

Natural England Commissioned Report NECR035

Stepping Forward

The Stakeholder Working Group on Unrecorded Public Rights of Way: Report to Natural England

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Natural England commission a range of reports from external sources to provide evidence and advice to assist us in delivering our duties.

This report was written by the Stakeholder Working Group on Unrecorded Rights of Way, which Natural England established. It recommends a package of legal and procedural changes that would require detailed implementation by Government.

Natural England has unreservedly commended the Group's report to Government.

Further information

This report and the covering letter to Ministers from Natural England Chair Poul Christensen can be downloaded from the Natural England website: www.naturalengland.org.uk

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FOREWORD BY RAY ANDERSON, CHAIRMAN OF THE STAKEHOLDER WORKING GROUP

The incompleteness of the legal record of public rights of way has been a contentious subject for many years. The Countryside and Rights of Way Act 2000 sought to address this. It provided for a 'cut-off date' in 2026, so that unrecorded pre-1949 public rights of way would cease to exist if not specifically preserved by regulations.

This has brought into sharp relief the task of capturing on the definitive map and statement before that date those currently unrecorded pre-1949 public routes that are already in use, or are useful or potentially useful to the connectivity of the local rights of way network. It was an inherent component of the Government's policy in enacting the cut-off provision that such routes should be preserved. However, one major source of concern, for all concerned, has been the complexity and long-windedness of the recording procedures.

Natural England set up in the autumn of 2008 this Stakeholder Working Group on Unrecorded Rights of Way, with membership from all parts of the interest spectrum. Natural England challenged the members of the Group to work together constructively to achieve progress in this area. The Group has now concluded its work, and has reached agreement on a cohesive package of proposals that it considers would deliver real benefit to all sides. This Report to Natural England sets out these proposals and the Group's underlying reasoning.

Arriving at this consensus has involved extended and profound debate, with all Group members playing a full and vital role. All have displayed an admirable willingness to take on board others' perspectives, to find ways to overcome differences, and to look for mutually acceptable ways to simplify and improve this important regime. All are clear that implementation of the proposals in full is crucial to preserving the balanced nature of the package, to maintain the consensus that has been established and that is a prerequisite for reform in this difficult area.

Equally important is for Government to act quickly in developing the detailed changes in existing law and procedures that will be needed to give effect to the Group's top level proposals, and then consulting widely to ensure that this fine detail reflects the needs of the wide range of interests involved. As the cut-off date gets ever closer, the requirement for a real step forward on this front is increasingly important.

I commend the Group's Report to Natural England as a blueprint for lasting progress in this area, born out of goodwill and a genuine desire to work together for the benefit of all concerned.



Ray Anderson, March 2010

ACKNOWLEDGEMENTS

The Group wishes to record its sincere thanks to:

Ray Anderson, whose wise chairmanship helped us to agree on a balanced package of recommendations, and

Gavin Stark, whose great skill in distilling our complex and far-ranging discussions into a cohesive and persuasive report was fundamentally important to our work.

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The Stakeholder Working Group on Unrecorded Public Rights of Way

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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.

CONTENTS

Foreword by Ray Anderson, chairman of the Stakeholder Working Group	1
Acknowledgements	3
Group members	4
Executive Summary	6
Contents.....	12
Chapter One: Background.....	14
<i>The official legal record of public rights of way is not complete – why is this?.....</i>	<i>14</i>
Chapter Two: Formation of the Stakeholder Working Group.....	16
<i>The Discovering Lost Ways Project</i>	<i>16</i>
<i>The Stakeholder Working Group.....</i>	<i>16</i>
Chapter Three: Progress in completing the definitive map and statement	18
<i>The original survey.....</i>	<i>18</i>
<i>Case work under the 1981 procedures</i>	<i>18</i>
<i>Estimating the number of unrecorded pre-1949 rights</i>	<i>23</i>
<i>Resourcing the process</i>	<i>24</i>
Chapter Four: The Group’s overall approach	26
<i>The need for certainty.....</i>	<i>26</i>
<i>Starting positions</i>	<i>26</i>
<i>Agreeing a way forward</i>	<i>27</i>
Chapter Five: Dealing with unrecorded pre-1949 rights.....	31
<i>Overview</i>	<i>31</i>
<i>Encouraging good-quality applications</i>	<i>32</i>
<i>Explaining the situation to landowners</i>	<i>35</i>
<i>Negotiating solutions.....</i>	<i>36</i>
<i>Nature conservation</i>	<i>39</i>

<i>Getting decisions accepted</i>	39
<i>Recourse where there is delay</i>	43
Chapter Six: Preparing for the cut-off	46
<i>Closing the definitive map and statement to historical rights</i>	46
<i>Exemption of routes featured on certain other records</i>	48
<i>Ability to make a prescriptive claim</i>	51
<i>The surveying authority’s own role in protecting useful pre-1949 rights</i>	51
<i>Corrections and clarifications</i>	52
Chapter Seven: Scope for integration and other improvements	54
<i>Possible areas where improvements could be made</i>	54
<i>Routes for cyclists</i>	55
<i>Simplifying legal status</i>	55
<i>Gates on byways</i>	56
Conclusion	57
ANNEX 1: Terms of reference	58
ANNEX 2: Members’ biographies	60
ANNEX 3: Schedule of meetings	65
ANNEX 4: Current procedures	66
ANNEX 5: Streamlined claims determinatin procedure	68
ANNEX 6: Flowchart with annotated changes	69
ANNEX 7: How the exceptions in section 54 of the Countryside and Rights of Way Act 2000 work	70

CHAPTER ONE: BACKGROUND**THE OFFICIAL LEGAL RECORD OF PUBLIC RIGHTS OF WAY IS NOT COMPLETE – WHY IS THIS?**

1.1 The public rights of way network is a vital part of the nation's heritage. It is a key means by which people enjoy the countryside and nature, keep themselves healthy and active, and get from A to B sustainably, including in urban and urban fringe areas.

1.2 Paths and other highways have long had a strong connection with maps. Perhaps surprisingly, it was not until 1949 that a duty was established to keep an official legal record of public rights of way. Before the National Parks and Access to the Countryside Act 1949 introduced the concept of the "definitive map and statement", it was not easy to find out for certain whether a particular route was a public right of way. There was a growing concern that as a result, existing public rights were being lost to development and other changes in land use. This was one of the many things the Act set out to tackle in the context of a wider post-war agenda of ambitious social reform.

1.3 For all of the difficulties that have attended the development of the definitive map and statement over the 60 years since, a huge amount has already been achieved. The definitive map and statement has secured the future of many rights of way, with about 190,000 km (118,000 miles) of public rights of way recorded in England, and almost all parts of the country covered.

1.4 The network of public rights of way is not static. The definitive map and statement can never be done and dusted. It will need continual updating to reflect the express creation, presumed dedication, extinguishment or diversion of particular routes. In this sense, the definitive map and statement will only ever be a complete record of the public rights of way that exist at a given moment. At present, however, it is not even that. Many historical public rights of way are not recorded on it, and some are recorded with the wrong status. Some of these unrecorded rights are still in regular use by the public. Others have effectively been forgotten, but the English common law includes the ancient maxim 'once a highway always a highway' – meaning that once established, a public highway cannot be lost as a consequence of lack of subsequent public use. So there is always the possibility as things stand of hitherto unrecorded rights of way being discovered and added to the map.

1.5 Some years ago a suggestion was made that this should be changed: that there should be a point beyond which rights of way that existed before the definitive map and statement was introduced, but have never been officially recorded, should be

extinguished¹. This proposal was taken forward, and a so-called “cut-off date” added to the statute book. This statutory provision – which specified the cut-off date as 2026 – has yet to be commenced legally. There have been extensive concerns about the possible loss of public rights that it might cause in view of the complex, often adversarial processes involved in considering whether such rights exist and getting them onto the definitive map and statement. On the other hand, there is a strong feeling among land managers and property owners that a cut-off needs to be brought into effect at the earliest opportunity in order to remove the situation where unknown rights of way can ‘appear out of the blue’.

1.6 This dilemma about how best to secure the recording of useful or potentially useful public rights of way on the definitive map and statement, while removing as soon as possible the current uncertainties about where unrecorded rights might exist, underscores all of the Group’s deliberations.

¹ This suggestion was made in advice given to Government in 1999 by the then Countryside Agency which said that Government should: *“take powers to enable the eventual closure of individual definitive maps to further amendments based on historical documentary evidence, but that these powers will be conditional upon the historical network having been researched and recorded to a high standard, against criteria set and monitored by a competent body at arm's length from Government”*. Sections 53 to 56 of the Countryside and Rights of Way Act 2000 were loosely based on this principle.

CHAPTER TWO: FORMATION OF THE STAKEHOLDER WORKING GROUP

THE DISCOVERING LOST WAYS PROJECT

2.1 The Countryside Agency set up the ‘Discovering Lost Ways’ project in 2001. This was to fulfil Government policy in introducing the cut-off that impetus should be given to the task of completing the definitive map and statement before the cut-off took effect. The project sought to capture evidence about ‘missing’ historical rights of way and those under-recorded on the definitive map and statement. It went through several stages including a scoping study followed by research in four counties, as a result of which 246 case files relating to potential ‘lost ways’ were assembled and test applications made to add four routes to the definitive map and statement for Cheshire.

2.2 Natural England inherited this project from the Countryside Agency and in February 2007 began a review of the effectiveness of the project. This concluded that fundamental problems with the current system for processing cases meant that the forced completion of the definitive map and statement by 2026 was not a practical proposition under current law and procedures: a fresh look at the whole system was required.

THE STAKEHOLDER WORKING GROUP

2.3 It was clear that, because of the contentious and emotive nature of the issues associated with unrecorded rights of way, any proposed remedies unilaterally imposed by Government would be unlikely to succeed. Natural England considered that a more promising approach would be to engage the three key interest sectors – land managers/business, users, and local authority rights of way staff – in developing an agreed package of measures that would address the difficulties its review had identified in a way that would bring real benefit to all sides.

2.4 In March 2008, Defra endorsed Natural England’s recommendation that it should close the Discovering Lost Ways project and instead work to develop a consensus about the best way forward, through an independently-chaired Stakeholder Working Group. At the same time, Defra made clear its intention not to implement the cut-off date provisions at least until the Stakeholder Working Group had reported.

2.5 The terms of reference agreed with the Group state that its purpose is to bring together representatives of the key relevant interests to:

- a. *consider the issues and difficulties associated with the process of recording of pre-1949 and other public rights of way that are not currently shown on the definitive map and statement maintained by surveying authorities; and,*

- b. work together with the aim of reaching consensus on a balanced package of strategic reforms in law and procedure that in the Group's view would bring real benefit to the various interests potentially affected by the claimed existence of such rights.*

Where appropriate the Group could draw attention to and consider other ways of improving access.

2.6 Natural England appointed an independent chair for the Group and fifteen members, five from each of the three principal sectors of interest. The membership also includes representatives from Natural England, Defra and the Countryside Council for Wales. The secretariat is provided by Natural England. More details of the Group are included in Annexes: 1 (Terms of reference); 2 (Members' biographies); and 3 (Schedule of meetings).

2.7 Defra and Natural England have made it clear that, to stand any chance of being adopted, any package of recommendations must be agreed by the Group as a whole, and must be de-regulatory in its overall effect. It has also been made clear that the Government has not, at this stage, accepted the case for further legislative reform but the Group has proceeded on the basis that a package supported by all key interests would be likely to prove highly influential.

CHAPTER THREE: PROGRESS IN COMPLETING THE DEFINITIVE MAP AND STATEMENT

THE ORIGINAL SURVEY

3.1 The definitive map and statement provided for by the 1949 Act sought to create a legal record of all non-vehicular public rights of way. This followed recommendations in a report by the Hobhouse Committee published in 1947², which envisaged that “*a total of four years...should give sufficient time to all parties concerned in the survey*”. But the subsequent process took some years and there were other significant problems, such as a lack of consistency in the process, parish boundary anomalies and large areas without acknowledged footpaths (there was less emphasis on other types of rights of way at this time). An attempt was made, through the 1968 Countryside Act, to strengthen and speed up the process, building on the concept of periodic reviews. However, this also proved unsuccessful and the Wildlife and Countryside Act 1981 brought in a range of measures that did away with existing review provisions and introduced a duty for surveying authorities³ to keep the definitive map and statement under continuous review, supplemented by provisions that enabled the public to participate in the process by making applications for orders to modify the definitive map and statement. These provisions are still in place, but the completion of the definitive map and statement, in terms of capturing all the rights of way that can be shown to exist, is still far from being realised.

CASE WORK UNDER THE 1981 PROCEDURES

3.2 Various attempts have been made to quantify the scale of changes being made to the definitive map and statement and the resource implications. Invariably the trend identified has been a worsening situation of increasing backlogs – with pockets of improvement in certain areas, but little sign of overall improvement nationally.

DEFINITIVE MAP MODIFICATION ORDERS

3.3 Rights may exist over a route that is not shown on the definitive map and statement, or additional rights may exist over a route even though they are not recorded. Where such rights are alleged to exist, there are procedures set out under the 1981 Act to enable the

² Ministry of Town and Country Planning, Footpaths and Access to the Countryside: Report of the Special Committee, September 1947, Cmd. 7207.

³ The bodies responsible for the definitive map and statement are known as ‘surveying authorities’. Generally speaking this is the county council or equivalent although the function may be delegated to other bodies, National Parks for example.

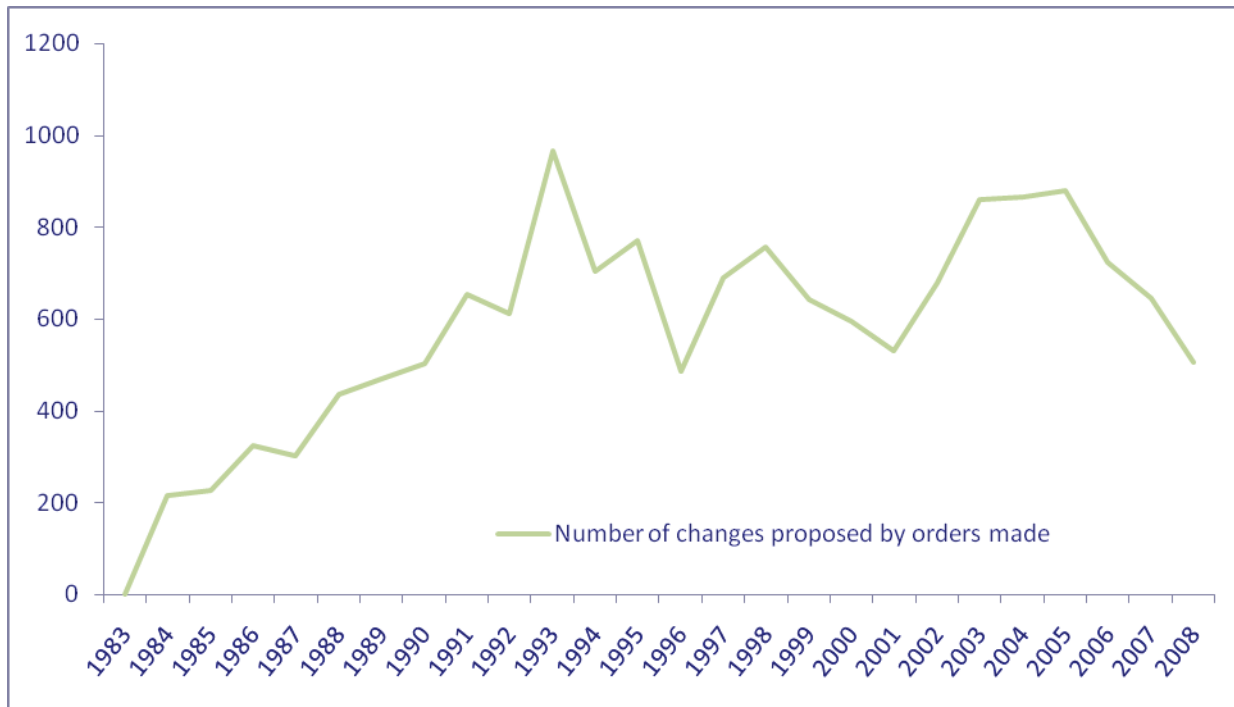
allegations to be tested. They allow for the surveying authority to make an order, known as a definitive map modification order, to amend the map and statement. The making of an order does not necessarily mean that the definitive map and statement will be changed. The order must first be consulted on, and then determined. Where representations are made the order is referred to the Secretary of State to be determined. The order must then be confirmed before the surveying authority can make any consequent changes to the definitive map and statement.

3.4 Whilst there are no national statistics available to quantify the number of orders made or confirmed each year, an indication of year on year throughput is provided by a case tracking system maintained by The Ramblers⁴. These records show that by 2008, definitive map modification orders made in England and Wales since the 1981 Act procedures were introduced included a total of 15,072 changes. It is not known how many orders this represents since orders often include multiple changes to the definitive map and statement, and the Ramblers' system tracks each change separately. Comparison of the Ramblers' figures with other estimates and statistics suggests that the number of orders made per year is approximately half of the number of changes, meaning that an average of approximately 300 orders have been made per year. Figure 3.1 is based on the Ramblers' data and shows the year on year variation in England and Wales. This information shows a significant decline in the making of orders in recent years. It would be prudent for Defra to work with surveying authorities and others to do further analysis of the reasons behind and implications of this trend.

3.5 As well as the number of changes that have been included in definitive map modification orders the Ramblers' data shows that the intended effect of these changes has been mainly to add a previously unrecorded route to the definitive map and statement (see Figure 3.2). How many of these instances have been to record a right of way that already existed before the definitive map and statement was introduced in 1949 is not known. A separate survey carried out in 2002⁵ and involving a questionnaire study of surveying authorities estimated that 27% of the definitive map modification orders being made at the time in England included reference to pre-1949 evidence. Combining this estimate with the Ramblers' data could suggest that so far around 2,000 orders have been made to add pre-1949 rights to the definitive map and statement.

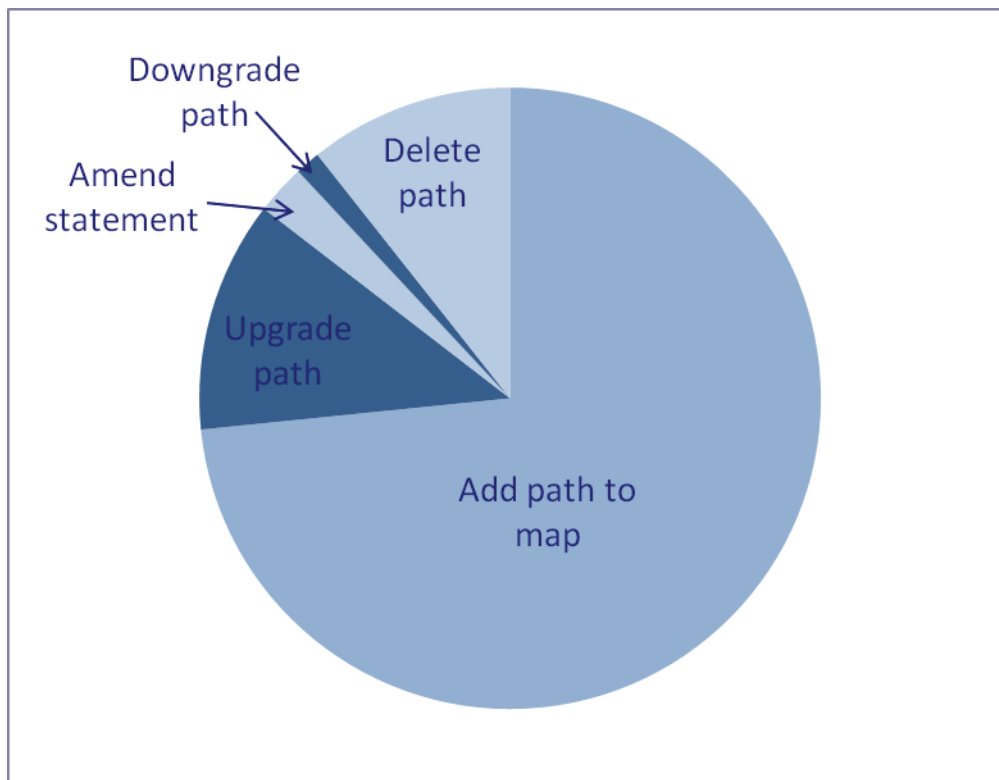
⁴ The Ramblers is one of the bodies that must be sent a copy of the notice of the making of an order and its confirmation.

⁵ This survey was carried out by Countryside Agency as part of the scoping study for the Discovering Lost Ways Project.



Source: Ramblers, 2009

Figure 3.1 The number of changes included in all definitive map modification order notices sent to the Ramblers (England and Wales)



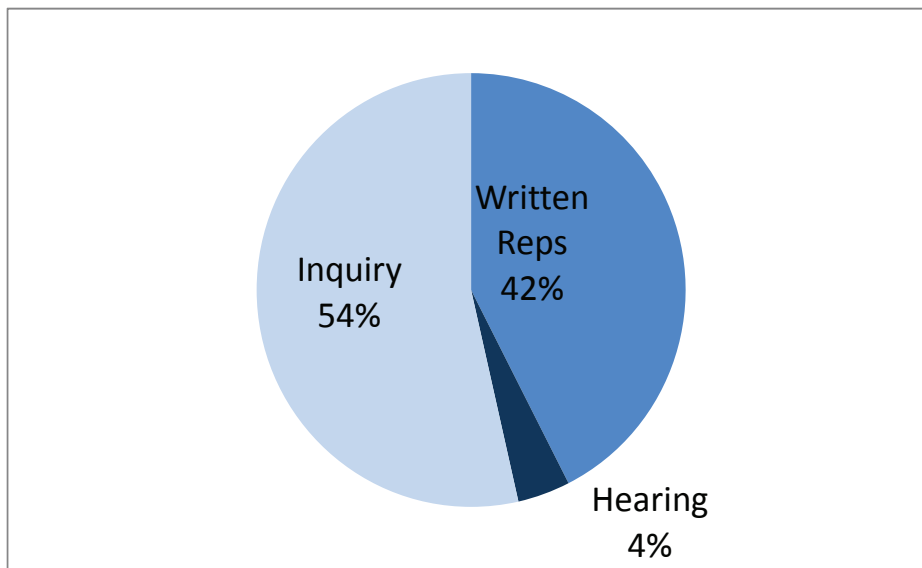
Source: Ramblers, 2009

Figure 3.2 The effect of changes proposed in all definitive map modification order notices sent to the Ramblers (England and Wales)

THE BACKLOG OF ORDERS WAITING TO BE DETERMINED

3.6 Anecdotal accounts suggest that the time taken for an order to be processed is increasing and that a growing number of cases are 'stuck in the system'. The 2002 survey invited surveying authorities to speculate on what would happen to the orders they make. The survey found an expectation that 60% of orders would be opposed and that this would be likely to lead to increased workload and delays. Opposed orders are referred to the Secretary of State and statistics compiled for England by the Planning Inspectorate⁶ show that in recent years the number of orders determined by the Secretary of State has averaged at approximately 150 and that 75% of these were eventually confirmed with or without changes. Just over half of the orders determined by the Planning Inspectorate were taken to public inquiry (Figure 3.3).

⁶ This information is published via the Planning Inspectorate website.



Source: Planning Inspectorate

Figure 3.3 The procedure type used for all definitive map modification order determinations made in relation to England by the Planning Inspectorate over a three year period from 2006/7 to 2008/9. The total number of determinations was 579.

3.7 The Byways and Bridleways Trust has carried out a more detailed analysis of determinations by the Planning Inspectorate and found that in 2009, 53 out of 118 related to pre-1949 rights of way (45%) and just under half of these were determined at public inquiry.

THE BACKLOG OF APPLICATIONS

3.8 At the time it was carried out, the 2002 study estimated that there were 2,114 applications that had been with a surveying authority for over a year but had not been determined. Assuming the size of the backlog has been increasing steadily since the definitive map modification order process was introduced, this could mean the backlog had grown at an average rate of 100 per year. Overall, the 2002 study surmised that the situation on backlogs was likely to worsen. Anecdotal accounts tend to confirm that overall backlogs are increasing despite some good examples of surveying authorities where the opposite has been true. A further questionnaire survey of surveying authorities in 2007⁷

⁷ The questionnaire survey of surveying authorities was carried out by the Countryside Agency as a part of the review of the Discovering Lost Ways Project.

appears to confirm this. The average number of applications waiting to be determined was 34 – which could suggest that there are around 4,000 registered applications, albeit that a portion of these will be determined within a year. Not all of these applications will necessarily lead to the surveying authority making an order since some will be rejected. The 2002 study estimated that 70% of applications lead to an order being made.

3.9 It is often assumed that most of the orders made by a surveying authority arise as a result of an application, but this is not always the case. The 2002 survey invited surveying authorities to speculate about the means by which orders are likely to be made in the future. It found that on average authorities anticipated that definitive map modification orders arising as a result of applications would account for about 60% of orders made, the balance arising from the authority directly or from informal approaches to it.

ESTIMATING THE NUMBER OF UNRECORDED PRE-1949 RIGHTS

3.10 The 2002 survey asked surveying authorities to estimate how many additional cases requiring modification orders to be made they would expect to be discovered from a full examination of all the archive records for their area. Surveying authorities representing 70% of the country recorded and the answer was an average of 216 per authority. This was extrapolated to make an England wide estimate of 20,000 cases. The figure is heavily caveated in the report, not least since only 15 of the 65 respondents had undertaken any form of systematic assessment.

3.11 A similar question was asked in the 2007 survey. Nearly half of respondents replied 'unknown', and the average for those that did respond was higher than that for the 2002 survey at 427. This difference could be a result of the question in 2007 being more general, since several high responses made by city authorities referred to the issue of unrecorded urban paths.

3.12 The variability of returns from surveying authorities corroborates anecdotal accounts that the completeness of the definitive map and statement varies hugely between areas. This picture is further reinforced by the results of the systematic investigations carried out as part of the Discovering Lost Ways Project (DLW) in study areas in Cheshire, Shropshire and Nottinghamshire. The 20,000 estimate from the 2002 study would equate to an average of 2.2 cases per parish. This compared with the results of the DLW pilot study which found an average number of cases per parish to be: 0.4 in Cheshire; 3.1 in Shropshire and 0.6 in Nottinghamshire.

3.13 It is impossible to draw firm conclusions about the scale of the issue. It appears that in some areas there are significant numbers of unrecorded ways, in others very few. An estimate of 20,000 cases would probably grossly overstate the number of 'new' routes waiting to be uncovered.

RESOURCING THE PROCESS

3.14 Arriving at an average time for processing an application through to determination is difficult. Many surveying authorities point out that it is impossible or impractical to try and provide an average time given the variability of factors such as how the case fits with an authority's own statement of priorities, complexity of research, number of landowners involved, number of objections and whether or not the case goes to public inquiry. Results from the 2007 survey show that an application can take anything from three months to fifteen years through to determination. Within this some indicative figures were given of the amount of officer time spent on processing each case, which ranged from 30 to over 500 hours. The most significant factor in resourcing the process, in terms of time and administrative and legal costs, was whether the application went to public inquiry. Surveying authorities quoted up to 170 hours of staff time being taken up with the work required for one public inquiry.

3.15 On the basis of figures provided in 2002, the average cost of processing an unopposed definitive map modification order was around £4,500, rising to nearly £9,000 if a public inquiry was held. The lowest cost of processing an unopposed definitive map modification order was £660 and the highest recorded, following a public inquiry, was £30,000. Other significant costs include press adverts and buying in legal advice. The cost of press adverts was between £150 and £2,000, and averaged £508.

3.16 The 2007 survey indicated that an experienced rights of way officer could process between four and eight applications per year, but in a number of authorities, particularly unitaries, there are officers with little or no experience of processing definitive map modification orders. The retirement of experienced officers and difficulties in recruiting and retaining staff in rights of way departments continue to be a problem. Salaries are often set at a low grade, reflecting the low priority given to rights of way work in many authorities. Regular restructuring or departmental cuts were also affecting 23% of respondents in 2007.

FUTURE PROJECTIONS

3.17 The main conclusion to draw from these various statistics and surveys is that progress is slow under the current system, local authority staff feel under huge pressure, and backlogs are adding to this and limiting progress with new applications. Responding to this would necessitate either increasing resources for this area of work or making changes to the system, or both. Figure 3.4 represents a possible model of current throughput for the definitive map modification order system based on available information. Improvements to the system could be justified on this basis alone but the imperative for taking action is even more pressing given the likely increase in pressure on the system as the cut-off gets closer. As indicated above, the overall amount of casework likely to result is unknown and

will vary considerably from area to area. The 2002 estimate of 20,000 cases is likely to be an exaggeration but even a case load of half of that amount spread over a ten year period is likely to necessitate a quadrupling of current capacity.

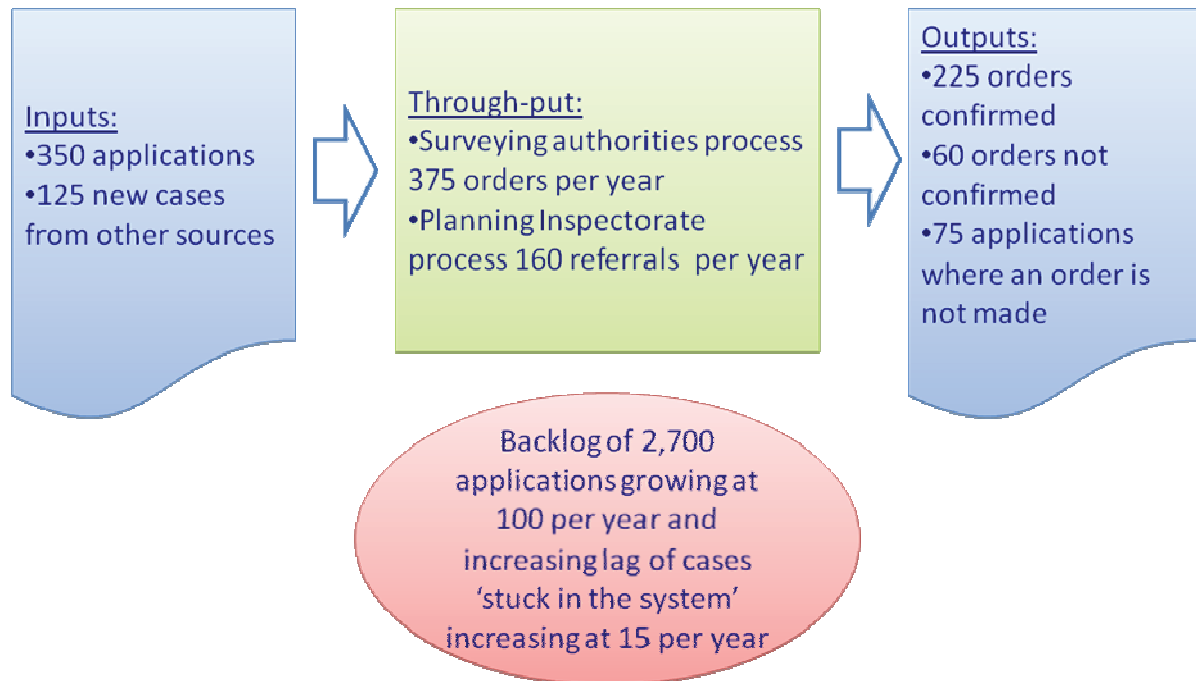


Figure 3.4 An estimation of annual throughput for the definitive map modification order system based on current capacity. These figures are purely a best estimate, based on combining the various estimates and statistics referred to in this section of the report.

CHAPTER FOUR: THE GROUP'S OVERALL APPROACH

THE NEED FOR CERTAINTY

“An authoritative record completed within a reasonable timescale”

Hobhouse Committee Report, 1947

4.1 There are two ways of looking at the current position and events leading up to it. Some would point out the huge progress that has been made and that the definitive map and statement has secured the future of many rights of way. Everyone is at least vaguely aware of the notion of public rights of way, even if they are a bit muddled about the facts: rights of way are now part of the national consciousness. Others might take a more pessimistic view and point out that it was clearly not the intention that sixty years on, arguments would still be continuing about the legal status of historical rights of way.

4.2 For the future, the definitive map and statement should be just that: a definitive record of the status of rights of way at that moment in time. Whatever your view of history, certainty about the existence or otherwise today of public rights of way that were created in the past is highly desirable. The Group agrees that certainty is needed as soon as reasonably possible and that this implies recording useful or potentially useful existing rights of way on the definitive map and statement, and then concluding the process of recording historical rights within a specified time period.

STARTING POSITIONS

4.3 During early discussions of the Group three main approaches were advocated, each of which initially had strong advocates. These starting positions can be broadly characterised as follows:

[A] ‘Fine tune the procedures and apply more resources’

By this argument, the current system for making changes to the definitive map and statement is about right. The legal rights of the public and of landowners are a serious matter. Where the existence of rights is claimed or disputed, this must be taken seriously. The application procedures introduced in 1981 are robust and well suited to contentious claims, especially those requiring testing of witness evidence. They include a range of checks and balances that ensure a fair hearing for all parties before decisions are made about the existence of rights. What is needed is for surveying authorities to apply more resources to this area of work, supported by minor improvements to procedures and stronger sanctions against poor performance.

This argument correctly recognises the inherent thoroughness of the current procedures. But any suggestion of merely throwing more resources at the system, even if that were feasible, misses the point. Without making the procedures simpler and more sensitive to the type of case, the current difficulties in terms of time taken to process cases, and their inherent cost, will not be resolved.

[B] 'One last review'

An alternative approach is to say that before the application system came into being in 1981, the basis on which the definitive map and statement was originally created provided an effective and economical way of compiling the record. The problem was that it was not done properly. What is needed now is for a one-off, time-limited exercise to get as many routes as practicable recorded before the definitive map and statement is closed to the addition of any further historical rights.

This approach gets back to what was originally envisaged in 1949 – a simple and pragmatic process to compile the map and resolve any disputed cases. For all the attractions of that idea, the difficulty is that such an exercise would effectively be repeating one that previously failed: why would it be any different this time around? Such a process would be cheaper in the long run than the current regime, but would require significant short to medium term investment.

[C] 'Stop recording and focus on improving the network'

Another suggestion is to say that sixty years is a long enough period to compile the definitive map and statement. The resources currently used to investigate old routes and deal with the long-winded procedures when their existence is disputed would be far better deployed by targeting improvements to the network itself, to help it meet current and future needs.

This argument is fresh and radical but assumes that investment in improving the network would be guaranteed, and that all parties would participate in a positive way. In practice it is very unlikely that a new statutory duty to do this would be imposed. Improving the network would remain 'nice to have', and the resources made available might decline rather than grow. Further, this approach relies on there being satisfactory means of preventing unintended consequences of a blanket extinguishment.

AGREEING A WAY FORWARD

4.4 It became clear that none of these viewpoints taken alone would provide an agreed solution. Further discussion of the merits of these approaches deepened the Group's understanding of the problems in closing the definitive map and statement. It became

clear that an approach combining strengths from each of these options might offer the most promising way forward.

4.5 The Group's proposals aim to:

- a. Make the system for administering the definitive map and statement more flexible, so that a light-touch administration is possible where appropriate, providing better value for money for the public purse and significantly improving turnaround times.
- b. Ensure that the system operates with optimum efficiency by improving procedures where things can be done more effectively or unnecessary steps can be removed.
- c. Put dialogue between applicants, land managers and the surveying authority at the heart of procedures to allow negotiated solutions to resolve any issues early in proceedings, and so avoid the need for protracted disputes.
- d. Improve trust and understanding by openness and early sharing of information.
- e. Make the system easier to understand for all involved.
- f. Put the onus on would-be applicants and objectors to make their inputs reasonable, appropriate and timely, so as to avoid unnecessary anxiety and cost whilst maintaining fairness.
- g. Strengthen sanctions against poor-performing authorities.

4.6 The proposals that follow in this report are deliberately kept strategic. They concentrate on what needs to be achieved, rather than getting tied up in the existing legal detail. Much further development work and consultation by the Government will be needed to design the detailed solution to give effect to the Group's strategic proposals. This will include working up proposals for specific changes to legislation and the contents of associated guidance.

4.7 The Group considers that improving the status quo will need a combination of: changes to legislation; better guidance; cultural change; and proper resourcing.

4.8 The Group's proposals are a carefully balanced package of recommendations that all require implementation. Any 'cherry picking' approach to implementation would rapidly dismantle the consensus that has now been established behind the proposals as a whole. It would also miss the point that the proposals are interdependent: trying to implement some but not others would not work.

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.

IMPLEMENTATION OF THE CUT-OFF

4.9 A cut-off date of 2026 is already specified in legislation. Unless the primary legislation is changed, the cut-off will take effect in 2026 as intended by Parliament, extinguishing (with certain provisos) any unrecorded pre-1949 footpaths or bridleways⁸. The Group recognises that arguments about whether or not rights of way existed prior to the definitive map and statement being established are divisive between stakeholders, and a drain on scarce public funds. The Group agrees that outstanding issues should be speedily and pragmatically resolved in accordance with the proposals in this report, so that the definitive map and statement can more readily be brought up to date, and then closed to applications based on pre-1949 documentary evidence. Since a cut-off is a necessary mechanism to achieve this closure and move forward, the Group sees it as integral to implementation of the recommendations that follow.

4.10 The proposals in this report are therefore made on the assumption that the cut-off will and should happen. The Group also agrees that closure of the definitive map and statement in this way is only justifiable on the basis that useful or potentially useful pre-1949 ways will be captured or safeguarded before the cut-off takes effect in accordance with its other proposals.

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.

CHANGES TO LEGISLATION

4.11 The Group recognises that implementing these proposals will necessitate some changes to primary legislation, and recommends that this be achieved through a Legislative Reform Order. Such an approach is considered realistic for two reasons:

- a. there is broad support for the Group's proposals; and
- b. implementing them would bring an overall reduction in administrative burden.

These are the key prerequisites for using a Legislative Reform Order.

⁸ The cut-off provision requires commencement by order. In addition there is a provision in section 56 of the Countryside and Rights of Way Act 2000 allowing the cut-off date to be deferred by up to five years by means of regulations, i.e. to 2031.

BETTER GUIDANCE

4.12 The Group considers that better guidance could do much to make the best of existing powers and procedures, and to share the benefits of existing good practice. A single source of clear and authoritative guidance, relevant to all parties involved in the process, will be needed.

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

CULTURAL CHANGE

4.13 The attitudes and behaviour of participants in the process are vital to delivering successful outcomes. Improving the law and the guidance can help in affecting the cultural norm, but will not of itself achieve the objectives described above. Support and encouragement should be given to all participants to help bring about the change in attitudes and culture needed to underpin new ways of working with a more cooperative and constructive approach. Members will work within their sectors to help promote this necessary cultural change.

PROPER RESOURCING

4.14 Unlocking the proper resourcing of this function is also a vital issue. The Group's proposals are designed to reduce the amount of resources needed to fulfil a surveying authority's statutory duties for capturing historical rights on the definitive map and statement. Increasing the priority given to the work of surveying authorities by the local authorities in question, and backing this up with a clear sense of strategic priority at the national level, will also be essential in order to meet the challenge. This implies imposing tougher sanctions where necessary against indifferent performance or neglect of statutory duties by surveying authorities.

STRATEGIC LOCAL CONSULTATION

4.15 In addition, strategic local consultation by the authority will be needed on how each of these four elements will play out at the local level. Local access forums will be key to this and surveying authorities should be expected to consult with them about their strategic application of any new guidance. The Group noted with approval that it is not within the statutory remit of local access forums to be involved on a case-by-case basis.

CHAPTER FIVE: DEALING WITH UNRECORDED PRE-1949 RIGHTS**OVERVIEW**

5.1 Following introduction in 1981 of the concept of continuous review of the definitive map and statement, and associated formal procedures, there has been a trend towards greater complexity in the process for capturing unrecorded pre-1949 rights. This was illustrated when at one of its early meetings, the Group was shown a print of the spreadsheet used by one authority to track progress with each of its modification order cases. The print stretched the entire width of a medium-sized conference room. This reflects the great lengths the current procedures go to in order to ensure fair and thorough consideration of the views of all interests, and of all available evidence. The Group believes there is good scope to streamline these procedures substantially to the benefit of all, without losing their essential objectivity and fairness. In particular the Group recognises that the move to an increasingly rigorous approach to evidence evaluation has impacted adversely on the time taken to determine cases, and thereby deliver the certainty that all require.

5.2 This is not to suggest in any way that adding historical ways to the definitive map and statement should be seen as a trivial thing. It can have significant consequences for the land or property in question, especially where the historical way was previously ‘unknown’ and conflicts with the established use of the land today. In such a scenario it is right and proper for all the evidence to be fully tested before any decision is taken as to whether a historical right exists. And given that adding such a route to the definitive map and statement is a benefit for users previously unaware of the right’s existence, it seems reasonable for there to be some flexibility about the way the route is reinstated if this can produce a better ‘fit’ with the modern use of the land.

5.3 At present, the claiming of historical rights and the subsequent determination processes often take on an adversarial ‘feel’. The problem is as much to do with underlying attitudes and culture as it is with the legislation and procedures. Best practice from around the country shows what can already be achieved through pragmatism, reasonableness and a desire to find sensible solutions – reducing delays, streamlining procedures and minimising disputes. The proposals outlined below build on such good practice to identify a suite of improvements at all stages of the procedures that the Group considers should go a long way to making the system less adversarial, more efficient and more cost effective.

5.4 The Group has been most concerned with applications to add unrecorded routes to the definitive map and statement, based on documentary evidence that a public right of way already existed before the definitive map and statement came into being. But aspects of the Group’s proposals will be relevant to other changes to the definitive map and statement, such as where applications are made to record higher rights over an existing

route, or to downgrade or remove routes from the definitive map and statement. Backlogs are a key issue to be tackled. It is vital that the streamlined procedures should be allowed to expedite the clearance of applications that are already in the system.

5.5 The Group believes it is in all parties' interests to press ahead with the reforms we recommend so that useful or potentially useful historical routes are captured or secured, landowners know where they stand, and surveying authorities have a proper basis for future management and improvement of the network.

5.6 Several flow diagrams are appended to this report as Annexes 4, 5 & 6: these provide details of current definitive map modification order procedures and an overview of the main changes described below.

ENCOURAGING GOOD-QUALITY APPLICATIONS

5.7 Applications from members of the public are principally what drive the recording system. Investigating cases and the train of procedures that follows an application can be resource intensive and time consuming. Making an application should not be taken lightly: alleging the existence of a public right of way over someone else's land is a serious matter. It is important that surveying authorities can focus their efforts on good-quality applications. A process that drives a high quality of application will make the system work more efficiently.

SCREENING AND REJECTING APPLICATIONS

5.8 A simple screening process for applications would help considerably. Surveying authorities should be able to reject applications summarily where the applicant's evidence fails to demonstrate that there is good reason to believe that a public right of way may exist. This is not intended to discourage applications. Rather, it seeks to help authorities to concentrate most of their time on cases where there is a realistic likelihood that a public right of way actually exists. Currently, surveying authorities have a duty to investigate the available evidence irrespective of the quality of an application. Any time spent on following up applications that on the face of it stand little or no chance of success is time wasted. Surveying authorities should have a new power to reject without substantive consideration applications that do not meet a Basic Evidential Test (see paragraph 5.10), on the understanding that they may be resubmitted if more convincing evidence can be found.

<p>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.</p>
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5.9 Surveying authorities are already required to keep and make available for public inspection a register of applications. Only applications that meet the Basic Evidential Test would be added to the register of applications – rather like a local authority confirming registration of a planning application. This is a key point because landowners who might previously have been affected by low-quality applications would be spared the associated uncertainty and the possibility that people will actually start to use the claimed way as a result. Enabling this kind of filtering could also do much to help clear existing backlogs (with provisos – see below), and to prevent new ones from forming.

5.10 For this to work, the emphasis would need to be on the content of applications, rather than on whether they are made in the correct form. An application would meet the Basic Evidential Test if it makes out a prima facie case for the existence of the way. What we mean by this is that the evidence put forward by the applicant gives the authority good reason to believe that a public right of way may indeed exist. If on the other hand the evidence is too weak to make out such a case, the authority should be able to reject it summarily on the basis that the applicant may re-apply if more convincing evidence can later be found. In the latter case, the land owner would not be troubled with the existence of the weak claim and it would not be publicised.

5.11 A formulaic test based on requiring particular items of evidence in all cases is not envisaged. The applicant need not have made a comprehensive investigation of every possible avenue of inquiry. He might for example produce:

- a. one document showing a public right of way, such as an inclosure act or award or a quarter sessions record; or,
- b. two or more different documents that taken together appear to show an acceptance of public use of a route over a period of time that may well imply deemed dedication of a right of way.

The principle of a Basic Evidential Test might also have relevance to user claims where an application is made on the basis of long use as of right.

RESUBMITTING APPLICATIONS

5.12 No time limits are suggested for resubmitting prior to the cut-off applications that have been filtered out under this proposed power. This is because the rejection of the application decides nothing substantive about the likelihood of a public right of way existing along the route: it merely reflects the lack of any convincing evidence submitted with the application. The ability to reapply acknowledges the possibility that other, more convincing evidence may come to light. It also guards against the public as a whole being disadvantaged by a weak application being made by a particular individual.

5.13 Where an application is rejected as not having met the Basic Evidential Test, there should be no specific provision for appeal – otherwise the purpose of a simple screening process would be defeated. An applicant convinced that the rejection was unfair could make their case to the local government ombudsman, or ultimately resort to judicial review.

5.14 Where such screening of applications is applied to existing backlogs the situation is slightly different. It might be unfair for the authority to be able to reject summarily an application that has been in the system for a number of years. In this situation, applicants should be allowed a specific, time-limited opportunity to identify better evidence in support of their claim, whilst retaining their place in the processing queue. If, after this time, the application is not sufficiently improved, it would be removed from the register of applications, and rejected as not having met the Basic Evidential Test.

5.15 Enabling weak ‘old’ applications to be weeded out in this way might give rise to concerns among users about surveying authorities potentially using this approach to clear existing backlogs by rejecting such applications out of hand. Defra should consider what guidance and remedies are needed to help ensure that meritorious applications, old or new, go forward to substantive consideration while poorly evidenced applications do not.

SUPPORTING INFORMATION

5.16 The ideal is for applications to be fully supported with details of all relevant evidence that the applicant has uncovered pertaining to a case. The more that relevant documents can be identified at an early stage, the easier consideration of the application by all affected parties will be. The guidance should encourage full disclosure of all such ‘leads’.

5.17 This should not mean that the applicant has to go to the personal difficulty and expense of producing physical copies of all the documents in question. This issue achieved prominence through a recent High Court judgment - the ‘Winchester decision’. This ruling led to the disqualification of some applications to record byways open to all traffic, because they fell within the terms of section 67(6) of the Natural Environment and Rural Communities Act 2006. While not seeking to unpick the effect that this ruling has had on claims for byways open to all traffic, the Group recognises that the Winchester decision has also had a wider practical effect. It has led some authorities to impose more stringent requirements for applicants for the recording of other types of way to enclose with their application full copies of all evidence relied upon. The Group considers this a step too far.

5.18 Wherever the surveying authority itself holds the documents, or they are readily available in a public archive, the applicant should be able to rely on providing a clear description of the source(s) they rely on, and its reference and location. It should then be for the authority to check the sources sufficiently to do the initial prima facie sift.

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.

EXPLAINING THE SITUATION TO LANDOWNERS

5.19 Where an application is made for a pre-1949 route to be added to the definitive map and statement, this can come as a shock to the landowner, who might have been unaware of its possible existence up until then. It is important that first contact with affected landowners is sensitive to this, and sets an appropriate tone for constructive resolution of the matter.

IDENTIFYING LANDOWNERS

5.20 Early identification of affected landowners is important so that they can be approached at the outset. Applicants should assist with the efficient processing of applications by supplying a list of landowners and occupiers they know to be affected by the proposals, without actually contacting them directly as they must at present. The surveying authority will need to check that it has obtained details of any affected registered title owners. Where one or more of affected landowners and/or occupiers cannot be identified through this process, the surveying authority should place site notices along the route inviting them to come forward within a prescribed period.

MAKING CONTACT WITH LANDOWNERS

5.21 Currently, where an application is made, the applicant is required to serve notice on the landowner or occupier. The result is often that the first a landowner hears about a claim is a quasi-legal letter from a member of the public, based on the existing statutory model, without a proper explanation of the background to the correspondence. Experience is that this often gets the process off on the wrong foot, for obvious reasons. It would be much better for the surveying authority to make the first contact instead, explaining in a less formal way the situation, how it will be dealt with and where to find more information. The other crucial difference from the status quo is that the authority should only initiate this contact in cases where an application passes the Basic Evidential Test.

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.

NEGOTIATING SOLUTIONS

5.22 All parties potentially stand to benefit from early negotiated solutions in place of protracted legal battles. Landowners might not welcome news of an unrecorded pre-1949 right of way being claimed, but are much more likely to take a constructive approach if all the circumstances are properly explained to them, and there is some flexibility to mitigate any significant conflicts there might be with the modern land use. In a case where the landowner accepts in principle that there is a public right of way, it should be possible for the matter to be quickly and amicably resolved.

FLEXIBILITY TO MITIGATE IMPACTS

5.23 An obvious benefit to the landowner would be to create scope for the authority to agree changes to a pre-1949 right of way to take account of any significant impacts that might otherwise result on their own or others' use of the land. The Group has been impressed by examples of a surveying authority achieving a successful outcome by effectively making changes to a route at the same time as it is recorded on the definitive map and statement (i.e. concurrent modification and diversion orders). This kind of approach should be strongly encouraged but is subject to the difficulty that the diversion order is vulnerable to objections and might fail, leaving the landowner in a difficult position and the surveying authority having wasted cost of making the diversion order. It could be made considerably easier by a new power for the surveying authority to make agreements with the owners concerned about the recording of routes, as an alternative to the current procedures based on rigorous evaluation of all available historical evidence.

5.24 Codifying this approach in the legal framework would make it much easier for surveying authorities to take a positive approach to resolving what might otherwise be controversial and protracted cases. The recording agreement would obviate the need for a definitive map modification order based on evidence. It would need to apply to the entire length of the affected route that the landowner in question controls, rather than only the part that he wishes to modify. Where more than one land holding is involved, an advantageous agreement with one landowner should not necessarily be held up by another disputing a further section of route. A further benefit to the landowner making the agreement would be avoiding the present administrative fees for seeking a diversion in these circumstances.

5.25 This flexibility should be available for all types of route that can be recorded on the definitive map and statement, including byways open to all traffic. Under present law byways open to all traffic are treated differently, and changes involve going to the magistrates' court. Changes could be made to the alignment or width of the route, and also to authorise physical limitations along the way such as gates. Guidance should be

given about minimum widths. Reduction in status would not be possible under such an agreement, as it would always be potentially against the public interest.

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.

SPEEDING UP RESOLUTION OF CLAIMS

5.26 It is expected that it will be in all parties' interests to get the matter quickly resolved. To guard against possible time wasting, surveying authorities should have clear discretion to draw a line under unpromising negotiations as and when they see fit. Defra should consider whether a maximum time limit should be prescribed to prevent undue delay in the surveying authority either contacting the landowner in the first place, or concluding discussions with them.

AGREEMENTS TO BE BINDING

5.27 The agreement would be between the surveying authority and the landowner. It should be possible for representations to be made in the public interest about what is proposed (see below), but the advantages of this approach would be lost if it were possible for the agreement to be vetoed by a third party. Surveying authorities would need to be empowered to act on behalf of the public. Clear guidance to surveying authorities would be needed about the types of change that might be contemplated under this procedure.

5.28 Once an agreement has been made, it would be counter-productive and wasteful of resources to allow further claims in connection with the original right. Once a recording agreement has been made, further claims based on historical evidence relating to public rights of way along that route, or along its original line, would be ruled out – including claims that higher rights exist along it. The Basic Evidential Test, with its emphasis on there being convincing evidence of the likely existence and status of a route, should minimise the practical risk of any injustice to the public arising as a result.

PREVENTING LOSS OF RIGHTS OR CONVENIENCE TO THE PUBLIC

5.29 Clearly, bilateral agreements between authorities and landowners could have the potential to be unfair to the public in relation to the treatment of pre-1949 rights of way. So it is important that the public is kept informed of what is envisaged and can voice concerns if agreements appear to go outside of the scope described by guidance, or to

work against the public interest. The overriding principle should be that there should be no significant loss of rights or convenience to the public as a result of an agreement.

5.30 In some cases, the application will be to record additional rights over an existing recorded route. This implies there might be less scope for change, though in practice if a route is already established there is less likely to be a problem anyway. The surveying authority would be the arbiter of this and would be able to take into account any betterment provided by the landowner.

5.31 A two stage process is envisaged. Firstly, the surveying authority would discuss the case with affected landowners, and an in-principle agreement would be made⁹. Secondly, key stakeholders would be informed once an in-principle agreement has been made, and given an opportunity to make representations to the surveying authority. This could include either representations to the effect that proposed changes to the route would work against the public interest, or new evidence that might cause the surveying authority to reconsider the true nature of the public rights.

5.32 In more detail, once an in-principle agreement has been made, the surveying authority would write to:

- a. the applicant,
- b. the parish/town council, and
- c. prescribed bodies consulted when a definitive map modification order is being considered

informing them of what has been agreed. A copy of the proposed agreement would be appended to the letter or made available via the internet, together with details of any application and of any investigation the surveying authority has made of the status of the route. This information would also be available for inspection at the surveying authority offices. A period would be allowed for representations to be made. Any final legal agreement would be made after the period for representations has elapsed, and could incorporate any changes in the light of representations. The surveying authority should be required to have due regard to representations but it should not be possible for objections to block an agreement, otherwise the advantages of this approach will be lost.

<p>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,</p>

⁹ As this would be a legal agreement, landowners would need to provide the surveying authority with documentary evidence of their legal interest in the land. They would also need to notify anyone else with a legal interest in the land, such as a farm tenant, before making an agreement with the authority.

although the surveying authority should be required to have due regard to representations about the proposed agreement or the status of the route.

NATURE CONSERVATION

5.33 There will be some cases where recording a formerly ‘unknown’ right of way might have an adverse impact on an area that is statutorily protected for nature conservation reasons. In this case there should be consideration of the possible impact on the features concerned, with the potential where necessary to include this in discussions about routing of the path (as above) or, *in extremis*, to use the procedures introduced by the Countryside and Rights of Way Act 2000 to enable a public right of way to be diverted, or its use regulated, for this reason on a site of special scientific interest. At present, ‘join-up’ between definitive map modification order and nature conservation procedures is poor, with the attendant risk of breach of national or international protected area legislation. To improve this, it is proposed that Natural England should be informed by the authority in any case where it is proposed to add to the definitive map and statement a pre-1949 right of way.

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

GETTING DECISIONS ACCEPTED

5.34 A common cause of administrative delay in bringing cases to a close is where things are taken out of the hands of the surveying authority because of an objection to its determination. Cases would be resolved more quickly if there was improved understanding of the reasons behind the authority’s determination, and if the scope for challenging it were limited. The following proposals build on this theme.

FLUSHING OUT THE EVIDENCE

5.35 The better informed the surveying authority is, the better will be its decision. It is good practice for surveying authorities to consult with affected parties and other local stakeholders before making a determination. Where a case is being investigated following an application the surveying authority must formally consult with the bodies prescribed in legislation. It is important that this exercise is effective in flushing out any relevant evidence at an early stage. If relevant evidence is held back then the case is likely to end up being referred to the Secretary of State, leading to lengthy delays and escalating costs. Whilst it would be unreasonable to rule out an objector submitting additional evidence after the surveying authority has made its determination, there should be scope for an award of costs against them if it is clear that relevant information was wilfully held back.

5.36 Guidance should emphasise the importance of applicants and objectors bringing forward relevant information as early as possible, and encourage surveying authorities to consult more widely, if appropriate, to reduce the risk of further evidence coming to light at a later stage.

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.

IMPROVING UNDERSTANDING

5.37 People are much more likely to accept a decision if they can understand the basis on which it has been made. Openness and sharing of information about the reasons for a decision and the evidence on which it was based will reduce the risk of misunderstanding and people choosing to make objections that then protract the process.

5.38 Part of the communication challenge is getting across to all interested parties – applicants, affected landowners, other potential objectors, and also local authority elected members – that the decision to be made in these cases is wholly, or mainly (where agreed changes to the route are envisaged), a legal one. Too often, either the determination process itself or the subsequent objections process give an airing to irrelevant policy considerations in circumstances where these can in fact have no bearing on the outcome of the case.

5.39 Costs come into this as well. A key objective of the Group’s proposals is to reduce the overall burden represented by the existing procedures for making changes to the definitive map and statement. The internet is increasingly being used as a cost effective and efficient way of sharing information: surveying authorities should be encouraged to make full use of this possibility. The current stipulations on how notices of all kinds must be published should be reconsidered – particularly the need for newspaper adverts, which are expensive and increasingly ineffective. The requirement for notices to be published in a newspaper could be minimised by these referring those with an interest to where they can view the relevant details online or at the surveying authority’s offices. A significant cost saving could be made here without any significant adverse consequences.

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.

MAKING DECISIONS STICK

5.40 Currently, wherever the surveying authority receives an objection or representation to an order these are passed to the Secretary of State regardless of their merit, leading to delays and increased costs. Remarkably, this has to happen even where only positive representations are made. The improved understanding of the surveying authority's determination that we are promoting must be coupled with making sure that well-made decisions stick, and are not exposed to irrelevant challenge. Where there are opportunities for objections, the onus should be on the objector to make their input relevant and timely.

5.41 People cannot be prevented from submitting an objection that is in fact irrelevant: the key issue is how such objections may be treated. Allowing objections that are not relevant to be summarily discounted by the surveying authority would be an important step forward. Objections that are not relevant should be treated merely as a registration of interest in the outcome. Defra should consider whether a suitable remedy already exists, or a more specific one is needed, to address the possibility that a surveying authority might discount an objection unreasonably under this power.

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.

OBJECTIONS WHERE IT IS DECIDED NOT TO MODIFY THE DEFINITIVE MAP AND STATEMENT

5.42 If the applicant objects to a surveying authority deciding not to make an order, this is currently treated as a separate right of appeal. As with objections, the appeal is to the Secretary of State although in this case it is dealt with by the National Rights of Way Casework Team at Government Office for the North East. A problem with this approach is that a case can potentially bounce between the surveying authority and Secretary of State, where first the applicant appeals and the Secretary of State instructs the surveying authority to make an order which is then objected to, sending the case back to the Secretary of State for a second time. The Group considers that this separate right of appeal could be done away with. The surveying authority will have already established that a prima facie case has been made and will have uncovered any counter evidence through its investigations or as a result of consultation. A single opportunity for objection, causing the case to be taken out of the surveying authority's hands for review by a higher authority, will further encourage all evidence to be put forward at an early stage.

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

CORRECTING WRONG DECISIONS

5.43 It is hoped that by encouraging openness and early sharing of information, instances where the surveying authority makes a wrong determination will be rare. Where problems do arise, all parties will benefit if the matter is dealt with effectively and efficiently. Contested cases are referred to the Planning Inspectorate to review on behalf of the Secretary of State. The Inspectorate can call a public inquiry or can review cases by written representations or at a hearing. Currently, the Inspectorate typically defaults to public inquiry for cases that appear contentious or have more than one objection, leading to long delays and considerable extra costs.

5.44 The Group considers that pre-1949 rights of way cases should normally be dealt with by written representations. Unlike user claims, there is no need for examination of witnesses since the case is based on whether the historical documentary evidence does or does not show that a public right of way exists. Such evidence is eminently suitable for review by written representations, and making this the norm would send out a strong signal to all parties about the nature of the evidence that is relevant. The Planning Inspectorate should of course retain the flexibility to opt for a hearing or even an inquiry where the circumstances warrant this, but it must not be perceived as an objector's right.

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.

5.45 Where objections are sustained they will not necessarily affect all aspects of a case, particularly where several routes are concerned. Hence a further suggestion is made for the planning inspectorate to have a similar flexibility to the surveying authority and be able to split a case such that only the objected part need be reviewed.

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

CORRECTING TECHNICAL ERRORS

5.46 Where there are more minor issues, such as an inconsequential error in the wording of an order, it should be possible for these to be corrected by the surveying authority with minimal further procedure. Again this will prevent cases being unnecessarily referred to the Secretary of State. The Group proposes that the surveying authority should publish a draft order and have greater flexibility to correct any technical errors that might be pointed out. The draft order could be published at the time the surveying authority advertises its determination, or at a later stage if the surveying authority is directed to make an order by the Secretary of State. The main point is to avoid cases going backwards

and forwards between the surveying authority and the Planning Inspectorate due to inconsequential errors.

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

STATUTORY REVIEW

5.47 All decisions made by the Secretary of State are open to challenge in the High Court. Special provision is made, within the legislation governing the Secretary of State's decisions about changes to the definitive map and statement, for challenge to be postponed until the statutory procedure has been allowed to run its course. This includes provision that at the end of the process, an aggrieved party may have recourse to the High Court by a special statutory review process if they are not satisfied that the statutory procedure has been correctly followed. Currently where the court finds against the Secretary of State this results in the original definitive map modification order being quashed and the surveying authority having to re-make the order. The Group considers that this should be changed so that it is the Secretary of State's decision rather than the surveying authority's order that is quashed. The effect of this change would be that the original order would stand to be re-determined by the Planning Inspectorate on behalf of the Secretary of State.

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.

RECOURSE WHERE THERE IS DELAY

5.48 Long delays in determining a case can lead to participants becoming frustrated. The bulk of proposals made in this report are designed to avoid this situation arising by providing surveying authorities with the means to resolve cases quickly and efficiently. Even so, a part of the overall package must include making it possible for participants with justifiable complaints to have access to strong sanctions to deal with any extreme cases of surveying authority inaction. Such recourse should be designed in such a way as not to generate extra work and thus penalise surveying authorities that are positively addressing the issue and making good progress. Recourse should be available to prevent inaction at any stage of the procedure but there is a particular concern in relation to failure to determine applications in a timely fashion and growing backlogs.

STRONGER SANCTIONS AGAINST FAILURE TO DETERMINE APPLICATIONS

5.49 Under current procedures, applicants can appeal to the Secretary of State if their application has not been determined within twelve months. Appeals are processed by the National Rights of Way Casework team, based at the Government Office for the North East. There is no national guidance on the sequence in which applications should be dealt with by the surveying authority. Most have their own priority statements that favour treating applications chronologically, with limited exceptions such as where an application would help to address an urgent public safety issue or the path is under threat from development. Concerns have also been raised about delays in processing the appeals themselves. Few if any have been upheld. The Secretary of State generally accepts the argument that lack of resources is limiting progress.

5.50 The present position is highly unsatisfactory. The existence of an appeal process holds out the promise of a speedy resolution for those wanting a case resolved, but in reality there is no redress if applications are effectively ignored for long periods. The situation is frustrating both for applicants wanting their claim to be considered, and for landowners affected by allegations that a public right of way exists over their land.

5.51 The Group has noted the value of the statutory notice procedures under the Highways Act 1980 to oblige a highway authority to comply with its statutory duty in respect of putting a highway back in to repair and removing serious obstructions. We consider that an equivalent procedure could provide more a powerful and sophisticated means of addressing extreme cases of surveying authority inaction than does the current system of appeal to the Secretary of State. The courts should be given powers to insist that a surveying authority specifies when an application will be determined, and ultimately to force the authority to make a determination and any consequent definitive map modification order. Landowners can be adversely affected by pending applications so should be able to have access to the same recourse as an applicant. In implementing this proposal, Defra should keep in mind that court fees, which have recently been increased substantially, represent a significant constraint on the usefulness of such sanctions.

<p>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.</p>
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ALLOWING A REASONABLE DEFENCE FOR THE SURVEYING AUTHORITY

5.52 The aim of introducing this measure is to provide an effective sanction targeted against poor-performing authorities. The detailed procedure should be designed not to penalise authorities that are making reasonable progress in dealing with applications.

Where a court does need to get involved it must always be mindful that things ‘cannot happen overnight’, and will always give a reasonable time in which to do the work. Experience of the notice procedure for obstructions seems to show that the notice/order process is as much educational as remedial. The same would be true here. The purpose of having such a process available is primarily to persuade the surveying authority to do the necessary work without the matter having to go before a court. We would expect word of the first few court appearances to get around quickly, leading to a change in attitude from some of the worst-performing authorities.

5.53 If the surveying authority has not responded to an application or determined it within a reasonable amount of time – twelve months say – then the applicant or affected landowner should be able to serve notice on the surveying authority requesting them to make a determination. This could be linked to the date originally given and specified in the register of applications. The surveying authority would have to reply within one month stating when the application will be determined. The amount of time allowed would depend on the circumstances but a maximum of 36 months might be considered. This is to allow a reasonable time for the matter to be resolved before it goes to court. If the surveying authority does not reply with a date within one month, the complainant would then be able to apply to the court for an order stating the date by which the application must be determined. The court will be able to take account of relevant circumstances such as the rate of progress the authority is making with any backlog of applications, or any effort it is making to resolve the case by other means.

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.

TRANSFERRING OWNERSHIP OF APPLICATIONS

5.54 Situations can arise where the original applicant cannot see the process all the way through to determination. Precious resources could be wasted for example where a claim is disputed and there is no one to advocate the case. In order to help guard against this it should be possible for ownership of an application to be passed on by devolution in writing, copied to the surveying authority, or by express intention in a will.

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

CHAPTER SIX: PREPARING FOR THE CUT-OFF

CLOSING THE DEFINITIVE MAP AND STATEMENT TO HISTORICAL RIGHTS

6.1 In Chapter Four:, we proposed that the existing CROW Act provisions, for pre-1949 rights of way to be extinguished if unrecorded at the cut-off, should be brought into force so that they can take effect as envisaged by that Act. The Group's agreement to this principle is contingent on the whole package of proposals described in this report being implemented, and their effectiveness being monitored by Government.

6.2 One of the reasons for framing the Group's proposals in this way is recognition that the existence of the cut-off date gives impetus to the action that is needed before closure on these matters can be achieved. The Group believes it would clearly be unacceptable for useful or potentially useful public rights to be lost as a result of implementing the cut-off. Its recommendations are designed to minimise this risk, while allowing sense to be made of situations where historical rights clearly conflict with modern land use.

6.3 At present, recorded rights can be challenged on the basis of pre-1949 evidence, and possibly deleted or downgraded. Once the cut-off takes effect, this should no longer be possible. The cut-off provisions already address this point for recorded bridleways¹⁰, but this should be extended to cover all recorded rights of way.

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.

MONITORING AND REVIEW OF PROGRESS

6.4 In implementing the recommendations in this report, Government will need to monitor closely the progress made under a streamlined system in recording or protecting useful or potentially useful pre-1949 rights of way before the cut-off. For this reason, the Group proposes that a stakeholder review panel is constituted to maintain a periodic oversight of this aspect of delivery, and to confirm to Government in due course that the cut-off can safely be implemented in the light of the progress made. A baseline survey of backlogs and cases already in the 'pipeline' will be needed against which progress can be assessed. The Group envisages that this panel would make an initial report in 2015,

¹⁰ Section 55 of the Countryside and Rights of Way Act 2000 provides that if a way is wrongly recorded as a bridleway (when in reality it had only footpath rights) at the cut-off, these rights continue.

allowing time for the improvements we have proposed to be implemented and to begin to have a real effect on the capture process.

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.

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

6.5 Improved local authority performance is fundamental to enabling the cut-off to be implemented. There is a power under section 71 of the Countryside and Rights of Way Act 2000 to make regulations to require highway authorities to report on their performance. It is recommended that this is used to ensure that a more comprehensive picture of progress is available.

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

EXEMPTIONS

6.6 The Group considers there are two main ways to prevent useful or potentially useful public rights of way being lost as a result of implementing a cut-off date:

- a. capture them on the definitive map and statement before the cut-off occurs; or
- b. find ways to exempt them from the effect of the cut-off.

6.7 In practice it will be necessary to strike a pragmatic balance between these two solutions. Capturing every useful or potentially useful right before the cut-off is implemented would be likely to require the cut-off to be deferred substantially beyond the original date of 2026. Conversely, accelerating the cut-off by relying on very extensive exemptions from its effects would militate against the core objective of delivering much greater certainty as to where rights exist.

6.8 Implementing the cut-off will extinguish any unrecorded footpaths or bridleways. Because this is a crude instrument, safeguards are included in legislation for exemptions to be specified in regulations to prevent unintended loss of rights. At that point the emphasis should be particularly on exempting from the effects of the cut-off the types of route that are likely to be in public use. 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. The Group's favoured approach is to minimise the need for blanket exemptions by maximising the practical scope for capturing useful or potentially useful rights of way through the various changes we are recommending.

6.9 A summary of the various categories of exception/exemption power under the Countryside and Rights of Way Act 2000 is given in Annex 7. Certain categories of public right of way are automatically exempted from extinguishment at the cut-off, and regulations can be made to specify other categories.

TRANSITIONAL PROVISIONS FOR APPLICATIONS UNDETERMINED AT THE CUT-OFF

6.10 Applications that have not been determined by the cut-off date would be vulnerable unless special provision is made in relation to them. Existing powers in the Countryside and Rights of Way Act 2000 allow regulations to provide transitional protection from the effect of the cut-off for any rights to which such applications relate. Using this power to safeguard any rights associated with registered applications would help, but would not allow the surveying authority time to screen the most recent applications against the Basic Evidential Test, and to register those passing it before the cut-off takes effect. The Group recommends that a brief period should be provided after the cut-off date, but before the associated extinguishment of unrecorded rights takes effect, to enable this screening and, where appropriate, registration to happen. No new applications from the public would be permitted during this post cut-off period. The transitional protection would lapse if an application were subsequently rejected.

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.

EXEMPTION OF ROUTES FEATURED ON CERTAIN OTHER RECORDS

6.11 As noted above, a key concern with implementing the cut-off is that it will lead to extinguishment of routes that are in regular use by the public. One way of dealing with this would be to make sure that all such routes are recorded on the definitive map and statement. However, doing this would be a major undertaking for many authorities and is not necessarily a good use of public funds, particularly when many of the routes in question are already identified within other highways records.

THE LIST OF STREETS AND LOCAL STREET GAZETTEER

6.12 The definitive map and statement is an official record of the public's legal rights. The impetus for establishing it was concern about the rate at which public rights of way were being lost, and the need to ensure their legal protection. There is no equivalent record of rights of way for motor vehicles (carriageways). Instead, local authorities must keep a list of streets¹¹ and a local street gazetteer¹², and must also upload information to the national street gazetteer¹³. Both the list of streets and local street gazetteer are open to public inspection; access to the national street gazetteer is limited. None of these records is definitive as to the legal status of a public right of way, and entries do not normally expressly distinguish between carriageways and other types of route. The list of streets is the oldest of these and came about as a result of the mid-nineteenth century drive to pave and install sewers to urban streets. The local and national street gazetteers are much more recent and were instigated to help utility companies identify whom to contact when carrying out works. There are more rigorous standards governing the creation and maintenance of these two records.

6.13 Conventional wisdom holds that each of these records fulfils different requirements and that they can, theoretically at least, co-exist quite happily. There is nothing to preclude overlap. For example the legal status of an alleyway can be recorded as a public footpath on the definitive map and statement, with details of who is responsible for maintaining it entered into the local street gazetteer. In practice there is a lack of consistency over which routes are included in the different records. The separation between the definitive map and statement and list of streets/local street gazetteer is often compounded by their being the responsibility of different local authority departments.

6.14 A common assumption is that there is no need to record a public right of way on the definitive map and statement if it is shown on the list of streets/local street gazetteer. In reality, this approach fails to offer due protection to these public routes. As things stand, it means that they would be 'unrecorded' as rights of way at the cut-off, and any that could

¹¹ Highway authorities have a duty, under section 36 of the Highways Act 1980, to keep a list of streets, being the highways that they maintain at public expense – so military roads, for example, would not be included.

¹² Part III of the New Roads and Street Works Act 1991 includes a provision for highway authorities to maintain a street works register. Among other things, the register includes a local street gazetteer to help utility companies identify who to inform when carrying out works. Each street within the register is allocated a unique reference number. The definition of "street" is a very broad one (section 48), and the register includes both highways maintained at public expense and also streets maintained by others – the latter being collectively referred to as 'unadopted streets' and including private roads.

¹³ The national street gazetteer is a national database system hosted by IDEA, a subsidiary of the Local Government Association. Highway authorities are required to upload prescribed information regularly to a password-protected website that provides a means by which utility companies can interrogate all the information in one place using automated routines.

be shown to have existed in 1949 would be extinguished. This is particularly true for pedestrian routes in an urban context, which are often of great antiquity but without any clear documentary evidence as to their status. Yet such routes are typically well used and an integral part of the local streets network. Hence an obvious exemption from the effect of the cut-off is public highways identified within the list of streets/local street gazetteer. This would encompass both routes that are publicly maintainable, and private streets carrying public rights.

6.15 It is assumed that by doing this the so-called ‘other routes with public access’ (ORPAs) shown on modern Ordnance Survey maps would effectively be protected, since this information is derived from the list of streets.

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.

DEALING WITH INCOMPLETE RECORDS

6.16 The lists of streets/ local street gazetteer are not always fully correct, complete and up to date. So the protective effect of such an exemption would be partial rather than comprehensive. Where all or part of a route is no longer maintainable by the highway authority, it may have been removed from the list of streets without any corresponding move to record the status of the route on the definitive map and statement.

6.17 Another cause for concern is the difficulty of locating records where there have been boundary changes following local government reorganisation. In this situation the list of streets for some areas may be incomplete or missing altogether, so these records cannot be relied upon to provide the necessary breadth of exemption. The stakeholder review panel we have recommended (proposal 19) will need to receive evidence about the extent of such gaps, and advise on whether further types of exemption are required to protect routes that are in regular public use.

6.18 Granting exemptions of this type would not create any new public rights where they do not already exist along routes shown on the records in question. It would merely protect against the loss of any public rights that do exist at the cut-off, so long as they are shown on the relevant record. This distinction would help to allay any concerns as to whether particular routes might have been wrongly added to such a document as public highways.

6.19 Case studies from pioneering authorities demonstrate how a common sense approach can be taken to addressing the recording of routes that are in public use in a predominantly urban context. ‘Omnibus orders’ or the ‘York procedure’ generally result in a single modification order recording without objection a significant number of paths in a

given area. The Group recognises the value of such initiatives and would like to see them applied more widely where the circumstances allow.

ABILITY TO MAKE A PRESCRIPTIVE CLAIM

6.20 The cut-off does not affect the ability to claim rights of way on the basis of long use. Perversely though, there could be an unintended consequence. There might be an incentive, for those wishing to avoid such claims succeeding, to seek to demonstrate that the route was in fact a pre-1949 right of way, and was therefore stripped of any public rights at the cut-off. The Group believes it should be possible in such a case to claim a prescriptive right of way where there has been the requisite period of long use, and that express provision to this effect is required. This might simply mean making a provision that a prescriptive claim is not to be defeated merely by showing that all or part of the user evidence relied upon in fact related to public use by right, as opposed to as of right¹⁴.

6.21 Conversely, the Group considers it important that the right established by a prescriptive claim made after the cut-off reflects the actual use that can be shown to have taken place during the period relied upon. It should not be possible after the cut-off for the applicant to use pre-1949 documentary evidence to claim that the status of the route is higher than that for which there is recent user 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.

THE SURVEYING AUTHORITY'S OWN ROLE IN PROTECTING USEFUL PRE-1949 RIGHTS

6.22 In accordance with their existing statutory duties, surveying authorities will themselves need to assess the potential for loss of useful or potentially useful pre-1949 rights to the cut-off provision, and take action to prevent this. Most surveying authorities already keep an informal list of possible anomalies within the definitive map and

¹⁴ The legal point here is that if the public have actually enjoyed a legal right to use a route up to 2026, an applicant would be unable without this special provision to make a prescriptive claim to record the right. This is because a prescriptive claim must demonstrate long use 'as of right' (i.e. without permission, force or secrecy). As things stand, this is not possible in a case where a legal right already existed along the route for all or part of the period of user that is being relied upon by the claim. The Group is clear that this legal distinction should not be allowed to prevent a successful application in a case where in all other respects the requirements for a prescriptive claim are met.

statement, such as an unexplained change in the existence or status of a route at a parish boundary. The period leading up to the cut-off will present a final opportunity for the surveying authority to resolve any outstanding issues of this kind by reference to the available documentary evidence. Where a surveying authority becomes aware of routes that it considers satisfy the Basic Evidential Test, there should be full and early involvement of owners and occupiers in determining the matter. Some surveying authorities already declare cases like this by making self-applications.

6.23 Defra should consider and consult on whether this kind of self-application should remain possible during the brief post cut-off period we recommended earlier for registration of recent applications that pass the Basic Evidential Test. A possible precedent for this is the provision that was made under the Commons Registration Act 1965, allowing authorities a 6-month period after the registers closed to public applications during which any final anomalies could be addressed.

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.

CORRECTIONS AND CLARIFICATIONS

6.24 Keeping records up to date and accurate is a significant challenge in its own right. A general problem for surveying authorities is the difficulty in correcting errors with the definitive map and statement. These can occur for a variety of reasons including map sheet joins, mapped alignments that are physically impossible to use, or problems that result from mapping systems having become more precise when the original definitive map and statement was often created at relatively coarse scale. Appropriate quality systems are needed to allow day to day management of records.

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

6.25 A possible scenario where problems might arise as a consequence of implementing the cut-off is if there is a mistake or lack of clarity in how a pre-1949 right of way is shown on the definitive map and statement. For example the line on the map may not have ever matched the one on the ground, or there may have been a transcription error as to the nature of a public right of way, or the precise alignment or width may be unclear. It is vital that implementing the cut-off does not prevent clarification of such details in accordance with clear guidance from Defra, and subject to appropriate safeguards.

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. Nothing in our other proposals is intended to prevent this.

CHAPTER SEVEN: SCOPE FOR INTEGRATION AND OTHER IMPROVEMENTS

7.1 Rights of way are only one part of the wider system of highways and other local routes. With increasing congestion on the roads, and the drive for sustainable travel alternatives, the need for management of the total highways network to be efficient, economic and effective is stronger than ever. Viewed in this context, greater integration of the management and administration of this system, including integrated recording of the range of similar public rights and their status, might be highly beneficial. This topic needs more substantive discussion with all of the relevant interests but we believe that the possible benefits mean that this is something Government should consider in the longer term.

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.

POSSIBLE AREAS WHERE IMPROVEMENTS COULD BE MADE

GREATER INTEGRATION OF HIGHWAYS RECORDS

7.2 Although the original purposes of the definitive map and statement, the list of streets and the local street gazetteer may have been different, there is considerable overlap between the routes they concern. Continuing to treat these as separate systems appears wasteful of resources and creates the risk of records increasingly diverging over time. Proper integration of all highways records, including the definitive map and statement, is an obvious next step, and starting to plan for it now makes sense. A particular area where efficiencies might be achieved could be in clarifying the need for a list of streets and whether that need could be better met by an integrated system.

COMPUTERISED SYSTEMS

7.3 The definitive map and statement was established before computer-based data management systems became the norm. The majority (76%) of surveying authorities now manage the definitive map and statement in digital form, with the official paper record only periodically updated. Some surveying authorities (42%) have gone further, and have made this information available on-line. Fully computerising the definitive map and statement would not be without its problems, and could not happen overnight. However, looking to the future and considering the enormous benefits of modern data management systems, this must be the direction of travel.

7.4 Highways maintenance records are way ahead in this respect. The local street gazetteer and associated national street gazetteer database were introduced more

recently than the definitive map and statement and have been developed as an electronic system. It will be important to learn from this experience of computerisation when taking forward the proposed greater integration of highways records.

PROVIDING INFORMATION TO THE PUBLIC

7.5 A particular benefit of more integrated administration would be the improved scope to provide information to the public. Currently it is difficult for a member of the public to get a comprehensive view of the available highways network, whether it is a cyclist wanting to plan a route or a potential purchaser requesting a conveyance search when buying land. Integrated, computerised records, compiled and maintained to consistent standards, would provide a strong platform from which to meet a range of information and other needs.

ROUTES FOR CYCLISTS

7.6 A particular example of the difficulties that arise from the separation between recording legal status and managing the highways infrastructure is that of routes for cyclists.

7.7 Cycling is very much a part of the sustainability agenda, and this sector has seen hugely successful improvement schemes in recent years. You might expect routes for cyclists to be recorded on the definitive map and statement – a record of non-motorised rights of way – but they are not. Currently where a footpath is converted into a cycle track, it gets removed from the definitive map and statement, and that alone is sufficient to draw objections. It would be strange to record a cycle track as a bridleway – meaning that cyclists would need to give way to horse riders – or as a restricted byway. Equally it is a cause of resentment that horse-riders have no right to use cycle routes in the same way that cyclists may use bridleways. In principle, the Group feels that this separation is looking outdated: cycle routes should be recordable on the definitive map and statement, and where appropriate should be available for use by all non-motorised users. This idea and the whole issue of how cycle tracks are created require further thought and development, so that Government can consult on it in due course.

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.

SIMPLIFYING LEGAL STATUS

7.8 A related topic is whether the current classification of public highways is the most appropriate for modern needs. Currently the legal status may be shown on the definitive map and statement in any of these ways:

- a. footpath;
- b. bridleway;
- c. restricted byway; or
- d. byway open to all traffic.

7.9 On the face of it, a single type of legal status for horse-riders, cyclists and carriage drivers would be simpler. All are forms of non-motorised transportation. There would be significant practical difficulties in giving effect to this principle, and the subject is not within the core scope of this Group, but the issue should be given further consideration by Government.

GATES ON BYWAYS

7.10 Currently it is not possible to apply for authorisation to erect a gate on restricted byways or byways open to all traffic. There are circumstances where this is desirable, for example to control movement of livestock. The Group considers that it should be possible for an owner to apply to a highway authority for authority to erect new gates on such routes in line with existing provisions for their erection on footpaths and bridleways. Defra should consider this in more detail and consult on how such a provision could be introduced and would work in practice.

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.

CONCLUSION

7.11 As a Group of people with wide-ranging views, interests and constituencies, we have worked long and hard to develop this balanced package of proposals. We commend them to Natural England, and to our sectors and our peers. We are convinced they provide the basis for real and workable improvements in this field of law, procedure and practice.

7.12 As individuals, and in our day-to-day roles, we will work to promote and support their effective implementation, and to help engender the culture shift that we all recognise as essential if the greatest benefit is to be realised when they are implemented.



Kate Ashbrook



Janet Davis

A. Lewis







J. Thompson

SJ Steer

Guy Williams

Mark Costen



ANNEX 1: TERMS OF REFERENCE

Purpose

Natural England has formed this Working Group to bring together representatives of the key relevant interests nationally to consider ways of improving access through public rights of way. In particular, the Group will:

- a. consider the issues and difficulties associated with the process of recording of pre-1949 and other public rights of way that are not currently shown on the definitive map and statement maintained by surveying authorities; and
- b. work together with the aim of reaching consensus on a balanced package of strategic reforms in law and procedure that in the Group's view would bring real benefit to the various interests potentially affected by the claimed existence of such rights.

Where appropriate, the Group will draw attention to other issues it identifies that may effect improvement of access.

Structure

A clear numerical balance between the three sectors of interest in this subject:

- a. Land management interests
- b. User interests
- c. Local authority interests

Membership of the group is by invitation of Natural England.

A small enough group to permit workable debate on complex issues.

The Group may from time to time ask others outside of the membership to attend meetings and contribute to discussions.

A list of members is appended at Annex 1.

Style of working

Independent chairing ensures a proper balance of input from members.

Honest, open debate among a group of people that listen to and respect each other's opinions, and expect their own to be treated in the same way.

Members commit in advance to personal attendance at all the Group's meetings, which will be programmed in advance.

A determination to make real, positive, innovative progress on a group of issues around this subject that in the past have proved difficult to resolve.

A strategic approach, informed by appropriate expert input and evidence from within and outside the Group.

Each member contributes to the Group of their own knowledge and experience, whilst at the same time acting as a conduit and ambassador for the Group, encouraging others in their sector to input to the Group's work by sounding out ideas with them or gathering information.

Natural England will co-ordinate the sharing of information both with and within the Group.

Natural England will prepare a note of key points from discussions, to be confirmed with the Group and then shared more widely to enable others to contribute to the Group's work.

The Group's final report, building on these meeting notes, will be drafted by Natural England and finalised with the Group through discussion and correspondence. The report will be made public.

Members' expenses

In general, it is expected that the organisations to which members belong will pay travel expenses; where this is not possible Natural England will pay travel expenses.

Natural England will pay accommodation costs for meetings involving an overnight stay.

ANNEX 2: MEMBERS' BIOGRAPHIES

Ray Anderson

Ray is a recently retired civil servant whose career was centred on MAFF and Defra. Most recently he sought to link policy to delivery for the Single Payment Scheme, following the problems experienced in delivering payments for the 2005 scheme year to farmers in England. He was previously responsible for the Whole Farm Approach, an innovative on-line system to help farmers develop the sustainability of their businesses. He chaired an independent stakeholder group on the agricultural management of commons which reported in 2003, leading to the commons legislation of 2006.

Andrea Graham

After 18 years working in scientific research for the horticultural and agriculture industry, Andrea joined the National Farmers Union three years ago as their Countryside Adviser. This role involves providing national policy advice to the NFU on many key countryside issues including agri-environment schemes, wildlife and biodiversity, the historical landscape as well as access and rights of way. One of the main tasks has been to take the National Farmers' Union lead on representing the views of members on the provisions for improved coastal access under the Marine and Coastal Access Act 2009.

Alasdair Mitchell

Alasdair is a farmer, freelance journalist and director of a marketing firm. A member of Northumberland National Park Authority, he has an avid interest in countryside issues, with particular concerns about the impact of access policy on rural residents and protected landscapes. He is a member of a variety of bodies, including the Soil Association and the Game & Wildlife Conservation Trust, and has also served on his local access forum.

Sarah Slade

Sarah is a Chartered Surveyor and farming landowner, with a particular interest in planning and rights of way issues. For the last ten years she has worked for the Country Land and Business Association, covering the south west as Regional Surveyor and dealing with a variety of issues, including planning, compulsory purchase, agricultural schemes and management, conservation, diversification, and access and public rights of way.

Whilst working as Regional Surveyor she also took on the role of National Dairy and Bovine TB Adviser at the Country Land and Business Association. In 2007 she became the Country Land and Business Association's National Access Adviser, and has recently returned to the role following the birth of her fourth child. Rights of way and access to the countryside have always been important issues for land managers, whether it be the management of the

public themselves, or managing land to accommodate existing rights of way. She is a member of the Devon Countryside Access Forum

Susan Steer

Susan is a rural chartered surveyor and land agent and runs her own business, Steer Ethelston Rural Ltd. specializing in matters relating to rural property, operating nationally and based in Cheshire on the family organic farm.

She is the chairman of the Royal Institution of Chartered Surveyors Countryside Policy Panel. This panel is the Institution's rural policy committee providing professional recommendations, in the public interest, to rural policy makers. Susan and her panel have recently been actively involved in the coastal access proposals of the Marine Bill.

Susan was one of the first three ladies to be admitted to The Royal Agricultural College to read Rural Estate Management in 1979. Her career started with the Land and Water Service of the Ministry of Agriculture and after a spell with a firm of land agents in Cheshire she joined Manchester Airport where she was involved in the £200 million second runway scheme.

Gwyn Williams

Gwyn is currently Head of Reserves and Protected Areas for Royal Society for the Protection of Birds, responsible for co-ordinating the Society's land acquisition and reserve management work, and planning casework – conserving Natura 2000 sites and SSSIs from damaging development. He has worked a variety of roles for RSPB since 1979, but has led on access policy for the Society for most of this time.

He has contributed to several Defra and Agency working groups as diverse as the Defra Lead in Gunshot Working Group, the CA National Countryside Access Forum, Defra Integrated Agency Stakeholder Group, Defra Flood Management Stakeholder Group, UK SPA and Ramsar Scientific Working Group, as well as leading RSPB input to several Bills (CROW 2000, NERC 2006, Common Land 2006, and the coastal access elements of the Marine and Coastal Access Act 2009).

Kate Ashbrook

Kate has been general secretary of the Open Spaces Society since 1984, and has campaigned for public paths and rights of public access for more than 30 years. She is a trustee of the Ramblers and the Campaign for National Parks, a member of the Institute of Public Rights of Way and Access Management, president of the Dartmoor Preservation Association and patron of the Walkers Are Welcome Towns Network. She was a member of the Countryside Agency board for its whole existence (1999-2006). In 2002 she won in the Court of Appeal against East Sussex County Council's failure to reopen the 'Hoogstraten' footpath.

Janet Davis

Janet has worked for the Ramblers for over 25 years, having first been appointed to monitor the working of Part III the Wildlife and Countryside Act 1981, and as secretary to the Rights of Way Review Committee. She has worked in rights of way policy and law throughout her time at the Ramblers and has particular experience of working on Bills during their parliamentary progress (Part II of the Countryside and Rights of Way Act 2000; the Rights of Way Act 1990, the Clean Neighbourhoods and Environment Act 2005, and the Natural Environment and Rural Communities Act 2006). Janet works closely with the Ramblers legal advisors on bringing legal action in the name of the RA, and is the editor of 'Footpath Worker' (the Ramblers specialist bulletin on legal aspects of rights of way). Janet enjoys walking and has personally tackled a number of National Trails including the Pennine Way.

Robert Halstead

As a chartered surveyor in private practice in West Yorkshire, Robert specialises in planning, development and rights of way, with previous experience in public and private sector land management. He is also involved in rights of way applications and public inquiries.

Active in rights of way as both a regular off-road cyclist and as a trustee of the South Pennine Packhorse Trails Trust, Robert also rides both classic and modern motorcycles on a regular basis and also acts as a voluntary respondent for the Land Access and Recreation Association. He is also a member of the Cyclists Touring Club, Trail Riders Fellowship, Scott Owners Club and Vintage Motor Cycle Club.

Alan Kind

Alan first had his interest in ancient highways sparked when his father took him to see part of a 'Roman road' on the moors near Harrogate approaching fifty years ago. Work as a volunteer from the late 1970s evolved into a professional relationship with various organisations and individuals, including the Byways and Bridleways Trust and Land Access and Recreation Association. Alan's particular current interests are surfacing and repair, disabled access, stock control barriers, and the 'downgrading tests' in definitive map modification orders, and he has over 25 years experience in research, making applications, and appearing at public inquiries.

Mark Weston

Mark qualified as a solicitor in 1988 and worked in local government for 18 years advising councils on planning, highway, and rights of way issues, appearing as the council's advocate at court and at public inquiries.

He took up his position as Director of Access, Safety and Welfare with The British Horse Society in 2005, and advises the Society on all equestrian access issues. He represents the Society on the Rights of Way Review Committee and the Equestrian Access Forum.

Mark is a Director of the British Horse Industry Confederation and a member of the Shropshire Local Access Forum. He is a keen rider and horse owner.

Richard Gething

Richard is a parish councillor living in rural Herefordshire and has been chairman of the Herefordshire Local Access Forum since its inception in 2003. He currently represents the National Association of Local Councils on the Rights of Way Review Committee. He contributed to one of the Pathfinder Projects as part of Natural England's review of Discovering Lost Ways and was a member of its Advisory Group. He has experience of committee work and particularly in achieving workable solutions to complex issues.

Alex Lewis

Alex Lewis is a qualified, but currently non-practising, solicitor who joined Hampshire County Council's rights of way section in 1994 after 12 years in private practice dealing with various aspects of property law. She has had over 15 years experience in dealing with definitive map issues and public path orders. Alex has represented the Institute of Public Rights of Way and Access Management Limited (IPROW) on the Rights of Way Review Committee and is on the Editorial Board of the Rights of Way Law Review, for whom she also writes articles, and lectures.

Rosalinde Shaw

Rosalinde worked as a Land Surveyor for 8 years before joining the rights of way service of Hertfordshire County Council in 1994, where she is now the definitive map team leader. She has a thorough understanding of definitive map processes gained over the last 15 years, and contributed to the early development of the national Good Practice Guide. She is the Local Government Association's representative on the Rights of Way Review Committee. As a regular user of rights of way, she understands the importance of access, the frustrations of an incomplete network, and the problems that are faced by landowners.

John Thorp

John has long experience of public rights of way in urban areas working at both Knowsley and Sefton Metropolitan Borough Councils, and as public rights of way officer at Warrington Borough Council since 1999. He has represented the Association of Metropolitan District Engineers rights of way group, Merseyside area, at their northern region meetings.

John has experienced the challenge of trying to establish regional and local trails including part of the Trans Pennine Trail "on the ground".

In addition to being responsible for the definitive map at Sefton and Warrington he has worked in the voluntary sector researching and applying for definitive map modification orders on behalf of the Trail Riders' Fellowship, dating back to 2002 – none of which to date have been processed.

Mike Walker

Mike has been involved in the management of rights of way in Buckinghamshire for 25 years. For the past 11 years he has been the county council's Rights of Way Manager. He is a founder IPROW member, and chairs the County Surveyors' Society South East Region Countryside Working Group and sits on the National Group.

Mike works with and manages on a daily basis issues, priorities and procedures relating to a surveying authority's role and, as a manager, fully appreciates the kind of pressures and constraints his staff has to work within. As a rights of way professional, Mike's interest is mainly to ensure that there are efficient processes that are fair and appropriate for today's network.

ANNEX 3: SCHEDULE OF MEETINGS

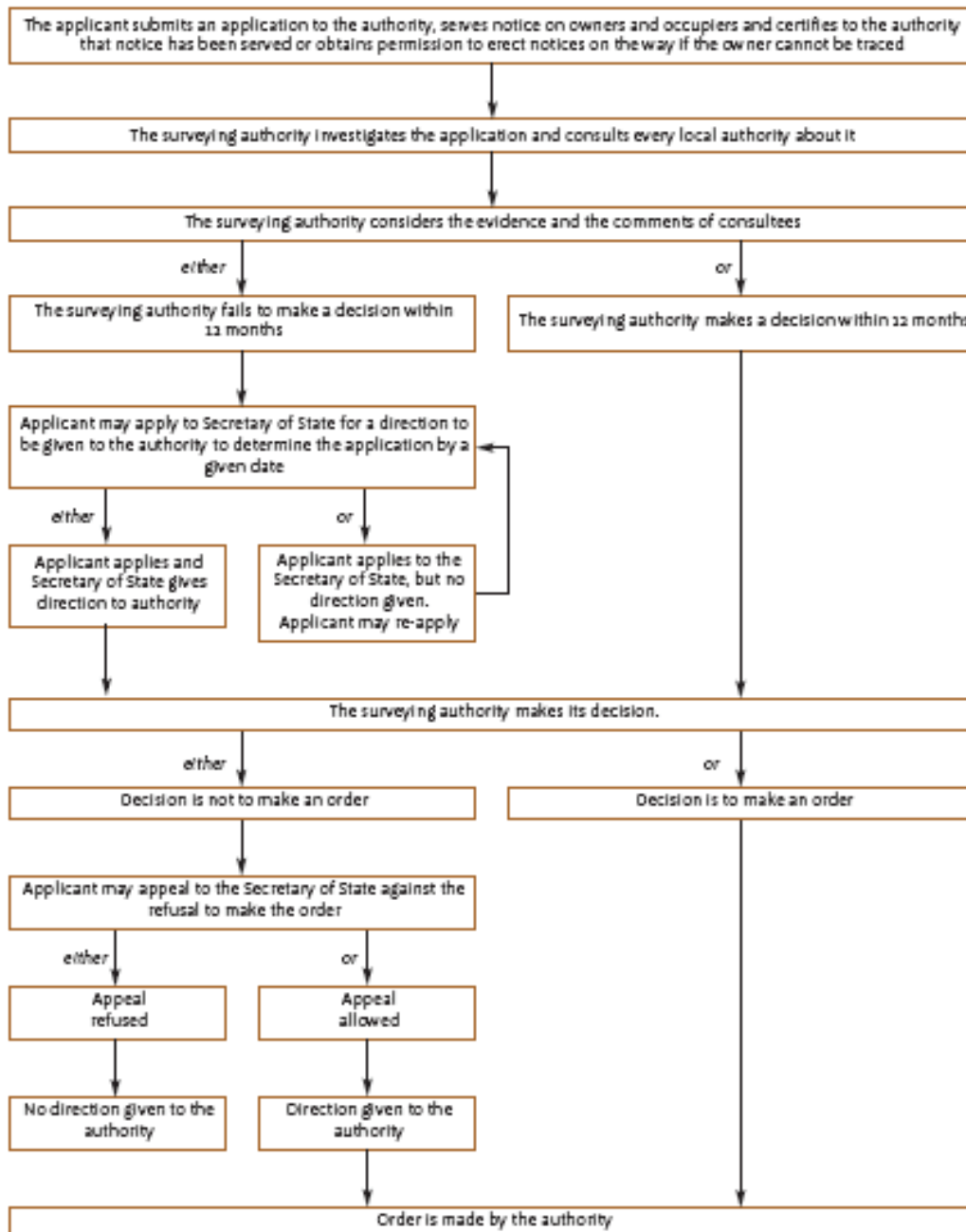
	Date	Time	Venue
1	Wednesday 1 st October 2008	10:30 to 15:30	Nobel House, London
2	Wednesday 12th & Thursday 13th November 2008	12:30 Wednesday to 14:00 Thursday	The Rutland Arms Hotel, The Square, Bakewell, Derbyshire, DE45 1BT
3	Tuesday 13th January 2009	10:30 to 16:00	1 East Parade, Sheffield, S1 2ET
4	Thursday 26th February 2009	10:30 to 16:00	The Cathedral Church of St Peter and St Paul, Church Street, Sheffield S1 1HA
5	Monday 30th March 2009	10:30 to 16:00	Ashdown House, 123 Victoria Street, London, SW1E 6DE
6	Tuesday 5th & Wednesday 6th May 2009	12:30 Tuesday to 14:00 Wednesday	Losehill Hall, Castleton, Hope Valley, S33 8WB
7	Thursday 25th June 2009	10:30 to 16:00	1 East Parade, Sheffield, S1 2ET
8	Tuesday 8th September 2009	10:30 to 16:00	John Dower House, Crescent Place, Cheltenham, GL50 3RA
9	Thursday 22nd October 2009	10:30 to 16:00	1 East Parade, Sheffield, S1 2ET
10	Thursday 26 th November 2009	10:30 to 16:00	Ashdown House, 123 Victoria Street, London, SW1E 6DE
11	Thursday 21 st January 2010	10:30 to 16:00	1 East Parade, Sheffield, S1 2ET

Meeting notes are available from the Natural England website at:
<http://www.naturalengland.org.uk/ourwork/enjoying/places/rightsofway/swgrow/default.asp>

ANNEX 4: CURRENT PROCEDURES

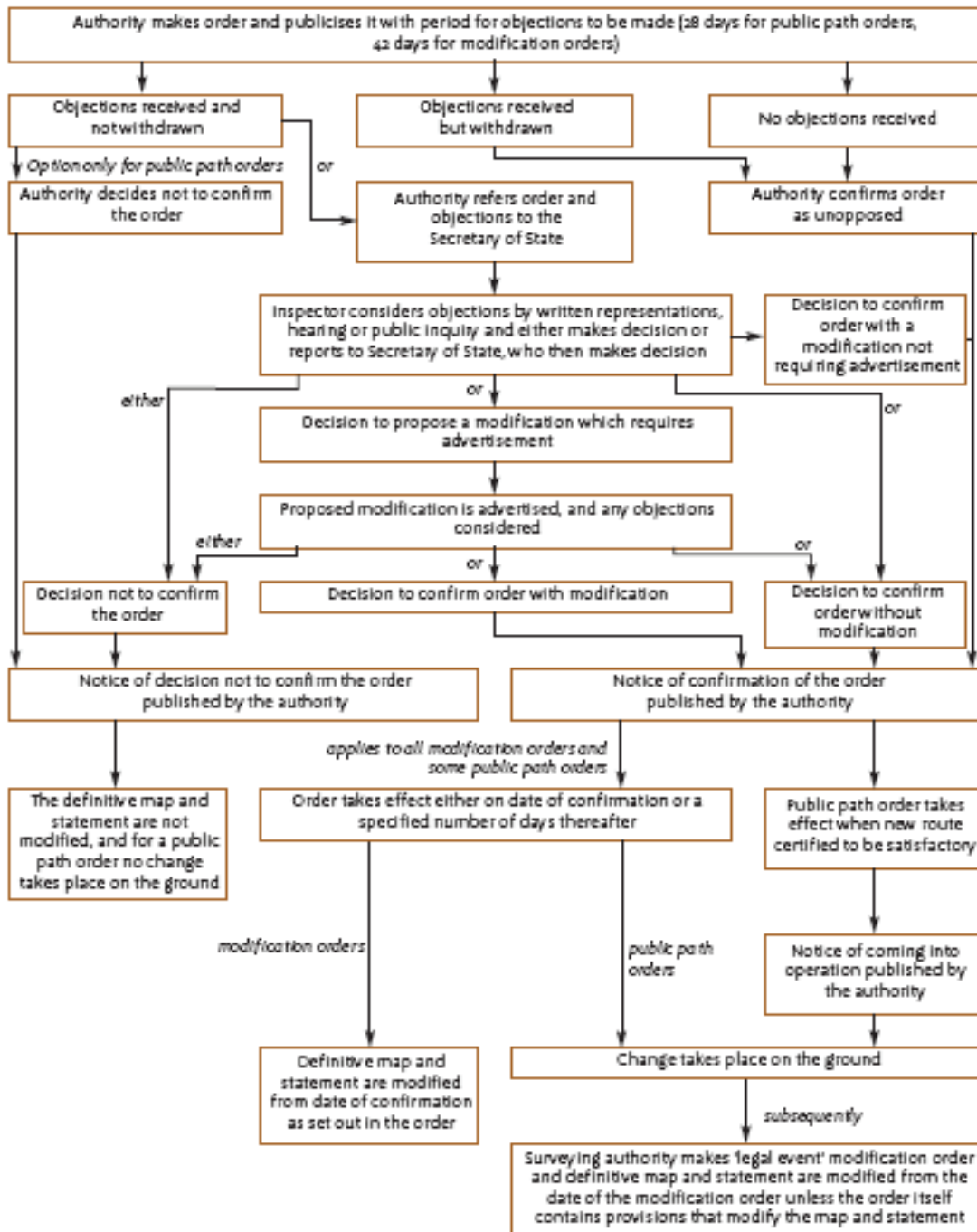
Flowchart:

Applications for modification orders



Extract from 'A guide to definitive maps and changes to public rights of way'. The 2008 revision of this publication is available to download from the Natural England website – www.naturalengland.org.uk

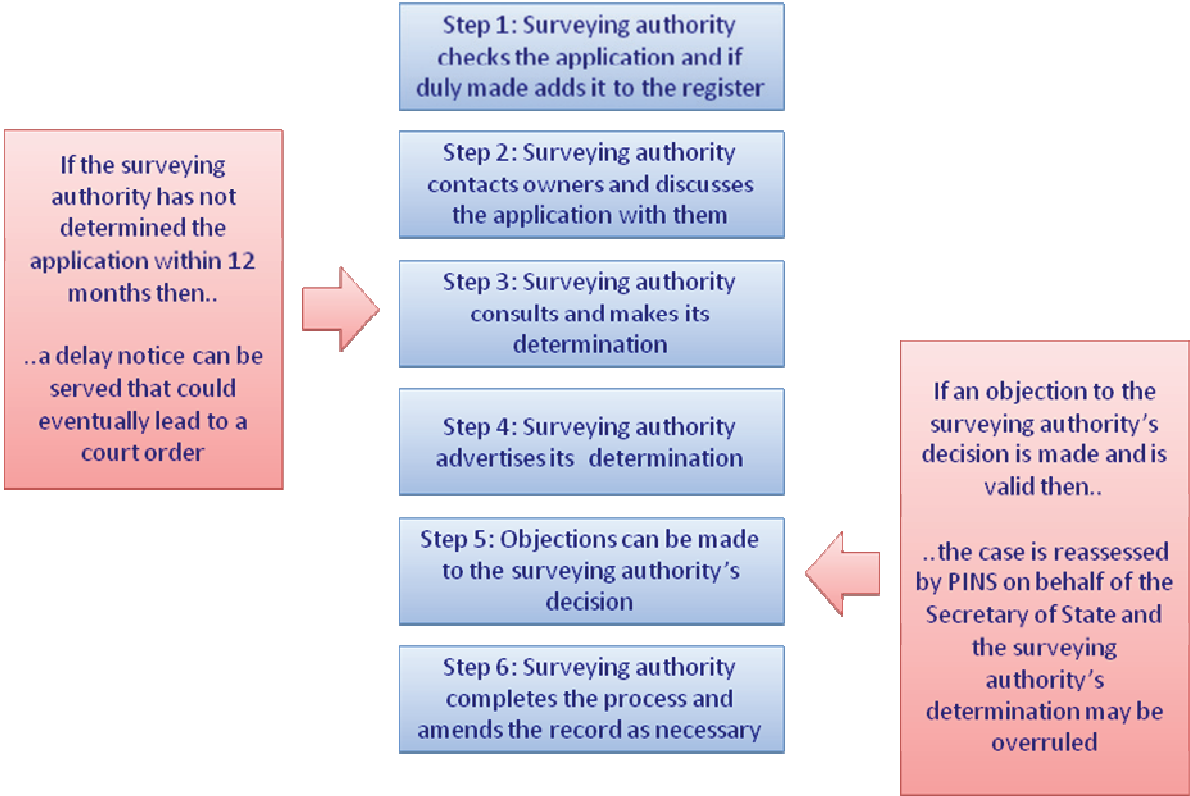
Flowchart:
Procedure for modification and public path orders



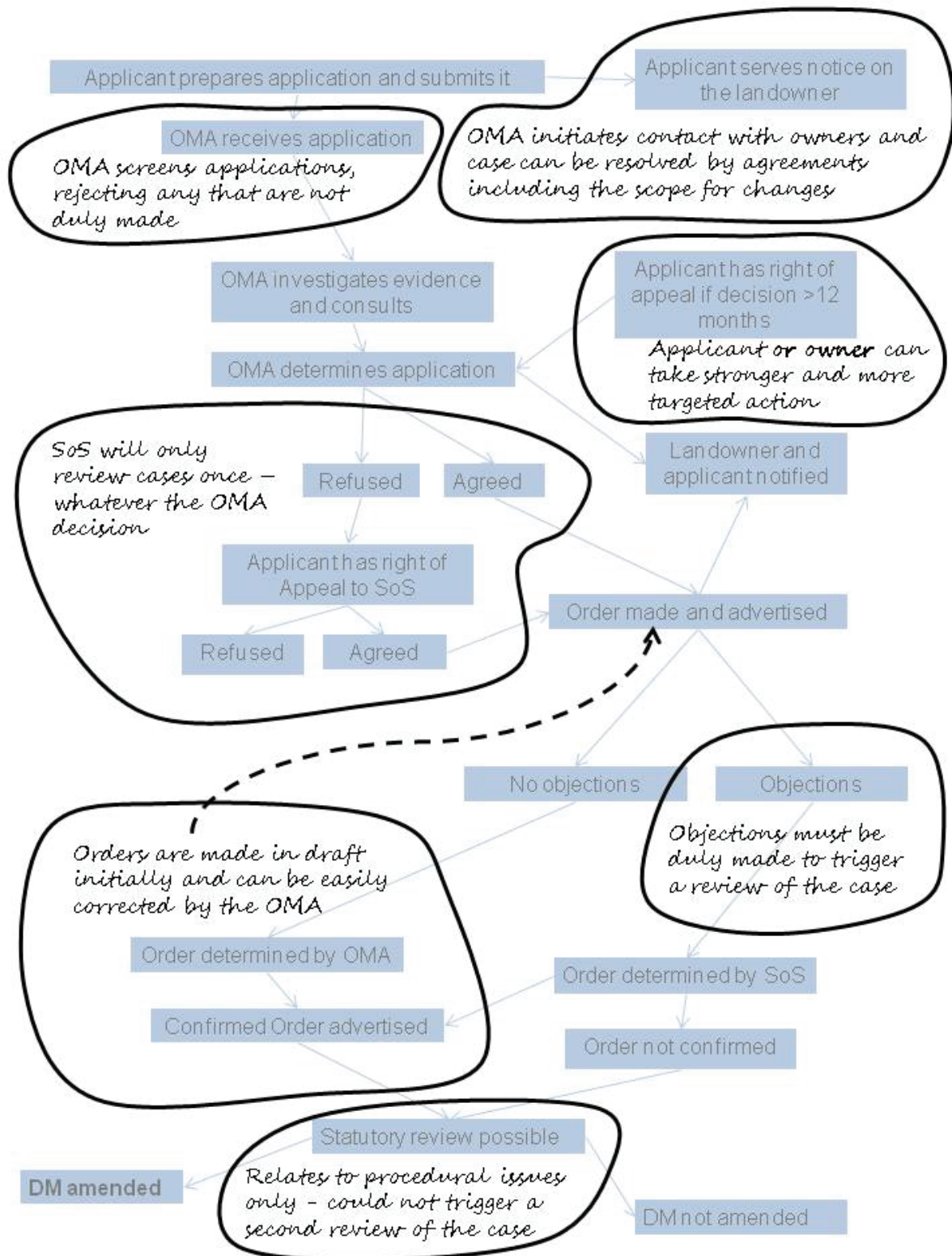
Extract from 'A guide to definitive maps and changes to public rights of way'. The 2008 revision of this publication is available to download from the Natural England website – www.naturalengland.org.uk

ANNEX 5: STREAMLINED CLAIMS DETERMINATION PROCEDURE

STREAMLINED CLAIMS DETERMINATION PROCEDURE



ANNEX 6: FLOWCHART WITH ANNOTATED CHANGES



ANNEX 7: HOW THE EXCEPTIONS IN SECTION 54 OF THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000 WORK

The cut-off is a blanket legal mechanism affecting all footpaths and bridleways that are not recorded on the definitive map and statement. Specifically, all rights of way that: (i) exist at the cut-off date of 1st January 2026 and (ii) existed on 1st January 1949 and (iii) were not recorded on the definitive map and statement at the cut-off date, will be statutorily extinguished.

Section 54 sets out which historical public rights of way¹⁵ would be excepted from extinguishment at the 2026 cut-off date. These are (broadly) as follows.

Footpaths or bridleways existing within the administrative country of London before 1/4/1965	section 54(1)(b)
Footpaths or bridleways at the side of the 'ordinary roads' network	section 54(1)(c)
Footpaths or bridleways that may be defined or specified in regulations (yet to be made)	sections 54(1)(d)&(e)
Footpaths or bridleways where their course, status, width or length in 2026 is the result of a legal event since 1949 <u>and</u> it communicates, or forms part of a coherent network, with a 'retained' ¹⁶ highway or part of the 'ordinary roads' network.	sections 54(2)(a)-(e) and section 54(3)
Public rights of way (by implication higher rights) over a public right of way created after 1949, excluding the pedal cycle rights bestowed by section 30 of the Countryside Act 1968.	section 54(5)(a)
Public rights of way existing within the administrative country of London before 1/4/1965.	section 54(5)(b)
Rights of way that may be defined or specified in regulations, or subsist over land specified in regulations (yet to be made)	sections 54(5)(c)&(d)

¹⁵ Rights of way in existence before 1949

¹⁶ 'retained' is defined by section 54(4) and essentially means any highway not extinguished by the cut-off provisions, but excluding those preserved by sections 54(2)&(3)

Putting aside those rights of way in London (where there is no statutory requirement for a definitive map and statement), foot/bridle ways running along the edge of carriageways and public rights of way that might be included in regulations yet to be made, the exceptions are essentially distil down to (broadly) those public rights of way subject to legal events since 1949.

