House of Commons Library

Deregulation Bill

Bill 162 of 2013-14

RESEARCH PAPER 14/06, 30 January 2014

This wide-ranging Bill will receive its Second Reading in the House of Commons on 3 February 2014. The Bill proposes a range of measures in line with the Government's aim to reduce burdens on businesses and public authorities. Its scope includes health and safety, employment law, company and insolvency law, the use of land, housing, transport, communications, the environment, Child Trust Funds, entertainment, criminal justice and economic growth. It involves input from ten ministerial departments, coordinated by the Cabinet Office. The Government has indicated that it intends for the Bill to be carried over to the next session of Parliament.

Research Paper 14/06

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Summary

The *Deregulation Bill* will receive its Second Reading in the House of Commons on Monday 3 February 2014. A draft version was published on 26 July 2013 and considered by a joint committee of both Houses (see below). The Joint Committee on the Draft Deregulation Bill referred to the draft Bill as a "portmanteau Bill", described by the Minister without Portfolio as "a slight mountain of a Bill". It covers a wide range of policy areas, summarised below.

The provisions of the Bill that relate to rights of way seek to untangle and speed-up the processes for determining and recording rights of way. The Joint Committee's report on the Bill noted that this set of clauses had attracted the most interest and "passion", and had featured in half the 300 responses received. The "rights of way clauses" would implement a range of measures put forward by a Natural England stakeholder working group on unrecorded rights of way in March 2010, further backed by a Defra consultation in 2012.

1 Introduction

The *Deregulation Bill* (Bill 162 of 2013-14) was introduced in the House of Commons on 23 January 2014 and is due to receive its Second Reading on 3 February 2014. The Bill, together with its Explanatory Notes, are available from the Parliament website, on which the progress of the Bill can be followed. It was announced during the Queen's Speech on 8 May 2013, described as a Bill "to reduce the burden of excessive regulation on businesses". It is the second substantial piece of regulatory reform legislation proposed by the current government, the first of which became the *Enterprise and Regulatory Reform Act 2013.*

The *Draft Deregulation Bill* was presented to Parliament on 26 July 2013 by the Minister for Government Policy, Rt Hon Oliver Letwin MP, and the Minister without Portfolio, Rt Hon Kenneth Clarke QC MP. In their joint foreword to the draft, the Ministers stated that the key measures in the Bill worked towards three ends: "freeing business from red tape"; "making life easier for individuals in civil society"; and "reducing bureaucratic requirements on public bodies". The Ministers described the Bill as:

> the latest step in the Government's ongoing drive to remove unnecessary bureaucracy that costs British businesses millions, slows down public services like schools and hospitals, and hinders millions of individuals in their daily lives.

The Minister for Government Policy has indicated that the Government intends for the Bill to be carried over to the next session of Parliament.

1.1 Pre-legislative scrutiny

A Joint Committee of both Houses was appointed in July 2013 to consider the draft Bill. The Committee gathered oral evidence from 16 October to 6 November 2013, and published both oral and written evidence in two volumes, available from the Joint Committee's page on the Parliament website. Its call for evidence received over 300 written submissions.

The Committee concluded its inquiry on 16 December 2013 and published its report on 19 December 2013.

On 30 January 2014, the Government published its response to the Joint Committee's report.

1.3 Structure of the research paper

This paper follows the structure of the Bill and deals individually with each of its clauses. The Schedules are considered alongside the associated clauses.

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5 Use of Land

5.1 Rights of Way (clauses 13-19 and Schedule 6)

Background

Clauses 13-19 (and Schedule 6) of the Bill relate to rights of way and generally seek to untangle and speed-up the processes for determining and recording rights of way. These processes have become complicated by a succession of legislative changes in classification criteria and cut-off dates. The provisions relate to the law of England and Wales but the amendments they make will only make changes that affect public rights of way in England, coming into force as appointed by the Secretary of State in a commencement order.

Clauses 13-19 particularly implement a range of measures put forward by a Natural England stakeholder working group on unrecorded rights of way in March 2010, further backed by a Defra consultation in 2012.

The pre-legislative scrutiny report on the Bill noted that this set of clauses had attracted the most interest and "passion" and had featured in half of the 300 responses received. A number of concerns and additional reforms were expressed which the Joint Committee has urged the Government to note because of this level of public interest. These are highlighted in the comment section below.

The problem of unrecorded rights of way pre-1949

Rights of way (footpaths, bridleways, etc.) have to be recorded by local authorities in England and Wales on a Definitive Map and Statement. This proper recording of routes was started via a duty included in the National Parks and Access to the Countryside Act 1949. It was originally expected that this work would be completed in five years or so but that was not the case and several attempts at improving the legislative framework followed. For example, Part 3 of the Wildlife and Countryside Act 1981 now sets out how the Definitive Maps and Statement should be maintained, reviewed and how changes can be made. If adequate evidence is presented regarding the use of a route then the Definitive Map has to be modified.

Today, these requirements form part of a complicated and inter-dependent series of legislation on rights of way and their recording which span over 60 years. This has lead to a slow process of recording previously unclaimed routes or reclassifying existing ones building up vast backlogs – estimated at some 4,000 applications. Commons Library Standard note, *Establishing a Right of Way* (SN06026 July 2011) explains the system of Definitive Maps and provides a timeline of key legislation.

The Countryside and Rights of Way Act 2000 (CROW 2000 s.53) sought to resolve the recording issue and remove uncertainty for landowners who risked having rights of way "discovered" on their land in the future. It set a statutory cut-off date (1

January 2026) for making claims for pre-1949 highways where there was only documentary evidence for the existence of such a highway. After the cut off any rights of way already in existence in 1949 but not recorded on the definitive map and statement would be extinguished (subject to certain exceptions). However, despite the cut-off incentive, a structured, well-funded exercise to claim routes did not emerge. Natural England therefore established an independently chaired Stakeholder Working Group to develop a consensus on the way forward.

The Stakeholder Working Group

A Stakeholder Working Group (SWG) on unrecorded rights of way (landowners, local authorities and users) was appointed by Natural England and Defra to make recommendations for changes in the law to enable unrecorded rights of way to be recorded more swiftly. The resultant report, *Stepping Forward*, sets out measures to address the situation to be implemented as a whole package. The General Election interrupted any adoption of the measures but they were further backed by a Defra consultation in 2012 and are now incorporated in Schedule 6 of the Bill.

Members of the SWG re-emphasised the necessity of implementing this whole package approach in their oral and written evidence to the Joint Committee in order to maintain the hard-won consensus on these issues across a range of interest groups. The support of The Ramblers, Local Government Association, Open Spaces Society and Natural England is dependent on this. The Joint Committee acknowledged this in its final recommendations.

Defra Consultation May–August 2012

In May 2012, the Government launched a public consultation on "Improvements to the policy and legal framework for public rights of way". This set out how the Government proposed to respond to the Stakeholder Working Group's report, but also set out proposals for a wider package of improvements in three key areas:

- Considering whether improvements should be applied to procedures creating rights of way and for diverting or extinguishing them.

- Looking at how it could be made easier for landowners to progress proposals for the diversion or extinguishment of rights of way affecting their land (subject to the current public interest tests); and

- addressing barriers to growth which result from non-planning consents, as highlighted in the 2010 Penfold Review.

The consultation was supported by a Defra-commissioned survey to get more information to support the consultation in September 2012. Over 300 responses from a wide variety of stakeholders were received.

According to Defra's consultation response document:

- Most respondents supported the Stakeholder Working Group proposals as a whole.

- There was broad acceptance of the Group's basic tenet that the proposals needed to be implemented as a package, because of the importance of

maintaining consensus reached between access, environmental, land owner and local authority representatives.

- There was some feeling that the opportunity to make more radical changes had been missed, but also recognition that it was not an easy task to produce a series of proposals that could gain agreement from all parties.

- A minority of respondents criticised the Stakeholder Working Group process as being unrepresentative and some expressed concern that there had been no opportunity for the wider rights of way stakeholder community to evaluate the Stakeholder Working Group proposals before they were published.

- There was strong support for national guidance for local authorities, applicants and landowners and backing for more flexibility for informal consultation and negotiated settlements in advance of formal legal proceeding and for improving the relationship between the parties involved in rights of way procedures.

- A strong message from respondents was the need to avoid introducing extra bureaucracy, with the associated costs. There were concerns that where any new any legal criteria were introduced, they need to be clearly defined and that the processes should be transparent.

- There was strong support across all sectors for a higher burden of proof for definitive map modification order applications.

The Bill

The Government has summarised the rights of way elements of the Bill as "devolving decisions on public rights of way to a local level, which will cut the time for recording a right of way by several years and save almost £20 million a year through needless bureaucracy."

Mitigating the 2026 cut-off date implications

Although the 2026 cut-off date (see section 1.1 above) was introduced to try and resolve recording issues, it generates a new set of legal complications itself. Clauses 13-15 seek to address these.

Clause 13 is intended to lower the number of applications to delete a right of way from the Definitive Map. It would insert a new Section 55A into the CROW Act which means that a surveying authority (the local authority) cannot modify the Definitive Map and Statement if a right of way shown on it would be affected **solely** on the basis of evidence that pre-1949 no right of way existed. The authority therefore would not have to consider an application for modifications which require a time-consuming investigation of historical evidence.

Clause 14 would empower the Secretary of State to make regulations (via a new section 56A in the CROW 2000 Act) which specify how surveying authorities might delay or otherwise mitigate the effect of the cut-off provisions. Such measures could include surveying authorities "saving" a right of way within a year of the cut-off date having considered the applications and evidence submitted by the public. They could also make provision for requiring surveying authorities to make decisions within

certain timeframes and with recourse to a Magistrates Court if such timescales are not met.

Clause 15 would amend the CROW Act to allow for those who rely on a public right of way for access to their property to retain a private right of way over it even if it is extinguished under CROW 2000.

Amending the Highways Act 1980 regarding extinguishing or diverting a right of way

The Highways Act 1980 allows applications to be made, in certain circumstances, to extinguish or divert a public right of way via an order (Sections 118ZA and 119ZA). Clauses 15-17 of the Bill amend these provisions. The Good Practice Guide from the Institute of Public Rights of Way and Access Management (IPROW) explains how these orders are currently managed.

Clause 16 would allow the Secretary of State to extend the type of land in England in respect of which it is possible to apply for an order to extinguish or divert a right of way. It would also modify how the Secretary of State determines appeals (s.121E of the 1980 Act) but would not affect the current right to object.

Clause 17 would extend the powers to erect stiles, gates or other works on a right of way. This is intended to improve access for most people because at present gates and stiles can only be erected on certain rights of way to contain livestock. This means that landowners often oppose other classifications offering wider public use because a gate would not be permitted.

Clause 18 would empower full cost recovery by the authority making a public path order. It would enable the Secretary of State to authorise charges to be imposed via s.150 of the Local Government and Housing Act 1989. This would allow the introduction of some discretion by the local authority provided that the charge does not exceed the actual cost incurred. At present if the centrally prescribed limit may not enable the local authority to recover all of its costs. It also includes provisions for the Secretary of State to recover costs when dealing with contested applications.

Changing the procedures for ascertaining rights of way in England

Clause 19 (introducing **Schedule 6**) would make changes to the procedures for ascertaining rights of way in England amending the Wildlife and Countryside Act 1981 and allow for regulations setting out transitional arrangements. Overall, the measures seek to pass responsibilities from the Secretary of State to local authorities and give greater flexibility in dealing with applications. For example:

- raising of the threshold at which an authority must make an order. The burden on an authority of having to make orders in respect of applications which contain reasonable allegations but do not satisfy the ordinary civil standard of proof is removed (Schedule 6 Para 2).

- a simplified and shorter procedure for dealing with obvious administrative errors in the definitive map and statement (Schedule 6 Para 3).

- special diversions for ways which have fallen into disuse whose existence has been proven by documentary evidence so that these can be realigned by agreement, subject to certain conditions.

- a new system for determining applications for definitive map modification orders, in which appeals to the Secretary of State against decisions by a surveying authority not to make an order can involve a full public inquiry into the entire matter.

- a right to apply to the magistrates court where the surveying authority is slow determining an application .

- a means of transferring applications for definitive map modification orders from one person to another to assist the voluntary sector so that work on an application does not have to start from scratch if an applicant is unable to proceed.

Comment

The pre-legislative scrutiny report on the Bill noted that this set of clauses had attracted the most interest and "passion" and had featured in half of the 300 responses received. A number of concerns were expressed about the pressures that the reform may place on local authorities with the inevitable rise in applications to process as the cut-off point is approached, despite the simplification measures of the Bill. The Joint Committee has urged the Government to note and fully assess these impacts.

The Joint Committee also pointed to a number of additions to the Bill that were suggested highlighting wider issues such as vehicular access (see section on wider reforms below). The Committee felt that the large level of public interest in these areas warranted Government action to address the concerns.

Although a number of the measures are based on the Stakeholder Working Group's recommendations, in some cases they go a little further, e.g. Schedule 6 (Para 2) regarding the burden of proof, and so discussions are still ongoing among the various interest groups to ascertain whether they still agree. However, the Joint Committee conveyed a sense that there was still broad support behind the provisions (e.g. National Farmers' Union, Open Spaces Society and Council for the Protection of Rural England) despite some criticisms and also evidence from the "Alternative Stakeholder Working Group". This Group, made up of individuals who have been adversely affected by rights of way legislation (e.g. paths going through their homes and gardens, etc.), have questioned whether the provisions are in fact deregulatory and makes a number of useful legal points to be explored around the working of the measures proposed. Overall, the Joint Committee called for the Government to "show leadership and balance" to take unrecorded rights of way reform to a successful conclusion.

Support for wider reforms

As with Defra's 2012 consultation, many providing evidence to the Joint Committee suggested specific additions to the provisions or used it as an opportunity to continue to call for root and branch reform. The issue being that the underlying classifications and systems of rights of way legislation which have evolved are inherent to the process of recording which has become a "red tape" issue.

The issue of mechanically propelled vehicles on certain rights of way continues to be a live issue despite the Natural Environment and Rural Communities Act 2006 which, in the light of public concern about off-road damage and intimidation of other users, extinguished many rights for modern vehicles on footpaths, bridleways or restricted byways that had developed from historic rights for horse drawn vehicles, etc. A specific addition to the Bill (supported by a third of respondents to the Joint Committee) was a new provision to re-classify unsealed Byways Open to All Traffic (BOATs) and unsealed Unclassified County Roads (UCRs) as Restricted Byways and closed to [mechanically propelled] vehicular traffic. Such a provision is intended to minimise the environmental damage to these lanes and the conflicts in use between vehicles and other users. This is supported, for example, by the Green Lanes Environment Action Movement (GLEAM), the Peak District Green Lanes Alliance, but not the motoring organisations' Land Access and Recreation Association (LARA). LARA supports the current provisions of the Bill (which do not affect its members) but does not support further restrictions on vehicle use on rights of way.

The National Farmers' Union broadly supports the rights of way clauses in the Bill but is also recommending a number of additions – for example, a presumption against routing rights of way through farmyards and other areas on the grounds of safety, security and nuisance. The Ramblers, who were in the original stakeholder group, are not proposing further amendments so as not to dilute their push for implementation of the original package which they recommended [and] which is broadly included in the draft Bill. The Country Landowners Association (CLA) and Natural England have also said that their support is dependent on adoption of the whole package with no cherry picking.

It would seem that whilst many would like to see wider reform, they accept that a Deregulation Bill is not the appropriate vehicle for it – despite the attraction that an opportunity for primary legislation presents. However, the Bill can perhaps be a useful vehicle to seek to address some of the well-known tangles in the system and see how far that experience informs a wider shake-up.