

## **Stakeholder Working Group on Public Rights of Way**

Meeting notes for the fifth meeting of the Group  
held on 30<sup>th</sup> March 2009  
at Ashdown House, 123 Victoria Street, London, SW1E 6DE.

### **Attendance**

- 5.1 The meeting was chaired by Ray Anderson and attended by: Alan Kind, Alasdair Mitchell, Alex Lewis, Andrea Graham, Carys Drew, Dave Waterman, Gavin Stark, Gwyn Williams, Janet Davis, John Thorp, Kate Ashbrook, Mark Weston, Mike Walker, Paul Johnson, Richard Gething, Robert Halstead, Rosalinde Shaw, Sarah Slade & Sue Steer.
- 5.2 Apologies were received from Terry Robinson.

### **Notes of the previous meeting**

- 5.3 The draft meeting note circulated by the secretariat was confirmed, subject to amending the third sentence in paragraph 4.27 from 'an income' to 'added value'.
- 5.4 Several corrections to the draft meeting note have been made on the advice of Ellen Duffy from the Department for Transport who attended the February meeting. These corrections are to clarify that the National Street Gazetteer (NSG) is the mechanism for sharing Local Street Gazetteers, which are a sub-set of the Street Works Register (SWR). Regulations specify only the contents of the SWR. The revised version of the minutes will be recirculated for information.

### **Action points from the previous meeting**

- 5.5 All action points had been completed.

### **Matters arising**

- 5.6 There was further discussion of the Guiding Principles in relation to two particular aspects.

#### Diversion of existing public rights of way

- 5.7 In relation to paragraph 4.30 of the minutes, several members reiterated their belief that the principle referred to there, and at footnote 3 to the Guiding Principles, should have also formed part

of the principles agreed by the Group. In response it was suggested that the objective referred to there could in fact already be addressed by bringing into effect the right to apply for a diversion enacted by schedule 6 of the 2000 Act. This provision had not been commenced after Defra consulted with stakeholders and decided that the power was deficient as drafted. DW agreed to provide a note to the Group setting out the reasons for this decision.

#### Protection of routes that are in use by the public

- 5.8 The Group had previously agreed that where unrecorded routes continue to be in use by the public there should be some type of protection from any cut off provisions consistent with the way that the route is being used. In further discussion it was agreed that in the absence of clear historic evidence of status, one approach to delivering this protection would be simply to rely on prescriptive claims based on long use as of right. However a difficulty with this approach is that the cut-off date provisions will extinguish unrecorded rights that existed in 1949 and continue to exist at the cut-off date in 2026. Once this extinguishment has taken place it will not be possible to claim such a route based on evidence of use that was accrued before the cut-off date. Thus as things stand, the effect of the cut-off date might be to 'restart the clock' on the accumulation of evidence of use.
- 5.9 It was suggested that this is not a problem in practice so long as the route is actually claimed. If the right is shown to have existed in 1949, it should end up recorded on the definitive map. If it is not shown to have existed then, nothing gets extinguished at the cut-off date, and any evidence of use continues to accrue. However, if a pre-1949 route is not claimed, any evidence of use prior to the cut off date could become inadmissible. The Group agreed that the cut-off ought not to be allowed to have this effect in such circumstances. The possibility of an exception provision as a way of protecting such routes was discussed but it was agreed that this would be unsatisfactory, in that it would be likely to lead to further complications in demonstrating that the route was in current use. It was proposed that an alternative approach would be for surveying authorities to make bulk orders in relation to routes in their area that broadly appear to have the physical or user characteristics of rights of way, even if there is a lack of historic evidence of status or formal user evidence. It was argued that extending this approach to rural areas would reflect the model that the Group had heard had been successfully trialled by some urban authorities, with bulk recording of such routes often not attracting any objection. In addition to routes not recorded at all at present, this type of recording might also relate to upgrading recorded routes where it seems clear to the surveying authority from the physical characteristics of the route or its juxtaposition with other recorded routes that it is likely to have been under-recorded.

## **A first framework of possible key proposals**

- 5.10 The Chairman explained that the aim for the remainder of the meeting was to begin to discuss the main proposals that the Group might agree upon, based on a short initial paper drafted by the Secretariat. He reminded members that they could not expect to meet all of the objectives of their sector in relation to public rights of way. However with goodwill on all sides it ought to be possible for an agreed package to be developed that would deliver real benefit to each of the main sectors. This first outline of what might be some key components of such a package was not intended to be a menu from which items could be selected or ignored: the balance struck between the various elements would itself be a key component of getting the balance right.

### **Proposal 1: Set an earlier cut-off date than 2026**

- 5.11 The proposal was that there should be a window of 5-7 years for historic claims to be registered. Rights applied for by the end of this period would survive until the application was determined. Unclaimed rights would be extinguished, subject to the other proposals. This was intended to provide early certainty for the many land holdings where no historic rights apply.
- 5.12 A view was expressed that this proposal depended on the voluntary sector shouldering the burden for getting claims registered. Resources would need to be provided to the voluntary sector, and/or its research activity would need to be facilitated (e.g. through evening opening of record offices). In response it was suggested that public money should not be used to fund volunteers' research – or alternatively, should also be given to landowners and nature conservation groups to support counter research, or should be channelled to surveying authorities in view of their neutral role.
- 5.13 The Chairman expressed the view that resources could not be secured through the recommendations of this Group: it would be for those concerned to argue the case for particular types of funding, outside the recommendations of this Group. Streamlining the system could in any case reduce costs and difficulties for all. However it would be important to return at its May meeting to the issue of whether 'letting volunteers get on with it' is likely to be sufficient to secure recording of useful historic rights.
- 5.14 A concern was expressed that imposing an earlier closing date for applications than originally planned could cause a rush of speculative claims and that this could be unfair to landowners - especially if weak claims remained unresolved for a long period of time, as happened in some cases at present. In response the view was expressed that the voluntary sector would not waste time and effort submitting applications without historic substance.

- 5.15 The Group discussed whether setting a national standard for applications, together with guidance, might help to reduce the likelihood of speculative claims and focus the voluntary sector on identifying and pursuing the claims most likely to succeed. The question was whether such a standard might serve as an initial filter, allowing the weakest applications to be sifted out at the outset, so that they would not even become registered in the first place.
- 5.16 It was suggested on behalf of surveying authorities that such an approach would simply waste scarce resources. If the test was evidential, it would be difficult for an authority to assess the merit of an application without first carrying out a full investigation of the evidence. Equally if the test was merely whether an application was in the right form, time would be wasted by hard-pressed authorities in assessing something with no direct bearing on the likelihood of the claimed right being a genuine one.
- 5.17 The principle of pre-screening of applications was not ruled out, but it was agreed that resources must not be significantly diverted from substantive processing of applications. Speeding up that substantive processing was likely to be fundamental to achieving the outcome the Group was seeking.
- 5.18 There was some discussion of whether varying the closure date for applications authority by authority would be preferable to a single national cut-off date. The Group felt on balance that a single national date would be important in galvanising the efforts of the voluntary sector and surveying authorities. There was no logical reason for deferring the date in cases where a particular authority was under-performing – indeed, doing so might reduce the pressure on such authorities to improve.
- 5.19 **Conclusion:** The Group did not rule out the possibility that the cut-off could be brought forward significantly, so long as useful existing rights could be recorded or applied for during this shorter period. A limited period for claims, possibly together with safeguards against the making of speculative claims, would tend to encourage claimants to focus their attention on strong claims for useful rights.

**Proposal 2: Protect routes the Street Works Register shows as publicly maintainable**

- 5.20 The underlying premise here was that routes shown on the Street Works Register (SWR) as publicly maintainable are always subject to public rights, and should therefore be either exempt from extinguishment at the cut-off date, or recorded on the definitive map.
- 5.21 A suggestion was made that if this proposal were to be taken forward, early warning would need to be given to highway authorities to check that their SWR was up to date, and did include all routes that are on the List of Streets. A comment was made that

there could be difficulties in some areas over identifying which routes are on the List of Streets, particularly where there has been a change in authority and records might not have been properly transferred. A point was made that in many authorities the SWR and List of Streets are held by a different department to the definitive map, and that this might make implementing this proposal more difficult.

- 5.22 A concern was expressed over the possible consequences of inaccuracies in the SWR or List of Streets. This point was illustrated by reference to a case in Cambridgeshire said to have been the subject of a lengthy and costly dispute. A comment was made that an exception provision would only serve to protect a route for consideration at a later date and would not demonstrate conclusively that it was actually a highway.
- 5.23 It was suggested that not only publicly maintainable routes on the SWR have public rights. RH agreed to refer the Secretariat to material in the 1992 Street Works Regulations to illustrate what additional categories might be relevant for this purpose.
- 5.24 It was suggested that concern over development of unrecorded urban rights of way could be reduced by making their inclusion on the SWR a material planning consideration when development proposals are being considered.
- 5.25 It was pointed out that York City Council had made omnibus orders to capture urban paths, an approach also successfully applied by other authorities. It was suggested that civic societies and/ or town councils might also have an important role in recording urban routes. Writing up good practice could be influential.
- 5.26 **Conclusion:** Routes shown on the SWR should be exempt from extinguishment at the cut-off date. The Group did not rule out a blanket approach to determining the status of these routes, by recording all unrecorded SWR routes as rights at a default level. This would give direct protection to such routes and avoid a piecemeal situation over establishing their status. But there could be some practical difficulties with this approach that would require further consideration.

**Proposals 3: Simplify the recording of some other unrecorded rights**

**Proposal 4: Tackle potential land use conflicts before unused routes are recorded**

**(NB - the Group agreed to tackle these two proposals together)**

- 5.27 The first element of this proposal was that the effort in investigating claims might be reduced where an application is unopposed. A view was expressed that this should only happen where the owner had been contacted and had given their positive assent. The consequences of giving such assent would need to be properly explained to them. A comment was made that the Group had

previously considered how ways of informing landowners could be improved and these should be included in any proposal. A concern was expressed that it may be difficult for a local authority to identify the owner and/or occupier affected by an application, or to establish their title.

- 5.28 A comment was made that it is possible for a subsequent application to be made for a route to be downgraded or removed from the definitive map on grounds that it was wrongly recorded in the first place. A concern was expressed that this might happen more often if routes were recorded that had not been fully investigated. In circumstances where there had been assent of the type discussed, more finality would be needed. A suggestion was made that the owner might be asked to dedicate the route but it was pointed out that it is not possible to dedicate a highway that already exists. A suggestion was made that where an owner had given positive assent, such routes could be exempt from subsequent downgrading. It was suggested that cases where an owner gave such assent would be rare, but a counter-view was put that in a case with clear historic evidence backing an application, positive assent might be the simplest option for the land owner.
- 5.29 The second element of the proposal was that recording a right of way could be made simpler where certain key types of evidence were present – with the onus switched to the owner or occupier to produce any evidence that the right originally created had since been extinguished or varied. A view was expressed that pushing through the recording of rights based on any formulaic approach to historic evidence was not acceptable. This view was illustrated by reference to a suggestion that had been submitted to the Group, that certain roads set out as private roads in an inclosure award for the benefit only of the inhabitants of the particular district or neighbourhood should be automatically recorded on the definitive map as public rights of way. A concern was also expressed that surveying authorities would be put in a difficult position in being expected to press forward with recording a route without having made a full investigation of all available evidence sources in case there had been a later change. A view was expressed that this proposal would only serve to provoke an intransigent response from landowners. A suggestion was made that it would be better to go down the route of helping a landowner to understand the strength and nature of evidence, and agree a positive way forward.
- 5.30 The third element of this proposal was that if ‘reawakening’ a historic right would threaten the viability of the established land use, an occupier should be able to suggest changes to the right in order to mitigate this. If these changes were accepted as legitimate, the right would be recorded so modified. The point was made that it would be important for such proposals to relate only to genuine potential impacts on the uses of the land, not just to individual preferences for a different alignment or type of right. A concern was expressed that it would be difficult for surveying authorities to

decide on the merits of such a proposal for change. It was felt that it would be difficult for them to adjudicate on the actual threat to the viability of the existing land use

- 5.31 It was suggested that it might be preferable to concentrate instead on limiting what types of objection to proposals would be treated as relevant. It was felt that this was likely to be more appropriate than limiting who can object. Constraining the scope for unreasonable objections might be the key to making progress with all three elements of this proposal, and to keeping the associated systems simple, unbureaucratic and workable.
- 5.32 A point was made that a provision included in Schedule 5 to the 2000 Act gives the Secretary of State powers to ignore irrelevant objections, such as objections to historic claims made on the basis of amenity. A view was expressed that PINS may not be taking advantage of this power to the full extent possible. A suggestion was made that the number of cases passed to the Secretary of State could be reduced if an equivalent power was given to local authorities to use at an earlier stage in the process.
- 5.33 A proposal had been made by a member of the Group for a new power for the surveying authority to make a 'recognition agreement' with a land owner, recognising that a specific type of right of way does exist. Such an agreement would be treated as a legal event, thus allowing the right to be recorded at that level on the definitive map. Any pre-existing higher right that wholly or partly shared the same route would not prevent such an agreement being made.
- 5.34 A comment was made that such an agreement power would offer a positive alternative to current recording and diversion procedures. A further comment was made that that legislation would be needed to give local authorities the necessary powers, but that a case for this might be made on the basis of regulatory savings. A view was expressed that where rights are being recorded along an alignment or at a level other than the historic one, there is a public dimension, and thus a case for building in consultation to the process if the concept is that the newly-recorded right should supersede the historic one.
- 5.35 The point was also made that the willingness of a land owner to make a recognition agreement acknowledging a previously unrecorded right was likely to turn on the strength of any historic evidence. It was suggested that this argued for clearer legal presumptions about the status of particular types of evidence in indicating that rights of way are likely to exist - notwithstanding for example the Andrews judgement relating to purported award of rights of way under the 1801 Inclosure Act. It would then be open to the land owner or occupier to propose a recognition agreement broadly reflecting the historic right, but addressing any threat it posed to the viability of the established land use.

- 5.36 **Conclusion:** The Group was attracted by the concept of “more negotiation, less imposition”, so long as the negotiation could take place against a background of clarified assumptions about the existence of any historic rights. Recognition agreements might be a means of short-circuiting the intricacies of the current DMMO processes, both in relation to capturing unrecorded rights and in relation to securing simultaneous changes to them where this is necessary in order to prevent threats arising to the viability of the existing land use.

**Proposal 5: Streamline the determination process**

- 5.37 There was no time for substantive discussion of this proposal during the meeting beyond noting that a number of suggestions have been made as to how this proposal could be achieved.

**Proposal 6: The Wild Card**

- 5.38 During the closing stage of the meeting the Group were asked if they felt there were any other key proposals that needed to be included within a balanced package. A number of suggestions were made:
- 5.39 A proposal was made that the sanctions against an authority not getting on with processing claims should be strengthened. A suggestion was made that if the case is not determined within 12 months it should instead be determined by the Secretary of State or be considered as ‘deemed refusal’. A comment was made that the difficulty with this approach is that authorities could opt not to determine applications in the knowledge that the task of processing the claim would then transfer to the Secretary of State. A suggestion was made that the 12 month appeal needed to have some teeth and that a way of achieving this would be for a deduction to be made from the authority’s rate support grant. A comment was made that this suggestion was unlikely to be taken forward. The view was expressed that such a right of appeal could skew the prioritisation established by authorities, and could itself add to the overall delay in determining them. A suggestion was made that the local access forum could have a role in drawing attention to unsatisfactory performance. A further suggestion was made that a magistrates court order could be made to insist that the authority determines an application.
- 5.40 A proposal was made that it should be possible for creation of new public rights of way to be applied for on the basis of need. A comment was made that the Local Access Forum could be involved in vetting proposals, and if its advice was ignored, there might be some system of escalation. A suggestion was made that such a provision could be important in the future management of the rights of way network, post cut-off date. The Chairman suggested that this is not core business for the Group, but could be a contextual point

for it to raise in terms of whether existing mechanisms for filling gaps in the 'needed' network are adequate in practice.

- 5.41 A proposal was made that existing cycle tracks should be recorded on the definitive map. It was commented that this would make good sense but that it raised the question as to what status they should be afforded. The view was expressed that the status distinction between cycle tracks and bridleways needed to be retained. Another view was expressed that a distinction should be made between roadside cycle tracks and other cycle tracks, for example those created by upgrading footpaths. A further view was expressed that multi-user routes should be the norm. Another view was expressed that more effort was needed to persuade people involved in creating cycle tracks to make them suitable for horse riders. Highway authorities tended to default to tarmac surfacing for any cycleways they create, even along existing bridleways. A further view was expressed that the cycle track network often served a different function to that of the bridleway network and needed to be managed accordingly.
- 5.42 A proposal was made that cost savings could be achieved by limiting the current requirement for advertisement of orders.
- 5.43 A proposal was made that section 119 of the Highways Act 1980 should be amended to strengthen the way that joint orders are made – at present one part of a joint order can be objected to, even though the two are linked. It was suggested that a more joined-up approach was needed.
- 5.44 A proposal was made that cost and time savings could be achieved by grouping cases that would currently be covered by separate orders, under a 'portfolio approach'. The proposed Natural England reports to the Secretary of State covering all access proposals for a section of coast might offer one model for a portfolio approach. A comment was made that current processes tended to make such an approach problematic: different cases relied on different evidence sources, and attracted different objections from different types of people.
- 5.45 A proposal was made that it should be easier to correct clerical errors with the definitive map. A further proposal was made that it should be easier to update the definitive map and statement when changes occur that affect descriptions of routes, such as where a pub is converted to a house.
- 5.46 A proposal was made that it should be easier to resolve anomalies over unexplained changes in status along through routes. A comment was made that this might be best approached via creation and compensation arrangements, since historic evidence for upgrades in such circumstances was unusual. It was suggested that a 'ride scale approach' to making routes more cohesive and logical, and removing clear anomalies, would be beneficial. It was agreed that the Group needed to give further consideration to the

issue and to the role of regulation versus the role of market forces in making sense of it.

### **Next meeting**

- 5.47 It was requested that the secretariat now prepare a developed framework of proposals for discussion at the next meeting of the Group in May. This paper will need to take account of the discussion recorded above and of the various more detailed proposals in circulation. It was noted that a paper summarising submissions made to the Group as a result of the call for evidence had been circulated and that these ideas would be considered further to see whether they contained any other potential 'wild card' options.
- 5.48 The Group agreed to keep the framework of proposals confidential at least until after the May meeting, where there would be further consideration of the Group's communications policy. For the time being therefore there should be no circulation of the proposals to members' networks.

### **Action points**

- 5.49 GS to circulate the agreed guiding principles and confirmed minutes.
- 5.50 GS to re-circulate JT's proposals concerning correcting anomalies and the unintended consequences of legislation.
- 5.51 DW to provide a note on the reasons for not commencing the right to apply provisions.
- 5.52 GS to circulate details of RH's proposal for recognition agreements.