

THE FUTURE OF BYWAYS: A LEGAL FRAMEWORK

A report to the Rights of Way Review Committee
by the Byways Working Party
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THE WORKING PARTY

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1: INTRODUCTION

1.1 The working party's terms of reference

- 1.1.1 The Working Party was established by the Rights of Way Review Committee following consideration by the ACC of legislative proposals made by Hampshire County Council following a well attended conference in Winchester in October 1989. We agreed that our terms of reference should be "*To consider law and practice relating to byways and the reclassification of RUPPs and to make recommendations*".
- 1.1.2 we sought to establish general principles for discussion and agreement where we consider the existing law and practice to be deficient. Our purpose was to restrict change to what we see as essential to allow byways to meet the demands arising from shared use by walkers, horse-riders and drivers of vehicles, in particular 4-wheel-drive all terrain vehicles. In our recommendations we have endeavoured to achieve consensus and to provide a legal framework within which decisions affecting individual highways could be taken locally.
- 1.1.3 Throughout this report the word "byway" means the vehicular highway given a new definition in paragraph 3.4.4, i.e. a carriageway the surface of which is not sealed against the penetration of water.
- 1.1.4 The report represents the views of the individual members of the working party, not their organisations.

1.2 Meetings

- 1.2.1 in addition to our meetings, we made a site visit to some byways in Avon: we are grateful to Avon County Council for making that visit possible.

2: GENERAL FINDINGS

2.1 Introduction

2.1.1 An increase in the use of unsurfaced country tracks, in particular by four wheel drive vehicles, has coincided with reclassifications under the Wildlife and Countryside Act 1981. This has stimulated a vigorous debate about the role these vehicular highways should play in countryside recreation and the impact of recreational use on farmers and landowners - and vice versa. Opinions tend to be polarised; some wish to exclude altogether recreational vehicles from unsurfaced roads. Others argue that there are ways and means by which the whole range of lawful users of these highways can be accommodated in their collective enjoyment, and business, in the countryside. We have tried to steer a "strait and narrow" course by concentrating on the underlying issues and the legislative framework within which appropriate and locally determined decisions can be implemented.

2.2 The importance of byways

2.2.1 We noted that there was already recognition that these highways (defined by us hereafter as "byways") were often of great recreational importance, but that this importance was not being reflected in the relevant legislation or in their management by highway authorities. In this sense the byway has a greater affinity to other recreational routes (footpaths and bridleways) than to the main highway network.

2.2.2 in the recent past byways have been regarded as the least important highways under the control of highway engineers. The byway is however an integral part of the recreational rights of way network as a whole meriting, we believe, special management to protect it against inappropriate maintenance, use or development. We recognise throughout this report the importance of byways to landowners and farmers who have to use them for access.

2.3 Recreational and utilitarian use

2.3.1 The uniqueness of the byway to the public is its potential for the widest range of uses for countryside recreation. We consider this should be recognised as the byway's primary public function. With the exception of agricultural/forestry access and for occasional access by vehicles for maintenance purposes (e.g. reservoirs, transmitters) the byway does not, and we submit, should not, serve any utilitarian transportation purpose. The byway should not be treated as just another kind of vehicular highway, but as a primary recreational asset in its own right.

2.3.2 We consider that existing legislation (especially that related to maintenance) ignores this critical difference and operates to put the byway at risk of being debased and compromised for countryside recreation. The essence of our recommendations is that the byway should be specifically recognised as a recreational asset and subjected to an appropriate regime of repair, maintenance, management and regulation, with account being taken of the interests of farmers and landowners. This would apply to byways whether or not recorded for the time being on the definitive map. We recognise the constraints upon highway authorities in allocating resources from stretched highway and recreation budgets.

2.4 Maps and lists of byways

2.4.1 At present some roads which are "unsuitable for motor cars" (perhaps because of little or no maintenance over the years) are recorded in highway authorities' lists of publicly-maintainable streets no differently from roads which are perfectly suitable for ordinary traffic. At the same time, some ways recorded on definitive maps as byways open to all traffic (BOATs) or roads used as public paths (RUPPs) are in use as adequately surfaced minor roads.

2.4.2 In both cases this failure to distinguish between the surfaced and unsurfaced roads can only lead to confusion: we make recommendations to end the confusion.

2.5 **Standards of maintenance**

2.5.1 we consider it desirable that a hierarchy of public vehicular highways should be recognised by highway authorities using maintenance standards as the criteria. The standards applied to byways would range widely to recognise the difference between wild and rocky and boggy mountain tracks with deep river crossings, and traditional lowland green lanes (with a few shallow pot-holes) able to take the occasional passage of private cars. The common factor would be the substantial absence of a sealed surface.

2.6 **Use, abuse and traffic regulation orders**

2.6.1 We did not consider in any detail evidence of vehicular use (or abuse) of byways. Hampshire's Conference revealed no evidence of widespread overuse, misuse, or abuse of these routes by recreational vehicles. Surface damage and/or nuisance has become an issue in some well-reported cases. The introduction of voluntary restraint and the carrying out of voluntary repairs by the organised user groups may sometimes overcome problems.

2.6.2 Where there is risk of lasting or regular damage, Traffic Regulation Orders (TROs) may be necessary. We make suggestions to encourage highway authorities to work with the organised user groups. We believe that:

(a) TROs should be used only where they are properly justified.

(b) The diminution of public rights whether by TROs or otherwise should not be seen as a means of dealing with problems such as itinerants, litter dumping or trespass, for which other remedies are available.

3: DEFINING A "BYWAY"

3.1 Byways under the 1981 Act

- 3.1.1 The inclusion of a way on a definitive map and statement as a "byway open to all traffic" (BOAT) can, and in the case of (a) below could, come about by any of the following means:
- (a) Reclassification under the 1968 Countryside Act of a way which was previously shown, (or could have been shown) as a RUPP on a definitive map. The tests to be applied for reclassification were those set out in paragraph 9 of Schedule 3 to that Act and were repealed by the 1981 Act
 - (b) Reclassification under section 54 of the 1981 Act of a way shown on a definitive map as a RUPP. The test to be satisfied is set out in subsection (3)(a) of that section, namely that a public right of way for vehicular traffic has been shown to exist.
 - (c) Addition of a way not previously shown on the definitive map under section 53(3)(c)(i). The test to be satisfied is that the way is a "byway open to all traffic" as defined in section 66(1) of the Act, namely that it is a "a highway over which the public has a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".
 - (d) Change in classification, under section 53(3)(c)(ii) of a way previously recorded on the definitive map and statement as a footpath or bridleway. The test to be satisfied is as in (c).
- 3.1.2 The test which applies to (c) and (d) is essentially the same test that should have been applied to the original inclusion on the definitive map as a RUPP of a way subsequently reclassified under (a) or (b). However it is clear that all ways now shown or having the potential to be shown on definitive maps as byways open to all traffic do not form an easily identifiable and homogenous group when their surface, use or character is considered. This is especially true since there is no provision in the 1981 Act for a byway which ceases to be "mainly used for the purposes for which footpaths and bridleways are so used" to be removed from the map. In other words, if a way first included as a RUPP in the 1950s was made up in the 1960s and is now an "ordinary" metalled road, it is still necessary for it to be shown on the definitive map as a BOAT.

3.2 General principles

- 3.2.1 We interpret the intention of the existing legislation as being that definitive maps should identify vehicular ways which, by their nature, are not likely to be used much, if at all, by ordinary motor traffic. They are therefore correspondingly of potential interest to people seeking to use the countryside for recreation whether as walkers, horse-riders, cyclists or drivers of suitable vehicles. We have noted above the importance of byways to farmers and landowners.
- 3.2.2 We propose that the legislation be amended in order to identify byways more accurately and to protect for the public their particular character. The recommendations that follow spell out our ideas on those amendments.

3.3 The name

- 3.3.1 Byways may comprise a small percentage of the public rights of way network, (estimated at about 5% nationally) but they are valued equally highly by the recreational motorist, the carriage driver and by people on foot, on horseback and bicycles. They can be particularly suitable for use by the disabled. Byways are an "off road" refuge for the exercise and enjoyment of the widest possible range of countryside highway uses. Our recommendations are aimed at identifying those vehicular highways which are not suitable or normally used by the public to take ordinary vehicles and to give them special recognition in terms of appropriate repair, maintenance, management and regulation, according to local circumstances.

3.3.2 We consider that the word "byway" best describes these highways and that the additional phrase "open to all traffic" is an unnecessary addition, given the often unwarranted anxieties that the phrase can engender. **We therefore recommend that the term "byway open to all traffic" be replaced with "byway".**

3.4 **Definition of "byway"**

3.4.1 Although it is easy to conjure an image of an ancient sunken track or stone-walled green lane winding across the moors and say "that's what we mean by a byway", we have not found it easy to come up with a simple and unambiguous definition.

3.4.2 We propose that byways should be defined by distinguishing them from higher class road which have a surface that is sealed against the penetration of water.

3.4.3 We considered whether this could be achieved by defining a byway as a carriageway other than a made-up carriageway, linked to the definition in section 329 of the Highways Act 1980, in which "made-up carriageway" means "a carriageway, or a part thereof, which has been metalled or in any other way provided with a surface suitable for the passage of vehicles". However we rejected that approach as we wish our definition to encompass ways which were in the past provided with a sealed surface but have now deteriorated so that ordinary motor vehicles do not use them.

3.4.4 **We recommend the following as a starting point:**

"Byway means a carriageway the surface of which is not sealed against the penetration of water".

3.4.5 We are importing the definition of carriageway from section 329(1) of the 1980 Act ["a 'carriageway' means a way constituting or comprised in a highway, being a way (other than a cycle track over which the public have a right of way for the passage of vehicles)"].

3.4.6 As the definition of "byway" needs to be worded to include a byway which is sealed in parts, but which is mainly unsealed, our proposal will require more specific consideration if it is to be used as a basis for legislation.

3.5 **Recording byways on the definitive map**

3.5.1 The following amendments to the 1981 Act appear to be needed if our proposal to change from "byway open to all traffic" to "byway" (para 3.3.2) and to identify byways by reference to their surface (para 3.4.2) are adopted. We recommend that they be made.

(a) Amendment of the term "byway open to all traffic" to "byway" in each place where it appears.

(b) Replacement of the definition of "byway open to all traffic" in section 66(1) with the new definition of "byway".

(c) Provision in section 53(3)(a) to allow deletion from the map, by means of a "legal events modification order (i.e. one which needs no advertisement), of a carriageway which has ceased to be a byway under our new definition because its surface has been sealed.

(d) A means for adding to the map byways meeting the definition.

3.5.2 Where the definition in section 66(1) is used in other Acts there will be a need to apply our proposed definition to the other legislation.

3.5.3 The process of deleting a byway by a legal event order is simple and need not involve much delay. With this in mind we considered whether also to recommend the addition of byways to the map in this way by permitting surveying authorities to make legal event orders to add to the definitive map as byways ways already recorded as carriageways on the list of publicly maintainable highways which authorities are required to keep under

section 36 of the Highways Act 1980. The arguments for and against such a change are as follows:

For: The vehicular rights test should be satisfied convincingly by the recorded liability of the highway authority to keep the highway in repair. Admission of a liability to keep a carriageway in repair is eloquent proof of the existence of vehicular rights.

Against: The list of maintainable highways is convincing evidence only of a liability to maintain and not status. The process by which additions and deletions to the list are made is administrative, not legal. No assurance can be given about the quality of such lists.

3.5.4 Our aim is to make the deletion and addition process as simple and expeditious as possible. But we recognise the problems attached to the addition of byways by a process which does not involve advertisement and the possibility of challenge and a nagging doubt about the quality and completeness of section 36 lists for this purpose leads us to conclude that byways should not be added in this way to the map by reference to these lists alone.

3.6 **Transition from current "byway open to all traffic" to new "byway"**

3.6.1 As the purpose of the proposed new definition of "byway" is to record more precisely on the definitive map those highways which have a character which it is particularly important to conserve, it follows that whilst all the new "byways" are likely to be ways which are, or could be, shown currently as "byways open to all traffic", the reverse is not true.

3.6.2 Furthermore, as our associated proposals below (para 4.3.6) seek to relate the maintenance liability to the character of byways and their utility to farmers and landowners and to discourage highway authorities and others from spending scarce resources on "improving" them unnecessarily, it is important that those ways which do not meet our new definition be identified and deleted from the map before these associated powers take effect.

3.6.3 **We therefore recommend that the amendments proposed in 3.5.1 above be brought into operation after a specified period, before the proposals at 4.3.6 become operative, so as to allow authorities to make orders under the new power proposed in 3.5.1 (c) to take off the definitive map ways which do not meet the new definition of "byway".**

3.7 **Allied matters**

3.7.1 The statutory reclassification of the status of RUPPs is widely misunderstood. We believe that our new definition of byway may go some way to dispelling largely ungrounded fears that confirmation of BOAT status per se will be attended by an influx of vehicles of all kinds damaging to countryside recreation and to farming and land-owning interests. Nevertheless the change of definition alone is unlikely to reduce the volume of objections related to matters unconnected with the crucial issue of the existence, legally, of vehicular rights. The experience of those dealing with the reclassification of RUPPs is that few objections deal with the relevant statutory tests. A significant burden of work arises for local authorities and for the Department of the Environment Welsh Office in dealing with contested reclassifications at public inquiry.

3.7.2 **Accordingly we recommend that paragraphs 6 and 7 of Schedule 15 to the 1981 Act should be amended to make it clear that an objection is "duly made" only if it relates to the existence of vehicular rights (or the existence of bridleway rights) in the particular case in question.** These difficulties have recently been canvassed in the case of *Lasham Parish Meeting v- Hampshire County Council and the Secretary of State for the Environment* which we consider gives added weight to our recommendations

3.7.3 In chapter 5 we deal with the regulation of use by traffic, and with amenity considerations which are relevant to the great majority of objections to reclassification orders.

3.7.4 We noted that the offence of displaying a misleading notice likely to deter public use under section 57 of the National Parks and Access to the Countryside Act 1949 applies to a

footpath, bridleway and a RUPP but not to a BOAT. **We recommend that section 57 should apply to a byway.**

4: MAINTENANCE AND MAKING-UP OF BYWAYS

4.1 Maintenance issues and dilemmas: the present position

4.1.1 We believe that the existing law puts byways in a precarious position. This arises from the uniquely potentially damaging range of lawful uses (and abuses) of byways; and the conventional response by highway authorities to calls for repair in respect of only one of the lawful uses - the vehicular one.

4.1.2 We believe that most byways are of ancient origin.

4.1.3 We considered the case of a typical byway at risk:

(a) It is an old track, which came into existence and was of public utility before 1836 so is maintainable at public expense. (NB a track coming into existence after 1836 is not repairable unless it has been adopted.)

(b) It is a much valued local amenity for walkers, the disabled, horse-riders, cyclists and the drivers of suitable vehicles, but the surface has been badly damaged.

(c) A notice under section 56 of the Highways Act 1980 is served on the highway authority: responsibility for repairing the highway and that it is out of repair has to be admitted.

(d) The highway authority's lawyers will advise that the byway must be put into a condition to render it suitable for the passage of the ordinary traffic of the locality at all seasons of the year. If vehicles using the track have become heavier over the years, the burden of repair has been increased accordingly.

4.1.4 In respect of the byway under discussion here the highway authority has to decide:

(a) What is the ordinary traffic of the locality: does it include ordinary low slung motor cars?

(b) What extent and scope of repair will satisfy the magistrates? The magistrates are not experienced in judging these matters and by law cannot give guidance as to the works which should be carried out.

(c) How best to secure value for money.

4.1.5 These issues are relatively easy to determine in respect of the main vehicular highway network. The working party are concerned about the effect of a "road engineers" response to these problems which (in order to secure value for money) may be to provide a sealed/black top/chippings surface against the penetration of water, and to mitigate the effects of erosion and motive forces in wet weather.

4.1.6 We believe that the law relating to byways should as a general rule operate to discourage all forms of surface sealing or other inappropriate "improvements" that would change the character of byways. We are sustained in this view by the numerous references in official policy aimed at protecting and conserving the countryside. Appropriate ancillary works such as drainage should be encouraged. We also believe that voluntary work by user groups under the strict guidance of the highway authority should be encouraged.

4.2 Extent of the maintenance liability: the future

4.2.1 Our recommendations at 4.3.6 would operate to ensure that the law and practice relating to byways are consistent with countryside conservation policies. We see these as being that:

(a) All byways should be maintained, within the proposed definition, to a reasonable minimum standard consistent with their setting, location, recreational and essential access traffic by farmers and landowners but not so as to require works to adoption standards under the private street works code (4.4).

- (b) Environmental and farming and landowner factors rather than public "transportation" factors should be taken into account in determining the standard and method of repair and the materials to be used.
- (c) Where a byway has been maintained to a certain standard, that standard of maintenance should continue unless good cause is shown to the contrary.
- (d) The highway authority should generally have a defence (e.g. in section 56 proceedings) in circumstances where it is in the overall interests of the amenity of the area to avoid sealing the surface of a byway. There should also be a specific defence where the track concerned leads to a dwelling which is a second home.
- (e) Final reinstatements by public utilities and others should be consistent with the above. In addition special engineering care should be exercised over the contractor's working methods, trench refilling and effects on natural and man-made drainage. On completion, the byway should be able to fulfil its previous function and similarly to resist weathering and the loadings imposed by normal recreational and access traffic. We believe that the standards to be prescribed by the Secretary of State for Transport under the New Roads and Street Works Act should make specific provision for byways.

4.2.2 The Department of Transport asked if we could provide an estimate of the effect on public expenditure of these proposals. We have not been able to come up with comprehensive information (the costs would in any case vary between different parts of the country according to different geological factors). Hampshire County Council has recently produced a report which demonstrates that the cost of carrying out works consistent with use approximating to our proposals may not be excessive. This report also suggests that subsequent maintenance costs may be of the order of £50 per kilometre per year. We also have some examples from Powys where sealing was undertaken purely as a response to legal enforcement under section 56; these indicate that the cost of such works is of the order of £40 per metre and part of these costs would be avoided if the defence we suggest was available to the highway authority.

4.3 **Protection against "sealing" and improvement**

4.3.1 The ability of any person to carry out the sealing of the surface of a highway (and other improvements) to make a BOAT suitable for the passage of vehicles, depends on whether the BOAT is maintainable at public expense and if so to what standard, and whether planning permission is required. The law relating to the maintenance of BOATs is complex and the working party seeks to avoid it being made more complex. In summary the existing position is this:

- (a) BOATs which were formerly recorded as RUPPs are maintainable at public expense. The number of maintainable vehicular highways is increasing, but not all ways brought on to the map are maintainable at the public expense, e.g. a way which came into existence after 1835 and which was added to the definitive map as a BOAT under a section 53 modification order.
- (b) The duty of a highway authority to provide a BOAT with a surface suitable for vehicular use depends on its age. If it existed before 1836 the saving in section 54(7) of the 1981 Act does not apply, and the highway authority can be obliged to provide a metalled surface or other means (e.g. drainage) if that is necessary to make it suitable for the passage of vehicles. We believe that many, if not most, BOATs came into being before 1836, so the existing enforceable burden of maintenance must be very significant.
- (c) Private individuals may be responsible for maintenance in various ways. In certain circumstances action may be taken against the highway authority and the highway authority then has a remedy against the individual.
- (d) The maintenance or improvement of the surface of a publicly maintainable BOAT is permitted development for the purposes of the planning legislation if it is carried out by the highway authority. Anyone other than the highway authority needs planning permission to maintain or improve a publicly maintainable BOAT.

- (e) The unadapted BOAT, mentioned at (c) above, is one which is not maintainable at the public expense but which is available for all public uses including the vehicular one. Works of maintenance (including sealing) or improvement within the boundaries of such a highway are permitted development and can be carried out by anyone.
- 4.3.2 We recognise the enormous range of types of byway: in mountainous and moorland terrain, in deep rural, semi-rural, urban fringe, and urban settings. We recognise also the range and scope of circumstances of maintenance responsibilities, of highway authorities, of private individuals and also those cases where no-one is responsible for maintaining byways suitable for the passage of vehicles. Any move to promote the protection of byways against sealing and improvement must take these complexities into account.
- 4.3.3 It appears to the working party that one appropriate mechanism for preventing the inappropriate sealing and improvement of byways particularly by individuals, and in any case the logical progression of existing law, would be to make all byways shown on the definitive map maintainable at the public expense, and this we recommend below. This would vest the surface in the highway authority and, more significantly, ensure that other persons require planning permission to seal or improve a byway.
- 4.3.4 We acknowledge the legitimate concerns of farmers and landowners who may have need to surface a byway to improve or facilitate essential access to adjoining land for agricultural purposes. In such cases we believe that planning authorities (and Planning Policy Guidance) should take these factors into account with a presumption generally in favour of consent. On the basis of the new definition of byway and the proposed statutory defence proposed at 4.2.1(d) above the duty to maintain would not oblige highway authorities to carry out works to adoption standards. We believe that a proposal to make all ways brought on to the map maintainable at the public expense should not increase significantly the burden on highway authorities.
- 4.3.5 We further considered the position of a highway authority faced by proceedings to enforce repair of a byway brought by the owner of a residential property seeking a better road surface for domestic purposes. We concluded that the highway authority should have a specific defence in circumstances where the residential property is a "second home" i.e. not a principal dwelling-house.
- 4.3.6 **Accordingly we recommend that:**
- (a) Highway authorities review their policies and practices in relation to the sealing and improvement of byways.**
 - (b) Voluntary work by user groups under strict guidance of the highway authority should be encouraged.**
 - (c) The standards to be prescribed by the Secretary of State for Transport under the New Roads and Street Works Act for reinstatement after public utility work should make specific provision for byways.**
 - (d) Highway authorities should have a statutory defence in legal proceedings to enforce the duty to repair a byway in circumstances where it is in the overall interests of the amenity of the area and the conservation of the countryside to avoid the sealing of the byway.**
 - (e) All byways recorded on the definitive map should be highways maintainable at the public expense.**
 - (f) There should be a presumption in favour of consent for the surfacing of a byway to improve or facilitate essential access to adjoining land for agricultural purposes.**
 - (g) Highway authorities should have a specific defence in legal proceedings to enforce the duty to repair a byway in circumstances where a residential property served by the route is not a principal dwelling house.**

4.4 **Private Streets**

4.4.1 Part XI of the Highways Act 1980 contains codes relating to the making up of new and private streets. As the term "private street" includes a highway that is not maintainable at public expense, the codes will apply to some byways as we propose them to be defined.

4.4.2 We propose above that all byways should be maintainable at public expense. This would normally have the effect of disapplying these codes, but we believe that the codes should still apply. There is precedent for this in paragraph 13 of Schedule 23 to the 1980 Act. This made similar provision in respect of earlier legislation making certain public rights of way maintainable at public expense.

4.4.3 We think that in practice the continued application of the codes will have little effect on the recreational byway because the codes are likely to be applied only in cases where the byway serves a significant residential or industrial purpose.

5: ROAD TRAFFIC REGULATION ON BYWAYS

5.1 Introduction

- 5.1.1 In our general findings (2.6) we assume that it may be necessary to control or prohibit the use of certain byways by vehicular traffic, or by certain classes of vehicular traffic, to prevent damage to the highway and from abuse by some drivers who enjoy "getting stuck in the bog". Such management may be necessary to ensure that the use of a byway is available for recreation generally and to enable access to be gained to land along its route.
- 5.1.2 We believe that the grounds in sections 1 and 22 of the Road Traffic Regulation Act 1984 for making traffic regulation orders (TROs) are generally adequate to cover the circumstances we have in mind. However it seems that the present cost of making TROs, and the implications of signing them, may deter highway authorities from embarking on the TRO route in all but the most serious cases.
- 5.1.3 There is a power under section 249 of the Town and Country Planning Act 1990 which has been used to regulate vehicles in urban areas. We can see no reason why this could not also be used as a management tool on byways in the countryside.

5.2 The grounds for making TROs

- 5.2.1 The Road Traffic Regulation Act 1984 gives highway authorities power to make TRO's on roads (including byways):
- (a) For avoiding danger to persons or traffic.
 - (b) For preventing damage to the road.
 - (c) For facilitating the passage on the road of any class of traffic including pedestrians.
 - (d) For preventing the use of the road by unsuitable vehicular traffic in relation to the characteristics of the road.
 - (e) For preserving the character of the road in a case where it is especially suitable for use by persons on horseback or on foot.
 - (f) For protecting the amenity of the area through which the road runs.
- 5.2.2 These wide powers are supplemented by section 22, which enables a TRO to be made in designated special areas of countryside for the additional purpose of conserving or enhancing the natural beauty of the area or of affording better opportunities for the public to enjoy the amenities of the area or for recreation or the study of nature in the area.
- 5.2.3 By way of a restriction on these wide powers the Act requires that the Secretary of State's consent shall be obtained in the case of any TRO preventing access by any class of vehicular traffic for more than 8 hours in 24 to any premises accessible only from the road. Such consent is in practice only likely to be forthcoming in exceptional circumstances and after a public inquiry. However we accept that access along byways to residential properties or for essential agricultural, forestry or public utility reasons which cannot be met in other ways, should not be prevented even though that very access may be the root cause of difficulties such as surface damage. The imposition of a TRO may still be appropriate but normally would have to include an "except for access" clause.

5.3 The regulations

- 5.3.1 In paragraph 5.1.2 we point out the cost implications of TROs for highway authorities. We feel that the Regulations governing the making and signing of TROs are unnecessarily complicated and expensive in their application to byways. We recognise their appropriateness to the main highway network which serves the nation's economic, commercial and social infrastructure.

- 5.3.2 Different considerations could, and should, apply to byways which nowadays serve mainly a recreational purpose. The number of commercial interests affected by the regulation of traffic on a byway will, in most cases, be limited compared with those in respect of the main highway network as will be the volume of vehicular traffic. We recognise also that a TRO could alter patterns of recreational use on adjoining and more distant byways.
- 5.3.3 The Rights of Way Review Committee has recently amended the Code of Practice on consultation to secure consultation with user groups and landowners prior to the making of TRO's. We consider that such consultation and modification will not increase the cost of the regulation of traffic overall because, in appropriate cases, and as the result of consultation and voluntary restraint, the regulation of traffic by TRO may not be required at all. Much will depend on the quality of consultation, flexibility and above all on understanding and goodwill. We feel that the measures to be taken by highway authorities to implement and enforce the regulation of traffic on byways should be commensurate with the impact that a TRO is likely to have on the public and on the interests of those using premises served by them.
- 5.3.4 **Accordingly we recommend that:**
- (a) The cost of advertising TROs should be reduced, e.g. by simplifying the wording of advertisements and doing away with the requirement to advertise in the London Gazette by substituting pre-advertisement consultation with national user groups and direct notification of a made TRO to such groups.**
- (b) The Traffic Signs Regulations and General Directions be amended to allow the use on byways of signs of less costly and less urban appearance and scale.**
- 5.4 **TROs and classification of a way as a byway**
- 5.4.1 As noted in paragraph 3.7.1, most people objecting to a byway classification do so out of concern over the potential impact of vehicular use on the surface of the way, conflict between users in vehicles and those on foot or horseback, and the impact of vehicles in the countryside. We believe that these concerns should be addressed when the correct status of the way is being considered. Vehicular status and vehicular use are separate legal issues, but the present administrative separation makes little sense to the general public, who are less concerned about the legalities of status, and history, than with the current and future use of the way.
- 5.4.2 Hampshire County Council proposed that at the time a surveying authority made a decision about byway classification it should at the same time consider the likelihood and implications of vehicular traffic. We agree with this and **we recommend that authorities publicise the policy considerations within which they will consider regulation of traffic.** (The question of these criteria is currently under consideration by another working party set up by the Rights of Way Review Committee which is examining the issues raised in the CLA's "Better Way Forward" document.) Hampshire also proposed that if the regulation of traffic were proposed it should be challengeable at a public inquiry at the same time as the reclassification. This is an attractive idea, but it gives rise to the following difficulties.
- 5.4.3 First, a public inquiry into a byway order will be examining the existence of vehicular rights, whereas discussion of the pros and cons of a proposed TRO starts from the presumption that vehicular rights exist. An inspector would presumably therefore see no point in considering the TRO aspect unless and until he had decided, after hearing the evidence, that the byway order should be confirmed. There is thus the prospect of a two-stage inquiry, into (i) the byway order, and then (ii), if that is confirmed, the proposed TRO. The two stages could be several months apart.
- 5.4.4 Second, an aim in suggesting that the likelihood and implications of vehicular traffic be considered at the same time as the byway classification is to direct concerns on "amenity" grounds towards support for traffic regulation and away from objection to the byway order, where such objection does not address the question of status. If that aim succeeds to the

extent of the byway order being unopposed, the surveying authority will be able to confirm it as an unopposed order. there will be no reference to the Secretary of State and no public inquiry.

- 5.4.5 If that happens, then there will also be no public discussion on traffic regulation, unless the authority has made a TRO and exercises its discretion to hold an inquiry. Those concerned about vehicular use will be frustrated if they do not have a say. This will apply equally to those who wish to use the way in motor vehicles (if they are denied the chance to argue at a public inquiry against a TRO) and those who wish to restrict or prevent motorised use of the way (if there is no TRO).
- 5.4.6 The conclusion has to be that the link will not always work, and, on the one occasion when a link can be made (the first example above), a two-stage inquiry will be needed.
- 5.4.7 The only solution to these problems which meets all the demands of the public is to give the public a statutory right to object to the authority's decision on restriction or prohibition of vehicular traffic even if the decision is to do nothing, and for that objection to be heard and decided by a person independent of the authority. However that cuts right across the existing provisions for traffic regulation where there is no requirement for a public inquiry: we do not believe that local and central government will see the conflicts over use of byways being sufficiently great to justify an exception being made.
- 5.4.8 We therefore conclude that it is not feasible to make a formal link between the Traffic Regulation Order and the Byway Reclassification Order.
- 5.4.9 Nevertheless we wish to remind highway authorities of their powers to hold a public inquiry into a Traffic Regulation Order, especially in circumstances where the regulation of recreational traffic is a contentious matter and the ability to enforce the order may turn on the attitude of the local community and of a wide range of users. **We recommend that the guiding principle for TRO's on byways should be "no TRO restriction without representation at a public inquiry".**

5.5 Encouraging self-regulation

- 5.5.1 We believe it would be a bonus if the regulation of vehicular traffic could operate in a way to increase the influence of the organised vehicular interests among vehicle users. The emergence of MOLARA as an organised federation of motoring organisations interested in countryside recreation has received practical recognition by some highway authorities who have a constructive and productive dialogue with it on a range of issues, including reclassifications, modifications and the voluntary maintenance of RUPPs and BOATs and joint working with other user groups.
- 5.5.2 It must be said that MOLARA (and indeed any organised user group) can exert an influence only on those who are associated with it in some way. We think the influence of MOLARA on the unsociable and the so far "unclubbable" driver could be promoted in appropriate TRO cases by ensuring that public use may be controlled or mediated through a body approved for the purpose by the highway authority instead of by a named officer of the highway authority. There is precedent in the regulations governing motor sports, where the RAC act as the agents for Government.
- 5.5.3 The following example demonstrates our thinking. A highway authority considers that:
- (a) The regulation of vehicular traffic on a byway is desirable for one or more of the qualifying grounds in the 1984 Act.
- (b) Controlled public use is possible under a regime of on-the-spot pro-active management and supervision closely related to the capacity of the surface to take vehicular traffic or some other factor e.g. weather conditions, the "style" of driving and likelihood of conflict.

(c) Without that regime of close supervision the byway would have to be "closed" for public vehicular use except, perhaps, for light recreational vehicles.

5.5.4 We think it unlikely that highway authorities will have the resources to manage byways in this way. The kind of management we have in mind is unlikely to be achieved directly through the highway authority's officers. Control at a distance may therefore tend to reduce the opportunity for public use that could otherwise be achieved by "local" management by user bodies. In these cases the involvement of MOLARA or another body approved by the highway authority in the regulation of traffic could increase significantly the scope for public use.

5.5.5 There will be many variations on this theme; where active control by those involved is likely to be generally acceptable and lead to a greater public use, than could be achieved if management were solely in the hands of the highway authority (who will have more pressing priorities).

5.5.6 **We therefore recommend that in the circumstances outlined in paragraph 5.5.3 a body, approved for the purpose by the highway authority, could under the terms of an appropriately drafted Order regulate use on behalf of the highway authority.** This could be achieved for example, by the approved body issuing plates or other marking devices to show that the vehicle is of a type or class authorised to use the byway at times and in circumstances specified in the TRO. Although it is for the courts to interpret the law we believe that no amendment of the 1984 Act is required to achieve "delegation" of active control by highway authorities. We believe that an appropriately drafted TRO is a way of providing limited vehicular user consistent with the capacity of surfaces to withstand use by Vehicles and to mitigate conflict with other users.

5.5.7 Our overall conclusion is therefore that a TRO on a byway should be made only if discussions with organised user groups and parish and district councils, and perhaps experimental trials to secure voluntary restraint, have failed to diminish conflicts of use and damage to surfaces to a manageable and reasonable level.

5.6 **Enforcement**

5.6.1 Highway authorities will be reluctant to make TROs if there is little or no prospect of them being complied with or if enforcement is not a practical proposition. We believe that barriers and other physical measures to prevent the passage of unauthorised vehicles may not be effective in all cases.

5.6.2 As the law stands now only the police have jurisdiction to prosecute a breach of a TRO regulating the passage of vehicles. In the almost certain knowledge that the police have greater priorities and could not cope with the task of routinely enforcing TROs in the countryside, **we recommend that highway authorities should be empowered concurrently to prosecute breaches of TROs in respect of byways.**

6: THE STOPPING-UP AND DIVERSION OF BYWAYS

6.1 The use of the magistrates' court: section 116 of the Highways Act 1980

- 6.1.1 The only general power available for the stopping up and diversion of byways is that contained in section 116 of the Highways Act 1980. This provides for an application by the highway authority to the magistrates court for extinguishment if the highway is "unnecessary"; or diversion if a diversion would make the highway "nearer or more commodious to the public". The jurisdiction is ancient in origin, springing from times when the Magistracy - sitting in Quarter Sessions - was the main administrative authority in the County.
- 6.1.2 Concern has been expressed in recent years about the suitability of the magistrates' jurisdiction. In particular suggestions have been made that the jurisdiction should be transferred to the Secretary of State. In view of the general thrust of this report, (that byways are part of the definitive map recreational rights of way network), this suggestion requires close examination.
- 6.1.3 Although section 116 applies also to footpaths-and bridleways, in practice diversion or extinguishment of these ways is normally dealt with by orders made under section 118 or section 119 of the Act.
- 6.1.4 We believe there is a powerful argument for abolishing resort to section 116 in respect of RUPPs and BOATs, involving its replacement with appropriate parallel powers to those to be found in sections 118 and 119.
- 6.1.5 County highway authorities have been consulted about these possible changes. It appeared that little use was made of section 116 for extinguishment or diversion orders in respect of footpaths and bridleways and that most, but by no means all, authorities would be happy to see the magistrates' jurisdiction relating to RUPPs and BOATs transferred to the Secretary of State. A substantial minority, however, wished to retain the route to the magistrates as an alternative particularly where such extinguishment or diversion is required in connection with a scheme involving other vehicular roads.
- 6.1.6 **Accordingly we recommend that, subject to an exception where the extinguishment or diversion of a footpath, bridleway or byway forms part of an application involving vehicular highways other than byways,:**
- (a) **The magistrates' jurisdiction be removed altogether in respect of extinguishment and diversion of footpaths and bridleways - thereby terminating the present concurrent jurisdiction.**
- (b) **The jurisdiction of the magistrates in respect of the extinguishment and diversion of RUPPs and BOATs be transferred to highway authorities, and to the Secretary of State in opposed cases, by making the procedures under sections 118 and 119 applicable thereto.**
- 6.1.7 Other issues to surface in our discussions were:
- (a) The need for highway authorities to have a specific power to charge for an application made to them under section 118 or 119; a parallel power is available under section 117 in the magistrates' procedure. We noted current proposals by the Department of the Environment to make regulations under the Local Government and Housing Act 1989 to enable authorities to charge for such orders.
- (b) A useful provision in section 116 enables the magistrates, in making a stopping-up or diversion order, to retain a lesser public right over the way, thereby ensuring its retention as a highway, i.e. the power to close or divert subject to retention of bridleway or footpath rights. **We recommend that such a power should be available under sections 118 and 119 for downgrading byways or bridleways.**

6.2 **Other powers**

- 6.2.1 **In those cases where there are powers available to local authorities applicable to footpaths and bridleways we recommend that byways should also be included**, e.g. section 32 of the Acquisition of Land Act 1981 (extinguishment in connection with compulsory purchase powers) and sections 257 and 258 of the Town and Country Planning Act 1990 (diversion or extinguishment of footpaths or bridleways affected by development; acquisition or appropriation for planning purposes).

7: OUR RECOMMENDATIONS SUMMARISED

- 7.1 The term "byway open to all traffic" should be replaced with "byway". [3.3.2]
- 7.2 The following should be used as a starting point for a new definition of "byway": "*Byway means a Carriageway the surface of which is not sealed against the penetration of water*" [3.4.4]
- 7.3 The following amendments should be made to the Wildlife and Countryside Act 1981:
- (a) Amendment of the term "byway open to all traffic" to "byway" in each place where it appears.
 - (b) Replacement of the definition of "byway open to all traffic" in section 66(1) with the new definition of "byway".
 - (c) Provision in section 53(3)(a) to allow deletion from the map, by means of a "legal event" modification order (i.e. one which needs no advertisement), of a carriageway which has ceased to be a byway under our new definition because its surface has been sealed.
 - (d) A means for adding to the map byways meeting the definition. [3.5.1]
- 7.4 The amendments proposed in 7.3 (c) above should be brought into operation after a specified period, before the provisions at 7.7 to 7.13 below become operative, so as to allow authorities to make orders under the new power proposed in 7.3 (c) to take off the definitive map ways which do not meet the new definition of "byway". [3.6.3]
- 7.5 Paragraphs 6 and 7 of Schedule 15 to the 1981 Act should be amended to make it clear that an objection is "duly made" only if it relates to the existence of vehicular rights (or the existence of bridleway rights) in the particular case in question. [3.7.2]
- 7.6 Section 57 of the National Parks and Access to the Countryside Act 1949 (misleading notices) should apply to a byway. [3.7.4]
- 7.7 Highway authorities should review their policies and practices in relation to the sealing and improvement of byways. [4.3.6(a)]
- 7.8 Voluntary work by user groups under strict guidance of the highway authority should be encouraged. [4.3.6(b)]
- 7.9 The standards to be prescribed by the Secretary of State for Transport under the New Roads and Street Works Act for reinstatement after public utility work should make specific provision for byways. [4.3.6(c)]
- 7.10 Highway authorities should have a statutory defence in legal proceedings to enforce the duty to repair a byway in circumstances where it is in the overall interests of the amenity of the area and the conservation of the countryside to avoid the sealing of the byway. [4.3.6(d)]
- 7.11 All byways recorded on the definitive map should be highways maintainable at the public expense. [4.3.6(e)]
- 7.12 There should be a presumption in favour of consent for the surfacing of a byway to improve or facilitate essential access to adjoining land for agricultural purposes. [4.3.6(f)]
- 7.13 Highway authorities should have a specific defense in legal proceedings to enforce the duty to repair a byway in circumstances where a residential property served by the route is not a principal dwelling-house. [4.3.6(g)]
- 7.14 The cost of advertising traffic regulation orders (TROs) on byways should be reduced, e.g. by simplifying the wording of advertisements and doing away with the requirement to

advertise in the London Gazette by substituting pre-advertisement consultation with national user groups and direct notification of a made TRO to such groups. [5.3.4(a)]

- 7.15 The Traffic Signs Regulations and General Directions should be amended to allow the use on byways of signs of less costly and less urban appearance and scale. [5.3.4(b)]
- 7.16 Authorities should publicise the policy considerations within which they will consider the regulation of traffic. [5.4.2]
- 7.17 The guiding principle for TROs on byways should be "no TRO restriction without representation at a public inquiry". [5.4.9]
- 7.18 Under appropriate circumstances a body approved for the purpose by the highway authority should be empowered by a TRO to regulate vehicular use on behalf of the highway authority. [5.5.6]
- 7.19 Highway authorities should be empowered concurrently with the police to prosecute breaches of TROs in respect of byways. [5.6.2]
- 7.20 Subject to an exception where the extinguishment or diversion of a footpath, bridleway or byway forms part of an application involving vehicular highways other than byways,:
- (a) The magistrates' jurisdiction under section 116 of the Highways Act 1980 should be removed altogether in respect of extinguishment and diversion of footpaths and bridleways - thereby terminating the present concurrent jurisdiction.
 - (b) The jurisdiction of the magistrates in respect of the extinguishment and diversion of RUPPs and BOATs should be transferred to highway authorities, and to the Secretary of State in opposed cases, by making the procedures under sections 118 and 119 applicable thereto [6.1.6]
- 7.21 A power should be available under sections 118 and 119 for downgrading byways or bridleways. [6.1.7(b)]
- 7.22 Where other powers are available to local authorities to close or divert footpaths and bridleways, they should be extended to cover byways. [6.2.1]