

**Draft Deregulation Bill – Call for Evidence**  
Report by Senior Waterways and Recreation Officer

<b>Summary:</b>	This report provides members with a summary of the measures contained in the recently published Deregulation Bill which relate to the policy and legal framework for recording and making changes to public rights of way. The report also summarises officers' proposed response to Government's call for evidence in relation to the draft Bill and makes a recommendation regarding a specific clause in the Bill that deals with the authorisation of stiles and gates on public rights of way under Section 147 of the Highways Act 1980 (HA).
<b>Recommendation:</b>	That members note the contents of the report and comment on officers' suggested response to Government's call for evidence

## **1 Background**

- 1.1 Members will recall that in 2012 the Government consulted on a range of changes to the legal framework for recording and making changes to public rights of way. The Broads Local Access Forum (BLAF) considered a report on this consultation at its meeting on the 13<sup>th</sup> of June 2012 and subsequently officers submitted a formal response to the consultation taking account of members' views.
- 1.2 Having considered the responses received to the public consultation Government has now published a draft Deregulation Bill. The Bill covers a wide range of legislative changes intended to simplify procedures and remove unnecessary bureaucracy for businesses and public authorities. The measures in the Bill which relate to public rights of way were developed from suggestions made by a Stakeholder Working Group (SWG) which included representatives from local authorities (including national park authorities), user groups and landowners. The draft Bill will go through a process of pre-legislative scrutiny, in which it will be examined by a Joint Committee of both Houses of Parliament. The first substantive Committee meeting will take place in early October and it is expected that the Committee will report its conclusions by the end of the calendar year. The Bill, amended in light of the Committee's recommendations, will be formally introduced to Parliament early in 2014, after which it will go through the full Parliamentary process. Government is now asking for submissions of evidence from interested parties prior to the first committee meeting
- 1.3 The rights of way element of the Bill which proposes changes to the Wildlife and Countryside Act 1981 (WCA), Countryside and Rights of Way Act 2000 (CROW) and HA 1980 is essentially the same as that proposed in the

consultation that members previously considered. The proposals in this Bill are intended to protect useful or potentially useful public rights of way from extinguishment while giving local authorities more scope to use their judgement in dealing with insubstantial or irrelevant applications and objections. In short the proposals aim to make procedures more streamlined and are in accordance with the Governments aim of reducing regulation and giving more power to local authorities and local people to develop solutions. The recommendations in the consultation document relating to rights of way and planning that members considered in 2012 have already been enacted in the Growth and Infrastructure Act.

- 1.4 Appendix 1 summarises the SWG recommendations which require primary legislation to bring into force and how the proposed legislation changes set out in the Bill relate to them.

## **2 Broads Local Access Forum Comments at Consultation Stage**

- 2.1 Perhaps the most contentious proposal put forward by the SWG was the recommendation that the 2026 cut- off date regarding the recording of public rights of way contained in Section 53 of the CROW Act 2000 should be implemented. While accepting this proposal, members recommended that it should only be brought into force if a range of additional safeguards, which were recommended by the SWG for the purpose of protecting unrecorded rights of way that existed before 1949 from extinguishment, were also enacted. In other words the BLAF viewed the proposals set out in the consultation document as a complete package of measures which should all be enacted together.
- 2.2 The Draft Deregulation Bill only contains clauses relating to the recommendations of the SWG that require primary legislation to bring into force. Government has indicated that once the necessary changes to the primary legislation have been made, the rest of the reforms package will be put in place, with a view to commencing all the provisions at the same time. The SWG proposals relating to the 2026 cut-off date and the protection of rights of way that existed pre 1949 will be implemented through secondary legislation and commencement orders. The remaining proposals will be implemented by other means, primarily through guidance.

## **3 Proposed Amendment to Section 147 Highways Act 1980**

- 3.1 The draft Deregulation Bill also proposes an amendment to Section 147 of the Highways Act 1980 which gives highway authorities the power to authorise the erection of gates or stiles on footpaths and bridleways for the needs of agriculture and forestry, particularly for the control of livestock. The Deregulation Bill proposes to extend this power to byways open to all traffic and restricted byways but in its current form it does not propose to allow gates to be authorised unless there is an agricultural reason for doing so. Officers consider that there are sound reasons for extending this provision beyond the needs of agriculture and forestry. Clearly, given the nature of the Broads grazing marsh landscape, there are many circumstances in which gates are

required for livestock management purposes, but the restriction of this power to agricultural circumstances does not allow for gates to be authorised for other reasons. For example, gates may be desirable for preventing unauthorised vehicular access, controlling access to sensitive designated sites or private property which is not used for agricultural purposes but where the landowner wishes to maintain a boundary fence. In some circumstances it may also be desirable to authorise the erection of fencing alongside public rights of way for public safety reasons. Officers consider that the proposal to extend this power to byways open to all traffic and restricted byways is sensible but propose to respond to the Government's call for evidence in relation to the Bill by suggesting that the text proposed in the Bill be amended to allow for the authorisation of stiles, gates and fences on public rights of way where highway authorities consider it to be expedient thus removing the agricultural restriction.

## **4 Conclusions**

- 4.1 The measures set out in the draft Bill are consistent with the recommendations of the SWG which were supported by the BLAF at consultation stage. Officers consider that the primary legislation changes proposed in the Bill, coupled with the additional measures that will be brought into force by secondary legislation, will simplify the current legal framework relating to public rights of way and in all likelihood deliver significant benefits for local authorities, user groups and landowners alike. Moreover, the proposals include the safeguards regarding the protection of unregistered rights of way that existed before 1949 that the SWG considered to be necessary. Officers therefore propose to respond to the call for evidence by supporting the rights of way elements of the Bill and suggesting that the clause relating to the authorisation of gates and fences under Section 147 of the HA be amended to allow such structures to be authorised where highway authorities consider it to be expedient as set out at paragraph 3.1 above. Members' views on this course of action are welcomed.

Background papers: Nil

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Broads Plan Objectives: TR2, TR3

Appendices: APPENDIX 1 Summary of clauses

## **Appendix 1: Summary of clauses**

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

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

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

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

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

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

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

**SWG proposals 6 & 7: “A surveying authority should be able to make an agreement with one or more affected landowners recognising the existence of a previously unrecorded pre-1949 right of way, but allowing it to be recorded with appropriate modifications on the definitive map and statement, where justified to avoid significant conflicts with current land use. This power should be subject to the public interest protections mentioned later in this report”.**

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

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

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<sup>1</sup> Wildlife and Countryside Act 1981

**SWG proposal 10: “The requirement for newspaper advertisements relating to surveying authority notices of all types should be minimised by referring those interested to details online or at the surveying authority’s offices”.**

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

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

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

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

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

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

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

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

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<sup>2</sup> Highways Act 1980

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

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

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

**SWG proposals 17 & 18: “Surveying authorities should determine applications and make any consequent definitive map modification order in a reasonable timescale. Where they do not, both applicants and affected owners should be able to seek a [Magistrates] court order requiring the authority to resolve the matter”.**

**“The court should allow surveying authorities a reasonable amount of time to do their job taking account of the local circumstances and the authority’s current efforts”.**

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

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

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

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

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

**SWG proposal 27: “Surveying authorities have an important existing role in securing the recording of useful or potentially useful routes if there is convincing evidence of pre-1949 rights of way along them. Defra should consider and consult on whether during the brief post cut-off period we have recommended for registration of recent applications, authorities should remain able to register**

**such rights by self-application, subject to the same tests and transparency as for any other application”.**

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

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

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

**SWG proposal 32: “It should be possible for an owner to apply to a highway authority for authority to erect new gates on restricted byways and byways open to all traffic in line with existing provisions for their erection on footpaths and bridleways”.**

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

#### **Other rights of way clauses.**

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

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

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