

Defra's consultation document on the Disability Discrimination Act and Structures on rights of way Version 1 draft 3_1(3) as circulated to LAFs for consultation

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Purpose of this paper

To provide background on the Defra draft document to Local Access Forum (LAF) members and other people attending LAFs.

Whilst the Defra document has not so far, it seems, been made publicly available, presumably LAF members will have it and one would expect it to be available for public inspection reasonably in advance of the LAF meeting at which it is discussed. It may turn up on google searches soon (I would be pleased to hear if so). The Defra deadline is 31st Jan 2010 to allow for different LAF cycles.

I was nominated by the Open Spaces Society to the Defra working party but took a wide view and I consider this document, despite some defects, to be a major step forward if published. A review a year or so after publication is on the cards, where further improvement is likely.

1 History

When the Disability Discrimination Act (DDA) 1995 came out its applicability to public rights of way was unclear. But then the DDA Act 2005 amended the 1995 version and clarified and strengthened it. Two key aspects of these Acts together were the definitions of 'providers of services' to embrace most rights of way activity and of 'disability' to include far more than those previously considered 'disabled'.

Some highway authorities have for some years tried to follow the government policy of Least Restrictive Option when drawing up path orders, for instance excluding structures from orders when they could be controlled better by subsequent authorisation¹ and applying conditions when exercising their powers to authorise structures outside of orders. Some have gone further than that and have removed some structures that no longer served a purpose such as stiles between two arable fields. Despite all that it was clear that, especially in path orders, least restrictive was not always being achieved for new structures and the quality of some structures in the field was not as good as was wished for.

Overlapping in time with that a team at the British Standards Institution (BSi) was completely rewriting the path structure standards documents to incorporate the government's least restrictive option concept and to be functional rather than prescriptive, so as to allow many different local designs of path structures to be easily adapted to comply. Participants at BSi included Countryside Commission, NFU, CLA and the main user groups.

¹ under Highways Act 1980 s147 on agricultural land or under s66 public safety.

In 2007 the Open Spaces Society sent a questionnaire to all local authorities involved with structures on public paths². The results showed a very mixed bag of understanding, of policy, and of practice. Whilst every authority would have known of the DDA and of the national standards (see 3 below) available to help implement it, the depth of that understanding was shown to be very variable.

Nationally the unevenness of least restrictive structure implementation was becoming very apparent to user groups with national cover such as the Byways & Bridleways Trust the Open Spaces Society and the Ramblers. And doubtless at Natural England and Defra. As a result of this and the failure of path orders to apply clear functional standards (BS or others) the Byways and Bridleways trust was objecting to large numbers of them. These matters were raised in the respected Rights of Way Review Committee (RoWRC) and their discussions led to Defra working with the RoWRC to try to draw up guidelines on path structures and the DDA. A working party was set up and a paper produced. Earlier this year it went to limited consultation and was revised by Defra, becoming the consultation paper you now have before the LAF.

2. Summary of the Defra document

The document does two main things, firstly it tries to illuminate the principles of the DDA in relation to path structures, secondly it tries to identify the legal restraints and opportunities relating to new path structures in the light of the DDA. And then to make recommendations for good practice.

In doing this it has undoubtedly given a seal of approval to several possibilities that were very far from being generally recognised previously. On Highways Act 1980 s147 authorisations of structures to control animals on agricultural land, many authorities were not making the approval automatically rescindable if the agricultural need ceased, indeed many believed that it was not lawful to do so³. Very few authorities were applying conditions such as tying open a gate when there were no animals to be controlled for a specified period of time. And even less were making the structures in diversion and creation orders conditional or variable, the view was widely held that that could not lawfully be done. The Defra guidance note makes it clear that such processes are not only proper, they are good practice.

The main guidance is only three pages long, but there are twelve annexes, which are informative or contain specific guidance, or both.

There are four main recommendations for authorities:

- 1. Have a published policy on structures on rights of way in line with DDA and of the duty to assert and protect public rights.**
- 2. Ensure that structures are clearly specified and documented.**
- 3. Always consider including in authorisations and orders, suitable conditions for removal when their purpose has been served.**

² <http://tinyurl.com/structuressurvey> or www.oss.org.uk and search for *structures* to see the OSS survey forms and the results.

³ Partly because one edition of the Blue Book had a missing 'and' in the statute, changing its meaning substantially.

4. Consider publicising information on accessibility of structures so as to inform users in advance of their using the paths.

3. BS5709

The consultation document time and again emphasises the need for standards in structures, standards that clearly specify what degree of interference of the public way is to be tolerated. Standards that define the manoeuvring space, the state of the ground under a kissing gate, the separation from barbed wire as well as the type and necessary physical parameters of the main structure. And standards that can, where considered appropriate to do so, be unambiguously enforced.

It quite rightly points out that a local standard may achieve that, whilst mentioning BS5709 some twenty times in the document. It never quite says 'use BS5709 unless you have something better and more comprehensive'. But it gets close.

It is likely, if Defra publishes this guidance note largely unchanged, that many authorities will normally specify BS5709 for structures. There is no need then for a detailed specification to write into orders, simply 'to BS5709'. And nothing would prevent properly recorded deviations from the standard where there is very good reason to do so. E.g. 'A gap to BS5709 except that the gap width may be 900mm'.

That would leave probably only one decision needed: whether to use the style of wording BS5709 or BS5709:2006 the former implying upgrading to the latest version, the latter fixing the specification for ever. The guidance note discusses this at G.5, G.6, G.7. The solution seems clearer than they make it out to be, reserve to the authority, by appropriate words in the order or authorisation, the ability to specify a later standard if the form BS5707:2006 is used, or perhaps better: reserve the right to waive the need for upgrade if the form BS5709 is used.

It may be of interest that BS5709 is due for its five yearly review shortly and some of the matters raised by this draft guidance document will be taken account of in the BSi's considerations. The BSi working party would be very pleased to hear of any issues or suggestions relating to standards for structures on paths chrisbeney@aol.com.

4. Two particular oddities

a. Cattle Grids

In most highway authority areas there are a good many cattle grids and there is separate legislation for grids in carriageways (HA80 s82) Forum members may find the consultation document weak on cattle grids in footpaths or bridleways. If these structures are to be referred to at all, then changes appear to be needed. Cattle grids have been the subject of recent discussions between RoWRC and Defra. Defra seem clear but does not plan a separate guidance note. So RoWRC is considering producing something. LAF members may feel it would be helpful if the Defra guidance document covered the matter. That might be achieved by a tidy up and a new paragraph as follows:

E.18 The first sentence serves to confuse by omitting carriageway, cycletrack, and doubtless others. Resolution is easy by adding 'and on no other type of highway' after

'bridleway' on line 2 of E.17. Then E18 and its irrelevant and confusing reference to cattle grids under different legislation altogether may be deleted.

In order to then clarify the question of cattle grids and section 147 of the 1980 Act, Defra might be requested to insert, where E.18 was, words to this effect:

The Act does not define 'other works' but the legal maxim 'of the like kind' would appear to restrict it to structures for the control of animals. A cattle grid would in principle pass that test. It is very unlikely that a cattle grid could satisfy DDA constraints unless a gated bypass were to be part of it. Fortunately BS4008 Cattle Grids automatically requires a BS5709 compliant bypass gate and so simply specifying 'A cattle Grid to BS4008' resolves all issues so long as the legal width of the path can accommodate the whole of the bypass gate. If it can not, then additional width would need to be dedicated.

Alternative standards could of course be used, but cattlegrids are complex structures with guard rail requirements for horses negotiating the bypass and small-animal escape ramps from the grid itself and fairly critical grid spacing and so on.

As to F3, it should then start with the words *In addition to authorisation (see E18)....*

b. Bridges

At E.15, LAF members might be asked whether the curiously worded last sentence of E.15 in any way follows from the preceding words. Lacking a resounding *yes* they might suggest a recommendation that Defra deletes the whole paragraph.

5. Conclusion

In conclusion, the draft guidance document seems, despite some residual defects, a major step forward in enabling highway authorities to carry out their statutory duties and powers in a balanced way as between path users and landholders. It is hoped that LAFs will welcome it.

Postscript.

Any queries on this paper or the Defra document to chrisbeney@aol.com or Chris on 01923211113.