Briefing note on rights of way clauses in the draft Deregulation Bill

Clauses needed to implement the rights of way reforms package are contained in the draft Deregulation Bill published on 1 July. The reforms package is essentially the same as that set out in the consultation paper: 'Improvements to the policy and legal framework for public rights of way' published in May 2012. One part of the package, which implements the Penfold Review recommendation on rights of way in relation to planning consents, has already been implemented though the Growth & Infrastructure Act.

Further information is available on the rights of way reforms consultation webpage, including impact assessments and a summary of the consultation responses.

The draft Bill will go through a process of pre-legislative scrutiny, in which it will be examined by a Joint Committee of both Houses of Parliament. The first substantive Committee meeting will take place in early October and it is expected that the Committee will report its conclusions by the end of the calendar year. The Bill, amended in light of the Committee's recommendations, will be formally introduced to Parliament early in 2014, after which it will go though the full Parliamentary process.

The rights of way clauses in the draft Bill implement those Stakeholder Working Group (SWG) proposals that require primary legislation for their implementation. A summary of those recommendations and how the clauses relate to them is set out in the annex to this note.

Once the necessary changes to the primary legislation have been made, the rest of the reforms package will be put in place, with a view to commencing all the provisions at the same time. The following Stakeholder Working Group proposals would be implemented through secondary legislation: proposal 1 (implementation of the 2026 'cut-off' date), proposals 20 & 24-26 (protection for useful or potentially useful rights of way from extinguishment) and proposal 8 (Natural England to be one of the prescribed consultees for orders. The remaining proposals would be implemented by other means, primarily through guidance.

The Natural England Stakeholder Working Group on unrecorded rights of way continues to play an advisory role in the implementation of these reforms and we will also be consulting with the wider rights of way stakeholder community during the implementation process.

Rights of Way Reforms Team
Defra
29 July 2013

Annex – summary of SWG recommendations that need primary legislation and how the clauses relate to them

SWG 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".

Schedule 6, paragraph 6(3) of the draft Bill introduces a preliminary assessment process to the existing schedule 14 of the 1981 Act[1] [page 72 of the draft Bill].

SWG 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".

Schedule 6, paragraph 6(2) of the draft Bill inserts a new sub-paragraph (3) into paragraph 1 of schedule 14 to the 1981 Act [page 72 of the draft Bill].

SWG 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".

Schedule 6, paragraph 6(3) of the draft Bill includes a requirement [sub-paragraph (4)(b)] for the local authority to serve notice on landowners if an application passes the preliminary assessment process [page 72 of the draft Bill]. The existing requirement for the applicant to serve notice on landowners is dis-applied in England by paragraph 6(6) of the draft Bill [at page 75].

SWG proposals 6 & 7: "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".

"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".

Schedule 6, paragraph 5 of the draft Bill introduces new sections 54B and 54C into the 1981 Act. These set out a process for modification of the definitive map and statement by consent by means of a "modification consent order" . This process includes provision to alter the right of way before it is recorded, provided agreement can be reached between the local authority and all affected landowners. Sub-sections 54C(5) & (6) modify the procedures in schedules 14 & 15 of the 1981 Act where they apply to modification consent orders [pages 69-71 of the draft Bill].

[1] Wildlife and Countryside Act 1981

SWG 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".

Schedule 6, paragraph 7(2) of the draft Bill amends schedule 15 paragraph 3 of the 1981 Act [page 79 of the draft Bill]. Schedule 6, paragraphs 9(2) & (6) of the draft Bill amend schedule 6 of the 1980 Act[2].

SWG 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".

The clauses in the draft Bill give local authorities the discretion not to submit appeals and objections to the Secretary of State where they judge them to be irrelevant to the Secretary of State's consideration in the following instances: new paragraph 3A(3) to schedule 14 to the 1981 Act inserted by schedule 6, paragraph 6(8) of the draft Bill [page 75]; new paragraph 7A(1) of schedule 15 to the 1981 Act inserted by schedule 6, paragraph 7(4) of the draft Bill [page 80]; new paragraph 2(2ZA) of schedule 6 to the 1980 Act inserted by schedule 6, paragraph 9(3) of the draft Bill [page 82].

The clauses in the draft Bill give the Secretary of State discretion not to provide the opportunity to be heard where he considers appeals, objections or representations to be irrelevant to his consideration in the following instances: new paragraph 3B(2) of schedule 14 to the 1981 Act inserted by schedule 6, paragraph 6(8) of the draft Bill [page 76]; new paragraph 3B(6) to schedule 14 to the 1981 Act inserted by schedule 6, paragraph 6(8) of the draft Bill [page 77]; new paragraph 2(4) of schedule 6 to the 1980 Act inserted by schedule 6, para9(4) of the draft Bill [page 83].

SWG proposal 12: "Cases should only ever be referred to the Secretary of State once".

Paragraph 6(8) of schedule 6 to the draft Bill inserts new paragraphs 3A-3D into schedule 14 of the 1981 Act. These paragraphs provide a new procedure (to replace the existing) where an applicant wishes to appeal against the refusal of the local authority to make an order on application. The replacement procedure is based on schedule 15 to the 1981 Act, so that it deals with any potential objections to the order applied for alongside the appeal and settles the question of whether an order should be made and confirmed in one process, leaving resort only to judicial review once completed [pages 75-79 of the draft Bill].

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

The clauses in the draft Bill give the Secretary of State the power to sever an order, where only part of the order is opposed, in new paragraph 7(1A) of schedule 15 to the 1981 Act inserted by schedule 6, paragraph 7(3) of the draft Bill [page 79]. The clauses in the draft Bill give local authorities the power to sever an order, where only part of the order is opposed, in the following instances: new

[2] Highways Act 1980

paragraph 7A(2) of schedule 15 to the 1981 Act inserted by schedule 6, paragraph 7(4) of the draft Bill [page 80]; new paragraph 2(2ZB) of schedule 6 to the 1980 Act inserted by schedule 6, paragraph 9(3) of the draft Bill [page 82]; new paragraph 2ZZA(1) of schedule 6 to the 1980 Act inserted by schedule 6, paragraph 9(5) of the draft Bill [page 83].

SWG 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".

The clauses in the draft Bill provide that the High Court may quash the Secretary of State's decision rather than the order in the following instances: new paragraph 12(2B) of schedule 15 to the 1981 Act inserted by schedule 6, paragraph 7(5) of the draft Bill [page 80]; new paragraph 5(3A)(2) of schedule 6 to the 1980 Act inserted by schedule 6, paragraph 9(7) of the draft Bill [page 84].

SWG proposals 17 & 18: "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 [Magistrates] court order requiring the authority to resolve the matter".

"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".

Schedule 6, paragraph 6(4) of the draft Bill introduces a new paragraph 1B into schedule 14 of the 1981 Act. This sets out a process for application to a Magistrates' court where a local authority has failed to carry out a preliminary assessment within 3 months [pages 72 & 73 of the draft Bill].Schedule 6, paragraph 6(4) of the draft Bill also introduces a new paragraph 1D into schedule 14 of the 1981 Act, which sets out a process for application to a Magistrates' court where a local authority has failed to either determine an application or carry out a preliminary assessment within 12 months [pages 73 to 75 of the draft Bill].

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

Schedule 6, paragraph 6(11) of the draft Bill inserts a new paragraph 4A into schedule 14 to the 1981 Act [page 79 of the draft Bill].

SWG 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".

Clause 12 of the draft Bill introduces a new section 55A into the 1981 Act [page 10 of the draft Bill].

SWG 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".

Clause 13 of the draft Bill introduces a new section 56A into the 1981 Act and procedure (based on schedule 15 to the 1981 Act) [Page 11 of the draft Bill].

SWG 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".

Schedule 6, paragraph 3 of the draft Bill inserts a new section 53ZA to the 1981 Act, which provides for a simplified procedure to make basic factual corrections [page 69 of the draft Bill].

SWG 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".

Clause 16 of the draft Bill amends section 147 of the 1980 Act [page 13 of the draft Bill].

Other rights of way clauses.

Clause 14 introduces a new section 56B to the 1981 Act. In a similar way to section 67(5) of the Natural Environment and Rural Communities Act 2006, this provides for a private right of way for any person that needs to access their property where a public right of way is extinguished by the 2026 cut-off provisions [page 12 of the draft Bill].

Clause 15 amends the (yet to be implemented) 'right to apply' provisions set out in the Countryside and Rights of Way Act 2000 by: (i) enabling the the scope of the right to apply provisions to be extended to land uses other than those already prescribed by the 2000 Act; (ii) giving the Secretary of State discretion not to make an order on appeal [page 13 of the draft Bill].

Clause 17 amends the (yet to be implemented) 'right to apply' provisions set out in the Countryside and Rights of Way Act 2000 by dis-applying the provision for a prescribed charge, in order to enable local authorities to instead recover the actual costs incurred. It also amends Part 1 of schedule 6 to the 1980 Act to enable the Secretary of State's costs to be recovered in cases dealt with by the exchange of written representations as well as by inquiry or hearing [page 15 of the draft Bill].