

## **Deregulation Bill: Explanatory Notes to Clauses 13-19**

### **Clauses 13 to 19 (and Schedule 6): background and territorial extent, application and commencement**

68. By way of background to these measures, Part 3 of the Wildlife and Countryside Act 1981 ("the 1981 Act") requires local authorities in England and Wales to maintain and keep under review maps and statements showing public rights of way in their area. The local authorities concerned are referred to in that Act as "surveying authorities" and the maps and statements are referred to as "definitive maps and statements". Part 3 also sets out the procedures which apply where an authority wishes to make a change to the definitive map and statement for its area or where someone applies for such a change to be made.

69. A definitive map and statement is conclusive evidence of certain matters. For example, if a map shows a footpath, this is generally conclusive evidence that the public had a right of way on foot over the land on a particular date.

70. Some rights of way are not recorded on a definitive map and statement. The Countryside and Rights of Way Act 2000 (section 53) provides for unrecorded rights of way created before 1949 to be extinguished immediately after 1 January 2026 (known as the "cut-off date"), subject to certain exceptions.

71. The Highways Act 1980 also deals with public rights of way. For example, it allows applications to be made, in certain circumstances, to extinguish or divert a public right of way.

72. Clauses 13 to 19 (and Schedule 6) form part of the law of England and Wales. However, the amendments made by them make changes which affect public rights of way in England only. They will come into force on a day to be appointed by the Secretary of State in a commencement order.

### **Clause 13: Recorded rights of way: additional protection**

73. The background to this, as explained in the introduction to clauses 13 to 19, is that section 53 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") provides for the extinguishment, immediately after 1 January 2026 (the "cut-off date"), of unrecorded rights of way created before 1949, subject to certain exceptions.

74. Rights of way created before 1949 but recorded on a definitive map and statement on the cut-off date will not be extinguished. Under the current law, it would, however, be possible for someone to apply to a surveying authority to have the definitive map and statement modified so as not to show the right of way. For example, an application might be made on the basis that there was no public right of way on foot over land shown on the map as a footpath. If the application succeeded and the map was modified so as not to show the footpath, this could affect the ability of members of the public to use the path (because they would no longer be able to rely on the map as evidence of the existence of a right of way on foot). In practice, applications to modify a map and statement so as not to show a right of way are usually made on the basis that there was no right of way over the land in question.

The investigation of applications based on evidence about the position before 1949 can be very difficult for authorities.

75. The clause changes the position by inserting a new section 55A in the 2000 Act. It provides that an authority may not, after the cut-off date, make a modification to a definitive map and statement if the modification might affect the exercise of a protected right of way and the only basis for the authority considering that the modification is appropriate is evidence that the right did not exist before 1 January 1949.

76. Subsection (2) of the new section 55A defines protected right of way. For example, a right of way on foot and a right of way on horseback or leading a horse over land shown on the definitive map and statement as a bridleway are protected rights of way.

77. This measure will protect the status of certain public rights of way by preventing modifications of the definitive map and statement after the cut-off date, even where evidence emerges that the right of way had been wrongly recorded. It will therefore reduce the burden on local authorities that arises from having to consider in detail applications for modifications which require an investigation of historical evidence.

#### **Clause 14: Unrecorded rights of way: protection from extinguishment**

78. The background to this clause, as with clause 13, is that section 53 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") provides for the extinguishment, immediately after 1 January 2026 (the "cut-off date"), of unrecorded rights of way created before 1949, subject to certain exceptions.

79. 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. This is because individuals and groups in the voluntary sector are likely to carry out research so that they can make applications to have unrecorded rights of way shown on a definitive map and statement (with the result that they will not be automatically extinguished after that date). There is concern that surveying authorities will also carry out research into unrecorded rights of way during this period in order to comply with the requirement that they keep under review definitive maps and statements. This could lead to surveying authorities unnecessarily duplicating the work of individuals and the voluntary sector.

80. The clause therefore inserts a new section 56A in the 2000 Act. It enables the Secretary of State to make regulations enabling a surveying authority to designate, during a period of one year after the cut-off date, public rights of way extinguished immediately after that date under section 53 of that Act. The new section 56A also sets out what else may be included in the regulations. It is envisaged that the power to make regulations will be used to provide for designated rights to cease to be regarded as extinguished as from the time of designation. Where a right is designated, surveying authorities will be required to decide whether to modify the definitive map and statement to show the right of way. If a right of way is then shown on the map, it will remain unextinguished. If the authority decides not to show the right of way, it will normally be extinguished again.

81. The purpose of the new 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.

### **Clause 15: Conversion of public rights of way to private rights of way**

82. The background to this clause, as with clauses 13 and 14, is that section 53 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") provides for the extinguishment, immediately after 1 January 2026 (the "cut-off date"), of unrecorded rights of way created before 1949, subject to certain exceptions.

83. There are situations where public rights of way are used by individuals to gain access to their own land. In such a case, the extinguishment of a right of way could cause real difficulties for the individuals concerned who may be prevented from obtaining access to their land.

84. The clause therefore inserts a new section 56B in the 2000 Act. It applies where a public right of way would be extinguished under section 53 of the 2000 Act immediately after the cut-off date. If the exercise of such a right of way is reasonably necessary to enable a person with an interest in land to obtain access to the land (or would have been reasonably necessary to enable that person to obtain access to a part of that land if the person had an interest in that part only), it becomes a private right of way (so that the person may continue to access the land). It does not matter whether the person is using the existing public right of way on the cut-off date, or is able to use it.

85. In the situation in which it applies, the new section 56B therefore protects the person with the interest in the land from the burden of the loss of access to it.

### **Clause 16: Applications by owners, etc., for public path orders**

86. The background to this clause is that, under section 118ZA of the Highways Act 1980, owners, lessees and occupiers of land used for agriculture, forestry or the breeding or keeping of horses may apply to a local authority for an order ("a public path extinguishment order") which extinguishes a public right of way over a footpath or bridleway crossing the land. Section 119ZA of that Act confers a comparable right to apply for an order to divert such a right of way ("a public path diversion order").

87. Under the current law, applications for a public path extinguishment order or a public path diversion order cannot be made in relation to other land, even where there would be good reasons for making such an order. *Subsections (2) and (3)* of the clause therefore amend, respectively, sections 118ZA(1) and 119ZA(1) of that Act to allow the Secretary of State to prescribe in regulations other kinds of land in England in respect of which such applications may be made.

88. A further difficulty with the current law relates to the procedure that the Secretary of State must follow in determining appeals against a refusal by an authority to make an order on an application under section 118ZA or 119ZA. It is considered that the procedure is insufficiently flexible and disproportionately burdensome in relation to certain cases. For example, regardless of the merits of the appeal, the Secretary of State is required to prepare a draft of an order giving effect to the application (section

121E(1)). *Subsections (4) and (5)* therefore amend section 121E (which sets out the current procedure). The new subsection (1A)(a) gives the Secretary of State the power to determine not to make such an order without following the procedure currently set out in section 121E(1). The new subsection (1B) requires the Secretary of State to inform the applicant of a determination under the new subsection (1A)(a) and the reasons for it.

**Clause 17: Extension of powers to authorise erection of gates at owner's request**

89. The background to this clause is that section 147 of the Highways Act 1980 authorises the erection of stiles, gates or other works on footpaths or bridleways crossing agricultural land for the purpose of preventing animals coming on to the land or escaping from it (referred to in the legislation as "the ingress or egress of animals"). However, there is no comparable provision for restricted byways or byways open to all traffic ("byways"). The main effect of this is that it is not possible for authorities to authorise the erection of gates on byways under section 147. One practical consequence of this is that owners may oppose applications to modify definitive maps and statements to show a restricted byway or a byway open to all traffic, even though they would be willing to agree to the modification if, for example, a gate were erected. Dealing with contested applications is burdensome for all those involved, including the Secretary of State who will generally have to deal with them.

90. The clause therefore amends section 147 (by inserting a new subsection (1A)) to enable a competent authority in England to authorise the erection of gates for preventing the ingress or egress of animals on a byway. The authority must be satisfied that it is expedient that gates should be erected on the byway before authorising them. "Competent authority" is defined in the new subsection (1A)(a) and (b). This will generally be the highway authority.

91. This measure will make it easier for owners to obtain permission to erect gates on byways. It is thought that it will also 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.

**Clause 18: Applications for certain orders under Highways Act 1980: cost recovery**

92. The background to this clause is that sections 118ZA and 119ZA of the Highways Act 1980 ("the 1980 Act") allow owners, lessees or occupiers of certain land to apply to local authorities for public path extinguishment orders or public path diversion orders. Certain amendments to those sections are made by clause 16 (so as to extend the kinds of land to which such applications may relate). The amendments made by this clause deal with the recovery of costs in respect of such applications.

93. Currently, the sections contain powers which allow the Secretary of State, in relation to England, or the Welsh Ministers, in relation to Wales, to prescribe charges payable on the making of such applications (and further charges where an order is made on the application). Under such regulations, the authority dealing with the application would be able to recover its costs but only up to the prescribed amount which would be set centrally and may not be at a level which would allow the authority to recover all of its costs.

94. The clause therefore amends sections 118ZA and 119ZA of the 1980 Act so as to limit the application of the charging provisions to Wales. The purpose of this is to allow the Secretary of State (in relation to England) to use the power under section 150 of the Local Government and Housing Act 1989 to authorise charges to be imposed in respect of applications under sections 118ZA and 119ZA. Under this power, it would be possible for the Secretary of State to authorise a charge the amount of which would be at the authority's discretion, provided it does not exceed the actual cost incurred. This provides the means for removing the burden on authorities which can arise under the current law if the centrally prescribed limit does not enable it to recover all of its costs.

95. The clause also amends paragraph 2B of Part 1 of Schedule 6 to the 1980 Act. Currently, it is unclear whether the Secretary of State, who has a role in dealing with contested applications for public path orders, can recover the costs of determining such an application by appointing a person to consider and deal with written representations instead of holding an inquiry or an oral hearing. The amendment clarifies that the Secretary of State may recover the costs (under the same principles governing the recovery of the costs of holding an inquiry or conducting an oral hearing).

#### **Clause 19: Public rights of way: procedure**

96. This clause introduces Schedule 6, which makes changes to the procedure for ascertaining public rights of way in England. See the commentary on Schedule 6 below. In relation to the procedures set out in paragraph 5 of Part 1 and Parts 2 and 3 of Schedule 6, this clause also provides for the Secretary of State to make regulations prescribing the transitional arrangements that are to apply to applications for a definitive map modification order made before the new procedures come into force.