

Modifying Definitive Maps: Part 1

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A new Definition Map Modification Procedure is proposed for England under ss.20 and 26 and sch.7, Deregulation Act 2015. A date for the commencement of the provisions is still awaited. I was told by DEFRA in July 2018 that a stakeholder working group had produced a comprehensive package of recommendations supported by a finely balanced consensus and a key recommendation was that the package of reforms was commenced as a whole on a single date.

However, it took time to translate such a wide ranging and complex set of reforms into legislation as DEFRA must make sure that it gets the details of the regulations and accompanying guidance right so that it is as effective as it can be. With the continuing help and support of the Stakeholder Working Group, DEFRA is making good progress on this work but is not yet in a position to say when the package will be out into effect.

Ministers are keen to ensure that the benefits of the reforms should be realised at the earliest possible date and an announcement will be made on this as soon as possible.

Background

Initially, the National Parks and Countryside Act 1949 required Local Authorities to survey all land in their areas over which Public Rights of Way were alleged to subsist and to prepare a draft map of them. The map was to annex a Statement with Particulars of each Right of Way, such as the position, width, any limitation or condition considered necessary to record and the relevant date as to publication.

After publication, official notices, consultations, determination of all disputes, declarations and applications, Local Authorities were to prepare and publish Definitive Maps and Statements which were conclusive as to the existence of Rights of Way at the relevant dates.

Currently, the five types of public rights of way (which are all 'Highways') are:

- Public Footpath – right of way on foot only with pushchairs and wheelchairs;
- Public Bridleway – right of way on foot and on horseback or leading a horse (with or without the right to drive animals) and non-mechanically

propelled bicycles excluding electrically assisted models;

- Public Path – Public Footpath or Public Bridleway
- Restricted Byway – right of way on foot and on horseback or leading a horse and all other vehicles except mechanically propelled vehicles; and,
- Byway Open to All Traffic – right of way on foot and on horseback or leading a horse and all other vehicles including mechanically propelled vehicles.

If a way is not shown on the Definitive Map, however, it is not proof that there are no public rights over it. Local Authorities were required under Part 3 Wildlife and Countryside Act 1981 to maintain and review their Maps and Statements and the 1981 Act sets out procedures for modification, but some other provisions are contained in Highways Act 1980.

If evidence was discovered that a right of way was not on the Map or was wrongly categorised, for example, as a Footpath when it should have shown as a Bridleway, then the Definitive Map and the Statement would require modification.

Similarly, it is open to anybody to apply to change the Map such as those wanting to use the route as a public right of way, landowners and other interested parties. Interest groups representing ramblers, horse-riders, cyclists, motorcyclists, quad-bikers and off-roaders are always on the look-out for new routes over which they can enjoy their pastimes and initiate and support or oppose applications for modification.

The problem of unrecorded rights was exacerbated by the 2015 decision in *R (Andrews) Secretary of State for Environment Food and Rural Affairs*¹ as the Court of Appeal ruled that Inclosure Commissioners had power under the Inclosure (Consolidation) Act 1801 to create Public Bridleways and Public Footpaths and not just private bridleways and footpaths as had previously been thought.

Section 53, Countryside and Rights of Way Act 2000, provided 1st January 2026 as the cut of date for the extinguishment of any Public Right of Way that existed on 1st January 1949 but was not yet shown on the Definitive Map and Statement.

The perceived needs for reform and how the act addresses them

The Deregulation Act 2015 as a whole was enacted to “make provision for the reduction of burdens resulting from legislation for businesses or other organisations or for individuals; make provision for the repeal of legislation which no longer has practical use; make provision about the exercise of regulatory functions; and connected purposes”.

Sections 20 to 26 and Schedule 7 of that Act approach the reforms on a section by section basis and seek to identify the reasons for the reforms.

Section 20

Local Authorities can find it very hard to investigate applications to modify the Definitive Map and Statement based on evidence about the pre-1949 position. The 2000 Act is therefore amended to introduce a “protected right of way” i.e. one recorded on the Definitive Map and Statement, and to preclude any modification to the Definitive Map and Statement in respect of a “protected right of way” after the cut-off date if the only basis for the modification is evidence that the “protected right of way” did not exist before 1949 or existed but in a different category to that recorded.

Section 21

As a deluge of applications for modification to the Definitive Map and Statement is anticipated immediately before the cut-off date to show unrecorded or wrongly categorised rights of way, because interest groups and individuals are anticipated to be researching such rights of way with a view to making applications for modification of the Definitive Map and Statement, the 2000 Act is amended to give the Secretary of State power to enable Local Authorities to designate within one year of the cut-off date those public rights of way which were extinguished by the cut-off to enable the product of the research by interest groups and individuals to be assessed and prevent permanent extinguishment in appropriate cases.

Section 22

To alleviate the problems caused to persons to have access to their own land when this

would otherwise be affected by extinguishment on the cut-off date, s.22 converts the public right of way to a private right of way for access.

Section 23

There are no provisions for Public Path Extinguishment Orders or Diversion Orders for land other than that used for agriculture, forestry or the breeding or keeping of horses and the procedure to be followed by the Secretary of State on Appeal against Local Authorities' refusals to make such orders is considered inflexible and burdensome. Accordingly, the Secretary of State is being given power to make regulations by s.23 of the 2015 Act in respect of other land and to make procedural changes.

Section 24

Although the Highways Act 1980 allows Highway Authorities to authorise the erection of stiles and gates etc. on footpaths or bridleways crossing agricultural land, to prevent the ingress and egress of animals, the provision does not apply to restricted Byways or Byways Open to All Traffic.

Accordingly, an owner could oppose a Definitive Map Modification Order for a Restricted Byway or a Byway Open to All Traffic because the Highway Authority could not authorise the erection of gates except for preventing the ingress or egress of animals. Section 24 therefore amends the Highways Act to enable Highway Authorities to authorise the erection of gates and that should reduce the number

of applications for Definitive Map Modification Orders in respect of Byways opposed by land owners, and involving the Secretary of State.

Section 25

When landowners and occupiers apply for Public Path Extinguishment or Diversion Orders the Secretary of State can prescribe the charges payable on the application and when an Order is made under the Highways Act, but may not allow the Local Authority to recover all of its costs.

Accordingly, s.25 of the 2015 Act amends the relevant provisions of the Highways Act to allow the Secretary of State to make regulations authorising the imposition of charges under s.150, Local Government Act 1989, up to the actual cost thereby alleviating the irrecoverable costs of the Local Authority. Section 25 also amends provisions in the Highways Act to clarify the provisions for recovery of costs of the Secretary of State when determining contested public path applications by way of written representations rather than oral hearing.

Schedule 7

Under sch.7:

- The burden of proof for Local Authorities under the 1981 Act is raised. Currently Local Authorities have to consider the discovery of evidence which shows that a right of way not shown on the Definitive Map and Statement subsists "or is reasonably alleged to

subsist or should be in a different category". This is considered to be lower than the ordinary civil burden of proof and the 1981 Act is amended to provide that the Local Authority should make a preliminary assessment to determine whether there is a "reasonable basis" for the applicant's belief.

- There is a relaxation of the requirement for the Local Authority to register an application which has not passed the preliminary assessment.
- With a view to reducing the burdens on landowners, Local Authorities and others where a newly discovered right of way conflicts with current land usage, there are provisions for making Modification Orders by consent.
- There are backstop provisions for when the Local Authority fails to conduct a preliminary assessment or determine an application to reduce the burden on the Secretary of State both in relation to applications under the 1981 Act and the Highways Act 1980.

Part 2 of this article – proposed to appear in the Spring edition of the ALA Bulletin – will deal with the specific procedures and, if by then they have been published by DEFRA, the official guidance and any regulations.

¹ [2015] EWCA Civ 669