

EXECUTIVE SUMMARY

1. The official record of public rights of way will never include all of the routes that existed prior to 1949. Once this would have been little more than an inconvenient fact of life because of the ancient maxim “once a highway, always a highway”, whereby even unrecorded and unused ways continue to exist legally. Now, things are different. Parliament enacted in 2000 a provision by which pre-1949 rights of way would be extinguished if they were not recorded by 2026. Bringing this cut-off into effect could extinguish many old ways that remain in public use today – or that are potentially useful routes – unless they have been officially recorded in the meantime. The prospects of achieving that are bleak as things stand, because of the lengthy and convoluted nature of the recording processes and the large case backlogs that have developed.
2. Nor is this only a problem for rights of way users. The lack of closure about historical rights of way continues to impact badly on others with an interest in the land. A person may buy a house or land under the assurance of legal searches that show no public routes affecting it, only to discover later that someone has compelling evidence that a public right of way does in fact exist there. Some historical ways that emerge ‘out of the blue’ may be incompatible with modern land use, but there is no provision within the recording process to deal with this.
3. Local authorities too are poorly served by this situation. The procedures they must follow for recording public rights of way are time-consuming and demanding, and often poorly resourced because of a sense within some authorities that this work has little priority. Too often they are the ‘piggy in the middle’ within an adversarial process between the person seeking to have a way recorded, and the person seeking to avoid that impact on their land.
4. The Stakeholder Working Group was set up by Natural England to look for ways to improve the position from all these points of view. It was acknowledged from the outset that a perfect world was unattainable – but that an agreed package of reforms – if one could be devised – would carry real weight and hold out the prospect of delivering significant benefits to all sides. The Group, which was independently chaired and contained a balanced representation of the key interests, met eleven times between October 2008 and January 2010. The result is this agreed report. There are two main parts to the Group’s recommendations.
5. First, there are the Group’s core proposals for how to capture or preserve useful historical rights, and then close the definitive map and statement to such rights. To achieve this, the Group has identified a package of deregulatory reforms that it

believes could command widespread support, and underpin and encourage vital cultural change.

6. Second, the Group considered how the legal record of public rights of way relates to the administration of highways generally. Protecting and managing them in an integrated way for this use will be more effective if the underlying administrative systems are integrated and support this. There is a compelling logic for this at a time of renewed emphasis on sustainable travel options. There are also real challenges in ensuring that urban routes in daily use are given the legal protection they need in the face of the extinguishment of pre-1949 rights at the cut-off.
7. Consensus is key to reform in this area. It is vital that these balanced proposals continue to be regarded as a complete package that will be implemented in full.
8. In all of this, the Group's driving ambition is to step forward as soon as practicable to a position where the emphasis is on improving the network in a way that is consistent with other uses of the same land.
9. The Group strongly believes that cultural change – among applicants, land and property owners, and within authorities – will be vital to meet these challenges. The Report contains the basis for encouraging this shift, but a positive and forward-looking approach will be required on all sides to make all of this work effectively.
10. Implementing the Group's recommendations would enable the work of surveying authorities to become significantly more cost-effective. Nevertheless, properly resourcing this important work – in recognition of the major public importance of the rights of way network – will be vital to achieving the success we all want to see.

Summary of the Group's proposals:

This is a cohesive and balanced package of recommendations. The consensus established around these proposals is dependent on all of them being implemented in full.

Aim: Deliver greater certainty about where pre-1949 public rights of way exist and do not exist – protecting useful or potentially useful rights from extinguishment

Proposal 1: Implementation of the cut-off is an integral part of the agreement reached by the Group. The statutory provisions for pre-1949 rights of way to be extinguished if unrecorded at the cut-off should be brought into force, with effective protection for useful or potentially useful rights of this kind given in accordance with the Group's other proposals.

Proposal 25: 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 24: 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 27: Surveying authorities have an important existing role in securing the recording of useful or potentially useful routes if there is convincing evidence of pre-1949 rights of way along them. Defra should consider and consult on whether during the brief post cut-off period we have recommended for registration of recent applications, authorities should remain able to register such rights by self-application, subject to the same tests and transparency as for any other application.

Proposal 20: It should not be possible after the cut-off date for recorded rights of way to be downgraded or deleted based on pre-1949 evidence, just as there will be no scope for them to be upgraded or added because of such evidence.

Proposal 26: 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.

Aim: Incentivise good quality applications, promote early sharing of information and limit the scope for unreasonable objections

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

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

Proposal 9: Where objections to the surveying authority's determination are made on the basis of new evidence, an award of costs against the objector should be considered if it is clear that the evidence has been wilfully withheld. This should be possible regardless of the outcome of the case.

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

Aim: Put dialogue, understanding and flexibility at the heart of procedures, with early negotiated solutions to resolve issues

Proposal 5: It should be the surveying authority and not the applicant that approaches landowners – and then only if the application passes the Basic Evidential Test. The authority should informally explain at an early stage the process and how the case will be dealt with.

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

Proposal 8: Natural England should be added to the list of prescribed bodies consulted when a definitive map modification order is being considered.

Proposal 32: It should be possible for an owner to apply to a highway authority for

authority to erect new gates on restricted byways and byways open to all traffic in line with existing provisions for their erection on footpaths and bridleways.

Aim: Improve procedures where things can be done more effectively or unnecessary steps can be removed

Proposal 4: Applicants should not need to provide copies of documents that are held by the surveying authority or are readily available in a public archive.

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

Proposal 12: Cases should only ever be referred to the Secretary of State once.

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

Aim: Make procedures more flexible, so that a light-touch administration is possible where appropriate

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

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

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

Proposal 19: It should be possible to transfer ownership of an application for a definitive map modification order.

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

Aim: Encourage the poorest performing authorities to rise to the standards of the best performing authorities

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

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

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

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

Proposal 21: 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.

Aim: Make the system easier to understand for all involved, and consider greater integration of the management and administration of the highways network

Proposal 2: A single source of clear and authoritative guidance, relevant to all parties involved in the process, will be needed.

Proposal 28: Consideration should be given to the data management systems needed to support administration of the definitive map and statement.

Proposal 30: Defra and DfT should jointly work with stakeholders to review the possible long-term benefits of greater integration of the management and administration of the highways network.

Proposal 31: A review should be carried out of how routes for cyclists could best fit in with the highways network to form an integrated whole, and provide for usage by all non-motorised users.