)&(e) and 54(5)(c)&(d)].

4.8 Further, there is a power in s 56(2) to make regulations that contain transitional provisions, including ones related to applications made, but not determined prior to the 'cut-off date'.

4.9 Section 56 defines the 'cut-off date' at 1 January 2026, but also provides a power in to make regulations setting a later date for all or some areas. That later date may be up to 1 January 2031, except in areas [subsection (4)] where the 1949 Act did not make the survey compulsory where there is no limit placed on a possible deferral of the cut-off date.

4.10 It should be noted that all these are powers: there is no duty on the SoS to make any regulations. It would therefore be perfectly lawful for the provisions to be applied so that any qualifying [s 53] pre-1949 right of way not recorded on the definitive map at 1 January 2026 would be extinguished, regardless of whether any application had been made to record it, of 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.

4.11 The provision in WCA 1981 s 54A works in a completely different way. It does not extinguish any public rights, but instead prevents any more ways being added to the definitive map and statement as byways open to all traffic.

4.12 **Commentary** : Although these provisions were passed by Parliament their non-implementation has meant that they have been overtaken by the more limited cut-off provisions introduced in NERCA 2006 (see para 4.44 below). What the NERCA provisions have provided is a foretaste of some of what may be in store in 2026 if the 2000 Act provisions are implemented.

4.13 *The effect of the NERCA provisions* Firstly, there has been the additional complication of deciding whether public rights were extinguished in 2006. Examination of Inspectors' decisions in relevant cases shows that often a considerable part of the decision is devoted to this issue: it must follow that a correspondingly large part not only of the Inspector's time but also that of the surveying authority and other parties was also devoted to the question.

4.14 Secondly, there have been a number of court cases, not only directly on the provisions, but also on aspects that might not have been foreseen, such as what is an application, what form maps at 1:25,000 scale have to take (on which the Supreme Court is currently deliberating) and the nature of the 'list of streets'. Other aspects, such as those around the substitute private rights provided for in NERCA 2006 s 67(5), may well be the subject of future cases.

4.15 *Implications for the CRWA provisions* All has been just for the relatively limited extinguishment of rights for mechanically-propelled vehicles - relatively limited, I suggest, in terms of the numbers of routes involved when compared to the numbers affected by the provisions in CRWA 2000, and also because those latter provisions will lead, in some cases, to the extinguishment of all rights over routes, rather than the partial extinguishment provisions of NERCA 2006.

4.16 The SWG appears to have had some similar concerns:-

> *"Over-reliance on exemptions could squander the opportunity to increase certainty about where rights of way actually exist. In the worst case scenario, the saving of effort in exempting routes rather than capturing them could be overwhelmed by the amount of later effort needed to determine whether an exemption did apply to a particular route. The exemption provisions in the Natural Environment and Rural Communities Act 2006 in respect of motor vehicle rights have been extensively criticised as technically deficient in this respect."*
>
> [SWG report, para 6.8]

4.17 There is also a much wider issue relating to the CRWA provisions. When that Act was going through Parliament the Minister took the view that it was realistic to think that historic rights could be recorded on the definitive map within what was then a 25-year period, provided sufficient resources were made available to surveying authorities.

4.18 In practice, the provisions were never implemented, and authorities were not provided with any resources. Now the government appears to believe that it will be feasible for authorities (at a time when it is requiring them to cut their spending) to undertake the work with no additional resources in a period of less than 10 years (from assumed commencement in April 2016 to a cut-off date of 1 January 2026).

4.19 At least one has to assume that it is the government's thinking: a recent Parliamentary question leaves me wondering precisely what the government is thinking:

Rights of Way : Asked by Lord Greaves

To ask Her Majesty's Government what assessment they have made of the number of historic rights of way which will not have been recorded by the time of the cut-off in 2026, broken down by (1) routes where claims have been submitted, and (2) routes for which claims have not been submitted. [I] [HL4235]

Lord De Mauley: The Government has not made any assessment of the number of historical public rights of way which will not have been recorded by the time of the cut-off date in 2026. Any assessment would depend on a number of unknown variables and could only be made at a disproportionate cost.

[House of Lords, Written Answers, 27 January 2015, p 10]

4.20 *No provision for statutory undertakers* Statutory undertakers have rights to put their apparatus in or under highways, and are likely to have done so in particular under many of the urban footpaths that are not recorded on definitive maps. If a local authority makes a public path order extinguishing a length of such a footpath it has to make, if need be, special provision in the order for the undertaker to have, in effect, a continuing private right of access to its apparatus [HA 1980 s 121(4)-(6)].

4.21 But what about the tens of thousands of routes over which public rights may be extinguished by the cut-off provisions? No protection for statutory undertakers is contained in the CRWA 2000 provisions, and none has been added by the amendments made by DA, unless a statutory undertaker is considered to have "an interest in land" (see para 4.67).

4.22 *How many routes will be affected?* The following table is my rough estimate for the county of Norfolk of the numbers of routes in different categories that may be affected by the implementation of the cut-off provisions. How many routes may be subject to extinguishment will depend on how the provisions are implemented. If my estimates are correct, then there could be as many as 2,500 routes that will be affected by the introduction of the provisions in some way, even if that is only the introduction of uncertainty as to their status.

Category	Unrecorded rights of way	Of which existed prior to 1949	Of which are threatened with extinguishment if not on the definitive map at the cut-off date
Formerly-excluded area of the former county borough of Norwich	500-1000	300-700	?
Formerly-excluded area of the former county borough of Great Yarmouth	200-400	150-300	?
Routes in other built-up areas	200-400	100-200	?
Routes for which there is historic documentary evidence (including evidence of additional rights over ways already recorded on the definitive map)	50-300	50-300	?
Routes on the map with no width recorded and where there is documentary evidence of width	100-300	50-200	?
Routes for which there is user evidence	?	Note 1	Note 1
Routes shown as ORPAs on OS maps or otherwise eligible to be recorded as BOATs	200-400	200-400	Note 2

Note 1 : There are unlikely to be any routes arising solely from user that existed prior to 1949, but there will be uncertainty in each instance as to whether the route did exist at that date as a public right of way,

Note 2 : Public rights will not be extinguished over these ways at the cut-off date but they will be affected by the provision in WCA 1981 s 54A that prevents them being recorded on the definitive map after the cut-off date.

4.23 *Consequences of uncertainty* Highway authorities are under a duty to record highways that are maintainable at public expense in the list of streets, and to keep that list up to date [HA 1980 s 36]. If a public footpath is, immediately prior to the cut-off date, recorded in the list of streets but not on the definitive map, is there an obligation on the authority to review the status of that way after the cut-off date in order to determine whether it has ceased to be a highway, and, as a consequence, ceased to be maintainable at public expense? Furthermore, if after the cut-off date, such a route is obstructed, will the authority decline to take action, taking the view that the status of the route is now uncertain, and citing in its support the case of *R v Lancashire CC ex parte Guyer (1980)*? [PCC] Add to that the government's acceptance that "The investigation of applications based on evidence about the position before 1949 can be very difficult for authorities" (EN para 130), and the extra burden on authorities is likely to be considerable.

4.24 A related issue is that, if a right of way is extinguished at the cut-off date, but the public continue to use it, any new right of way created by their use will not be maintainable at public expense (and thus should not appear in the list of streets).

4.25 *How will the provisions be implemented?* As Defra has neither followed up its 2012 consultation exercise with any statement of how it intends to proceed nor published any draft regulations we are in the dark.

4.26 What the SWG proposed in relation to implementation was the following:

a) 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, in part]

b) 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]

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

d) Regulations should be made to ensure close monitoring of surveying authority performance in preparing for the cut-off. [Proposal 23]

e) Provision should be made for rights covered by registered applications to be saved from the effect of the cut-off until the case is substantively determined. There needs to be an appropriate post cut-off period to enable registration of recent applications if they pass the Basic Evidential Test. [Proposal 24] [Note: the SWG's Basic Evidential Test is Defra's preliminary assessment procedure]

f) 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]

g) It should not be possible to defeat after the cut-off an application based on evidence of long public use merely by showing that any of that use took place along a pre-1949 right of way that still existed at the time of the cut-off. Neither should it be possible to use pre-1949 documentary evidence after the cut-off to claim that the status of the route is higher than that for which there is recent user evidence. [Proposal 26]

4.27 Defra's 2012 consultation document did not make any specific proposals for the implementation of the above, but rather expressed general opinions as follows:-

a) "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." [Defra para 4.1 on SWG proposal 25]

b) "We … believe that rights of way that are in regular, continuous use should not be extinguished just because they came into existence before 1949." [Defra para 4.3 on SWG proposal 26]

c) "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." [Defra para 4.5 on SWG proposal 24]

d) "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." [Defra para 9 on SWG proposal 1]

e) " … 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 …" [Defra para 9.1 on SWG proposals 22 and 23]

4.28 So we know that Defra will definitely <u>not</u> be implementing the parts of the SWG package that will enable the changes to be monitored for their effectiveness, but what we don't know is what those changes will be.

4.29 As far as the potential exemption for applications is concerned [CRWA 2000 s 56(20(b)(i)] any provision has been made more complicated by the introduction of the preliminary assessment test - will exemption be given to <u>all</u> applications or only those that have passed the test? - and by not knowing to what extent the new provisions for applications will be applied retrospectively to applications made before the introduction of the new provisions. If that date is April 2016, and the cut-off date remains 1 January 2026, it seems almost certain that there will be, at the cut-off date, some undetermined applications made prior to April 2016, so any regulations need to allow for that possibility.

4.30 As regards the other possible exemptions - the SWG's proposals for routes on the list of streets and those that are in regular use - Defra's consultation document appears accepting, although it also noted that there were legal difficulties with the latter concept (para 4.4). There has been no consultation on possible ways to overcome them, and no attempt to make any legislative provision in the Deregulation Act to do so? So how committed is Defra to the view that "rights of way that are in regular, continuous use should not be extinguished just because they came into existence before 1949."? After all, that is exactly what the cut-off provisions in the 2000 Act do.

4.31 It is my view that the greatest number of unrecorded rights of way is to be found in urban areas, principally, but by no means exclusively, those areas where the 1949 Act provisions were not compulsory, and where it has only been a duty to compile a definitive map since 1983. Neither Defra nor the SWG undertook any research in such areas to ascertain just

how many unrecorded routes there might be, and the *Discovering Lost Ways* project avoided urban areas and routes, both in the documentary sources that were investigated and in the areas that were studied.

4.32 The SWG report, at para 3.10, noted that in a 2007 survey, "several high responses made by city authorities referred to the issue of unrecorded urban paths". Overall the report concluded (para 3.13) : "It is impossible to draw firm conclusions about the scale of the issue." (the issue being estimating the number of unrecorded pre-1949 rights). In its impact assessment Defra adopted the overall estimate of 20,000 cases from a 2002 survey, presumably on the basis of there being no other figure it could use.

4.33 Living in a former county borough where next to nothing has been done since 1983 to record rights of way on the definitive map, I reckon that the estimate is far too low: my estimate is that some research would conclude that the true figure for the number of unrecorded rights of way in England that will be affected by the cut-off provisions is between 50-100,000. The make-up of that figure will vary from area to area - see my list of categories in the table at paragraph 4.22.

4.34 So, what will happen with possible exemptions? Either they will fail to secure the exemptions sought by the SWG, in which case the public will lose many thousands of public rights of way (predominantly footpaths) at the cut-off date, or they will succeed. But there will still be an issue of assessing in each case whether or not an exemption applied: will we find, as forecast by the SWG that *"the saving of effort in exempting routes rather than capturing them could be overwhelmed by the amount of later effort needed to determine whether an exemption did apply to a particular route"*? And keep in mind that the cut-off provisions are not a brief, temporary, exercise: questions about whether or not a right of way was extinguished in 2026 will have to be asked, and answered, indefinitely into the future.

4.35 If the exemptions do succeed in protecting the routes referred to by the SWG then most of the rights of way not recorded on definitive maps at the cut-off date will not be extinguished. The consequence will be that there will remain substantial uncertainty over the status of unrecorded routes: indeed for the reasons given above the provisions will, in my view, introduce uncertainty in many cases where there is none at present.

4.36 I also see issues if, as the SWG appears to intend (Defra's intentions being unclear), regulations are made to exempt routes recorded in the list of streets. The first issue is the date on which they are so recorded. If it is, as provided for in the equivalent provision in NERCA 2006 s 67(2)(b), 'immediately before commencement', then no-one will know, in advance of that date, whether a particular route will be so recorded on that date, as there is no provision for the public to have a say in changes to the list. The consequence may well be that would-be applicants for DMMOs decide to submit applications on the principle of 'better safe than sorry' even if it then transpires that the route was on the list at the prescribed date.

4.37 The second is that there is no provision in legislation to require the keeping of a copy of the list of streets at any given date, nor any prescription of the format in which it is to be kept or any requirement to make such a copy available for public inspection free of charge.

4.38 The third is that the legislation does not require the list to indicate the status of a route recorded in it. For the purposes of the NERCA exemption this may not matter, as the extinguishment was only partial, but for the purposes of the CRWA cut-off provisions, it could be significant. The extinguishment provisions apply only to unrecorded footpaths and bridleways, so if it can be argued that a particular route has a different status, such as road, cycle track or restricted byway the rights will not have been extinguished.

4.39 The fourth is that there is no requirement for the list to define the position or width of a route or for it to be accompanied by a map. There is thus plenty of scope for disputes about whether an entry in the list of streets did actually refer to the route alleged to have been extinguished at the cut-off date.

4.40 I find many of the exceptions in s 54 impossible to interpret. An 'explanation' was provided by the Stakeholder Working Group at Annex 7 (p 70) of its report, but I find it difficult to reconcile the explanation with the text of the legislation, or indeed to reconcile the explanation that post-1949 'legal' events are in effect excluded with the provisions of s 53(6) & (7). The explanation refers, in part to "forms part of a coherent network" which, in my view, adds unwarranted gloss to the legislation. [PCC]

4.41 *The no more byways provision in s 54A* It has never been clear to me what this provision was expected to achieve. It does not extinguish any public rights, but rather seeks to prevent them being recorded in a legal register created to provide the public with conclusive evidence of the existence of their rights. It will still be possible for disputes about the status of byways to arise, and to be resolved, but the resolution will have to be in the courts rather than at a public inquiry - and if the outcome of a court case is a declaration that public rights do exist, those rights will still not appear on the definitive map.

4.42 The provision also appears to preclude the making of a legal event that would have as its effect, or part of its effect, the addition of a new length of BOAT, e.g. a legal event order to give effect to a SSSI diversion order for a BOAT under HA 1980 s 119D. [PCC] However it does not preclude a DMMO (evidential or legal event) to change the recorded status from FP, BR or RB to BOAT because it applies only to "any way not shown in the map and statement as a highway of any description".

4.43 The likely impact of the provision has been affected by NERCA 2006 - see below.

Consequential effects of the NERC Act

4.44 **Detail** : NERCA 2006 s 67 extinguished unrecorded public rights of way for MPVs in the circumstances provided for in the section.

4.45 **Commentary** : Many of the affected by NERCA would, prior to the Act, have been eligible for recording on the DMS as BOATs, and as such would potentially have been affected by WCA 1981 s 54A (see above). Extinguishment of MPV rights therefore converted them into routes eligible for recording as RBs, and such recording is not affected by any of the CRWA cut-off provisions. They are also thereby exempted from the effects of s 54A. However, as noted above (para 3.80), although the public's rights over them will not be extinguished at the cut-off date, and although it will still be possible to record those rights on the DMS, such routes are affected by the MCO provisions being introduced by the DB and the potential consequences of those provisions may deter applications to record them.

4.46 A further consequence of the NERCA extinguishment is to introduce a possible partial loophole into the s 54A ban. Suppose that, after the cut-off date, you believe that a way is a BOAT but you don't have the money to apply to the court for a declaration of public rights. Instead you apply for a DMMO to record it as a RB, arguing (even if you don't believe it) that MPV rights were extinguished by NERCA. The authority is under a duty to investigate your application, unless it concludes at preliminary assessment procedure that you were wrong to hold your belief (and that implies fairly detailed consideration of the application at what is supposed to be a simple initial check). It may, having undertaking that investigation, conclude that it should not make an order, because the way is in truth a BOAT. However, having thereby publicly stated that it believes that there are public rights

of way for mechanically-propelled vehicles, is the authority then committed to upholding those rights if their existence is disputed? [PCC]

Amendments made by the Deregulation Act

4.47 **Detail** : The first DA amendment is the insertion of new CRWA 2000 s 55A. This creates an additional new term "protected right of way", defined as any way shown in the DMS at the cut-off date as FP, BR, RB or BOAT. A surveying authority may then not, at any time after the cut-off date, "make a modification" to a DMS if:-

a) the modification "might affect" the exercise of a protected right of way; and

b) the only basis for the authority considering that the modification is requisite is the discovery by the authority of evidence that the right of way did not exist before 1 January 1949.

4.48 The second DA amendment is the insertion of new CRWA 2000 s 56A. This extends the power of the SOS to make regulations under s 56 to include provisions that enable surveying authorities to 'designate', within a period of one year starting with the cut-off date, rights of way that were extinguished at the cut-off date. There are related powers to make regulations about the making of DMMOs for 'designated rights of way' within a specified period and for such ways not to be regarded as extinguished until a decision is made.

4.49 The third DA amendment is the insertion of new CRWA 2000 s 56B. This mimics NERCA 2006 s 67(5) by providing that people with an interest in land accessed from a right of way extinguished at the cut-off date acquire a private right of way for the benefit of the land if the right of way is 'reasonably necessary' to enable that person to obtain access to it.

4.50 Commentary : *The first amendment (new s 55A)* The first amendment is, I believe, intended to tackle a weakness in the CRWA 2000 provisions. This would prevent the correction of an error by means of concurrent deletion and addition, where the 'addition' element was of a right of way that existed in 1949. As such it would be extinguished at the cut-off date, and thus could no longer be added. However the corresponding deletion could still go ahead, leaving a gap in the right of way. The intention is presumably also that other deletions would also be prevented.

4.51 However the provision seems to me to contain a number of drafting issues. In subsection (1) what is the meaning of "make a modification"? It is not a phrase used in other rights of way legislation. Does it include or exclude confirmation of a modification order made prior to the cut-off date? [PCC]

4.52 In subsection (1)(a) "might affect the exercise" is imprecise. [PCC]

4.53 In subsection (1)(b) "the only basis for considering that the modification is requisite" is also imprecise. [PCC]

4.54 In subsection (1)(b) reference is made to "the discovery by the authority of evidence that the right of way did not exist before 1 January 1949". EN para 133 claims that this clause will prevent modifications being made after the cut-off date even where it emerges that the right of way had been wrongly recorded. I question whether that is correct: the Clause does not appear to prevent an order being made to downgrade the recorded status of a way on the basis that the right of way existed before 1949, but as a different status.

4.55 Subsection (2) defines "protected right of way" by reference to the definitive map and statement at the cut-off date, and therefore appears to assume that the surveying authority will keep a copy of each but it imposes no duty on the surveying authority to do so. What happens if the authority fails to do so? Is the section rendered impotent? [PCC]

4.56 Subsection (3)(b) defines "definitive map and statement" by reference to the 1981 Act. However the definition in that Act is not entirely clear. Does it mean the original (or last revised or last consolidated) definitive map and statement on their own, or does it mean that map and statement together with all the modification and reclassification orders that have taken effect since the relevant date or date of review of the map? In some areas there will be a very significant difference. By way of the difficulty of interpretation see section 56(4) which refers to a "definitive map and statement as modified in accordance with the provisions of this Part": a similar reference is made in section 57(3). [PCC]

4.57 EN para 133 suggests that this clause will "reduce the burden on local authorities that arises from having to consider in detail applications for modifications which require an investigation of historical evidence". I disagree. I see nothing in the Clause to prevent an application being made. It will have to be investigated and determined by the surveying authority. Only if the authority concludes that the tests in subsection (1)(a) and (b) are met will it be able to reject the application, and it will still be possible for such a rejection to be the subject of an appeal to the Secretary of State. Although I accept that if the clause succeeds in its purpose it will offer protection to public rights of way I question whether there will be any significant saving to authorities from the way it is drafted at present.

4.58 A further issue that arises from the cut-off provisions and that seems to me unresolved by this provision is that of the effect of the cut-off provisions on unrecorded widths. In Norfolk, few, if any, of the 2,000+ routes recorded on the definitive map under the 1949 Act provisions have any width recorded, and Norfolk is by no means alone. Indeed I wonder what proportion of the hundreds of thousands routes recorded on definitive maps throughout England have no width recorded for all or part of their length.

4.59 Suppose that on such a route (on the definitive map but with no width recorded), someone discovers evidence, say from an Inclosure Award, of a width for the route. An application is made after the cut-off date to record the width. How does the authority respond? Does it take the view that, because no width is recorded, it is not possible to determine whether any part of the route was extinguished at the cut-off date by virtue of not having been recorded, and therefore the application must be considered? [PCC]

4.60 If it does, and decides that the application has passed the preliminary assessment test, does it then have to treat the application as one subject to the modification consent order procedure? To do so, the basis for the authority's view that it might be requisite to make a modification is documentary evidence of the existence of a right of way before 1949. In this case, is the evidence not of the existence of a right of way, but of its extent? [PCC] As one of the consequences of applying the modification consent order procedure can be an order extinguishing part of the width, the question is far from academic.

4.61 I would accept that if a width is presently recorded in the definitive statement, and there is documentary evidence (e.g. Inclosure Award) of a greater width existing prior to 1949, then that additional width is subject to the cut-off provisions and potentially subject to extinguishment, depending on the application of the exemptions.

4.62 Does new section 55A deal with this issue? The question is whether the recording of a hitherto-unrecorded width for a route on the definitive map at the cut-off date "might affect the exercise of a protected right of way". It might seem not, but what if the historic evidence showed a way less than the width currently in use? Or, put another way, what is the width of a "protected right of way" if none is recorded in the statement? [PCC]

4.63 *The second amendment (new CRWA 2000 s 56A)* According to EN para 137 the purpose of this provision is:-

"to enable surveying authorities to wait until after the cut-off date to assess what research has been carried out by individuals and voluntary organisations. There will be a one-year period after that date within which they can act under the regulations to prevent rights of way being permanently extinguished. They will therefore be able to avoid duplicating any work done by individuals and voluntary organisations and focus, during the one-year period following the cut-off date, on areas where research has not been carried out by individuals and voluntary organisations."

4.64 This assumes, of course, that the power the section gives to make regulations to that effect is actually exercised. In the absence of draft regulations it is difficult to judge the likely success of this provision. However I consider that the task of the surveying authority will be made significantly harder by the other provisions in the Bill, notably those relating to the preliminary assessment and the associated non-recording of applications in the register. There is a suggestion in EN para 135 that there may be unnecessary duplication of research effort. I suggest that this is made much more likely if individuals and the voluntary sector are unable to find out for which routes applications have been submitted, because those applications have not been recorded in the public register pending their preliminary assessment. This situation will be more likely to arise if the EN is correct, "It is thought that, in the period immediately before the cut-off date, there will be a large volume of applications to surveying authorities for modifications to be made to the definitive map and statement to show rights of way that are currently unrecorded."

4.65 The provision appears to assume that, immediately after the cut-off date, the surveying authority will be able to identify which public rights of way were extinguished at that date. I consider this extremely unlikely, as "the investigation of ... the position before 1949 can be very difficult for authorities" and that it is improbable in 2026 authorities will suddenly acquire the resources, in both quantity and quality, to undertake the necessary work. But if authorities are able to take action, it will surely add to what are likely to be substantial backlogs of work.

4.66 A simpler solution would surely have been to extend the cut-off date so that it remained, as intended in 2000, as a date 25 years after commencement. That is, in fact, still possible for formerly-excluded areas under the existing legislation [CRWA 2000 s 56(3)(b)].

4.67 *The third amendment (new CRWA 2000 s 56B)* In common with the corresponding provisions in CRWA 2000 s 50 and NERCA 2006 s 67(5), this section does not provide any procedure for ascertaining whether private rights were created at the cut-off date, for defining their extent or for recording such rights.

4.68 It seems to me that there will be instances where deciding whether a private right exists will not be straightforward. See the case studies in Appendix 4 for some local examples. Firstly, suppose I have access from the front of my property onto a road, not affected by the cut-off provisions, and from the back onto a footpath, extinguished under the cut-off provisions. Is it "reasonably necessary" for me to continue to be able to have access along the footpath - and if so, in both directions? [PCC]

4.69 Secondly, the property is accessed by a footpath running between two roads, and lies about one-fifth of the way along the path. Is it "reasonably necessary" for the property to have a right of way along the footpath in both directions? If the answer is that it depends on the particular circumstances of the case and can only be determined by a court case, then I suggest that the provision does not offer that much of a guarantee to affected landowners.

4.70 Thirdly, what if the property in which I have an interest is in fact a shop or other business that I run and that depends on members of the public being able to access it (as may well be the case for some of the historic routes in the centre of Norwich)? Is their access, and

use of the route as a through route so that I get the passing trade, protected as well as my personal interest in obtaining access to my premises? [PCC]

4.71 I raised above the absence of any protection in the legislation for the interests of statutory undertakers. It is possible that this provision may be considered to offer that protection, but it depends on the rights of statutory undertakers to place apparatus being enough to make them "a person with an interest in land". Are they? And if they are, is the substitute provision - "a private right of way of the same description for the benefit of the land" - sufficient to give undertakers the same rights to install, maintain, inspect, etc their apparatus as they had when it was a public right of way? [PCC]

5 The right to apply for PPOs

The provisions as introduced in the 2000 Act

5.1 **Detail** : New HA 1980 ss 118ZA, 119ZA, 119C and 121A-121E were inserted, and amendments to HA 1980 ss 120 & 121 were made, by the 2000 Act. The overall 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 SoS in certain circumstances.

5.2 **Commentary** : These procedures were introduced because, it was claimed, local authorities were slow or reluctant to deal with applications for PPOs. It is now 15 years since the provisions were enacted, but not implemented, and there ought therefore to be 15 years' worth of evidence of the problems caused to applicants by the failure to implement the provisions. Where is that evidence?

5.3 More particularly, the provisions, even as amended by DB (see para 5.7 below), will not replace the existing procedures. They will provide an alternative means of applying in certain circumstances. Whether that alternative will be seen as preferable will depend on what is specified in the regulations (no drafts have been published) and how efficient Defra (or perhaps the Planning Inspectorate on its behalf) is at administering appeals and, in certain circumstances, order-making. It is perhaps worth noting that the procedure the Secretary of State will follow is essentially the same procedure that has been in existence for the last 30+ years for DMMO applications, a procedure being replaced by DB with court applications because it is "widely regarded as ineffective" (EN para 527). Why should it suddenly become effective when applied to PPOs?

5.4 The following applications and proposals will remain subject to the existing procedures:

a) Applications for diversion or extinguishment or rights of way that do not cross agricultural or forestry land, or other land that has been made the subject of the provisions by regulations (no draft of which has been published by Defra).

b) Applications for diversion or extinguishment or rights of way that do cross such eligible land, but where the applicant has chosen not to apply under the provisions in sections 118ZA and 119ZA.

c) Proposals initiated by an order-making authority where there is no application.

d) Applications for diversion or extinguishment that also involve an application for a creation order.

5.5 Unless the regulations referred to in (a) above significantly extend the scope of this new procedure, my experience suggests that only a minority of diversion proposals will come within its scope. According to the Government Minister : "The right to apply will be extended to land-use types other than those for agriculture, forestry and the keeping of horses—for example, to private residential gardens." [Lords Hansard, 3 February 2015, col 590], but as no draft regulations have been published it is impossible to judge the accuracy of his statement (and in any event the regulations will be made by a new government after the general election). But providing for an extension of the scope of the provision by regulations, rather than simply amending it to apply to all land, implies in turn that some land, and the rights of way across it, will be excluded. What will happen if a would-be applicant wants to divert a length of path which runs only partly over land to which the new procedures apply?

5.6 A further criticism is that there are substantial differences between this proposed procedure for PPO applications and the procedure for DMMO applications, as set out in the table below. I suggest that those who seek to use the procedures, and, perhaps more particularly, those who have to administer them, will find the differences confusing.

	Applications for diversion and extinguishment orders under new procedure (ss 118ZA, 119ZA of 1980 Act)	**Applications for definitive map modification orders (as proposed to be amended by the Deregulation Act)**
Requirement for applicant to notify other parties (e.g owner / occupier / user groups) of application	Not known (will depend on content of regulations, no drafts of which have been published)	No
Period of time from submitting application to becoming eligible to seek a decision on the preliminary assessment application if one has not already been made.	There is no preliminary assessment procedure.	3 months - application for a decision may be made only by applicant
Period of time from submitting application to becoming eligible to seek a decision on the application if one has not already been made.	4 months - application for a decision may be made only by applicant	12 months - application for a decision may be made by applicant or by owner or occupier of land affected by application (*this latter assumes they have been notified of the application by the authority following preliminary assessment)*
Procedure for seeking a decision after the expiry of the relevant period	Application to the Secretary of State (no right of further appeal other than application for judicial review)	Application to the magistrates' court (in both cases) (right of appeal to Crown Court and thence to higher courts)
Power to appeal to the Secretary of State	On refusal : to make an order; or to confirm as an unopposed order an order made on the application; or to submit to the Secretary of State an opposed order made on the application	On refusal to make an order
Procedure on appeal against refusal to make an order	Secretary of State publishes draft order	Secretary of State does not publish draft order but deals with matter as an appeal against the decision of the authority not to make an order

Amendments made by the Deregulation Act

5.7 **Detail** : The Act makes the following changes to the provisions as introduced in the 2000 Act::

a) the coverage for diversion and extinguishment orders is extended to include “land of a prescribed description”

b) gives the SoS power to decide not to make an order when an appeal is made to him

c) removes the prescription of the fee to be charged by an authority in England

5.8 **Commentary** : The first amendment was commented on above. The other two changes offer flexibility, which in the case of the first one, may mean disappointment for applicants in some cases.

6 PPO procedures

Changes to publicity for orders

6.1 **<u>Detail</u>** : Changes similar to those made for DMMOs (see para 3.99) are made in HA 1980 Sch 6 para 1(3) & (3ZA).

6.2 **<u>Commentary</u>** : Appendix 3 lists the different procedures that will apply once these changes have been made: as will be seen, no attempt has been made to ensure a consistent approach to publicising changes to rights of way. Whereas for DMMOs there is only one authority making, and thus publicising, orders in any area, that is not the case for PPOs. Within a five-mile radius of where I live, there are five authorities with powers to make orders (Norfolk County Council, three district councils and the Broads Authority). That means five separate websites where notices may be published. In addition the new appeal procedures described above envisage the SoS potentially making orders much more often than now: where on the sprawling website that is www.gov.uk will notices be published? The site has headings for policies, announcements, consultations and publications, but none for public notices.

Dealing with irrelevant objections

6.3 **<u>Detail</u>** : New paras 2(2ZA)-(2ZE) and 2(4) in HA 1980 Sch 6 give authorities and the SoS power to disregard objections that they consider would not be relevant to the SoS in determining whether or not to confirm the order were it submitted to him. As with the similar provision for DMMO, the authority must have regard to any guidance given by the SoS.

6.4 **<u>Commentary</u>** : No draft guidance has been published by the SoS, so it is difficult to comment. In cases where the only objection contains nothing of relevance, this power could be useful, but how many of those are there? As PPOs are subjective when compared to the objective nature of DMMO, I suggest that it will be rare for objections to be irrelevant (as opposed to irritating to the order-making authority or applicant)? But clearly where an authority takes a different view, there is scope for this issue to be considered by the courts [PCC].

Splitting orders

6.5 **<u>Detail</u>** : New paras 2(2ZB) and 2ZZA give authorities 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).

6.6 **<u>Commentary</u>** : For the reasons given above the likely number of irrelevant objections, I consider that this new provision is likely to be little used.

Hearing of objections

6.7 **<u>Detail</u>** : New paras 2(5)&(6) give the SoS power to offer an objector only the opportunity to make written representations, thereby denying the objector's right to insist on a hearing

6.8 **<u>Commentary</u>** : This will apply only to Highways Act cases, not to those under the Town and Country Planning Act 1990. It matches the change made to DMMO procedures in the new Sch 14A.

7 Gates on byways

7.1 **Detail** : New HA 1980 s 147(1A) and associated subsection (5A) extend the power to authorise gates to include RBs and BOATs. Consequential amendments are made to s 146 in relation to the owner's duty to maintain.

7.2 **Commentary** : The principal justification given in the EN (paras 145-147) for this provision is that "it is thought that it will … have the effect of reducing the number of occasions on which applications for an order modifying a definitive map and statement to show a byway are opposed by landowners". However for that to occur, the authority will presumably have had to take a decision to authorise a gate before the landowner decides not to oppose the application. That in turn assumes that the authority will be prepared to take a view on the status of the way for the purposes of authorisation before it has made a decision on the DMMO application.

7.3 Surely it is more likely that any deal between a landowner and an authority to authorise a gate in return for an agreement not to object to the recording of the way as a BOAT will come about by means of the modification consent order procedure, especially as the MCO power to create a new limitation is not restricted to agricultural land and the need to prevent ingress or egress of animals. If so, then this extension of the power to create new lawful obstructions on highways will be applied principally to ways whose status as RBs or BOATs is not in dispute. I am not aware of any evidence of a need for such a power, or that the evidence of benefit to owners and occupiers is outweighed by the additional interference with the exercise of the public's rights.

7.4 In any event, the evidence for the principal justification is itself weak, and seems to be a supposition on the part of organisations representing farmers and landowners rather than any hard evidence that their members will be willing to agree to the recording of routes on the definitive map if only they can have gates authorised across them.

8 Temporary diversions for dangerous works

8.1 **Detail** : New HA 1980 ss 135A and 135B 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 are likely to cause danger to users. 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, 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.

8.2 **Commentary** : I am not aware of any statement by Defra on whether the commencement of these provisions is intended to be part of the ROW reform package. But if the provisions are now considered unnecessary, I would have expected their repeal to have been included in DA, so my assumption is that it remains the intention to implement them. Having said that, it has to be questioned what evidence there is from the last 15 years of non-implementation that the provisions are needed.

8.3 The cost to the landowner of complying with the requirements, in particular the local newspaper advertisement, will be significant, and may restrain use of the provision. Highway authorities will face an additional burden of enforcement, as there is no power for them to recoup any additional costs they face in policing these provisions (although they can recover costs if enforcement action is needed).

References and links

Defra consultation and impact assessments - link

Although the page offers "download the full outcome" all you are offered is a "summary of responses", which does not contain any information about how Defra proposed to proceed as a consequence of the consultation exercise.

Stepping Forward

Report of the SWG **-** link

Deregulation Act 2015 - link

Deregulation Bill

The Bill, Explanatory Notes, amendments and other material such as the submissions made to the House of Commons Committee are available from this link

Draft Deregulation Bill

Details of the Committee that considered the Draft Bill and associated evidence etc are available from this link.

Appendix 1 : Summary list of possible court cases

1. The nature of the explanation that will have to be contained within an application for a DMMO (para 3.2)
2. Whether failure to provide an explanation is grounds for refusing an application under the preliminary assessment procedure, or whether the application can be regarded as 'incomplete', so that the time period has not started (para 3.4)
3. Meaning of 'have access to' in the context of an authority's power to say whether copies of documents need to be supplied by an applicant (para 3.6)
4. Meaning of 'reasonable basis for the applicant's belief' in the context of the preliminary assessment procedure (para 3.19)
5. The investigations that authorities should make, and the tests they should apply, when undertaking the preliminary assessment procedure (para 3.22)
6. Liability if a property is sold in ignorance of a DMMO application because the preliminary assessment procedure was not undertaken promptly (para 3.25)
7. Whether an affected owner has the right to have a say at the preliminary assessment stage (para 3.26)
8. The correct test to be applied by authorities following the abolition of the 'reasonably alleged' ground (para 3.30)
9. Possible application of Article 6 of the ECHR ('determination within a reasonable time') to the determination of DMMO applications (para 3.48)
10. Consequences of an applicant being unaware of an application and thus unable to apply to the court (para 3.51)
11. How an authority decides the basis for its view that a modification might be requisite (para 3.65)
12. Meaning of "might be requisite" (para 3.67)
13. The implications of a decision that a modification might be requisite for the authority's subsequent decision-making (para 3.69)
14. Whether in the case of an application for downgrading, the post-1949 evidence of depiction on the definitive map has to be taken into account for MCO purposes (para 3.71)
15. The absence of any statutory test for deciding on a partial width extinguishment or the addition of a limitation in the MCO process (para 3.75)
16. The meaning of "obvious", "administrative" and "error" (para 3.86)
17. How details such as position, width and limitations are dealt with in the revised appeal procedures (para 3.95)
18. What constitutes a 'relevant' objection to a DMMO (para 3.103)
19. The extent of the power to transfer applications (para 3.106)
20. The implications for highway authorities' statutory duties in relation to maintenance and obstructions of the possible extinguishment of rights of way at the cut-off date (para 4.23)
21. The meaning of the exceptions in CRWA 2000 s 54 (para 4.40)
22. The implications for legal event orders of new WCA 1981 s 54A (para 4.42)
23. The implications of NERCA 2006 for the new s 54A ban on recording BOATs (para 4.46)

24. Meaning of 'make a modification' (para 4.51)
25. Meaning of 'might affect the exercise of a protected right of way' (para 4.52)
26. Meaning of 'the only basis for considering that the modification is requisite' (para 4.53)
27. Implications of an authority's failure to keep a copy of the DMS at the cut-off date (para 4.55)
28. Meaning of 'definitive map and statement' (para 4.56)
29. Implications of the cut-off provisions for unrecorded widths (para 4.59)
30. Implications of evidence of unrecorded widths for the MCO procedure (para 4.60)
31. Width of a 'protected right of way' if no width is recorded in the statement (para 4.62)
32. Meaning of 'reasonably necessary' for replacement private rights of way (para 4.68)
33. Implications of replacement private rights of way for shops and businesses (para 4.70)
34. Implications of cut-off provisions and replacement private rights of way for statutory undertakers (para 4.71)
35. What constitutes a 'relevant' objection to a DMMO (para 6.4)

Appendix 2 : Financial impact of the changes

The alleged financial saving

1. My assessment of the alleged financial saving is based on the Impact Assessment (IA) "Simplifying & streamlining rights of way procedures" published by Defra alongside the Draft Bill, as no further IA was published in connection with the Bill.

2. The Ministerial Foreword to the Draft Bill (page 4) claimed that "devolving decisions on public rights of way to a local level … will … save almost £20m a year". I think that someone in the Cabinet Office failed to notice that the table of savings on page 240 was expressed over a 10-year period, even though that qualification was underlined.

3. In the government's response to the report of the Joint Committee on the Draft Bill (para 75), it reduced drastically the expected saving: "Local authorities are expected to make savings of almost £2 million a year through these measures." This revised figure is in line with the estimates in the IA.

4. The IA contained (Table 3) a central estimate annual saving to local authorities of £1,807,500, made up almost entirely of four elements (references are to SWG proposals):

a)	Proposal 3 (preliminary assessment)	£348,000
b)	Proposal 10 (notices in local papers)	£1,080,000
c)	Proposal 12 (single reference to Sec of State)	£285,000
d)	Proposal 29 (obvious administrative errors)	£85,500

5. For the reasons given in the Appendix to this paper, I consider that a more accurate estimate of the savings would be approx £220,000, made up principally of :-

a)	Proposal 3 (preliminary assessment)	£12,000
b)	Proposal 10 (notices in local papers)	£202,500
c)	Proposal 12 (single reference to Sec of State)	£NIL
d)	Proposal 29 (obvious administrative errors)	£5,700

6. In other words, the only proposal that produces any certain saving is the proposal to scrap placing notices in local papers. Even then, a saving of £200,000 annually does not go very far among 138 local authorities.

The alleged saving of time

7. Nowhere in the IA or the Draft Bill documents, or the Explanatory Notes to the Bill, is there any quantification of the alleged saving of time. Instead there are various references to proposals being expected to reduce the burden on local authorities.

8. In the absence of any quantification, it is difficult to assess the evidence, but it is important to note that nowhere do the Explanatory Notes recognise that some aspects of the provisions increase the burden on local authorities, by introducing new procedures. Moreover I consider that there will be a more general additional burden on authorities arising from the greater complexity of the procedures as proposed to be amended by the Bill.

9. That additional burden will arise directly through staff having to understand the more complex provisions, but also indirectly as those who are involved with the recording process, whether bodies such as parish councils, path users or landowners struggle to understand them, and in the process create extra work for the local authority staff.

10. I therefore question whether there is any evidence to support the suggestion that the provisions in the Bill will speed up the process. Moreover it will be difficult to assess the

impact of the provisions. Defra has refused to introduce regulations requiring authorities to report on their definitive map work, which perhaps explains the discrepancy shown in between the IA estimate of 1,200 cases being determined each year and the actual figure obtained by the Ramblers following FOI requests of only 300 cases. With no accurate figures prior to the introduction of the provisions, and no plans to monitor what happens, there will be no accurate assessment of the impact of the changes.

The cost of the cut-off provisions and the reform package as a whole

11. The IA states that 20,000 is considered a reasonable estimate of the number of applications that may be made before the cut off point. However it then goes on to say : "Proposal 1 of the stakeholder working group is to implement the cut off in 2026. As this would occur under business as usual the impact of this proposal is not examined and so is excluded from the analysis of this option."
12. At at average estimated cost of £2,900 to surveying authorities for the determination of an application, "business as usual" would therefore cost authorities an estimated £58 million over the just under 10 years expected to be allowed between commencement and cut-off, or an average of about £6 million each year. That is three times the IA's estimated saving to authorities, and nearer 30 times my estimate. Even on the government's own estimates, therefore, implementation of the whole package is going to leave surveying authorities worse off to the tune of several million pounds each year. There would be extra costs for those applications (the majority) that are approved and for which orders are made.
13. There are (at least) three possible scenarios:-
    a) Authorities find resources to deal with all these applications, and there is then a knock-on effect as orders are made, objections are lodged etc
    b) Far fewer applications are made, because the user groups, parish councils, etc, simply cannot cope. The consequence is greater uncertainty about the status of unrecorded routes after the cut-off date. [The only way of determining whether a route was extinguished at the cut-off date will be to make a DMMO application after that date and see if it is rejected on the grounds of extinguishment at the cut-off date.]
    c) The applications are made, but the authorities cannot cope, and do not even get to preliminary assessment stage. The consequence is that there will be thousands of 'invisible' applications - neither recorded on the register nor notified to owners and occupiers.
14. In any event I think that 20,000 is far too low as an estimate for the number of routes that will be affected by the cut-off provisons - see para 4.33.

Assessment of the principal savings claimed in the IA

1 : General assumptions	**IA estimate**	**My estimate**	**Comments**
Number of cases annually (1A)	1200	300	My estimate uses results from Ramblers 2013 FOI survey
Number of opposed cases dealt with by Planning Inspectorate (PINS) annually (1B)	500	150	My estimate uses figures from PINS statistical report

2 : Proposal 3 - preliminary assessment	IA estimate	My estimate	Comments
Proportion of cases passing preliminary assessment (2A)	90%	90%	IA estimate not based on any evidence, so far as I am aware, but I am prepared to accept it. Estimate needs to allow for resubmission of failed applications
Number of cases passing preliminary assessment annually (2B)	1080	270	Calculated as 1A*2A
Number of cases failing preliminary assessment annually (2C)	120	30	Calculated as 1A*(100%-2A)
Average cost per application to authorities of undertaking preliminary assessment test (2D)	NIL	£150	IA makes no provision for this extra work
Average cost per application to authorities of notifying owners and occupiers of cases that have passed the preliminary assessment test and related correspondence (2E)	NIL	£100	IA makes no provision for this extra work, Some owners and occupiers who are informed of the application and that the authority has approved it in a preliminary assessment are likely to enter into correspondence as this will be the first they have heard of the application
Total cost of undertaking preliminary assessment and related work (2F)	NIL	£75,000	Calculated as 1A*(2D+2E)
Estimated cost of determining an application (2G)	£2,900	£2,900	
Estimated saving from not determining cases that fail the preliminary assessment (2H)	£348,000	£87,000	Calculated as 2C*2G
Estimated net saving annually	£348,000	£12,000	Calculated as 2H-2F

3 : Proposal 10 - advertising in local newspapers	**IA estimate**	**My estimate**	**Comments**
Number of advertisements required each year (3A)	2160	450	IA estimate seems to assume that all applications that pass the preliminary assessment will require two advertisements - for making and confirmation, thus calculated as 2*2B. I assume that of 300 applications (my 1A), 250 will lead to orders (one advert) of which 200 will be confirmed (another advert).
Average cost per advertisement (3B)	£500	£500	SWG report Stepping Forward para 3.15 quotes average cost per advert of £508.
Average cost per notice of additional work placing notice on council website (3C)	NIL	£50	IA makes no allowance for this additional work
Saving from no longer placing advertisements in newspapers (3D)	£1,080,000	£225,000	calculated as 3A*3B
Additional cost of alternative arrangements (3E)	NIL	£22,500	calculated as 3A*3C
Net saving	£1,080,000	£202,500	calculated as 3D-3E

4 : Proposal 12 - referral to the Secretary of State once	**IA estimate**	**My estimate**	**Comments**
Reduction in number of cases referred to the Secretary of State annually (4A)	50	20	The reduction in numbers is of those cases which now succeed on appeal and are then opposed when an order is made. My analysis of PINS appeal decisions is that around 25 appeals succeed each year, but not all of those result in opposed orders. I estimate that 20 are opposed, 5 are not.
Saving per case : local government (4B)	£5,700	£3,000	IA estimate based on cost of dealing with opposed order in writing : appeals involve fewer people so should cost less
Annual saving for cases that will be referred only once : local government (4C)	£287,500	£60,000	Calculated as 4A*4B
Number of cases annually which are currently referred only once to the Secretary of State (4D)	0	20	Not included in IA : these are the unsuccessful appeals.
Extra cost per case of advertising and more complex procedure for such cases : local government (4E)	0	£3,000	Not included in IA. My estimate is based on the saving in the second row above - in future unsuccessful appeals will be subject to more complex procedures than now.
Annual extra cost of additional work : local government (4F)	0	£60,000	Calculated as 4D*4E
Net annual saving : local government	£287,500	£NIL	Calculated as 4C-4F

5 : Proposal 29 - obvious administrative errors	**IA estimate**	**My estimate**	**Comments**
Reduction in number of cases referred to the Secretary of State annually (5A)	15	1	I am not aware of any evidence to support the IA estimate. It should be easy to produce and check - all Planning Inspectorate decisions are made available online. Where is the list of the 60 or so cases there should have been in 2010-2013 if the IAs estimate is accurate? I believe the number of cases is very few: if the error was so obvious, why would anyone have objected?
Saving per case : local government (5B)	£5,700	£5,700	
Annual saving : local government	£85,500	£5,700	Calculated as 5A*5B

Appendix 3 : Advertising of changes to rights of way

Authority website : "on a website maintained by the authority and on such other websites or through the use of such other digital communications media as the authority may consider appropriate"

SOS discretion : legislation provides that manner of advertising is "such other ways as the Secretary of State may direct" or "In such manner as appears to the Secretary of State to be requisite"

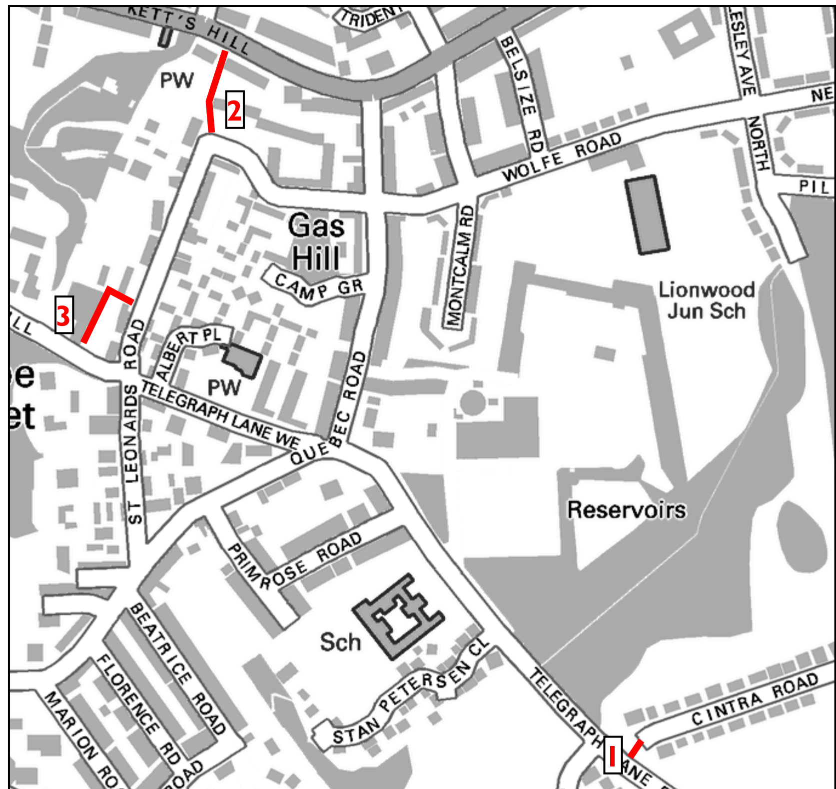
Statutory provision	Requirements for giving public notice
Defence Act 1842 s 16	None
Defence Act 1860 s 40	None
Military Lands Act 1892 s 13	LG and local newspaper
Land Powers (Defence) Act 1958 s 8	LG and local newspaper
Harbours Act 1964 ss 14 and 16	LG, local advertisement and SOS discretion
Highways Act 1980 s 14	LG and local newspaper
Highways Act 1980 s 18	LG and local newspaper
Highways Act 1980 s 26	Now : local newspaper / DB : authority website
Highways Act 1980 s 116	LG and local newspaper
Highways Act 1980 s 118	Now : local newspaper / DB : authority website
Highways Act 1980 s 118A	Now : local newspaper / DB : authority website
Highways Act 1980 s 118B	Now : local newspaper / DB : authority website
Highways Act 1980 s 119	Now : local newspaper / DB : authority website
Highways Act 1980 s 119A	Now : local newspaper / DB : authority website
Highways Act 1980 s 119B	Now : local newspaper / DB : authority website
Highways Act 1980 s 119D	Now : local newspaper / DB : authority website
Local Government, Planning and Land Act 1980 Schedule 28	SOS discretion
Acquisition of Land Act 1981 s 32	Now : local newspaper / DB : authority website
New Towns Act 1981 s 23	SOS discretion
Civil Aviation Act 1982 s 48	LG and local newspaper
Cycle Tracks Act 1984 s 3	Local newspaper
Housing Act 1985 s 294	Local newspaper
Airports Act 1986 s 59	LG and local newspaper
Housing Act 1988 Sch 10	SOS discretion
TCPA 1990 s 247	London Gazette and local newspaper
TCPA 1990 s 248	London Gazette and local newspaper
TCPA 1990 s 249	London Gazette and local newspaper
TCPA 1990 s 251	London Gazette and local newspaper
TCPA 1990 s 257	Local newspaper
TCPA 1990 s 258	Local newspaper
TCPA 1990 s 261	Local newspaper and also LG if order made under s 247
Water Industry Act 1991 s 167 SOS	LG and local newspaper
Water Resources Act 1991 s 167	LG and local newspaper
Transport and Works Act 1992 ss 1,3	LG and local newspaper
Leasehold Reform, Housing and Urban Development Act 1993 Sch 20	SOS discretion

Regional Development Agencies Act 1998 Sch 6	SOS discretion
Planning Act 2008 s 136	LG, local and national newspaper
Private and Local Act of Parliament	LG and local newspaper

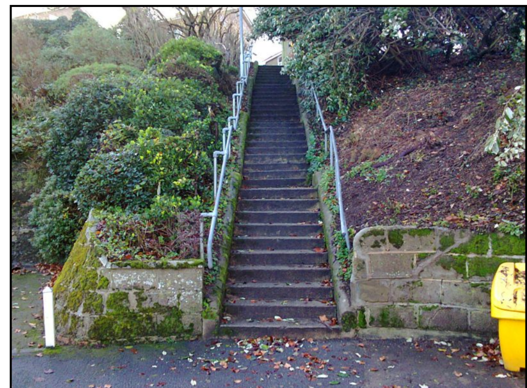
Appendix 4 : Case studies

These case studies of paths in Norwich, mostly near to where I live, are included to illustrate some of the issues that I foresee arising under the cut-off provisions. None of the routes are currently recorded on the definitive map: all are shown as ‘publicly maintainable roads’ on Norfolk County Council’s website (www.norfolk.gov.uk) in the “Where I live” section (and also on the countryside access map that shows definitive rights of way information)

All maps use Ordnance Survey Open Data. Crown Copyright and Database right 2015.

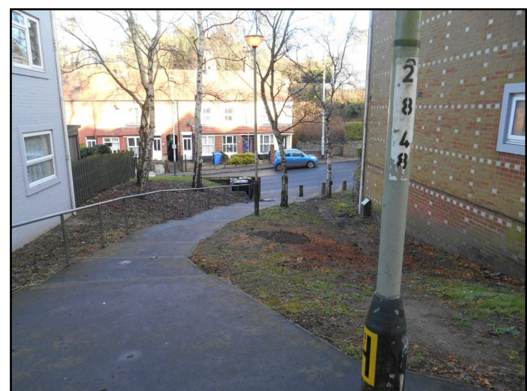


Route 1 : steps to Cintra Road



Cintra Road was developed between the 1930s and the 1950s. Map or other documentary evidence or personal recollection may provide evidence as to when the steps were constructed, and if that date was after 1949, this is likely to resolve the question of whether this was a public footpath at that date. But if they were constructed prior to 1949, it does not follow that there was a public right of way over them at that date, and deciding when the right was created is likely to be difficult.

Route 2 : Ladbrooke Place steps



There is a flight of steps down the hillside through an area redeveloped in the late 1960s. Clearly not a right of way in 1949, then? However before the redevelopment there was a footpath (‘Corkscrew Alley’) which was definitely a right of way in 1949 and which followed, it seems, very much the same route at the bottom where a shallow flight of steps leads to the road. Subsection (6) of CRWA 2000 s 53 says that for the purposes of determining whether any part of a highway was on 1 January 1949 a footpath or bridleway, any diversion etc on or after that date shall be treated as having occurred before 1 January 1949. So is the public footpath down these steps to be treated as a diversion of Corkscrew Alley and thus liable to be extinguished at the cut-off date?

Route 3 : St Leonard's Alley

This runs (roughly) west and then south from St Leonards Road to Gas Hill, forming the two sides of a rectangle not formed by the junction of those roads. Six properties are served directly from it, from the corner in the middle of the route, and below that point : a terrace of properties is also served from the eastern end. Off-road parking spaces are provided at the eastern end on the site of a former terrace. There is no parking available by the properties at the other end.

As well as serving the properties, the path also provides extensive views for those going downhill, and a welcome respite from the steepness of the climb in the other direction (Gas Hill is the steepest hill in Norwich).

With exception of one recently-built house, the properties were built for workers at the gas works that existed for many years at the bottom of Gas Hill. It is shown partly-excluded from the adjoining hereditaments on the Finance Act map, and shown as a physical feature on the OS base map for that map.

Questions that arise :

(a) Was it a public footpath in 1949?

The way undoubtedly existed as a physical feature long before that date, but its origin appears to have been a private access to properties provided for the gas workers. The Finance Act map suggests attribution of ownership of certain lengths to adjoining properties. Thus it is not immediately clear when it became public. Further research would be needed.

(b) If public rights are extinguished in 2026 under the cut-off provisions, what private rights will the owners of the adjoining properties acquire in substitution?

In 2027, the owner of one of the three properties towards the bottom of the route decides to sell. A prospective purchaser is advised by their solicitor that there are issues to do with the access to the property. This is because the solicitor's enquiries have established:

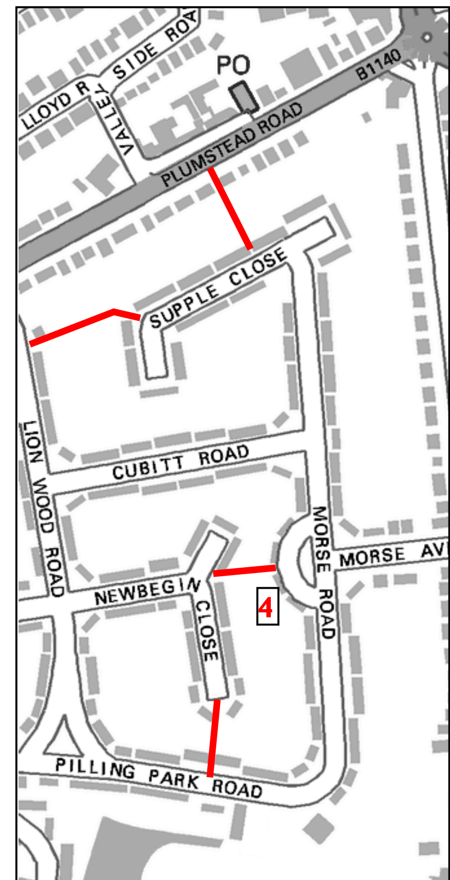
(i) the route is not recorded on the definitive map;

(ii) there is no application to record the route on Norfolk County Council's register of applications for definitive map modification orders;

(iiii) however such an application was made before the cut-off date, and is currently in a queue of several hundred awaiting processing by the Council. The Council is unable to say when the application might be assessed under the preliminary assessment procedure in Schedule 13A to the 1981 Act.

The solicitor advises that because it is unclear whether or not public rights exist over the way, it is also not possible to take any action to determine what private rights would have been created if the public rights had been extinguished at the cut-off date. In particular, it is unclear whether it could be said that it was "reasonably necessary" to use the route to access the car parking at the other end, when there is an alternative, albeit longer, route to the parking area via Gas Hill. The prospective purchaser decides to go elsewhere, and the would-be vendor, who just happens to be a journalist, writes their experience up as a story criticising the County Council.

Route 4 : Pilling Park Estate paths



In 1930 Norwich Corporation purchased Mousehold House and the surrounding estate. It then developed a large housing estate, known as the Pilling Park Estate. Included on that estate are four footpaths : as is clear from the map, they provide short-cuts between the roads, and also provide access to the shops and bus stops on Plumstead Road to the north.

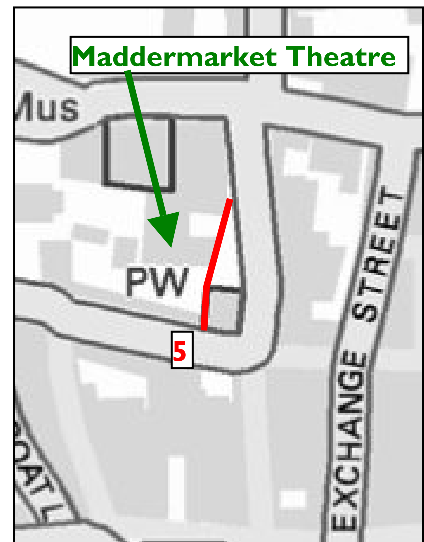
Questions that arise:

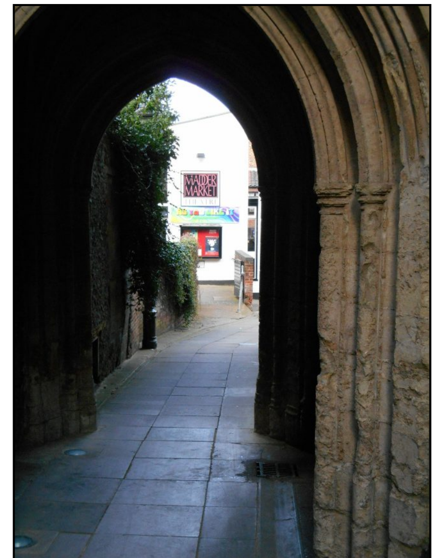
(a) how easy is it to determine when the footpaths became public rights of way?

(b) on estates such as this built as local authority housing, but subject to the 'right to buy' for the last 30 years or so, who now owns the subsoil of paths such as these if the adjoining properties have been sold off?

(c) in the path in the photograph, some of the properties bordered by the path have gates from their rear gardens giving access on to the path. If the public rights over the path are extinguished at the cut-off date, will it be held to be 'reasonably necessary' for the owners (if they are the owners) to have a private right of way, and, if so, over the whole length and width of the route or only part of it? If the council still owns such a property, will its interest in the land be considered sufficient for it to acquire the right?

Route 5 : St John's Alley





Norwich city centre is famous for its concentration of medieval churches. Many of those churches have paths alongside, or in some cases through, their churchyards. In a couple of cases the paths run under the church tower. St John's Alley is one such: I have not been able to ascertain whether the tower was built above the path because the path was there first, and surrounding development meant there was no room to divert the path, but it is a possible explanation.

Either way there is no doubt that the path was there as a physical feature, and almost certainly also as a public right of way, for many years, probably centuries, before 1949.

But what of its status? Today it is used only as a footpath, but might there be evidence that in the past it had some vehicular use, and was therefore neither a footpath nor a bridleway in 1949? If so, it would be excluded from the possible operation of the cut-off provisions.

The other issue that arises is that in order to get to the Maddermarket Theatre you have to go along the path. What private rights would accrue to the theatre if public rights are extinguished? A right for it to invite its customers to access in either direction, or only one? The test for the creation of such a private right is whether at the cut-off date the exercise of the public right of way reasonably necessary for a person with "an interest in land" to obtain access to it. That will not include a would-be theatregoer in 2027.