The Right Way Forward:

THE CLA'S COMMON SENSE APPROACH TO ACCESS IN THE COUNTRYSIDE

Country Land & Business Association

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CLA Country Land & Business Association

FOREWORD

There is a dichotomy within the public rights of way system in England and Wales. On the one hand it offers more than 137,000 miles of public footpath, bridleway and byway providing a level of access admired throughout the world; on the other hand it is governed by a failing bureaucratic and legislative system which is long-winded, expensive and completely incomprehensible to the ordinary person.

Indeed, to refer to rights of way as a "system" suggests an order and logic which is not apparent in reality. Tens of thousands of pounds of public money can be spent pursuing claims for ways which have not been used for centuries, if ever, while present-day users struggle along overgrown paths because there is not enough money for maintenance.

This cannot be right.

Common sense needs to be applied to benefit both users and landowners, and to provide better value for money for stretched public funds. Public access is a minefield of legal complexity; a tortuous and archaic system beloved only by those who can turn its convoluted procedures and subtleties to their own advantage. This disadvantages the ordinary person and, because of the costs of the system, benefits no one.

Changes to public rights of way have been frequently resisted because of fears that the system would be undermined. Such fears are unnecessary in respect of the changes proposed in this report: our proposals are aimed specifically at enhancing the system, improving efficiency and getting better value for money.

We commend this report to government and urge immediate action.

Harry Cotterell
President, CLA

ACKNOWLEDGEMENTS

The problems identified in this report are directly drawn from the many experiences of CLA members – landowners and users – who, frequently baffled by the complexities and intricacies of the rights of way system, were compelled to draw on us for guidance. In seeking to provide practical solutions to those problems in ways which are both workable and which would not undermine existing rights of way, particular thanks are due to the members of the CLA's Access and Rights of Way Working Group – landowners, surveyors, business owners and lawyers who gave freely of their time and expertise and whose advice, ingenuity and clear thinking were invaluable.

LIST OF ABBREVIATIONS

CROW	Countryside and Rights of Way Act 2000
Defra	Department for Environment, Food and Rural Affairs
ESA	Environmentally Sensitive Area
LAF	Local Access Forum
ROWIP	Rights of Way Improvement Plan

PUBLIC RIGHTS OF WAY ON THE DEFINITIVE MAP

Definitive map	The definitive map and accompanying statement are the legal record of public rights of way in England and Wales.

Types of right of way found on the definitive map are:

Footpath	Public path for walkers
Bridleway	Public path for walkers, horse riders and cyclists (cyclists must give way to other users)
Restricted Byway	Public path for walkers, horse riders, cyclists and other non-mechanically propelled vehicles (such as horse drawn carriages)
Byway Open to All Traffic	Public path for all traffic, including motorised vehicles, but where the use is predominantly on foot or on horseback

Users of mobility vehicles are entitled to use any of the above types of public right of way.

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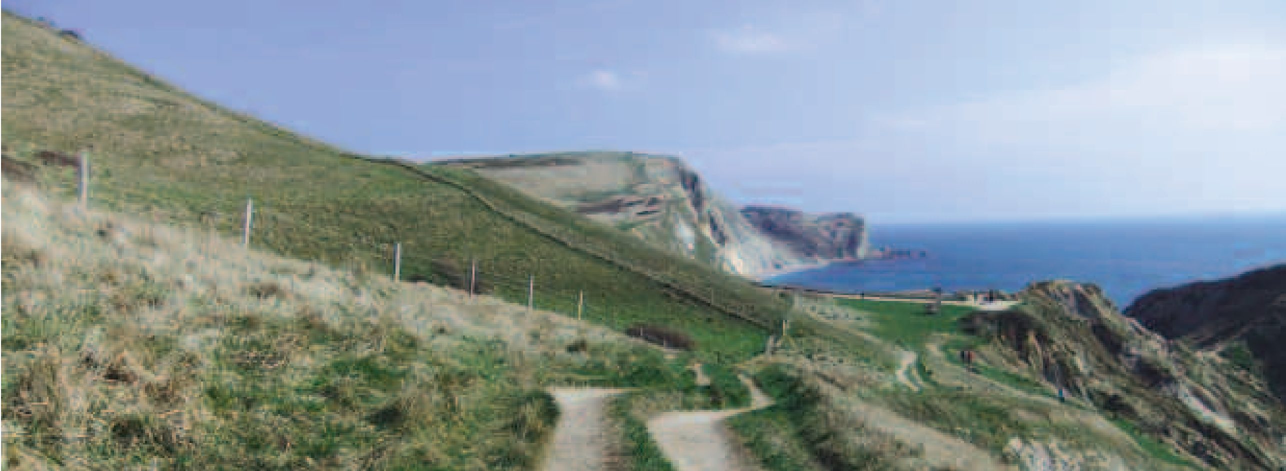


EXECUTIVE SUMMARY

The rights of way system defies common sense. Highway authorities spend tens of thousands of pounds investigating claims of alleged historic rights of way while struggling for funds to create routes which will cater for today's multiple needs – walkers, disabled users, horse riders, cyclists. It is ironic that authorities were required to create Rights of Way Improvement Plans (ROWIPs), yet are often unable to implement even simple measures because of the bureaucratic constraints of the legal system.

It defies all sense of propriety and logic when substantial resources are spent trying to open up paths unused for decades or centuries, if at all, regardless of the impact of such moves.

It is ridiculous that authorities are required to go through the same drawn-out bureaucratic process to correct small errors on the definitive map as they would have to follow to make significant alterations, such as a path closure.

The CLA believes it is unjust that property owners have no right to request paths are diverted out of their gardens or away from busy, and potentially dangerous, farmyards.

It is unfair – to users and landowners – that no clear consistent width is applied to public rights of way. It is extraordinary that there is no consistency for livestock owners who currently have the right to place a gate or stile on a footpath or bridleway which crosses a field, but not if a byway does so.

An injection of common sense is required.

There must also be a greater sense of fairness within the system. Thus it cannot be right that livestock owners, with little place else to keep their livestock other than their fields, can be held liable for their stock when they have not been at fault.

Similarly, it is not clear why landowners have a secure legal process which allows them to offer informal access to the public along paths, but have no equivalent legal process to allow them to offer informal access over an area of land.

Issues of efficiency also need to be addressed. The CLA believes everyone has a vested interest in ensuring the system is as efficient as possible. Questions of ideology are irrelevant. At present it can take many years to process a rights of way claim, resulting in enormous cost and ongoing uncertainty for all.

Even once fought and won, cases can be reopened and examined all over again – hardly a sensible use of scarce resources.

The test to be applied when a right of way is alleged to exist varies at different stages of the process. This lack of consistency means authorities are obliged to waste scarce time and resources on investigating routes that meet one test but not the other and, consequently, will never become public rights of way.

Spurious claims can be prevented by provision for the award of costs, as is the case in other areas of law, while the administrative burden can be reduced by removing rights of appeal at interim stages of the process, which slows down the system and adds nothing to the final decision.

The process can also be made more efficient by ensuring that claims for rights of way based on use are brought in a timely manner. Attempting to establish a use that took place 50 or more years ago becomes a time-consuming and near-impossible task. Where a route is being used and that use is suddenly stopped, it seems right that this should be the appropriate moment to bring forward a claim, while evidence is fresh.

Improving rights of way is not just about administrative process. It is also about the experience on the ground – the actual management of public access. For too many people, the rules are so complex that compliance becomes impossible. Simplifying the rules and applying common sense, while at the same time ensuring that paths are well signed, maintained and unobstructed, are basic principles that should apply to all paths.

Access is about more than rights of way: although local authorities have seen their budgets cut, the grand plan for an English coastal path, complete with "spreading room", remains a key objective of Natural England. It is regrettable that the Government did not use the approach taken by the Welsh Government: this would have enabled the rapid delivery of a coastal path (completion is expected in Wales during 2012, whereas in England the 2020 timescale is already acknowledged as unachievable), while at the same time ensuring that landowners' interests were taken properly into account.

It is welcome, however, to see the governments in England and Wales supporting voluntary agreements to govern access to inland waters. Care must be taken in all formal access provision not to overlook the myriad opportunities for access that already exist or could be provided. The value of permissive access is frequently dismissed but, as was illustrated by the outcry from users at the loss of permissive access from environmental schemes, such access can be highly valued.

The ideological obsession with absolutes which has shaped access and public rights of way provision is unresponsive to changes in use and demand, and fails to meet new needs and desires. A change in approach is required to produce an adaptable, versatile system, which makes sense to the ordinary person.

1. INTRODUCTION

It is almost 20 years since the CLA last published policies on public access and rights of way. Much has changed since then, most notably the misnamed "right to roam", introduced by the Countryside and Rights of Way Act 2000 (CROW). This marked a watershed in the balance between public and private rights: the Act granted the public a right of access to certain areas of land but did not make provision for compensation for any losses incurred by the owner of that land as a result of that provision. A core tenet of private property rights had been broken.

The effect of CROW lingers on. It has coloured the new provisions for coastal access in England (although not Wales) and has, through the dedication of substantial areas of access for walkers, created tension and consequent pressures from other users, such as canoeists, cyclists and horse riders, for increased free access to land.

Landowners are the focus of this pressure. The fact that land has to serve other purposes – food production, environment, wildlife, energy, climate change reduction, coastal change, tourism, employment, housing and so on – seems to fall outside the consideration of many vested interests. Landowners, however, have to manage these often-competing interests and know how hard it can be to achieve a balance.

Public access, far from being seen as a stand-alone issue, must be recognised by government and users as something which needs to be managed alongside these other issues. It cannot be pursued in isolation regardless of the impact it has on existing operations or of the benefits that well-managed access can have for landowner, user and government.

Opportunities exist to improve the present system, to make it more relevant to current needs and more efficient. Public access is a minefield of legal complexity, full of tortuous procedures and subtleties, often devoid of common sense; it has created a process cherished by those who revel in legal argument and can turn its archaic and convoluted procedure to their own advantage. Disputes about rights of way can cost tens, or even hundreds, of thousands of pounds, and take decades to resolve. They can poison relationships between individuals and colour the relationship between landowners and local government.

In this policy paper the CLA proposes measures to improve the present system.

There are many who are fearful of change, seeing it as an attack on existing public access and believing that any proposals, especially from a group representing landowners and rural business, would

surely damage users' interests. Those who take that stance forget that most landowners acknowledge, respect and preserve the rights across their land. They are often users too, and many rural businesses benefit from public access to the countryside. If we are to move on from the damaging conflict of the past, we must cultivate a new way of thinking that embraces trust as well as change.

We do not suggest this will be easy.

However, the CLA believes its proposals show how public rights of way and wider access provisions can be improved for landowners and users, while also offering efficiency savings for local government.

In setting out these policies, we urge a different approach. Polarisation between users and landowners has been exacerbated by a rights of way system which, in seeking simply to record and protect what already exists, fails to meet the challenges of providing access where it is needed, or of adapting to changed circumstances.

These proposals do not damage public rights of way. They will strengthen the system, make it more flexible, more efficient and, most importantly, more rational and understandable to the ordinary person.

2. RIGHTS OF WAY – A SYSTEM WITHOUT COMMON SENSE?

To the public, the rights of way system defies common sense. Its archaic and convoluted procedures are welcomed only by those who revel in legal pedantry and who can turn these obscure processes to their advantage. Below we set out examples of some of this lost logic, along with ways in which the system could be improved.

2.1 Lost Ways

It is wholly wrong, and defies all sense of propriety and logic, that paths which have been unused for decades, centuries or even at all, can be "discovered" out of the blue and opened up across land, which may be garden, commercial or farm land, or have been developed. The greatest sense of injustice occurs when there has been no use within living memory and there is no evidence of a path on the ground. That injustice is compounded if the land is registered and all relevant searches were completed at purchase.

Such paths can cause significant interference with modern-day operations and can affect the amenity of residents and the property value. Challenging the existence of these paths is time-consuming and expensive and, should they be confirmed, the process for getting them changed is slow and expensive, and the outcome uncertain.

From the point of view of users, such rediscovered paths may not fit with the existing network, and may not offer circular routes or linkages with other parts of the network. The inadequacies of the "unrecorded ways" approach are clearly set out by The Trails Trust in its recently issued handbook *Creating Multi-user Public Rights of Way*. This notes that seeking to record unrecorded rights of way is costly, divisive, alienates landowners and users, has unpredictable outcomes, cannot deliver access where needed or in any reasonable timescale and does not deliver a strategic modern network.

It seems that many users have clung to the notion of unrecorded ways not because they benefit the network, but because users think that may be the best opportunity available to extend the existing network. We believe there are better solutions to benefit users and landowners.

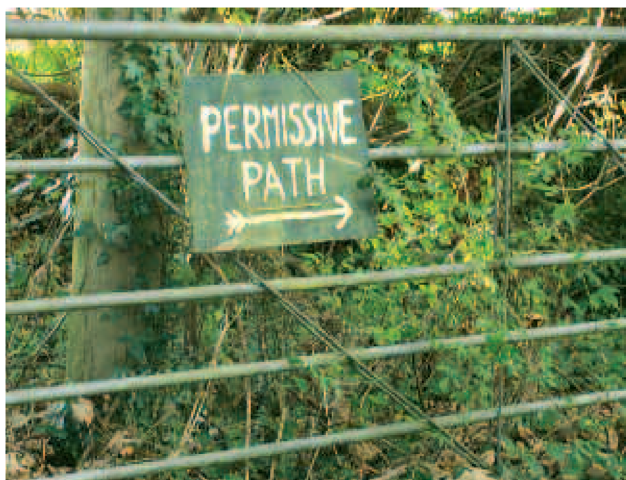
As long as authorities are required to process claims for unrecorded ways, significant resources will be tied up in this work, preventing local communities from making real improvements to the rights of way network. Increasingly, like The Trails Trust, user groups are realising that focusing on the past does not deliver a network suitable for modern-day needs. The Government must now act to draw the line under such claims by implementing the 2026 deadline set out in the Countryside and Rights of Way Act 2000.

The CLA also believes there is a strong case for bringing to an immediate end claims for unused, unrecorded ways. It is the claims for these ways which most often impinge on existing uses of land because there is no current use of the way. Consequently, they are likely to be most contested by owners as the claim appears "out of the blue". Significant local authority resources are tied up in researching, checking and processing these very technical claims, which can take years to resolve and cost local authorities tens of thousands of pounds, regardless of the length of path that may ever be achieved.

Halting such claims would free up considerable local authority resources to deal with other public rights of way duties, which are often of greater concern to the public. These include maintenance and signage as well as the time and resources to be able to implement improvements identified in documents such as ROWIPs.

The CROW Act provided a cut-off date of 2026 for adding these rediscovered paths to the definitive map. It is a great concern that this provision has not yet been commenced and the CLA calls on government for the early implementation of this measure.

To free up local authority resources for improvements which have been identified as locally beneficial, we also seek an immediate halt to claims for unused and unrecorded ways.



The CLA recommends:

- The provision for a cut-off in 2026 for adding rediscovered paths to the definitive map, as set out in the CROW Act, should be commenced.
- Government should immediately halt claims for unused, unrecorded ways, so that authorities can focus resources on improvements which have been identified as locally beneficial.

CASE STUDY: Lost ways claim renders land unusable

A Shropshire CLA member was seeking to purchase some land on which to keep her mares and stallion. It was vital the land did not have rights of way across it because of the security and safety issues associated with keeping stallions. After an extensive search, some fields, which were already known to her having been previously owned by her family years before, came up for sale. Despite this, she still ensured that full checks for possible rights of way were undertaken by her solicitor prior to purchase, and was reassured when these all proved negative.

After she had bought the land, an application was made for a restricted byway through the middle of it. The claim was based on evidence of a right of way in a 200-year-old Inclosure Map even though that same evidence had been considered and discounted during a definitive map review by the highway authority.

At appeal, the inspector decided the byway existed. Consequently the member was required to remove the gates along the byway (gates not being permitted on byways). This left the fields open, unsecured and unusable for any livestock.

The member said: "The whole point of purchasing this land was that it was safe and secure for the horses. It makes a complete mockery of land registry, the searches process and also my discussions with the council – which told me that a definitive map review had been undertaken and that no public rights of way had been found in that parish – if this can come out of the blue afterwards."

2.2 Livestock

The effect of the Animals Act 1971 is that livestock keepers are liable for the behaviour of their animals, regardless of any steps they might have taken to prevent injury. Livestock owners must follow Health and Safety Executive guidance where public access is permitted to land where livestock is kept. However, difficulties can arise, particularly where all the land owned by a livestock keeper is publicly accessible.

Increased access means that the potential for conflict between users, dogs and livestock also increases.

It is reasonable that livestock keepers should be liable for their stock only where the animal is inherently dangerous or where the keeper has been negligent. Government agreed, and promised during the passage of the Marine and Coastal Access Act 2009, that it would amend the Animals Act. This promise has not yet been fulfilled.

The CLA recommends:

- The Animals Act 1971 should be amended as promised by government so as to make keepers strictly liable only for animals which are inherently dangerous or where the keeper has been negligent.

2.3 Inconsistencies and *De Minimis* Changes

The rule of law "once a highway, always a highway" throws up strange anomalies, meaning:

- ways once proposed as highways, but never set out, can still be claimed as rights of way;
- ways which have gradually altered to accommodate change (e.g. along a crumbling cliff path) technically no longer exist, although a path may still be walked;
- adherence to the map takes precedence over common sense solutions, so that paths, even those walked and accepted by the public, have to be "returned" to their "true" (but perhaps less convenient) position; and
- making alterations is cumbersome, lengthy and expensive to pursue and, consequently, the definitive map is inflexible and very limited in its ability to accommodate change.

This was not the intention when the concept of the definitive map was first conceived: processes were not meant to be lengthy and bureaucratic and, while fully intending to be a correct and permanent record of public rights of way, these paths were not meant to be unalterable.

The map was intended to be an ever-changing and up-to-date record of public rights of way, hence the requirement under the National Parks and Access to

the Countryside Act 1949 for comprehensive and frequent reviews. These were never completed because of the bureaucratic complexity.

Changes are needed to ensure that simple alterations can be made easily. For example, there are more than 200 changes needed to the definitive map for Exmoor, mostly due to minor differences between the map and the paths as walked.

A pragmatic approach is sought for this type of *de minimis* change where the landowner is in agreement. This would save time and money for local authorities and government by avoiding the cumbersome, bureaucratic and lengthy modification order and objection process.

The CLA proposes a new category of modification – an "amendment notification" – for *de minimis* changes. When the authority discovers the map differs from the path walked on the ground, instead of demanding that the public now follows the line on the map, it should first check that the landowner is happy with the route as walked and, if so, apply an amendment notification – a simple notification to declare that the map is being modified to record the walked route.

The CLA recommends:

- A new category of modification – an "amendment notification" – for *de minimis* changes should be created. Where there is a difference between the walked route and the map, and the owner is content with the route walked, highway authorities should be encouraged to modify the map to the walked route.
- A new "amendment notification" procedure should also apply to cattle grid bypass gates and other types of *de minimis* change. The consent of the owner is essential before any action is taken.
- Defra should issue guidance to encourage a pragmatic approach to be taken to small, technical *de minimis* changes.

CASE STUDY: Minor changes cause major problems

A Lancashire farmer and CLA member had a footpath on his land which passed over some stiles, around a cattle yard and across a field. The path had been waymarked by the highway authority, which had also provided two stiles along the section around the yard.

However, some years later the highway authority realised the route of the footpath was shown on the definitive map as being a few metres to the east of where it actually was, and that the path should therefore pass through the cattle yard, rather than alongside it.

There is currently no means by which the authority can quickly and easily adapt the definitive map to match the route being walked. So, to "rectify" the present situation and bring the footpath into line with the definitive map, the farmer would have to remove two fences so that the public could cross the cattle yard.

The only alternatives currently available would be to seek a definitive map modification order – a lengthy and cumbersome process for such a small change, or for the farmer to apply for a diversion order to correct the map. This is also an expensive process, and one carrying no guarantee of success.

The farmer said: "It seems quite extraordinary we are having to go through all this rigmarole, even though the path is open and can be easily walked by people, simply because it doesn't quite match up with a line on a map. You would think it would be easier to change the line on the map, but actually, it appears it is easier to knock down fences and build a new path. What is really galling is that the path has gone around the yard for as long as we can remember, and the authority has even signed and maintained it there."

2.4 Diversions

Many public rights of way pass through farmyards, livestock areas, private gardens, and along farm drives. Two issues arise as a result: safety and privacy. A third issue, that of commercial practicality, arises where paths pass through diversified businesses.

The safety issue relates mainly to farmyards, livestock and, depending on its nature, some farm drives, especially narrow ones used by heavy machinery.

Privacy issues tend to arise when paths pass through or close to private gardens.

Commercial practicality arises where paths pass through diversified businesses and particularly in cases where the public right of way passes through an area where the public is expected to pay. Such an issue can especially arise where paths are "discovered" as the ability to charge fees to enter certain areas can be compromised.

There should be a presumption in favour of the diversion in such circumstances. This should not be limited to those examples listed above and should be clearly set out by Defra to guide local authorities and inspectors.

Currently, there is no duty on local authorities to consider landowner applications for diversions, merely a power to deal with them. Some authorities refuse altogether to consider such applications; others simply give them a low priority which means they may wait many years before being considered.

The Countryside and Rights of Way Act 2000 proposed rectifying this by providing a legal "right to apply" for a diversion or extinguishment for agricultural or forestry owners, but not for others, and by stipulating the authority had to consider the application within a reasonable timescale. However, government has yet to implement these provisions.

In addition, the CLA believes the provision of a fast-track process in limited circumstances, such as diversion out of working farmyards, away from land where a public right to walk is inconsistent with the present land use, and away from private gardens, should also be considered. This would enable diversions to be undertaken by a highway authority using powers similar to those proposed within the *Stepping Forward*[1] report (proposal six). Such powers would apply to existing paths and not just previously unrecorded paths as the *Stepping Forward* report proposed.

The CLA recommends:

- The "right to apply" under section 118ZA/119ZA of the Countryside and Rights of Way Act 2000 should be commenced.
- The scope of the "right to apply" should be extended to any landowner, so that applications may be made for any land management issue.
- Defra should issue specific guidance to highway authorities setting out the presumption in favour of diverting paths away from farmyards, commercial areas, gardens and other areas where privacy, safety or security is an issue. Such a presumption should not be defeated because, for example, a route follows an historic line.
- Defra should also consider issuing guidance on the use of diversions to avoid adverse impacts on areas of conservation value, particularly in situations where unrestrained use by dogs would adversely affect wildlife. The potential for temporary diversions in such circumstances should be investigated.
- The proposed primary legislation – cited in the *Stepping Forward* report – to provide a power for highway authorities to agree diversions should be applied to existing paths as well as previously unrecorded ones.

CASE STUDY: Battle to change access through farmyard

A Devon farmer and CLA member applied to divert a footpath away from a busy farmyard and on to an existing and well-used permissive path around the buildings.

The highway authority supported the diversion. There was also a policy within its ROWIP which endorsed diversions of this type. However, on publication of the proposed diversion, objections were received on the basis that the route was an historic one and therefore should not be altered.

The inspector found that although the local authority had a policy supporting diversions out of farmyards, there was no such national requirement. She refused the diversion order.

The farmer said: "It has cost us thousands of pounds so far and we are no further forward. The authority supports our case but it seems that is not enough. We can't afford to fight this any longer."

1. *Stepping Forward*, The Stakeholder Working Group on Unrecorded Public Rights of Way: Report to Natural England (March 2010).

2.5 Width of Path

A common source of confusion and debate between owners and highway authorities is the legal width of the path, in situations where the "boundary to boundary"[2] rule does not apply.

While this issue can arise where an owner needs to fence off a path (as referred to in the *McKaskie* case[3]), it can also relate to changes in land use, development, or the "opening up" of a recorded but unused path.

Owners frequently cite difficulty in establishing what the correct path width should be. In many cases path widths are not recorded on the definitive map and case law suggests that the width should be that used or what is "reasonable".

It is the definition of "reasonable" that can be an issue. The definition varies from authority to authority, many of which have now adopted policies on the subject setting out particular widths to apply within their area, although it seems likely that these are only enforceable for new paths.

There would be greater clarity for all and better consistency of approach if the definition of "reasonable width", in the absence of any other obvious factors such as a clearly walked path width or the "boundary to boundary" rule, was the width set out within the Rights of Way Act 1990 for the purposes of reinstatement of the land after cropping.

The widths are:

- one metre for a cross-field footpath; one-and-a-half metres if field edge;
- two metres for a cross-field bridleway; three metres if field edge; and
- three metres for cross-field byways and restricted byways; five metres if field edge.

The CLA recommends:

- Defra should issue guidance to all highway authorities advising that, in the absence of other factors, such as the "boundary to boundary" rule, a record on the definitive map, or an obviously walked path width (which may be narrower or wider than the widths within the Rights of Way Act), a "reasonable" width is that set out in the Rights of Way Act 1990.

2. Where a way runs between fences (or walls etc.) there is a rebuttable presumption that the whole area is dedicated to the public, provided the fences were laid out by reference to the highway and not for some other reason.
3. *McKaskie v Cameron* (2009) in which the judge suggested that fencing off a path could be one way of meeting the duty of care under the Occupiers Liability Acts 1957 and 1984. The case was only heard at court of first instance and therefore the decision is not binding.

2.6 Structures

The current law allows highway authorities to grant permission to a landowner to place a gate or other structure across a footpath or bridleway if it is to ensure the safety of livestock.

Should a landowner find himself with a byway, however, there is no legal means, however sympathetic a highway authority might be, by which the authority can grant consent for a gate to control livestock.

This has particular implications where previously unrecorded byways are discovered and cut across field boundaries.

Amending the Highways Act 1980 to allow highway authorities the same power to authorise structures on byways as presently exists for bridleways and footpaths would remedy this.

With increases in rural thefts, public rights of way, especially those open to vehicular access, are a particular problem for people living in the countryside. The power under the Act should be extended to permit the erection of gates or other structures for the protection of property or security reasons.

The CLA recommends:

- The Highways Act 1980 should be amended so that structures can be authorised on byways and restricted byways under the same powers that already exist for bridleways and footpaths.
- Powers under the Highways Act 1980 should be extended to allow gates or other structures to be erected on public rights of way for the protection of property or for security reasons.

CASE STUDY: Access decision puts children's safety at risk

A householder and CLA member lives on the outskirts of a village, and a footpath passes through his garden and into an adjoining arable field. Following a complaint by a member of the public, the highway authority told the householder he was not permitted to have gates on the footpath because they were not shown on the definitive map.

Furthermore, they could not authorise any gates as there was no agricultural need for them – they could only authorise gates where they were needed for livestock.

The householder said: "I have my grandchildren to stay with me frequently. How am I supposed to keep them safe and secure if I cannot even shut the gate to my own garden?"

2.7 Village Greens

Growing numbers of claims are being made for village greens, most notably on land which would not, traditionally, have been regarded as a village green. Claims are increasingly a result of disputes between neighbours, and are also used as a tactic in preventing development of land. Recent court cases, notably the *Redcar*[4] case, have been unhelpful to landowners suggesting that an existing use of land does not necessarily prevent a claim of public use as a village green.

While designation as a village green may continue alongside an existing use such as a golf course, its designation prevents changes in the use of that land and any development. Village green status can therefore have a significant effect on the use of land.

There is no equivalent procedure to section 31(6) of the Highways Act 1980 within the Commons Act 2006 which landowners can use to prevent claims for village greens (similar to the way in which landowners can show that they do not wish to dedicate a right of way). The only way in which landowners can currently prevent or restrict use is by erecting signs.

However, many landowners have difficulty in using signs to prevent illegal use. This can be especially the case where land is crossed by existing public rights of way, thus making illegal use difficult to detect and, because of the requirement not to deter use of the public ways, hard to prevent. Fencing to deter public access is often not practicable, either because the land is being farmed, or because of the presence of public rights of ways and/or permissive access.

For those landowners who wish to allow informal access across an area of land, the lack of an equivalent procedure to section 31(6) means they are frequently advised against tolerating any access. Provision of such a procedure would enable landowners to offer informal use across areas of land.

The CLA recommends:

- A similar procedure to section 31(6) Highways Act 1980 should be put in place, so that landowners are able to complete a statutory declaration and map thereby preventing the acquisition of village green rights, as previously promised by government.

4. *R v Redcar and Cleveland Borough Council and another* (2010).

3. EFFICIENCY – IMPROVING THE ADMINISTRATION OF RIGHTS OF WAY

When considering the efficiency of the rights of way system, questions of ideology are irrelevant. Every group has a vested interest in ensuring the system is as efficient as possible. Efficiency can also be improved by measures which we cite under other headings.

The following issues are all examples of ways in which the administration of rights of way falls short. Improving these would bring benefits to all parties.

3.1 Length of Time

The time taken to deal with a public path or modification order (from the initial claim through to resolution) can frequently be many years. This is far too long, resulting in an unacceptable burden on landowners as well as ongoing uncertainty.

The CLA recommends:

- A simplified process for dealing with claims is required: the present process is unwieldy, time-consuming and costly. This is an issue of efficiency, not ideology, and could be addressed by a review with suggestions considered by an independent body such as the Law Commission.
- The proposals contained within the *Stepping Forward* report of The Stakeholder Working Group on Public Rights of Way should be considered as part of such a review.
- Consideration should be given to using barristers to determine contested orders, rather than the Planning Inspectorate, as is now the case with village green applications.
- Consideration should be given to enabling local authorities to determine public path orders themselves, weighing up any objections, as authorities currently do for planning applications, and making the order if they consider it right to do so. It would avoid the need for automatic referral to the Planning Inspectorate should an objection be made. Although the applicant's right of appeal would need to remain, this would nevertheless both speed up the process and reduce cost for local authorities.
- Defra should amend the advice contained in Circular 1/09 to encourage the use of section 116 (the magistrates' court procedure) for diverting or stopping up bridleways and footpaths as well as vehicular ways.

CASE STUDY: The impact of a definitive map modification order

A Devon householder bought his home in 2003 on a long and narrow strip of land. Searches established that there was no right of way affecting the property and no claim for a public right of way pending. It was later established that a claim had been filed in 1997, but to the wrong people. The former owners of the property had not been notified.

In March 2004, a public footpath was claimed, running from one end to the other of his long narrow property. Although the claim was rejected by the highway authority, the claimant appealed and the matter was heard at public inquiry. The inspector's decision was not made until June 2009 when he also rejected the claim.

The householder said: "For a period of five years the quality of my life and future was uncertain. This claim was my first experience of the rights of way system. I experienced a confrontational system exploited by a claimant intent on pursuing the objective of getting as many footpaths established as public rights of way as possible, irrespective of the cost to the landowner or to the county council (i.e. the ratepayers) or its recreational value, number of potential users or the consequences.

"The claimant displayed a total disregard for the burdens he imposed on me – namely the anxiety, stress, [legal] defence costs, security implications, loss of value and saleability of my property."

3.2 Double Jeopardy

As the law stands now, a claim can be fought and won (often over a period of many years), and then the entire case can be reopened and examined again because of the discovery of new, or allegedly new, evidence. Fighting claims costs landowners, and authorities, time and money. It places an unacceptable burden on landowners to fight ongoing claims. Claimants may be tempted to withhold some evidence so as to have another bite of the cherry should the initial decision go against them, or may be less than assiduous in their research knowing that they can always make a further claim.

The CLA recommends:

- Where a claim has already been examined and determined on a path no further claim should be able to be brought. A modification to the "discovery of evidence" test for triggering the duty to review is required, incorporating the concept of *res judicata*, which prevents reconsideration of any matter already determined.

CASE STUDY: Double jeopardy

Shropshire County Council sought to add a bridleway to the definitive map because there was some evidence it may have existed.

That evidence was challenged by the landowner and, after two public inquiries in 2000 and 2002, the inspector concluded he agreed with the landowner: there was indeed insufficient evidence to prove that a bridleway existed and so it should not be added to the map.

In any other area of law, this would have been an end to the matter. However, user groups set about seeking to find out if there was any further evidence they could bring into play. In 2003, they discovered within the County Records Office a document which might indicate that the alleged path was a public footpath (although not a bridleway). On the strength of this they persuaded the authority to make a further order, to which the landowner again objected. Around eight years later they are still waiting for the order to be submitted to the Secretary of State so that an inquiry can be held, and therefore the outcome remains uncertain.

The location of this "new" evidence was the same County Records Office where both users and the authority had already discovered material relevant to the previous inquiries. It is unclear why it was not found before and presented to the first inquiry.

The lawyer representing the landowner notes: "In most civil proceedings the rules are strict. The new evidence has to be produced at the court of first instance. The Court of Appeal will rarely allow it. Once the case has been decided it is *res judicata*, meaning the same issues cannot be litigated again. There is a legal maxim that there must be an end to litigation. The power to make a new order on the discovery of new evidence under section 53(3)(c) of the 1981 Act runs directly counter to this principle."

3.3 The "Reasonably Alleged" Test

The test at initial order making stage is that a route is "reasonably alleged" to subsist. However, the order can only be confirmed if it is found "on the balance of probabilities" to subsist. The CLA believes the "balance of probabilities" test should be used throughout – the earlier, lower test results in confusion as well as wasted time, money and resources in making orders for claims which will not succeed on the balance of probabilities. Defra should issue guidance to authorities, reminding them that the test at inquiry is the "balance of probabilities" and that this should be taken into account when assessing whether or not to make an order.

The CLA recommends:

- The test throughout all stages of a right of way claim should be that of "balance of probabilities". The Government should issue new circular guidance to this effect.

3.4 Costs Awards

Landowners should be able to claim the costs they have incurred if they have to defend a spurious claim, including where claims are determined by written representations. A change would prevent unfounded or "on principle" objections, speed up the process and result in cost savings to government. Planning Circular 03/2009 allows the award of costs against unreasonable behaviour in planning appeals dealt with by written representations. Defra should confirm that this guidance also applies to rights of way cases including those determined by written representation.

The CLA recommends:

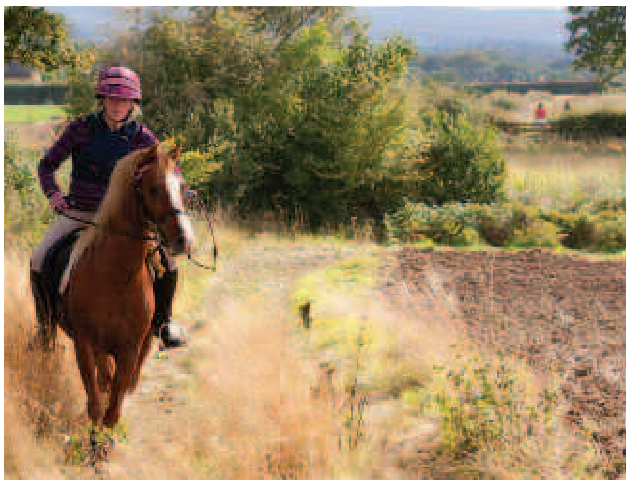
- Costs should be able to be awarded in all cases, including written representations, where there has been "unreasonable behaviour" in line with Planning Circular 03/2009.

3.5 Appeals under Schedule 14

There is presently a right of appeal for a claimant under Schedule 14 section 4(1) of the Wildlife and Countryside Act 1981 which allows an appeal against an authority's failure to make a definitive map modification order. The authority will have decided the evidence produced is insufficient to meet the lowest test, which is that a right of way is "reasonably alleged" to subsist. Having a right of appeal at this stage does nothing to improve the overall process – indeed, the result is often to slow it down as it creates another administrative burden and extra costs for government, local authorities and individual landowners.

The CLA recommends:

- The right of appeal under Schedule 14 section 4(1) should be abolished.



3.6 Certainty

There is currently no time period within which claims for public rights of way must be brought. As claims are calculated from the date the use is "brought into question" this can result in claims for public rights of way being made where the use is alleged to have taken place 40 or 50 years ago. It seems reasonable that if a route has been used, and that use is challenged, that there should be a time period within which the claim must be brought, as is the case with village greens and other areas of law.

The CLA recommends:

- Claims for rights of way should be brought within two years of the use being brought into question, as is the case with village greens.

CASE STUDY: More than 20 years to bring a claim

A Norfolk householder and CLA member has owned a small property for many years, one of an estate of properties. In 2010, a claim for a public right of way across the estate was made. It is known that signs prohibiting use have been in place for at least the previous 20 years. The claim therefore rests on use that may, or may not, have taken place during the 1970s and potentially as far back as the 1950s.

Not only can recalling matters such as use, signs and the route followed be difficult after many years have elapsed, but key witnesses may have died, complicating the process still further.

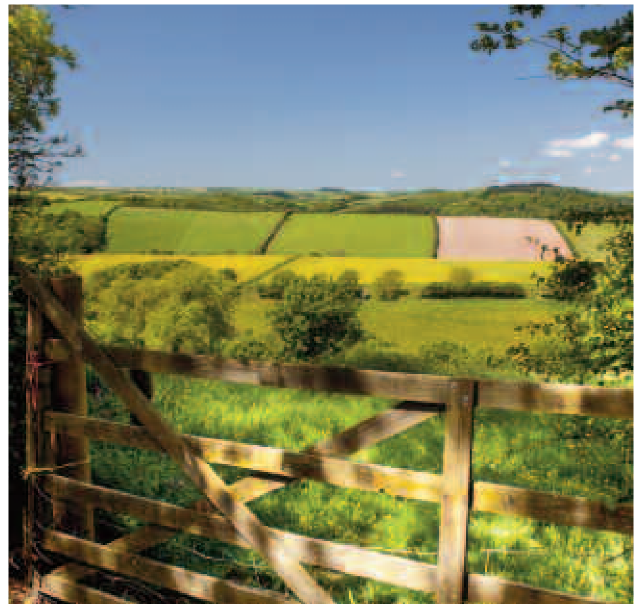
The householder said: "We recall one property owner who for many years challenged people on the alleged footpath. She also had a chain across her property, where the alleged footpath now goes. Unfortunately she died a few years ago aged over 90."

Allowing delays of many years before a claim is brought is also unfair to owners who have purchased a property and are unaware of potential use many years previously, and who would take comfort in the fact that signs were currently in place prohibiting use.

The householder added: "I find it confusing that for many years signage was in place and yet people make a claim based on use which allegedly took place previous to such signage being there."

4. MANAGING PUBLIC ACCESS

Many of the problems that arise with public access are not a result of defects in the law, but simply failures in management. Public access to the countryside has been encouraged by government and its agencies, often on a vague assumption that people will instinctively know how to behave and where to go. Experience shows that this is not the case. Good access needs maintenance, management and, on occasion, enforcement to ensure that users and landowners are not adversely affected by illegal, or indeed, simply thoughtless behaviour.



4.1 Public Understanding of Access

The many different types of access rights are confusing for the public. Most users do not know or care about underlying rights. It is largely irrelevant to them whether the access is along a public right of way or CROW open access land or is permissive. Often, they just want to go for a walk, ride or cycle along a well-defined path that is easy to use and follow.

The vast majority does not wish to cause trouble. However, a minority believes their "rights" take precedence over everything else. This can cause huge problems for landowners, who often have to deal with resultant problems alone and without support from other agencies such as police, highway authorities, countryside rangers and so on.

There is a growing disregard for private property and increasing incidents of trespass and anti-social behaviour, including the inability to control dogs, which adversely affects landowners and other users. This disregard is a symptom of a wider problem than mere public access. Nevertheless, in the context of access policy it is clear that the provision of greater access, without a corresponding requirement for greater user responsibility and effective enforcement, is resulting in a situation which, in some areas, renders the farmer's ability to use his land impossible. It also creates an intolerable situation for other users.

The Countryside Code does not offer clear messages about what the public can and cannot do. Even where improvements are made, most users will not be familiar with the Code or have it with them.

The easier the footpath is to follow, the less likely the user is to cause damage, and the better will be their feeling towards the owner of the land. Better signage and waymarking are essential as an aid to education, and are also frequently mentioned as important by the public in access research. There should be no assumption that users will refer to maps or the Countryside Code; access should therefore be obvious and easy-to-follow on the ground.

- *"We are close to the town and find that increasingly people walk everywhere. Recently, we even came across a website produced by a local man who was promoting our farm tracks and environmental headlands as routes for walking. We have public rights of way, and we are happy to have people walking on our permissive paths, but there are areas where it is dangerous to go or where access would damage wildlife. People need to understand this."* West Midlands landowner and CLA member
- *"We are getting persistent problems with people straying off the footpath, picnicking and, especially in hotter weather, lighting fires and drinking in large groups. We let the fields to a local farmer for grazing but he will not take the land much longer if this illegal use persists."* Warwickshire landowner and CLA member
- *"I have a problem with walkers on the footpaths on my land leaving gates open. My wife has had to go and retrieve our ponies when they have been let out of the field by walkers leaving the gate open."* Sussex landowner and CLA member
- *"The lane is used illegally by motorcyclists and horse riders despite it being clearly marked by the local council as a footpath."* Cornwall householder and CLA member
- *"We have recently signed and waymarked all the paths and we find that people tend to follow them now."* Norfolk landowner and CLA member
- *"There is a big ongoing problem that we have of constant trespass by local people along the edges of fields and in one wood in particular. It has become worse in recent years as people have taken advantage of the cross-compliance two-metre margins along the hedgerows."* Hertfordshire landowner and CLA member

An issue exists with environmental stewardship and buffer strips and field margins. These are often seen as routes to walk by people, which can lead to conflict with the environmental aims.

Lessons should be learned from permissive access where measures have been very successful at getting messages across about where people are allowed to go and how they should behave. The knowledge that such access can be removed engenders respect for it. This is a lesson that should also be applied to public access.

Users should be encouraged to take responsibility for their own safety. This does not mean that landowners can create or permit dangers to exist. But users should be responsible for complying with the Countryside Code and taking notice of any signs erected (for example, warning of cattle in a field).

The Big Society approach should encourage the deployment of local footpath wardens or countryside rangers to help in the proper use and management of public rights of way. Alternatively, local partnerships of users, landowners and parish councils could be set up to manage access.

The CLA recommends:

- Easy-to-follow signage and well-waymarked paths are essential. Highway authorities should ensure that paths are well signed and the surface is easy to use, and that highway budgets provide for proper maintenance. Paths should be waymarked and landowners should ensure that there are no obstructions.
- A change in responsibility is needed, so the onus is on users to take responsibility for their own safety. This means complying with the Countryside Code and taking notice of any signs. The Countryside Code should put an emphasis on compliance and responsibility. Where users do not comply with the Code, they should not be able to seek redress. The Code should be condensed into an easily reproducible form which can be readily affixed at access points.
- Government should enable the temporary or permanent closure of paths where persistent illegal or anti-social use occurs.
- Local partnerships similar to Parish Paths Partnerships, drawn from users, landowners and parish councils, could be responsible for the management of access within parishes.
- Defra and Natural England should take active measures to help farmers in protecting buffer strips and margins under stewardship schemes from access, and ensure that the public is aware of the purpose of this land.

4.2 Enforcement

The ongoing issue of illegal use of public rights of way by four wheel-drive vehicles illustrates that legislation is nothing without proper enforcement. Some local authorities have been reluctant to use Traffic Regulation Orders (TROs). Even where these have been implemented, compliance can be an issue.

Where access is on foot, there can be issues regarding the proper use of public rights of way, or behaviour on open access land, especially where dogs are involved.

Indeed, enforcement of the complex rules for dogs on open access land appears impossible in practice. Given the documented significant impact that dogs can have on ground-nesting birds and livestock, consideration should be given to excluding dogs from moorland areas between April and June where existing restrictions are not complied with.

The deployment of local footpath wardens or countryside rangers to encourage the proper use and management of public rights of way is vital and can reduce the need for subsequent enforcement.

The Big Society approach could see the start of partnerships between access users, parish councils and landowners to tackle illegal access (similar to Farm Watch[5]).

Parish Paths Partnerships should be encouraged to manage the use of public paths, ensure compliance and report problems.

Highway authorities should be willing to use all the tools at their disposal to enforce proper use of public paths, including in situations where landowners highlight problems.

Compliance is reported as being much better on permissive access, where there is always the risk that the access right will be withdrawn. This lesson should be learned for public rights of way. Where there are

5. Farm Watch is a partnership between police and the farming community to fight rural crime.

persistent problems with illegal or anti-social use, the highway authority, or landowner upon requisite notice to the highway authority, should have the power to close – either permanently or temporarily – the affected paths.

The CLA recommends:

- Highway authorities should be encouraged by government to properly enforce use of rights of way, including situations where problems are experienced by landowners. Authorities must accept that their responsibility for public access includes that of ensuring public compliance with the rights granted.
- A consistent approach should be encouraged across all authorities as this will help with compliance.
- Footpath wardens or countryside rangers should ensure proper use of public rights of way.
- Local partnerships between owners, users and parish councils should be encouraged to take responsibility for tackling illegal use and should be supported in this by the highway authority and, where necessary, the police. Highway authorities should be supportive of requests for measures to tackle illegal use, such as the erection of barriers.
- Landowners should be encouraged to report all instances of illegal use, and authorities should keep a record of all such instances.
- Highway authorities and landowners should have the power to close (even temporarily) paths where illegal and/or anti-social use is taking place.
- A fast-track procedure for permission to install posts, fixed or hinged, should be introduced to restrict the width of routes and help to tackle illegal vehicular use.

CASE STUDY: Council fails to use its powers

A Cheshire landowner and CLA member was concerned at the illegal use of a bridleway, and particularly the constant fly-tipping taking place there. The fly-tipping was a nuisance to the owners and made the bridleway unpleasant and dangerous for users. The local highway authority was unwilling to use its powers to prevent the illegal access. The landowner said: "The council is not being at all helpful. It feels like we are being victimised."

CASE STUDY: Damage to historic stone walls

A Yorkshire farmer and CLA member farms within an Environmentally Sensitive Area (ESA), of which his historic stone walls are an important feature. A bridleway crosses some of his fields, and some of his land is also open access land under the Countryside and Rights of Way Act.

Despite the presence of six gates into a large field, walkers have persisted in taking a short cut from a local caravan site across the stone walls, damaging and breaking them down. As well as the cost of repair incurred by the landowner and the damage to an important landscape feature, there is also the risk that livestock will escape where the walls are damaged.

The Countryside and Rights of Way Act makes it clear that climbing and damaging walls is not acceptable behaviour by users. However, the member noted that "the ranger from the National Park wasn't much help". In despair, he added: "Should I just ignore the walkers and let them cause criminal damage? The damage done to the historic walls will cost a fortune to repair, and I have an obligation through the ESA to keep my walls in good condition. But neither the National Park nor Defra seem interested in the damage."

CASE STUDY: Illegal use by four-wheel drive vehicles (4x4s)

A Worcestershire landowner and CLA member had problems with youths driving on a bridleway. Such use is illegal under the Road Traffic Act 1988, but, although prosecution of the offenders by the police is possible, a practical solution to prevent illegal use occurring was the most pressing need.

The highway authority has the power to erect a barrier to prevent illegal access or to restrict the use through a gate. However, the reluctance of authorities to use the powers available to them is particularly frustrating where illegal use occurs.

The landowner said: "This affects me and my tenant and I would like to see it stopped. The ruts in the lane caused by these 4x4s are now 18 inches deep and it is impossible for anyone to get down the bridleway, even on a horse."

5. ACCESS TO COAST AND WATER

There is a significant difference between the implementation of proposals for coastal access in England and in Wales. It is the English proposals that have caused most concern, although this should not be taken to mean that the Welsh coastal path has been unfailingly successful. Differences also exist in the provision of access to inland water, where the Welsh proposals have potential for unfairness and an adverse impact on riparian owners as well as existing users.

5.1 English Coastal Access and Margin

The proposals for coastal access under the Marine and Coastal Access Act 2009 are now being implemented. CLA members remain extremely unhappy at the extent of coastal access, particularly the coastal margin provisions. The lack of compensation for loss incurred increases these concerns. The coastal access process and coastal reports for Weymouth Bay, the first part of the national coastal path to be rolled out, have not proved reassuring to landowners who say their concerns have been ignored within the proposals.

The designation of margin is causing an unfair burden on coastal landowners and businesses. The lack of compensation means there is no check or balance on Natural England's designation of land which, as the Weymouth Bay experience illustrates, does not take account of landowners' concerns. Natural England appears to have misinterpreted the legislation on coastal margin which restricts the margin to coastal land.

The CLA remains fundamentally opposed to the coastal access legislation. We believe it does not take sufficient account of landowners' rights. Now that the actual process has commenced, we see no evidence to allay those fears. Furthermore, there appears to be a lack of will within government to address these issues.

Human Rights legislation, Article 1: Protection of Property states: *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived[6] of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

The Article continues: *"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties[7]."*

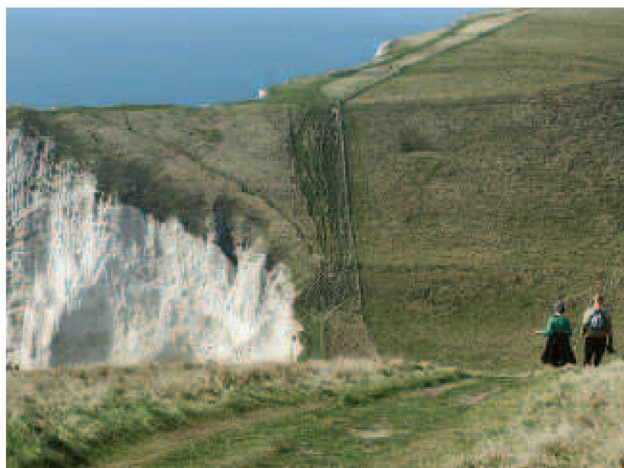
The CLA remains alive to the possibility that the application of the coastal access provisions may deprive a landowner of the peaceful enjoyment of his land in a way which is not in the public interest and where that deprivation has remained uncompensated by the State.

The presence of the provisions on the statute book reduces the value of a holding and the viability of the business. If loss of income or failure of a business can be shown to have resulted from the implementation of coastal access, legal redress should be sought.

The CLA recommends:

- The CLA will continue to actively lobby government to address the concerns relating to the coastal access legislation and its implementation.
- The CLA would support the withdrawal of the new coastal access provisions and encourage proper recognition of existing coastal access or new access similar to that provided in Wales.
- Government and Natural England should take account of landowner concerns in the implementation of coastal access.
- The CLA challenges the view that the granting of a public right over land does not amount to dispossession under the Human Rights Act, and that such dispossession does not result in damage or loss for which compensation should be made.

6. Deprive is defined as "dispossess" or "debar from enjoying".
7. Deprivation may occur if in the public interest and the person is compensated for the impact on his possessions.



5.2 Welsh Coastal Access

The CLA supports the approach taken by the Welsh Government in ensuring that landowners affected by the Welsh coast path are compensated for their losses. We note this pragmatic approach is set to achieve coastal access in Wales by the target date of 2012, benefiting users and landowners.

The CLA recommends:

- The Government should consider adopting the approach used by the Welsh Government in its implementation of coastal access in England.

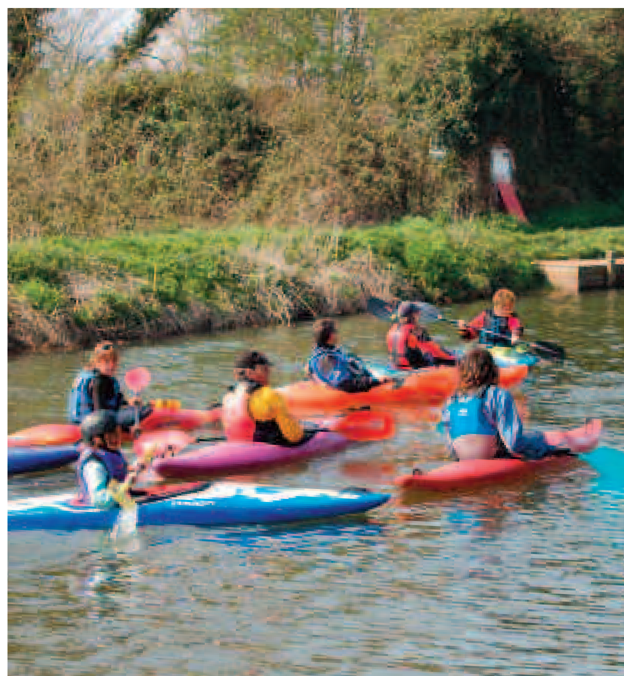
5.3 Rivers and Inland Waters

Riparian owners are under threat. There is increasing pressure for access to and along rivers. Campaigning has been led by canoeists, but rafters, swimmers and extreme sports enthusiasts are all keen to gain greater and free-of-charge access to water.

Conflict between canoeists and fishermen has been intensifying. Fishermen who have paid large sums of money for exclusive access often feel most aggrieved about infringement of the rights they have bought. In Wales, voluntary agreements are proposed but the threat of legal action if these fail means that these are voluntary in name only. The Government has so far supported a voluntary approach to canoe access in England.

The CLA recommends:

- The CLA strongly supports the use of voluntary agreements governing access along rivers. The many and varied uses of rivers mean that access is best controlled, for the benefit of the river and its wildlife, by agreements that can operate flexibly as required, rather than within a rigid statutory framework. We welcome the Government's support and encouragement for the implementation of voluntary agreements.
- We note the decision of the Welsh Government to encourage access to inland waters and we urge the Welsh Government to adhere to the proposed voluntary approach. If users do not adhere to voluntary codes, thereby showing that they cannot act in a responsible way, the CLA believes further access should not be provided.
- Remedies should be available and used against those who deliberately flout the law and ignore voluntary codes of access.



CASE STUDY: Voluntary canoe agreements

Following conflicts between different users of a river in the south west of England, a riparian owner and CLA member set up a permit system for canoeists. The system has now been in place for a number of years.

The Fisheries Association and the British Canoe Union have an agreement permitting access over specified winter months, and also detailing the access points to the river and car parking arrangements so that local residents are not inconvenienced by canoeists' cars. Permits must be obtained in advance for canoeists. The system ensures that a very popular section of river can be suitably managed.

The owner said: "I would like to think that it is a model of success."

6. OTHER OPPORTUNITIES FOR ACCESS

The access debate has been characterised by an obsession with "rights". The opportunities to be offered by other types of access have been dismissed because of the absolutist and uncompromising approach taken by campaigners.

The ideological arguments that have shaped access debates have failed to consider the wider picture, and have not taken proper account of the many different types of access in all their widest and most fluid forms: permissive, environmental, de facto, commercial or informal. These other types of access can, when coupled with the solid foundation of definitive access, create a far greater array of provision than could ever be achieved through just an historic-based process.

Yet, the obdurate and ongoing pursuit of ideological "rights" fails to meet existing needs as well as new demands – such as those of mountain bikers and other leisure users.

Care needs to be taken that these additional access opportunities are not lost through the side-effects of public policy and law.

If, for example, courts continue to make decisions which say that landowners must be clear about preventing access if they are not to inadvertently create "rights", landowners will increasingly, though reluctantly, decide they must stop informal access altogether. Many of our proposals in this policy paper aim to address this issue.

Policy-makers must also give due recognition to the opportunities that can arise from other forms of access.

6.1 Commercial Opportunities

The enlargement of so-called "free" access to the countryside is a real concern: it can undermine existing commercial activities and eat into new opportunities for enterprise. Indeed, the concept of "free" use is illusory; it is merely free at point of use, which means that users can fail to appreciate the true cost of access and consequently fail to give it the respect it deserves.

Commercial opportunities for access should not be denied, and can serve to meet public demand very effectively – often more effectively than the informal access provided by the CROW Act or public rights of way. For example, there are commercial mountain bike trails, adventure playgrounds, family cycling trails, horse trails, fishing, commercial climbing, guide-led walks as well as associated opportunities for commercial enterprise including car parking and other facilities such as cafés.

On the coast, commercial opportunities, such as the provision of accommodation or facilities including car parks and cafés can emanate from exclusive access to beaches, cliffs and caves. Value may also accrue from exclusive access for activities such as fishing.

The value of these commercial activities to the economy should be recognised in public access policy-making.

The CLA recommends:

- Government should recognise the commercial value of access.
- Access policies and practice must not adversely affect commercial activities and opportunities.

▶ *"We run a holiday business on the coast. The value of having exclusive access to the little beach is about a quarter of our turnover. If we were to lose that, we would simply not be profitable."* South West landowner and CLA member

▶ A West Midlands landowner and CLA member, who had diversified his business to create a livery yard, said: *"We wanted to maximise the benefits of the yard for horse riders, so we have also set up a toll ride scheme on various local tracks and farm roads."*

▶ *"The car park income that we get from people coming to walk here helps us fund some of the conservation and access management activities on the estate."* South West landowner and CLA member

▶ A landowner and CLA member in the South West of England, who diversified his existing operation into an award-winning business including an education and visitor centre, said: *"Exploring the wildflower meadows, parkland and lakes is part of its wide appeal to visitors."*

6.2 Permissive Access

Permissive access offers significant opportunities, which may not be available in other ways, to provide access to the countryside. This could be to areas that would otherwise remain inaccessible, or to groups of people – such as riders, the less-abled or groups of young people. Permissive access may be provided by the landowner in the form of area or linear access; it may form part of a permissive agreement – for example with a local authority; or it may be provided as part of an environmental scheme.

Recent policy trends have often discounted permissive access, ignoring the high value that can be placed on this type of access by users. Changes to environmental stewardship schemes mean that many types of access may, in future, no longer form part of these schemes. A campaign by user groups and national parks to encourage government to reinstate permissive access provides examples which illustrate the value of permissive access to users. The CLA urges government to reconsider its decision to remove support for access from environmental schemes. It seems illogical to withdraw funding for access which meets local needs, when so much of the thrust of government policy is about localism and meeting the needs of local communities.

Permissive access offers many benefits; it is flexible and can be tailored to changes in land use (for example, headlands within an arable rotation). It can be provided quickly and easily without the formalities of the bureaucratic definitive map process. It can offer access to specific groups, such as horse riders or cyclists. It can be used to easily provide links to create circular routes, or access to otherwise inaccessible areas of countryside. It engenders respect because users know that abuse of the rights can lead to removal of access. Landowners are willing to offer permissive access because they retain control of the access and with it the ability to deal with any problems that may occur.

The CLA supports the concept of permissive access and has consistently promoted it as a means of allowing access to the countryside. The Government needs to recognise the benefits that permissive access brings and its overall contribution to public access.

- *"I own and manage some ancient woodland within an Area of Outstanding Natural Beauty. I actively encourage walkers: they have to write to ask for permission, which they then receive, along with a map and annual newsletter. The scheme works well and has mutual advantages."* Surrey landowner and CLA member

- *"We have provided several miles of permissive paths, including circular routes and links between villages. It is appreciated by locals because there are no footpaths otherwise."* Norfolk landowner and CLA member

- *"We have provided two permissive paths. We have had no problems with them at all. People know that if we did get problems, we would close the paths. People have respect for the access we provide."* Oxfordshire landowner and CLA member

- *"We have offered permissive access for a number of years. It has worked very well and we have been able to control dogs which we wouldn't have been able to do if we had public rights of way."* Yorkshire landowner and CLA member

The CLA recommends:

- Government policy should recognise the benefits that permissive access brings and its contribution to overall public access.
- Government should provide greater support for permissive access whether through environmental schemes or other measures.
- Existing permissive access, including that provided through environmental schemes, should be properly promoted through a single generic website and available on Ordnance Survey digital maps.
- Permissive access provided through environmental schemes should also be promoted through notification to Local Access Forums (LAFs) and parish councils.

7. SUMMARY OF RECOMMENDATIONS

To enhance the public rights of way system, improve efficiency and obtain better value for money, the CLA believes the actions below are necessary.

Rights of Way – A System without Common Sense?

2.1 Lost Ways

The CLA recommends:

- The provision for a cut-off in 2026 for adding rediscovered paths to the definitive map, as set out in the CROW Act, should be commenced.
- Government should immediately halt claims for unused, unrecorded ways, so that authorities can focus resources on improvements which have been identified as locally beneficial.

2.2 Livestock

The CLA recommends:

- The Animals Act 1971 should be amended as promised by government so as to make keepers strictly liable only for animals which are inherently dangerous or where the keeper has been negligent.

2.3 Inconsistencies and *De Minimis* Changes

The CLA recommends:

- A new category of modification – an "amendment notification" – for *de minimis* changes should be created. Where there is a difference between the walked route and the map, and the owner is content with the route walked, highway authorities should be encouraged to modify the map to the walked route.
- A new "amendment notification" procedure should also apply to cattle grid bypass gates and other types of *de minimis* change. The consent of the owner is essential before any action is taken.
- Defra should issue guidance to encourage a pragmatic approach to be taken to small, technical *de minimis* changes.

2.4 Diversions

The CLA recommends:

- The "right to apply" under section 118ZA/119ZA of the Countryside and Rights of Way Act 2000 should be commenced.
- The scope of the "right to apply" should be extended to any landowner, so that applications may be made for any land management issue.
- Defra should issue specific guidance to highway authorities setting out the presumption in favour of diverting paths away from farmyards, commercial areas, gardens and other areas where privacy, safety or security is an issue. Such a presumption should not be defeated, because, for example, a route follows an historic line.
- Defra should consider issuing guidance on the use of diversions to avoid adverse impacts on areas of conservation value, particularly in situations where unrestrained use by dogs would adversely affect wildlife. The potential for temporary diversions in such circumstances should be investigated.
- The proposed primary legislation – cited in the *Stepping Forward* report – to provide a power for highway authorities to agree diversions should be applied to existing paths as well as previously unrecorded ones.

2.5 Width of Path

The CLA recommends:

- Defra should issue guidance to all highway authorities advising that, in the absence of other factors, such as the "boundary to boundary" rule, a record on the definitive map, or an obviously walked path width (which may be narrower or wider than the widths within the Rights of Way Act), a "reasonable" width is that set out in the Rights of Way Act 1990.

2.6 Structures

The CLA recommends:

- The Highways Act 1980 should be amended so that structures can be authorised on byways and restricted byways under the same powers that already exist for bridleways and footpaths.
- Powers under the Highways Act 1980 should be extended to allow gates or other structures to be erected on public rights of way for the protection of property or for security reasons.

2.7 Village Greens

The CLA recommends:

- A similar procedure to section 31(6) Highways Act 1980 should be put in place, so that landowners are able to complete a statutory declaration and map thereby preventing the acquisition of village green rights, as previously promised by government.

Efficiency – Improving the Administration of Rights of Way

3.1 Length of Time

The CLA recommends:

- A simplified process for dealing with claims is required: the present process is unwieldy, time-consuming and costly. This is an issue of efficiency, not ideology, and could be addressed by a review with suggestions considered by an independent body, such as the Law Commission.
- The proposals contained within the *Stepping Forward* report of The Stakeholder Working Group on Public Rights of Way should be considered as part of such a review.
- Consideration should be given to using barristers to determine contested orders, rather than the Planning Inspectorate, as is now the case with village green applications.
- Consideration should be given to enabling local authorities to determine public path orders themselves, weighing up any objections, as authorities currently do for planning applications, and making the order if they consider it right to do so. It would avoid the need for automatic referral to the Planning Inspectorate should an objection be made. Although the applicant's right of appeal would need to remain, this would nevertheless both speed up the process and reduce cost for local authorities.
- Defra should amend the advice contained in circular 1/09 to encourage the use of section 116 (the magistrates' court procedure) for diverting or stopping up bridleways and footpaths as well as vehicular ways.

3.2 Double Jeopardy

The CLA recommends:

- Where a claim has already been examined and determined on a path no further claim should be able to be brought. A modification to the "discovery of evidence" test for triggering the duty to review is required, incorporating the concept of *res judicata*, (which prevents reconsideration of any matter already determined).

3.3 The "Reasonably Alleged" Test

The CLA recommends:

- The test throughout all stages of a right of way claim should be that of "balance of probabilities". The Government should issue new circular guidance to this effect.

3.4 Costs Awards

The CLA recommends:

- Costs should be able to be awarded in all cases, including written representations, where there has been "unreasonable behaviour" in line with Circular 03/2009.

3.5 Appeals under Schedule 14

The CLA recommends:

- The right of appeal under Schedule 14 section 4(1) should be abolished.

3.6 Certainty

The CLA recommends:

- Claims for rights of way should be brought within two years of the use being brought into question, as is the case with village greens.

Managing Public Access

4.1 Public Understanding of Access

The CLA recommends:

- Easy-to-follow signage and well-waymarked paths are essential. Highway authorities should ensure that paths are well signed and the surface is easy to use and that highway budgets provide for proper maintenance. Paths should be waymarked and landowners should ensure that there are no obstructions.
- A change in responsibility is needed, so the onus is on users to take responsibility for their own safety. This means complying with the Countryside Code and taking notice of any signs. The Countryside Code should put an emphasis on compliance and responsibility. Where users do not comply with the Code, they should not be able to seek redress. The Code should be condensed into an easily reproducible form which can be readily affixed at access points.
- Government should enable the temporary or permanent closure of paths where persistent illegal or anti-social use occurs.
- Local partnerships similar to Parish Paths Partnerships, drawn from users, landowners and

parish councils, could be responsible for the management of access within parishes.

- Defra and Natural England should take active measures to help farmers in protecting buffer strips and margins under stewardship schemes from access, and ensure that the public is aware of the purpose of this land.

4.2 Enforcement

The CLA recommends:

- Highway authorities should be encouraged by government to properly enforce use of rights of way, including situations where problems are experienced by landowners. Authorities must accept that their responsibility for public access includes that of ensuring public compliance with the rights granted.
- A consistent approach should be encouraged across all authorities as this will help with compliance.
- Footpath wardens or countryside rangers should ensure proper use of public rights of way.
- Local partnerships between owners, users and parish councils should be encouraged to take responsibility for tackling illegal use and should be supported in this by the highway authority and, where necessary, the police. Highway authorities should be supportive of requests for measures to tackle illegal use, such as the erection of barriers.
- Landowners should be encouraged to report all instances of illegal use, and authorities should keep a record of all such instances.
- Highway authorities and landowners should have the power to close (even temporarily) paths where illegal and/or anti-social use is taking place.
- A fast-track procedure for permission to install posts, fixed or hinged, should be introduced to restrict the width of routes and help to tackle illegal vehicular use.

Access to Coast and Water

5.1 English Coastal Access and Margin

The CLA recommends:

- The CLA will continue to actively lobby government to address the concerns relating to the coastal access legislation and its implementation.
- The CLA would support the withdrawal of the new coastal access provisions and encourage proper recognition of existing coastal access or new access similar to that provided in Wales.
- Government and Natural England should take account of landowner concerns in the implementation of coastal access.
- The CLA challenges the view that the granting of a public right over land does not amount to dispossession under the Human Rights Act, and that such dispossession does not result in damage or loss for which compensation should be made.

5.2 Welsh Coastal Access

The CLA recommends:

- The Government should consider adopting the approach used by the Welsh Government in its implementation of coastal access in England.

5.3 Rivers and Inland Waters

The CLA recommends:

- The CLA strongly supports the use of voluntary agreements governing access along rivers. The many and varied uses of rivers mean that access is best controlled, for the benefit of the river and its wildlife, by agreements that can operate flexibly as required, rather than within a rigid statutory framework. We welcome the Government's support and encouragement for the implementation of voluntary agreements.
- We note the decision of the Welsh Government to encourage access to inland waters and we urge the Welsh Government to adhere to the proposed voluntary approach. If users do not adhere to voluntary codes, thereby showing that they cannot act in a responsible way, the CLA believes that further access should not be provided.
- Remedies should be available and used against those who deliberately flout the law and ignore voluntary codes of access.

Other Opportunities for Access

6.1 Commercial Opportunities

The CLA recommends:

- Government should recognise the commercial value of access.
- Access policies and practice must not adversely affect commercial activities and opportunities.

6.2 Permissive Access

The CLA recommends:

- Government policy should recognise the benefits that permissive access brings and its contribution to overall public access.
- Government should provide greater support for permissive access whether through environmental schemes or other measures.
- Existing permissive access, including that provided through environmental schemes, should be properly promoted through a single generic website and available on Ordnance Survey digital maps.
- Permissive access provided through environmental schemes should also be promoted through notification to Local Access Forums (LAFs) and parish councils.

CONTACTS

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