

**Open Report on behalf of Richard Wills - Executive Director for Environment & Economy**

Report to:	<b>Mid-Lincolnshire Local Access Forum &amp; South Lincolnshire &amp; Rutland Local Access Forum</b>
Date:	<b>20<sup>th</sup> October 2015</b>
Subject:	<b>Deregulation Act 2015</b>

**Summary:**

A report on the provisions affecting public rights of way work in the Deregulation Act 2015 and likely consequences

**Recommendation(s):**

That the report is considered and advice to the Authority from the Local Access Forums is provided

## 1. Background

The Deregulation Act 2015 was given Royal Assent in March 2015 and contains within it a number of provisions based on a "rights of way reform package" based on the deliberations of a stakeholder working group made up of people representing users, landowners and local authorities.

The reforms consist of amendments to primary legislation (laws) and requirements for secondary legislation (orders and regulations) and will affect work across the following public rights of way (PROW) areas:

- Changes to the procedures for Definitive Map Modification Orders (DMMOs)
- The introduction of the Definitive Map "cut off" provisions from the Countryside & Rights of Way Act 2000
- The Right to Apply for a Public Path Order (PPOs diversions / extinguishments)
- Changes to the procedures or PPOs
- Gates on Restricted Byways (RB) and Byways Open to All Traffic (BOATS)

The various changes to these areas are considered below.

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## **2. Changes to the Procedures for DMMOs**

- An applicant must give a reason for the application

The applicant must make a statement accompanying their application as to why they believe the evidence they are submitting is sufficient to require the Definitive Map & Statement (DM&S) to be modified.

This will require new regulations to be made and as yet no draft regulations are available so it is not possible to consider what form the reason must be given or the detail required.

- The requirement to provide all copies of evidence may be waived

This will allow applicants to submit applications with a list of documents if it is believed that the Authority has the documents in its own possession. For example the listing of documentary evidence such as Enclosure Awards if it is located in Lincolnshire Archives. It will be expected that the applicant will make inquiries of the Authority as to whether the requirement to provide copies of evidence can be waived in their application.

- Preliminary Assessment

On receipt of an application, evidence and reason the Authority must make a preliminary assessment of the evidence within 3 months of the application. It must assess the application against a "basic evidential test".

As yet no draft regulations as to what the test may entail have been issued.

Should the authority fail to comply within the 3 month timeframe an applicant can serve a notice on the authority of their intention to apply to the magistrates' court for an order to compel the authority to carry out its duty. An applicant has up to 6 months to apply for such an order after they have notified the authority of their intention to do so.

- Notification to landowners

This will now become the responsibility of the Authority as opposed to the applicant and will take place after the preliminary assessment.

- Changes to the register of DMMO applications

Authorities will not be required to include DMMO applications on the register until the preliminary assessment has been completed. It will be at the authority's discretion if it does do so.

- Removal of the "reasonably alleged test"

Currently an authority will determine to make a DMMO if it believes that the evidence demonstrates that a right of way has been reasonably alleged to subsist. However to be able to confirm an order a slightly more onerous test must be applied being "on the balance of probabilities". It follows that, although unlikely, an order could be made as it has been "reasonably alleged" but not confirmed (even if there are no objections) as the balance of probability test isn't met.

The Deregulation Act provisions will amend this so that the only test the authority will consider prior to making an order will be based on a balance of probability.

- Rights of Appeal

If an authority fails to make a decision on whether or not to make an order within 12 months of completion the preliminary assessment then the applicant or an affected owner or occupier can apply to the magistrates' court for an order to compel an authority to carry out its duty to do so. Similar to the appeal process mentioned above for preliminary assessment delays.

Previously such an appeal could only be made by the applicant and was made to the Secretary of State (and usually dealt with by the Planning Inspectorate)

- Modification Consent Orders

For cases where documentary evidence shows that route came into being before 1949 then an authority must ascertain whether every owner (but not occupier) either:

- a) Consents to the making of the order as per the evidence, or
- b) Would consent if the route was:
  - Diverted, and/or
  - Altered in width, and/or
  - Subject to new limitation or condition imposed on it (e.g. a gate where historically there had not been one)

It also appears that owners could ask for a status of claimed way to be downgraded, e.g. from Restricted Byway to Bridleway. This isn't explicitly mentioned in the Act but is caught by reference to current legislation in the Wildlife & Countryside Act 1981.

The authority may then make a Modification Consent Order to add the amended route to the DM&S. Whilst representations and objections can be made to the order the authority can effectively overrule them and confirm the order without recourse to a public inquiry. An order can be challenged in the High Court though in the same way as a DMMO.

- The Correction of "obvious administrative errors"

The Secretary of State will be granted power to make regulations allow authorities to make orders to correct errors (whether or not on application). Three tests will need to be met:

- a) That a modification order to add, alter the route, status or particulars of, or delete a right of way is required.
- b) That the need to make an order is the result of an administrative error, and
- c) That both the error and the modification needed to correct it are obvious.

As yet no draft guidance is available so it is not known what guidance or regulations will be available to direct this new procedure.

- Appeals against an authority's decision not to make an order.

Currently if an applicant appeals to the Secretary of State an Inspector will either uphold the authority's decision or direct it to make an order. Which once objected to could be resent to the Secretary of State to review the case once more.

The new regime allows any person(s) to make an appeal and the Secretary of State has a further power to make an order his, or her, self.

The intention is that matters and evidence will only be reviewed by the Secretary of State once and that should any objections to a directed or Secretary of State made order be considered irrelevant (i.e. do not challenge the evidence) then an order can be confirmed straight away.

- Publicity for DMMOs

The requirement to place the notice of an order in a local newspaper is removed and replaced with a requirement to publish such a notice on a website maintained by the authority.

- Dealing with objections

An authority will be able to dismiss "irrelevant" objections as described above. In doing so it must have regard to the guidance provided by the Secretary of State (as yet not available).

If an objection is considered relevant to the evidence then the authority no longer has to submit the whole order and may "sever" it to submit only that part which subject to objected to the Secretary of State.

In considering a relevant objector the Secretary of State may now offer only written representations as opposed to a hearing.

- Transfer of applications

There will be a new power for an applicant to transfer the application to another named person. This must be done by way of notice to the authority. This seems

limited in scope and does not seem to assist where the applicant had died and is unable to serve notice on the authority.

- Transitional arrangements

The Secretary of State will have a power to issue regulations to apply some, or all, of the provisions above to the existing outstanding workload of Definitive Map Modification Orders.

As yet no draft regulations have been issued so it is unknown as to the impact this might have on the backlog of work in Lincolnshire.

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### **3. The introduction of the Definitive Map "cut off" provisions from the Countryside & Rights of Way Act 2000**

The Deregulation Act will bring into force the provisions of the earlier 2000 Act that any footpath or bridleway that is not recorded on the definitive map & statement by the date of the cut off, and was in existence before 1<sup>st</sup> January 1949, will be extinguished.

Also, that routes shown on the DM&S will have any higher, unrecorded rights, extinguished. i.e. If a route is shown as footpath then any unrecorded bridleway rights that there may be evidence for are extinguished.

The 2000 Act contains provisions for the Secretary of State to have a power (but no duty) to make regulations that will prescribe exceptions. These have not yet been formulated in draft form but it would be reasonable to expect that savings may include:

- Routes where there is an application to include it on the DM&S that remains undetermined by the time of the cut-off date (this is given in the 2000 Act to be 1<sup>st</sup> January 2026 although there will be a power for the Secretary of State to make regulations to extend this up to 2031.)
- Routes not shown on the DMS but are recorded as highways maintainable at public expense on the authority's "List of Streets"

Post the cut-off date it will also be no longer possible to add a route to the DM&S as a Byway Open to All Traffic.

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### **4. The Right to Apply for a Public Path Order (PPOs diversions / extinguishments)**

These provisions were originally contained in the 2000 Act but not brought into force and the Deregulation Act amends them slightly.

The right to apply as outlined in the 2000 Act is applicable to land used for agriculture, forestry or the breeding and keeping of horses and special orders for school security.

There is also a power for the Secretary of State to extend the categories of land where the right becomes applicable but no draft regulations have been made available as yet. It is widely expected that after the significant input of the "Intrusive Footpaths" campaign that the regulations may include private residential gardens but as yet this remains undetermined. There has also been suggestion that where the right to apply for a diversion or extinguishment of a path from a private residential garden is made, there will be a presumption that any made order will succeed regardless of objection. Again no regulations have been made and this remains speculation.

The applicant will have a right of appeal to the Secretary of State if the authority has not made a decision on an application within 4 months. There is also a right of appeal to the Secretary of State should an authority refuse to make an order, refuse to confirm an unopposed order or refuse to submit an opposed order to the Secretary of State.

The Secretary of State may make his/her own draft order, on appeal, should an authority refuse to make an order but is not obliged to do so.

The authority may make a charge for processing any applications made.

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## **5. Changes to the procedures or PPOs**

- Changes to the publicity of orders

Similar to the amendments to the requirements for publicising DMMOs, a notice of the making of a PPO will no longer need to be published in a local newspaper although this will only apply to PPOs made under certain legislation. Generally those orders made by LCC will be made under the Highways Act and will be published on the authority's website. Orders made by Districts under planning law will still be required to be publicised in the local press.

- Dealing with irrelevant objections

Authorities may disregard objections they consider not to be relevant to the tests of the legislation but in doing so must have regard to any guidance published by the Secretary of State

As yet no draft guidance has been published so it is difficult to ascertain what may be considered irrelevant. The quality of an alternative route or the need to extinguish a route in a PPO is subjective as opposed to the evidentially based DMMOs. It is unclear as to what might be considered irrelevant but it remains an opportunity for an authority to confirm an opposed order.

- Splitting Orders

An authority will be able to "split" an order so that any part that is unopposed can be confirmed and opposed sections can be submitted to the Secretary of State.

- Opportunity for objections to be heard

The Secretary of State will have a new power to offer only the written representations procedure to an objector as opposed to a right to insist on a hearing.

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## **6. Gates on Restricted Byways (RB) and Byways Open to All Traffic (BOATS)**

This will extend the power to authorise structures on footpaths and bridleways found in Highways Act s.147 to install gates on RBs and BOATs.

An application to install such a feature will extend only to land used, or being brought into use for agriculture, forestry or the breeding or keeping of horses. An application will only be approved if the need for the structure is to restrict to ingress or egress of animals

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## **7. Report Consultation**

### **a) Has Local Member Been Consulted?**

n/a

### **b) Has Executive Councillor Been Consulted?**

n/a

### **c) Scrutiny Comments**

n/a

### **d) Policy Proofing Actions Required**

n/a

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## **8. Background Papers**

*Commentary on and analysis of the Defra "rights of way reform package"* - John Trevelyan – [www.rowtac.co.uk](http://www.rowtac.co.uk) February 2015

This report was written by Chris Miller, who can be contacted on 01522 782070 or [countryside\\_access@lincolnshire.gov.uk](mailto:countryside_access@lincolnshire.gov.uk).

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