

General Overview and Scrutiny Briefing Note

Public Rights of Way Service Briefing

3rd September 2015

The Public Rights of Way (PROW) network in Herefordshire is approximately 3475 km in length and comprises 3019 km of footpaths, 418 km of bridleways, 6 km of restricted byway and 31 km of byways open to all traffic (BOATs).

The PROW network is part of the wider highway network and is subject to similar legal requirements and restrictions as the ordinary road network. (There are specific legal requirements as to how PROW are recorded.) In brief, the Council has the following principal duties:

1. To ensure that PROW are properly maintained (section 41, Highways Act 1980)
2. To assert and protect the rights of the public to use PROW and prevent any obstructions to them (section 130, Highways Act 1980)
3. To keep the Definitive Map & Statement (DMS), the legal record of PROW, accurate and up-to-date (Part III, Wildlife & Countryside Act 1981)

The PROW service is delivered by the Council's Service Provider, Balfour Beatty Living Places, as part of the Public Realm contract. Strategic objectives for the service are contained in a statutory document, the Rights of Way Improvement Plan (ROWIP). The current ROWIP was published in 2007 and also contains annexes setting out relevant policies and procedures. A revised ROWIP is due to be published shortly and will reflect the much reduced level of resources currently available.

Introduction and Background

Reports on the Council's PROW function were considered by the Environment Scrutiny Committee in 2010 and 2011. These recognised that PROW was not a high priority service for the Council and that significant backlogs of work existed, particularly around its duty to keep the DMS **up-to-date**. This was in the context of legislative change introduced by the Countryside & Rights of Way (CROW) Act 2000, which meant that the DMS was intended to be closed in 2026 to claims for recording pre-1949 rights of way. Apart from the PROW shown on the DMS, there is believed to be a significant length of routes that carry public rights that are not currently recorded. Many of these will be extinguished unless they are recorded on the DMS by 2026 or are the subject of compliant formal applications (schedule 14 Definitive Map Modification Order (DMMO) applications) to be added to it.

The implication of this is that a surge in applications is expected in the period leading up to 2026, exacerbating the existing backlog. The current volume of DMMO work is reported to the Herefordshire Local Access Forum (HLAF), a statutory, independent group of PROW stakeholders that provides advice to HC and other bodies on PROW and access to the countryside. The table below captures the information presented at the most recent meeting of the HLAF in May 2015. It is currently the situation that, on average, it will take well in excess of 10 years for a DMMO application to be determined and any subsequent order confirmed.

1	No. of DMMO applications undetermined at 31/03/2015	89
2	No. of New DMMO Applications received in 6 month period ending 31/03/2015	1
3	No. of DMMO Applications determined in 6 month period ending 31/03/2015	2
4	No. of DMMO Applications determined and awaiting order making at 31/03/2015	5
5	No. of DMMOs made in 6 month period ending 31/03/2015	2
6	No. of DMMOs made but not yet confirmed at 31/03/2015	9
7	No. of DMMOs confirmed in 6 month period ending 31/03/2015	1

Some HLA members, who are also representatives of other PROW Interest Groups, concerned by the potential extinguishment of public rights, have been lobbying the Council to take a proactive approach to this issue and have raised a series of proposals to officers and questions to Full Council meetings etc. The primary purpose of this report is to provide some detailed background to the subject of the recording of minor highways to enable the Scrutiny Committee and others to better understand this technical and complex subject.

Following the passing of the Countryside and Rights of Way Act, the Department for the Environment, Food and Rural Affairs (Defra), the then government department responsible for PROW legislation and policy, sponsored several projects to examine how the proposed closure of the DMS in 2026 could be equitably and efficiently implemented. This led to the establishment of a Stakeholder Working Group (SWG), comprising representatives of PROW user groups, landowning and farming organisations and local authority interests, with the clear remit of bringing forward a set of proposals, based on a consensus, for reform of DMS legislation to enable the 2026 closure to happen. The SWG's final report, "[Stepping Forward](#)", was published in March 2010 with a list of 32 recommendations. The recommendations were accepted by Government and a set of measures were included within the [Deregulation Act 2015](#) to give effect to a number of them. Many of the recommendations and much of the detail will however be implemented through secondary legislation and guidance which is still to be developed and published. The Government's stated aim is to have this in place by April 2016 but it remains to be seen whether this timescale is realistic.

To understand the issues that are being raised with HC by PROW interest groups, it is first necessary to set out the framework of highway records. There are four sets of records of significance as per the table below:

HIGHWAY RECORD	Definitive Map & Statement (DMS)	List of Streets (LoS)	Street Works Register (SWR)	Local Street Gazetteer (LSG)
STATUTORY BASIS	s53 WACA81	s36 HA80	s53 NRSWA91	Street Works Regulations 2007
TYPES OF ROUTE RECORDED	<ul style="list-style-type: none"> • footpaths • bridleways • restricted byways • byways open to all traffic <p>All regardless of maintenance responsibility.</p>	All highways maintainable at public expense	<ul style="list-style-type: none"> • All highways maintainable at public expense • All streets that are prospectively maintainable highway • “Every street, of which the local highway authority are aware, which is a highway but for which they are not the street authority.” 	All highways regardless of maintenance responsibility and all other routes that comply with the Data Entry Conventions for the NSG / LSG regardless of the existence or otherwise of highway rights.

Attention has traditionally been focused on the List of Streets (LoS) and DMS. Many authorities typically (but incorrectly) considered that the LoS recorded the ordinary road network (and some urban footways) whilst PROW were recorded on the DMS only. In fact the relationship between these two documents is more complex. The DMS should record all PROW regardless of whether they are maintainable at public expense or not. The LoS should record all highways maintainable at public expense regardless of status. As the vast majority of PROW are maintainable at public expense they should thus also be recorded on the LoS. A considerable number of routes on the LoS (e.g. many urban footways and some unsurfaced unclassified roads) should also be recorded on the DMS (as footpaths and restricted byways or BOATs for the examples cited).

Another significant difference between the DMS and the LoS is the manner in which they are maintained and updated. The depiction of a route on the DMS provides conclusive proof of its existence and status in a court of law. Due to this legal conclusivity, any changes to the DMS have to follow a process prescribed in law (Part 3 and Schedules 14 & 15 Wildlife & Countryside Act 1981) which includes a raft of checks and counterbalances so that proposed changes are fully consulted on and properly considered to ensure that routes added to the DMS are PROW; a process which is lengthy and time consuming. In contrast, whilst there is a legal duty to provide a LoS, there is no statutory framework or guidance setting out how it is to be maintained or updated. Consequently many authorities had a very relaxed approach to alterations with highways engineers often adding or removing lengths of route seemingly based as much on an assessment of its utility and potential liability as on the evidence of whether it was or was not highway maintainable at public expense.

The Street Works Register (SWR) and Local Street Gazetteer (LSG) are much newer creations, arising from the duties set out in the New Roads and Street Works Act 1991. This legislation was primarily intended to aid the management and coordination of works on the road network but incidentally has required the establishment of the SWR which should record not only all highways maintainable

at public expense (i.e. what should be shown on the LoS) but also any other highway of which the highway authority is aware. The LSG stems from 2007 regulations (<http://www.legislation.gov.uk/uksi/2007/1951/contents/made>) which necessitated the compilation of a gazetteer which complies with the British Standard BS 7666-1 "Spatial data sets for geographical referencing - specification for a street gazetteer". The LSG should include all highways but also various non-highways which nonetheless meet some of the BS7666 criteria. The recent evolution of the LSG has been driven as much by issues such as property addressing and route optimisation as the need to record highways and thus it is not wholly surprising that the implications of both the SWR and the LSG were initially missed by those involved in Definitive Map research.

The rationale behind the recent questions being asked of HC by PROW Interest groups was a specific proposal contained in the SWG report. Proposal 25 states:

"Routes identified on the list of streets/local street gazetteer as publicly maintainable, or as private streets carrying public rights, should be exempted from the cut-off."

As noted above, one of the main purposes of the CROW Act was to close the DMS to claims of historical rights of way after 2026. It was always envisaged that some form of transitional measures would be provided to save from extinguishment certain rights that remain unrecorded on the DMS in 2026. Proposal 25 suggests that apart from compliant Schedule 14 application routes, public rights should also be protected from extinguishment if the routes concerned are shown in a particular way on the LoS or LSG.

Local activists recognised the lack of a formal process for altering the LoS and SWR and contrasted this with the complexity of the Sch14 application process and the lengthy backlog in subsequently determining the applications and making the necessary DMMOs. They viewed proposal 25 as a possible means of short-cutting the process and began to request HC to amend the other highway records to show various routes over which they alleged public rights exist.

The view of officers has always been that regardless of the existence or otherwise of a prescribed process for amending a highway record, the Council nonetheless has to satisfy itself that the alleged rights actually exist (and whether or not the way is maintainable at public expense if the way is to be added to the LoS or SWR). The legal test to be applied is "on the balance of probabilities". Furthermore, the staff best placed to make such an assessment are those staff in the PROW team already working on determining DMMO applications. These applications are dealt with on a prioritised basis according to criteria set out in the Council's ROWIP.

It appears to be inequitable for those who have researched and submitted legally compliant DMMO applications to suffer even further delays because staff are reallocated to deal with "informal" and unprioritised requests to amend the LoS. Nonetheless, recognising that the Council has a duty to maintain a LoS, the Council proposed introducing a Protocol setting out how requests to amend the LoS should be made and managed. In essence this recommended that applicants should submit sufficient evidence to demonstrate, on the balance of probabilities, that the alleged highway rights exist and that the route is maintainable at public expense. Those applications would then be prioritised according to the same criteria applied to DMMOs and dealt with by the PROW staff accordingly. This protocol has recently been formally adopted as the Council's [Highways Record Protocol](#).

Officers have further concerns about the focus on SWG Proposal 25. Firstly, at this juncture, it is merely just a proposal. It did not form part of the primary legislation in the Deregulation Act; if it is to be implemented then it will have to be introduced as part of the package of regulations and

guidance. It appears premature at least to develop a strategy of seeking inclusion of routes on the LoS /LSG unless and until it is clear that that will be an effective means of protecting rights from extinguishment.

Secondly, the approach of the activists seems to be based on the understanding that simple inclusion on the LSG will be sufficient to protect rights from extinguishment. In fact, the proposal refers to routes shown on the LoS or LSG as “publicly maintainable, or as private streets carrying public rights”. It may be that many of the routes concerned meet the criteria of BS7666 sufficiently to be shown on the LSG but that of itself does not automatically imply public rights over them.

There has been further debate about the meaning of the word “aware” in the condition for inclusion on the SWR - “Every street, of which the local highway authority are aware, which is a highway but for which they are not the street authority”. In the view of officers, this means that HC must have considered the available evidence of the status of the route and concluded, on the balance of probabilities that it was a highway. It is not a lesser cursory test or hunch.

As things stand currently, it is the view of officers that the appropriate approach is for activists to be encouraged and supported to research and submit suitable applications for DMMOs. As and when regulations and guidance are published, this approach can be reviewed and amended to help ensure that as many useful unrecorded PROW are saved from the 2026 DMS as possible. Work is on-going to improve online access to the Council’s highways records and officers and PROW interest groups are actively engaging with central government to input ideas and influence the development of the guidance & regulations.

Spencer Grogan
Parks and Leisure Commissioning Manager
Herefordshire Council

Will Steel
Network Regulation Manager
Balfour Beatty Living Places