

# Improvements to the policy and legal framework for public rights of way – a public consultation



## Response proforma

Please use this proforma to answer the questions in the above document. The closing date for submission of responses is **Monday 6 August 2012**. Please send your response by:

- email to: [RightsofwayReforms@defra.gsi.gov.uk](mailto:RightsofwayReforms@defra.gsi.gov.uk)
- or post to: Andrew Crawford, Reform Projects Team, Zone 1/09, Temple Quay House, 2 The Square, Temple Quay, Bristol BS1 6EB

The above email address may also be used for general queries relating to this consultation.

In line with Defra's policy of openness, at the end of the consultation period copies of the responses we receive will be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London SW1P 3JR. The information they contain may also be published in a summary of responses. If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in email responses will not be treated as such a request.

You should also be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

To help us analyse responses, please provide details of yourself or your organisation (\* if appropriate) below.

Name	David Jacobs BSc MCIHT
Organisation / Company*	Dudley MBC
Job Title*	Project Engineer
Department*	Urban Environment
Address	The Council House Mary Stevens Park Stourbridge DY8 2AA
Email*	david.jacobs@dudley.gov.uk
Telephone*	01384 891736
Fax*	01384 814428
Date of response	6 <sup>th</sup> August 2012

NB: on the form below, please leave the response box blank for any questions that you do not wish to answer.

**Please do not feel that you have to answer all questions. Responses, including any general comments you might wish to make, are welcome on any number of the questions – we do value your comments.**

For each question it would be helpful if you could please indicate whether you agree, disagree or are uncertain by marking the appropriate box.

Parts 1 to 4 – General consultation questions		
1. Do you agree that there should be a brief, post cut-off period during which applications that pass the basic evidential test can be registered?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
No. This would lead to confusion and would not overcome the major problem of authorities putting the review till the last moment. Definition of the Basic Evidential Test would not be uniformly applied.		
2. Do you agree that during this period, local authorities should be able to register rights of way by self application, including any self applications made in the past, subject to the same tests and transparency as for any other applications?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
N/A See comments below about the List of Streets wherein such paths can be registered.		
3. Are there any other categories of rights of way that need to be protected by exceptions set out in regulations?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	

Not sure	<input type="checkbox"/>	
Comment:		
See comment later on List of Streets		
4. Do you agree that the [Stakeholder Working Group's] proposals [in paragraphs 5.1-5.12] would be effective in improving the process of recording rights of way?		
Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
This seems wholly beneficial although guidance will be needed to define a Basic Evidential Test.		
5. Do you think that more use could be made of electronic communications, for example, to make definitive map modification order applications online and to serve notice of rights of way orders?		
Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
6. Are there any particular issues associated with these proposals which have not been captured and which we should consider?		
Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		

At a recent AMLA meeting there was a solid consensus that these proposals, although in the main welcomed, did not address the fundamental point that PROW legislation is too complex and posed the question as to whether we needed, the Definitive Map, The List of Streets and the National and Local Street Gazetteers (LSG and NSG) as separate documents. It is proposed that paths identified on the List of Streets or private streets carrying public rights should be protected from the cut off date ( Stakeholders Proposal 25). This gives such paths legal status. This conforms with view of Mr Justice Glidewell passing judgement in the High Court 1985 ( West Yorkshire MCC v Molly Wedgewod ). As read from the Byway and Bridleway 2004/1/4 "the law holds that it is presumed that everything that was done in the name of the law in times passed was done correctly. Thus those who have compiled the List of Streets for over 250 years are presumed to have acted properly. I agree that the record kept by the county council of streets maintainable at public expense is conclusive that the streets in it is so maintainable"

Clearly future highway legislation and freedom of information is being channelled towards a comprehensive document of all ways open to the public whether maintainable, public or private negating the need for the List of Streets. That document will undoubtedly be the NSG. This will also record the status and maintenance liability.

Dudley may be thought as an urban area but it has about one third of its area as open space and green belt and therefore is reasonably placed to experience many diverse aspects of public rights of way.

In my officers's experience, recall to definitive statements play a very small part in the everyday workings. If public rights of way can be held within the List of Streets why should there not be an option to hold the definitive paths in the same way? This does not affect the path's history, does not deminish its status and does not affect the way in which paths can to changed via planning and highway orders.. Statements can still be held as a supporting document.

Within our authority, almost without exception the public rights of way are maintainable at public expense. It is acknowledged changes that S36(6) would need amending to include all highways, maintainable or not.

There are numerous authorities that wrongly do not include paths such as "1957" Housing Paths S36(2)9b) and S38 paths. By potentially using the List of Streets these can be easily included without the administration of the Modification process. See development comments below.

This Council recognises that the comments above are radical but many strike a cord with many urban and semi-urban authorities. In Warwick on 5<sup>th</sup> July 2012 there was a meeting of the Highways Working Group. This Council believes that many of the comments, above and below would have been considered favourably by the majority of the attendees.

7. Do you think that the mechanism [proposed in paragraph 7.2 and annex B], would work effectively?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
8. Do you think that there would be a residual risk that it would be in a local authority's interests to decline to make an order in the first place?		
Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	
Comment:		
Authorities should be trusted in this respect.		
9. Do you think that the alternative mechanism set out [in paragraph 7.3] would work effectively?		
Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
10. Do you have any other suggestions for ensuring that cases go to the Secretary of State only once?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

11. Do you agree that applicants and affected owners should be able to seek a court order requiring the authority to determine an outstanding definitive map modification order application?

Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	

Comment:

12. Do you think this is an appropriate way to resolve undetermined definitive map modification order applications?

Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

13. Do you have any suggestions for alternative mechanisms to resolve undetermined definitive map modification order applications?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

Certainly in urban areas, utilise the recording of public rights of way by means of the List of Street (to include unadopted PROW's) and the NSG and scrap the need for Legal Event Modification Orders since the latter does nothing to enhance the status or dimension of the highway. Advertise changes to the List of Streets/ NSG that are not express dedication eg S25, S38 and s228 bi-annually and resolve issues by means of Tribunals at the first instance. The element of the List of Streets/NSG for PROW's could still be in held in a Map Form to satisfy the Definitive Map diehards.

14. Do you have any suggestions on how a process might work, which would enable an appropriate diversion to be agreed and put into effect before the way is recorded and brought into use?

Yes	<input checked="" type="checkbox"/>
No	<input type="checkbox"/>
Not sure	<input type="checkbox"/>

Comment:

Expand S119 to include diversions of claimed paths and only make the diversion operative when the diversion is to the satisfaction of the Highway Authority.

15. What aspects of data management systems for recording public rights of way need to be tackled?

Comment:

The definitive map / list of streets needs to be published bi-annually with a list of changes in the previous years. The definitive map should be in an electronic form

16. What are the key outcomes that need to be achieved in terms of data management systems?

Comment:

Integration with the LLists of Streets (expanded and the NSG)

17. Do you agree that the proposals identified in [Part 2] should be applied to the policy and legislation governing public path orders?

Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	

Comment:

18. Do you think that more use could be made of electronic communications for public path orders, in similar ways to those suggested for definitive map modification orders in Question 5?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

19. Do you agree that enabling local authorities to recover their costs in full would incentivise them to pursue public path orders requested by landowners or managers?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

This idea does not sit well with S257 Orders. When there is S257 Order sought by the Council on behalf of the developer for his benefit and it is objected to, thereafter the Council picks up a bill?

20. Would local authorities be incentivised sufficiently to enable retention of a right of appeal to the Secretary of State without the risk of local authorities shifting the burden and



cost of order-making onto the Secretary of State?

Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	

Comment:

21. Should the proposed arrangements apply to all public path orders and not just to land used for agriculture, forestry, or the keeping of horses?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

22. How could it be made clear what charges are levied for each stage of the public path order-making process and that the charges reflect the costs actually incurred?

Comment:

Estimated costs are very often seen as maximum. Local authorities should be able to justify all costs beyond a set fee.

23. Do you think that landowners should have the option of outsourcing some of the work once a public path order is made in order to have more control over the costs?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

24. Might this [full cost recovery for public path orders] have an impact on other aspects of rights of way work?

Yes	<input checked="" type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input type="checkbox"/>	

Comment:

25. Are there any alternative mechanisms [to full cost recovery for public path orders] that should be considered?

Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	

Comment:

26. Under Option A [in Part 4], how do you think wider adherence to existing guidance might be achieved?

Comment:

- 1) Each Council should have a dedicated officer with experience in public rights of way that vets planning applications in their area and become part of the internal process. However, this should not place the obligation on the authority to identify PROW's, this must firmly rest with the developer.
- 2) Developers must be made more aware of the Planning Policies affecting PROW's , especially the policies on sustainability, highways adoption standards and "Secured by Design" ( Safety ). Many applications totally ignore these.
- 3) Any pre-meetings with planning officers on sites that affects the siting of a public right of way should be attended by an officer versed in public rights of way. PROW's are a material consideration in a planning application.
- 4) Developers should be reminded that Traffic Assessments must include pedestrian traffic.
- 5) In Dudley the above has been engrained in the system and since the mid 1980's the Council have never had to make a retrospective Order.
- 6) Public rights of way officers should have a good dialogue with officers engaged in traffic planning and the adoption of estates.
- 7) The working copy/ definitive map should include the whole spectrum of public rights of way eg 1957 Housing paths -Section 36 (2)(b) paths and not just the definitive ones.

27. What do you think would be the best option to minimise the cost and delay to developers while safeguarding the public interest on public rights of way?

Comment:

- 1) My officer has worked with PROW and developers for about 25 years and has written a Practice and Precedent for the Rights of Way Law Review. Without doubt , the problem lies with developers who do not make the correct enquiries on land. This can stem from purchase of land through to the development proposals.  
Good development and consultation will not encourage objections.
- 2) Dispense with S257 Orders since there is no difference in essence between a S247 and a S257 Order. PROW's are highways and must be seen in that light by developers.. It is an anomaly that development can have 1 metre square of all purpose highway to close, say, and 500 metres of footpath to divert and thus necessitates a S247 Order. Alternatively, the reverse, except the S of S should see applications in the case of classified roads.
- 3) S247 Orders are free whereas S257 Orders are about £2500. However, our view is that there should be a reasonable charge made by the S of S for a S247 Order. S247 orders tend to lead to less frivolous objections. S247 Orders are made by the developer and should be clear that it is a condition of planning permission.
- 4) Delays should be minimal as there is nearly always a contract period and prior permissions between permissions and site works. This is the time for the Orders. Presently the S of S time element for a S247 Order is considerably less than six months; normally quite adequate and efficient.
- 5) Objected Orders should be heard at a Local Tribunal or by written representations unless there are special reasons determined by the S of S.

28. Are there other options that should be considered [to minimise the cost and delay to developers while safeguarding the public interest on public rights of way]?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
<p>1) Options B and C belies the true problem. Parallel Orders and Conditioning is not the way forward since planners will want to defer solutions just to pass an application. This will lead to the lowest standards of replacement highways that will not fit into a sustainable and safe environment.</p> <p>2) Almost without exception public rights of way affectinf sites are debated right up to planners reports into the public domain and beyond to the 11<sup>th</sup> Hour. Parallel Orders would not fit into the realities of the Council's timescales. Option C would be an administrative nightmare. Officers have only 8 weeks on a normal application. These applications can be and amended many times that affects the setting of a public right of way. A plan drawn at an early stage may not be applicable to the final development proposals in the vast majority of cases that goes to out Planning Committee.</p> <p>3) The way in which objections would be framed would still lead to a Public Inquiry. It would not make it more transparent as the public may consider that the Planning Committee's decision as regards the agreement as final which it is not .</p> <p>4) Order plans should be based on the approved proposals and not the existing OS map base. An inset of the later may be advisable. Especially S247 Order plans look like a jumble of monochrome notations that cannot be related by members of the public to local features. Many objections are due to fear of the unknown and lack of clear advertising and consultations.</p>		
29. Do you think that enabling a single application form to be submitted through the Planning Portal would improve the process?		
Yes	<input type="checkbox"/>	
No	<input checked="" type="checkbox"/>	
Not sure	<input type="checkbox"/>	
Comment:		
<p>1) Many applicants fail to recognise public rights of way until their omissions is pointed out some time in the application period. If this happens the 8 week period would presumably be restated.</p> <p>2) Standards forms invaribaly to not fit the local circumstances and a Council's omissions to that form would be questioned and and potentially objected to . Going through the web is welcomed but it is likely to alienarte many of the population who would not see this a fair way of alerting the public to an application. See above comments on concurrent orders.</p> <p>3) Some paths are not recorded. It may be advisable to deal with potential public paths by the developers recogning the paths and going for a diversion to deny claims at a later date. This type of senario would not fit into Parallel Orders.</p>		

**Part 5 – Impact Assessments (and related) questions**

(i) Is the estimate for the number of unrecorded rights of way a fair estimate (20,000) and is the rate at which local authorities record them (1,200 per year) a fair reflection of what is anticipated to take place over the next 10 years?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Not sure	<input checked="" type="checkbox"/>

Comment:

(ii) Are the 'typical costs' used in the impact assessment a fair assessment of the costs? (as shown in table 1 of the impact assessment)

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Not sure	<input checked="" type="checkbox"/>

Comment:

(iii) Are the assumptions used to calculate the impacts (as found in the final column in the tables in annex 4 of the impact assessment) a fair assessment of the likely impacts of the proposals?

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>
Not sure	<input checked="" type="checkbox"/>

Comment:

(iv) Is it a fair assumption that the familiarisation cost is negligible to both local authorities and landowners – if not how long do you think familiarisation would take?		
Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	
Comment:		
(v) Are there any other impacts that have not been quantified (or identified) which you think could be quantified (or identified)? Please provide evidence		
Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	
Comment:		
(vi) Is the assumption that the cost of putting the new guidance into operation will be negligible a fair assumption?		
Yes	<input type="checkbox"/>	
No	<input type="checkbox"/>	
Not sure	<input checked="" type="checkbox"/>	
Comment:		



















