

Access Reform Programme

Options Identification Paper: Expert Group 2
Flexibility on Public Paths

Options Identification Paper: Reforms 2A and 2B

Introduction

ExG2 met on 13th March 2020 to discuss options for how to implement the *policy intent* set out by Welsh Government for Reforms 2A and 2B.

This report has been produced following the second meeting of Expert Group 2 (ExG2). The report outlines the main Reform Options identified for implementing the two Reforms.

The Reform Options identified from this stage of the Expert Group process will be taken forward for detailed consideration by each Expert Group. This will include providing greater detail and analysis of each proposal – including any common elements and/or cross-cutting issues.

It should be noted that the content of this paper contributes to developing advice to Welsh Government for the reform of access legislation as part of the Access Reform Advisory Group. Any such information and outputs produced during the ARAG process do not represent the policy position of Natural Resources Wales, Welsh Government or other members of the Access Reform Advisory Group (Steering Group/Expert Groups).

Process

Following the first meeting, members were asked to consider the Problem/Issues Identification Paper produced for each reform and submit ‘Outline Reform Option Proposals’ summarising possible approaches to implementing the Policy Intent set out for each Reform.

These outline Reform Proposals, with ones put forward on the day, were presented and considered by members of the Expert Group. The various proposals were then compared and grouped according to broadly common approaches.

Options that it was broadly agreed fell outside the scope of the Reform and *Policy Intent* set by Welsh Government were discounted.

The remaining Option Proposals were then considered further in sub-groups. The sub-groups were asked to add further information and detail about the key elements that each proposal would need to include, taking account of the key issues identified in the Problem/Issues Identification Paper.

Reform 2A

Identification of Outline Reform Options

The first stage of the process identified broad Outline Proposals that were agreed should be considered further. The Outline Proposals are summarised in the following table:

2A: Outline Proposal Title	Summary Description of Outline Proposal
i. General application of higher rights to footpaths [s30 approach]	Roll out the general application of higher rights to footpaths, using a 1968 Countryside Act section 30-type approach, with an associated caveat or clause on the requirement for responsible use.
ii. Higher rights applied to footpaths with powers to exclude based on unsuitability	Higher Rights applied across the footpath network. Powers would be provided for LHAs to assess paths for unsuitability of higher rights. Paths could be excluded where rights were assessed to be unsuitable. 'Unsuitability' would be determined on the basis of a formal assessment process and criteria (unsuitability assessment).
iii. Selective application of higher rights to footpaths applied on a case-by-case basis	Higher Rights applied on a case-by-case basis, assess process, linked to farm scheme through a duty to appraise network by LA applying standard criteria linked to ROWIPs

Reform Option Proposals – identification of further required elements

For each of the broad Outline Proposals identified above a summary description and key elements, or ingredients, that would be needed with each proposed option approach were identified. These are summarised below for each Outline Proposal

2A(i) General Application of Higher Rights to Footpaths [Countryside Act 1968 s30-Type Approach] with a clause for responsible behaviour

Outline Option Proposal Description:

To extend, across all public footpaths in Wales, the range of activities that the public can undertake by right. A Countryside Act 1968, section 30-type provision would give rights for cycling and horse-riding to use footpaths; there would be no responsibility for local authorities to maintain or improve footpaths for higher rights use. A clause or caveat in the legislation would also be put in place to provide a mechanism for excluding and restricting access.

Key Elements within 'General Application of Higher Rights to Footpaths' Outline Option Proposal:

The option was considered to require the following elements within it:

Ref No.	2A(i) Required element for outline option proposal	Alternative element for outline option proposal
001.	Legislation amended to allow cycling and horse-riding on footpaths [using a Countryside Act '68 section 30-type provision]	Legislation provide for natural accompaniments to permit carrying of non-mechanically powered water craft on footpaths and other PRow for legitimate access to inland waters.
002.	Legislation [along lines of s30] to specify maintenance duty only required for use on foot – not for horse riders or cyclists	Legislation includes maintenance and upkeep for higher rights
003.	Mapping regulations amended to reflect change. This would include the definitive maps of PRow. Depiction through other mapping sources would also need to reflect changes (e.g. Ordnance survey)	
004.	Definitive map updating- mechanism to bring definitive maps up-to-date	Clear DMMO backlog prior or alongside but with additional staff resource in order to then run map updates.
005.	Reduced public liability, as defined under CRow, is applied to PRow	
006.	A duty (and associated powers) given to LHAs to modify limitations (infrastructure) for higher rights with consideration for limiting illegal access and facilitating accessibility improvements	Limitations modified as part of agreements made through land use payment schemes.
007.	Legislate for a 'Restrictions & Exclusions mechanism' – Create an E&R process that enables higher rights to be withdrawn on sections of path where there is proven irresponsible behaviour. This process should be through application including consultation and appeals process (reasons could include impacts on: working land, nature conservation, wildlife, H&S considerations etc)	Statutory code to provide mechanism to take enforcement actions against irresponsible behaviour [see below]
008.	Give LHAs powers to upgrade signage/waymarking for footpaths with higher rights, including the power to place signage for reasons other than direction finding.	

Ref No.	2A(i) Required element for outline option proposal	Alternative element for outline option proposal
009.	Embed clause or caveat for regulations to specifically outline responsible higher rights use, in guidance or other mechanism. This would include a “hierarchy of users” on paths and define “formal agreements” on sections of path that were deemed to be problematic. Failure to comply would trigger the E&R process outlined above.	Develop a Statutory code (similar to way Scottish code is laid out) that deals with individual users, resulting in their personal loss of rights and parallel enforcement mechanism
010.	Place duty on NRW/WG to issue a code of conduct, and a duty on WG/NRW and all Access Authorities to promote understanding of it.	
011.	Communication of access rights (through mapping, comms campaign; within [revised] countryside code and activity codes work)	
012.	Rules around commercial activity on PRow and CRow reviewed and better aligned in relation to higher rights. Clearer definitions of commercial activity developed and communicated.	

It is possible for an option proposal to have variations identified in one or more key elements, while retaining the overall approach. These have been noted above within the table.

2A(ii) Higher Rights applied to Footpaths with powers to exclude based on unsuitability

Outline Option Proposal Description:

Higher Rights applied across the footpath network following the s30 type approach outlined in Reform 2A(iii) in first instance. Powers would be provided for LHAs to assess paths for unsuitability of higher rights. Paths could be excluded where rights were assessed to be unsuitable. ‘Unsuitability’ would be determined on the basis of a formal assessment process and criteria (unsuitability assessment)

Key Elements within ‘Higher rights + unsuitability Approach Outline Option Proposal:

This option was considered to require the following elements within it:

Ref No.	2A(ii) Required element for outline option proposal	Alternative element for outline option proposal
001.	Legislation applying s30 type approach [see Reform option 2A (iii) for those required elements]	

Ref No.	2A(ii) Required element for outline option proposal	Alternative element for outline option proposal
002.	LHAs duty [power?] to assess public FPs network for unsuitability for higher rights use [with flexibility to exclude different types of user rights] – no new or additional powers to restrict or exclude footpath rights	Discretionary power to assess unsuitability; Rights to apply to LHA to make unsuitability assessment
003.	Powers for WG to make regulations setting out unsuitability assessment process including to provide guidance from WG to LAs as to process and criteria for assessment	
004.	Powers to set framework for unsuitability assessment criteria to include [for example]: Infrastructure; widths of current paths; public safety; volume of use – current and expected	
005.	Power [duty?] for LHA to carry out unsuitability appraisal of network including consultation Consultees defined in legislation [including LAFs, landowners, PPO statutory consultees?]	Path-by-path assessments made at discretion of LHA; application process to LHA for assessment[s] of specified FPs
006.	Discretionary powers for LHAs in making decisions: LHAs should be able to rule out certain routes based on their appraisal of the network	
007.	Inclusion of appeals as part of appraisal process – this should be internal initially between the LHA and the LAF. Appeals for complex issues, unresolved issues would move to the Planning Inspectorate stage for decision	LAF provide advice to LHA, in line with current role
008.	Requirement for ‘periodic’ review of unsuitable routes – routes excluded permanently or allow for review [see right]	Period of review: routes excluded on time limited basis (rolling review)
009.	Powers for the LA’s to consider and amend structures on PROW – would be needed to appraise routes designated as unsuitable (i.e. cannot be sole reason for determination of unsuitability)	Duty for the LA’s to consider structures on PROW – would be needed to appraise routes for de-selection
010.	Define commencement time – e.g. how and when new rights come into practice	Transition period approach? E.g. time to alter furniture where required
011.	LA’s to receive more powers to sign along routes where complexity of access provision is increased, e.g.	

Ref No.	2A(ii) Required element for outline option proposal	Alternative element for outline option proposal
	<ul style="list-style-type: none"> - Advisory signs where access rights have changed and/ or are restricted (through designation as unsuitable) - Type and placement of sign would be LA decision 	
012.	Education around revised Countryside Code <ul style="list-style-type: none"> - Revision of CC and related activity codes - Public awareness campaign[s] - Landowner awareness - Enforcement possibility and setting out what is expected of people - Setting norms for compliance 	Statutory code (as in Scotland) <ul style="list-style-type: none"> - To alter people's perceptions of access - Better educating tool? - User policing of irresponsible actions (social media use)

It is possible for an option proposal to have variations in one or more key elements, while retaining the overall approach. These have been noted above within the table.

2A(iii) Selective Application of Higher Rights to Footpaths

Outline Option Proposal Description:

By application to the relevant local authority or National Park Authority on a case-by-case basis, the extension of activities that the public can undertake, by right, on public footpaths. To include non-motorised forms of recreation, including cycling and horse-riding. (Not a blanket approach as above option reform).

Key Elements within 'Selective Application of Higher Rights to Footpaths' Approach Outline Option Proposal:

This option was considered to require the following elements within it:

Ref No.	2A(iii) Key element for outline option proposal	Alternative element for option
001.	Legislation to provide powers for LHAs to designate individual footpaths for higher rights use.	

Ref No.	2A(iii) Key element for outline option proposal	Alternative element for option
002.	Powers for regulations to set out: process of designation, including criteria to assess footpaths, provision for assessment of impacts (e.g. to land management, nature conservation/ wildlife, H&S considerations etc)	
003.	Simple and time limited processes (cf with lengthy DMMO process for example)	
004.	Make legislative provision for consultation and appeals process	
005.	Definitive map (DM) regulations amended to reflect change	
006.	DM updating: mechanism to bring definitive maps up to date	DMMO backlog needs clearing prior to map updates or alongside.
007.	Additional powers for LAs/ NPAs to modify limitations on paths (infrastructure) to facilitate access for higher rights and for accessibility reasons	Additional powers for LAs/ NPAs to modify limitations infrastructure and surfacing?
008.	Redefine natural accompaniments (linked to reform 1A – e.g. carrying of boats to inland water over rights of way)	
009.	Restrictions & Exclusions mechanism for defined reasons – by application to LHA (working land, Nature Conservation, wildlife, H&S considerations etc)	Restrictions & Exclusions mechanism – at discretion of LHA (working land, Nature Conservation, wildlife, H&S considerations etc)
010.	Consider new term /definition of FPs designated with higher rights; + revised statutory signage	No change to FP terminology, except powers to display higher rights on designated footpaths (Others may not)
011.	Recreational code – modification of Countryside code, therefore advisory guidance only	Legislate for statutory code (similar to way Scottish code is laid out) to define rights and responsibilities, including sanctions for breach of the

Ref No.	2A(iii) Key element for outline option proposal	Alternative element for option
		code [e.g. loss of rights when not acting in accordance with code; serving of notices]

It is possible for an option proposal to have variations in one or more key elements, while retaining the overall approach. These have been noted above within the table.

Reform 2B

Identification of Outline Reform Options

As with Reform 2A, the first stage of the process for 2B identified the following broad Outline Proposals and determined which ones should be considered further. The outline options considered further are summarised in the following table:

2B: Outline Proposal Title	Summary Description of Outline Proposal
i. Diversion or closures by notification	Simplify process for short-term diversion by notification without the need for press advertising. An alternative route should be provided and shown online and on the ground. It includes for stock control measures and other specified reasons.
ii. Statutory access code diversion	Statutory code to define provision of alternative, short-term measures to divert public access
iii. Temporary diversion for works	Use the same mechanism that is being developed in England to create temporary diversions to PRow under section 135A of the Highways Act

2B(i) Diversion or closures by notification

Outline Option Proposal Description:

Simplify process for short term diversion by notification without the need for press advertising. An alternative route should be provided and shown online and on the ground. It includes for stock control measures and other specified reasons.

Key Elements within ‘Diversion or closures by notification’ Outline Option Proposal:

The ‘Diversion or closures by notification’ option was considered to require the following elements within it:

Ref No.	2B(i) Required element for outline option proposal	Alternative element for outline option proposal
001.	Shift onus onto landowners to notify LHAs of intention for temporary diversion/closure <ul style="list-style-type: none"> - [New legislation provisions] - Simplify and speed up process of closure/diversion - Guidance to produce a template for notification 	
002.	New legislation provisions: <ul style="list-style-type: none"> - power for registered landholders to notify of short-term temporary closure/diversions of [FPs/BWs?] - powers to regulate provisions 	Provision for temporary diversions only, i.e. requires provision of alternative route
003.	LHAs should receive all relevant information packaged within notification from landowners: <ul style="list-style-type: none"> - Checklist (reasons for closure/diversion of what and why) - Map/plan of route closure/diversion - Alternative route available (if not then reasons why) - LA ability to check frequency of closures and question need 	LAs able to monitor who and where closures appear by record. This could enable discussion for more permanent diversions of certain routes should they appear as notifications frequently. What is in the best interest?
004.	Registration of land by landowners to the LA – LAs control register <ul style="list-style-type: none"> - Registration/ signup to use this simpler process - Provides landownership/ plans - LAs can identify land parcels and ownership and have on record details of previous diversions/ closures and reasons 	
005.	Option for exclusion/ temporary diversion: <ul style="list-style-type: none"> - Exclusion for certain types of user (but still allowing other types access) if deemed an issue at certain periods. E.g. restriction of dogs during lambing periods/ wildlife protection - Would not be a requirement for an alternative route 	Option as a temporary diversion for all users <ul style="list-style-type: none"> - All users restricted - Would require an alternative route in place
006.	Grievance Process allowing a more transparent [challengeable] process. <ul style="list-style-type: none"> - Available to users/public 	
007.	Notices needing to be date stamped [start and end dates] <ul style="list-style-type: none"> - Onus on landowner to ensure notices are in place and removed on date stated 	

Ref No.	2B(i) Required element for outline option proposal	Alternative element for outline option proposal
	<ul style="list-style-type: none"> - LA enforcement procedure to prompt this, ensuring diversions/closures are not in place longer than necessary 	
008.	Communicating notifications: Landholders to notify LHA - online LA Communication online to: <ul style="list-style-type: none"> - User groups - Public - Stakeholders Landholders: <ul style="list-style-type: none"> - Onsite notice and plan requirement regardless of closure length 	
009.	Outdoor access code / Communicating to users about potential for route changes at ground level	

It is possible for an option proposal to have variations in one or more key elements, while retaining the overall approach. Variations have been noted in 'Alternative elements' column in the above table.

2B(ii) Statutory access code diversion

Outline Option Proposal Description:

Statutory code to define provision of alternative, short-term measures to divert public access for land management purposes. Alternative routes provided in accordance with the code would be a temporary right of way.

Key Elements within 'Statutory access code diversion' Outline Option Proposal:

The 'Statutory Access code diversion' option was considered to require the following elements within it:

Ref No.	2B(ii) Required element for outline option proposal	Alternative element for outline option proposal
001.	Legislation for a statutory access code to enable this option (which would have both mandatory and advisory elements)	
002.	Define (guidance) circumstances of diversion(s) <ul style="list-style-type: none"> - Landholder defined - Stakeholder input (e.g. NAFW) Clearly define circumstances in code for users/landowners/ managers Transitional (all/mostly) Processes (not works changing route)	User able to find their own reasonable alternative route/diversion, if one not appropriately given.

Ref No.	2B(ii) Required element for outline option proposal	Alternative element for outline option proposal
003.	Define reasonable alternative route <ul style="list-style-type: none"> - Safe and reasonable provision - [Signed] <i>Liabilities for landowner & users</i> <ul style="list-style-type: none"> - <i>Rights of Way</i> <i>Convenience</i> <i>Communications</i> <i>Safe/equivalent</i>	
004.	Communicating – What to expect in the code (cascading the code to all); formal notices	
005.	Development of an overall Statutory Code – for all CRoW/PRoW Access	
006.	How long does the Statutory Code cover? <ul style="list-style-type: none"> - When does an application for a longer diversion is needed? <i>(goes back to the defining stage)</i>	
007.	Communication – on the ground <ul style="list-style-type: none"> - Signage template (to be part of code) - Dedicated social media presence 	Social Media accounts for public to ‘go to’ for all statutory code information.
008.	Appeal process through Highways Authority <ul style="list-style-type: none"> - For users who have a grievance over short-term closures/ diversions (<i>too many</i>) - Penalties or an order 	

2B(iii) Temporary diversion for works

Outline Option Proposal Description:

Use the same mechanism that is being developed in England to create temporary diversions to PRoW under section 135A of the Highways Act

Key Elements within ‘Temporary diversion for works’ Outline Option Proposal:

The ‘Temporary diversion for works’ option was considered to require the following elements within it:

Ref No.	2B(iii) Required Elements	Additional Elements
001.	Define [drawing on draft legislative proposals in England] a new Section 135A of the Highways Act: <ul style="list-style-type: none"> - LAs to have new powers to create temporary diversions for specified land management reasons: [agricultural related] works and management of livestock. 	The diversion to be permissive in nature Powers for LHA to divert onto neighbouring land with agreement

Ref No.	2B(iii) Required Elements	Additional Elements
	<ul style="list-style-type: none"> - Determination and making of temporary diversions by LHA; - Diversions duly made to have status of temporary PRow with associated powers [for LHAs], rights and responsibilities - Rights for land holders to apply for temporary closures - Regulations for process <p>[Consider diversion or closure for more limited extent and effect by notice?]</p>	<p>Powers to include temporary closures for limited, specified reasons and/or exclusions for specific users in some circumstances [or should this be left to TROs?]</p> <p>Limit number and extent of such diversions/ closures within any land holding or neighbouring land holding in a fixed period</p>
002.	<p>Regulatory powers to define: process and criteria, including:</p> <ul style="list-style-type: none"> - form and making of applications, - assessment criteria and processing of applications; - decision criteria [including assessment of alternative routes e.g. impact on network/onward journeys; H&S; LRA etc]; - online applications [and notices – see below] to LHA; - standards for provision of alternative routes [including connectivity; form of notices/signage - closures in exceptional circumstances only 	<p>Centralised application [and notification] portal for Wales [see below] – possibly CRow also</p>
003.	<p>Provision of 14-day notice period before any work is carried out. This was felt to be correct. Notice required to be given online through the LAs website LHAs to provide start/end date stamped standard notices/signage for landowners / managers to put up on site.</p>	<p>Provision of notification via online Wales portal. Each LHA areas would have a section. [Potentially used for range of public access processes - link to Reform 3A potentially]</p>
004.	<p>Provide a mechanism for closure in some cases using model of the 28-day rule applied in the CRow Act. Limit extent and number of paths affected in a fixed time period [say annually, or within a X year period]</p>	<p>No 28 day closure mechanism.</p>

Ref No.	2B(iii) Required Elements	Additional Elements
005.	<p>Online application process to reduce the administration time for the LA, including templates/forms to create for all the legal paperwork online.</p> <p>Online notification of diversions – reducing costs of advertising.</p> <p>On site signage/notices: LHA to provide site signage to be put in place by the land owner / manager instead of doing works to mark out the diversion themselves, this would reduce the cost.</p> <p>[Minimise overall costs: estimate that the cost of the process could be reduced to as little as £300 per application [from estimate of over £2000]. However, could generate new, additional work]</p>	
006.	<p>Powers to temporarily divert the PRoW would keep same liabilities. There was also a discussion about bringing reduced liability over from the CRoW Act to apply to PRoW as well.</p>	<p>Permissive route – but would increase liability to landowners compared with PRoW</p> <p>Reduce liabilities for PRoW in line with CRoW Act [or as per MACA England]</p>
007.	<p>Duty of the landowner/manager to put up signs / temporary fencing (in the instances of stock control) to mark out the diversion.</p> <p>Duty of the LA to provide the signage for the landowner to use.</p> <p>Notices with map of affected route on LHA website.</p>	<p>Centralised portal for notices and applications [possibly wider public access issues – see Reform 3A] – managed by individual LHAs. Wales map of affected routes</p>
008.	<p>Provisions will need to take account of potential higher rights use of footpaths subject to outcome of Reform 2A proposals. Enabling legislation with details provided through regulations would be more flexible and readily revised in future.</p>	<p>Alternatively, a review process of the powers could be included to ensure they can be altered, if necessary.</p>

Appendix A

Expert Group members in attendance at the meeting:

Name	Organisation
Kate Ashbrook	Open Spaces Society
Chris Dale	Swansea County Council
Duncan Dollimore	Cycling UK
Sophie Dwerryhouse	Country Land and Business Association
Nick Fenwick	Farmers Union Wales
Rachel Lewis-Davies	National Farmers Union Wales
Rhian Nowell Phillips	Countryside Alliance
Anthony Richards	Pembrokeshire Coast National Park Authority
David Shiel	Clywydian Range AONB
Mark Weston	British Horse Society
Alison Roberts	Natural Resources Wales
Joseph Roberts	Natural Resources Wales
Sarah Smith	Welsh Government
Jont Bulbeck	Natural Resources Wales
Jayne Carter	Natural Resources Wales