

GLEAM



Green Lanes Environmental Action Movement
Patron: HRH The Duke of Edinburgh KG KT

**A NEWSLETTER for those interested in protecting ancient ways
from the ravages of use by motorised recreational vehicles.
SPRING 2004**

GLEAM's RESPONSE TO DEFRA CONSULTATION DOCUMENT 'USE OF MECHANICALLY PROPELLED VEHICLES ON RIGHTS OF WAY.'

In December 2003 the Department of the Environment, Food and Rural Affairs (DEFRA) published this Consultation Document, inviting responses by 19 March 2004. **GLEAM** responded at length (12 pages), and any member who wishes to have a copy of this will be sent one on request, but only by e-mail from DAWGardiner@aol.com. This is probably the most important response that **GLEAM** has ever made. It should be noted that **GLEAM** is listed as a Consultee by the Department, as are a great number of other organisations ranging from local authorities, such bodies as English Nature, the Magistrates Association, the CLA, the Ramblers Association and a variety of off-roaders clubs and associations to smaller, more local pressure groups such as the Friends of the Ridgeway.

The full Document can be viewed on the DEFRA website at <http://www.defra.gov.uk/wildlife-countryside/cl/pub-licrow.htm>. The following is a summary of the Document, with its 7 specific proposals in full, and a summary of **GLEAM**'s response to each.

The Minister's Foreword

The Foreword to the document by the Minister, Rt Hon Alun Michael MP, is for the most part excellent, referring to the damage caused by mechanically propelled vehicles (MPVs) to fragile tracks, which he had seen for himself. He said that it does not make sense that historic evidence of use by horse drawn vehicles before the internal combustion engine existed can give rise to use by modern MPVs. His stated policy aim is to ensure that any historic evidence or use dating from a time when it could not have been envisaged that the way would be used by the sort of MPV we have today, should only enable that way to be recorded as a right of way for vehicles that are not mechanically propelled. We believe the new category of restricted byway provides this opportunity. This is the best statement of intent we have seen on this subject for a very long time.

The Proposed Repeal of s34A

S34(1) *Road Traffic Act 1988 (RTA)* created the offence of driving an MPV without lawful authority off-road or on a road which is a footpath, bridleway or restricted byway. S34(2), introduced in *Countryside and Rights of Way Act 2000 (CROW)* partly as a result of pressure from **GLEAM**, creates the presumption that a way shown as one of these on the definitive map is a way of the kind shown. This puts the burden of proof that vehicular rights exist onto the defendant, whereas previously the burden lay on the prosecution to prove that they did not exist, i.e. to prove a negative, which is impossible. There was also support from all parties during the *CROW Bill* to make it an offence of strict liability to drive on such ways. However, this would have prejudiced landowners, tenants and those relying on unrecorded rights to gain vehicular access to their properties.

After intense pressure from **GLEAM**, the Government introduced s34A, which sets out the categories of drivers who are able to put forward a defence that vehicular rights exist. These are broadly those with an interest in the land, but no others. Where a defendant does not fall within one of these categories, the presumption is that the way is of the type shown on the definitive map, and the defendant does not now have the opportunity to rebut this by proving that vehicular rights exist. Guilt is assumed without the defendant being able to prove otherwise.

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This creates what is called an irrebuttable presumption. The Government have now concluded that s34A is incompatible with the European Convention on Human Rights, which requires a presumption of innocence until guilt is proven, and they will repeal it.

In GLEAM's view, it is not a breach of Human Rights to prevent the use of ways where rights have not been established, but where there are straightforward provisions available for users to get the record corrected, if they can prove such a case. These provisions exist under s53 *Wildlife and Countryside Act 1981*, and motorists have every opportunity to use them before they use the way in question.

If s34A is repealed, and nothing is put in its place, prosecuted motorists will then be able to claim that vehicular rights exist. This will face magistrates with a jurisdiction that they do not have, and a decision that they are not trained or competent to make, in deciding what rights exist on any particular way. Such a decision is properly taken by an Inspector at a public inquiry, with opportunity for objection by any citizen, with research into extensive historical records, and a thorough understanding of complex areas of law. Even if magistrates were to decide, their decision would not be a matter of record, and would have to be made all over again if the same offence was repeated in the future. Thus the repeal of s34A, if nothing is put in its place, will leave an unworkable situation regarding s34. **GLEAM considers that contravening s34 should be made an offence of strict liability, unless and until higher vehicular rights are proved on the way in question, and are shown as such on the definitive map.**

In deciding not to implement s34A, the Document states that it in no way undermines the Government's resolve to tackle problems arising from the use of rights of way by MPVs. They seek to achieve the right balance between the interests of the various organisations and individuals concerned, and the interests of maintaining the tranquillity and conservation value of the countryside. **GLEAM does not believe that it is possible to balance these two sets of interests. The former can only destroy the latter, and the two are incompatible.**

Proposal 1

We will develop a strategy to disseminate and better inform the police, local authorities, the courts and others about the extensive powers and penalties already available for dealing with vehicles using the rights of way illegally, anti-socially, or, in sensitive areas, harmfully.

As a first step, we will be issuing a Departmental Circular shortly covering the use of the powers in paragraphs 6.1-7.5 [in the consultation paper] with particular reference to encouraging the better understanding and appropriate use of traffic regulation orders.

GLEAM entirely supports the development of such a strategy, and the issuing of a Departmental Circular.

Proposal 2

We invite views on the revision of the advice and guidance on managing the different sorts of traffic on vehicular rights of way in the publication *Making the Best of Byways* (1997). We will also publish the results of the research project on the use of byways open to all traffic, which will be used to inform the revision of *Making the Best of Byways*.

GLEAM endorses the updating of *Making the Best of Byways*. This booklet is severely biased towards the role of local authorities in furthering the use of public rights of way by off-road motor vehicles.

Proposal 3

We propose to introduce legislation to provide that any future use of a footpath or bridleway that would (immediately before the commencement of the relevant new legislation) have given rise to a public right of way for vehicles shall be treated as giving rise to restricted byway rights, but no other public rights of way. This will prevent any future usage giving rise to claims for public rights of way for mechanically propelled vehicles.

GLEAM endorses this proposal wholeheartedly, believing it to be long overdue.

Proposal 4

We propose to introduce legislation, which will make it no longer possible to establish the existence of a byway open to all traffic by reference to historic (pre-commencement) use by, or other evidence relating to, non-mechanically propelled vehicles.

We propose to do this by introducing a cut-off date after which (subject to certain exceptions) any unrecorded rights of way for vehicles shall be recorded as restricted byways in the definitive map and statement.

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We propose the cut-off date should be one year from the commencement of the new legislation.

Exceptions

We consider it should be possible to show that the public have a right of way for vehicles where the right arose

- by virtue of an express dedication for mechanically propelled vehicles;
- by virtue of any enactment authorising use by mechanically propelled vehicles; or
- by virtue of any qualifying use by mechanically propelled vehicles.

This means that applications to record byways open to all traffic can continue to be made until the end of 2025 where they are supported by evidence of lawful use by mechanically propelled vehicles.

This proposal is in three parts. The first part, the recognition of the distinction between MPVs and non-MPVs, and the rights that flow therefrom, is again welcome and overdue.

In the second part, GLEAM does **not** agree that there should be a one-year delay to the cut-off date. This will give time for off-roaders to submit a predictable tidal wave of literally thousands of protective applications for BOAT status. These will overwhelm local authorities to such an extent that it will take decades, if not centuries, to clear the backlog. Furthermore, if s34A is repealed, all these ways will be granted immunity from the proposed change of regime, and offenders will be able to rely on horse-and-cart evidence to escape prosecution, until the applications are determined.

In the third part, the exceptions are well justified. GLEAM believes that not only should the new legislation apply from the date it is enacted, but that it should be retrospective to the date when it was first proposed in the Consultation Document (9 December 2003). A principle is either right or it is wrong. If it is right, it should be applied with speed and vigour. The motorists are losing nothing, for an established right was never there in the first place.

Proposal 5

We propose that applications for definitive map modification orders (DMMO s) to recognise vehicular rights submitted before the end of the one-year cut off date will be processed to their conclusion. Similarly orders already in progress will be processed to final determination.

We propose to introduce the register of applications for DMMO s prior to commencing the relevant new legislation.

We do not intend to review or amend the rights attached to ways already shown in the definitive map and statement as byways open to all traffic.

As with Proposal 4, there is no logic in excepting applications in progress. GLEAM says that the cut-off date should apply to applications already made, and to provisional orders in progress at the date of the Consultation Document (9 December 2003).

There is at present no sanction against making an irresponsible application. Once an application is made, the cost of processing it and of carrying it to a public inquiry is borne by the local authority at public expense. By contrast, any objector has to carry his own costs, which can be very substantial. It is grossly inequitable that there should be no sanction against making an irresponsible application, but a substantial sanction against objecting to it. If applications before a cut-off date are to be excepted from the proposed legislation, then it will be essential to award costs in parallel against both applicants and objectors.

Proposal 6

We propose that an easement conferring a private right of way for vehicles for the benefit of an owner or occupier should be recognised where (before the commencement of new legislation) a public right of way has arisen, which would before the one year cut off date have been treated as a right of way for vehicles, and is now being treated as giving rise to restricted byway rights.

GLEAM agrees that a change in legal concept should not prevent private motorised use where access rights can be shown.

Proposal 7

We invite views on bringing forward the 2026 cut off date under section 56 of the 2000 Act and section 54A of the Wildlife and Countryside Act 1981 for the purpose of recording byways open to all traffic based on evidence of mechanically propelled vehicle use.

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As with the exceptions under Proposal 4, there is no particular reason to bring forward this cut-off date from 2026, except for the achievement of certainty at an earlier date. In the vast majority of cases the evidence of claims will be established well before that date, so that injustice is not a major issue. The number of claims on the newly limited basis will be greatly reduced, so there is merit in achieving that state of certainty in as short a time as is practicable, say 10 years or less.

Conclusions

GLEAM considers the Minister's Foreword to the Consultation Document to be largely excellent, particularly where he says that it does not make sense that historic evidence of use by horse drawn vehicles before the internal combustion engine existed gives rise to rights of use by modern MPVs. His policy aim is the best statement of intent for protecting unsurfaced green lanes from damage by MPVs that we have seen for a long time. This is reflected in Proposal 3 and the first part of Proposal 4.

However, there are parts of the Consultation Document which totally undermine and nullify all the good intentions of the Minister. Particularly these are:

The proposal to repeal s34A *RTA* without putting anything in its place will leave an unworkable situation in respect of s34, in that magistrates do not have the jurisdiction or competence to decide the existence of claimed MPV rights in cases of prosecution for driving an MPV on a footpath, bridleway or restricted byway.

The proposal to introduce a cut-off date for applications for byways open to all traffic one year after the commencement of the legislation, combined with the proposal that all such applications made before this cut-off date will be processed to their conclusion, will give rise to a tidal wave of protective applications during this one-year period of grace. This will create a backlog of applications which will take local authorities decades if not centuries to clear, during which time all ways which are the subject of undetermined applications will remain open to MPV use, and vulnerable to damage. Even during the course of drafting this representation, it has become evident that the predicted wave of applications has already become a reality.

These proposals in combination put at risk of severe damage by MPVs **all** unsurfaced public rights of way of **all** classifications throughout England and Wales. Unless remedies are adopted similar to those suggested in **GLEAM**'s response, we fear that there will be no green lanes left to protect.

BBC1 visits the Yorkshire Dales.

The state of a number of green lanes in the North Yorkshire Dales was the subject of a TV programme in the early evening on BBC1 on 25th February in which Mike Bartholomew, the chairman of the Yorkshire Dales Green Lanes Alliance, starred.

The YDGLA, which is affiliated to GLEAM, was formed to put a stop to recreational off-roading in the Dales where much damage had been done to paths. The BBC programme showed aerial photographs of the most affected lanes. Mike put forward an entirely convincing case on behalf of those who are campaigning to protect the lanes in this National Park. Publicity is an excellent weapon for this purpose; and it was most valuable to get this programme on the air at peak viewing time.

Additionally in the Dales...

The long-expected Experimental Traffic Regulation Orders (ETROs) have at last been implemented. These Orders, which will ban motor vehicles from four groups of the most damaged routes in the Dales, came into effect on 1st March. The time taken from first proposal to implementation has been three years, which has allowed three more years of damage to be done. These three years included an over-long and over-conscientious period of consultation.

We must now wait and see what the outcome of this experiment will be. It is to be hoped that other highway authorities who go down the ETRO route will be able to bring them about a bit more quickly.

GOOD NEWS FROM THE RIDGEWAY.

One of GLEAM's earliest concerns was the appalling state of the Ridgeway, a pre-historic drove road which runs for 85 miles from Avebury in Wiltshire to Ivinghoe Beacon in Buckinghamshire. Off-roaders have turned long sections of it into muddy quagmires. But the Friends of the Ridgeway have been campaigning vigorously in more recent years, and at last a major success has been achieved.

Ian Ritchie, Chairman of the Friends of the Ridgeway reports:



A short section of the Ridgeway National Trail will no longer suffer the surface damage and the noise of recreational off-road motor vehicles. Wiltshire County Council has imposed a permanent Traffic Regulation Order (TRO) on Smeathe's Ridge from 8th March 2004.

Smeathe's Ridge is a beautiful section of the Trail, running for about 4km. Between the iron age hill fort of Barbary Castle and the village of Ogbourne St George. In recent years it has become a popular venue for the off-road fraternity, and every weekend its tranquillity is shattered, particularly by the sound of motorbike engines. It will be a joy to walk, horse-ride or cycle the section in peace. Come and try it!

Even more importantly, there is real hope that all the vulnerable sections of the Ridgeway will be protected by seasonal TROs from October 2004. The Ridgeway Management Group (representing all the six Highway Authorities along the Trail) has been pressed by the Minister for Rural Affairs, Alun Michael, to introduce these measures before next winter. This will honour a commitment that the Government gave last July. The local councils now need to move fast to put all the necessary legal steps in place, but already West Berkshire Council has pledged to do this.

Whilst seasonal TROs fall short of the outright ban sought by the Friends of the Ridgeway, this move represents a huge step towards the achievement of our ultimate objective. We are cautiously optimistic!

Support from CPRE at last.

The Campaign to Protect Rural England has responded to DEFRA's Consultation Document along much the same lines as GLEAM. It is good to know that the ruination of green lanes is being taken seriously by CPRE after frequent appeals, something which had previously been left to the branches and to other local organisations, often quite small ones, trying to protect just one local path.

A Change of Mind.

It has long been a mystery to many people why the British Horse Society, whose members ride on bridleways and byways, has firmly adopted the stance of encouraging the use of byways by motor vehicles, a policy which actively disadvantages their members. In the past, extending the Byway Open to All Traffic network might have helped the BHS carriage-driving members; but since the introduction of Restricted Byways in *CROW Act 2000*, that reason is no longer valid. Commenting on DEFRA's consultation document, a BHS spokesman reiterated their position and warned against alienating vehicle users by excluding them from using rights of way...For most riders, the issue is more about damage to the surface than the surprise and danger of meeting a motor vehicle.

Links between the BHS and motoring organisations such as LARA were emphasised. Tim Stevens of LARA takes particular issue with the activities of GLEAM, as might be expected. However, the BHS has many members who are also members of GLEAM and of other groups which actively oppose the use of unsurfaced rights of way by recreational motor vehicles, objecting to the damage, noise and pollution caused. There have been numerous occasions where the Access & Rights of Way Department of the BHS appeared to have totally lost touch with its membership and their wishes.

There has recently been considerable correspondence on the subject in the magazine *Horse and Hound*. For instance, a Durham reader wrote in response to various articles:

Has the BHS really sunk to the depth of having to be subservient to off-roaders organisations by helping them to claim lost ways, often on spurious evidence, so that these can be used by 4x4s and trail bikes? We can be sure that these paths would soon not be in fit state to be used by riders - let alone walkers....Surely the BHS is not silly enough to put itself into the hands of off-roaders, who have their own row to hoe?

More letters along the same lines followed; and surprise, surprise: a Press Release was issued on 27 February by the Board of Trustees of the BHS, giving its broad support to the proposals in DEFRA's consultation paper. It approved the statement that: The policy of The British Horse Society is to seek to increase all opportunities for off-road riding. Limiting access on rights of way for mechanically propelled vehicles will increase safety for our horses and riders. BHS chief executive Kay Driver said this policy is in accordance with the wishes of our members, our active volunteers and many affiliated bridleways groups. It is important that our response is in the best interests of our members and all horse riders....

It seems to have taken a very long time for the BHS to realise that the interests of their own members must come first.

Lord Hardy of Wath.

One of GLEAM's original and most eloquent honorary members in the House of Lords died on 16th December last year at the early age of 72. Peter Hardy was a life long campaigner for the environment, and during his time as MP for Rother Valley fought to get a number Acts to protect the countryside, wildlife and hedgerows through parliament.

From GLEAM's perspective, the Wildlife & Countryside Act 1981, which he was instrumental in amending in favour of various species of animals and birds, was however flawed, in that it did not differentiate between mechanically and non-mechanically propelled vehicles. This omission was in large part responsible for the subsequent use of Byways Open to all Traffic by off-roaders and the damage which they caused.

We are very sorry to have lost a steadfast and hardworking politician who was on the side of green lanes throughout his career.

From the Forest of Dean in Gloucestershire Sylvia Mills writes :

A grassy hillside path became a quagmire where huge earthmovers were transferred between 40 tonne container lorries and a firm's depot half a kilometre away. Locals protested, but officialdom favoured this illegal vehicular activity.

After 18 months, an Order upgrading the whole track (part BOAT, part bridleway) to byway was issued by the county council, who misinterpreted every map. Naturally, people objected. The Local Government Ombudsman agreed that spending six years arranging a public inquiry was unacceptable, giving permission to renew the complaint if the Order failed.

Exhaustive research, proving indubitably that private vehicular rights were restricted to the adjacent field users and that no public ones existed, was accepted by the Inspector. The track was classified as a bridleway.

Spurious objections by a member of the Trail Riders Fellowship and by a local entrepreneur caused a second similar Inquiry. Then the Parish Council asked the County whether they could involve the police and get the illegal usage, much of it on the adjacent Beauty Spot car park, stopped.

Shatteringly, the County Council claimed that vehicular rights remained unresolved, and that the distressingly muddy, deeply rutted track was in good condition, misquoting their Milestones Policy to say that legal parking, not the highly dangerous operations which terrified legitimate users, was occurring. Police and County Council each said the other was responsible for enforcement or prosecution. Approaches to more senior Council officers only caused deadlock.

The Ombudsman's researcher refused to review the essential evidence, which went back several years, like the Council's unsafe explanation, considering only events of the past eight months and ending the case over-abruptly.

At this point, foot and mouth disease closed rights of way, although vehicles from infected areas continued openly to operate here. The police spoke to the drivers because of local tensions, and a Council document purporting to give permission to use the track was produced; but the Council said it was incorrect. The police continued their operation, and advised people from both ends of the bridleway of the right phone numbers, so that when eventually a patrol car was free, the miscreants were observed and cautioned.

Meanwhile the Ombudsman wrongly exonerated the Council, finding no procedural fault. I approached the County Solicitor for an explanation, but he had retired. Then the Council for the Supervision of Solicitors, who lost papers and muddled names, stated that one cannot complain against a local authority solicitor who worked in its best interest. The Legal Services Ombudsman reiterated that the case had been dealt with satisfactorily overall.

Twelve, yes twelve years, had passed; and then, strangely, the County Council decided to fulfil its statutory duties, wrote to the miscreants saying use of the lane is unauthorised and threatened possible prosecution. Now the bridleway's structure is to be restored, as the lorries and JCBs have eventually moved on.

If you must get involved like me, never, ever give up if right is on your side. Don't lose hope. Don't die! Two witnesses were 90, some who helped the police as described were over 80.

Try to look with detachment at your long piece of astounding research - a slice of history - a humorous tale - your charitable gift to society. Thank goodness for word processing, photocopying, and your new perceptions of human nature.

Here I would like to thank Andy Dunlop, Marlene Masters and Elizabeth Still of GLEAM for their invaluable advice and encouragement to a novice.

This case was unusual because of the great size of the vehicles on a little but well-loved track and the unaccountably unhelpful attitude of certain people. A word in the right place could have solved the problem in the early 90s. As it is, it has become quite a rare success story.



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In Parliament....

An Early Day Motion, motion number 380, was tabled in Parliament by John Mann, MP for Bassetlaw, for signatures by other MPs in support of the Motion. It reads:

**USE OF UNSURFACED BYWAYS
OPEN TO ALL TRAFFIC BY
MECHANICALLY
PROPELLED VEHICLES**

That this House welcomes the Government's proposal to close the legal loophole whereby historical evidence of use by horse and cart, or dedication as a carriage-way prior to the invention of the internal combustion engine, can give rise to a claim for a byway open to all traffic, which, if successful, allows for use by modern recreational motor vehicles of green lanes and other unsurfaced routes in the countryside; notes existing byways open to all traffic will still be subject to inappropriate and unsustainable use by recreational motor vehicles; is concerned that our most precious countryside in the national parks and areas of outstanding beauty and our national trails such as the Ridgeway continue to suffer appalling damage; and urges the Government to take action forthwith to protect these areas by reclassifying existing unsurfaced byways open to all traffic as restricted byways and issuing

better guidance on enforcement to enable the relevant authorities to take swift and effective action where recreational vehicles are being driven illegally.

GLEAM wrote to all its 91 MP honorary members urging them to sign this EDM. At the time of going to press 90 MPs had signed the Motion, of whom 33 MPs are honorary members of GLEAM. Other signatories have been sent details of GLEAM and have been offered honorary membership also.

(Note: An Early Day Motion is a notice of a motion for which no date has been fixed for debate. The tabling of an EDM is a device to draw attention to an issue and to elicit support for it by inviting other MPs to add their signatures. An MP would not expect their EDM to be debated. MPs can also table amendments to existing EDMs. EDMs often attract a great deal of publicity, and many people regard them as a gauge of opinion. Members of the Government and their shadows do not sign EDMs, and some MPs never sign any EDMs on principle.)

**GLEAM aims to protect
public paths from
unnecessary damage. If
you would like more
information or wish to
assist please write to:
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**Published by GLEAM
Chairman: David Gardiner.
Executive Secretary and Editor: Elizabeth Still**
