

Understanding the Defra guidance on Public Path Structures

(Gaps, Gates, Stiles, Cattle-grids etc.)

The Defra guidance is focussed on local authorities and their obligations under the Equality Act 2010 which incorporates the Disability Discrimination Acts of 1995 and 2005.

It should be of value to:

- # Local Authorities
- # Landholders
- # Path users and user groups

and particularly to *someone who has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities* to whom the Equality Act applies.

This ‘Understanding’ document gives some background and an overview of the 35 page Defra document.

The full Defra guidance:
Authorising structures (gaps, gates & stiles) on rights of way
may be found on the Defra site

www.defra.gov.uk

or direct at

www.pittecrofttrust.org.uk/structureguidance.pdf

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Understanding Defra's good practice guide on structures on rights of way.

This Understanding paper tries to do for the 35 page Defra document what our Understanding BS: 5709 paper does for BS: 5709, the British Standard for Gaps Gates and Stiles, namely give some background, a simplified overview of the recommendations, and some specific details.

We hope that having read this Understanding paper, you will have grasped the essence of the Defra document. That may be all you need, but if you need more then we hope this guide will make it easier to understand Defra's document.

The full Defra guidance is available on the Defra website and at www.pittecrofttrust.org.uk. The guidance applies only within England. We acknowledge Crown copyright in the material where we have quoted from it.

Notes:

'Structures' is used in this guide to mean objects on or in a public path such as stiles, gates, chicanes, cattle-grids, which prevent full and free use of the whole path width.

HA80 refers to the 1980 Highways Act as amended to date.

Queries and comments on this document are encouraged, send to defracguidance@pittecrofttrust.org.uk

Some Background

For many years there have been differences of view amongst highway authorities, lawyers, and planning inspectors on what constitutes proper authority for, and proper definitions of, path structures.

The government policy of Least Restrictive Option has helped a little now that it is quite widely accepted, for example a specification of a structure in an order, once commonly just 'a stile at point X' has become the less restrictive 'a Kissing Gate at point X'. But in most cases still without any attempt to specify the quality or degree of permanence of the structure.

The two Disability Discrimination Acts (1995 and 2005) now part of the Equality Act of 2010 gave teeth to the Government's Least Restrictive Option policy. The 2005 Act made it clear that public paths were covered by their provisions. 'A gate at point X' would no longer be good enough

To some people involved in path structures the implications of these 1995 and 2005 Acts was clear: structures should

- 1 not be authorised permanently
- 2 always be least restrictive and
- 3 always be to a defined standard

But the authorities and inspectorate were unsure that this was appropriate in orders and held back.

Defra, doubtless recognising that the hesitation was partly due to lack of official guidance, supported the setting up of a working party of the Rights of Way Review Committee which represents a wide range of rights of way interests. This led to publication of the Defra guidance document in October 2010.

The Defra guidance addresses new authorisations. Whilst some of the guidance is relevant to the issues of existing structures that are lawful but needlessly restrictive, that is not its main purpose.

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The Equality Act 2010

Key aspects of this Act are the definitions of 'providers of services' to embrace most rights of way activity and of 'disability' to apply to far more people than those previously considered 'disabled'. Mobility difficulty, poor sight, learning difficulties, manual dexterity and so on all come within the Act.

(Defra guidance p9 B3)

Public authorities must, for services which they provide, make reasonable adjustments to meet the needs of those with the disabilities above. In addition they have a legal duty to foster good relations and equality of opportunity between people with these disabilities and others.

(Defra guidance p10 B8)

See also page 8 of this document

In a Nutshell

The Defra guidance contains four key recommendations (1 to 4, see bottom of this page) supplemented by reference to certain other matters. Recommendations 1 to 4 have been slightly rephrased and referred to as A to D for the purposes of this 'Understanding the Defra guidance' document.

Recommendation A. Each local authority should have a published policy on how it will meet the requirements of the Equality Act in relation to public rights of way. This is the key recommendation. Here is Defra's 'non exhaustive' list of relevant topics for coverage within that policy document:

- 1 The standards for the design of proposed structures (paragraphs D.3 to D.9)
- 2 Dealing with existing structures that appear to be unlawful
- 3 Removal of existing structures
- 4 Repair and replacement of existing structures
- 5 Conditions for the authorisation of structures
- 6 The authority's approach to historical structures, those of characteristic local design or structures affected by landscape considerations
- 7 Dealing with proposed diversions and the structures that a landholder wishes to install on the created section of the way.
- 8 Dealing with proposed path creation agreements and the structures that a landholder wishes to install on the created section of the way.

Recommendation B. All newly authorised structures to be specified, made, and installed to a rigorous standard, and inspected afterwards for compliance. See [p 5](#) for details

Recommendation C. A mechanism for subsequent removal, or replacing with a more convenient structure, to be considered for incorporation within the order or authorisation. See [p 6](#) for details

Recommendation D. The details of all lawful structures, to the extent that they affect the public, to be considered for publication, eg on a web site. See [p 6](#) for details

Other matters. See [page 7](#) for details

Limitations or Authorisations?

Structures for public safety HA80s66

Maintenance of structures

Cattle Grids

Town and Country Planning Act 1990

The Equality Act 2010. See [page 8](#) for details

Miscellaneous. See [page 9](#) for details

Bridges

Existing structures

New permanent structures

And finally ('A structure to

BS5709 at point X')



A stile at Point X

Defra's wording of their main Recommendations

As a matter of good practice, authorities should:

- 1) have a published policy on how it will meet the requirements of the Equality Act in relation to public rights of way – see Annex D;
- 2) ensure that any structures they give lawful authority to are clearly specified and documented – see Annex G;
- 3) consider including in any specification, provision to remove or vary the structure when the need for it changes or ceases – see Annex C;
- 4) consider displaying information on all lawful structures (including the accessibility) to enable someone with limited mobility to plan routes other than just those that are officially designated as 'easy access' – see Annex J.

Understanding Recommendation B

Recommendation B. All newly authorised structures to be specified, made, and installed to a rigorous standard, and inspected afterwards for compliance.

What Standard?

The Defra guidance time and again emphasises the need for standards in structures, standards that clearly specify what degree of interference with the public right of way is to be tolerated. The guidance speaks of 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, be unambiguously enforced. Current practice in some authorities is to have an engineering drawing of a gate or whatever with most dimensions, but with no usability or safety specification to cover things like opening force and sharp edges, let alone ‘matters beyond the physical structure such as the state of the ground around the structure’

Defra quite rightly points out that a local standard ‘could’ achieve what is required, whilst mentioning BS 5709 some twenty times in the document. It never quite says ‘use BS 5709 unless you have something better and more comprehensive’. But it gets close:

At page 17 para D8: “It is recommended that where authorities are contemplating moving away from BS 5709 they should be clear about their reasons for doing so and their ability to demonstrate compliance with the Equality Act if challenged.”

The working party that helped draft the Defra guidance was aware that many authorities had their own sets of standards, but there was no evidence that any were as comprehensive as BS 5709. It follows that those authorities have a choice of a substantial and in some cases radical revision to their standards or to adopt BS 5709 as the norm. Path users, landholders, and their organisations would be advised to question very closely those authorities that continue with their own standards.

This may be the moment to state that BS 5709 is not a fixed set of designs, it is a functional specification with examples of compliant structures which are just that, examples. Many other often quite different designs would comply, sometimes following a local tradition. Further, if there is genuine need for something deviating from BS 5709 in specific parameters, it is entirely proper to use “To BS 5709 except for...”

[Note. Buying and installing a structure stated to be ‘BS compliant’ by a manufacturer does not in itself mean it will comply; manoeuvring space, ongoing ground condition and other aspects are also required to be addressed. Manufacturers should not say any more than ‘This structure is capable of complying with BS 5709’].

At page 26 para G5 Defra touches on the choice of BS 5709: 2006 or BS 5709, the former being fixed, the latter implying the latest version. The former is generally recommended by Defra, but if we are to take ‘least restrictive’ seriously, the reasoning for preventing authorities having the ability to require reasonable update to later standards is unclear. Some updating at highway authority request can of course be explicitly accommodated within the order conditions.

Understanding Recommendations C and D

Recommendation C. A mechanism for subsequent removal, or replacing with a more convenient structure, to be considered for incorporation within the order or authorisation.

The assumption of ‘any authorisation is for ever’ has its origins probably in ancient paths with ancient structures that can have been assumed to have been dedicated subject to those structures. Also of course explicit new dedications of rights of way, made without being part of a ‘deal’ can clearly have permanent limitations. That background, plus there being no explicit provision for removal or modification of structures in the HA80 diversion legislation, nor in the TCPA 1990, nor even in the HA80s147 structures-for-control-of-animals legislation, may have led to a fairly widespread belief that such provision was not possible. It is now not unusual for s147 authorisations to include removal clauses although the practice is rare in statutory orders. The Defra guidance is therefore of considerable significance in this respect.

There is an opportunity to use the inherent ongoing least restrictive option requirement of BS 5709 to avoid complex removal conditions in orders, but this concept is not spelled out in the Defra guidance and initially we may expect to see in orders simple requirements such as the removal of a gate and storing it whilst stock are wintering in sheds. Then perhaps replacement of the structures by whatever is the currently least restrictive necessary structure at the authority’s reasonable request may follow. S147 approvals could move that way much faster, indeed many are already close.

Recommendation D. The details of all lawful structures, to the extent that they affect the public, to be considered for publication, eg on a web site.

Defra’s recommendation 4 (page 7 of their guidance) is for the displaying of information on all lawful structures (including the accessibility) to enable someone with limited mobility to plan routes other than just those that are officially designated as ‘easy access’. They refer to annex J where they say the public already has access to the definitive statement, also to records of authorised structures. The latter is highly questionable. Many authorities simply don’t have these records themselves. A pity Defra did not address this more directly. But the thrust of their recommendation is that the public should have access to information on lawful structural limitations on public paths and to information on the nature of those limitations. When authorities have websites showing rights of way then lawful structures could conveniently be shown there.

Although not stated, it would be within the spirit of the Defra document to believe that limitations other than path related structures should also be published if practicable. For instance fords or exceptionally narrow paths.



A very rare sight, a stile compliant with BS 5709

Understanding other parts of Defra's Guidance

Structures authorised for public safety under HA80s66(2)&(3)

Defra at page 24 para F2 covers this. These structures are highway authority responsibility in all aspects. They are removable or alterable at will by the authority. Defra basically says an authority should apply the same rules as they would to a landowner and must balance the pros and cons of such structures on all users.

Maintenance of structures

A structure not maintained to the standard specified becomes unlawful and can be removed by the authority (Defra Guidance page 20 E12, E22.). The public can use HA80s130A to require the authority to act.

Town and Country Planning Act 1990: TCPAs257

Defra at page 24 para F1 points out that structures cannot be authorised in a diversion order made under this Act. If appropriate then HA80 s147 can be used. Failing that then a HA80 diversion would need to be used in order to allow structures. TCPA orders give developers a fast track process with less hurdles than HA80 orders. Having no limitations may be part of the reasonable price to pay for this faster process.

Limitations or Authorisations?

The question is this: where a structure on a path affected by a path order (eg HA80 diversion or creation) can be legitimised either by an order or by an authorisation (eg HA80s147 for control of animals) then which is preferable?

Defra's Annex I addresses this. This topic generated warm discussion amongst the members of the working party.

Where structures can't be authorised via HA80s147 they can normally only be authorised through an order,. At the start of Annex I para 1.2 Defra says:

“Structures that the landholder wishes to install from the outset, on the way that is to be created, must be recorded as a limitation in the diversion order.”

But Defra does not say that this is only true of structures that cannot be authorised elsewhere. If it can be so authorised (eg for stock control) then the ‘must’ in that quote is not really valid.

All limitations in orders can now, under [Recommendation C](#), have conditions requiring them to be made less restrictive at a later date so the playing field between limitation and authorisation is more level than was generally assumed. It is suggested that all that Annex I says on this is ‘Given the choice where either way is possible, normally authorise structures by means of an order rather than doing it later by eg s147’. And if any reasoning to back this up exists in the guidance, it is far from obvious.

Defra recommend making sure the landholder knows that the authority will be influenced by the Equality Act in any decisions (Annex I.3), also making sure that the landholder is aware of the possible difficulty of getting structures authorised subsequent to the order (Annex I.3).

Cattle Grids

The question ‘can a cattle grid be authorised under HA80s147?’ has drawn heated debate in the past. Defra says at page 21 para E18 that it would be unlikely to satisfy Equality Act constraints unless a bypass were to be part of it. One can think of the bypass as the authorised structure with the grid equivalent to the associated fencing needed where the structure isn't across the full width of the path. Defra point out that the British Standard for such grids, BS4008, requires a BS5709 standard gate so in fact ‘A cattle grid to BS4008’ is all that is required. The bypass gate part must be wholly within the path's legal width, with extra width dedication if needed to achieve that.

The Equality Act 2010

The Equality Act 2010

Without the two Disability Discrimination Acts of 1996 and 2006, especially the latter, the Defra document would very likely not have been issued.

Defra's guidance has two annexes whose headings are not very different at first glance:

Annex B – *The Equality Act and its relevance to rights of way*

Annex C – *Disability discrimination legislation and its application to rights of way*

Think of Annex B as mostly about the principles and areas of applicability of the Act, and Annex C as mostly about the actual applications of it.

In **Annex B** the definitions of 'providers of services' embraces most rights of way activity and the definition of 'disability' includes far more than those previously considered 'disabled'. Mobility difficulty, poor sight, learning difficulties, manual dexterity and so on will come within the Act. (Defra guidance p9 B7)

Public authorities must make reasonable adjustments to meet these disabilities.

In addition they have a legal duty to foster good relations and equality of opportunity between people with these disabilities and others. (Defra guidance p10 B8)

Areas of impact for rights of way are identified at page 10 para B8 as:

- structures such as gates on rights of way
- the condition and character of the rights of way network
- production and implementation of a Rights of Way Improvement Plan.

Only the first of these is covered in detail by the Guidance.

In **Annex C** the issues about the application of the Equality Act are generally set out quite clearly and they set the scene for the rest of the document.

Diversions – Creation orders – minimum number of structures and the least restrictive necessary. The authority can and should ensure this.

Creation agreements – there may need to be compromise for overall benefit and if any public funding of the landholder is involved extra caution is needed.

In all orders and authorisations there should be provision for modification or removal of structures if there are no longer grounds for their remaining.

There is one issue in this Annex C worth raising. On page 14 para C10, middle says. '*...there is no impediment...*' post-order to an application by a landholder for a different (more onerous to path users) type of structure if the landholder has a genuine new need. But if the original order was under HA80 there is indeed an impediment if the structure in the order was not for agricultural animal containment but for some other purpose. Defra doesn't make clear what form of application could then be made by the landholder for a changed structure.

Miscellaneous

Bridges E15

Defra discusses bridges as limitations at page 20 para E15. The logic of E15 is not easy to follow and it doesn't distinguish between the cases of bridges existing at dedication and those added later. This Understanding document is unable to explain E15 to others until some clarification emerges.

New permanent structures

There is at present no law against generous landowners dedicating new rights of way, made without being part of a 'deal', and which include permanent limitations. A landowner can dedicate by simple deed, or even just verbally, and as soon as the public start using it, it becomes a public right of way (though not maintained at public expense). On the other hand, if a HA80 creation agreement is used, this involves the highway authority, and public maintenance, and the authority would have to carefully weigh up the pros and cons of accepting a path with such limitations in order to remain compliant with the Disability Act.

See Defra guidance page 13 para C4.



""Volunteers convert the old stile to a BS5709 kissing gate.

And finally

There is a case to be made for saying that all that is needed in orders or in authorisations is eg "A structure to BS 5709 at point X". The logic is that the BS inherently requires the least restrictive option and is an ongoing functional standard, not an installation standard. If for a HA80s147 authorisation the stock control need ceases, then after a reasonable time a kissing gate would fail the least restrictive option requirement of BS 5709 and would have to be modified or removed. An added bonus is that 'Tgeqo o gpf vdkp'E about linking the approval to the actual on-the-ground need as it changes over time becomes virtually unnecessary, at the most a standard phrase could be added to put it beyond doubt. This implication of BS 5709 is not well understood at present. It did not make it explicitly into the Guidance, so this may be a step too far in the short term. Its time may come.

End of Pittecroft Trust Defra Structures guidance summary

This version 3c is a non-substantive-change update from 3b