

# GLEAM



Green Lanes Environmental Action Movement

Patron: HRH The Duke of Edinburgh KG KT

[www.gleam-uk.org](http://www.gleam-uk.org)

**A NEWSLETTER for those interested in protecting ancient ways  
from the ravages of use by motorised recreational vehicles.  
SPRING 2009**

## **An Update on Rights of Way in Wiltshire**

*by Anne Henshaw*

The long-awaited Wiltshire County Council Rights of Way Improvement Plan became available in early autumn 2008. It is a useful document, and when used alongside The Wiltshire Wayfarer (the rights of way newsletter for Wiltshire County Council) and the Countryside Access Forum website, it provides a comprehensive overview for those interested in what is happening regarding the extensive network of public Rights of Way (RoW) in the County.

Following a series of wet winters and the dreadful summer of 2008, the network has in many cases degenerated into a series of deeply-rutted muddy tracks. Many of these are unsafe or impassable for walkers, cyclists and horse riders. This situation is not confined to the Byways, but includes Bridleways and Footpaths. The lack of any long periods of dry weather, with either frosty conditions in winter, or sun with drying winds in summer, has made repair work increasingly difficult. This, combined with a severe lack of funding, means that the RoW Department has no hope of keeping up with the outstanding repairs, let alone the increase likely to follow after yet another wet winter.

Climate Change has altered our traditional seasons, and consequently the traditional seasonal approach to rural work must also change. A new approach to surface maintenance and repair has to be found by the highway authority, and all users should become more involved in the planning and decision-making process. With Rights come Responsibilities. These, in the context of public paths, need to be balanced between the different categories of user.

The RoW Department has a tradition of proceeding with extreme caution and pessimism with regard to controlling mechanically propelled vehicles (MPVs). When it comes to closing a badly damaged Byway or Bridleway by means of a Traffic Regulation Order (TRO), they back away from this option. They base their reluctance on the assertion that it is their statutory responsibility to protect and assert the rights of all, and that closing a Byway, or even a Bridleway, would not stop the irresponsible minority from ignoring the closure, and would impede the use by permitted categories. However, it is always the “higher users”, that is to say those using MPVs, who appear to benefit from the protection, since they can continue to use the quagmires they have created, leaving the “lesser users” to struggle along deeply-rutted unwelcoming tracks.

GLEAM has achieved wonderful results as a result of their campaign to persuade local authorities to keep the damage by recreational off-roaders to a minimum, but there is still more to be done. Read all about the most important event of the past year, the Winchester case (challenge against decision of Hampshire County Council and Defra) on their website.

The materials and repair costs are spiralling, and the materials are becoming harder to procure. The traditional use of road planings has decreased with the EU requirement to recycle these planings back onto the roads when they are resurfaced. The availability of crushed rock and oolitic limestone (the other traditional repair materials) is not a problem, but the cost of transportation to the site is. An example: Repairs at Roundway Down, Devizes took 400 tons of base hardcore and limestone at a cost of £5,000 haulage, plus £2,000 repair costs, to complete 400 metres of severely damaged byway. *Contd.....*

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An alternative is to issue a temporary or permanent TRO, or to seek voluntary restraint. In order to stop further damage on unsurfaced paths, whether Byways or Bridleways, with consequential huge repair costs, this is a cheaper and more sensible option. These orders cost around £4,000 to obtain, the temporary orders being cheaper, but they only last for up to six months.

The costs arise from the legal work, along with necessary advertising and signage. Voluntary restraint costs no more than the time it takes to erect closure signs but, not being legally enforceable, it tends to be ignored by the off-roaders.

The RoW Department is unwilling to use TROs, maintaining that the Orders could not be enforced and would be ignored by the minority of users who caused the problem in the first place. Why could they not be monitored and enforced by local people and the Parish Councils? These are the local eyes and ears, and are likely to be the most aware of who the offenders are, and when they are about. If the irresponsible minority, whoever they are, persist, then it is up to all of us who are users, and enjoy the quiet recreation offered by our ancient tracks, to report this minority to the police or the authority. The Department is disappointingly inactive, and appears to view any proactive steps as being too complicated. We must apply sustained pressure to change this attitude.

Parish Councils should be much more engaged with the issue. Their Rights of Way representative should be encouraged to check the condition of paths in the parish at least as regularly as the Parish Stewards check the metalled roads, ditches and banks.

The situation can only get worse, and doing nothing is not an option.

The wonderful network of public paths which we have in Wiltshire has been handed down to us by past generations. We should value it as a community resource. It comes with no acquisition cost (unlike a sports pitch, leisure centre or public park) and is a facility offering potential enjoyment for all ages. It can improve our health as well as promote better understanding of the countryside and of the environment. At present the whole issue is fraught with tensions between the different categories of user, perceived “rights” (with seemingly no responsibilities), and a derisory budget with the lowest level of priority within the WCC Transport Finance Department.

This attitude must change at every level. Parishioners should find out what action their Parish Councils are taking to protect and maintain paths in their area, what plans they have for them for the future, and should ask if they have carried out a survey of their condition within the last ten years.

Depending on the system of local government in any area, prospective County, Unitary, District or Borough Council candidates should be asked what are their views on Rights of Way, and what they would do, if elected, to change any current “do nothing” attitude which may exist within their Council.

This action is needed if Council attitudes at all levels are to be changed.

*Anne Henshaw is Chairman of North Wiltshire & Swindon CPRE, and is CPRE Representative on the Wiltshire & Swindon Countryside Access Forum.*

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### *Shared Use of Public Rights of Way*

At a recent Conference in London of South-East Local Access Forums, Kent Countryside Access Forum presented a paper on the shared use of Public Rights of Way. In this paper ‘shared use’ meant shared between walkers, horse riders, pedal cyclists and carriage drivers. The thrust of the paper was to improve the network of routes for the benefit of residents by enabling them, where possible, to be shared between these classes of user. It was significant that motor vehicles were excluded from any concept of sharing, firstly because sharing with motor vehicles is not successful, and secondly because it leads to a greater risk of accident.

## Winchester Shock Waves - Chapter 2

by Graham Plumbe

Hon Adviser, GLEAM; Vice-Chairman, GLPG

The consequences of the Winchester case in the counties were reported in the last newsletter. This is an update. Some cases involve appeals to the Secretary of State against rejection of BOAT claims. These are handled by the Government Office for the North East (GONE), which in recent times came almost to a standstill due to the need to set up a new Department of Transport operation. The Minister reported on 10 February that this work is complete and that normal service will be resumed as soon as possible. We shall see.

In **Somerset**, where 102 claims foundered as a result of Winchester, nine have been appealed to GONE with added assertions of 5-year use exemption. Regrettably, SCC invited the appeals in spite of averring that no appeal rights exist in these cases. GONE previously rejected appeals on the basis that no appeal rights exist. It remains to be seen what will be made of the present referrals. Meanwhile, the CPS got cold feet about a prosecution of trail riders using a restricted byway, and this has led to aggressive defiance by certain hotheads. Their day will come.

**Yorkshire Dales NPA** added five more TROs to the eight previously reported. LARA has challenged the legality of the original eight, but the case has not yet been heard in the High Court, and the exact nature of the challenge is unclear. Winchester has abolished the vehicular rights on some of the total of 13 TRO'd routes, so the TROs are, in some cases, a belt-and-braces job. Whether LARA and the TRF will attempt to reclaim mpy rights on some of these routes by deploying another of the NERC exemptions is unclear, but they will have a hard job; an attempt, last summer, to use the 5-year-main-use exemption was a conspicuous failure.

**Dorset's** problems with maps to the wrong scale now afflict **Buckinghamshire** as well. Repeated approaches to Defra for a view on this have at long last produced the answer that Counsel's opinion has been sought and will very shortly be made known. It has been acknowledged that the hands that GONE has been sitting on have been tied by Defra's delay. Dorset CC meanwhile has obtained its own Counsel's opinion, but has declined to make the answer known until just before the next Committee meeting in May. "What about openness?" do we hear you say? Bucks has another little puzzle as to what happens where no list of evidence is supplied. That is clearly not what the Act requires and this is in hand.

In **Wiltshire**, the West Grimstead case was successful, with a consent order obtained to quash a BOAT order. Jonathan Cheal of Thring Townsend Lee & Pembertons handled the case. WCC has acknowledged that 48 out of 53 pre-cut off BOAT applications now bite the dust, and "a small number" of existing orders cannot be confirmed.

Other odd-ball situations march on. The **Warwickshire** legal misfire by an inspector, as to compliance of applications other than in the context underlying Winchester, was on our recommendation appealed by the landowners. The High Court quashed the decision by way of consent order, with costs awarded against PINS. WCC now has to redetermine the application, presumably as a restricted byway. James Pavey of Knights Solicitors handled the case. The case in **Nottinghamshire**, where NCC unlawfully determined an application made to itself, resulted in a restricted byway based on evidence without mention of our issue. Others cases are pending. In **Derbyshire** there has been uncertainty as to the application of Winchester, and friendly exchanges with officers appear to be moving things forward. GLEAM Committee Member Dr Karen Hinckley is doing sterling work on a number of claims and with success. The **Lake District NPA** is facing a challenge to restricted byway orders on Garburn Pass and Walna Scar. The TRF are asserting that vehicular rights were established by club motorcycle activity in the few years before 1930. That assertion is being vigorously resisted as a matter of both evidence and law.

Members are encouraged to report any situations where activities by authorities or BOAT applicants pose any doubts.

In another context, the effect of NERCA and more recently Winchester has raised questions about the British Horse Society's policy of supporting the use of mechanically propelled vehicles on green lanes. The suggestion that the policy ought perhaps to be reviewed has been put to the Society by some members. GLEAM is not involved in this, but is concerned about the outcome. It would therefore be of interest to hear of any instances where serious damage to byways has occurred, where horses have been alarmed by aggressive driving of motor vehicles or prevented from using the ways for safety reasons, where injury has occurred as a result of rutting. Such accounts would where appropriate be forwarded to the Society.

## Control and Repair of Damage to BOATs

Before the Countryside and Rights of Way (CROW) Act 2000 there was a poorly-defined class of Right of Way, the Road Used as Public Path (RUPP), introduced in the 1949 Act. It was never clear which RUPPs did or did not carry motor vehicular rights. Hence they were widely used (and abused) by recreational off-road motor vehicles. This was so unsatisfactory that in two subsequent Acts highway authorities were required to reclassify their RUPPs as Byways Open to All Traffic (BOATs), as bridleways or as footpaths. This made very slow progress, and was going to take many years to complete. Finally the Government took the bull by the horns. In the CROW Act they introduced the Restricted Byway (RB), which would be open to vehicles other than mechanically propelled vehicles, i.e. to horse-drawn vehicles and bicycles. All remaining RUPPs would become RBs. However, this did not come into effect for another six years, until the commencement of the Natural Environment and Rural Communities (NERC) Act 2006 on 2nd May 2006 in England, (later in Wales).

Since that date the former RUPPs have no longer been available to off-roaders. A consequence of this is that all their off-roading activities have had to be concentrated onto BOATs. If these BOATs are unsurfaced, as most of them are, the increased motor vehicular usage has increased the surface damage to them out of proportion to the increased use. In many cases this damage has made these BOATs at best unpleasant, at worst impassable, for lesser classes of user on foot, on horseback, on bicycles or in horse-drawn vehicles. This damage needs to be both controlled and repaired.

### Controlling the Damage

The obvious solution to the problem of controlling the damage is for highway authorities to put Traffic Regulation Orders (TROs) on the BOATs in question, banning motor vehicles from them. A TRO is a very flexible tool, which can be applied to any type, width or length of road, to any type, weight, width or speed of vehicle, and for any period of time, permanent, temporary or seasonal. All the necessary legislation for this to be done is already in place in the Road Traffic Regulation Act (RTRA) 1984. A permanent TRO costs about £4,000 to apply, and a lesser amount each year to maintain. By contrast, a badly-damaged BOAT can cost about £25,000 per mile to repair. It must be better to apply a pre-emptive TRO to any vulnerable BOAT before the damage is done.

However, highway authorities tend not to use TROs, perhaps hoping that no damage will be done. Then, when damage is done, they are faced with the dual costs of both repairing the damage and applying a TRO. They may also hide behind s130(1) Highways Act 1980, which states: 'It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.' Thus, while a highway authority may be protecting the rights of mechanically propelled vehicles to use (and thereby damage) an unsurfaced byway open to all traffic, this may not be protecting the rights of lesser users on foot, on horseback, on bicycles and in horse-drawn vehicles.



*Badly damaged BOAT at Boxford, Berks*

GLEAM is investigating possible procedures whereby a responsible body, having repeatedly requested a TRO for a particular route, and which has always been refused, may appeal to the Secretary of State against this repeated refusal. This appeal would then be heard by a trained Inspector at a Public Inquiry. By 'responsible bodies' we would include District and Borough Councils, Parish Councils and Meetings, recognised conservation and user groups, and affected landowners. The cost of such

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an appeal would be borne by the losing side if the opposition is unreasonable, which would guard against vexatious appeals by over-zealous activists. However, such a procedure would probably need a small piece of primary legislation to achieve. This would be too small to merit a Bill of its own, but would have to be tacked onto another larger Bill on a related subject, perhaps by amendments which add sections to RTRA '84. This process is known in Parliament as 'Christmas Tree-ing'.

Another means by which members of the public themselves can help to control damage to Rights of Way is by using s59 Police Reform Act 2002 (as amended in 2005 and 2008). Under this, members of the public who are alarmed, distressed or annoyed by off-road motor vehicles can report an incident to the police. (Damaging the surface of the highway can cause considerable annoyance!) It is essential to report the registration number of the vehicle causing the incident, because without this the police can do nothing. The police will then find out the registered keeper of the vehicle, and find out from the Police National Computer if the vehicle or its keeper has had a warning from any police force or been seized in the previous 12 months. If it has not, they will issue a warning. If it has, the police may seize and impound the vehicle. To get it back, the owner will now have to pay £150 for trail bikes, or £150 to £300 for 4x4s depending on whether they were on or off road, upright or overturned, undamaged or severely damaged, plus £10 for trail bikes or £20 for 4x4s for every day that they have been held. If it is not reclaimed after 7 days, the Police Authority may dispose of it after 14 days from the date of seizure. If the offence is sufficiently severe or repeated, or if the vehicle has not been reclaimed or disposed of within 56 days, the police may crush the vehicle. To see a full summary and interpretation of s59, visit the GLEAM website, [www.gleam-uk.org/news](http://www.gleam-uk.org/news), scroll down and click on the Autumn 2003 Newsletter, in which there is an article on this on pages 4-6, though the penalties for seizure and holding of the vehicles have now been increased as above. In an adjoining article in this current issue there is a list of the offences for which a motor vehicle may be reported to the police using s59.

### **Repairing the Damage**

Despite all efforts to control the damage to BOATs and other Rights of Way, there are still many BOATs and former RUPPs which carry the scars of earlier severe damage; and on many BOATs the causing of damage by off-road motor vehicles is an on-going process. This damage has to be repaired if these BOATs are to be conveniently and pleasurably used by lesser classes of user. It should be remembered that the definition of a BOAT is "a highway over which the public have 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 foot-paths and bridleways are so used", i.e. by walkers and horse riders. It is not for the primary use of off-roaders to go mud-plugging.

Highway authorities have a duty under s41 Highways Act 1980 to maintain the highway in such a state as to be safe and fit for the ordinary traffic of that highway. If they do not do this, there is a procedure laid down in s56 of the Act whereby a user may compel an authority to repair a highway which is out of repair. Readers who would like to make use of this procedure should contact GLEAM for further advice.

Highway authorities often plead lack of funds as being their reason for not carrying out the necessary repairs. Is this really a valid excuse? To answer this we should look at a case which may not be familiar to many readers, particularly as it concerns education and not rights of way. This is the case of *R v East Sussex County Council, ex parte Tandy*. This case went up through the High Court and the Court of Appeal in 1997, and went to the House of Lords in May 1998.

Beth Tandy was a 14-year-old girl who was severely disabled with ME, with special needs such that she could not go to school, but had to receive her education at home. East Sussex County Council had a duty to provide this, but had chosen to reduce it to save money. In the Tandy case in the House of Lords (*as reported in The Times of 21st May 1998 and in Byway & Bridleway 1998/6/37*) "the question was whether a local education authority could take into account the availability of financial resources in deciding what sort of education should be provided for a child. Lord Browne-Wilkinson noted the dilemma that cash-starved authorities face, but held that the education authority could, if it wished, divert money from other educational or other applications which were merely discretionary so as to apply such diverted moneys to discharge the statutory duty. The argument was not one of insufficient resources to discharge the duty, but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the ground that it

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preferred to spend its money in other ways was to downgrade a statutory duty to a statutory power. Parliament had chosen to impose a statutory duty, not a power... the courts should be slow to downgrade such duties into mere discretions. If Parliament wished to reduce [a duty] to [a power] then it was up to Parliament so to provide; it was not for the courts to adjust the order of priorities between duties and discretions.”

This principle applies just as much to highways and rights of way as it does to education. Highway authorities have a statutory duty to maintain highways to the appropriate standard, just as they have a statutory duty to keep the definitive map and statement under continuous review. If there are not enough funds in the highways maintenance or definitive map budgets, then funds to meet these statutory duties should be taken:

- a. from other discretionary spending within the highways budget (e.g. for the creation of new ways, as distinct from re-discovered lost ways to be put on the definitive map); and
- b. from other discretionary spending other than on highways within the budget of the whole of the local authority.

Thus it may be found that the highway authority has plenty of money to spend on the necessary repairs to rights of way, provided the local authority has not chosen to spend the money on other things.

**David Gardiner**

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### **In Pursuit of Excellence**

by Graham Plumbe  
Hon Adviser, GLEAM; Vice-Chairman, GLPG

It can be galling to have your hand smacked by an inspector for saying something out of turn, without having the chance to reciprocate when inspectors get it wrong. Certain inspectors have got it badly wrong in recent years and we decided to take this up with the Planning Inspectorate (PINS). The story starts in May 2008 with representations on the following issues:

- (i) Inspectors must not take evidence privately, particularly as to untested points of law, without disclosing such information to the parties for comment or for taking legal advice.
- (ii) Inspectors cannot decide law, but they have to take a view to arrive at conclusions as to rights. They therefore need to know the principles of statutory interpretation.
- (iii) Order Decisions must necessarily contain a summary of the arguments from the parties. To omit major elements will leave parties dissatisfied as to recognition of their case, and will invite misconceived appeals or hinder the process.
- (iv) Where witnesses are clearly not impartial, evidence as to credibility must be accepted.
- (v) If significant events occur after a public inquiry is closed, the inquiry should be re-opened. It is wrong for a decision to be changed without giving the parties an opportunity to comment. This happened in respect of NERCA commencement, the Winchester judgment and two instances of Defra reversing its public advice.
- (vi) If a point of law occurs to an inspector which has not been aired, it must be exposed for comment. A patently wrong interpretation of NERCA had reversed an inspector's conclusion, and this has since led to the order being quashed.

All six issues have now been resolved and the points we made accepted in full. This took eight months, largely due to the ineptitude of the Quality Assurance Unit at PINS who eventually handed the problem back to the Rights of Way Section and thence to the Specialist Casework Branch. The latter has apologised for the handling, and has written a commendably gracious letter confirming that all points had been discussed in depth at a two day meeting of inspectors. Appropriate guidance has now been given to inspectors.

## **Offences for which a Mechanically Propelled Vehicle can be reported to the Police by a Member of the Public using s59 Police Reform Act 2002**

### **Careless and inconsiderate driving**

#### **S3 Road Traffic Act 1988**

If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.

### **Driving mechanically propelled vehicles elsewhere than on roads**

#### **S34(1) Road Traffic Act 1988**

Subject to the provisions of this section, if without lawful authority a person drives a mechanically propelled vehicle—

- (a) on to or upon any common land, moorland or land of any other description, not being land forming part of a road, or
- (b) on any road being a footpath, bridleway or restricted byway, he is guilty of an offence.

### **Damaging the surface of the highway**

#### **S1(1) Criminal Damage Act 1971**

A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

*[The property being damaged in this case is the surface of the highway vested in the highway authority.]*

#### **S131A Highways Act 1980**

- (1) A person who without lawful authority or excuse, so disturbs the surface of—
  - (a) a footpath,
  - (b) a bridleway, or
  - (c) any other highway which consists of or comprises a carriageway other than a made-up carriageway,as to render it inconvenient for the exercise of the public right of way is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale.

*[Level 3 is currently a fine not exceeding £1,000.]*

- (2) Proceedings under this section shall be brought only by the highway authority or the council of the non-metropolitan district, parish or community in which the offence is committed; and, without prejudice to s130 (protection of public rights) above, it is the duty of the highway authority to ensure that where desirable in the public interest such proceedings are brought.

*[s130(1) states: 'It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.' Thus, while a highway authority may be protecting the rights of mechanically propelled vehicles to use (and thereby damage) an unsurfaced byway open to all traffic, this may not be protecting the rights of lesser users on foot, on horseback, on pedal cycles and in horse-drawn vehicles.]*



## Horse Stiles on Byways and Bridleways

Where there is a Byway Open to All Traffic (BOAT) which is vulnerable to damage by off-road motor vehicles, and is subject to a Traffic Regulation Order (TRO) banning these vehicles, or where there is a Restricted Byway (RB) or Bridleway which continues to be used illegally by these vehicles, it has long been desirable to put up some form of obstacle which will prevent them from using the way. It is easy to stop 4x4s by putting in steel posts which are close enough together that 4x4s cannot pass between them. However, this will not allow a horse-drawn vehicle (HDV) to pass. An obstacle which will allow HDVs to pass, but not 4x4s is the Kent Carriage Gap, which has been used in several places on BOATs and RBs. However, while these allow HDVs to pass, they also allow ridden horses and trail bikes.

It is not easy to put up an obstacle which will allow horses to pass, but not trail bikes. West Berkshire Council have now put up a new type of obstacle to do this, with which members may not be familiar. This is the Horse Stile, illustrated here. These have been erected on Old Street, a major feeder track to The Ridgeway, which at this point is a severely damaged BOAT. For several years GLEAM has been pressing WBC to put a permanent TRO on Old Street. However, the Council are now carrying out repairs, and have put on a temporary TRO to protect the repairs.



At each end of the affected section they have also erected a Horse Stile. This is two galvanised tubular steel frames, each set in concrete at least 2ft into the ground. The frames are 5ft apart, so no 4x4 could get between them. Bolted to the frames are two sleepers, 10in high and 3ft apart. With these dimensions a walker or a horse can step over them, a bicycle or a push chair can be lifted over them, but it is hard to lift a trail bike over them. Beside the Horse Stile is a locked gate, through which legitimate users (including HDVs) who have been issued with a key may pass.

These Horse Stiles appear to be permanent structures, and it will be interesting to see if WBC will make their temporary TRO permanent. GLEAM is pressing for this.

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### Venue for 2009 AGM. Members Prefer Newbury

In recent years the Annual General Meeting of GLEAM has been held at Newbury Rugby Club in Berkshire. It was suggested at this year's meeting that the 2009 AGM, due to be held on 23rd October, should be held on the Royal Showground at Stoneleigh in Warwickshire, to make it easier for those members who live in the north to attend.

A poll was therefore conducted of all members to find which of the two possible venues they would prefer to attend, or if they had no preference as to venue. They were asked not to reply if they did not intend to come to the AGM wherever it was held.

The result of this poll was as follows:

Prefer Newbury venue 26 members  
Prefer Stoneleigh venue 4 members  
No preference as to venue 4 members

GLEAM AGMs will therefore continue to be held at Newbury Rugby Club for the foreseeable future.

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**Published by GLEAM**  
**Chairman: David Gardiner.**  
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