Law Commission
Reforming the law

Level Crossings
Analysis of Consultation Responses

Consultation Paper No 194 (Analysis of Consultation Responses)

PART 1
INTRODUCTION

1.1 This document analyses the responses of consultees to the joint Consultation Paper: Level Crossings, published by the Law Commission and the Scottish Law Commission)[1]. This analysis of responses is designed to be read in conjunction with the Law Commissions' Report on Level Crossings (Law Com No 339) (Scot Law Com No 234).

1.2 The consultation paper was published on 22 July 2010. The public consultation process ran from publication on 22 July to 30 November 2010.

1.3 During this period, the Law Commission received 114 written responses from a wide range of consultees, which included:

(1) the Government, Welsh Assembly Government and Members of the Scottish Parliament

(2) Railway operators

(3) Tramway operators

(4) The Office of Rail Regulation

(5) The Health and Safety Executive

(6) The Rail Accident Investigation Board

(7) The Rail Safety and Standards Board

(8) Land Registry

(9) Local authorities

(10) Police forces, including the British Transport Police

(11) Lawyers

(12) Academics

(13) Railway professionals

(14) Access groups

(15) Trade associations

(16) Non-governmental organisations

(17) Members of the public

1.4 A full list of formal written responses is provided in Appendix A.

1.5 In addition, the Law Commission and Scottish Law Commission attended events throughout Great Britain and held meetings with the project advisory group. A full list of events attended is provided in Appendix B.

1.6 The Commissions also attended a number of site visits to railways and tramways. A description of these site visits is provided in Appendix C.

1.7 We are very grateful for all those who took part in consultation events and submitted formally responses. We are also very grateful to the members of our advisory group for providing advice and information throughout the project.

In this consultation analysis, we set out each question asked in the consultation paper in turn and then discuss the responses received. We also discuss points raised which were not covered in the consultation paper.

[1] Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143. Subsequent references to specific paragraphs are in the format CP, para X.

We would welcome the views of consultees on whether, for the purposes of our proposals, "railway" should be defined as a transport system where the tracks are segregated from other traffic. [CP para 1.44]

Introduction

1.8 Of the 114 consultation responses that were received, 37 responses addressed the question of whether a "railway" should be defined as a transport system where the tracks are segregated from other traffic. Twenty of those agreed with the proposal, 15 disagreed, and two were equivocal.

1.9 A significant number of consultees disagreed with our proposed definition of "railway" – including, notably, all of the tramway operators who responded to our consultation paper and the Office of Rail Regulation. Those who agreed included disability representative groups, several local authorities and access forums, the Department for Transport, Network Rail, and many trade associations and unions.

Line of sight operation

1.10 The tramway operators Trampower, Edinburgh Trams, Greater Manchester Passenger Transport Executive, now Transport for Greater Manchester, Nottingham Express Transit and London Tramlink, along with the Confederation of Passenger Transport and the Heritage Railway Association, each made the point that the fundamental differences in the operating systems of railways and trams warrant the exclusion of trams from the scope of this project.

1.11 These consultees explained that trams have more in common with vehicular modes of transport such as buses than with trains. The Greater Manchester Passenger Transport Executive, which operates Manchester's Metrolink tram system, stated that its tramway system operates "under tramway principles where the vehicles are effectively road vehicles operating on a fixed track". The most significant difference between them seems to be that tramways operate on a "line of sight" basis. The Confederation of Passenger Transport explained:

> Trams are *designed* to operate amongst or alongside road traffic, so a tramcar must be able to stop within the sight line of the driver. This is referred to as driving on "line-of-sight", and is exactly the same as the way a road vehicle is driven. Full segregation of the tramway from road traffic is therefore unnecessary; an adequate degree of safety can be assured with signs and traffic signals as for a road junction.

1.12 Tram vehicles can operate on a line of sight basis as they are lighter than railway vehicles, travel at lower line speeds, and are capable of braking more quickly. Edinburgh Trams explained that their vehicles operate at a line speed of 50 kilometres per hour on the street and up to 70 kilometres per hour off the street. In the words of Trampower:

> Trams, but not trains, have emergency brakes that will slow a tram at the same rate as other road vehicles. Tram drivers can therefore avoid collisions, and tram driver training, like bus driver training, focuses on defensive driving techniques.

1.13 Several of these consultees also explained that tramway vehicles are governed by road traffic signs and signalling systems. The Heritage Railway Association explained that "the regime for signs and signals for tramways are already closely governed by the Traffic Signs Regulations and General Directions 2002[2]". London Tramlink provided a useful description of tramway signalling systems:

> Tramlink single line signalling is not intended to confirm to a driver that the line ahead is clear and safe in the way that Railway signalling does and in fact it cannot do this as the system will allow more than one tram into a section at any one time where the trams are travelling in the same direction. … .
>
> The signalling of our single line sections is provided to efficiently manage the flow of traffic across the sections and has the same basic functionality as traffic signals used to regulate the bi-directional flow of follow of traffic past a permanent or temporary lane restriction. The signalling does not convey a safety message and is not "fail safe" in the railway sense.

1.14 London Tramlink also noted that its signalling system is regulated by highway authorities, highlighting the connection between tram systems and road traffic.

1.15 The Heritage Railway Association, Nottingham Express Transit and the Confederation of Passenger Transport commented that a number of tram systems have portions of track that are off-street (segregated from road traffic) but that retain all the other characteristics of tramways. They still drive on a line of sight basis and are typically segregated for operational reasons, such as increased line speed, rather than for safety reasons. The consultees noted that Office of Rail Regulation's guidance on tramways[3] considers off-street tramways as a category of tramway, not as a railway. The Confederation of Passenger Transport noted that *all* UK tramways have some sections of off-street tramway.

1.16 These consultees pointed out that the proposed definition of "railway" would capture tramway systems that contained sections of segregated track, despite their only superficial resemblance to a railway. This would have serious, far-reaching consequences for the tram industry. London Tramlink noted that it would result in the "inevitable application of railway engineering and operating principles in an environment for which they are not designed and are not appropriate". The Greater Manchester Passenger Transport Executive explained that it would interfere with the company's recent efforts to convert several old level crossings along its route to road junctions:

[2] SI 2002 No 313.

[3] Office of Rail Regulation, *Railway Safety Publication 2: guidance on tramways* (2006), http://www.rail-reg.gov.uk/upload/pdf/rspg-2g-trmwys.pdf (last visited 30 May 2013).

> Although for historic reasons some of the crossings on the Metrolink System were formally level crossings the Greater Manchester Passenger Transport Executive and/or Network Rail have successfully sought revocations of the particular crossing orders. The crossings concerned either are, or shortly will be controlled by highway style road traffic and Light Rail Transit signals. It would be most unfortunate if these revised Regulations reinstated formal level crossing status to these locations.

1.17 The Greater Manchester Passenger Transport Executive also noted that the treatment of these types of trams as "railways" would constrain their flexibility to make necessary changes to the tram network, and would "require different operational responses contrary to the safety principles of consistency across the network".

1.18 Trampower also noted that reclassifying the junctions between roads and off-street tramways as level crossings would carry significant cost (£750,000 per junction) and cause unnecessary disruption to road traffic.

1.19 For these reasons, the above consultees suggested that the definition of "railway" should rely not on whether the tracks are segregated from other traffic, but on whether the transport system operates on a line of sight basis.

Existing definitions of "tramway" and "railway"

1.20 Six consultees suggested that the Law Commissions should use the definition of "tramway" found in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 to inform their definition of "railway":

> "tramway" means a system of transport used wholly or mainly for the carriage of passengers—
>
> (a) which employs parallel rails which—
>
> (i) provide support and guidance for vehicles carried on flanged wheels;
>
> (ii) are laid wholly or partly along a road or in any other place to which the public has access (including a place to which the public has access only on making a payment); and
>
> (b) on any part of which the permitted maximum speed is such as to enable the driver to stop a vehicle in the distance he can see to be clear ahead; […].[4]

1.21 The Office of Rail Regulation noted that the definition in the 2006 Regulations was "tried and tested" and well understood by relevant parties, and that it was preferable to draw upon existing statutory definitions in the interest of consistency and simplicity.

[4] SI 2006 No 599, reg. 2(1).

1.22 The Heritage Railway Association noted that this definition addressed the shortcomings of the definition of "tramway" in section 67(1) of the Transport and Works Act 1992, which reads:

> "tramway" means a system of transport used wholly or mainly for the carriage of passengers and employing parallel rails which—
>
> (a) provide support and guidance for vehicles carried on flanged wheels, and
>
> (b) are laid wholly or mainly along a street or in any other place to which the public has access (including a place to which the public has access only on making a payment); […].[5]

1.23 It explained that the definition in the Transport and Works Act 1992 had two problems:

> (1) the words "wholly or mainly along a street" take no account of the significant section of street concerned and furthermore they can give rise to a transitory element in that with a developing system the proportions of street to the remainder may differ from time to time so that what is a railway on one day may become a tramway on another; and
>
> 2) it takes no account of the vital distinction between railway and tramway operating practices, in that a railway operation is fully-signalled whereas tramway operation is normally by line of sight.

1.24 Not all consultees agreed that the definition of "tramway" in the Railways and Other Guided Transport Systems (Safety) Regulations 2006 was useful in the context of level crossings. Passenger Focus acknowledged that it was useful to draw a distinction between transport systems that operate on line of sight and those that do not for the purposes of the 2006 Regulations. It felt that it was desirable to have "a single safety management system for each tramway network, most of which are hybrids running partly on roads and partly on segregated routes". However, it is more important when considering the management of level crossings to ensure that the legal regime is "appropriate to the physical facts on the ground". It should be easy for road users to recognise level crossings as such, and the most practical way to distinguish between a tramway junction and a level crossing is the segregation of the tracks.

1.25 Northamptonshire County Council preferred a definition based on the maximum speed of the vehicles using the railway, but also pointed to the simple definition of a "railway" in section 118A(8) of the Highways Act 1980:

> "railway" includes tramway but does not include any part of a system where rails are laid along a carriageway.

1.26 "Tramway" is not defined in the 1980 Act.

[5] The same definition is used in section 23 of the Transport and Works (Scotland) Act 2007.

A wider definition of "railway"

1.27 Tom Craig suggested that all systems that operate on rails should be included in the project. Otherwise, arguments and delay might occur as a result of disagreement as to whether a given system is, in fact, a railway.

1.28 Three consultees suggested that a "railway" should not be limited to those where the gauge is over the statutory minimum of 350mm. The Office of Rail Regulation explained that the current practice is for it to regulate safety on all railways on tracks over 350mm, and on railways with a gauge of less than 350mm if they cross a carriageway (see section 67(1) of the Transport and Works Act 1992 and section 23 of the Transport and Works Act (Scotland)). They explained that it was appropriate for this practice to continue. Network Rail, Andrew Harvey and Michael Haizelden also noted that similar protection should be afforded to crossings with railways below a gauge of 350mm.

Conclusion

1.29 Although many consultees agreed with our proposed definition of "railway", a significant minority of consultees – primarily tramway operators – suggested that our definition should take better account of the operational differences between railways and tramways. In particular, they suggested that the definition should distinguish between those transport systems that operate on a line of sight basis and those that do not.

PART 2
SCOTLAND AND WALES: DEVOLUTION AND OTHER ISSUES

2.1 This Part did not contain any proposals or questions.

PART 3
DISABILITY AND ACCESSIBILITY

We would welcome any comments that consultees may have on disability and accessibility issues in respect of level crossings. [CP para 3.50]

Introduction

3.1 Of the 114 consultation responses that were received, 40 responses commented on disability and accessibility issues in respect of level crossings.

The need for a review

3.2 Many consultees believed that a review of disability and accessibility at level crossings was warranted. For instance, Cambridgeshire County Council stated:

> The opportunity should be taken to redress the balance relating to structures on public rights of way in consideration of both accessibility/disability and wider safety concerns.

3.3 Devon County Council welcomed the inclusion of issues of safety and accessibility for disabled pedestrians, drawing attention in particular to public rights of way crossings. It suggested that:

> The railway legislation and guidance should reflect the recent Department for Environment, Food and Rural Affairs Guidance on Structures and British Standard 5709:2006 in relation to public rights of way.

3.4 Similarly, the North Yorkshire Local Access Forum drew attention to the:

> new Department for Environment, Food and Rural Affairs guidance on disabled access on all rights of way, and the appropriate structures which can be erected should this be necessary.

3.5 John Irven and Clive Gray stated that the Railways Clauses Consolidation Act 1845 had been used as a justification for the installation of gates that were difficult for people with disabilities to access. They argued that “clearly things have moved on since 1845 and need to be clarified and consolidated”. Similarly, the Southern Snowdonia (Joint) and the Northern Snowdonia Local Access Forums stated that “the removal of (steep, ladder) stiles has been refused by the railway authority, quoting agreements made over a century ago”.

3.6 On the other hand, several consultees such as the Rail Safety and Standards Board stated that the review of accessibility was outside the scope of this project, particularly in light of the Board's own review which was published after publication of the Consultation Paper. Similarly, Transport Scotland, the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers’ Forum both agreed that the Rail Safety and Standards Board review is a “suitable vehicle to consider this issue”.

The responsible authority

3.7 Network Rail argued that Part 3 of the Consultation Paper did not "address the important role that highways authorities also have in relation to level crossings". It highlighted that "highways and planning authorities have a considerable role to play in terms of regulating other traffic flow into and around level crossings". It stated, for example, that tactile strips are typically put in place by the highways authorities rather than by Network Rail.

3.8 Powys County Council stated that the maintenance of both gates and stiles is legally the "responsibility of the owner of the boundary in which they are installed, although they are entitled to a minimum 25% contribution from the Council".

3.9 Conversely, in relation to defining a "service provider" under the Disability Discrimination Act 1995, the Country Land and Business Association stated that:

> It should be considered that as far as public rights of way are concerned, it is the local access authority (usually the County Council) who is the service provider … and not the landowner.

Safety and accessibility

3.10 Powys County Council expressed its support for improving accessibility of level crossings on a public right of way, stating that it would "benefit all members of the public, both with and without disabilities". It described its adoption of a "least restrictive access" policy in respect of public rights of way. It added:

> Measures to improve accessibility are also likely to increase the safety of the level crossing for users, as they are likely to enable people to use the crossing and move clear of the railway lines more quickly.

3.11 However, some consultees pointed to a potential conflict between safety and accessibility. For example, John Irven and Clive Gray described problems at a level crossing in Goviers Lane, Watchet, which have since been resolved.

Enforcement

3.12 The Office of Rail Regulation noted that the Department for Transport "has the policy lead on accessibility across all transport modes". The Office of Rail Regulation has "specific enforcement responsibilities, for example, in relation to the requirement for operators to have a Disabled Persons Protection Policy as a condition of their licence".

3.13 John Irven and Clive Gray stated that there is a need for "overview and investigation independent of the Office of Rail Regulation".

Practical suggestions

3.14 Many consultees made practical suggestions for the improvement of accessibility at level crossings.

USE OF STILES

3.15 Several consultees drew attention to the problems caused by the use of stiles. For example, Monmouth County Council and the Institute of Public Rights of Way and Access Management stated:

> There is no reason why a kissing gate rather than a stile could not be installed at many locations, which would enable users to quickly and more safely cross the railway.

MEETING THE NEEDS OF DIFFERENT GROUPS

3.16 The joint response from the Guide Dogs for the Blind Association and the Joint Committee on the Mobility of Blind and Partially Sighted People drew attention to the mobility needs of blind and partially sighted people, which they felt had not received sufficient attention in the consultation paper. They highlighted that "one of the most dangerous parts of the pedestrian environment for blind and partially sighted people is level crossings" and divided the problems faced by blind and partially sighted people into three broad categories:

(1) knowing when they have arrived at a level crossing;

(2) knowing when it is safe to cross; and

(3) once crossing, knowing that they remain safe and are following the correct line of travel.

3.17 To overcome these problems, they made several practical suggestions. For example, they highlighted that in the absence of gates, "there is nothing stopping [a blind or partially sighted person] from walking onto the tracks". They explained:

> Although there are many possible solutions to these problems, including full barriers, tactile paving, visual contrast and audible clues, more research needs to be done on how these can be linked to signalling. Implementing solutions will require a partnership approach between local authorities and Network Rail or the appropriate infrastructure operator, because level crossings cover both highways and railway track.

3.18 They drew attention the National Level Crossings Safety Group as "an important national forum for discussing and progressing issues relating to level crossing safety".

3.19 Network Rail stated that "design of level crossings, bridges and underpasses is … a complex issue and not one that has simple solutions". It argued:

> Although different users … do experience difficulties with some level crossings, bridges or underpasses, we note that the difficulties are not uniform, and that what is a difficulty for one set of users may not be a problem at all for others, while what may be an improvement for one set of users may cause or increase difficulties for others.

3.20 Similarly, the British Horse Society stated that "care needs to be exercised that provision for one group does not impact on another". It gave an example of notices being placed, for readability, at heights that "interfere with the manoeuvring circles that horses may make when the rider approaches a telephone or operates a gate".

NECESSITY

3.21 Community Safety Partnerships Limited expressed support for "the application of equality legislation to level crossings taking account of the condition of the route providing access to the level crossing". It provided the following example:

> If a footbridge is to replace a level crossing there should be no requirement that it is fully accessible if the footpath on either side of the railway is over rough ground and incapable of being used by anyone who is subject to a material reduction in mobility.

Other issues

3.22 Several consultees commented on whether Network Rail should be treated as a private company or a public body for the purposes of the Equality Act 2010. For example, the Department for Transport stated that for the purpose of the impact assessment, both the Department for Transport and the Office of Rail Regulation have treated Network Rail as a private company. On the other hand, Transport Scotland stated that the role of the state in Network Rail "is *not* minimal". It disputed the figures stated in the consultation paper and stated:

> The Office of Rail Regulation consultation on track access charging shows 65% of Network Rail income is from Network Grant and only 27% from track access charges, and some of this is from subsidised operators.

3.23 Network Rail disputed that "the distinction between providers of services and public authorities is less clear-cut when applied to Network Rail" and insisted that "on the contrary, the distinction is quite clear" and that "in respect of public level crossings, Network Rail is not a public authority". It pointed out that the Information Tribunal had held in its decision *Network Rail v Information Commissioner* (2007) that Network Rail is not a public authority.

3.24 The Egham Chamber of Commerce highlighted that – although "disabled people should have access on the same basis as others" – in light of the current economic conditions "the council can meet its obligation to provide equal access by providing none". It gave an example to illustrate this point:

> Engham has just two old and decrepit pedestrian bridges which re not being replaced, and new ones not provided, apparently because of the budgetary implications of making the new bridges Disability Discrimination Act compliant.

Conclusion

3.25 The majority of consultees who responded on the issue of disability and accessibility at level crossings suggested that more could be done to improve the accessibility at level crossings for people with disabilities and other users. On the other hand, a small number of consultees noted that different users have different needs and that what may be an improvement for some may hinder access for others. Several practical suggestions were made for how to improve level crossings, with the inadequacy of stiles being a recurring theme. Some consultees were of the opinion that the Rail Safety and Standards Board review is a more appropriate vehicle for these concerns.

PART 4
CREATION OF LEVEL CROSSINGS

We would welcome the views of consultees on the current system of creating level crossings [CP para 4.30].

Introduction

4.1 Of the 114 consultation responses that were received, 34 consultees provided views on the current system of creating level crossings.

4.2 In general, a greater number of consultees opposed the creation of new level crossings other than in exceptional circumstances, as compared to those who were more amenable to the creation of new level crossings and who agreed that a new procedure for creating level crossings could be useful.

No new level crossings

4.3 Thirteen of the consultees who answered this question took the view that new level crossings not be created other than in exceptional circumstances. The Office of Rail Regulation, the safety and economic regulator for the railways, takes a strong policy stance on the issue of level crossing creation:

> Apart from in exceptional circumstances, there should be no *new* level crossings on any railway. This fundamental principle aligns with the concept of "eliminating the risk", the first element of good risk management, and remains the Office of Rail Regulation's position.

It explained further that the policy applies equally to the reinstatement of old or disused level crossings, typically an issue that arises in the heritage railway sector. It confirmed that any reopened level crossings on heritage lines "are the exception not the norm".

4.4 Many consultees endorsed the Office of Rail Regulation's position, explaining that bridges or underpasses were vastly preferable to new level crossings. The Department for Transport, for instance, explained that level crossings were "often a source of considerable delay for people using the road network". It suggested that the creation of new crossings was not consistent with the duty placed on local authorities by the Traffic Management Act 2004 to address congestion. John Tilly was disappointed that, despite the Royal Commission on Transport's call in 1929 for the abolition of level crossings, new level crossings continued to be created.

4.5 The Office of Rail Regulation's position was also endorsed by Network Rail, though it expressed the view that the policy stance needed to be "slightly moderated" in some circumstances:

> This needs to be slightly moderated by a different set of criteria that should apply when, for example, one new level crossing is being created in order to close two other crossings, or where one crossing is to be closed and another created in a safer location, such as where there is better sighting of trains.

4.6 Several consultees, including the Heritage Railway Association and the Confederation of Passenger Transport, suggested that the existing procedures for creating new level crossings were adequate, in particular the system for obtaining orders under the Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007. The Bodmin and Wadebridge Railway Company, a heritage railway operating in Cornwall, explained that it was in the process of applying to reinstate a level crossing along a former railway line. While it found the system for creating a new level crossing complex and at times difficult to navigate, it commented that overall "the current system is comprehensive".

The need for new level crossings in particular circumstances

4.7 Five consultees did not support the general presumption against the creation of new level crossings, generally on the grounds that new crossings could be useful in allowing or improving public access. The British Horse Society commented that the closure of level crossings often had a significant impact on equestrians, particularly where the alternative route across the railway was not safe. It provided an example of a bridleway level crossing near Tunbridge Wells that was closed and riders were diverted onto a lane that crossed a narrow bridge:

> Riders are forced to dice with death on the hazardous road, which is outside any speed limit and is now quite busy, whereas crossing the railway would be far safer for them. But the Society has been informed by the highway authority that as the level crossing has been permanently stopped up there is no possibility whatsoever of getting it reopened, since understandably the railway does not want to reopen the crossing.

4.8 The Society suggested that a simple procedure to allow for the re-opening of level crossings in certain circumstances would be of great assistance in situations such as these.

4.9 The Cyclists' Touring Club commented that new level crossings might be warranted as a means of improving safety at level crossings prone to misuse:

> It is preferable to have a managed crossing rather than unmanaged and random crossing of the railway at many points. If it is not possible to provide a foot/cycle crossing with grade separation where a clear demand has created a potential risk of trespass to cross the line, a formal means to deliver a properly aligned and safely constructed level crossing will reduce the costs of boundary repairs, and policing, and reduce the risk of an incident.

4.10 Likewise, the Conwy East Local Access Forum noted that the Office of Rail Regulation's position on new level crossings failed to acknowledge that closure was not the only way to reduce risk at a level crossing.

4.11 The North Yorkshire Local Access Forum and the joint response from the Guide Dogs for the Blind Association and the Joint Committee on the Mobility of Blind and Partially Sighted People, stressed that any new level crossings must be accessible and in conformity with the requirements of the Disability Discrimination Act 1995.

A new procedure for creation of level crossings

4.12 Several consultees took the view that a simpler, quicker procedure for creating new level crossings might be useful. The Department for Transport commented that although it supported the policy position that new level crossings should only be created in exceptional circumstances, it could be desirable to introduce a new procedure for the creation of individual level crossings:

> We do not agree that the Transport and Works Act 1992 procedure necessarily results in an expensive and time consuming process however we recognise that it may be helpful to create a non-TWA device for some circumstances.
>
> However, it would need to be made clear what situations an additional procedure would cover and what could be authorised. For example, could its purpose be to enable a private right of way to be acquired compulsorily against the wishes of the railway undertaker? Or would it be to create a simple process to deal with the single issue of constructing a railway over an existing right of way?

4.13 Passenger Focus took the view that a simple, less costly procedure should be available for the creation of new level crossings on existing railway lines. Community Safety Partnerships Limited outlined two circumstances in which such a procedure could be used: where the creation of a level crossing would enable two or more crossings to be closed, or when a temporary level crossing was considered necessary for the safe operation of the railway system or to permit construction of an alternative to a crossing. Powys County Council said that there was a need to avoid legislation that would actively limit the ability to create a new level crossing where the circumstances are considered exceptional. They gave the following example:

> …it may be appropriate to consider creation of a level crossing at a new, safer location for one or more public rights of way, where no other maintenance or diversion option is available and the impact of extinguishment on the rights of way network would be unacceptable

Conclusion

4.14 Responses to this question were fairly mixed. Some consultees were against the creation of new level crossings whilst others thought that new crossings could be necessary in the interests of safety or of increasing public access.

PART 5
THE CURRENT REGULATION OF LEVEL CROSSINGS

Depending on the outcome of consultation, we suggest that if the current system of regulation is to be retained, the relationships between special Acts, level crossing orders and HSWA 1974 duties, should be clarified for the future [CP para 5.62].

Introduction

5.1 Of the 114 consultation responses that were received, 28 consultees provided views on the need to clarify the relationship between special Acts, level crossing orders and Health and Safety at Work etc Act 1974 (HSWA) duties if the current system of regulation is to be retained. Twenty-six of those agreed that the relationship should be clarified if the current system of regulation is to be retained, one disagreed, and one was equivocal.

Need for clarification

5.2 This proposal received overwhelming support from consultees. The Office of Rail Regulation was the only consultee to disagree with the suggestion that the relationship between special Acts, level crossing orders and HSWA be clarified for the future if the present system of regulation is to be retained. The Office of Rail Regulation commented that as it fully supported the proposal to regulate safety entirely under the HSWA regime, a simple clarification of the relationships between existing provisions was "not a viable option".

5.3 A variety of stakeholders supported this proposal, including Network Rail, the Department for Transport, Associated Society of Locomotive Engineers and Firemen, several railway professionals and heritage railways, and the Rail Safety and Standards Board. The response from the Bodmin and Wadebridge Railway Company, a heritage railway operating in Cornwall, illustrated the need for clarification in this area:

> I have tried to follow through the various repeals and additions to [the special Act authorising the railway]. I gave up after 1919, when the whole maze of legal provisions became too big for me. Clarification would be extremely helpful for the likes of me, and could be of some use to practising professionals dealing with level crossings.

5.4 Passenger Focus also summed up the problem by stating that "the current law is unnecessarily complex, at times uncertain, and potentially confusing".

5.5 Network Rail welcomed clarification of the relationship between level crossing orders and HSWA in particular. It added, however, that any such endeavour would also need to consider the EC Regulation 352/2009 on Common Safety Methods, which deals with the management of changes to the railway, and the possibility of a duty of co-operation between road and rail representatives.

5.6 Two local access groups noted that some guidelines or other guidance would be needed to set out clearly the order of precedence between special Acts, level crossing orders, and HSWA. Bridgend Local Access Forum noted in particular that it would be necessary for an independent organisation to produce the guidance, to guard against potential bias.

The primacy of HSWA

5.7 Although the Office of Rail Regulation was the only consultee to oppose the proposal on the grounds that a move to safety regulation under HSWA was preferable to clarifying the relationship between the sources of regulatory control, several consultees did register a general preference for HSWA. The Associated Society of Locomotive Engineers and Firemen commented that although clarification was welcome it preferred a HSWA-based safety regulation system. Fife Access Forum noted its "strong preference for the HSWA having an increased role in regulation of level crossings".

5.8 Suffolk County Council did not express views on "which regime takes precedence" but explained that it regularly referred to HSWA when undertaking its duties as highway authority. Mike Lunan commented on the question of what should prevail:

> HSWA should prevail over all other legislation (unless new primary legislation is introduced, at which point the "ranking" of existing legislation should be clearly set out).

5.9 Northamptonshire County Council appeared to suggest that HSWA should be consolidated. Cambridgeshire County Council asked for clarification of the particular instances in which section 3 of HSWA might apply in the context of level crossings.

Conclusion

5.10 All but one of the consultees who answered this question agreed that the relationship between special Acts, HSWA and level crossing orders was not clear and should be clarified for the future if the current system of safety regulation is retained. Several consultees expressed a preference for the HSWA regime and an interest in its primacy over other legislative enactments.

PART 6
CLOSURE OF LEVEL CROSSINGS

6.1 This Part did not contain any proposals or questions.

PART 7
THE CASE FOR REFORM

We provisionally propose that the regulatory regime for level crossings should aim to:

ensure safety at level crossings;

promote the efficient operation of railways and, where present, highways/roads, taking account of the need to strike a balance between the interests of rail, road and other users;

allocate duties and responsibilities appropriately amongst the various actors; and

provide appropriate means to define rights of way at level crossings in so far as feasible, and to extinguish them where necessary [CP para 7.3].

We welcome views on whether these objectives provide an appropriate guide for reform. Would any other objectives be appropriate? [CP para 7.5]

Introduction

7.1 Of the 114 consultation responses that were received, 50 consultees provided views on the proposal to use the objectives above as a guide for reform. Forty-seven of those agreed that the objectives provide an appropriate guide for reform and three disagreed.

7.2 It should be noted at the outset that although the majority of consultees who answered this question are recorded as having agreed that the objectives above are an appropriate guide for reform, most of them also provided suggestions for improving the list, whether in the form of additional aims or the clarification or rephrasing of certain objectives.

First objective: safety

7.3 Several consultees, such as Network Rail, the Rail Safety and Standards Board and the Parliamentary Advisory Council for Transport Safety stressed the importance of safety considerations in relation to level crossings.

7.4 Others noted that it was not accurate to speak of "ensuring safety at level crossings", since the only way to ensure safety at a crossing is to close it. Instead, the Institute of Public Rights of Way and Access Management and Monmouthshire County Council suggested that "the aim should be to minimise risk, which is not the same thing as eliminating it". Transport Scotland also suggested amending the first objective to read "ensure an *appropriate level* of safety at level crossings" (emphasis added). Since complete safety cannot be guaranteed, the Confederation of Passenger Transport likewise suggested qualifying the objective of ensuring safety with "so far as is reasonably practicable", adopting the language from section 3 of HSWA.

7.5 Network Rail was the only consultee to suggest extending the objective even further, to include safety at level crossings and "on the railway infrastructure generally". The Confederation of Passenger Transport noted that it was necessary to include some reference in this objective to the need to strike a balance between "ensuring safety and operational feasibility for both road and rail vehicles".

7.6 The joint response from the Guide Dogs for the Blind Association and the Joint Committee on the Mobility of Blind and Partially Sighted People suggested adding an explicit reference to the needs of disabled users: to "ensure safety of all users especially blind and partially sighted and other disabled people".

Second objective: efficient working and balance of interests

7.7 This objective was generally supported by consultees, several of whom commented on its scope to include considerations of convenience. The Department for Transport suggested that the objective could be rephrased to reflect "a balance between the interests and convenience of level crossing users". Likewise, John Tilly suggested that a reference to convenience could be necessary to protect against the risk of accidents caused by the impatience of road users at level crossings. Andrew Harvey, on the contrary, believed that the inclusion in this factor of a duty on the railway to consider the convenience of road users could "open a large can of worms". He suggested that this objective should more clearly state whether such a duty is envisaged, and that any regulatory regime ought to provide a mechanism for resolving problems of this nature "in an equitable and proportionate manner".

7.8 Powys County Council explained that it can be difficult to reconcile a local authority's statutory duty under section 130 of the Highways Act 1980 to protect the public's right to use and enjoy the rights of way network with the competing interests of railway operators such as Network Rail, whose aim is to enhance the efficiency of the railway. For its part, Network Rail noted that this factor should explicitly include accommodation crossings and private rights of way.

7.9 Three consultees commented on the financial element of this factor. The Institute of Public Rights of Way and Access Management and Monmouthshire County Council noted that efforts to balance the efficient operation of the railway and the highway often come at a cost. Improvements in efficiency, such as through the replacement of level crossings with bridges or underpasses, do not have "quick-fix" solutions. The Conwy East Local Access Forum, however, noted that efficiency must be understood not purely in economic terms. It explained that efficiency "implies convenience of use and this is crucial to those users who may not have a commercial interest, such as pedestrians".

Third objective: allocation of duties and responsibilities

7.10 In relation to this objective two consultees queried the use of the term "various actors". Bodmin and Wadebridge Railway Company suggested replacing it with "interested parties". Conwy East Local Access Forum suggested specifying that it included all users.

7.11 Several consultees, including the Department for Transport and Passenger Focus, noted that the objective should include the appropriate allocation of costs between the relevant parties. The Rail Safety and Standards Board added that the term "appropriately" will need to be defined, with reference to both the costs and responsibilities to be allocated between the relevant actors. Andrew Harvey took a different approach to the question of costs, suggesting that the "cost caused by change should be borne by those introducing or benefiting from the change".

7.12 Two consultees pointed to the duties and responsibilities of local authorities in particular. The Bridgend Local Access Forum cautioned that this objective should not be used to impose wider duties on local authorities in the absence of any equivalent duties on railway operators such as Network Rail. Powys County Council noted that existing legislation already allocates "many of the duties and responsibilities relating to the maintenance of public rights of way". It explained that, in exercising their statutory duties and powers, local authorities try to balance and reconcile the needs of all interested parties. It went on:

> It is essential that any regulatory regime for level crossings does retain the Council's ability to do this where possible, but that recognizes that other statutory duties in respect of public rights of way may, on occasion, have to take precedence in any decision made about a level crossing.

Fourth objective: defining and extinguishing rights of way

7.13 Many consultees commented on this objective, most of whom registered their concerns with the emphasis on extinguishing rights of way at level crossings. The vast majority of access groups who answered this question objected to the reference to the closure of level crossings in the list of objectives. They, along with several local authorities and bodies such as the Rail Safety and Standards Board and Passenger Focus, suggested that the reference to extinguishment either be deleted, or that the qualifier "where necessary" be defined to provide greater certainty to this objective. For example, the Hampshire Countryside Access Forum commented:

> In considering the extinguishment of rights of way over level crossings 'where necessary', the term 'necessary' needs to be clarified. In all cases it needs to be borne in mind that it may be safer to use a level crossing than to mix with road traffic, which involves a greater exposure to risk, as it will often involve a longer distance with traffic, often with no footway.

7.14 Likewise, the Fife Access Forum opposed the reference to extinguishment:

> The wording of point (4) of the aims should be changed to "define appropriate means to define rights of way, both private and public, and access rights at level crossings in so far as feasible." The words "and to extinguish them where necessary" should be deleted. There should be a general presumption that level crossings should stay open unless a rigorous process towards closure is followed and closure should always be a very last resort.

7.15 Many of these consultees stressed the need to ensure that safe diversions are identified before the closure of any level crossings. For instance, the Cyclists' Touring Club commented that extinguishment should only occur where an adequate diversion has been agreed between highway authorities, landowners and crossing users. Similarly, in their joint response, the Southern Snowdonia and Northern Snowdonia Local Access Forums commented:

> The objectives appear laudable except for the presumption that extinguishment of rights can be easily sanctioned. In practice, rights of access are a very emotive issue and as time moves on no one can be certain that a current right of access that may be little used, will not become very important. Rather than extinguishment, it would be far better to be thinking in terms of perhaps diversion to a safer crossing point or making the existing crossing safer, than extinguishment.

7.16 The Bridgend Local Access Forum and the Wiltshire and Swindon Countryside Access Forum suggested that closure did not belong in the list of objectives as the existing statutory framework for closing level crossings was adequate. Passenger Focus suggested that, in addition to closure, the objective should make reference to the creation of new level crossings even though it may occur only rarely.

7.17 Finally, Paths for All and Scottish Natural Heritage suggested that the list of aims should focus less on the identification of legal rights and should provide more generally for the regulation of all crossings, whether the right of passage is by right or by permission. Scottish Natural Heritage mentioned that in a pilot investigation of the safety of twenty user-worked level crossings in Scotland, "a significant level of responsible use occurred on all the crossings in that sample selection, irrespective of the rights position". It concluded:

> If that relatively random selection showed such a good level of co-existence in practice, it indicates that a wider degree of responsible public use can be both practical and safe, even without a defined legal right to cross over 'private' crossings. This suggests that a proposed new regulatory regime should not focus exclusively on trying to establish legal rights.

7.18 The Heritage Railway Association suggested that this objective and the third were the most important of the listed aims.

Additional objectives

7.19 Some consultees suggested other objectives for inclusion in the list. For instance, English Heritage proposed the following additional aim:

> To conserve the historic environment in accordance with the principles set out in Planning Policy Statement 5 on Planning for the Historic Environment (2010).

7.20 The Heritage Railway Association suggested including: “to deal with the effects of incremental changes of use or the degree of use”. The Bodmin and Wadebridge heritage railway company proposed adding the objective of creating criminal offences specific to level crossings. Transport Scotland made two suggestions: to “make level crossing legislation simpler and more accessible” and to “clarify a fair and simpler process for the closure of both public and private level crossings, with or without an alternative means of crossing the railway”.

7.21 More generally, the Egham Chamber of Commerce noted that the list of objectives should focus on the rights of individuals, particularly those of road users subject to long delays at level crossings when the barriers are down. Several other consultees noted that more attention needed to be paid to those people affected by level crossings who are *not* road users. For instance, Lincolnshire County Council, Karl McCartney MP, and the joint response from the Association of Directors of Environment, Economy, Planning & Transport and the National Traffic Manager Forum noted the impact of level crossing regulation on communities that are severed or segregated by the rail network.

7.22 Finally, Newcastle County Council added that it would like to see improvements to accessibility for all residents, particularly those with disabilities, along with standardised procedures across the UK to “reduce the risk of misunderstanding between rail operators and highway authorities”. It noted that standardised accessibility systems would also benefit highway users.

Other concerns with the proposed objectives

7.23 The Country Land and Business Association was not in favour of the list of objectives. It proposed that the list was biased in favour of railway interests, with little to no consideration of the value of level crossings to local businesses and users. William Bain also disagreed with the proposal, noting that the variety of level crossing types and locations warranted a more flexible system: “it seem illogical … to regard all level crossings as needing the same rules and regulations”.

7.24 Perth and Kinross Council did not believe that the list struck the right balance between rail and road interests, “especially in Scotland where important crossings may be neither a highway nor a road”. Finally, the Mountaineering Council of Scotland noted that the objectives should also seek to ensure that “the railway is not an unnecessary barrier to access, particularly in Scotland with the public presumption and expectation of generally open access across land”.

Conclusion

7.25 Most of the consultees who answered this question agreed generally with the proposed list of objectives as a guide to reform. However, there were many suggestions for improvement of the list, particularly with regards to the fourth objective. Only three consultees disagreed with the list in its entirety.

We provisionally think that the current regulatory regime should be reformed as it does not sufficiently recognise the potentially competing interests affecting level crossings and does not adequately cater for all level crossings [CP para 7.30].

Introduction

7.26 Of the 114 consultation responses that were received, 30 consultees provided views on the proposal to reform the current regulatory regime for level crossings. Twenty-seven of those agreed with the proposal, two disagreed, and one was equivocal.

The need for clarity, transparency, and balance

7.27 The consultees who answered this question generally agreed that reform of the current regulatory regime was needed. Where they differed was in the precise form that reform should take, and the reasons for undertaking the reform.

7.28 Several consultees emphasised the need for greater clarity and transparency in the regulatory regime governing level crossings. The Department for Transport explained the problems with the current system:

> The present package of legislation is considered as being too complex, making it difficult to identify which parts were still relevant and which were redundant. Even when identified as applicable, the actual legislation can be difficult to locate, as well as being outdated and unclear once found. This can make effective management of level crossings (including rights of way and highways) difficult and give rise to safety concerns.

7.29 The Conwy East Local Access Forum also noted that the present legislation was "conflicting or inconsistent" and suggested that reform was needed in the interest of clarity. It added, however, that where existing legislation is unambiguous and clear, it should be retained to the extent possible to avoid confusion. Suffolk County Council emphasised the need for reform from a safety perspective, while the Confederation of Passenger Transport stressed the value of adopting a regulatory approach based on goal-setting supported by guidance and codes of practice, rather than a prescriptive approach.

7.30 The Heritage Railway Association agreed that reform was needed but underlined the need to ensure that any new system was both transparent and equitable. Indeed, Passenger Focus queried whether the proposals for reform adequately addressed the question of an equitable balance between the competing interests. It noted the tendency for the railway to exercise "unfettered control over when users of other modes are allowed to use [level crossings]" and suggested that consideration be taken of measures that would restrict or limit the railway's allocation of access time. It commented:

> It is a source of some surprise to us that there appears to be no statutory obligation upon rail operators to open crossings to other users at any particular time, or for any particular length of time, or at any particular frequency, or even at all. And we are equally surprised that this statutory silence has not given rise to litigation.

7.31 Two consultees took the view that reform was needed in order to improve level crossing design. In their joint response, the Guide Dogs for the Blind Association and the Joint Committee on the Mobility of Blind and Partially Sighted People recommended consistency in level crossing design. William Grasby, a member of the public, suggested that design be improved to take better account of human error and failings.

7.32 Other consultees who agreed with the proposal to reform the regulatory system for level crossings include the Office of Rail Regulation, the Rail Safety and Standards Board, Transport Scotland, several local authorities and access groups, and the Association of Train Operating Companies. Network Rail also agreed with the proposal, adding that the "requirement to obtain the Office of Rail Regulation approval should be retained and Network Rail's existing safety obligations should be taken into account".

Cautions about reform

7.33 Only two consultees objected to the proposal for reform. The Country Land and Business Association did not believe that a case had been made out for reform, suggesting instead that:

> It is quite clear that the real reason for reform is to give greater powers to the network operators and stack these against reduced representations and ability to appeal for other interests using the crossings.

7.34 Tom Craig did not believe that a whole new system of regulation was required but merely a "careful and proper examination of the systems that exist". He cautioned that while the problems associated with level crossings might be ameliorated with limited reform, there is no "quick fix" solution. The Bridgend Local Access Forum was not opposed to the suggestion of reform, but warned that a cautious approach should be taken, with more opportunity for in depth analysis of any proposed changes to the regulatory system. It also warned against changes that would give railway interests precedence over all others.

Conclusion

7.35 The proposal to reform the current regulatory regime was widely supported by the consultees who addressed this proposal in their response. The need carefully to balance railway interests against other relevant interests was emphasised by both those consultees who agreed with the proposal, and those who opposed it. Overall, consultees took the view that reform was needed to provide a clear, transparent workable system for regulating level crossings.

PART 8
SAFETY REGULATION AND CLOSURE: REFORM PROPOSALS

We provisionally propose that the regulation of safety at level crossings should be governed entirely by the general scheme of HSWA [CP para 8.11].

Introduction

8.1 Of the 114 consultation responses that were received, 41 responses addressed the question of whether the regulation of safety at level crossings should be governed entirely by the general scheme of HSWA. Thirty-two of those agreed with the proposal, six disagreed, and three were equivocal.

8.2 The majority of consultees who answered this question supported the proposal to regulate safety at level crossings under HSWA. Its supporters include the Department for Transport, the Office of Rail Regulation, Network Rail, the Rail Safety and Standards Board, the Association of Train Operating Companies, the National Farmers' Union, the Railway Industry Association, and many local authorities and access forums.

8.3 Consultees opposed to the regulation of safety under HSWA were: John Tilly, Andrew Harvey, Tom Craig, the Heritage Railway Association, Egham Chamber of Commerce, and William Bain.

Flexibility and clarity of HSWA

8.4 Many of those who supported the move to a HSWA-based safety regime believed that it would provide a more flexible system, in which generic changes could be made more easily. For instance, the Health and Safety Executive described the current system for safety regulation as "disjointed and piecemeal", and welcomed a simplified, modern approach to safety regulation under HSWA.

8.5 Several consultees noted that, under the present system, it was difficult to make improvements or changes to the safety requirements at level crossings due to the existence of detailed, prescriptive level crossing orders. The Railway Industry Association observed:

> that the very existence of level crossing orders does, on occasion, hinder the provision of improvements to level crossings because of the detail contained within them. Any departure from those requirements can be deemed as an infringement of an order.

8.6 As an example, it pointed to improvements in light bulb technology. Many level crossings stipulated that bulbs of a particular wattage had to be used at the crossing. With the advent of low wattage light-emitting diode lamps, a lower wattage of light was needed to achieve the same level of brightness as a conventional filament bulb. However, converting to a light-emitting diode light would constitute an infringement of the level crossing order. It welcomed a system that would allow for generic improvements such as these to be made, without the need to amend each level crossing order.

8.7 The Office of Rail Regulation fully endorsed the proposal to regulate safety at level crossings under HSWA. It noted, as above, the difficulty of making improvements to level crossings in the existing system, describing the process as often "bureaucratic, protracted and time-consuming". It suggested that the current system acts as a disincentive to making innovative changes or improvements to level crossings. Further, it noted that it could be difficult to determine which legislation applied to a given crossing, to interpret the provisions of antiquated special Acts, and to apply them to modern-day scenarios. Likewise, the heritage railway Bodmin and Wadebridge Railway commented that the "elimination of the need to trace back for a hundred years or so of Private Acts would be very welcome to heritage organisations with limited resources".

8.8 The Royal Society for the Prevention of Accidents suggested that the greater clarity of a HSWA-based safety regime could lead to improvements in the safety record at level crossings:

> Clarity is clearly important to ensure that the application of safety regulations as they apply to level crossings is clearly understood by all the agencies involved, and that monitoring, investigation and enforcement actions are co-ordinated so that gaps are not created and effort is not duplicated.

8.9 Two consultees pointed out that the regulation of railway safety already falls under the HSWA umbrella. Passenger Focus noted that all or most railway-specific safety legislation has been made under HSWA, and that an extensive body of guidance has been created by the rail industry to assist operators in interpreting and applying the test of "reasonable practicability" under HSWA. The Office of Rail Regulation also explained that, in practice, it already manages risks under health and safety law:

> Inspectors already "instinctively" go through a HSWA based "thought process" with the [level crossing] order – where in place – being the mechanism to achieve the desired outcome. Under a HSWA model the same approach could be taken to achieve the necessary levels of protection, with escalation to improvement notices where appropriate standards have not been implemented.

Resistance to the abolition of level crossing orders

8.10 The most significant reason for consultees' opposition to HSWA, and a common concern even among those who supported the proposal, was the loss of level crossing orders. In general, level crossing orders were thought to provide clarity and certainty by setting out in a single document exactly what was needed at each level crossing, and providing a reliable record of the agreement reached between, for instance, the railway operator and the highway authority. These consultees were wary of a safety regulation system that did not allow for the production of such a document.

8.11 The perceived benefits of level crossing orders can be grouped into three areas. The first concerns the certainty and predictability provided by level crossing orders. As explained by the Railway Industry Association, the process of preparing a ground plan (a pre-requisite to any level crossing order) and drafting an order provides a degree of certainty that the crossing will be reasonably safe. It may be less clear under a HSWA system whether the risks at a particular crossing have been minimised "so far as is reasonably practicable" under section 3 of HSWA – and thus whether the crossing is sufficiently safe. The Rail Safety and Standards Board also explained that without a bespoke level crossing order reflecting the agreement reached between the relevant parties, there might be doubt as to whether the chosen safety arrangement was suitable for that crossing.

8.12 Andrew Harvey disagreed with a move to HSWA largely on the grounds of lack of certainty. He suggested that, if level crossing orders were replaced with a system of HSWA regulations, approved codes of practice, and guidance, it would result in "unacceptable variation in standards across the country". The Heritage Railway Association concurred on this point.

8.13 Professor Andrew Evans of Imperial College also noted the problems with a so far as is reasonably practicable test, and cautioned that it "has come to be interpreted in a way that is not sensible". He explained that the Court in *Edwards v National Coal Board* held that SFAIRP required a duty holder to implement a safety measure unless the costs of doing so were "grossly disproportionate" to the benefits achieved.[1] He took the view that the test in *Edwards* was outdated, decided as it was in 1949, and does not take stock of the "radical improvements" that have been made in valuing safety benefits. Under a HSWA system, highway authorities might have to "divert scarce resource away from their best highway schemes into less beneficial level crossing schemes". The Railway Industry Association noted as well that the so far as is reasonably practicable test had set high safety standards, perhaps higher than they needed to be, resulting in increased costs for the railway industry. The Confederation of Passenger Transport described the potential for unnecessary safety accommodation to result from a stringently applied so far as is reasonably practicable test as "safety creep".

8.14 The second perceived benefit of level crossing orders was that the process of creating an order provided a framework for reaching agreement between all relevant parties on the safety arrangements for a particular level crossing. The Railway Industry Association noted that the order provided a useful permanent record of what was agreed between the parties. Several consultees, such as the Rail Safety and Standards Board and the Royal Society for the Prevention of Accidents, remarked that the ability to impose duties on a highway authority in a level crossing order was especially important, and were keen to retain this power if a HSWA-based safety regime were adopted. Passenger Focus cautioned that it would be necessary to ensure that HSWA applied equally to regulate road safety risk as it does rail safety.

[1] *Edwards v National Coal Board* [1949] 1 All ER 743 at 747.

8.15 Third, level crossing orders are useful in the area of enforcement. The Rail Safety and Standards Board noted that it could be difficult to enforce breaches of HSWA without the ability to refer to the specific requirements listed in a level crossing order. Disputes could arise over whether the arrangements at a particular crossing were adequate in the absence of the specification set out in the level crossing order.

Other concerns about HSWA1974

8.16 Although most of consultees' doubts about HSWA related to the loss of level crossing orders, some registered other concerns. John Tilly commented that a HSWA-based safety regime would not leave room for considerations of convenience. This could lead to increased misuse of level crossings (and consequently an increased number of fatalities) and to excessive delay for road users.

8.17 Egham Chamber of Commerce also opposed the proposal on this basis. The convenience issue will be discussed at more length in subsequent parts of this analysis.

8.18 The Heritage Railway Association was concerned that an approach to regulating safety under HSWA would be too generalised and subjective. It was not clear how a HSWA system could account for the particular differences and challenges posed by unusual crossings, such as that over the Welsh Highland line at Britannia Bridge in Porthmadog. Further, it questioned who would bear ultimate responsibility for ensuring that the right balance had been struck between safety and accessibility under a HSWA-based regime.

8.19 The Heritage Railway Association also queried the applicability of HSWA to volunteers on heritage railways. As some heritage railways are run entirely by volunteers, section 3 of HSWA – which extends general health and safety duties on employers and self-employed persons toward members of the public – would not apply to those railways. Neither would regulations made under section 15 of HSWA apply to them, since regulations are limited in scope to the general purposes of Part 1 of the Act and the general purposes are, in turn, limited to "persons at work". However, they noted that it would be possible to expand the class of people considered "at work" by regulations enacted under section 52 of HSWA. The trade association Confederation of Passenger Transport also requested that the applicability of HSWA to volunteers be clarified.

8.20 Finally, the Department for Transport and the Highways Agency noted that it would be necessary to provide clarity under a HSWA system as to the identity of the duty holder under section 3. The Highways Agency believed that the section 3 duty only applied to highway authorities when they were "undertaking works (including maintenance) on the network". John Tilly and Passenger Focus also noted that HSWA would not apply to regulate road users, whose actions cause the majority of problems at level crossings.

Suggested way forward

8.21 Many consultees, such as the Office of Rail Regulation and the Railway Industry Association, took the view that HSWA regulations, approved codes of practice and guidance would be sufficient to regulate safety at level crossings. Other consultees suggested replacing level crossings orders with another type of document, to address some of the problems with revoking level crossing orders without some form of replacement. Transport Scotland suggested that a "mini-level crossing order" could be created to provide specific detail of the arrangements at that crossing over and above the general provisions in regulations and codes of practice. The Rail Safety and Standards Board suggested that a system of "safety interface agreements", similar to the model adopted in Australia, could be adapted for use in the UK. These points will be discussed in more detail in subsequent parts of this analysis.

8.22 The Office of Rail Regulation commented that "a successful move to a HSWA-based system would be dependent upon well-crafted regulations and supporting guidance". It proposed retaining the following advantages of the present system in any HSWA regime:

> The opportunity to set out the desired standards/levels of protection for each class or type of level crossing; the opportunity to clearly allocate responsibilities between the parties; availability of information pertaining to the crossing to both inspectors and public; suitable points of regulatory influence/intervention in relation to all the various parties/actors; and provision for consultation and co-operation with (and relevant input from) various parties, including on planning matters.

8.23 Finally, the Rail Safety and Standards Board noted that detailed guidance would be necessary to ensure that all parties understood how to interpret and apply a risk-based safety regulation system.

Conclusion

8.24 Overall, the consultees who answered this question were supportive of a move to a HSWA-based system for safety regulation. Such a move would provide much-needed flexibility and a means of making generic changes to safety requirements in line with technological advancements and changes. However, many consultees felt strongly about the potential loss of level crossing orders. They commented that level crossing orders provided certainty and a framework for reaching agreement between the relevant parties, and aided enforcement. Some consultees pointed to other problems associated with the regulation of safety under HSWA, namely its inapplicability to volunteers and non-business users of level crossings, and its inability to enable convenience issues to be taken into account. Suggestions were made as to the way forward under a HSWA-based system of safety regulation.

However, if consultees consider that it would be preferable to retain the current system of regulating safety at level crossings, what changes should be made to improve the system? [CP para 8.12]

Introduction

8.25 Of the 114 consultation responses that were received, 12 responses provided suggestions as to what changes should be made to improve the system if the current system of regulating safety at level crossings were retained.

8.26 The low response rate to this question possibly arises in part from the high level of support from consultees for a move to a HSWA-1974 based system for regulating safety at level crossings.

Relationship between existing legislative provisions

8.27 The Associated Society of Locomotive Engineers and Firemen suggested that if the existing safety regulation system were retained, the relationships between special Acts, level crossing orders and HSWA should be clarified. The Rail Safety and Standards Board suggested that the provisions governing level crossings in old public general Acts be reviewed, updated, and consolidated in a single statute. They also commented that the provisions relating to level crossings in the original special Acts could be repealed. Passenger Focus made a similar point, commenting that:

> If the current system is retained in its essentials, there is still considerable scope for tidying-up, e.g. of the bespoke provisions governing individual crossings contained in the original special Acts which authorized railway construction.

8.28 John Tilly did not agree that the level crossing provisions in special or private Acts should be repealed. He maintained that their repeal would "be a very risky road to traverse" as there was a danger that provisions still required for the proper maintenance and regulation of the crossing might be lost. He did, however, advocate a "simplified" version of the present system.

8.29 Northamptonshire County Council suggested that HSWA could be "strengthened to include detailed criteria for public safety on crossings". These criteria could then be used to inform the Secretary of State's decision to stop up or divert a public footpath over a railway under sections 118A or 119A of the Highways Act 1980. The Council commented that such a system could provide much needed guidance for the exercise of section 118A and 119A powers. It would be much clearer whether there were sufficient safety concerns to warrant stopping up the right of way. The criteria could include the speed of oncoming trains, visibility, and signalling factors.

Alternatives to level crossing orders

8.30 Two consultees suggested that the current system could be improved by replacing level crossing orders with a more streamlined process. Andrew Harvey suggested adopting "slimmed down level crossing orders" that would operate in tandem with regulations and approved codes of practice. These alternative level crossing orders could stipulate, among other things, the type of crossing, any specific exemptions to the general provisions in regulations and approved codes of practice, and authorisations for traffic signs and road markings. The regulations and approved codes of practice, on the other hand, could incorporate much of the detail currently found in industry guidance and level crossing orders.

8.31 Network Rail suggested that, if the present system were retained, level crossing orders could be converted to "level crossing arrangements":

> Each arrangement would be level crossing specific and built by calling up details from a requirements database; this would allow a single update to effect a change to all arrangements that call against that requirement.

8.32 This proposal would retain many of the benefits of the present system – such as maintaining a balance between safety and convenience – while addressing many of its shortcomings – most notably, the difficulty implementing generic safety improvements to level crossings.

Level crossing design and working relationships

8.33 Several consultees made specific recommendations to improve the processes for designing and regulating level crossing safety. The heritage railway company Bodmin and Wadebridge Railway suggested that railway operators could be deemed to be aware of the safety recommendations in reports by the Rail Accident Investigation Branch. It did not believe that this proposal would place an undue burden on heritage railways.

8.34 William Grasby suggested that level crossing design should take better account of human error and frailties. To improve safety (and save lives), as many level crossings as possible should be closed and replaced with bridges or underpasses. He also welcomed increased use of manned, full-gated crossings. If unmanned crossings were retained, then he recommended that barriers be used to completely close off the road, that video link coverage to the nearest manned signal box be used, that crossing be capable of being operated by hand in the case of malfunction, and that railway line speeds be reduced to allow train drivers to stop on a line of sight basis.

8.35 Community Safety Partnerships Limited recommended that, whichever system of safety regulation is adopted, it should provide equally for road and rail interests. It also noted that the system should specifically address authorised users of private level crossings.

8.36 Finally, Network Rail suggested that it may be useful to require road and rail authorities to enter into an interface agreement for all public level crossings, as is the case in New South Wales and Victoria in Australia.

Reform in other areas of law

8.37 The Heritage Railway Association preferred the retention of the present system of regulating safety, but wanted to see improvements in planning law as it relates to level crossings. South Gloucestershire Council suggested that criminal laws be enacted to penalise the failure to keep one's dog on a short lead while crossing a railway line.

Conclusion

8.38 Although only 12 consultees responded to this question, they made a number of suggestions for improving the system of safety regulation if the current system is retained. Many of the consultees suggested clarifying the relationship between the special Acts, level crossing orders and HSWA while others made more specific suggestions for design improvements and alternatives to level crossing orders.

We therefore invite consultees to comment on our provisional proposal that the Office of Rail Regulation, as the safety regulator for the railways, should remain as the body with overall responsibility for safety regulation at level crossings. (CP para 8.15)

Introduction

8.39 Of the 114 consultation responses that were received, 35 responses addressed the question of whether the Office of Rail Regulation should remain as the body with overall responsibility for safety regulation at level crossings. Thirty of those agreed with the proposal, three disagreed, and two were equivocal.

8.40 This proposal enjoyed broad support from consultees. Notably, the Office of Rail Regulation agreed that it should have primary responsibility for safety regulation at level crossings. The only consultees to reject this proposal were William Bain, the Egham Chamber of Commerce, and Northamptonshire County Council.

The Office of Rail Regulation's expertise in rail safety

8.41 Several consultees commented that it was important to have a single body responsible for safety regulation, to avoid problems and lapses in communication that could occur if responsibility was split with other agencies. Transport Scotland pointed out that the lack of a single highways or roads authority suggested that the Office of Rail Regulation is the appropriate body to take overall responsibility for safety at level crossings.

8.42 Passenger Focus saw the Office of Rail Regulation's experience and expertise in the area of rail safety as an advantage, noting that it is "a repository of the relevant technical expertise". John Tilly noted that it was important to ensure that Office of Rail Regulation inspectors had sufficient training and experience in rail safety and the legal requirements of HSWA.

8.43 Some consultees thought that the Office of Rail Regulation's expertise in rail safety could be a disadvantage. Six consultees, including two of those who disagreed with the proposal, suggested that the Office of Rail Regulation could have a bias toward rail interests. They proposed that a regulator with more independence from the rail industry would be preferable to the Office of Rail Regulation as the overall safety regulator for level crossings. While the Department for Transport agreed that the Office of Rail Regulation was the most appropriate body to regulate safety at level crossings, it did express some concern that the Office of Rail Regulation might not have sufficient powers or competence to consider road interests adequately. Northamptonshire County Council did not support the proposal to designate the Office of Rail Regulation as the body responsible for regulating level crossing safety on the grounds that it was impractical to take responsibility for the public safety of road users away from highway authorities and grant it to the Office of Rail Regulation.

A wider set of powers and functions

8.44 A few consultees noted that designating the Office of Rail Regulation as the primary safety regulator for level crossings would require an expansion of the Office of Rail Regulation's existing powers and functions. Passenger Focus explained that the Office of Rail Regulation may have to adopt a wider notion of "risk" under the as low as reasonably practicable test:

> Extending the Office of Rail Regulation's regulatory remit to embrace the roles and responsibilities of highway authorities and highway users at and around level crossings is that its present terms of reference (or the manner in which they are interpreted) must be appropriate to this widened role. In requiring rail operators to apply the as low as reasonably practicable test at crossings, for instance, we consider that it is important that they should be required to have regard to overall (or "societal") risk, rather than purely that under their immediate control. In the absence of this, there is a danger that the Office of Rail Regulation may condone actions aimed more at the exporting of risk that at its minimization.

8.45 The Rail Industry Association commented that with the Office of Rail Regulation as the body with overall responsibility for safety at level crossings, it might be necessary for the Office of Rail Regulation to formally "sign off" any material changes to level crossing designs:

> We consider that this should be a "light touch" approach, as we acknowledge such a process would not be in keeping with the the Office of Rail Regulation's involvement in other matters relating to the construction and operation of railways as set out in the [Railways and Other Guided Transport Systems (Safety) Regulations 2006]. However, it may be necessary in this instance because level crossings represent an interface between the railway authorities and the highway authorities.

8.46 The Department for Transport commented that it would be necessary for the Office of Rail Regulation to consider convenience issues at level crossings (along with safety) and to ensure that its actions toward highways authorities are "balanced and proportionate with an understanding of road issues". It also pointed out that the Office of Rail Regulation does not currently have any powers or duties toward non-railway users of level crossings. Mike Lunan made a similar point, noting that the Office of Rail Regulation may have to be given wider enforcement powers to enforce against non-rail bodies such as highway authorities.

Inter-agency working

8.47 A few consultees commented that the Office of Rail Regulation would have to maintain clear working relationships with other agencies. The Royal Society for the Prevention of Accidents stated that a strong working relationship and protocol would have to be established between the Office of Rail Regulation and the Health and Safety Executive, along with the active involvement of highway authorities and the police. It commented that the difficulty in allocating primary responsibility to either a road or rail body warranted consideration of mechanisms to ensure cooperation between the parties:

> It is difficult to give one sector (road or railway) primacy over regulating level crossings, which are a road-rail interface. Neither the rail sector nor the Health and Safety Executive have the necessary expertise (or resources) to manage the highways around level crossings and highway authorities and the police do not have the necessary expertise (or resources) to manage the railway side of level crossings. Therefore, co-operation and liaison seems the only practical option. If this is not operating satisfactorily under the current system, a more formal liaison system (perhaps even with a legal duty to consult and co-operate) may be needed.

8.48 The Heritage Railway Association took the view that the Office of Rail Regulation should have a lead role in regulating safety but should enter into memoranda of understanding with other agencies and bodies. The Health and Safety Executive suggested that, although the Office of Rail Regulation should have primary responsibility for regulating safety at level crossings, in some circumstances it should have concurrent jurisdiction with the Health and Safety Executive.

Conclusion

8.49 A majority of consultees supported designating the Office of Rail Regulation as the body with overall responsibility for regulating safety at level crossings. Some consultees, even many of those who agreed with the proposal, cautioned that the Office of Rail Regulation's close involvement with the rail industry may lead to a perception of bias. Others considered that the Office of Rail Regulation's expertise in rail safety made it appropriate for the regulator to continue to regulate safety at level crossings. Several consultees emphasised the need for inter-agency cooperation.

If our preferred option of moving to a HSWA-based system of regulating safety is accepted, we propose that regulations should be made by the Secretary of State under section 15 of HSWA in relation to level crossings. [CP para 8.17]

Introduction

8.50 Of the 114 consultation responses that were received, 27 responses addressed the proposal that, if a HSWA-based system of regulating safety is accepted, regulations should be made by the Secretary of State under section 15 of that Act. Twenty-three of those agreed with the proposal, two disagreed, and two were equivocal.

8.51 A majority of consultees agreed without qualification that regulations should be made under section 15 of HSWA. John Tilly disagreed, stating that such regulations would "fail to address public behaviour". Conwy East Local Access Forum was the only other consultee to disagree, on the basis that the proposal "could lead to unwise political intervention".

Benefits of section 15 regulations

8.52 Many consultees suggested that regulations enacted under section 15 of HSWA would encourage the standardisation of safety systems at level crossings and allow for generic changes to these systems to be made more easily. The Department for Transport noted that, since this proposal would simplify the current safety regime, it would not undermine the Coalition government's attempts to cut down on excessive regulation.

8.53 Transport Scotland suggested that, for those level crossings with particular constraints or challenges, it might be necessary to retain some form of "mini level crossing order" to cover the detail that could not be provided by regulations. Passenger Focus thought that section 15 regulations could address the potential problems caused by the loss of level crossing orders:

> It ought to be possible to frame regulations in such a way as to make continuing provision for individual crossings to be subject to specifications analogous to orders, if there is a continuing demand for this on the part of operators. Such specifications could be drafted to incorporate as many standard clauses (derived from a code of practice) as are appropriate to them, and be capable of relatively easy amendment as circumstances require, but still retain the bespoke terms and drawings particular to each location.

8.54 The Rail Industry Association commented that HSWA regulations and approved codes of practice should aim to provide a clear framework for reaching agreement between the parties (possibly including a duty to co-operate between road and rail authorities); avoid specifying engineering detail; provide certainty that the arrangements at a particular crossing are safe; and promote consistency and standardisation between crossings. The Office of Rail Regulation suggested a list of key points that regulations and approved codes of practice should include:

> The opportunity to set out the desired standards/levels of protection for each class or type of level crossing; the opportunity to clearly allocate responsibilities between the parties; availability of information pertaining to the crossing to both inspectors and public; suitable points of regulatory influence/intervention in relation to all the various parties/actors; and provision for consultation and co-operation with (and relevant input from) various parties, including on planning matters.

Responsibility for drafting section 15 regulations

8.55 Both the Department for Transport and the Bodmin and Wadebridge Railway Company took the view that the Office of Rail Regulation should be responsible for drafting the regulations. The Department for Transport added that it should have oversight of the drafting process to ensure that road and convenience interests were properly accounted for.

Other comments

8.56 The Bridgend Local Access Forum did not take a position on this proposal, but did note that, if the Secretary of State did bring section 15 regulations into force, Welsh regulations should be published concurrently to avoid running two different safety regulation systems at the same time.

8.57 The Heritage Railway Association emphasised that any new regulations should clarify the position of volunteers – specifically, heritage railways operated entirely by volunteers – under HSWA. It suggested that the scope of the section 15 regulation-making power needs to be widened by expanding the definition of "work" under section 52 of HSWA. It also noted that it would be necessary to ensure that section 15 regulations were made binding on highway authorities.

8.58 The Confederation of Passenger Transport qualified its support for the proposal by pointing out that a HSWA-based safety regulation system might lead to:

> "Safety creep", whereby features which are not entirely essential are nevertheless installed, and might have a negative influence on, for example, converting a railway to a tramway.

8.59 Finally, Network Rail noted that regulations should not apply retrospectively to existing level crossings.

Conclusion

8.60 Overall, this proposal commanded broad support among consultees, many of whom took the view that section 15 regulations would provide for a simpler, more efficient system for regulating safety at level crossings. Two consultees specified that the Office of Rail Regulation should be responsible for drafting any regulations, while others pointed out particular issues that ought to be addressed by the regulations.

If our preferred option of moving to a HSWA-based system of regulating safety is accepted, we propose that the Office of Rail Regulation should be given the power to issue approved codes of practice under HSWA in relation to level crossings. [CP para 8.19]

Introduction

8.61 Of the 114 consultation responses that were received, 30 responses addressed the proposal that the Office of Rail Regulation should be given the power to issue approved codes of practice under HSWA in relation to level crossings. Twenty-six of those agreed with the proposal, two disagreed, and two were equivocal.

The Office of Rail Regulation as the appropriate body

8.62 This proposal was widely supported by consultees, most of whom agreed without reservation that the Office of Rail Regulation should have the power to issue approved codes of practice concerning level crossings.

8.63 The Office of Rail Regulation supported the proposal. It explained:

> At the time of the transfer of powers between the Health and Safety Executive and the Office of Rail Regulation the decision was taken to not provide the Office of Rail Regulation with [approved codes of practice] making powers. We believe that the Law Commissions' proposals may change the balance of whether or not the Office of Rail Regulation needs these powers and we understand that [the Department for Transport] is now prepared to re-examine that decision.

8.64 The Department for Transport stated in its response that "the current rail safety regime is sufficiently mature to enable the Office of Rail Regulation to be empowered to produce approved codes of practice for level crossings". Transport Scotland suggested that the Office of Rail Regulation be granted the power to issue approved codes of practice not only for level crossings, but for all aspects of rail safety.

8.65 It was suggested by the Health and Safety Executive that any approved codes of practice be made available both in the English and Welsh language. The Fife Access Forum added that codes of practice would have to be made widely available to the public, and should be referenced in the Scottish Outdoor Access Code, the Highway Code, and driving examinations.

8.66 Several consultees qualified their support for the proposal by commenting that the Office of Rail Regulation would have to seek to balance competing interests and would have to consult with other bodies or agencies, local authorities and user groups. The National Farmers' Union was particularly concerned that approved codes of practice should not be developed simply to "meet the needs of highways authorities and large rail operators", emphasising that they must be accessible and appropriate for users and owners of private level crossings.

8.67 The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Manager Forum both suggested that, while it was necessary to ensure that the Office of Rail Regulation balanced road and rail interests in order to secure support from the highway sector, it could be difficult to do so given that there is no equivalent regulator in the highway industry.

8.68 It should be noted that the Office of Rail Regulation stated in its response that it would "consult widely" in producing approved codes of practice. It committed to:

> Liaising closely with road colleagues and other enforcing authorities. Our aim would be to achieve the right balance between setting out appropriate approaches to managing risk whilst allowing sufficient flexibility to allow for adaptation to technological advancements and any changes in industry structure or dutyholder. We would want to avoid frequent updates to the supporting guidance which, whilst possible, would be resource intensive and time consuming.

Consultees who disagreed with the proposal

8.69 Only two consultees disagreed with this proposal. Devon County Council took the view that the Health and Safety Executive was better placed to issue approved codes of practice for level crossings. Michael Haizelden doubted the value of approved codes of practice under a HSWA-based safety regime. He considered that existing guidance was sufficient:

> Whilst the publication of guidance, representing good practice, may be of value, particularly to smaller rail operators (including the heritage sector), it is a considerable step on, in regulatory terms, to publish codes of practice. Indeed, it is possible that a code of practice could, itself, become a stultifying influence on the development of level crossings.

8.70 Finally, Lincolnshire County Council and Karl McCartney MP, who otherwise supported the proposal, queried whether the Office of Rail Regulation was sufficiently independent from rail interests to be responsible for drafting approved codes of practice.

Conclusion

8.71 Overall, consultees supported the proposal to grant the Office of Rail Regulation the power to issue approved codes of practice for level crossings. Notably, the Department for Transport agreed that the Office of Rail Regulation was sufficiently mature as an institution to take on this additional role. Consultees emphasised the need to consult and balance competing interests in drafting any such codes of practice.

We ask consultees whether it would be desirable expressly to provide that a breach of section 3 of HSWA at a level crossing should be subject to enforcement by the Office of Rail Regulation, not the Health and Safety Executive. [CP para 8.33]

Introduction

8.72 Of the 114 consultation responses that were received, 30 responses addressed the question of whether it would be desirable to provide that a breach of section 3 of HSWA at a level crossing should be subject to enforcement by the Office of Rail Regulation, rather than the Health and Safety Executive. Twenty-one of those agreed that the Office of Rail Regulation should be responsible for enforcement, five disagreed, and four were equivocal.

The Office of Rail Regulation as enforcement body

8.73 Generally, the consultees who answered this question believed that the Office of Rail Regulation should be responsible for enforcing breaches of section 3 of HSWA at a level crossing. Many stressed the importance of having a single enforcement body rather than shared or concurrent jurisdiction, and believed that the Office of Rail Regulation's particular expertise and experience lent itself to this role. For example, the Rail and Safety Standards Board suggested that the Office of Rail Regulation should be the enforcement body as "the Health and Safety Executive no longer has the specialist knowledge in this area and the involvement of the two bodies would create confusion and, probably, additional costs".

8.74 Notably, the Health and Safety Executive agreed that the Office of Rail Regulation should have this responsibility. It suggested that we "take this opportunity to make the jurisdiction as clear as possible". The Department for Transport and Transport Scotland also emphasised the need to reduce the existing uncertainty in the legislation and to state clearly which body is responsible for enforcement of HSWA breaches at level crossings. While Transport Scotland agreed with the designation of the Office of Rail Regulation as enforcement body, the Department for Transport had some residual concerns which are discussed below.

8.75 Given the lack of clarity surrounding the Office of Rail Regulation's enforcement jurisdiction over highway/roads authorities, the Heritage Railway Association noted that "it would seem essential that it is established that the Office of Rail Regulation's powers also extend over highway/roads authorities in this regard".

Health and Safety Executive as enforcement body

8.76 Northamptonshire and Devon County Councils were the only two consultees to expressly reject the Office of Rail Regulation as the appropriate enforcing body in favour of the Health and Safety Executive. Devon County Council explained that "any breach of section 3 of the HSWA by the local authority relating to inadequate signing, lining etc would be dealt with by the Health and Safety Executive". It took the view that there were sufficient monitoring bodies with the power to enforce against local authorities without requiring the Office of Rail Regulation to take on this role. Northamptonshire County Council preferred to see the Health and Safety Executive as the enforcing body on the grounds of efficiency, noting that "it could be argued that health and safety issues on railways are substantially no different than elsewhere".

Other options and considerations

8.77 The Department for Transport suggested that setting out the Office of Rail Regulation's enforcement role in legislation might be helpful to resolve uncertainty. However, it registered some concern with the suggestion in the consultation paper that a highway authority's failure to conduct its undertaking with regard to the safety of the public at a level crossing would "relate to the operation of a railway", and thus fall within the Office of Rail Regulation's enforcement jurisdiction under the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006.[2] It noted that the primary duty of highway/roads authorities is to "maintain the highway" under section 41 of the Highways Act 1980. They do not have the power or the competence to judge the safety requirements of the railway when conducting their undertaking at or near a level crossing. Nor does the Office of Rail Regulation have the power or competence to assess safety for the road network at or near level crossings. Therefore, the Department was concerned that the Office of Rail Regulation would not be able to judge whether the highway/roads authority "was conducting its undertaking appropriately" at a level crossing.

8.78 The Highways Agency, which did not express a preference for either the Health and Safety Executive or the Office of Rail Regulation as the appropriate enforcement body, commented that the section 3 HSWA duty of a highway/roads authority was more limited than that suggested in the consultation paper. It explained that "highway authorities only have a legal duty under section 3 when undertaking works (including maintenance) on the network" and that, in all other situations, they were limited to the duty to maintain the highway under section 41 of the Highways Act 1980.

8.79 The Office of Rail Regulation did not wholly endorse the proposal to designate it as the authority responsible for enforcing breaches of section 3 of HSWA at level crossings. It considered that the present arrangement was adequate, and that to produce a set of rules particular to level crossings would undermine the project's aim of simplifying the law:

[2] SI 2006 No 557, reg 3.

> We believe strongly that the boundaries of enforcement responsibility between the Health and Safety Executive and the Office of Rail Regulation should remain based on the existing principles of demarcation. The creation of different or "special" arrangements for managing risks at level crossings would be confusing for both the regulated and regulators.

8.80 However, it pointed out that the legislation does not allow the Health and Safety Executive and the Office of Rail Regulation to "mutually agree allocation of enforcement responsibility between them where it is unclear who the enforcing authority is", and suggested that such a power might be useful. It also commented that greater clarity of the existing lines of responsibility would be welcome.

8.81 Two consultees were doubtful that enforcement under HSWA would address the greater problem of misuse of level crossings by the public. John Tilly, who nevertheless supported the proposal to designate the Office of Rail Regulation as the body responsible for enforcement, explained that enforcement under HSWA "will not stop 90% of all level crossing accidents (or more) because HSWA was never intended for this type of issue". Passenger Focus also took the view that greater consideration should be given to the issue of how to enforce HSWA against not only highway/road authorities, but also "road users in general".

8.82 As the Railway Industry Association pointed out in its response, it is difficult to give one sector (road or rail) priority in regulating or enforcing safety at level crossings and therefore co-operation and liaison are essential. The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Manager Forum suggested, for this reason, that it may be sensible for the Office of Rail Regulation and the Health and Safety Executive to have joint responsibility for enforcing HSWA breaches at level crossings. The National Farmers' Union suggested that the Office of Rail Regulation and the Health and Safety Executive should have concurrent jurisdiction over HSWA breaches at level crossings.

Conclusion

8.83 Overall, consultees agreed that the Office of Rail Regulation should be made responsible for enforcing breaches of HSWA at level crossings. Several consultees commented on the lack of clarity in the legislation in this area. For its part, the Office of Rail Regulation preferred to retain the existing demarcation of responsibility between it and the Health and Safety Executive, though it would like to see greater clarity as to the bodies' respective roles and, ideally, a power to allocate responsibility between them in cases of uncertainty. The Health and Safety Executive was content for the Office of Rail Regulation to take on primary responsibility for enforcement at level crossings.

Would it be desirable for the Office of Rail Regulation and the Health and Safety Executive to have concurrent jurisdiction for enforcement of breaches of the general duties under HSWA or "relevant statutory provisions" where the breach occurs partly at a level crossing; or should the Office of Rail Regulation's railway-specific jurisdiction oust that of the Health and Safety Executive? [CP para 8.39]

Introduction

8.84 Of the 114 consultation responses that were received, 22 responses addressed the question of whether it would be desirable for the Office of Rail Regulation and the Health and Safety Executive to have concurrent jurisdiction for enforcing HSWA breaches where the breach occurs partly at a level crossing. Six of those agreed that the Office of Rail Regulation and the Health and Safety Executive should have concurrent jurisdiction, 15 disagreed, and one was equivocal.

Consultees favouring the Office of Rail Regulation having sole jurisdiction

8.85 A majority of consultees who answered this question were opposed to the Office of Rail Regulation and the Health and Safety Executive having concurrent jurisdiction over breaches of HSWA that occur partly at a level crossing, and believed that the Office of Rail Regulation's railway-specific jurisdiction should oust that of the Health and Safety Executive. Several consultees stressed that concurrent enforcement could create uncertainty, confusion, and delay. The joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Local Government Association and the Association of Transport Co-ordinating Officers commented that "concurrent jurisdiction could be a recipe for endless arguments over interpretation of particular circumstances". Network Rail took the view that concurrent jurisdiction "could create uncertainty and duplication".

8.86 Transport Scotland suggested that it would be preferable for the Office of Rail Regulation to take the lead in enforcing these breaches, with assistance from the Health and Safety Executive where necessary:

> It would be preferable for the Office of Rail Regulation to have lead jurisdiction backed up with a memorandum of understanding on how the Health and Safety Executive could support the Office of Rail Regulation in enforcing an offence that occurred partly on railway infrastructure in general, not just specific to level crossings.
>
> The Office of Rail Regulation should have primacy because the potential for any breach to have an impact on a wider range of the public (railway users) is such that this is the biggest risk to be managed.

Consultees favouring the Office of Rail Regulation and the Health and Safety Executive having concurrent jurisdiction

8.87 A minority of consultees took the view that the Health and Safety Executive and the Office of Rail Regulation should have concurrent jurisdiction in the particular circumstance of a HSWA breach that occurs partly at a private level crossing, and partly on land adjacent to it. Two members of Parliament, Nia Griffith MP and Karl McCartney MP, along with two local authorities and the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Manager Forum supported concurrent jurisdiction. Suffolk County Council commented that a business user of a level crossing, such as a farmer, was likely to understand his or her obligations under HSWA but was less likely to have any familiarity with "the Office of Rail Regulation requirements when working or operating away from the crossing i.e. in an adjoining field". As such, it opted for concurrent jurisdiction.

8.88 The Health and Safety Executive acknowledged that concurrent jurisdiction, supported by a memorandum of understanding, could be appropriate and sensible in these circumstances. However, it suggested that there was still a strong case for designating the Office of Rail Regulation as the sole enforcing authority and requested further discussion on this issue with a view to establishing, "for simplicity's sake", the Office of Rail Regulation's sole jurisdiction over private level crossings.

Other options and considerations

8.89 A few consultees did not accept either of the two options suggested in the consultation question. The Rail and Safety Standards Board proposed an alternative method for determining whether the Office of Rail Regulation or the Health and Safety Executive should enforce a HSWA breach at a private crossing:

> The test should be whether the breach occurred just at the crossing or just because of the crossing, in which case jurisdiction should be with the Office of Rail Regulation, or whether the existence of the crossing was immaterial to the breach, in which case jurisdiction should be with the Health and Safety Executive.

8.90 The Department for Transport did not express a strong view on this question, choosing instead to defer to the Office of Rail Regulation and the Health and Safety Executive who "are likely to have the strongest views on how concurrent jurisdiction might work in practice". However, it took the view that some certainty was needed, and therefore welcomed "recommendations that either provide certainty (i.e. the Office of Rail Regulation has jurisdiction) or provide a framework of co-operation that provides certainty that one party will act".

8.91 The Office of Rail Regulation did not support concurrent jurisdiction, but instead suggested that a power to allocate enforcement jurisdiction between it and the Health and Safety Executive should address the problem posed by breaches of HSWA at private level crossings that occur in part at the crossing, and in part elsewhere.

8.92 Northamptonshire County Council was the only consultee to suggest that in the circumstances outlined in the proposal, the Health and Safety Executive should have sole jurisdiction for enforcement.

Conclusion

8.93 A large majority consultees preferred the Office of Rail Regulation to have sole jurisdiction over breaches of HSWA that occur partly at a private level crossing, rather than the Office of Rail Regulation having concurrent jurisdiction with the Health and Safety Executive. Many consultees pointed to the potential for concurrent jurisdiction to create uncertainty and confusion. The Office of Rail Regulation preferred to retain the existing system for demarcating responsibility, but with the power of allocation. The Health and Safety Executive thought there was merit in concurrent jurisdiction, but saw the designation of the Office of Rail Regulation as sole enforcing authority as a simpler solution.

We invite consultees to comment on the problem that HSWA cannot apply to owners of rights of way over private level crossings who are not business users. [CP para 8.43]

Introduction

8.94 Of the 114 consultation responses that were received, 25 responses commented on the problem that HSWA cannot apply to owners of rights of way over private level crossings who are not business users.

Continue to apply provisions of special Acts

8.95 Only one consultee suggested retaining those provisions of special Acts dealing with safety. The Heritage Railway Association noted that the inability of HSWA to apply to private level crossings with non-business users served to illustrate the problems inherent in a move to a HSWA-based safety regime. Instead, it opted for the retention of special Acts and level crossing orders under the Level Crossings Act 1983.

Extend HSWA duties to non-business users

8.96 Five consultees suggested extending the duties under HSWA to include non-business users of private level crossings: Network Rail, Mike Lunan, Association of Train Operating Companies, Suffolk County Council, and the joint response from the Southern and Northern Snowdonia Local Access Forums. The Forums commented that the exclusion of non-business users from the HSWA regime created an anomaly that suggested HSWA was in need of revision:

> If such an individual were to cause an accident at a level crossing he should be prosecuted in the same way irrespective of the fact that he is not an employer or employee.

8.97 The Cyclists' Touring Club stressed that any changes to HSWA would have to be preceded by "considerable consultation with all user groups including national equestrian and cyclist organisations".

8.98 It should be noted that the National Farmers' Union and the Health and Safety Executive specifically opposed any extension of HSWA duties to non-business users of private level crossings.

Rely on existing criminal penalties

8.99 The most popular suggestion to address the inapplicability of HSWA to non-business users of private crossings was to use existing criminal penalties to enforce against misuse. The Rail Safety and Standards Board commented that "it would be better for existing criminal processes to apply to such cases even accepting present difficulties in providing adequate evidence". Passenger Focus also suggested using the criminal law, noting that it may be necessary to create new criminal sanctions to ensure that this type of offence was capable of being prosecuted. The suggestion to rely on existing criminal law was also made by Associated Society of Locomotive Engineers and Firemen, Bodmin and Wadebridge Railway Company Limited, and the access group Scotways.

8.100 The Department for Transport agreed that a move to a HSWA-based system would create an "enforcement gap" at level crossings without business use and welcomed a solution that would address that gap. It explained that there were, nevertheless, existing safeguards for health and safety at private level crossings used by non-business users aside from direct enforcement, including but not limited to criminal penalties already in place. It pointed to the fact that Network Rail was able to have recourse to a buyout process "for crossings that prove to be bad actors", and that it would continue to exert its influence over safety arrangements at private level crossings. Indeed, the Department noted that any level crossings arrangement that is considered adequate at present will likely continue to be so under a HSWA system.

8.101 Two consultees noted that non-business users of private level crossings were still likely to owe a common law duty of care, which should provide sufficient scope for enforcement against misuse.

Other suggestions

8.102 The Highways Agency suggested that the easiest solution would be to create a "separate piece of primary legislation", though it did not specify whether the legislation would serve to extend the HSWA duties or create some other mechanism for enforcement.

8.103 Transport Scotland suggested creating two new sub-classes of user-worked crossings: commercial and public. HSWA would apply to owners of the first sub-class of crossing, as they would be using their right of way for work-related purposes and would therefore be subject to the duties of employers and the self-employed under HSWA. The creation of the second sub-class would effectively designate all private user-worked crossings as public rights of way. In so doing, "the duty of care would revert to the railway infrastructure manager, who would have the same duty of care for this level crossing sub-class as they did for other public level crossings". This would not mean, however, that the owner would necessarily have to allow public access to the crossing in practice:

> The privacy of the adjacent land/dwelling house owner would not be compromised by the public status of the level crossing since the adjacent land and dwelling house would still have private status.

8.104 It did point out, however, that it could be difficult to designate the level crossing as "public" if access would effectively be restricted to those members of the public invited onto the property of the adjacent land owner.

Conclusion

8.105 While a few consultees suggested retaining the safety provisions of special Acts or extending HSWA duties to non-business users of private level crossings, the majority took the view that existing criminal offences and common law duties were sufficient to enforce against misuse at these crossings.

Do consultees think that a move to a HSWA-based system would create problems in practice? [CP para 8.44]

Introduction

8.106 Of the 114 consultation responses that were received, 23 responses addressed the question of whether a move to a HSWA-based system would create problems in practice. Eight of those agreed that there would be problems in practice and 15 disagreed.

8.107 Many consultees expressed their concerns about HSWA in response to the proposal to move to a HSWA-based system for regulating safety at level crossings. This part of the analysis is restricted to responses specifically addressed to this question.

Problems with HSWA in practice

8.108 Only a third of consultees who answered this question considered that a move to a HSWA-based system would create problems in practice. The Heritage Railway Association, who opposed such a move, explained that it would create uncertainty without improving user safety at level crossings. Powys County Council pointed to a specific example of uncertainty that could arise from a move to a HSWA-based system: the lack of clarity as to the extent to which a highway authority is required to maintain a public right of way approaching a level crossing. It commented that "the standard to which public rights of law are maintained varies in accordance with the location and usage of the path". For instance, busy urban paths require more maintenance that rural paths used for recreational purposes. Adjacent landowners may also have maintenance duties for a public right of way. While the council can enforce against landowners in some circumstances, it stressed that the degree of maintenance of a right of way was "by no means entirely under the control of the council".

8.109 Suffolk County Council, thought that problems would arise under HSWA from any attempt to require highway authorities to carry out work to improve the convenience of level crossing users. It noted that local authorities did not have sufficient resources to enable this.

8.110 The joint response from the Arfon-Dwyfor, Southern and Northern Snowdonia Local Access Forums pointed to the lack of consistency in enforcement as a potential problem with a HSWA-based safety system. Specifically, it stressed that a person responsible for causing an accident at a level crossing should be "prosecuted in the same way irrespective of the fact that he is not an employer or employee". The North Yorkshire Local Access Forum suggested that approved codes of practice should seek to address the problems with a move to a HSWA system and be subject to public consultation.

No problems with HSWA in practice

8.111 Many consultees thought that while problems would be expected with any new system of safety regulation, they were capable of being overcome. Mike Lunan explained that "problems are there to be overcome, not avoided. Once those regulated have understood and adapted to the change there is unlikely to be any difficulty".

8.112 The organisations the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum agreed in their joint response that the challenges of a HSWA-based system can be addressed, noting their "confidence that enforcement responsibilities will be clarified".

8.113 Network Rail and Transport Scotland both agreed that there should not be any major problems in practice with a move to HSWA, but indicated that it might be necessary to retain some of the features of the present system of level crossing orders that ensure certainty in safety regulation. Transport Scotland emphasised, however, that a HSWA-based system would not prove to be any more problematic than the current system of regulating safety through level crossing orders.

8.114 The Office of Rail Regulation did not think that any problems would arise in practice, since most level crossings were already effectively governed by a HSWA regime.

Conclusion

8.115 Relatively few consultees took the view that a move to a HSWA-based system of regulating safety at level crossings would create problems in practice. Those who did foresee problems focused on the potential for uncertainty under HSWA, and the problems with binding highway authorities in the current economic climate. The majority of consultees considered that any obstacles with the proposed move to HSWA could be overcome.

We ask consultees to consider whether there is a "convenience gap" in our proposal to replace reliance on special Acts and level crossing orders with a HSWA-based system. If so, how should the gap be closed? [CP para 8.51]

Introduction

8.116 Of the 114 consultation responses that were received, 28 responses addressed the question of whether a "convenience gap" would result from our proposal to replace reliance on special Acts and level crossing orders with a HSWA-based system. Twelve of those agreed that there would be a "convenience gap", two disagreed, and six were equivocal. Eight consultees directed their response to this question to the problems that arise within the existing system of regulating level crossings, and did not specifically address the impact that a move to a HSWA-based system would have on the question of convenience.

8.117 Thirteen of those who commented, provided suggestions for how the convenience gap – whether arising from a move to HSWA or in the present system – could be closed.

Balance between road and rail interests

8.118 Many consultees expressed concern about an apparent lack of balance between road and rail interests in establishing what is required for the safety and convenience of all parties. As the overriding purpose of HSWA is to protect health and safety, it may be difficult for convenience to be taken into account in a purely HSWA-based system of safety regulation. Level crossing orders, on the other hand, are capable of making provision for the convenience of those using the crossing as well as for their safety. We asked consultees to comment on the potential "convenience gap" that would result from the proposal to regulate safety under HSWA.

8.119 A number of consultees commented that the convenience of road users is often disregarded in the interests of safety or the convenience of the railway.

8.120 Lincolnshire County Council and Karl McCartney MP noted that problems arise when one party – typically the railway operator – adopts measures to enhance its own convenience to the detriment of others. The Department for Transport and Cambridgeshire County Council provided the example of level crossings that are closed for long periods of time (whether for the safety or convenience of the railway), causing road congestion and serious delay to road users. The Department for Transport commented that the railway would have to incur significant cost to make provision for road user convenience, such as the construction of a relief bridge, demonstrating that safety and convenience are not always linked.

8.121 The Egham Chamber of Commerce commented:

> This provides a strong incentive for signalmen to keep crossing gates closed when they anticipate two (or more) trains in succession even when the gap between them considerably exceeds the time needed to raise and lower the gates. … Regular users of the crossings experience waits of six to ten minutes without any trains on a regular basis, and well beyond this if there are more than two.

8.122 E. Sutherland-Loveday, who lives adjacent to a level crossing in Scremerston, provided an illustration of the problems with convenience to road users at certain crossings. The Scremerston level crossing is an automatic, full-barrier crossing on the road leading to a popular beach and several properties. As the road is a cul-de-sac, any vehicle going to and returning from the beach area must travel over the level crossing. Mr Sutherland-Loveday explained that the crossing barriers are frequently closed for long periods of time due to the failure of railway signallers adequately to monitor the level crossings from the signal box further down the line. After 20 minutes of closure the barriers are automatically locked down and need to be physically released by an engineer. He explained that road users experience significant problems and delay as a result of this procedure (which has led, at times, to closures lasting up to three and a half hours).

8.123 John Tilly made the point that "convenience of all parties must be considered".

8.124 Several consultees noted the difficulty of resolving the funding issue. Michael Haizelden took the view that the solution to the problem of delay at gated level crossings that are closed for long periods of time cannot be found in law reform, as it depends primarily on the existence of funding or financing arrangements. John Tilly suggested that highway authorities may, at times, have to fund improvement to highway design capacity. Transport Scotland identified the developer as a potential source of funding:

> The responsibility to make provision for other users should not automatically fall to the rail operator as the need for alteration may have arisen from change of use arising from some other development. In this scenario why should this responsibility fall to railway operators? Their obligation should be not to make provision worse and not to make it less safe. It would be for the developer to contribute to the provision.

8.125 Not all consultees agreed that there was a gulf between safety and convenience. The Office of Rail Regulation commented that there is scope for convenience to be considered under the existing HSWA model of safety regulation:

> Considerations under [the "so far as is reasonably practicable" test] would naturally include a degree of convenience – if significant inconvenience to users would arise then it would become a safety issue as there would be an increased likelihood that greater risks would be taken.

8.126 Northumberland County Council referred to the Scremerston level crossing mentioned above, explaining that the lack of convenience to road users caused by the emergency lock-down procedure encouraged them to adopt unsafe measures to try to cross the railway line when the barriers are closed.

8.127 The Automobile Association made this same point, commenting that inconvenient crossings are more likely to lead road users to take risks, thus decreasing safety. It was the only consultee to state that the balance between road and rail traffic "is probably about right and should not change".

Suggestions for addressing the "convenience gap"

8.128 Two consultees suggested that the retention of level crossing orders would serve to close the "convenience gap". The Heritage Railway Association advocated the retention of both level crossing orders and special Acts. The joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Local Government Association and the Association of Transport Co-ordinating Officers suggested that level crossing orders could be maintained as "a second tier of safety regulation within the HSWA regime". Transport Scotland did not propose retaining level crossing orders or special Acts, but did suggest that the "generic convenience requirements contained within special Acts could be incorporated into regulations and an approved code of practice".

8.129 Although the Office of Rail Regulation took the view that convenience could be considered adequately within a HSWA regime, it acknowledged that it could be sensible for convenience to be "explicitly addressed by any primary legislation arising from the Commissions' work". It deferred to other stakeholders to identify those cases in which convenience would not have a sufficient relationship with safety to be addressed under a HSWA regime of safety regulation. The Department for Transport also indicated that a new regime of safety regulation would have to make explicit reference to convenience. It commented that:

> It is a priority for "convenience" to exist separately in any new regime rather than being subsumed under safety provisions and do not yet agree with suggestions that the two issues are always linked to a degree that adequately addresses convenience concerns.

8.130 Devon County Council, Passenger Focus, and the Highways Agency also agreed that a legal instrument should be created that would specifically address convenience. This will be considered in greater detail under the next proposal.

8.131 Two consultees deferred to the Office of Rail Regulation on this question. The Health and Safety Executive and Conwy East Local Access Forum commented that it was for the Office of Rail Regulation to consider how to address the "convenience gap". Cambridgeshire and Devon County Councils added that the Office of Rail Regulation should be making greater use of the provisions in the Level Crossings Act 1983 that refer to convenience, when considering the safety and accessibility of level crossings.

8.132 Northumberland County Council and the Egham Chamber of Commerce suggested solutions to the "convenience gap" that relied on changes to the existing systems of railway operation. The Council took the view that primary legislation should place "an enhanced duty on the operators of a railway to ensure speedy and quick responses if there is a level crossing failure". Egham Chamber of Commerce suggested abolishing the system of fines if railway signallers cause trains to be delayed, and allowing a regulator to "fine Network Rail for abusing its power to control the sharing of space at crossings".

8.133 Network Rail did not support the creation of new legislation to address convenience, explaining that it was not desirable to separate safety from convenience and that, moreover, the issue of funding for safety-neutral proposals needed to be addressed. Michael Haizelden, as noted above, agreed that a legal solution would not address the problem of the "convenience gap".

8.134 Finally, a few consultees emphasised that the solution might lie with greater co-operation and agreement between the relevant parties. Association of Train Operating Companies suggested imposing a duty to co-operate, while Community Safety Partnerships Limited explained that the gap could be closed by requiring parties to enter into an interface agreement concurrent with a duty to co-operate. The Confederation of Passenger Transport also suggested that agreement between the parties would be more useful than a legal solution.

Conclusion

8.135 Very few consultees disagreed that a "convenience gap" could arise from a move to a HSWA-based safety regime. However, many consultees took the opportunity to note their concerns about the failure of the present system to strike the right balance between the convenience of road users and either the safety or convenience of the railway. The most common example given was the enhanced safety or convenience of the railway causing excessive delays for road users at crossings that are closed for long periods of time. A number of consultees provided suggestions for how a new system of safety regulation could address and ideally close the "convenience gap".

We ask consultees whether in practice it would be necessary to have a legal instrument that would: require rail operators to take safety-neutral steps to enhance the convenience of the users of the highway/road at a level crossing; and/or require highway/roads or traffic authorities to take safety-neutral steps to enhance the convenience of rail users, by enhancing the efficiency of the level crossing for rail use. [CP para 8.52]

Introduction

8.136 Of the 114 consultation responses that were received, 34 responses addressed the question of whether it would be necessary to have a legal instrument that would either require rail operators to take safety-neutral steps to enhance the convenience of highway/road users at a level crossing, or require highway/roads authorities to take safety-neutral steps to enhance the convenience of rail users.

8.137 Thirteen of those agreed that both rail operators and highway/roads authorities should be required by legal instrument to take safety-neutral steps to enhance the convenience of the other class of user, five took the view that the duty should only apply to rail operators, one commented the duty should only apply to highway/roads authorities, and 11 did not think that such a legal instrument was necessary at all. Four were equivocal as to whether a legal instrument was required.

No legal instrument required

8.138 A minority of consultees who answered this question did not support the creation of a legal instrument to impose duties on railway operators and/or highway/roads authorities to take safety-neutral steps to enhance convenience. There was considerable overlap between these consultees' reasons for opposing this proposal and the suggestions for closing the "convenience gap" listed in the proposal above. As explained above, several consultees believed that the solution was not legal but depended on funding sources; others preferred to leave the issue with the Office of Rail Regulation for consideration; the Heritage Railway Association suggested retaining special Acts and level crossing orders; and three consultees proposed that a duty to co-operate, an interface agreement, or mutual agreement between the parties could address the issue of convenience.

8.139 Network Rail was among the consultees who emphasised the importance of co-operation between the relevant parties:

> We hope that a statutory duty to co-operate between the railway undertaker and the highways authorities would be able to address this point, without imposing an additional burden on railway undertakers and always mindful of the priority of safety issues.

8.140 Northamptonshire County Council was opposed to this proposal on the grounds that existing legislation already provided for safety-neutral steps to be taken to enhance convenience, such as the Highways Act 1980, the Countryside and Rights of Way Act 2000, and the Disability Discrimination Act 1995. Along similar lines, the local access forums of Arfon-Dwyfor, Southern Snowdonia and Northern Snowdonia indicated in their joint response that the Disability Discrimination Acts of 1995 and 2005 set minimum standards with which railway operators are expected to comply. They suggested that there be a presumption that "all level crossings are Disability Discrimination Act-compliant unless there is a very good site-specific reason why they should not be so".

Impose obligations on railway operators <u>and</u> highway/roads authorities

8.141 Many consultees believed that a duty to take steps to enhance convenience should be imposed on both railway operators and highway/roads authorities. Three local authorities took this position, though Devon and Cambridgeshire County Councils distinguished between the two options, the first being "necessary" and the second being "reasonable".

8.142 Powys County Council provided a detailed response on this point, explaining that this measure would have "mutual benefits for all parties". It specified that any legal instrument imposing such a duty on rail operators would need to:

> Allow for sufficient flexibility in the detail of any measures taken, to ensure that the steps taken for any individual crossing are the most appropriate for that location. The likely level and type of usage of the public rights of way linked to the crossing would need to be taken into account in determining any required steps to enhance convenience. … The views, preferences and land management needs of the surrounding landowners must also be taken into account […].

8.143 Other consultees who supported this proposal were the Egham Chamber of Commerce, Bodmin and Wadebridge Railway Company Limited, Scotways, and Ken Otter.

Impose obligations on railway operators <u>or</u> highway/roads authorities

8.144 Five consultees supported the use of a legal instrument to impose a duty on railway operators – but not highway/roads authorities – to take steps to enhance the convenience of level crossing users.

8.145 Two local access forums – from Bridgend and North Yorkshire – supported this option. The Bridgend Local Access Forum raised concerns about imposing an equivalent duty on highway/roads authorities, as it could result in those authorities effectively subsidising works that would also benefit private rail operators. This might carry some cost for the convenience of road users down the line. The local authority organisations the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Manager Forum suggested in their joint response that it was reasonable to expect contributions from both the highway/roads authority and the railway for works done for the convenience of road users. Associated Society of Locomotive Engineers and Firemen and Suffolk County Council also agreed with this proposal.

8.146 Transport Scotland was the only consultee to suggest that a duty should only be placed on highway/roads authorities. Agreeing that a legal instrument of some kind was needed, it explained that highway/roads authorities need to be made responsible not simply for the convenience of rail users, but also for "the safety impact that increases in road traffic may have on the operation of a crossing".

Other considerations

8.147 The Department for Transport and Transport Scotland both indicated that the apportionment of costs is a key issue that could be addressed by any legal instrument that is adopted. The Department explained:

> It would be useful to see recommendations that acknowledge the importance of convenience at level crossings and a tool that allows action to increase convenience in a safety neutral manner. However, appropriate apportionment of costs will be a key output of such a tool.

8.148 Fife Access Forum declined to comment on this proposal except to note that "such legal instruments would ensure that high quality risk assessments were carried out at all level crossings".

Conclusion

8.149 Overall, a majority of consultees who answered this question agreed that it was necessary to create a legal instrument imposing duties on railway operators and/or highway/roads authorities to take safety-neutral steps to enhance convenience. Though most preferred that the duty be placed on both rail operators and highway/roads authorities, some suggested that either rail operators or highway/roads authorities should have such a duty, and not both. A minority of consultees who answered this question did not think that a legal instrument of this kind was necessary or useful.

Is there a need for provision to enable convenience-related measures to be put in place at level crossings? If so, would it be preferable to: extend the power under section 15 of HSWA to make regulations, to include considerations of convenience; or create a new power to make separate convenience-related orders for particular level crossings? [CP para 8.57]

Introduction

8.150 Of the 114 consultation responses that were received, 32 responses addressed the question of whether it would be necessary to have some provision to enable convenience-related measures to be put in place at level crossings. Nineteen of those agreed that such provision was necessary, nine disagreed, and three were equivocal. Of those who agreed, 14 took the view that it was preferable to extend the regulation-making power under section 15 of HSWA to make regulations to include considerations of convenience, while two considered that a new power should be created to make separate convenience-related orders for particular level crossings. One suggested that either option would be appropriate.

No provision is required

8.151 Those consultees who disagreed that it was necessary to make provision for convenience-related measures to be put in place at level crossings did so for essentially the same reasons for which they disagreed that a legal instrument was necessary in the question above. To summarise, those consultees considered that existing legislation, level crossing orders and special Acts were sufficient; that a duty to co-operate between relevant parties would address the problem; that a legal solution would not address the funding problem; and that the Office of Rail Regulation should consider how to address the question of convenience.

8.152 Network Rail added that "there should not be a new obligation on railway undertakers to do additional work for convenience of other users".

Extend the regulation-making power under section 15 HSWA

8.153 The vast majority of consultees who agreed that some provision was required to enable convenience-related measures to be put in place at level crossings preferred the extension of the regulation-making power in section 15 of HSWA to make "incidental" or "supplemental" provision for matters of convenience.

8.154 Both the Office of Rail Regulation and Transport Scotland indicated that this option was simpler and more straightforward than creating convenience-related orders for individual crossings. The Department for Transport suggested that it would be preferable to try to link safety and convenience in order to avoid over-stretching the section 15 regulation-making power. The Bodmin and Wadebridge Railway Company Limited explained that it was preferable to keep the legal requirements in a single place, rather than creating new and different orders that would "add to the burden of documentation".

8.155 Finally, Cambridgeshire County Council explained that it may be necessary explicitly to require consideration of convenience under section 15 regulations in much the same way that sections 118A and 119A of the Highways Act 1980 require consideration of the reasonable practicability of making the crossing safe for use, and of any arrangements for appropriate barriers and signs.

8.156 The other consultees who supported this proposal – including the British Horse Society, Lincolnshire County Council, Associated Society of Locomotive Engineers and Firemen, and two Members of Parliament – did not explain the reasons for their preference.

Create a new power to make convenience-related orders

8.157 Only two consultees supported the creation of a new power to make convenience-related orders for level crossings. The Rail Safety and Standards Board explained that convenience-related orders would have to be created if a move to a HSWA-based system were adopted, as considerations of convenience "are essentially in conflict with HSWA requirements". It cautioned, however, that such orders might impose limits on rail traffic but not on road traffic, as members of the public could not lawfully be prevented from using a public highway.

8.158 The Egham Chamber of Commerce preferred this option as it was not clear how convenience could be made to fit within the HSWA regime:

> It is difficult for us to imagine how legislation concerned with ensuring safety can include powers to make regulations about convenience, and we are not confident that such powers would ever be exercised.

Other considerations

8.159 Association of Train Operating Companies made a separate point about enforcement. It noted that it might be necessary to consider how to enforce against one party that fails to take the convenience of the other into account. It suggested that provision for this could be made under section 15 of HSWA.

Conclusion

8.160 A considerable number of consultees did not think it was necessary to make provision for convenience-related measures to be put in place at level crossings. The proposal to extend the power under section 15 of HSWA to make regulations to this effect was generally endorsed. Only two consultees queried whether the regulation-making power in section 15 of HSWA was wide enough to enable regulations to be made on the matter of convenience.

We provisionally propose a new procedure for level crossing closure orders to allow for closure of both private and public level crossings [CP para 8.63].

Introduction

8.161 Of the 114 consultation responses that were received, 39 responses addressed the proposal for a new procedure for level crossing closure orders to allow for closure of both private and public level crossings. Twenty-five of those agreed with the proposal, eight disagreed, and six were equivocal.

The existing procedure for closure

8.162 Nearly twice as many consultees supported the proposal to create a new procedure for the closure of level crossings than opposed it or were equivocal. Although many consultees did not elaborate on the reasons for their support, several noted that the existing system for closing level crossings was cumbersome, expensive, and difficult to use. The London and Home Counties and Eastern branches of Solicitors in Local Government commented in its response that:

> The powers to close and divert highways, even the lower level of highways such as footpaths, bridleways and cycle tracks is very limited and circumscribed by statutory restriction and case law. These are historically derived from times when the intensity of use of both the highways and the railways was much less.
>
> As a consequence, the processes for closing and diverting highways are costly and cumbersome and do not allow the highway authority to balance considerations of safety (either of the highway user or of the railway) against the convenience of alternative routes or at least to do so easily.

8.163 Network Rail commented that it supported the proposal as:

> Level crossings pose a significant safety risk, and we actively seek to close crossings. We very much hope that the outcome of the Commission's consultation and report will be that it becomes easier to do so.

8.164 The proposal was also supported by, among others, the Highways Agency, the Department for Transport, the Office of Rail Regulation, the access groups Scotways and Ramblers, and several local authorities.

8.165 Several consultees considered that a new system for closing level crossings was unnecessary on the grounds that the existing procedures in the Transport and Works Act 1992 and the Highways Act 1980 were adequate. The Pembrokeshire Local Access Forum took the view that the closure procedures in these Acts are "democratic and transparent procedures dealing with the issue of public safety as the legal test".

8.166 The Vale of Glamorgan Local Access Forum noted that the relevant provisions in the Highways Act 1980 (sections 118, 118A, 119 and 119A) are sufficient. As a result:

> It is therefore not agreed … that special dispensation is required for rail operators in respect of diversions or extinguishments where desired in the operators' own interests (or indeed public interests). Economic benefit should provide a basis for a section 119 diversion and be balanced against the existing tests of section 119 that seek to protect rights of the public in relation to the alteration of highways by applying commodiousness tests.

Balancing ease of closure with public access rights

8.167 Responses to this proposal showed a tension between the need to facilitate closure and change for the railway industry, and the need to protect public access. Michael Haizelden commented:

> Whilst the removal of a level crossing is clearly attractive to rail operators, it is important not to understate the value of access to level crossing users. Care should be exercised so that the pendulum, legally, does not swing too far in the direction of making closure of level crossings easier.

8.168 Devon County Council suggested that, when closure is contemplated by the railway industry, the first consideration should be whether there is a role for a road-rail partnership group to consider more fully the safety issues and any potential for "cost effective remedial works" to address the problem.

8.169 The National Farmers' Union opposed the closure of level crossings on safety grounds:

> …when the reason for closure is related to the economic gain of the rail operator, it is unacceptable to be able to hold landowners to ransom by installing powers to compulsorily close a right of way without providing an alternative access.

Likewise, the Country Land and Business Association added that railway operators should be prevented from closing a crossing on safety grounds when the safety problems stem from the operator's failure properly to maintain the crossing.

8.170 Many consultees, including the North Yorkshire Local Access Forum, the Country Land and Business Association and the British Horse Society, stressed the importance of providing an alternative means of crossing the railway where necessary. The British Horse Society commented that "a safe and convenient alternative means of crossing the railway must be provided for all categories of traffic entitled to use the crossing, which includes equestrian traffic". The Society considered that there should be both a duty and a power on the railway industry and the highway authority to ensure that adequate alternative provision has been made before a closure order could be approved.

8.171 Clive Robey suggested that Network Rail should have the power to close level crossings that are subject to "rampant" misuse, provided that Network Rail had done all that was reasonably practicable to prevent the misuse.

Public consultation and rights of appeal

8.172 Several consultees emphasised the need for public consultation in the closure process, and for a mechanism by which members of the public could challenge or object to a closure decision. The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum commented that:

> For all future applications to close (or divert) public level crossings, the appropriate local access forum in the area, other statutory rights of way user groups (eg. Ramblers Association, British Horse Society etc) and town and parish councils should be formally invited to comment as consultees.

8.173 Similarly, the North Yorkshire Local Access Forum suggested that an improved system for closing level crossings would have to "include a system for public consultation on the proposals and in the event of irreconcilable objections the opportunity for an independent hearing". Michael Haizelden commented that "any procedure should enable small groups or individuals to easily and cheaply put their case and to effectively contest arguments about safety".

8.174 Ramblers provided a detailed suggestion for the consultation process that would have to be included in any new system for level crossing closure:

> Proposals to close or divert right of way level crossings should be the subject of a clearly defined statutory consultation process between the railway operator seeking the change and rights of way interest groups and parish and community councils. Those consultations should take place before the operator approaches the local highway authority (or the Secretary of State/relevant Ministers under the Law Commission's proposals).

Powers of compulsory purchase

8.175 The National Farmers' Union and the Country Land and Business Association were concerned about the proposed use of compulsory purchase powers to extinguish a farmer's right of way over a private crossing.

8.176 The National Farmers' Union was concerned in particular about the amount of compensation likely to be paid to the landowner. As there is no "market rate" for a private right of way over a railway, it suggested instead basing the rate of compensation on both "the extra cost and inconvenience to the landowner of having to travel further to get to a piece of land" and the railway operator's cost savings from closure. It stated that compulsory purchase orders should be a measure of last resort, after all efforts to reach a negotiated settlement had failed.

8.177 Both of these consultees argued that a landowner who objects to a compulsory purchase order must have a right to an inquiry or a hearing. The Country Land and Business Association pointed out that the proposed system for closure would reduce the existing appeal rights of landowners and "flies in the face of all current compulsory purchase legislation which gives a right of appeal in person usually heard at a public inquiry". It objected to the fact that, under the proposed procedure, landowners would have the same right of appeal as a member of the public not directly affected by the closure.

8.178 The Department for Transport agreed with the proposal to create a new system for closure including powers of compulsory purchase. It explained that compulsory purchase powers "are potentially a key tool" in closing level crossings in appropriate circumstances. It warned, however, that the rates and criteria for compulsory purchase in the context of level crossings would have to be consistent with standard compulsory purchase rules. It also noted that if a highway were stopped up and diverted under section 116 of the Highways Act 1980, the compulsory purchase powers in that Act could be used to acquire land required for the diversion. It commented that it would be hard to justify a less rigorous procedure for compulsory purchase in the context of level crossing closure in light of this existing procedure in the Highways Act 1980. The Department agreed that an appeals process would have to be put in place.

Promoting a closure order

8.179 The Office of Rail Regulation suggested that it would be helpful for the closure procedure to specify more clearly "the process by which closure can be *initiated*":

> Currently, this tends to come down to the infrastructure manager's discretion with limited incentives for any party. A model such as Alternative to Level Crossings Assessment Tool might help provide a first cut of public road crossings that warrant consideration for closure. Certain parties may want to see closure commenced (for all types of crossing), but no interested party has currently a right of initiative to set in train the process.

8.180 It explained that, while the Rail Safety and Standards Board's Alternative to Level Crossings Assessment Tool model may be useful for identifying some crossings that would benefit from closure, its usefulness was limited by the fact that it applied only to public crossings and was not yet finalised. Some other system was needed to ensure that the closure process could be adequately initiated. It did not believe that it should be designated as an "initiator" of closure, as it would "prejudice our role as potential arbiter in any subsequent dispute concerning matters of closure".

8.181 Network Rail proposed that the following bodies should be able to promote a closure order:

> Network Rail Infrastructure Limited (or the infrastructure operator from time to time), other licensed network or infrastructure operators, the highways and local authorities and the Office of Rail Regulation. We see some benefit in the owner of land through which a public footpath runs also having the opportunity to apply for a level crossing closure order of that footpath where it crosses the railway on the level, subject to satisfying the decision-maker that there would not be any resulting increased usage of other level crossings. The user of a private level crossing should also be entitled to propose level crossing closure orders for that particular crossing.

Conclusion

8.182 There was considerable support from consultees for this proposal. However, some strong objections to a new procedure for closing level crossings were raised, largely on the grounds that it risked skewing the balance between railway interests and access rights, and did not provide sufficient scope for public consultation or scrutiny. The National Farmers' Union and the Country Land and Business Association were opposed to the proposed powers of compulsory purchase that would accompany a closure order.

Should there be a list of factors to be taken into account in considering an application for a level crossing closure order? [CP para 8.66]

If so, we would welcome the views of consultees on the following list of factors:

(1) safety of users of the crossing (including information as to the incidence of accidents at the level crossing);

(2) costs involved in maintenance of the crossing compared with costs involved in closing or closing and replacing the crossing;

(3) the effect of closure as opposed to retention (in the case of public level crossings) on the efficiency of the rail and road networks;

(4) the effect (in the case of public level crossings) on the integrity of the network of non-vehicular public rights of way;

(5) the effect of closure compared to retention of the crossing on the local community;

(6) the effect on those holding private rights over the crossing;

(7) the usability of the level crossing or its potential alternatives for all level crossing users;

(8) the convenience of level crossing users; and

(9) the effect on the environment and local amenity [CP para 8.67].

Introduction

8.183 Of the 114 consultation responses that were received, 41 responses answered the question of whether there should be a list of factors to be taken into account in considering an application for a level crossing closure order. Thirty-nine of those agreed with the proposal, one disagreed, and one was equivocal.

8.184 Fifty-two responses provided comments on the proposed list of factors.

A list of factors

8.185 The proposal to include a statutory list of factors to consider in a closure application was almost universally endorsed. The only consultee to disagree with the proposal was the Conwy East Local Access Forum, which was concerned that the list would be taken as definitive and that pertinent considerations would be excluded.

8.186 Some consultees suggested that such a list would provide greater transparency, fairness and consistency in the decision-making process. Powys County Council noted that the inclusion of the list of factors as statutory criteria for closure "would be in line with the current procedures and legislation relating to other legal orders, including public path orders".

8.187 Many consultees suggested that the list should be neither hierarchical nor exhaustive. The Rail and Safety Standards Board commented that the factors "should not have any order of importance since this is likely to be subject to variation between locations and types of crossings". Indeed, it was primarily the unique nature of each level crossing that led these consultees to conclude that a flexible, non-exhaustive list was preferable to a rigid list of factors that had to be applied mechanically in each case. Sills and Betteridge Solicitors added that the list should be "forward looking and not merely a snapshot as at the date the decision is taken".

8.188 Transport Scotland suggested that, in light of the variation between crossings, it may be preferable to include the list of criteria in guidance rather than in any primary legislation. Likewise, the Heritage Railway Association supported the proposal despite the danger of it being "too prescriptive".

8.189 Ramblers and the North Yorkshire Access Forum thought that the introduction of a list of criteria for closure would mitigate their concerns about sections 118A and 119A of the Highways Act 1980 – namely, that those provisions do not adequately consider the effect of the proposed stopping up on highway users.

Comments on the proposed list of factors

8.190 The proposed list of factors was considered satisfactory by most consultees. However, only six consultees proposed adopting the list of nine factors as it was set out in the consultation paper. Most consultees who answered this question suggested amendments, additions or deletions to the list.

8.191 Transport Scotland, Northamptonshire County Council and the Rail Safety Standards Board noted that the over-riding concern in an application to close a level crossing should always be safety.

MODIFICATIONS TO THE PROPOSED LIST OF FACTORS

8.192 The first factor in the provisional list was the safety of users of the crossing, including information as to the incidence of accidents at the level crossing.

8.193 Most consultees were satisfied with this factor. However, the Office of Rail Regulation noted that the information needed to determine the safety of users at the crossing should include more than the incidence of accidents. Likewise, the Department for Transport and Transport Scotland suggested including a reference to misuse of the crossing, whether deliberate or accidental, even if the misuse does not result in an accident. South Gloucestershire Council suggested that existing and proposed line speeds could be considered when assessing the safety record of a particular crossing, while in their joint response the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Manager Forum commented that risks posed by nearby developments should also be considered.

8.194 Two local access forums commented that the safety record of the alternative route should also be considered under this factor.

8.195 The second factor was the cost involved in maintaining the crossing compared with the cost involved in closing or closing and replacing the crossing.

8.196 Several consultees commented on the specific costs that should be considered under this factor. Passenger Focus commented that "cost" should include the delay to all road users and rail users. Network Rail suggested that it should include the costs of maintenance, operation, construction and renewal of the level crossing throughout the appraisal period. The Country Land and Business Association was concerned that rail operators might use their failure properly to maintain a crossing as justification for closure. It recommended that:

> costs involved in the maintenance of the crossing should be the cost of maintaining that crossing once it is up to a suitable standard rather than the cost of bringing it up to the appropriate standard.

8.197 The Department for Transport took the view that it would be necessary to set a time period over which the costs could be measured. It suggested using either the "typical life of a crossing before renewal e.g. 25 years or perhaps periods usually used for cost benefit analysis of infrastructure projects such as 30 or 60 years".

8.198 Three consultees expressed more fundamental concerns with this factor. The Wiltshire and Swindon Countryside Access Forum and Sills and Betteridge Solicitors explained that the railway's historic duty to provide a right of way across its line should not be derogated from on the basis of the financial impact on the railway of either maintaining or closing the crossing. Bridgend Local Access Forum also opposed the inclusion of this factor on the grounds that frequent use of a crossing justifies the greater expense of maintaining it, and should not serve to strengthen the case for closure.

8.199 The third factor was the effect of closure as opposed to retention (in the case of public level crossings) on the efficiency of the rail and road networks.

8.200 The Conwy East Local Access Forum asked how "efficiency" would be defined in this factor. Several other consultees suggested specific considerations that should form part of this balancing exercise, notably: the "costs of mitigation of any adverse effects on these networks"; the impact of closure as opposed to retention on rail and road user delay and operating costs; and the impact on local businesses and communities. The Bridgend Local Access Forum commented that this factor is irrelevant, as "any level crossing closure would automatically improve rail efficiency in the area of the closure".

8.201 The fourth factor concerned the effect (in the case of public level crossings) on the integrity of the network of non-vehicular public rights of way.

8.202 This factor was generally welcomed by consultees, many of whom were pleased that it recognised the rights of non-vehicular users of crossings such as equestrians, ramblers, cyclists and pedestrians. However, several consultees considered that the factor should specifically include consideration of the safety, accessibility and distance of any alternative route. Ramblers commented that:

> A minor diversion for users of motor vehicles can be a very serious imposition on travel for non-motorised users. Consideration of the effect of a level crossing closure or diversion must take into account the length and time needed to use any alternative route or routes. In addition to considering the integrity of the network, the list should also include reference to the safety of the alternative route: non-motorised users may be no better off if they are forced away from a level crossing and on to a narrow country road with no footway.

8.203 The North Yorkshire Local Access Forum queried whether the term "non-vehicular" should be used, noting that public rights of way include restricted byways and byways open to all traffic, currently used by several different types of vehicle such as vehicles for disabled users. It also suggested that crossing closures can diminish "the length of the total network and often its connectivity". The Wiltshire and Swindon Countryside Access Forum added that it should take account of the effect on the network of "byways open to all traffic and restricted byways".

8.204 Two local authorities and three access groups made the point that this factor should incorporate a requirement to have regard to any relevant Rights of Way Improvement Plan. Hampshire County Council Countryside Service added that regard should also be had to the provisions of the Equality Act 2010.

8.205 The fifth factor was the effect of closure compared to retention of the crossing on the local community.

8.206 Again, many consultees supported the inclusion of this factor in the proposed list of criteria for closure. Only three consultees suggested modifications to the factor: the Department for Transport suggested that consideration should be paid to the impact of alternative, diversionary schemes on the local community, such as the potential for severance of communities. The North Yorkshire Local Access Forum noted that the frequency of trains and the length of time the crossings are closed were other relevant considerations affecting the local community. Finally, Bridgend Local Access Forum suggested defining the term "community".

8.207 The sixth factor was the effect on those holding private rights over the crossing.

8.208 Only one consultee made any substantive comments on this factor. The Country Land and Business Association commented that this factor should include consideration of the effect on businesses, private interests, and sporting and grazing rights.

8.209 The seventh factor was the usability of the level crossing or its potential alternatives for all level crossing users.

8.210 The Department for Transport considered that the accessibility and distance of the potential alternative should be considered under this factor. The Department was "aware of a particular case at Wareham where the alternative road bridge is both some distance from the crossing and has no pavements". Cambridgeshire County Council emphasised the safety aspect of level crossings, suggesting that this factor should include consideration of "whether it is reasonably practicable to make the crossing safe for use by the public", similar to the requirement in section 118A(4)(a) of the Highways Act 1980.

8.211 The eighth factor was the convenience of level crossing users.

8.212 The Bridgend Local Access Forum suggested that this factor was “too subjective” while Passenger Focus suggested that convenience might be adequately addressed by the other factors in the provisional list.

8.213 Finally, the ninth factor was the effect on the environment and local amenity.

8.214 Very few consultees commented on this factor. Transport Scotland commented that it should include consideration of carbon issues “as a clean environmental indicator”.

ADDITIONS TO THE PROPOSED LIST OF FACTORS

8.215 Many consultees suggested additional factors that should be taken into account in considering an application for a level crossing closure order, which were not included in our proposed list.

8.216 Network Rail suggested the following four additional factors:

> The impact of a private level crossing on the railway network (or add “private” to (3)); the safety of those using the railway including train operating companies and freight operating companies and road and rail users and pedestrians; the impact of alternative safety measures if a crossing is to remain including eg noise (whistle-blowing), cost (eg signalling, barriers), speed restrictions on the train operating companies, freight operating companies, Network Rail and on rail passengers who may face delays; and the feasibility of an alternative crossing at a different location (diversion), taking into account cost and impact on the railway.

8.217 Several consultees wanted to see more explicit consideration of the safety of any alternative crossing in the closure scheme. Cambridgeshire County Council commented that the likelihood of safety problems “transferring” to the alternative crossing or diversion should be considered along with the proposed list of factors. The Cyclists’ Touring Club warned that there were problems in diverting pedestrians and cyclists to a busy road with heavy traffic as an alternative to the level crossing. This point was also made by the North Yorkshire Local Access Forum, which was wary of non-vehicular users’ ability to navigate a “narrow country road with no footway” as an alternative crossing. The British Horse Society suggested that there should be a risk assessment of any proposed alternative route, to ensure that it is both safe and accessible for all users.

8.218 The Highways Agency wished to see some explicit recognition of the effect of any alternative crossing on the safety of people who were not necessarily users of the level crossing, such as “the rest of the road or footpath network which may be subject to changes in traffic flows”. It also noted that some consideration should be given to the effect of the closure on the “viability or funding for other schemes or projects to improve [the] safety of highways or footpaths”.

8.219 Some consultees suggested increasing the consideration given to access rights and the network of public rights of way. The Vale of Glamorgan Local Access Forum proposed the "protection of the rights of the public to use existing highways without undue inconvenience" as an additional factor, voicing its concern that access could be curtailed by the closure proposals. Scotways commented that, at least in Scotland, "any material impact on exercise of access rights" and on the network of non-vehicular public rights of way should be considered in a closure decision. Central Bedfordshire Council commented that the "strategic importance of a path crossing in relation the wider network" was a relevant consideration.

8.220 Karl McCartney MP and Lincolnshire County Council suggested that the effect on the local economy should be included in the list of factors. The Heritage Railway Association suggested including "the effect on public utilities and other bodies with cables and other services which pass beneath the crossing".

8.221 Other consultees made general suggestions to improve or clarify the list of factors. The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum suggested that the term "non-vehicular user" should include all users of the level crossing, including cyclists and carriage riders. The Cyclists' Touring Club emphasised that it should be open to the decision-maker to consider a set of crossings as a comprehensive scheme. It took the view that when each level crossing is considered individually, the benefits or drawbacks of closure may not be apparent.

8.222 Lady Elizabeth Akenhead, a member of the public with a strong interest in equestrian access, commented that more explicit protection was needed for equestrians. She took the view that the interests of the rail industry, the need to protect the landscape, and the cost to the railway industry of any safe and convenient alternative to the level crossing would "almost invariably be held to outweigh the interests of horses and riders".

8.223 Finally, Community Safety Partnerships Limited proposed an entirely different scheme for level crossing closure based on "a test of impracticability". It explained that when the test of impracticability is not satisfied, there should be a presumption that a level crossing closure order will be granted. The test of impracticability would be satisfied in the following circumstances:

> (1) The closure of the level crossing would leave the persons(s) having rights of user without an existing reasonable alternative means of crossing the railway;
>
> (2) In all the circumstances of the case, closure without providing a reasonable alternative means of crossing the railway would have a disproportionate and adverse effect on those person(s) and that in the case of private level crossings compensation would not be an adequate remedy; and
>
> (3) No reasonable alternative means of crossing the railway can be provided either because it would not be feasible to do so or because a reasonable alternative means of crossing the railway can only be provided at a cost which is disproportionate in relation to the safety and other benefits gained by the closure of the crossing.

Conclusion

8.224 The vast majority of consultees who answered this question agreed that a specified list of factors should be taken into account in considering an application for closure, though there was some disagreement among consultees as to what that list should include. Many consultees proposed changes to the provisional list of factors or suggested new factors that went beyond the provisional list. However, no consultees expressed any strong opposition to the list of factors and most of the suggested modifications or additions were of a relatively minor nature.

Should the factors be set out in order of importance? If so, how should they be ordered? [CP para 8.68]

Introduction

8.225 Of the 114 consultation responses that were received, 42 responses answered the question of whether the factors to be considered in an application for a level crossing closure order should be set out in order of importance. Nine of those thought that they should be set out in order of importance, 31 thought that the list should not be set out in order of importance, and two were equivocal.

Case-by-case decision-making

8.226 The consultees who took the view that the list of factors to be taken into account in considering an application for closure of a level crossing should not be hierarchical or ranked in order of importance, included Network Rail, the Office of Rail Regulation, the Highways Agency, the Department for Transport, many local access groups, the Heritage Railway Association, and Ramblers.

8.227 The majority of those consultees expressed the view that as the relative importance of each factor will vary from one level crossing to the next, it would be inappropriate to impose a uniform order of priority on the list of factors. For example, the Highways Agency suggested that:

> assuming this process will be undertaken by competently trained and qualified staff we consider that identifying the importance of each criteria to the specific site should be part of the assessment.

8.228 The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum suggested that the site-specific circumstances ought to determine the priority of the factors:

> We feel that the importance of the relevant factors should be determined by the specific circumstances on a case-by-case basis, with appropriate local consultation. Trying to set out a generic "one-size-fits-all" order of importance would be an incorrect approach.

8.229 The Department for Transport commented that:

> There would be significant difficulty in producing a ranking structure with which all interest groups would agree. Therefore, the factors should remain unranked and the prominence of particular factors in individual cases will be a key part of any decision making process.

8.230 The Office of Rail Regulation and the joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that it would be difficult to reach stakeholder agreement on the relative importance of each factor.

The importance of safety

8.231 A few consultees, whilst taking the view that the factors should be given equal weight, suggested that it might be appropriate for safety to have priority. The Office of Rail Regulation, Network Rail, and the joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that even in the absence of any formal order of priority, safety should be paramount in the decision-making process.

8.232 Passenger Focus also emphasised the overriding importance of safety, though it commented that safety might effectively be captured by the second factor in the provisional list (the costs involved in maintaining the crossing compared with closing it, or closing and replacing it):

> When assessing the economic case for safety-related expenditure, both road and rail authorities routinely assign monetary values to the likelihood of deaths and injuries being averted by a particular safety improvement. So it would be possible to argue that no special importance should be assigned to the safety of users, because this is taken into account in the cost calculations required by item (2). For presentational reasons, however, we believe that it is desirable that it should retain first place in this list, even if the numbering does not represent a formal order of priority.

8.233 Karl McCartney MP and Lincolnshire County Council took the same view that safety should have the highest priority in the list of factors.

Suggested order of priority

8.234 A minority of consultees suggested that the factors should be set out in order of importance. The Country Land and Business Association suggested re-ordering the list of nine factors to give prominence to the factors that touch on the safety of level crossing users, the effect of closure on those holding private rights over the crossing, and the usability of the crossing and its alternative. It suggested that the two least important factors would be, in order, the effect of closure on the integrity of the network of non-vehicular public rights of way, and the effect of closure as opposed to retention on the efficiency of the rail and road networks. The National Farmers' Union argued for a strong focus on the "economic disruption to business activities from the closure of private crossings" under the sixth factor.

8.235 Three access groups suggested listing the provisional factors in order of importance. Fife Access Forum proposed to retain safety as the first factor but moved the second – the cost of maintaining versus closing the crossing – to the end of the list. The remaining factors would stay the same with the exception of an additional factor in the fourth position (explained in the proposal above) and the fifth and sixth factors being placed between the eighth and ninth provisional factors. The Bridgend Local Access Forum thought that safety should be the most important factor, followed by the third (effect on closure on efficiency of rail and road networks) and fourth (effect of closure on the network of public rights of way) factors. Scottish Natural Heritage commented that the second factor (costs) should be given less weight than most if not all of the other factors.

8.236 The joint response from the Association of Directors of Environment, Economy, Planning and Transport, Association of Transport Co-ordinating Officers and the Local Government Association proposed moving the seventh factor – the usability of the crossing and its potential alternatives – to the fourth position, and moving the sixth factor – the effect of closure on those holding private rights over the crossing – to the end of the list.

8.237 Mike Lunan thought that the factors should not be set out in order of importance, and commented that if a ranking were adopted, the first three factors were "correctly ordered in decreasing order of importance" while the remaining factors were less deserving of weight. Associated Society of Locomotive Engineers and Firemen commented that the factors should be ordered as in the consultation paper.

Conclusion

8.238 The majority of consultees who answered this question preferred that the relative importance of each of the factors be left open, as a matter to be considered on a case-by-case basis. However, even some of the consultees who did not want the factors to be set out in order of importance suggested that safety should be a paramount in considering an application to close a level crossing. Some consultees proposed a re-ordering of the factors in the provisional list, though they all agreed that safety should be paramount.

We provisionally propose that the application for a closure order should be determined in England by the Secretary of State, in Wales by Welsh Ministers and in Scotland by the Scottish Ministers. [CP para 8.84]

Introduction

8.239 Of the 114 consultation responses that were received, 32 responses addressed the proposal that an application for a closure order should be determined in England by the Secretary of State, in Wales by Welsh Ministers, and in Scotland by the Scottish Ministers. Twenty-one of those agreed with the proposal, nine disagreed, and two were equivocal.

Existing system of local decision-making is adequate

8.240 Northamptonshire County Council and the Conwy East Local Access Forum both commented that the existing provisions for stopping up and diversion in the Highways Act 1980 obviated the need for any new closure procedure. The Forum said :

> I can see no reason for new legislation where the existing is adequate and unambiguous, and in this respect, there are many provisions of the Highways Act 1980 and associated other Acts applicable to the situation, and that these should be used wherever possible to avoid confusion and conflict.

8.241 The Bridgend Local Access Forum commented that there was no reason to change the present system of rail crossing orders being processed by highway authorities.

8.242 Two consultees, Central Bedfordshire Council and the Central Bedfordshire and Luton Joint Local Access Forum, suggested that this proposal was not in line with the Government's localism agenda and opposed it on that basis. Central Bedfordshire Council added that "if matters go straight to the Secretary of State it removes the right of individuals to have their objections heard locally".

Efficiency concerns

8.243 Several consultees commented on the need to ensure that any new closure system is efficient and not vulnerable to delay and unnecessary bureaucracy. Transport Scotland favoured the more efficient option – whether it is applying first to the relevant highway or road authority for a closure order, subject to appeal to the Secretary of State, Welsh, or Scottish Ministers, or applying directly to the Secretary of State, Welsh or Scottish Ministers in the first instance:

> When determining the most efficient option, consideration would need to be given to the likelihood of a highway/road authority being able to make an uncontested ruling. If the majority of applications to a highway/road authority were likely to go to appeal, it would be more efficient to apply direct to Secretary of State, Welsh or Scottish Ministers as suggested.

8.244 Ramblers were also concerned about efficiency. They opposed the proposal, in part because it would introduce unnecessary delay, bureaucracy and cost in the closure procedure:

> Under the present regime for rights of way, if the local authority has not made an order within six months then the Secretary of State has a discretion to exercise his own order-making powers. By way of such a mechanism, the initial role of the Secretary of State could be minimised. Only if the local highway authority was not amenable to the proposal or was too slow in its implementation would the Secretary of State/Ministers need to become involved.

8.245 They contrasted the above procedure with the proposed system, noting that under the proposed system the Secretary of State, Welsh or Scottish Ministers would inevitably have to engage with local highway or road authorities. In the interest of simplicity and efficiency, they preferred that the initial application for a closure order be made directly to the highway or roads authority.

8.246 The Open Spaces Society opposed the proposal for similar reasons, noting that it did not understand the reason for the procedure beginning with an application to the Secretary of State or Welsh/Scottish Ministers, "when nearly every other path-change procedure is through the highway authority".

8.247 Association of Train Operating Companies agreed with the proposal but on the condition that it not "introduce undue delay". The public rights of way team of South Gloucestershire Council also supported the proposal, on the grounds that it would promote uniform decision-making by a body equipped to consider matters of national significance.

The need for consultation and the right to an appeal

8.248 Ramblers commented that the existing system has a number of safeguards to ensure that individuals are informed of plans for the closure or diversion of a highway, and that their objections can be heard by an independent arbiter. They suggested that the usual system for advertising a proposed order and serving prescribed organisations with notice of the plans should remain in place if a new system for closure is created. Objections to the plans should be forwarded to the Secretary of State or Welsh or Scottish Ministers "for determination before an independent inspector".

8.249 Passenger Focus highlighted the need for consultation with "all individuals and organisations affected" and the opportunity for them to make formal objections. The Bridgend Local Access Forum also sought some assurance, should the proposed closure system be taken forward by Government, that adequate consultation would be carried out and that objectors would have a right to an appeal, either in the form of written representations, a hearing, or a public inquiry.

Conclusion

8.250 Approximately two thirds of consultees who answered this question agreed with the proposal. The majority of consultees who disagreed with it were representatives of access groups, many of whom were concerned that the proposed system for closure would diminish the role of consultation and the right of relevant parties to an appeal or inquiry or that it would weaken the local element of closure decision-making. Several consultees also emphasised the importance of promoting and protecting efficiency in the closure system.

In relation to the question as to whether to stop up a highway or road, and whether to divert a highway or road either side of the railway, we suggest three options: decision by the local highway/roads authority; decision by the Secretary of State/Scottish Ministers/Welsh Ministers but subject to consultation with interested parties and local bodies; or initial decision by the local highway/roads authority, subject to an appeal on the merits to the Secretary of State/Scottish Ministers/Welsh Ministers.

We provisionally favour the third option, but would invite comments from consultees. [CP para 8.85]

Introduction

8.251 Of the 114 consultation responses that were received, 48 responses provided comments on the three options for final decision-making on an application to stop up or divert a highway or road as part of a closure order. One of those preferred the first option, six preferred the second, 39 preferred the third, and two did not support any of the three options.

8.252 The Department for Transport and Central Bedfordshire Council thought that this proposal should be considered with reference to the Government's localism agenda, which promotes more local decision-making.

Option 1: decision by local highway/roads authority

8.253 The only consultee to support the first option was the Wiltshire and Swindon Countryside Access Forum. It commented that highway authorities can be entrusted to carry out their duties in accordance with section 130(1) of the Highways Act 1980, which requires them "to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority". It suggested that, unlike decisions made by government Ministers, "decisions made by highway authorities are taken by impartial bodies – highway authorities themselves, magistrates and planning inspectorates".

8.254 Both the Rail Safety and Standards Board and the Department for Transport expressed doubt that option 1 would provide the right balance between local and national interests. The Rail Safety and Standards Board commented that highway or roads authorities would not necessarily have adequate knowledge of (or sympathy toward) rail interests. The Department commented that "the effective right of local veto may not adequately consider, and therefore negate, any larger national benefits to be gained from a closure project".

Option 2: decision by Secretary of State or Scottish/Welsh Ministers subject to consultation

8.255 Few consultees supported the second option, which would grant final decision-making authority to the Secretary of State or Scottish/Welsh Ministers, but subject to consultation with interested parties and local bodies.

8.256 The Country Land and Business Association preferred the option that would leave the final decision to be made by the Secretary of State or Scottish/Welsh Ministers. Hampshire and Monmouth County Councils and the Institute of Public Rights of Way all supported this option, but on the condition that an objection by a highway authority should prompt a public inquiry in order to determine the application. Ken Otter preferred this option on the grounds that closure decisions would involve major infrastructural changes, which would best be decided by a national authority.

8.257 The solicitors' firm Sills and Betteridge commented that the first and third options were counter to the proposal to have the application for a closure order determined by the Secretary of State or Scottish/Welsh Ministers, as a decision to stop up a highway on either side of a crossing was tantamount to closure. It went on:

> The adoption of either the first or the third proposals would produce the absurd result that where the local highway authority was in favour of closure and willing to make a road closure order, it could decide the proposal whereas where the local highway authority was opposed to the closure and would not make a road closure order the Secretary of State would have to make a level crossing closure order under the [provisional closure] procedure referred to in paragraph 15.28 [of the consultation paper]. It is absurd that the highways authority should be a judge in its own cause where it supports a level crossing closure. … The local highways authority will never be a disinterested arbiter on the closure of a level crossing.

8.258 The Rail Safety and Standards Board was critical of the second option, noting that it was disproportionate in that it would refer all decisions to the Ministers or the Secretary of State, even where there was no disagreement or objections to the closure. The Department for Transport commented that, although option 2 had some merit in terms of efficiency, it might not adequately represent local interests.

Option 3: decision by local highway/roads authority, subject to appeal to Secretary of State or Scottish/ Welsh Ministers

8.259 The majority of consultees who answered this question preferred the third option, which would see the local highway or roads authority taking the initial decision on stopping up, subject to an appeal on the merits to the Secretary of State or Scottish/Welsh Ministers. These consultees included the Office of Rail Regulation, the Department for Transport the Railway Industry Association, the British Horse Society, several local authorities and access groups, and Ramblers.

8.260 Many consultees commented that option 3 was preferable as it struck the right balance between local and national interests. The Highland Council, for example, preferred the first option but conceded that the third would provide necessary balance. It commented that "the appeal to Ministers can act as an arbiter and provide assurance if any party was missed in error".

8.261 The highways special interest group of the London & Home Counties and Eastern Branches of Solicitors in Local Government emphasised the capability of the highway authorities to authorise the stopping up of public highways, though this power might have to be circumscribed:

> As Highway Authorities are democratically elected bodies, well positioned to take decisions in the interests of the local community, there seems every reason to give to them the power to authorise the stopping up of highways in general, but in particular at level crossing where there are public safety issues.
>
> Such power could, if necessary, be circumscribed by conditions, that the authority must be satisfied as to the existence of appropriate alternative routes and/ or that the closure is in the interests of public safety, and could also be subject to a right of appeal to the Secretary of State. However, in principle, particularly if a closure is on public safety grounds, the limitations on the exercise of the power should be as few as possible.

8.262 Several consultees warned, however, that the third option had some potential to create delay. The Department for Transport commented that the procedure could be subject to delay "unless time limits are stringently adhered to". On the contrary, Transport Scotland preferred the third option precisely because of the time savings it would bring, suggesting that it "would minimise Parliamentary time and therefore make the whole process quicker".

8.263 Other consultees noted some lack of clarity as to how the third option related to the closure of private level crossings. Cambridgeshire County Council queried whether the public crossing closure system would be used for level crossings in relation to which there were private and public rights of way. Network Rail proposed that "a reduced form of the same procedure be used for closing up private level crossings where these are unable to be closed by agreement".

8.264 Powys County Council and the joint response of Southern Snowdonia (Joint) and Northern Snowdonia Local Access Forums pointed out that as highway authorities do not currently have a duty to consider stopping up orders, any such duty would significantly increase the workload and costs of the highway authority. They suggested that the costs of making such orders should be recoverable from the applicant.

8.265 The Highways Agency and the Department for Transport noted that there was some potential under the third option for Scottish/Welsh Ministers or the Secretary of State to be charged with reviewing their own decision on the stopping up issue. The Highways Agency commented that as trunks roads are directly maintained by the relevant Secretary of State or devolved Minister, it may be necessary to identify a means of creating some independence if a decision about a trunk road were appealed under the proposed procedure. The Department for Transport suggested that in situations where the Secretary of State or Scottish/Welsh Minister was acting as the highway authority, it might not be necessary to follow the proposed two-step process. Cambridgeshire County Council made the point that any appeal should be heard by the Department for Environment, Food and Rural Affairs rather than the Department for Transport, as the Department for Transport did not have sufficient specialist knowledge of issues affecting public rights of way.

Other options

8.266 The Rail Safety and Standards Board proposed a fourth option for consideration, based on a duty of co-operation:

> Initial decision by the local roads highways authority and the rail infrastructure manager, working together under a duty of co-operation, subject to an appeal (etc, as per option 3).

It added that the existence of a duty of co-operation would reduce the adversarial nature of the procedure and would allow the different interests to be seen as complementary, rather than conflicting.

8.267 Network Rail endorsed the above option, but also proposed a procedure of its own similar to that in the Highways Act 1980 and the Roads (Scotland) Act 1984. The procedure would involve the following steps:

> (1) publication of notice of intention to promote order, with pre-publication consultation if appropriate; (2) publication, notification and display of the order; (3) a period of at least 6 weeks for representations to be made; (4) if no objections, confirmation at end of statutory period; or, if objections lodged and not withdrawn, referral to the Secretary of State / Scottish Ministers / Welsh Ministers for consideration of objections; (5) a decision by the Secretary of State / Scottish Ministers / Welsh Ministers to either confirm the order, confirm the order subject to modifications, or refuse to confirm the order; (6) no right of appeal against the determination, save for statutory challenge.

8.268 The Conwy East Local Access Forum preferred that the existing system for closure of level crossings be retained, and did not support any of the three options.

General comments: consultation and a right to an inquiry

8.269 A number of consultees stressed the importance of consultation and the need to ensure that a hearing or inquiry can be held when objections to the stopping up are made. Ramblers and other local access groups emphasised that notice must be served on prescribed organisations and the plans advertised in the usual way. The also commented that objections should be heard by an independent arbiter, such as a planning inspector. Cambridgeshire County Council suggested that only relevant objections should be determined by a public inquiry.

Conclusion

8.270 By far the majority of consultees who answered this question favoured the third option, which was also the option provisionally favoured in the consultation paper. Among these, several consultees expressed some concerns about the resource implications, the possibility for delay, and the potential lack of independence in some cases. The first option was the least popular, while the second option was supported by six consultees. Two consultees suggested an entirely different procedure to determine the stopping up procedure for public highways.

We invite views from consultees on what time-limit for the use of compulsory purchase orders would be appropriate. [CP para 8.86]

Introduction

8.271 Of the 114 consultation responses that were received, 24 responses provided views on what time limit would be appropriate for the use of compulsory purchase orders.

Aligning time limitswith those under existing procedures

8.272 Many consultees suggested tying the time limits for the use of compulsory purchase orders to existing procedures under other legislation.

8.273 Suffolk County Council, the Conwy East Local Access Forum, the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum, and the joint response from the Association of Transport Co-ordinating Officers, the Local Government Association, and the Association of Directors of Environment, Economy, Planning and Transport all suggesting retaining the same time limits that are used in the planning process. Suffolk County Council commented that the time limit for a planning consent outline is three years, and five years for full consent. The time limits for development under a development consent order are set out in section 154 of the Planning Act 2008.

8.274 Other consultees pointed to the current time limits for the exercise of compulsory purchase powers under the Transport and Works Act 1992. Passenger Focus and the Department for Communities and Local Government noted that the powers of compulsory purchase under the 1992 Act must be exercised within five years (paragraph 30 of schedule 1 to the Transport and Works (Model Clauses for Railways and Tramways) Order 2006). Transport Scotland, however, noted that the compulsory purchase powers under the Transport and Works Act 1992 must be exercised within three to five years. These consultees all suggested adopting these same time limits for the exercise of compulsory purchase powers under our proposed closure scheme.

8.275 The Fife Access Forum suggested more generally that the “timescales should be consistent with other compulsory purchase order processes”. In addition to the time limits described above in the context of planning law and the Transport and Works Act 1992, section 4 of the Compulsory Purchase Act 1965 stipulates a general time limit of three years for the exercise of compulsory purchase powers.

Specific time limits

8.276 Only two consultees suggested imposing a time limit shorter than three years. Nia Griffith MP suggested two years, while John Tilly proposed a time limit of three to six months. The Association of Train Operating Companies noted simply that “the time limits should be short”.

8.277 However, the Department for Communities and Local Government cautioned that it could be difficult to introduce a time limit shorter than the three years enshrined in the Compulsory Purchase Act 1965:

> If you wanted a shorter provision for the level crossing compulsory purchase orders that were part of a closure order, it would require some modification of section 4 of the Compulsory Purchase Act 1965. If the likely applicants for a closure order were happy with a shorter time limit, then we would not necessarily object on principle. We should, however, warn people that the three year limit has been in the legislation since 1845 (then as the default time limit), so shortening it could leave acquiring authorities in an awkward position if (say) funding had to be reapplied for or there were unforeseen engineering problems.

8.278 Four consultees proposed a time limit of three years for the use of compulsory purchase powers under our proposed closure scheme. Karl McCartney MP and Lincolnshire County Council suggested a three year limit that was capable of being extended to take compelling mitigating circumstances into account. The National Farmers' Union and the Country Land and Business Association also proposed a three year limit. The Association commented that "it is assumed that the funding and engineering operations are in place so as soon as consent is acquired then work can take place".

8.279 A few consultees proposed a five year time limit. Although Community Safety Partnerships and the Heritage Railway Association did not provide reasons for their suggestion, Network Rail explained why five years might be necessary:

> In determining appropriate time-limits, the engineering aspects of level crossing closures need to be taken into account. These will vary according to local circumstances. It is not uncommon for three years to be needed. An appropriate time-limit, therefore, is something in excess of this. We suggest five years. There may be circumstances where, by agreement, a longer period may be appropriate.

8.280 The Rail Safety and Standards Board suggested that extension of the time limit beyond five years should be permitted "subject to the agreement of both parties and an undertaking that the owner could request compulsory purchase at any time".

Conclusion

8.281 The responses to this question suggested time limits ranging from three months to more than five years. Many consultees looked to existing legislative provisions as a guide to the appropriate time limits for the use of compulsory purchase powers under our proposed closure scheme. In general, a time limit of between three and five years was favoured by most consultees.

We invite views of consultees on whether planning consent should be deemed to be included in a level crossing closure order [CP para 8.87]

Introduction

8.282 Of the 114 consultation responses that were received, 27 responses addressed the question of whether planning consent should be deemed to be included in a level crossing closure order. Twenty-two of those agreed with the proposal and five disagreed.

Support for deemed planning permission

8.283 The majority of consultees who answered this question agreed that planning consent for associated works, such as a replacement bridge or underpass, should be deemed to be included in a level crossing closure order. Network Rail strongly supported the proposal.

8.284 Several consultees explained that deemed planning consent was necessary in cases where the case for closure depended on the existence of an alternative means of crossing the railway. The Rail Safety and Standards Board commented that:

> To grant a stopping up order on the basis that a replacement bridge will be provided without granting planning consent for that replacement bridge seems contradictory.

8.285 Transport Scotland suggested that it would not be necessary to include deemed planning permission in a closure order "where the closure order incorporates stopping up the way without alternative provision".

8.286 Several other consultees agreed with the proposal on the grounds that it would promote efficiency and reduce bureaucracy. The joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum noted that "the alternative of two separate democratic processes seems to labour the point" while John Tilly stated simply that "one process would seem more sensible than several". The Association of Train Operating Companies commented that the inclusion of deemed planning permission in a closure order would serve to simplify and speed up the closure process.

Concerns and cautions

8.287 The Office of Rail Regulation agreed that the proposal could improve the efficiency of the closure process but cautioned that it would be necessary to ensure that the "appropriate planning procedures had been adhered to". Along similar lines, Cambridgeshire County Council emphasised that the process must make provision for adequate consultation at an early stage. It explained that it was "aware of experiences in Kent in this regard and cannot impress too strongly the importance of early engagement with all stakeholders". Perth and Kinross Council also stressed that "neighbours, communities, or other interested parties" must have the ability to comment on the proposals.

8.288 Although the Department for Transport agreed that planning consent should be deemed to be included in a level crossing closure order, it warned that "unless there is a clear process for public objection/appeals this may well lead to a perception of 'stealth' planning permission being granted". The Conwy East Local Access Forum did not support the proposal for similar reasons; it took the view that the separate step of obtaining planning permission was necessary to provide a "procedural check" on the process. Likewise, the joint response from the Association of Transport Co-ordinating Officers, the Local Government Association and the Association of Directors of Environment, Economy, Planning and Transport that planning should remain a separate issue from closure.

8.289 The solicitors' firm Sills and Betteridge considered that the present procedure of obtaining planning permission for development projects prior to making a decision on level crossing closure did not work in practice. The effect of the planning decision preceding the closure decision was that:

> The views of closure supporters and opponents are disregarded in the planning process because level crossing closure is not the issue before the local planning authority. When the question of level crossing closure then comes to be considered, it is hard to engage the public on a matter which they will see as having a foregone conclusion as a result of the local authority's planning decision. Furthermore, the applicant for closure will try to build up a head of steam behind his proposal by virtue of the local planning authority's decision. The question of the level crossing closure thus does not ever receive a fair hearing.

8.290 It suggested that the decision of whether to grant planning permission should be "postponed pending the decision on the proposed level crossing closure". It added that any deemed planning permission would have to be limited to the construction or removal of railway infrastructure.

8.291 Northamptonshire County Council also did not agree that a closure order should include deemed planning permission, "unless the proposed stopping up is being proposed in order to allow a development to take place rather than for safety reasons".

Other considerations

8.292 The Department for Transport noted that it would be necessary to consider how to address the particular planning issues affecting, for instance, areas of outstanding natural beauty and heritage or conservation areas. It suggested that the planning consent procedure under our proposed closure scheme could seek to replicate the "rigorous process" for obtaining planning permission for orders under the Highways Act 1980. Sills and Betteridge solicitors also noted that it would be necessary to consider the effect of the proposal on listed buildings.

8.293 Passenger Focus noted that the inclusion of deemed planning consent in a level crossing closure order mirrored the procedure available for works authorised under the Transport and Works Act 1992, as per section 16 of that Act. The Department for Transport pointed out however, that planning permission is not actually included in a Transport and Works Act 1992 order, but is "the subject of a separate direction (under section 90(2A) of the Town and Country Planning Act 1990) that planning permission be deemed to be granted".

Conclusion

8.294 Most of the consultees who answered this question thought that it would be both practical and efficient to include deemed planning permission in a level crossing closure order. Several cautioned, however, that it would be necessary to ensure that there was the opportunity for effective consultation and for objections to be heard.

We provisionally propose that level crossing closure orders should be capable of including provision for the apportionment of the costs of closure and replacement between the statutory authorities concerned [CP para 8.89].

We invite consultees to comment on the apportionment of costs of closure and replacement of level crossings [CP para 8.93].

Introduction

8.295 Of the 114 consultation responses that were received, 39 responses addressed the proposal that level crossing closure orders should be capable of including provision for the apportionment of the costs of closure and replacement between the statutory authorities concerned. Twenty-one of those agreed with the proposal and 18 disagreed.

8.296 Most of the consultees who disagreed with this proposal did not oppose the general idea of allowing apportionment of costs to be provided for in a level crossing order. Rather, much of the disagreement centred on *how* the costs should be apportioned. Many consultees did not agree with our analysis at paragraphs 8.90 to 8.92 of the consultation paper and proposed alternative approaches to the apportionment of the costs of closure. These consultees are included above as consultees who disagreed with the proposal.

Costs should be borne by promoter

8.297 Nearly half of the consultees who opposed this proposal believed that the costs of closure should only be apportioned between the promoters of the closure order. Sills and Betteridge Solicitors provided the example of a closure advocated by Network Rail and a highway authority, and opposed by a district or parish council. It felt that the district or parish council should not be forced to pay any of the costs of closure.

8.298 Access groups such as Ramblers, the Open Spaces Society, the Vale of Glamorgan Local Access Forum and the Central Bedfordshire and Luton Joint Access Forum also took this view. The National Farmers' Union commented that closure orders benefiting both rail and road interests should be applied for jointly, allowing for appropriate apportionment of costs:

> As the applicant will be the organisation benefiting from the closure, it is appropriate that they pay the costs associated with that closure. If both road and rail users will benefit from a closure then it would be appropriate for both interests to jointly apply for a closure order and share the financial burden in this way.

8.299 Several other consultees suggested that the "promoter pays" principle should be adopted as a default rule, with apportionment occurring only if the closure would also benefit other parties. Cambridgeshire County Council commented that the highway authority would have to agree that the closure was in its interest before it should be made to share the cost of closure. The Bridgend Local Access Forum commented that highway authorities currently have the option to split the costs of closure if it is considered to be in the public interest, and should be entitled to carry on with this informal arrangement.

8.300 The Conwy East Local Access Forum suggested that this approach was fair to the local authorities concerned:

> The promoter of a closure should be responsible for its full cost unless it can be demonstrated that there will be benefit to another party. It is not right that a statutory authority should have costs forced upon it by a (probably) private sector commercial interest over an issue that is not of direct value to the authority. … The public purse should not be raided for the private gain of commercial interests.

8.301 The Department for Transport agreed that level crossing closure orders should be capable of providing for the apportionment of costs, but it queried why the Law Commissions had rejected the default rule that the promoter should pay unless contrary provision is made in the closure order. It noted that this rule is essentially the same as the provision made for apportionment of costs in section 255 of the Highways Act 1980, of which the Law Commissions approved in paragraph 8.92 of the consultation paper. Transport Scotland echoed this query, suggesting that it "seems a reasonable default and a basis from which to argue changes".

8.302 Network Rail, Association of Train Operating Companies and Passenger Focus thought that section 255 of the Highways Act 1980 provided a suitable framework for the apportionment of the costs of closure. Network Rail added that the economic model Alternative to Level Crossings Assessment Tool developed by the Rail Safety and Standards Board could be used in conjunction with section 255 of the 1980 Act to make recommendations on the apportionment of costs. Northamptonshire County Council suggested instead that other provisions in the Highways Act 1980 – namely sections 28, 118A and 119A – were adequate, and thus no change was necessary.

Costs should be borne by the railway industry

8.303 Four consultees suggested that the railway industry should always pay the costs of closure. The Hampshire Countryside Access Forum and the Hampshire County Council Countryside Service took the view that as it is the railway industry that anticipates the greatest risk from level crossings, it should bear the costs of closure. The former consultee wrote:

> Railways and public rights of way largely co-exist with a low level of incidents, despite the increased speed and frequency of rail travel over recent decades. The risk from public rights of way is therefore low and the cost of mitigation measures put forward by the railway industry, who would appear to perceive a higher level of risk, should be borne by the railway industry.

8.304 Monmouthshire County Council and the Institute of Public Rights of Way and Access Management, agreed that the "cost of all mitigation measures on the public right of way network should be borne by the railway industry".

8.305 The Egham Chamber of Commerce and Suffolk County Council suggested that the railway operator should pay for the costs associated with the closure itself, while the costs of building a diversion – such as a bridge or overpass – could be apportioned between the railway operator and the highway authority.

Other considerations

8.306 Community Safety Partnerships Ltd was the only consultee to suggest that the costs of closure and replacement should always be shared equally between the railway infrastructure manager, the highway authority and the local authority. If the local authority and the highway authority are the same entity, then it proposed that the costs should be divided equally between that entity and the rail authority.

8.307 The Heritage Railway Association supported the proposal to allow a closure order to provide for the apportionment of costs between the relevant parties. However, it warned that "the proposal may be appropriate when all the parties are large statutory bodies but not when heritage railways are involved". It suggested adopting an individual, case-by-case procedure for allocating costs. Transport Scotland also commented that the circumstances associated with the closure should determine which parties should contribute to the costs of closure. For instance, level crossing replacements should be funded by the developer (possibly with a contribution from the railway infrastructure manager) where the need for replacement arose as a result of the developer's proposed project.

8.308 The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum suggested in their joint response that the closure order could provide general guidance on how to reach agreement on the apportionment of costs, rather than stipulate precisely how much is to be paid by each party. They commented that "this ultimately has to be dealt with on a case by case basis which could then be sealed as part of the order once joint agreement was reached by all parties".

8.309 The Rail Safety and Standards Board agreed strongly that a closure order should be capable of providing a legally binding statement on the apportionment of costs. It explained that the economic model Alternative to Level Crossings Assessment Tool demonstrates that the costs of closure should not fall exclusively to the local authority involved:

> It was concluded that apportioning scheme construction costs directly to the authority under which they are traditionally associated is likely to result in an unacceptable distribution between road and rail authorities. This could discourage one or both authorities from making progress with the scheme, even where there are clear benefits to be gained. It was concluded that a method of distributing costs that produces a similar 'return on investment' both for the road and rail authorities involved would be preferable.

Conclusion

8.310 Only a small majority of consultees who answered this question agreed with the proposal. However, as explained above, much of the disagreement related not to the provision for level crossing orders to stipulate the apportionment of costs, but to the way in which we proposed to apportion costs between the parties. Many consultees wanted the promoter to bear all the costs of closure, while others suggested that the costs should fall to the railway operator. Others suggested that a case-by-case approach was warranted.

We provisionally propose that the procedure for level crossing closure orders should be subject to short time-limits at each stage, including consideration by the Secretary of State/Scottish Ministers/Welsh Ministers [CP para 8.95].

We ask consultees for their views on what time-limits there should be for the application process [CP para 8.96].

Introduction

8.311 Of the 114 consultation responses that were received, 35 responses addressed the proposal that the procedures for level crossing closure orders should be subject to short time-limits at each stage, including consideration by the Secretary of State or Scottish/Welsh Ministers. Eighteen of those agreed with the proposal, 10 disagreed, and seven were equivocal.

8.312 Seventeen consultees provided views on the provisional time-limits for the application process for a simple closure set out at paragraph 8.97 of the consultation paper. Nine agreed with the time-limits as proposed, while ten disagreed or suggested other time limits.

Comments on the proposed time-limits

8.313 A small majority of consultees agreed that the time-limits for each stage of the level crossing closure procedure should be relatively short, including Network Rail, several local authorities, access groups such as Ramblers and the Open Spaces Society, Association of Train Operating Companies, and the Rail Safety and Standards Board.

8.314 The time-limits proposed in the consultation paper for a simple closure order, not involving the stopping up or diversion of a highway or road, were:

(1) serving the application to commencement of application: 1 month;

(2) consultation: 12 weeks;

(3) determination by the national authority (following any further proceedings necessary): 2 months.

8.315 As noted above, just over half of the consultees who commented on those time-limits either disagreed with them or proposed some modifications to them.

8.316 The Department for Transport suggested adopting a procedure similar to those used for works under the Transport and Works Act 1992 and the Planning Act 2008, which emphasise the role of pre-application consultation. It suggested that "front-loading" the procedure with a pre-application consultation phase would allow for "a more streamlined process for consideration of closure orders". If this approach were taken, a shorter "objection period" of three or four weeks could follow the application for an order.

8.317 The Heritage Railway Association was the only consultee to comment specifically on the time-limit proposed for the first phase, suggesting that it be extended from one month to 12 weeks.

8.318 Several consultees, primarily access groups, emphasised the importance of the second phase of the closure order application process: consultation. Sills and Betteridge Solicitors did not take issue with the time-limit proposed, but explained the need for a lengthy consultation period:

> There needs to be sufficient time between the publication of a proposal and the closing date for representations to enable proponents and opponents of the proposal to coalesce into groups, to obtain professional representation and to make submissions. Thereafter, the proposals can take a fairly rapid course.

8.319 The joint response from Southern Snowdonia (Joint) and Northern Snowdonia Local Access Forums echoed the point that individuals or organisations need sufficient time to respond, and suggested that "if tight time limits are insisted upon, then an appeal process will need to be put in place to ensure the process is seen to be fair". The Country Land and Business Association also argued that the time limit proposed for consultation was too short:

> Allowing an individual only one month to get together a professional team to respond to a closure order is insufficient - it may take him all that time to get his advisors on to the particular site to get a full picture of what is proposed. There should be time within the consultation period to submit representations but also to have discussions with the relevant authority. Twelve weeks might only allow you time to submit your objections, but would allow no time for negotiation over the proposal.

8.320 Ramblers and the Open Spaces Society commented that the consultation period should last at least 42 days, while the National Farmers' Union suggested extending it from 12 to 16 weeks.

8.321 Two consultees, Nia Griffith MP and the Country Land and Business Association, suggested extending the proposed time-limit for the third stage of the closure application process: determination by the national authority. Nia Griffith MP proposed a time-limit of 39 weeks rather than the two months proposed in the consultation paper. The Country Land and Business Association thought that two months was not a sufficient length of time for the national authority to make a determination "on a case that may have taken at least three months to put together". It was concerned that insufficient attention would be paid to the issues raised during consultation, and that as a result decisions could end up being "politically motivated or rubber stamped rather than properly, fully and completely considered".

8.322 Transport Scotland added that along with eight weeks to consider the results of the consultation, the national authority should have four weeks to publish the confirmed closure order.

8.323 Community Safety Partnerships proposed a different set of time-limits for the closure application procedure:

> Within 60 days of an application to close a level crossing a 60 day public consultation period should begin. Within 60 days of the ending of the consultation there shall be a decision. Any appeal should be lodged within 30 days and a final decision by the secretary of state shall follow within a further 60 days.

8.324 The Rail Safety and Standards Board suggested that the entire process should not exceed 12 months, while John Tilly suggested a six to 12 month period for the entire procedure. Likewise, Powys County Council commented that a closure application affecting a public right of way would need at least six months to be considered.

8.325 Finally, Sills and Betteridge Solicitors suggested that a closure order should require the closure of the level crossing within a defined period. The period should be relatively short where there is no related development. Where there is a related development, that period should be no longer than the period for planning permission to be implemented.

Arguments against short time-limits

8.326 Three consultees took the view that short time-limits for each stage of the closure order application process were unrealistic. Lincolnshire County Council and Karl McCartney MP commented that, in their experience, even a simple traffic regulation order could take up to nine months to process. The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented in their joint response that:

> There will be very few “simple” closures. Every closure will affect someone and there needs to be sufficient time to consult, consider options and negotiate. Thorough consultation and democratic processes can become protracted. Budgeting cycles and developer timescales also need to be considered in many cases. The aim of a short time-limit seems admirable but is unlikely to be practical.

Suffolk County Council made a similar point, commenting that more complex applications for closure would require more time to process.

8.327 The Vale of Glamorgan Local Access Forum argued that the introduction of time-limits would place an undue burden on the resources of local authorities, who may have to accelerate level crossing closure orders at the expense of other orders. The Hampshire County Council Countryside Service, Monmouthshire County Council, and the Institute of Public Rights of Way and Access Management commented that it would be necessary to ensure that local authorities had adequate resources before timeframes could be reduced.

8.328 The Bridgend Local Access Forum queried why Network Rail, the likely promoter of closure orders, should benefit from shorter time-limits as compared to other order-making processes. It also suggested that short time-limits could result in rushed decision-making and the unsatisfactory resolution of important issues. The Forum preferred that there not be any time-limits in the closure process.

Other issues

8.329 The Office of Rail Regulation did not comment on the proposed timeframe, other than agreeing that the time-limits should be strict. However, it suggested that the process followed for the closure of railway stations could be used as a model for the level crossing closure procedure.

8.330 Network Rail commented that it was not clear whether the time-limits proposed at paragraph 8.97 of the consultation paper related equally to private level crossing closures, but suggested that they should. The Department for Transport queried what was meant by a "simple" closure order, and commented that it might be difficult to determine at the outset whether an application for a closure order would be classed as simple or more complex. It added that a "fast track process" should be available for cases in which closure was agreed between the owner of a private right of way and the railway infrastructure owner.

Conclusion

8.331 Although a small majority of consultees who answered the question agreed that short time-limits should be imposed at each stage of the process, there was considerable disagreement with the time-limits that were proposed. The most contentious point was the period of time granted for consultation. Several consultees opposed the use of short time-limits on the ground that they were not practical and would impose undue resource constraints on local authorities.

We invite views on what the time-limits should be for closure orders including the stopping up or diversion of a highway or road [CP para 8.99].

Introduction

8.332 Of the 114 consultation responses that were received, 21 responses provided views on what the time-limits should be for closure orders including the stopping up or diversion of a highway or road.

General guidance

8.333 Although many consultees specified time-limits that might apply in this situation, others provided more general suggestions. Network Rail, commented that "to be effective, the process needs to be speedy without compromising on fairness". Both the Association of Train Operating Companies and Ken Otter stressed that the time-limits should be as short as possible.

8.334 The Highways Agency commented that the length of time required to assess adequately all relevant factors will vary "from scheme to scheme", and as such the time-limits should be long enough to take this into account.

Extended time-limits for closure involving stopping up or diversion

8.335 Many consultees suggested extending the time-limits for the closure application process when it involves stopping up or diverting a highway or road. The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum proposed a longer period of consultation in this instance, of 16 weeks rather than 12. The Egham Chamber of Commerce also suggested extending the first steps of the process to at least four months, "since in practice most people don't read public notices and a process can be nearly over before the most affected people become aware of it".

8.336 Suffolk County Council and the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that although a six month time-limit (as proposed for simple closures) would be "ideal", the process for stopping up or diverting a highway can be protracted and might need to be extended to 12 months. Lincolnshire County Council and Karl McCartney MP suggested that the total time period for the closure process in this case should be between 12 and 24 months.

8.337 The Rail Safety and Standards Board commented that the length of time needed to close a level crossing would depend on the type of crossing under consideration:

> For the closure of a little used foot path where no diversion works are required 28 days should be adequate. However, for closures that require significant compulsory purchase and bridge design works which may have to be aligned with level crossing renewal programmes and other large scale redevelopment plans which will not commence in detail until the closure order is granted, a ten year period may be appropriate.

8.338 Ten years was the longest period of time suggested by any consultee.

Retain existing or similar time–limits as for closure of roads

8.339 Several consultees proposed that the time-limits for closure of a level crossing involving the stopping up or diversion of a highway or road should mirror the existing time-limits for the closure of roads outside the level crossing context. Passenger Focus commented that:

> Passenger Focus sees no a priori reason why the time limits set for the closure of a crossing and the stopping up or diversion of a road in these circumstances should differ from those prescribed in legislation governing the closure of roads for any other reason.

8.340 Likewise, the Hampshire County Council Countryside Service, Northamptonshire County Council, and the joint response from the Association of Transport Co-ordinating Officers, the Local Government Association, the Association of Directors of Environment, Economy, Planning and Transport and the Hampshire County Council commented that the current timescale for the stopping up and diversion of highways or roads was “adequate”.

8.341 Community Safety Partnerships proposed using the same time-limits for closure orders involving stopping up or diversion as for the simple closure process.

Conclusion

8.342 The responses to this question were fairly evenly balanced. Some suggested extending the time-limits if the closure involved the stopping up or diversion of a highway or a road. Others suggested that the existing time-limits for the stopping up of highways or roads should be mirrored. Several consultees commented on the importance of striking the right balance between a swift procedure and a fair one that is able to take all relevant factors into account.

We provisionally propose that, after the expiry of the consultation period, the Secretary of State/Scottish Ministers/Welsh Ministers should decide whether, exceptionally, to hold a hearing before a person appointed by them. Otherwise, further consideration of competing views should be dealt with by the exchange of written representations [CP para 8.103].

Introduction

8.343 Of the 114 consultation responses that were received, 30 responses addressed the proposal that, after the expiry of the consultation period, the Secretary of State or Scottish/Welsh Ministers should decide whether, exceptionally, to hold a hearing or whether further consideration of the matter should be dealt with by the exchange of written representations. Sixteen of those agreed with the proposal, nine disagreed, and five were equivocal.

Support for the proposal

8.344 A small majority of consultees who answered this question agreed that a hearing should be held only in exceptional circumstances. These consultees included the Department for Communities and Local Government, Network Rail, the Heritage Railway Association, two trade associations, three local access forums, and the Rail Safety and Standards Board.

8.345 Most of the consultees who agreed with the proposal did not provide reasons for their support. Passenger Focus, who were among those who agreed with the proposal, commented that the reasonableness of the Secretary of State or Scottish/Welsh Ministers' decision would still be subject to judicial review.

Problems with holding a hearing only in exceptional circumstances

8.346 Several consultees opposed this proposal on the grounds of lack of fairness. The Country Land and Business Association commented that the proposal would significantly disadvantage parties considered “statutory objectors” under the current closure system, who have an automatic right to a hearing. The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum stressed that a hearing must always be held where there are significant objections to the proposal, while the National Farmers’ Union commented that a person who objects to a compulsory purchase order must have the right to a hearing. Likewise, the Wiltshire and Swindon Countryside Access Forum suggested that:

> When it is proposed to stop up or divert a highway, a public local inquiry or hearing should always be the first choice unless objectors agree to determination by written representations. Fairness should take precedence over cheapness.

8.347 Sills and Betteridge commented that the closure of a level crossing involving a public highway should be determined by means of a public inquiry, as it “will involve considerable local interest”. They argued that public inquiries should be held even for the closure of private level crossings, as an inquiry could have the effect of bringing to light other people’s claims to rights of way over the crossing.

8.348 The Department for Communities and Local Government and the Department for Transport raised the issue of the proposed procedure's compliance with human rights legislation. The former consultee explained that the current procedure for compulsory purchase orders and compensation has been held in the case law to meet the requirements of articles 6(1) and 8 of and article 1 of the First Protocol to the European Convention on Human Rights (incorporated into UK law by the Human Rights Act 1998). The Department for Communities and Local Government suggested that it would be necessary to ensure that any new, analogous procedure – designed to be faster and less onerous – was in line with these requirements. Department for Transport commented that, if human rights legislation did impose a right to be heard "for anyone whose land would be subject to compulsory acquisition powers" or whose rights would be extinguished by the closure procedure, then a hearing would have to be available not only in exceptional circumstances.

8.349 The Department for Transport raised three other issues concerning the proposal. First, it suggested that an inquiry or a hearing might actually be more efficient than written representations in some cases:

> It may also sometimes be more efficient to hold an inquiry or hearing, even where not strictly required, if the nature and extent of objections were to make the written representation procedure impracticable.

8.350 Second, it voiced concern that the proposed procedure for objections to closure, were already available under the Highways Act 1980 but under that Act the right to a hearing in certain circumstances was automatically triggered.

8.351 Finally, the Department and Transport Scotland took the view that it would be necessary for promoters of a level crossing closure order to have some degree of certainty as to whether to apply for an order under the new procedure or under the Transport and Works Act 1992:

> An applicant ought to be entitled to expect that an application properly made should be seen through to a decision, rather than be informed possibly four months after making an application that the proposal should instead have been made under the Transport and Works Act 1992 procedure. Unless detail is contained in specific guidance it would be difficult for promoters to know which process to use, while if an application is refused this presumably has cost and resource implications for the promoter.

8.352 The joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that it was unclear what circumstances would be considered sufficiently "exceptional" to trigger a hearing.

Other options

8.353 A few consultees suggested that the procedure followed by the Planning Inspectorate in respect of public path orders should be adopted here. Ramblers explained:

> Whilst the Planning Inspectorate may decide on the most efficient way of deciding a case, it remains open to an objector to ask to be heard. If a local authority, including a parish or community council, is amongst the objectors then there must be an inquiry.

8.354 This suggestion was also made by the Open Spaces Society and Cambridgeshire County Council.

8.355 Finally, the Hampshire County Council Countryside Service, Monmouthshire County Council, and the Institute of Public Rights of Way and Access Management commented that it would be appropriate for the Secretary of State or Scottish/Welsh Ministers to rely on their existing criteria for deciding whether objections should be heard through an inquiry or by written submissions.

Conclusion

8.356 This proposal received moderate support. Although a majority of consultees agreed that the Secretary of State or Scottish/Welsh Ministers should decide whether, exceptionally, to hold a hearing in place of written representations, several disagreed. Many of the consultees who disagreed suggested that a hearing or public inquiry should always be available in the interest of fairness and compliance with human rights obligations, while others suggested replicating existing procedures.

Provisionally we do not consider that it is necessary to exclude the possibility of obtaining a TAW/S order where a level crossing closure order may be obtained, or the other way round, but we invite consultees' views [CP para 8.106].

Introduction

8.357 Of the 114 consultation responses that were received, 23 consultees provided views on whether it is necessary to exclude the possibility of obtaining a Transport and Works Act 1992 (or Transport and Works (Scotland) Act 2007) order where a level crossing closure order may be obtained, or the other way around. Twenty of those agreed that the two procedures should be available, one disagreed, and two were equivocal.

8.358 The consultees who answered this question were overwhelmingly in favour of retaining the possibility of obtaining a Transport and Works Act 1992 order for the closure of a level crossing, alongside our proposed procedure.

Reservations with retaining two parallel procedures

8.359 Devon County Council was the only consultee to disagree with the proposal, on the grounds that retaining the two options would cause confusion. Northamptonshire Country Council said that it did not wish to comment on the question as it opposed the proposals for a new closure regime and believed existing legislative procedures were sufficient. Although the Office of Rail Regulation had no strong views on the matter, it commented that guidance would be useful to assist promoters in deciding which procedure to follow. The Department for Transport echoed the need for guidance.

8.360 While Powys County Council agreed that the possibility of obtaining a Transport and Works Act 1992 order should be retained for large or complex schemes, it noted that it was unlikely a Transport and Works Act 1992 order would be sought given the greater cost and the cumbersome procedure involved. It added that:

> Proposals affecting individual level crossings only should ideally be assessed using a single process and against a single set of criteria. Any appeal or reconsideration mechanism needs to be built in to the level crossing order process, in an analogous way to other orders, rather than offering two separate procedures to achieve the same effect in the same circumstances.

8.361 Cambridgeshire County Council commented that having the two procedures would be acceptable.

The value of having two possible procedures

8.362 Although the vast majority of consultees who answered this question agreed that promoters of closure should be able to choose which procedure to follow, very few provided reasons for their position.

8.363 Passenger Focus endorsed the analysis at paragraph 8.105 of the consultation paper, commenting that:

> It would be undesirable to require promoters of schemes under the Transport and Works Act 1992 to have to follow a separate but parallel procedure in order to obtain consent for any consequential crossing closures (or, indeed, openings).

8.364 Transport Scotland suggested that it would be appropriate for the Transport and Works Act 1992 procedure to be used when a level crossing closure order was sought as part of a larger project. The Department for Transport argued that it would be sensible to leave the choice of which procedure to follow for closure, to the promoter of the closure order. Finally, Ramblers approved of retaining the possibility of applying for closure under the Transport and Works Act 1992, as the Transport and Works Act 1992 procedure "provides that an order may not be made extinguishing a right of way unless the Secretary of State is satisfied that an alternative right of way has been or will be provided, or that no alternative is required".

Conclusion

8.365 Most consultees who provided views on whether the Transport and Works Act 1992 procedure should exist in tandem with the proposed closure regime agreed that both procedures should be available. It was suggested that guidance be provided to assist the promoter in deciding which process to follow.

We therefore provisionally propose that level crossing closure orders should be statutory instruments and that they should be treated as general instruments [CP para 8.111].

Introduction

8.366 Of the 114 consultation responses that were received, 23 responses addressed the proposal that level crossing closure orders should be statutory instruments and that they should be treated as general instruments. Eighteen of those agreed with the proposal, three disagreed, and two were equivocal.

Public accessibility

8.367 The National Farmers' Union and Passenger Focus, supported the proposal that level crossing closure orders should be statutory instruments on the grounds that it would improve their accessibility for the public.

8.368 The Department for Transport and the Office of Rail Regulation, on the other hand, argued that there were other means of ensuring the public could access level crossing closure orders. The Department commented that "modern electronic access would make non-SI closure orders just as accessible", both consultees added that the Office of Rail Regulation publishes enforcement notices on its website.

Necessity of treating closure orders as statutory instruments

8.369 The majority of consultees who answered this question agreed with the proposal, without elaboration. Nia Griffith MP described the proposal as "desirable for the sake of practicality".

8.370 However, there were several responses opposing the proposal or raising significant concerns with it. The Department for Transport and the Office of Rail Regulation did not support the proposal. The Office of Rail Regulation commented that "making closure orders statutory instruments would be overly bureaucratic and would represent legislative overkill". The Department for Transport provided several reasons for opposing the proposal. It commented that:

> The additional bureaucracy and resource implications involved in producing statutory instruments (such as explanatory memorandums and Ministerial involvement) would not be welcome and not in line with the principles of this review.

8.371 Along with the accessibility point made above, the Department took the view that the proposal was not in line with Sir Philip Hampton's 2005 review on reducing administrative burdens[3] or the Government's attempts to reduce regulation across all departments. It also commented that treating closure orders as statutory instruments could increase the overall timescale for the closure procedure, especially if the statutory instrument were used to alter primary legislation – which would require the involvement of Parliamentary Counsel. Third, it did not see the necessity of allowing statutory instruments to amend, revoke or re-enact the statutory instrument itself:

> We are not clear on the need to "amend/revoke/re-enact" the SI as once a highway is stopped up revoking a closure order would not make the highway again - orders would have to be made in order to create a new highway. We can think of no examples when this provision might be needed […].

Conclusion

8.372 Most of the consultees who answered this question agreed with the proposal to treat level crossing closure orders as statutory instruments, for reasons of practicality or public accessibility. However, both the Office of Rail Regulation and the Department for Transport opposed the proposal, arguing that it was not necessary and, in the Department's view was neither in line with current Government policy nor the aims of the project.

[3] Sir Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) HM Treasury, www.berr.gov.uk/files/file22988.pdf (last accessed 31 May 2013).

We provisionally propose that under the new system for closure of level crossings, the function of making level crossing closure orders in relation to both public and private level crossings in Scotland should be transferred to the Scottish Ministers [CP para 8.116].

We therefore provisionally propose that under the new system for closure of level crossings, the function of making level crossing closure orders in relation to both public and private level crossings in Wales should be transferred to the Welsh Ministers [CP para 8.119].

Introduction

8.373 Of the 114 consultation responses that were received, 12 responses addressed the proposal that, under the new system for closure of level crossings, the function of making level crossing closure orders in relation to both public and private level crossings in Scotland should be transferred to the Scottish Ministers. All 12 of those agreed with the proposal.

8.374 Thirteen responses addressed the proposal that the function of making level crossing closure orders in relation to both public and private level crossings in Wales should be transferred to the Welsh Ministers. All 13 of those agreed with the proposal.

8.375 As the responses to these two proposals were almost identical, they are analysed together.

Executive devolution to Scottish and Welsh Ministers

8.376 These two proposals were unanimously endorsed by the consultees who addressed them in their responses.

8.377 In general, consultees agreed that it was desirable to avoid the possibility of conflict between Scottish or Welsh Ministers and the Secretary of State in the proposed closure procedure. Passenger Focus added that it would be "sensibly consistent with the role of the devolved administrations in relation to transport generally". The Department for Transport took the view that the proposals had merit, but deferred to the Scottish and Welsh Governments for their views. Network Rail agreed with the proposals but noted "the potential difficulties arising from doing so in a HSWA-style system".

8.378 The access groups Scotways and Bridgend Local Access Forum responded only to the Scotland-specific proposal. Bridgend Local Access Forum supported the proposal subject to its comments on the importance of public consultation and the need for clearly defined procedures in the closure process.

8.379 Transport Scotland commented that Scottish Ministers were content for the Law Commissions to propose this devolution of powers, but required a more detailed analysis of the options before arriving at a definitive view. He agreed that the proposal could serve to avoid conflict between the Scottish Ministers opposing an order to stop up a road and the Secretary of State supporting the closure of a level crossing. However, Transport Scotland also commented:

This preference is subject to the comments made in response to Paragraph 8.84, where it may be preferable, in the first instance, to agree closure of private level crossings between the owner of the level crossing and the private right of way owner and only appeal to the Scottish Ministers if the closure application is contested.

Similarly, this preference is also subject to the comments made in response to Paragraph 8.84, where it may be preferable, in the first instance, for highway/road authorities to make level crossing closure orders and only appeal to the Scottish Ministers if the closure application is contested.

8.380 Three consultees addressed the proposal only as it applied to Wales: Nia Griffith MP, the Conwy East Local Access Forum, and the joint response from Southern Snowdonia (joint) and Northern Snowdonia Local Access Forums. They all agreed with the proposal, the latter consultees describing it as “logical” in their joint response.

Conclusion

8.381 All consultees who answered these questions agreed that Scottish and Welsh Ministers should be given the power to make level crossing closure orders for both public and private level crossings in Scotland and Wales, respectively.

We invite views of consultees on whether it would be useful to introduce a system of infrastructure agreements for level crossings [CP para 8.126].

Introduction

8.382 Of the 114 consultation responses that were received, 29 consultees provided views on the question of whether it would be useful to introduce a system of infrastructure agreements for level crossings. Twenty-two consultees agreed that such a system would be useful, four disagreed, and three were equivocal.

Benefits of infrastructure agreements

8.383 The majority of consultees who answered this question commented that a system of infrastructure agreements could be a useful way of enhancing the co-operation and involvement of all relevant parties in managing level crossings.

8.384 A few consultees specified that infrastructure agreements might be best used for major changes, such as those suggested at paragraphs 8.124 and 8.125 of the consultation paper. Nia Griffith MP, for instance, emphasised that the agreements would not be appropriate "for routine use" but should be used in the case of major changes at a crossing. The Department for Transport also specified that infrastructure agreements would be most useful where changes to the crossing arrangements are contemplated, rather than for closure:

> In our view an infrastructure agreement would focus on the effective management and interaction of the infrastructures for both convenience and safety whilst a crossing is in operation. Establishing such an agreement prior to the curtailment of that interaction could potentially be seen as wasteful.

8.385 Network Rail commented that an overarching agreement on infrastructure requirements would "facilitate improved understanding and from that, improved management of the infrastructure".

8.386 Different views were expressed as to whether the agreements should be voluntary or compulsory. On the one hand, the Department for Transport and the Heritage Railway Association argued that infrastructure agreements should be entered into voluntarily. On the other hand, Passenger Focus warned that, if the agreements were voluntary, they may prove to be no different in practice from existing road-rail partnership groups. They commented that a more formal structure for agreements may be required if the proposal to reform the system for regulating safety and closure at level crossings is adopted. Transport Scotland also commented that "if infrastructure agreements are to be managed collectively then the system would need to be compulsory and include railway operators, road and planning authorities". However Transport Scotland opposed the proposal on the grounds that such agreements could end up diluting the current simple safety management process.

8.387 Devon County Council noted that the proposed infrastructure agreements would have much in common with existing detailed local operating agreements, entered into between highway authorities and the Highways Agency. It explained that the detailed local operating agreements are useful as "a mechanism for agreeing operational procedures to ensure a joined up network and maintain traffic flow in the event of an incident". The agreements also have the benefit of confirming each party's roles and responsibilities in particular circumstances.

8.388 The Bodmin and Wadebridge Railway Company suggested that a model infrastructure agreement could be produced, not to be used verbatim in all instances but as a useful "aide-memoire" to assist the parties in ensuring that the agreement covers all the important points. Community Safety Partnerships suggested that the parties to be included in an infrastructure agreement should be listed in regulations, that an agreement should be reached within five years, and that it should be reviewed every five years (or sooner if there is a material change to the circumstances of the crossing).

Concerns about infrastructure agreements

8.389 Two consultees did not support the need for infrastructure agreements on the basis that the existing structures for reaching agreement were sufficient. John Tilly took the view that the present system of level crossing orders already provided a means of reaching agreement between the parties. Similarly, Northamptonshire County Council explained that, as sections 118A and 119A of the Highways Act 1980 already provided for the "formulation of agreements between rail operators and highway authorities prior to the making of orders", there was no reason to implement infrastructure agreements.

8.390 Sills and Betteridge Solicitors acknowledged the merits of the proposal, but cautioned that it would be necessary to guard against certain dangers:

> Developers, train operating companies and Network Rail have much to gain from the closure of level crossings. There will undoubtedly be cases where they would be happy to "buy" the closure of a level crossing. … Appropriate safeguards need to be put in place to prevent the buying of level crossing closures.

8.391 The Egham Chamber of Commerce commented that infrastructure agreements requiring advance consultation between parties would be desirable. But it noted that those with an interest went beyond developers, rail, road, and planning interests. They commented that they "would like a more open forum with representation by/of the lowest tier of lowest government".

Duty to co-operate

8.392 Several consultees suggested that a duty to co-operate may be more useful than the introduction of infrastructure agreements. Association of Train Operating Companies took the view that a duty to co-operate could be "of wider assistance" than a system of infrastructure agreements. The Office of Rail Regulation, while acknowledging that there was merit in the proposal to introduce infrastructure agreements, suggested that the duty of co-operation could be structured in a similar way to that in regulation 22 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006 ("ROGS"), whereby:

> …every transport operator should co-operate, insofar as is reasonable, with any other transport operator operating on the same system to achieve its safe operation. In practice, this regulation has been used to bring together significant dutyholders (for example in the context of large station sites) and has obvious parallels with the various actors and issues involved in managing risks at level crossings.

8.393 The Office of Rail Regulation suggested that the duty could incorporate matters of safety and convenience and supporting guidance could be used to "set out the critical success factors for effective co-operation and consultation, without prescribing a model for it". Network Rail also noted that regulation 22 of Transport Systems (Safety) Regulations 2006 provided a useful template for co-operation arrangements.

Conclusion

8.394 Although the majority of consultees who answered this question took the view that infrastructure agreements could be useful, several consultees cautioned that existing systems and legislation, or a specific duty to co-operate, would be of equal or even greater assistance in securing agreement between the relevant parties.

We provisionally propose the expansion of the role of road-rail partnership groups, as they have proven to be successful in bringing together the various and often competing interests dealing with matters relating to level crossings [CP para 8.131].

Introduction

8.395 Of the 114 consultation responses that were received, 32 responses addressed the proposal to expand the role of road-rail partnership groups. Twenty-three of those agreed with the proposal, four disagreed, and five were equivocal.

The need for road-rail partnership groups

8.396 It was clear from the responses to this question that there was a need to improve or enhance the level of communication and inter-agency working of both rail and road interests. Tom Craig mentioned that there was:

> …a simple lack of understanding between the railway people running trains on one side of the interface with those crossing the railway or involved in some way on the other side of the interface.

8.397 Several consultees commented that their own involvement with road-rail partnership groups had been positive, and welcomed their expansion. Network Rail commented that the groups had been useful in bringing together various stakeholders including planning authorities and highway authorities to discuss and make progress on issues such as level crossing closure, road congestion and traffic controls. The Department for Transport took the view that road-rail partnership groups were a useful means of forging links between stakeholders, while the National Farmers' Union, Powys County Council and the Bridgend Local Access Forum thought that the groups were helpful in that they brought together conflicting interests to discuss issues, reach solutions and strengthen the lines of communication.

8.398 Powys County Council added that the road-rail partnership meetings were useful in providing a single regional point of contact with Network Rail. David Allen on behalf of communities in South Lincolnshire and North Cambridgeshire, stressed that a "multi-agency solution" was necessary to remedy the problems at level crossings.

Duty to co-operate

8.399 A few consultees suggested that, instead of expanding road-rail partnership groups, a duty to co-operate could be imposed on highway authorities and rail operators. The Railway Industry Association considered that many of the present problems, including the need for railway operators to seek permission from local authorities to conduct work on the crossing, could be addressed through a general duty of co-operation.

8.400 The Parliamentary Advisory Council for Transport Safety commented that:

> A more formally structured relationship or a framework for cooperation which positively focuses on a duty of cooperation may be of use. In order to fulfil the duty of care, stakeholder cooperation is key.

8.401 A statutory duty to co-operate was also suggested in the joint response of the Guide Dogs for the Blind Association and the Joint Committee on the Mobility of Blind and Partially Sighted People and the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum. Network Rail suggested that a duty to co-operate should be imposed on all relevant bodies that were involved in a road-rail partnership.

Cautions and concerns

8.402 The Arfon-Dwyfor, Southern Snowdonia and Northern Snowdonia Local Access Forums supported the expansion of road-rail partnership groups, provided that "they did not become bureaucratic and unwieldy". Lincolnshire County Council and the joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum noted that more work would have to done on the frames of reference of these groups before they could be expanded.

8.403 Network Rail also acknowledged that the expansion of road-rail partnership groups could impose an undue burden on private and heritage railways.

8.404 The Egham Chamber of Commerce commented that in their area road-rail partnerships had been of no benefit, noting the tendency for rail interests to dominate the group. Sills and Betteridge warned, along these lines, that it would be important to ensure that all transport interests were effectively represented. Ken Otter stressed that "local activists" must be included in road-rail partnership groups at all stages, to ward against closed-door decision-making.

8.405 Transport Scotland suggested that road-rail partnerships could be made compulsory:

> If made compulsory, their role could then be expanded as appropriate. The expansion of their role without making them mandatory is difficult to conceive since this would leave a responsibility gap in areas where a voluntary partnership was not formed.

8.406 However, Michael Haizelden warned against including any element of compulsion as it could "impose a disproportionate burden" on voluntary groups, among others. The Heritage Railway Association commented that, as road-rail partnership groups can be quite time consuming, involvement should be voluntary in the first instance.

Conclusion

8.407 Consultees were generally supportive of this proposal, but many noted that a duty to co-operate could be used to achieve the same aims. A number of consultees made suggestions to improve the efficiency of road-rail partnership groups before consideration of any expansion.

Should there be statutory provision requiring the construction of new level crossings on existing railway lines in certain specified circumstances [CP para 8.136]?

Introduction

8.408 Of the 114 consultation responses that were received, 36 responses answered the question of whether there should be statutory provision requiring the construction of new level crossings on existing railway lines in certain specified circumstances. Twenty-six of those agreed with the proposal, nine disagreed, and one was equivocal.

Circumstances that would require construction of new crossing

8.409 Over two thirds of consultees who answered this question, including many access groups and local authorities, agreed that the construction of new level crossings on existing lines should be statutorily required in certain specified circumstances.

8.410 Several consultees commented that this proposal would be useful in enabling and encouraging access for pedestrians and cyclists etc. Devon County Council commented that development projects may require the construction of new crossings as "sustainable transport and healthy lifestyles policies encourage the provision of off-road pedestrian and cycle links". It suggested, along with Cambridgeshire County Council, that the proposal should extend not only to new level crossings but to level crossings that were previously unrecorded in the Definitive Map and Statement, the legal record of public rights of way. The Department for Transport, while expressing considerable support for the Office of Rail Regulation and Network Rail's policy stance against the creation of new level crossings, commented that it supported the proposal for a statutory provision to authorise new crossings in certain circumstances. In particular, it was "conscious of the issues surrounding land access in Scotland". Michael Haizelden suggested that this power might only be necessary for the creation of new footpath crossings.

8.411 The Southern Snowdonia and Northern Snowdonia Local Access Forums explained in their joint response that the creation of new level crossings had become an important issue following the Welsh Assembly Government's decision to create an all-Wales coastal path by 2012. They commented that this initiative showed the merit in providing a system for the creation of new level crossings.

8.412 Other consultees took commented that new level crossings should only be constructed in very limited circumstances. Community Safety Partnerships did not believe that new crossings should be created to facilitate access rights in Scotland. Rather, it proposed that a new crossing should only be required where it would enable two or more crossings to be closed, or where a temporary level crossing was necessary for the safe operation of the railway system or to permit construction of an alternative, grade-separated crossing.

8.413 John Tilly also stressed that this requirement should apply only in exceptional circumstances and that the person seeking the new level crossing should be responsible for all the costs associated with it.

8.414 Passenger Focus took a similar view, commenting that the power should be used sparingly and that the applicant should pay the costs of creating the crossing. It also suggested that the procedure for creation of new level crossings should mirror the procedure for their closure. While the National Farmers' Union also proposed that the procedure should mirror an application for closure, it did not agree that the applicant should always bear the costs. It commented:

> The consideration of costs would obviously need to be handled differently as it would not be fair to expect user groups or small businesses to meet the infrastructure costs of the national rail operator.

8.415 Several other consultees, including the Association of Train Operating Companies and the joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum, emphasised that the requirement to create new level crossings should be imposed rarely and should not interfere with the general presumption that new level crossings are not created in other than exceptional circumstances. The Country Land and Business Association, however, advocated reversing this general presumption such that a new level crossing would be created every time a crossing is compulsorily closed, "unless the acquiring authority can prove that there is no longer a need for a crossing in that location".

No statutory requirement to create new crossings

8.416 A minority of consultees who responded to this question opposed a statutory requirement to create new crossings in specified exceptional circumstances. Rail The Safety and Standards Board argued for a statutory prohibition on the creation of new public road crossings – but not necessarily public footpath or private crossings – on existing railway lines. It added:

> Crossings on new or reopened lines should not normally be considered but, if they are found to be essential, should be subject to Transport and Works Act 1992 orders. The creation of new crossings on existing lines should be subject to the closure of at least one existing crossing. In these circumstances the order authorising the stopping up of the crossing(s) should authorise the creation of the new crossing. In principle a stopping up order could allow the closure of any number of crossings but only the creation of one replacement crossing.

8.417 The Heritage Railway Association, Network Rail and Northamptonshire County Council took the view that the existing legislation governing the creation of level crossings was adequate, and did not agree that any new procedures should be enacted.

8.418 The Automobile Association, the Office of Rail Regulation, and the Associated Society of Locomotive Engineers and Firemen opposed the suggestion on the grounds that no new crossings should be created apart from in exceptional circumstances. Transport Scotland warned that specifying the circumstances in which a new crossing could be created could serve to encourage their creation, contrary to the presumption against them. The Confederation of Passenger Transport commented that the circumstances in which a new crossing might be necessary should not be specified in legislation, and that the decision of whether to create a new crossing should be taken on a case-by-case basis.

Conclusion

8.419 The majority of consultees who answered this question acknowledged the usefulness of a statutory requirement to create new level crossings in certain specified circumstances. However, many consultees commented that this would undermine the general presumption against creating new level crossings and advocated the use of existing legislative procedures.

If so, should the decision-maker be able to override opposition to the construction of a new level crossing [CP para 8.137]?

Introduction

8.420 Of the 114 consultation responses that were received, 24 responses answered the question of whether the decision-maker should be able to override opposition to the construction of a new level crossing. Eighteen of those agreed with the proposal, three disagreed, and three were equivocal.

Ability to override opposition is essential to effective working

8.421 The majority of consultees who answered this question agreed that the decision-maker should be able to override opposition to the construction of a new level crossing. The Department for Transport and the Confederation of Passenger Transport commented that the decision-maker's ability to override opposition to the construction of a new level crossing would be necessary to ensure that progress could be made. Scotways commented that the power to override opposition was necessary as Network Rail and the Office of Rail Regulation would invariably oppose the construction of a new crossing. Likewise, Passenger Focus commented that the decision-maker should be able to override opposition to the construction of new crossings. They added that if there were no opposition, crossings could be created by agreement.

8.422 Several consultees emphasised the importance of the decision-maker's objectivity and independence. The National Farmers' Union thought that:

> Any proposal for the creation of new crossings should be considered objectively by someone who should be able to have the power to override objections to the creation of a new crossing and strike a balance between the various conflicting factors such as safety, but also cost and convenience.

The North Yorkshire Local Access Forum commented that the decision-maker must be independent, suggesting that the decision be made by someone akin to a planning inspector. The Association of Train Operating Companies stressed that the decision-maker would need to provide reasons for their decision, by setting out "in sufficient detail the justification for overriding opposition".

8.423 Sills and Betteridge and Transport Scotland agreed that the decision-maker should be able to override opposition, in much the same way that it can be done in the closure procedure.

Concerns about the proposal

8.424 Three responses expressed equivocal views on the question. The Hampshire County Council Countryside Service and the joint response from the Association of Transport Co-ordinating Officers, the Local Government Association and the Association of Directors of Environment, Economy, Planning and Transport queried what form of arbitration would be adopted to decide whether to override opposition, and by whom it would be carried out. The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented in their joint response that it could be contrary to the principle of co-operation and inter-agency working:

> Whilst there is a view that an ultimate decision can be made to overrule, this does seem to be rather dictatorial when we are striving for joint co-operation. As before it does not support the objective of elimination of 'at grade' crossings. However, as before, the Secretary of State or relevant Ministers would be the final arbiter.

8.425 The Heritage Railway Association did not agree that the decision-maker should have the power to override opposition, explaining that there might be valid safety concerns involved. Network Rail also opposed the idea.

8.426 Community Safety Partnerships Limited commented that such a power would not be necessary if the statute clearly defined the circumstances in which a new level crossing would have to be created.

Conclusion

8.427 While a few consultees expressed some concerns about the decision-maker's ability to override opposition to the creation of a new level crossing, the majority of consultees who answered this question supported the idea. Several noted that it would be essential in order to ensure an effective procedure for the creation of new level crossings, provided the decision-maker was sufficiently independent.

We would welcome the views of consultees on our proposal that the provisions in special Acts should be disapplied in so far as they deal with safety at level crossings to the extent that HSWA applies [CP para 8.142].

Introduction

8.428 Of the 114 consultation responses that were received, 29 consultees provided views on the proposal to disapply the provisions in special Acts insofar as they deal with safety at level crossings to the extent that HSWA applies. Twenty of those agreed with the proposal, eight disagreed, and one was equivocal.

Clarity and certainty

8.429 Many consultees took the view that the disapplication of the safety provisions in special Acts would serve to improve the clarity and accessibility of the safety regulation system. The Office of Rail Regulation commented that disapplication was a neat, clear solution to the problem of reconciling special Acts with HSWA, and suggested that the "early availability of regulations and supporting guidance" would assist in the transition to a new regime. The Rail Safety and Standards Board noted that disapplication would be useful in getting rid of peculiar provisions in special Acts with little modern relevance, while the heritage railway Bodmin and Wadebridge Railway Company Limited suggested that it would help to clarify the state of the law for railway operators tasked with researching special Act provisions.

8.430 A few consultees took the opposite view of the proposal, suggesting that to disapply the safety provisions in special Acts would create uncertainty and a lack of clarity in the safety regime. The Heritage Railway Association, for instance, commented:

> The heritage sector values the clarity that can be obtained from specific orders and Acts and wishes to see these remain in force unless there can be shown to be a significant benefit to all parties for changing them.

8.431 Likewise, Network Rail thought that the proposal to disapply the safety provisions of special Acts could lead to uncertainty as it would be necessary for them to remain in force for private level crossings which are not used for business purposes as HSWA would not apply to such crossings. The need to provide some alternative arrangement for authorised users of private level crossings whose actions are not covered by HSWA was also raised by Community Safety Partnerships.

Repeal or disapply provisions in special Acts?

8.432 Few consultees expressed views on the merits of disapplying the safety provisions in special Acts as opposed to a general repeal of those provisions. Only three consultees suggested that the safety provisions in special Acts should be repealed or revoked rather than disapplied.

8.433 The Department for Transport considered that the provisions should be repealed on an individual basis, by way of a schedule in the draft Bill listing all special Act provisions no longer required under the new safety regulation system. It described the problems with the proposal to disapply the provisions:

> By having a shadow existence of disapplied special Act safety provisions but also having other parts potentially "live", combined with any new HSWA provisions creates another layer of complication to the level crossing legislative status – which does not necessarily contribute to the simplification aim of this review.

8.434 Although the Department commented that the individual repeal of the safety provisions in special Acts would be "difficult, time consuming and would require extreme care not to interfere with other provisions", it stressed that it was the more appropriate option and was more in line with the Government's Better Regulation agenda.

8.435 The Egham Chamber of Commerce and Northamptonshire County Council also suggested repealing the safety provisions in special Acts. The Chamber commented that it would serve "the interest of having a simple and transparent regulatory system".

Individual consideration of special Acts

8.436 Five consultees made suggestions that involved the individual consideration of the provisions in special Acts dealing with safety matters. The Confederation of Passenger Transport took the view that the "blanket disapplication" of the safety provisions in special Acts would be dangerous and that it would be necessary to examine the detail in each Act. Sills and Betteridge also noted that the question of how to deal with the safety requirements in special Acts under a HSWA-based system should be dealt with on a case-by case basis:

> Some of the provisions in local Acts may be obsolete by the passage of time. However, others may reflect peculiarities of the local geography which remain. Where the 1974 Act provides a lower level of protection than the special Act and the reasons for granting the special provisions remain, the special Acts should remain in force.

8.437 Similar points were raised by Powys County Council, the North Yorkshire Local Access Forum and the joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Association of Transport Co-ordinating Officers and the Local Government Association.

Conclusion

8.438 Although the majority of consultees who answered this question supported the disapplication of special Acts insofar as they make provision for safety to the extent that HSWA applies, some consultees suggested that a more refined approach was needed and a review of the individual safety provisions in special Acts to determine their continued relevance. Others suggested the general or individual repeal of the provisions.

We would also welcome the views of consultees as to whether there should be a power for the Secretary of State to make orders to enable the repeal of provisions in special Acts in so far as the provisions relate to safety matters [CP para 8.143].

Introduction

8.439 Of the 114 consultation responses that were received, 24 consultees commented on whether the Secretary of State should have a power to make orders enabling the repeal of provisions in special Acts insofar as the provisions relate to safety matters. Twenty-one of those agreed with the proposal and three disagreed.

Overall support for the proposal

8.440 Although the majority of consultees who answered this question agreed that the Secretary of State should have the power to repeal safety provisions in special Acts, very few explained the grounds for their support.

8.441 Transport Scotland commented that a power to repeal special Act provisions on an individual basis would be useful if special Acts came to the fore in specific instances, and would "greatly simplify safety regulation of level crossings and make the legislation more accessible".

8.442 Passenger Focus also welcomed the proposal but noted that it was not clear whether the proposal related solely to the special Act provisions dealing with safety at level crossings, or to safety on the railway more generally. It agreed with the proposal in principle and commented that:

> It is undesirable that there should be different safety regimes on different sections of the rail network, particularly if the relevant requirements are contained in special acts whose terms are not widely known or easily accessible.

8.443 Several local authorities, trade associations and access groups also supported the proposal.

Concerns and other considerations

8.444 While only three consultees disagreed with the proposal, several consultees provided only qualified or partial support for it. For example, Network Rail did not object to the proposal in principle but took the view that it would be essential for the railway operator to be involved in the Secretary of State's exercise of the proposed power. It also warned:

> Great caution needs to be taken prior to any repeal. The special Acts contain numerous other provisions which are essential to operation of the railway network and the consent of the railway undertaker should be sought before any repeal.

8.445 Likewise, Community Safety Partnerships agreed that the Secretary of State should have this power, but only in cases where an interface agreement had been made for the level crossing in question.

8.446 The Department for Transport commented that ideally all the safety provisions in special Acts would need to be revoked on an individual basis. It suggested that this could be achieved by means of a repeals schedule to the Commissions' draft Bill listing the provisions which would no longer be required under the new regime. Under this approach, a general power to repeal provisions would not be required.

8.447 John Tilly disagreed with the proposal on the basis that the repeal of special Act provisions on level crossings would threaten the right of a landowner to use their right of way. Northamptonshire County Council also disagreed with the proposal, preferring the wholesale repeal of the special Act provisions by way of an amending Act.

Conclusion

8.448 Most consultees who commented on the proposal agreed that the Secretary of State should have the power to repeal the safety provisions in special Acts on an individual basis. Those who disagreed with it were also opposed, more generally, to the proposal to disapply the special Act provisions insofar as they relate to safety at level crossings. Thus, it is not surprising that they would disagree with this proposal since the two proposals would operate in tandem.

We provisionally propose that all existing level crossings orders should be revoked if the HSWA-based system is adopted [CP para 8.144].

Introduction

8.449 Of the 114 consultation responses that were received, 28 consultees addressed the proposal to revoke all existing level crossing orders if the HSWA-based system of safety regulation is adopted. Eighteen of those agreed with the proposal, nine disagreed, and one was equivocal.

Procedural and transitional issues

8.450 Several consultees, some of whom agreed with the proposal and some of whom disagreed, made suggestions concerning the transition from level crossing orders to a HSWA-based system of safety regulation. The Department for Transport agreed that level crossing orders should be revoked, but noted the importance of ensuring "legal continuity of safety at level crossings". It suggested that guidance and regulations under HWSA 1974 should be in place either before or concurrent to the revocation of level crossing orders. The Office of Rail Regulation also noted that regulations and guidance would aid the transition to a HSWA regime. It drew a parallel between the proposed transition to HSWA and the previous move to the Railways and Other Guided Transport Systems (Safety) Regulations 2006[4]:

> We see a need to support industry through the transition in a similar manner to that of the move from a prescriptive regime under the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 to a more goal-setting approach under the Railways and Other Guided Transport Systems (Safety) Regulations 2006. We would however be firmly against any "deeming across" of orders (as happened with the transition from safety cases under the Railways and Other Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 to certificates under the Railways and Other Guided Transport Systems (Safety) Regulations 2006).

8.451 Passenger Focus suggested that the transition could be managed by "a planned migration system from the current system to the new one during a predetermined period of transition (lasting, say, not more than five years)". It agreed that level crossing orders would have to be revoked eventually to ensure that a parallel system of safety regulation did not persist alongside the HSWA specifications.

8.452 Transport Scotland supported the proposal to revoke level crossing orders on the condition that they are replaced with an alternative system which would take account of "any unique localised requirements contained within existing level crossing orders that cannot be contained in generic regulations or an approved code of practice". Network Rail took the same view.

[4] SI No 599 2006.

8.453 Sills and Betteridge and the Confederation of Passenger Transport warned that the details of each level crossing order would have to be examined, on a case-by-case basis, prior to revocation.

The loss of level crossing orders: benefits and drawbacks

8.454 Some consultees who disagreed with the proposal expressed resistance to the loss of level crossing orders under a HSWA-based system more generally.

8.455 The Heritage Railway Association commented that the loss of level crossing orders would result in a lack of clarity for all parties with responsibilities at level crossings, while the Egham Chamber of Commerce stated that the revocation of level crossing orders would reinforce the present imbalance between safety and convenience. John Tilly stressed that too little was known about how the move to a HSWA regime would work in practice to justify the revocation of level crossing orders. Hampshire County Council Countryside Service and the joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Association of Transport Coordinating Officers, and the Local Government Association described the proposal simply as a "risky strategy" and opposed it on those grounds.

8.456 Two consultees emphasised the benefits of revoking level crossing orders under a new HSWA-based system of safety regulation. Michael Haizelden commented that their revocation would pave the way for "a proper risk based approach, that better reflects improvements in knowledge and technology". The joint response from the Arfon-Dwyfor, Southern Snowdonia and Northern Snowdonia Local Access Forums also supported the proposal on the basis that it would give primacy to safety.

Conclusion

8.457 Roughly one third of the consultees who answered this question did not agree that level crossing orders should be revoked following a move to HSWA, either because they wished to retain level crossing orders or because they had concerns about the transitional or practical implications of such a move. Two thirds agreed with the proposal and many provided suggestions for how the transition could be managed.

We provisionally consider that our proposals should apply to all level crossings on all types of railway [CP para 8.147].

Introduction

8.458 Of the 114 consultation responses that were received, 31 consultees addressed the question of whether the proposals should apply to all level crossings on all types of railway. Twenty-one of those agreed with the proposal, eight disagreed, and two were equivocal.

Consistency and predictability

8.459 The majority of consultees agreed that the proposals should apply to all railways, including heritage and private railways. The most common reason for this view was that a uniform system applicable to all railways would promote consistency and predictability across the rail and road networks. This view was taken by, among others, the Department for Transport, the Office of Rail Regulation, and access groups such as Ramblers.

8.460 Two consultees commented that this uniformity would also be advisable from the perspective of road users. The Rail Safety and Standards Board noted that both mainline and heritage railways were created by way of special Act, and that there was no principled reason why users of a level crossing should expect different legal processes to apply "purely because of changes in ownership of the railway". Similarly, Passenger Focus commented that clarity and predictability were crucial to ensure safety at level crossings for road users:

> A critical requirement for safety at crossings is that their mode of operation should be unambiguous and instantly apparent to highway users (whether in vehicles or otherwise). From the highway users' perspective, the type of railway involved will normally be largely immaterial, and a common approach to the design and operation of all crossings is therefore a desirable goal.

8.461 The Bodmin and Wadebridge Railway Company Limited also agreed that the proposed "safety measures should apply equally to all fare-paying passenger railways".

Different regime for heritage railways, private railways, and tramways

8.462 A minority of consultees strongly opposed the move to apply the proposals to all railways. Notably, the Heritage Railway Association suggested retaining the current regime of special Acts and level crossing orders for the heritage sector.

8.463 Several consultees concurred that the proposals should not apply to heritage railways, including Hampshire County Council Countryside Service and the joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Local Government Association, and the Association of Transport Co-ordinating Officers. The Confederation of Passenger Transport suggested exempting not only heritage railways but also tramways (heritage and otherwise). The North Yorkshire Local Access Forum and the National Farmers' Union were the only consultees to suggest tailoring the proposals to the specific characteristics of both heritage and private railways. South Gloucestershire Council suggested applying an exemption to all routes with a maximum line speed of 25 miles per hour or less, which they noted would be likely to include many heritage railways.

8.464 Network Rail did not object to the proposal but noted that it would still be necessary to consider the particular issues affecting heritage and private railways. The Railway Industry Association explained that, although it supported the proposal, it "leaves unanswered the question posed in the consultation document as to what constitutes a railway for the purposes of the legislation".

8.465 The Rail Freight Group suggested that level crossings at major industrial sites or docks ought to be excluded from the remit of the project as the road and the rail networks are owned and managed in common and there is therefore no third party "right of way" in the legal sense. However, the Rail Freight Group noted that there was at least one site, and possibly more, where the ownership arrangements were such that a level crossing could be said to exist. It was concerned about the implications of applying the proposals to those crossings:

> The Commission's provisional definitions and conclusions may make the safety management systems of some major industrial or docks estates with extensive private road and rail networks more complex or onerous, by extending the legal framework for level crossings to on-site road/rail interfaces that are not currently so regulated. If so, this might act as a disincentive to the retention of on-site rail facilities and to the use of rail freight, and hence lead to an overall reduction in societal safety and sustainability.

8.466 The Freight Transport Association endorsed this view.

Conclusion

8.467 The Heritage Railway Association was among the small group of consultees who argued strongly that heritage railways should be excluded from the remit of the project. Few other consultees suggested exempting private railways. The majority agreed that the proposals should apply equally to all types of railway, largely in the interest of uniformity and predictability.

However, we would welcome the views of consultees as to whether our provisional proposals should be adapted for heritage railways and private railways and if so, how [CP para 8.148].

Introduction

8.468 Of the 114 consultation responses that were received, 22 consultees addressed the question of whether the proposals should be adapted for heritage railways and private railways and, if so, how. Ten of those agreed that the proposals should be adapted, nine disagreed, and three were equivocal.

8.469 There was considerable overlap between this consultation question and the previous question concerning the application of the proposals to all types of railway, whether mainline, heritage or private. Many of the consultees who agreed to the previous proposal did not go on to answer this question.

Simplicity and consistency

8.470 As noted above, those consultees who did not agree that the proposals should be adapted for private or heritage railways emphasised the need for simplicity and consistency in the regulation of level crossings. Transport Scotland commented that consistent standards of safety were required across the rail network and looked to other stakeholders such as the Heritage Railway Association to justify the need to apply a different regime to heritage railways.

8.471 The heritage railway Bodmin and Wadebridge Railway Company Limited also agreed with the proposal. The Office of Rail Regulation concurred that all railways should be subject to the same regime.

The specific characteristics of heritage railways

8.472 The Heritage Railway Association strongly supported the proposal to adapt the proposals for heritage railways. It took the view that retaining the existing system of special Acts and level crossing orders for heritage railways would achieve four aims. First, it would "avoid the uncertainties, anomalies and weaknesses" of a move to a HSWA-based safety regime. Second, it would avoid the need to examine and sort through "hundreds of individual items of legislation" in order to determine which provisions of special Acts ought to be repealed or disapplied. Third, it would prevent heritage railways – most of which are independent businesses with small annual turnover – from incurring the costs of replacing equipment and training personnel under a new safety regime. Finally, it would allow heritage railways to preserve their traditional level crossings:

> It would enable the preservation and operation of traditional level crossings, with special operating and signalling systems, which heritage railways regard as an important feature of their raison-d'etre.

8.473 The Hampshire County Council Countryside Service and the joint response from the Association of Directors of Environment, Economy, Planning and Transport, the Local Government Association and the Association of Transport Co-ordinating Officers recommended that heritage railway representatives be consulted in order to craft an approach that recognises the "different regime under which heritage railways operate". They commented that the application of generic rules to heritage railways has not always worked in practice:

> Heritage railways have frequently fallen victim to new regulations framed for main line railways (also in the European sphere) with the result that recourse to derogations applied after the event has often been needed to achieve a common sense solution. This is time-consuming and potentially expensive.

8.474 Some consultees pointed out areas in which heritage railways differed from mainline railways that might merit differential treatment under the proposed safety and closure regimes. Network Rail did not express strong views on this question but noted that "heritage and private railways vary greatly in many respects both amongst themselves and compared with our network". The joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum emphasised the different concept of risk on some heritage or private railway lines. It noted that a railway such as the private tourist railway operated at Exley Gardens in Hampshire did not impose the same degree or type of risk as railways on the mainline network.

8.475 Similarly, the National Farmers' Union pointed to differences between heritage or private railways and the mainline railways, such as average line speed, public accessibility, frequency of use and their ability to fund improvements at level crossings. It argued that these differences warranted further consideration of how the proposals could be "better tailored to the individual characteristics of private and heritage railways". Community Safety Partnerships suggested that the proposals should apply to level crossings on all railways except for private crossings and heritage railways "on which public travel is permitted where the financial contributions of the parties should be negotiated on a case by case basis".

The specific characteristics of freight railways

8.476 As explained in the analysis of the previous question, the Rail Freight Group and the Freight Transport Association suggested in their joint response that level crossings at major industrial sites or docks ought to be excluded from the remit of the project. It commented that the application of the proposals to level crossings at those sites could be a disincentive to the use of rail freight in the future, due to the introduction of onerous regulatory requirements on "road-rail interfaces that are not currently so regulated". This, in turn, could result in a reduction of safety and sustainability.

Conclusion

8.477 A small majority of consultees who answered this question agreed that the proposals should be adapted for heritage or private railways. Several consultees pointed to the practical differences between heritage and mainline trains, such as regards line speed, accessibility and funding, to justify their conclusion that the proposals should be modified for heritage railways. The Heritage Railway Association suggested that special Acts and level crossing orders should be retained for heritage railways. The Rail Freight Group was the only consultee to specifically address the circumstances of private freight railways on docks and industrial sites.

PART 9
PLANNING: ENGLAND AND WALES

We would welcome examples or experiences of how consultation works in practice [CP para 9.19].

Do consultees think that the current practice of consultation relating to level crossings is adequate between local planning authorities, railway interests, developers and the public? If not, we would welcome specific examples [CP para 9.26].

Introduction

9.1 Of the 114 consultation responses that were received, 26 consultees addressed the question of whether the current practice of consultation relating to level crossings is adequate between local planning authorities, railway interests, developers and the public. Six agreed that the process was adequate, while 20 disagreed.

Is the current practice of consultation about planning matters adequate?

9.2 The majority of consultees who answered this question thought that the consultation process between local planning authorities, railway interests, developers and the public was inadequate. These consultees included those representing rail interests – such as Network Rail and the Heritage Railway Association; road interests – such as the Automobile Association; and public access or rights of way interests – such as Ramblers. The Department for Transport and the Office of Rail Regulation agreed that there was scope for improving consultation between local authorities and railway interests to account for the impact of developments on level crossings. The joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum stressed that "greater dialogue and understanding is required between all parties" to ensure that conflicting interests are resolved in the planning process.

9.3 The problem of developments resulting in a change of use of a level crossing was identified by a number of consultees. The Heritage Railway Association and the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that planning authorities too often ignore the problem of change of use or the impact of a gradual increase in traffic affecting the crossing. The Heritage Railway Association commented:

> Consultation is not always effective. This is particularly true when planning permission allows a crossing to be more heavily used to permit a landowner to develop his adjacent land for a limited purpose, such as for the purpose of a caravan site. If the permission sets no upper limit on the number of caravans to be placed on the site, this may gradually be increased and with it the degree of use of the crossing so that its nature is materially changed and with it costs of upkeep and safety considerations.

9.4 The Automobile Association also provided numerous examples of developments near level crossings that have led to increased use of the crossing and therefore increased congestion on the roads. It emphasized the importance of proper consultation with the railway authorities to prevent these problems from occurring, suggesting that "generally the views of the railway on this should dominate". John Tilly took the view that planning authorities do not understand the railway and safety issues that arise in relation to a proposed development.

9.5 Several consultees suggested that consultation relating to level crossings was not sufficiently wide, and often failed to reach relevant stakeholders. Access groups such as Ramblers and the North Yorkshire Local Access Forum commented that the consultation process for developments affecting public rights of way in particular was not robust, and that rights of way issues were not adequately considered in the planning process. The East Riding of Yorkshire and Kingston upon Hull Joint Local Access Forum and the Open Spaces Society also commented that consultation with bodies representing public access interests was inconsistent and inadequate.

9.6 Other weaknesses in the practice of consultation relating to level crossings were identified by consultees: that highway and planning authorities did not adequately consult each other during the planning process (Conwy East Local Access Forum); that train operating companies were not presently consulted, as the planning authority expects the rail operator to consult with industry (the Association of Train Operating Companies); and that rail operators too frequently failed to respond to consultations, to their own detriment (Lincolnshire County Council and Karl McCartney MP). The Welsh Assembly Government commented that it was in the process of consulting on the creation of a list of statutory and non-statutory consultees for the planning process in Wales.

9.7 The Rail Safety and Standards Board commented that a difficulty arises in that it falls to the developer to decide, at first instance, whether the proposed development would result in a material increase in volume or change of use of the crossing that would trigger the need to prepare a transport assessment:

> This appears to put the onus on the developer, initially, to decide whether the changes are material. The difficulty arises when it cannot be decided if the changes are material, particularly if the development is some distance from the crossing. Traffic networks are very complex. Also, different level crossings will have different degrees of impact for the same change. The infrastructure manager would need to be consulted in the preparation of the traffic impact statement.

9.8 The Arfon-Dwyfor, Southern Snowdonia and Northern Snowdonia Local Access Forums suggested in their joint response that planning authorities were not able to consult adequately with stakeholders because of their tight time constraints.

9.9 Not all consultees took the view that the practice of consultation relating to level crossings was flawed. For instance, Community Safety Partnerships considered that the effectiveness of consultation would vary from one local authority to the next. The heritage railway Bodmin and Wadebridge Railway Company had had a positive experience in conducting consultation on a proposed extension of their railway line. They had engaged in informal, preliminary consultation as suggested to them by the Department for Transport, and found it useful. The Association of Transport Co-ordinating Officers the Local Government Association and the Association of Directors of Environment, Economy, Planning and Transport commented in their joint response that they were satisfied with the consultation process, though they thought that guidance would be useful to assist in "fostering the ability to use developer contributions towards closure, replacement or improvement of level crossings".

Examples of how consultation works in practice

9.10 Several consultees provided examples of situations in which the planning consultation process had not worked in practice. Most of these concerned the failure of planning authorities to consult the appropriate stakeholders or to properly address the issues raised by railway operators during the consultation process when making decisions that affected level crossings. For example:

(1) Network Rail provided an example of a public footpath level crossing in Pulborough, adjacent to which a developer proposed to construct 146 residential dwellings. The planning authority of Horsham District County consulted Network Rail, who explained that due to the inevitable material increase in the use of the crossing to enable those residents to access the village centre, the crossing should be closed and a footbridge built in its place. The developer's transport consultant did not agree that there would be any increase of traffic over the crossing. The planning authority recommended that the developer contribute to transport infrastructure under a section 106 agreement, but the amount recommended was insufficient for construction of a footbridge. Planning permission was eventually granted with a condition that the developer contact Network Rail to "discuss possible measures to maintain or enhance pedestrian safety at the level crossing". Further negotiations were not successful in obtaining funds to build a footbridge.

(2) Sills and Betteridge commented that, in their experience, there was never an appropriate time to raise the issue of level crossing closure. Closure was not able to be addressed early in the planning process, and subsequently it was considered too late to raise the issue:

> Level crossing closure is simply "off the agenda" so far as consideration of a planning application is concerned. Debate centres upon the merits of the proposed development. It is airily asserted that everything is subject to level crossing closure. The planning permission then contains a Grampian condition. No doubt the proponent of closure will in due course assert on a closure application that everything had been gone into at the planning stage and that the decision maker in relation to the level crossing closure should not re-open planning issues that have already been determined.

(3) The Office of Rail Regulation listed several examples of planning processes failing to account of increases or changes in use of level crossings, resulting in safety concerns. For instance, it pointed to a private user-worked level crossing in County Durham that serves three farms. Three planning applications had been made in respect of the farms which would have dramatically increased traffic over the crossing; the applications were for a caravan park, a horse training ménage facility, and an outdoor training centre. The Office of Rail Regulation commented:

> It is unclear whether the planning authorities took any cognisance, or felt it was their role to do so, of the effects of these cumulative changes of use on the level crossing.
>
> The planning authority did advise the railway of the applications, though it appears they did so as they are an adjacent owner, rather than under their obligation in item (e)(ii) of the Table to section 10 of the Town and Country Planning (General Development Procedure) Order 1995. There is no evidence that the authority consulted either the Secretary of State for Transport or the Office of Rail Regulation as the Secretary of State's agent as required by that legislation.
>
> It appears highly unfortunate that the person at the railway company who received the notification from the Authority regarding the adjacent developments was oblivious to the affect that these would have on railway operations and made no comment on any of the applications [citations omitted].

(4) Lady Elizabeth Akenhead pointed to a case in West Sussex in which a large housing development was approved next to a bridleway crossing. Network Rail had not been consulted and, as a result, the section 106 agreement did not provide for a bridge to replace the bridleway crossing.

(5) West Somerset Railway provided an example of a public level crossing at Minehead. The crossing is adjacent to a new commercial development, including a large supermarket and a fast food outlet. Part of the planning process for this development included the construction of a roundabout 110 m south of the level crossing. West Somerset Railway was consulted by the planning authority on this application, and it submitted a detailed response outlining its concerns about the impact of the development on the safety of the level crossing. It was worried, in particular, about the short distance between the roundabout and the crossing, and the possibility of cars backing up over the crossing. The traffic assessment prepared during the application process projected a 25% increase in traffic along the road crossing the railway, but made no reference to the likely impact on the level crossing.

Planning permission was granted, without conditions. West Somerset Railway continues to oppose these developments and wishes to upgrade the level crossing to a manually controlled, full barrier crossing. The Office of Rail Regulation also noted in its response that the development has led to an increase in pedestrian traffic. The present crossing does not provide sufficient protection to pedestrians, who are not prevented from crossing the railway even when the barriers are down.

(6) The Egham Chamber of Commerce explained that several large developments – two office blocks and two housing developments – had been built "on a short stretch of road between a very congested level crossing and a very congested junction". It learned subsequently that the level crossing was not included in the highway authority's "road model" during the planning process. It was also told that the planning authority had not been able to protect certain areas from development that could have been used to construct a bridge or underpass to replace the troublesome level crossing, which itself has been subject to vociferous debate since 2001.

Other issues

9.11 The Department for Transport commented that the Government had recently sought to abolish regional strategies. The Department for Communities and Local Government made the same point and added:

> On 6 July 2010, the coalition Government revoked all regional strategies under section 79(6) of the Local Democracy, Economic Development and Construction Act 2009. This action was challenged in the High Court by developer Cala Homes (South) Limited, and the verdict of 10 November concluded that section 79 powers could not be used to revoke all regional strategies in their entirety. As a result of the judgment regional strategies have been reinstated as part of the statutory 'development plan'. The coalition Government remains determined to return decision-making powers in housing and planning to local authorities and the communities they serve. It is firmly committed to abolishing regional strategies in the forthcoming Localism Bill.

Conclusion

9.12 The majority of consultees who answered this question took the view that the consultation process with planning authorities relating to level crossings was inadequate. They provided examples to demonstrate that consultation was not always conducted with the appropriate stakeholders or did not adequately take account of the impact of the development on a level crossing. Many consultees were concerned that planning authorities and developers failed to grasp the extent of the changes to the level crossing that would result from the proposed development. A minority of consultees were satisfied with the current practice of consultation.

Do consultees think that the current legal requirements for consultation where development affects a level crossing should be modified? If so, what modifications should be made [CP para 9.27]?

Introduction

9.13 Of the 114 consultation responses that were received, 23 consultees addressed the question of whether the current legal requirements for consultation where development affects a level crossing should be modified. Nineteen agreed that the consultation process needed to be modified and four disagreed.

Improved consultation processes

9.14 Many consultees suggested improving the legal mechanisms for consultation with stakeholders. The Department for Transport suggested re-visiting the draft provisions that were not included in the Road Safety Act 2006, which would have mandated consultation with railway authorities where development could require changes to the safety arrangements at level crossings. The Department commented that Network Rail should not be expected to monitor for itself any emerging development plans or planning consultations across the entire rail network. It also commented that:

> A solution that more clearly mandates engagement may prove more successful in capturing local authority planning consultations. Resource issues for local authorities are likely to be minimal as Network Rail would form one of a list of stakeholders. This solution would also have resource implications for rail operators though these may be offset by benefits derived from more planning approvals that were sympathetic to the effects of increased usage on local level crossings.

9.15 The Department went on to explain that there may be insufficient understanding of the impact of developments on level crossings so that where a simplified transport statement is produced with a limited assessed impact, it may be that level crossing issues are overlooked, and no formal consultation process initiated. It also suggested that planning authorities should consult highway authorities or the Secretary of State on any material changes that could result from a development.

9.16 Many consultees suggested particular bodies with whom consultation should be mandatory, namely (1) railway operators, (2) railway operators *and* the Office of Rail Regulation, (3) highway authorities, and (4) highway authorities *and* railway bodies. The North Yorkshire Local Access Forum suggested that consultation should be mandatory whenever a development was likely to alter the use of a level crossing, though it did not specify which bodies should be consulted. Conwy East Local Access Forum suggested that internal consultation between planning and highway authorities should be provided for in statute

9.17 Several consultees, including the Automobile Association, suggested that the views of the railway ought to take precedence during consultation. The National Traffic Managers' Forum and the Association of Directors of Environment, Economy, Planning and Transport stated jointly that the lack of any statutory requirement on planning authorities to take railway views into account makes it "too easy for a planning authority to just ignore the response of the rail authority". Indeed, Lincolnshire County Council and Karl McCartney MP commented on the lack of any requirement on the planning authority to accept the views of the railway operator. They explained that the Highways Agency has powers of direction, allowing them to instruct the authority to reject a planning application, but Network Rail does not. Network Rail requested that it be given "a clear role" with respect to planning consultations such as through the conferral of powers of direction.

9.18 Sills and Betteridge suggested that the question of level crossing closure should be consulted on either prior to or concurrently with the making of a planning application, to ensure that it is adequately considered.

Need for guidance

9.19 The Office of Rail Regulation acknowledged that there were "weaknesses within the planning system that could prove to be an impediment to effective implementation of the [Law Commissions'] proposed changes". It suggested that some statutory recognition of the scope of consultation might be useful:

> The current arrangements need to work better. Whilst we can take some practical steps to improve guidance to the relevant agencies/authorities about the sort of issues we should be consulted on and how that consultation would best work, it could be that this needs to be captured in legislation and therefore a more permanent – legal – fix might be needed.

9.20 Those "practical steps to improve guidance" suggested by the Office of Rail Regulation above were highlighted by Community Safety Partnerships, who suggested that improved guidance was needed – possibly in the form of a code of practice issued by the Office of Rail Regulation. Lady Elizabeth Akenhead agreed that guidance would be helpful:

> The definition of what exactly is likely to affect the use of a level crossing may be difficult to cover precisely in legislation, but it should be possible to devise guidance to planning authorities which will ensure that the railway operators are not consulted about every minor house extension near the railway but are consulted about every major development.

9.21 Network Rail suggested that a definition for what constitutes "development affecting a level crossing" could be included in regulations, along with other requirements of the planning consultation process. The Southern Snowdonia (joint) and Northern Snowdonia Local Access Forums emphasised in their joint response that any guidance would need to be "examined carefully for accuracy".

Other ideas from consultees

9.22 Consultees suggested various other means of improving the legal requirements for consultation where development affects a level crossing. For instance, the Department for Transport and Suffolk County Council commented that an increased role for road-rail partnership groups might improve the effectiveness of the planning consultation process. The Heritage Railway Association proposed that there should be a duty on the planning authorities not only to consult, but also to formally respond to all submissions made during consultation and to provide "a reasoned explanation of the decisions reached". In their joint response, the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum suggested that Network Rail should have the right to appeal against a planning decision to the Secretary of State or Scottish/Welsh Ministers. Three consultees, including Network Rail, stated that a traffic assessment should be mandatory for all planning applications that could affect a level crossing. The Rail Safety and Standards Board suggested that such a requirement:

> …need not be onerous for small developments, as simple statements would be adequate. The assessment should include pedestrian use of roads, footpaths and rights of way.

9.23 The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum also suggested another way of making planning authorities consider the impact of a development on a level crossing more fully:

> Perhaps the attention of Planning Authorities could be sharpened if it was clear that they would be corporately and individually liable if a fatality was to occur at a crossing adjacent to a new development they had permitted and mitigation measures required as part of the rail authority response had been ignored?

Those satisfied with the current legal requirements

9.24 The Bodmin and Wadebridge Railway Company took the view that the present process for consultation relating to level crossings was adequate, "provided the railway gets proper individual notice that a major planning issue is to be considered". Hampshire County Council Countryside Service, Nia Griffith MP, and the joint response from the Association of Transport Co-ordinating Officers, the Local Government Association and the Association of Directors of Environment, Economy, Planning and Transport all agreed that the legal requirements for consultation did not need to be modified.

Conclusion

9.25 Very few consultees took the view that the legal requirements for consultation were adequate where development affects a level crossing. Many suggested improving the consultation process by making consultation as requirement in certain circumstances or for certain bodies. Some consultees emphasised the role of railway bodies, such as operators, and suggested that their views should be given greater legal protection. The increased use of guidance was among the other suggestions made by consultees.

We provisionally think that the current legal provision is sufficient to allow for developer contributions towards closure, replacement or improvement of level crossings. It may be that what is required is guidance, which would be beyond the scope of this project [CP para 9.38].

Introduction

9.26 Of the 114 consultation responses that were received, 18 consultees addressed the question of whether the current legal provision is sufficient to allow for developer contributions toward closure, replacement or improvement of level crossings. Twelve agreed that the current legal provision is sufficient, five disagreed, and one was equivocal.

Making the developer pay

9.27 Several consultees stressed the importance of a legal mechanism that would force the developer to carry the costs associated with the upgrade, closure or replacement of a level crossing that is necessary as a result of the proposed development. For example, the Heritage Railway Association commented that the developer should be required to bear the all the costs when "the developer wishes to upgrade a user-worked crossing to allow access to a development, such as an hotel". The Department for Transport commented that it wished to see:

> …developers contribute more to the upgrade/replacement of level crossings, where the usage of these has increased as a result of that development. This would avoid the need to use scarce public road or rail funds in order to maintain safety or relieve congestion.

9.28 These consultees pointed to the shortcomings of the current legal arrangements in achieving this desired result. Network Rail voiced a concern that the current legal arrangement does not require the developer to make contributions "as a matter of course" in situations where it would expect such an obligation to be triggered. The Heritage Railway Association noted that developer contributions are only optional, and that planning authorities often grant planning permission after giving too much weight to the financial benefits of the development to the local authority, and too little weight to the wider social issues and the financial burden it would place on the rail operator. It cautioned that appropriate safeguards would have to be put in place to prevent this from occurring. John Tilly did not think that developers would bear the costs of Network Rail level crossing upgrades, nor that planning authorities would exert pressure on developers to contribute to the costs.

9.29 Some consultees addressed their comments specifically to the process for reaching an agreement between the developer and the planning authority under section 106 of the Town and Country Planning Act 1990. The Rail Safety and Standards Board commented that the procedure for section 106 agreements was easier to follow and therefore should be used more often. The Southern Snowdonia and Northern Snowdonia Local Access Forums took the view that section 106 agreements were sufficient to allow for developer contributions toward closure, replacement or improvement of level crossings. This view was shared by the Department for Communities and Local Government, which also pointed to the Community Infrastructure Levy and the use of agreements under section 278 of the Highways Act 1980. The Department explained that section 278 agreements allow developers to enter into agreements with the local highway authority or the Highways Agency to make changes or improvements to public highways:

> The fundamental principle of all section 278 agreements is that the developer must bear the full cost of administering the process, designing and implementing the works.

9.30 The Department for Transport also pointed to the possibility of using section 278 agreements to help fund works that have an effect on the road. It took the view that:

> It is possible that a section 278 agreement could be used at a level crossing where a bridge or underpass is required by utilising the powers of the highway authority who will have a part in any infrastructure construction. Section 278 therefore also offers a potential tool to seek contributions, though efficient use of this would require close co-operation between rail and road bodies.

Guidance

9.31 Five consultees suggested that improved guidance could be useful to assist in allowing developer contributions to be made when appropriate. The Department for Transport commented that "well publicised, accessible guidance may raise awareness and understanding of the issues". The guidance could, it suggested, provide much-needed advice to planning authorities on how to weigh the objections made by railway stakeholders. Cambridgeshire County Council, Devon County Council, the Hampshire County Council Countryside Service, and the joint response from the Local Government Association, the Association of Transport Co-ordinating Officers and the Association of Directors of Environment, Economy, Planning and Transport also suggested using guidance to encourage the use of developer contributions toward works at level crossings.

9.32 On the contrary, the Department for Communities and Local Government commented that additional information on developer contributions to level crossing works was not likely to be provided, as the existing guidance on section 106 agreements and the Community Infrastructure Levy was sufficiently concise.

Conclusion

9.33 Although the majority of consultees agreed that there was sufficient legal provision to allow for developer contributions where and when appropriate, several consultees strongly disagreed. They emphasised the need for a legal mechanism to force the developer to pay for all or some of the costs associated with the upgrade, closure, or replacement of a level crossing affected by a development project. Some consultees suggested that improved guidance be issued.

Do consultees think that section 106 obligations are appropriate legal mechanisms for obtaining developer contributions for upgrading or replacing level crossing infrastructure [CP para 9.39]?

Introduction

9.34 Of the 114 consultation responses that were received, 28 consultees addressed the question of whether section 106 obligations are appropriate legal mechanisms for obtaining developer contributions for upgrading or replacing level crossing infrastructure. Twenty-one agreed that section 106 agreements were appropriate, three disagreed, and four were equivocal.

Cautious optimism regarding section 106 agreements

9.35 Many consultees agreed that section 106 agreements could be effective in encouraging developer contributions to level crossing improvements or replacement, including several access groups, local authorities and central government departments. For example, Hampshire County Council Countryside Service explained that section 106 agreements could be helpful in addressing the impact of a development on traffic levels at a level crossing many miles from the proposed development. The Rail Safety and Standards Board suggested that section 106 agreements might even help to "maintain community cohesion".

9.36 However, most consultees who supported the use of section 106 agreements hedged their support with cautions or suggestions for improvement. The Department for Transport commented that while section 106 agreements could be appropriate for obtaining developer contributions, the process might be improved and clarified. Likewise, the Heritage Railway Association noted the limited effectiveness of these agreements when they are only voluntarily entered into. The joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum stressed that the decisions as to how to spend developer contributions collected under a section 106 agreement were often controversial:

> Currently section 106 monies are often targeted politically towards what the local community sees as its requirements, eg. a pedestrian road crossing, subsidised bus transport, town centre enhancements – all about the place where they live. There is no realization of the dangers posed by an open highway/rail interface. Such matters should be equally considered as say, a road speed limit or traffic calming close to a new school.

9.37 Suffolk County Council commented about the willingness of developers to meet their section 106 obligations, and suggested that a bond be entered into to ensure payment. Sills and Betteridge commented that funds collected by way of a section 106 agreement could be used to effectively "buy" level crossing closure. They noted that planning permission for controversial developments has often been granted in the past "because of the attractiveness of what has been offered by a developer under a section 106 agreement".

9.38 This concern was addressed by the Department for Communities and Local Government. It explained that there were sufficient safeguards in the law and guidance on section 106 agreements to ensure that they were an appropriate means of securing developer contributions for level crossings. The Town and Country Planning Act 1990, the Community Infrastructure Levy Regulations 2010, and the guidance in Circular 5/05 limits section 106 agreements to those situations in which a planning obligation is necessary to make the development accessible, and where the obligation relates directly to the nature and scale of the development. The guidance also "ensures planning obligations are not used as a means to buy or sell planning permission". Overall, the rules require "a clear link between the use of a planning obligation for funding towards level crossings and the development to which the planning obligation relates".

Co-operation and consultation

9.39 Several consultees, including the Department for Transport, explained that the effectiveness of section 106 agreements depends on adequate co-operation and consultation between rail and planning authorities. Michael Haizelden suggested that railway operators should have "a greater locus in these matters", while the North Yorkshire Local Access Forum noted that railway operators need improved notification of planning applications to allow them to seek developer contributions. The Egham Chamber of Commerce noted the limited effectiveness of section 106 agreements with respect to level crossings in its county council area, suggesting that the problem could rest with the separation of the highways and planning authorities. It could be that improved communication between the two authorities would improve the use of section 106 agreements.

9.40 Consultees pointed to the failure to collect adequate funds for level crossings works in a section 106 agreement. The Heritage Railway Association explained that it had first hand experience of a section 106 agreement for which the developer contribution was inadequate for the work that had to be done, as a result of the local authority's decision not to accept the railway's cost estimates. Likewise, Network Rail provided an example of a section 106 agreement in which the developer contribution was inadequate:

> The Council's Development Control Report recommended that a section 106 contribution be sought from the developer towards "transport infrastructure". However, the amount of the recommended contribution was insufficient for the construction of a footbridge at the level crossing, and other highway improvements were recommended.

9.41 It added that the arrangements for section 106 contributions should be contained in regulations rather than guidance, and should be capable of accounting for the impact of a development on a level crossing some distance away from it.

Conclusion

9.42 Although most consultees who answered this question took the view that section 106 agreements were appropriate for obtaining developer contributions for upgrading or replacing level crossings, many of those consultees provided suggestions as to how the system could be improved. Several thought that co-operation and consultation between railway and planning authorities should be improved.

Will the situation be improved if the Community Infrastructure Levy is adopted by local planning authorities [CP para 9.40]?

Introduction

9.43 Of the 114 consultation responses that were received, 15 consultees addressed the question of whether the situation would be improved if the Community Infrastructure Levy is adopted by local planning authorities. Ten agreed that the Community Infrastructure Levy would improve the situation, four disagreed, and one was equivocal.

Shortcomings of the Community Infrastructure Levy

9.44 The four consultees who disagreed that the Community Infrastructure Levy would improve the ability to require developers to fund upgrades or changes to level crossings held varied opinions on the matter. Sills and Betteridge expressed the same concern about the Community Infrastructure Levy that it held with respect to section 106 agreements: that planning permission and level crossing closure will essentially be "bought" by developer contributions. It commented:

> The closure of a significant level crossing will only be as part of a very large scheme. Therefore any infrastructure levy in relation to that scheme will be a large sum of money. The possibility, in economically straightened times, of a local authority obtaining a very large sum of money will be no less attractive than the local authority obtaining the sort of benefits which are offered under a section 106 agreement.

9.45 Cambridgeshire County Council expressed serious concerns about the Community Infrastructure Levy, noting that "the formulae are required to be developed by local planning authorities who are not always well-engaged with highway authorities". John Tilly commented that the Community Infrastructure Levy was of limited effectiveness because it was discretionary, while the Heritage Railway Association did not see any evidence that the situation would be improved if the Community Infrastructure Levy was adopted by local planning authorities. Network Rail was equivocal as to the use of the Community Infrastructure Levy, but noted that "the future of the Community Infrastructure Levy remains unclear until the Government announce their detailed proposals in the Localism Bill 2010".

The CIL charging rate and amount of funds collected

9.46 The Department for Communities and Local Government was among the consultees who took the view that the Community Infrastructure Levy could improve the situation with regard to developer contributions toward level crossing upgrades or replacement. It commented that the charging authority, which is generally the local planning authority, would need to set a charging schedule that would determine the mandatory charge to be paid by developers of most new buildings. That schedule would be "informed by infrastructure needs and viability assessments". It noted that the Community Infrastructure Levy can be used more flexibility than funds collected under section 106 agreements, which must be "tied to specific development and specific items of infrastructure" connected with the development. The Department suggested that railway authorities should engage with planning authorities in deciding how to allocate Community Infrastructure Levy funds:

> The level crossings required would not need to be identified prior to the Community Infrastructure Levy being raised, as authorities can change their plans for spending the Community Infrastructure Levy as priorities alter over time. It would help to do so though, to ensure adequate funds are raised to provide for the infrastructure to underpin new development. … Responsible bodies for creation and maintenance of level crossings should liaise with charging authorities to identify new level crossings, as well as level crossings which require updating or replacing, to support new development. Such engagement ensures that the cost of such infrastructure is taken into account when considering infrastructure needs in the area to support the development plan. This consideration forms the basis for setting a Community Infrastructure Levy charge in the charging schedule.

9.47 Many other consultees commented on the need to ensure that adequate funds are collected for the upgrade or replacement of level crossings, which typically requires large expenditure. Suffolk County Council echoed the Department's suggestion for the works required at level crossings to be factored in to the infrastructure plan, to ensure that adequate funds are set aside for that purpose. Lincolnshire County Council, Karl McCartney MP and the joint response from the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum made the point that railway authorities would have to decide for themselves what is required in terms of upgrades or changes to level crossings crossings, in order to engage more proactively with local planning authorities. The Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum commented that it may be useful to collect small sums from a number of development projects in order to fund a single, large infrastructure project:

> It may help balance requirements if contributions from many smaller developments could be collected to fund a single, strategic rail road interface improvement so that funds remained at each development for the local infrastructure as well.

Conclusion

9.48 Overall, consultees' opinions were fairly mixed on the Community Infrastructure Levy, with few expressing any strong opinions on its potential effectiveness. Several consultees commented that it would be necessary to ensure that adequate funds were collected for the upgrade or replacement of level crossings, and provided suggestions to that effect.

If not, what more is needed [CP para 9.41]?

Introduction

9.49 Of the 114 consultation responses that were received, seven consultees answered the question of what more is needed in this area if section 106 agreements and the Community Infrastructure Levy are not considered adequate.

Suggestions for reform

9.50 The few consultees who answered this question provided a range of ideas to improve the ability for developer contributions to be made toward the closure, upgrade or replacement of level crossings. In brief:

(1) Sills and Betteridge suggested that the decision-making regarding developer contributions should rest with the Secretary of State (following an Inspector's report).

(2) The Heritage Railway Association suggested that a formal agreement on cost recovery should be made prior to planning permission being granted.

(3) Network Rail and the joint response of the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum suggested that increased funding from central government would be of assistance. Both consultees noted, however, that a funding increase was unlikely in the current economic climate.

(4) The Associated Society of Locomotive Engineers and Firemen suggested that adoption of the Community Infrastructure Levy should be compulsory for local planning authorities.

(5) Cambridgeshire County Council commented that "there should be explicit provision for public rights of way".

(6) Ken Otter advocated "a realisation by the Government that every crossing needs to be removed if possible" with support from central government.

Conclusion

9.51 Very few consultees responded to this question. Their suggestions for enhancing developer contributions to level crossings ranged from putting increased pressure on Government to making the Community Infrastructure Levy or a formal cost recovery agreement compulsory.

PART 10
PLANNING: SCOTLAND

We would welcome examples or experiences of how consultation works in practice [CP para 10.7].

Introduction

10.1 Of the 114 consultation responses that were received, five consultees responded to the request for examples or experiences of how consultation works in practice.

Transport Scotland

10.2 Transport Scotland provided several examples of the consultation process in planning applications, two of which suggested that inadequate consultation may have taken place. In Dingwall, planning approval was granted for a large supermarket on one side of a level crossing, with a secondary school located on the other side. Transport Scotland commented:

> This has resulted in a large increase in vehicle traffic accessing the supermarket and also a large increase in pedestrian traffic between the school and supermarket at certain times of the day. No upgrade to the crossing resulted from these two developments, giving rise to the assumption that there may not have been adequate consideration of their impact.

10.3 Similarly, Transport Scotland commented that the development of a large supermarket at Ardrossan Harbour had resulted in increased traffic over the two nearby level crossings, again suggesting inadequate consultation.

10.4 Transport Scotland also provided examples of its role in highlighting level crossing-specific issues within the planning process. They mentioned that Transport Scotland engages with local planning authorities in their preparation of development plans and encourages them to highlight issues affecting level crossings in their main issues report. In the case of a proposed development in Clackmannanshire, the planning authority noted in its issues report that the development could result in increased traffic over a level crossing at Cambus. In reply, Transport Scotland provided important background information concerning the prior decision to upgrade the crossing to a full-barrier crossing. It explained to the planning authority that the crossing was upgraded in order to "safely accommodate proposed additional development at Cambus". Noting that the development was therefore unlikely to have an impact on safety at the level crossing, Transport Scotland nonetheless highlighted the potential for increased road traffic to "result in a longer queue of traffic forming when the barriers are closed" and recommended that this issue be considered further.

Network Rail

10.5 Network Rail took the view that the consultation requirement in the Scottish planning process is "too open to interpretation by local authorities" and does not pay adequate regard to the cumulative impact of a development on a level crossing. As an example, it pointed to the proposed development of several homes at Port-An-Eorna, a small hamlet in the Highlands that can only be accessed by a user-worked crossing at Duirinish station. Network Rail was consulted in 2007 on a planning application for the construction of one dwelling house in the hamlet. It did not object to the application but it "raised concerns in respect of the impact any additional future development would have on the safety of the level crossing".

10.6 One year later it was consulted again on a similar planning application, which it opposed on the grounds of safety concerns arising from likely increased traffic over the crossing. At that time it learned that several developments at Port-An-Eorna been approved over the years without Network Rail being notified or consulted. In the end, the planning application was approved. Network Rail outlined its concerns:

> This example is not unique of instances in the Highlands whereby the council does not enact their statutory requirement to consult Network Rail in respect of planning applications where development is likely to result in a change to the volume or character of traffic using a level crossing. In this instance there was no recognition by local politicians of the cumulative impact that sporadic, piecemeal housing development could have on the usage of a level crossing.

The Office of Rail Regulation

10.7 The Office of Rail Regulation provided the example of the Dalfaber level crossing over the Strathspey railway in Aviemore, Scotland. It commented:

> The land to the east of the railway is being progressively developed for executive housing and the levels of traffic now passing over the crossing are rendering the current arrangements unsuitable. Debate has ensued through the planning process about the need for the crossing to be upgraded and where the cost should lie. Whilst it appears that the planning appeal heard by the Scottish Government Reporter has agreed that the crossing needs to be upgraded it has not ruled on whether the developer should bear the cost of the upgrade.

10.8 The Office of Rail Regulation noted that the railway operator would be required to pay at least £150,000 to upgrade the crossing, the need for which was brought about by a gradual change of use over which it had no control.

Other comments

10.9 The Heritage Railway Association commented that in its experience "heritage railways in Scotland are not generally afforded the same consideration as the national network operator". As a result, incremental developments are approved that lead to increased traffic at level crossings, which results in an increased cost and safety burden on the heritage railway.

Conclusion

10.10 Although few consultees provided examples of how the consultation process works in practice in Scotland, the examples above demonstrate that planning authorities do not always take adequate account of the impact of proposed developments on level crossings.

Should amendments be made to the requirements under the 2008 Regulations for consultation with Network Rail Infrastructure Limited and other railway undertakers, where development is likely to affect a level crossing to a material degree [CP para 10.9]?

Introduction

10.11 Of the 114 consultation responses that were received, eight consultees answered the question of whether amendments should be made to the 2008 Regulations for consultation with Network Rail and other railway undertakers where development is likely to materially affect a level crossing. Six agreed that amendments should be made, one disagreed, and one was equivocal.

"Material" change

10.12 A few consultees noted the lack of clarity around what is meant by a "material" impact on the level crossing. Network Rail commented that any amendment to the 2008 Regulations would have to define "material" in order to be of use. It suggested that this clarification might be best made in guidance, but noted that the Scottish Government is seeking to "reduce the amount of central guidance and leave these decisions to individual local authorities". Scotways also queried the meaning of the term "material" and pointed to discrepancies in previous occasions in what had been considered a material impact.

10.13 Transport Scotland suggested moving away from the term "material" and instead imposing a positive obligation to consider the impact of the development on level crossings in all cases. They commented:

> Where there is a level crossing in the area, the railway infrastructure manager who owns and operates the level crossing should be a statutory consultee with regards to any planning application that could impact on traffic over the crossing.

10.14 They added that a similar requirement should be imposed to consult with road authorities when a development could affect road traffic.

Other ideas

10.15 The Heritage Railway Association noted that, as there is already a duty to consult, the problem lies in the lack of any legal remedy when the planning authorities fail to consult "prior to a material change to the level of use at a level crossing". It pointed to a case in Scotland in which a local authority approved the re-routing of a cycle path over a public footpath crossing without consultation.

10.16 John Tilly, the Cyclists' Touring Club, and the Associated Society of Locomotive Engineers and Firemen took the view that amendments should be made to the 2008 Regulations. The Office of Rail Regulation was the only consultee who did not support such a move. It considered that it was preferable to take steps "to ensure that existing obligations are consistently met", rather than modifying the existing system.

Conclusion

10.17 The suggestion of amending the 2008 Regulations was generally well-received by the consultees who answered this question, though several expressed concerns over the use of the term “material”. The Office of Rail Regulation opposed the idea on the grounds that it was better to improve enforcement of the present system.

Should there be a requirement for a transport plan to be produced in connection with an application for planning permission for a development in the vicinity of a level crossing which is likely to have a material effect on the traffic (in terms of volume and/or composition) that uses the level crossing [CP para 10.15]?

Introduction

10.18 Of the 114 consultation responses that were received, 11 consultees answered the question of whether a transport plan should be produced in connection with an application for planning permission for a development near a level crossing that is likely to have a material impact on the traffic over the level crossing. All 11 consultees agreed with the proposal.

The need for a transport assessment

10.19 Many consultees supported this proposal for a transport plan, including the Office of Rail Regulation, the Railway Industry Association, the Association of Train Operating Companies John Tilly, the Rail Safety and Standards Board, the Associated Society of Locomotive Engineers and Firemen, the Cyclists' Touring Club, and Community Safety Partnerships.

10.20 Transport Scotland clarified that in Scotland it would be a transport assessment – rather than a transport plan – that would be carried out. They agreed that a transport assessment should be conducted "for all developments requiring planning permission where a change of use or new development is likely to result in a significant increase in the number of trips". They commented that a transport assessment should highlight issues relating to level crossings. When such issues are identified, the railway infrastructure manager should be made a statutory consultee. They added that leave to appeal to the Scottish Ministers should be available in the event that there is a conflict regarding a requirement to upgrade a level crossing.

10.21 Network Rail also pointed out the difference between a transport plan and a transport assessment, explaining that the latter is what is required in Scotland. It suggested that guidance could be helpful to assist the local authority in identifying the circumstances that would warrant the conduct of a transport assessment. The Rail Safety and Standards Board suggested that a transport assessment should be mandatory for all planning applications, a task that "need not be onerous for small developments, as simple statements would be adequate".

10.22 The Heritage Railway Association took the view that the proposal was sensible but went on to suggest that the same or similar requirements be imposed for all "changes to road transport infrastructure not linked to a property development requiring planning permission".

Conclusion

10.23 All consultees who answered this question took the view that a transport plan – or, more accurately, a transport assessment – should be included in an application for planning permission for a development that is likely to have a material effect on the traffic at the crossing.

Our provisional view is that any future procedure governing closure of level crossings should aim to involve planning authorities in the decision to close or replace a crossing (in particular where development is a factor necessitating closure) [CP para 10.20].

Introduction

10.24 Of the 114 consultation responses that were received, eight consultees addressed the proposal to aim to involve planning authorities in the decision to close or replace a level crossing in any future procedure governing the closure of level crossings. Seven consultees agreed with the proposal and one expressed equivocal views.

Involvement of planning authorities in closure

10.25 In general, consultees who answered this question agreed that planning authorities should be involved in the decision to close a level crossing in any future closure procedure. The Department for Transport, the Office of Rail Regulation, the Heritage Railway Association and Community Safety Partnerships agreed with the proposal without qualification. John Tilly also agreed, but noted that Network Rail has the power to compulsorily purchase land without involving planning authorities under the Transport and Works Act 1992 and the Transport and Works (Scotland) Act 2007.

10.26 Transport Scotland strongly supported the proposal. They also commented that it might be useful to make reference in the development plan to the potential closure of level crossings resulting from the proposed development. This would "provide a formal mechanism for all parties, including the public, to comment through the statutory consultation periods associated with plans". Network Rail also made reference to the statutory consultation process, suggesting that it needed to be improved. It commented that local authorities are often "reluctant to use stopping up powers under the Roads (Scotland) Act 1984" and, as a result, tend to use the stopping up powers set out in planning legislation. It described these powers as costly and time-consuming, as they usually involve a public inquiry. It added:

> Moreover as these are relatively rare processes they are not well understood by local authorities – there are no application forms, no responsible departments, no set fees, several stages almost duplicate previous stages and even one objection (regardless of its merit or lack of merit) leads to the time and expense of a public inquiry.

10.27 The Associated Society of Locomotive Engineers and Firemen also agreed with the proposal, but emphasised that the planning authority should not have "a veto over closure" unless it agreed to fund a replacement for the crossing, such as a bridge or underpass.

Conclusion

10.28 Consultees who responded to this proposal generally supported it. They agreed that planning authorities should be involved in any future procedure for closing level crossings, with several noting the problems with the statutory consultation process in the present procedure.

Are there any legal obstacles to the use of agreements (in particular, planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997) to secure contributions from developers towards level crossing infrastructure? Are there any other improvements which could be made in this area [CP para 10.28]?

Introduction

10.29 Of the 114 consultation responses that were received, six consultees addressed the question of whether there are any legal obstacles to the use of agreements to secure contributions from developers toward level crossing infrastructure, and provided suggestions for other improvements that could be made in this area. One consultee agreed that there were legal obstacles to its use, three disagreed, one was equivocal, and two provided suggestions for improvement without commenting on the existence or otherwise of legal obstacles.

Legal obstacles

10.30 The Heritage Railway Association and Transport Scotland were not aware that there were any legal obstacles to the use of agreements in securing developer contributions. The main obstacle was the lack of awareness of the uses of section 75 of the Town and Country Planning (Scotland) Act 1997. The Rail Safety and Standards Board took the same view of section 75 planning agreements as it did to the use of agreements under section 106 of the Town and Country Planning Act 1990. It had commented that section 106 agreements should be sufficient to allow for developer contributions for upgrades or replacements of level crossings required as a result of change of use at the crossing. The Associated Society of Locomotive Engineers and Firemen did not state conclusively whether there were any legal obstacles to its use, but did note that any loopholes in the legislation would need to be closed.

10.31 Network Rail provided a detailed response to this question, stating overall that the use of planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997 is viable, subject to several considerations. First, it explained that it is the planning authority – not Network Rail – that is in receipt of funds from the developer under a section 75 agreement. Network Rail does not have any means of making a separate agreement with the developer and thus cannot enforce the agreement if necessary. This leaves Network Rail in a difficult position if it were to try to recover its costs associated with the upgrade or replacement of the level crossing affected by the development.

10.32 Second, it explained that planning agreements under section 75 are specific to particular developments. The developer contributions must relate to a development for which planning permission has been granted and cannot be sought by the planning authority for more general purposes. For example, it explained that a planning authority is unlikely to be able to impose “a blanket requirement for all developers in the area to make a small contribution irrespective of the location or nature of their development”.

10.33 Third, Network Rail explained that the use of planning agreements depends on effective consultation with the planning authority's statutory consultees. It noted that "the onus is on Network Rail to respond rather than the planning authority to take the initiative to seek the contribution". In addition, Network Rail needs to participate in preparing local plans, since developer contributions must be "heralded in a local development plan or supplementary planning guidance". In responding to planning authorities' main issues reports, Network Rail regularly highlights issues of level crossing safety and encourages the planning authority to reject developments that would increase the use of level crossings and to secure full developer contributions for developments that would require the replacement of a level crossing for safety reasons. It suggested that:

> Guidance on emerging development plans should be clear that level crossing safety is a material planning consideration and that it will be taken into account at development plan stage as well as in development management decisions.

10.34 Finally, it noted a tension between the general practice in Scotland to use phased payment schedules ("whereby any financial contribution is paid in instalments which relate to the development economics of the proposal") and the practice of closing a level crossing before the development has been occupied and therefore before the traffic over the crossing has increased as a result of the development.

Suggestions for improvement

10.35 Two consultees made suggestions for improving the ability to foster developer contributions toward level crossing infrastructure. John Tilly suggested that it might be helpful to make reference to the use of planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997 in any primary legislation arising from this project. Transport Scotland suggested that developers should be made to demonstrate that their proposed development will not adversely affect the safety at a level crossing before planning permission is granted. In addition, they noted that there should be "an appeal mechanism that can be applied where there is disagreement regarding the scope or compulsion of developer contributions".

Conclusion

10.36 Of the few consultees who responded to this question, the majority took the view that there were no legal obstacles to the use of planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997 to secure developer contributions towards level crossing infrastructure. Network Rail provided a list of concerns about the effectiveness of planning agreements and two other consultees made specific suggestions for improvement.

PART 11
RIGHTS OF WAY AND ACCESS ISSUES: ENGLAND AND WALES

Do consultees think there should be a statutory prohibition on the future acquisition of private rights of way over the railway by prescription [CP 11.39]?

Introduction

11.1 Of the 114 consultation responses that were received, 20 consultees addressed the question of whether there should be a statutory prohibition on the future acquisition of private rights of way over the railway by prescription. Eleven consultees agreed that there should be a prohibition, eight disagreed, and one was equivocal.

Support for a statutory prohibition

11.2 The proposal was generally supported by railway operators – such as Network Rail, heritage railways, and the Association of Train Operating Companies – as well as the Department for Transport and the Rail Safety and Standards Board. For instance, the Bodmin and Wadebridge argued that it would not be fair for railways with limited use (particularly heritage railways) to be subject to prescriptive acquisition of rights of way, as they may not be aware of prolonged or regular use of "informal foot crossings" over their line.

11.3 Network Rail also supported the proposal, explaining:

> Previous owners of the railway have historically been able to defeat claims to prescriptive rights over level crossings by relying on section 55 of the British Transport Commission Act 1949, which makes trespass on the railway a criminal offence. The argument is that a prescriptive right cannot be acquired through conduct which is unlawful.

It added that the exclusion of level crossings and railway lines from section 57 of that 1949 Act, which provides that a right of way cannot be acquired by prescription over certain railway land, was likely a result of Parliament's perception that there was simply no risk of prescriptive rights over crossings ever arising.

11.4 Network Rail was the only consultee to suggest that the prohibition should also cover public rights of way. North Yorkshire Local Access Forum specifically opposed a statutory prohibition on the prescriptive acquisition of public rights of way that have not yet been included in the definitive map.

11.5 Community Safety Partnerships made its support for the proposal conditional on the prohibition not precluding "the transfer of rights from a crossing which is to be closed to another level crossing". Likewise, it did not want the prohibition to apply to a new level crossing that is "provided to facilitate a net reduction in the number of level crossings".

Those against a statutory prohibition

11.6 Several local access groups were among the consultees who did not agree that there should be a statutory prohibition on the acquisition of private rights of way over the railway by prescription. The Conwy East Local Access Forum took the view that it may be necessary to override "certain vested interests" to safeguard the public interest in creating new level crossings in some circumstances. Scotways noted that prescriptive use must still be compatible with the operation of the railway, and that it could be possible for the Lands Tribunal to extinguish or modify an easement on safety grounds if necessary. On these grounds, it opposed the proposal.

11.7 The Bridgend Local Access Forum and the Rail Safety and Standards Board warned that it may be difficult to determine precisely what rights of way are in existence before implementing a prohibition. The latter consultee commented:

> There is still likely to be doubt about what rights were granted at the time of construction and what might have been obtained by prescription before prohibition on gaining any more rights.

The former consultee added that it might not be equitable to prevent unrecorded private rights of way from being recognised, particularly if they provide the only means of access to an owner's land.

11.8 The Country Land and Business Association were concerned that the prohibition might enable railway operators to shirk their duty to ensure that "all its crossings are being used in a correct manner". It queried the logic of applying a different rule to the acquisition of rights by prescription in the particular context of level crossings. The Office of Rail Regulation opposed the proposal simply on the grounds that it might not be necessary. It commented that "preventing acquisition of rights is simply capping the number of recognised users rather than controlling the actual traffic level" over the railway.

11.9 The suggestion was made that the proposal might go too far in curtailing the acquisition of private rights of way. Michael Haizelden made this point, while the Rail Safety and Standards Board suggested that it might prohibit activities to which the railway is unlikely to object. Activities that do not alter the type or degree of use might be unproblematic, such as "access by car or small van for infrequent maintenance work to a pumping plant or wind turbine".

Conclusion

11.10 Responses to this question were fairly mixed, with a minority opposing a statutory prohibition on the acquisition of private rights of way by prescription. Objections were made generally on the grounds of fairness and because of practical concerns about the potential impact of the prohibition.

We provisionally propose that there should be a statutory list of factors which should be taken into account by courts when deciding whether changed or increased use at a private level crossing amounts to excessive use [CP para 11.49].

Introduction

11.11 Of the 114 consultation responses that were received, 19 consultees addressed the proposal to provide a statutory list of factors that should be taken into account by courts when deciding whether changed or increased use of a private level crossing amounts to excessive use. Fifteen consultees agreed with the proposal, two disagreed, and two were equivocal.

Advantages and disadvantages of a statutory list of factors

11.12 Several consultees suggested that a list of factors to be considered by courts in deciding whether changed or increased use of a crossing amounts to excessive use would be helpful to the parties involved (Rail Safety and Standards Board), to the courts (the Department for Transport), or more generally (Association of Transport Co-ordinating Officers).

11.13 A few consultees, including Network Rail, emphasised that the list should not be exhaustive. Indeed, the Conwy East Local Access Forum opposed the proposal partly on the grounds that any statutory list of factors implies that factors not listed are excluded. It explained that judges can be trusted to make rational decisions without the need for a list of factors. It also suggested that any definition of "excessive use" should "consider the use for which the crossing was originally required", taking into account factors such as changes in transport provision, changes in construction material, and other changes of use.

11.14 The National Farmers' Union strongly opposed the proposal. It took the view that the question of excessive use is a matter of fact that must be determined on a case by case basis, without reference to a narrow set of standardised criteria. It emphasised the extent to which farming practices have changed since the time of the original grant of the easement, with horse drawn machinery being replaced by large machines such as combine harvesters. It went on:

> With the increased demand for food security in this country farmers are under greater pressure to produce more food for a growing population. As a result, where a private level crossing dissects areas of land, for example arable land then increased use of a level crossing could be likely, particularly during harvest. It would be, and should be for a Court to decide, on the facts of a case whether the use amounts to excessive use and thus supports injunctive relief. The Court should have complete remit to consider any matters it deems relevant.

11.15 In addition, it questioned the emphasis on penalising a farmer's excessive use of a level crossing when the railway industry continues to make "even greater use of railways with bigger, faster and more frequent trains travelling along routes".

Other ideas and questions

11.16 Michael Haizelden suggested introducing a parallel procedure to consider the impact of changes to railway activity on the users of level crossings. He suggested that this process could take account of changes in railway operating practices or increased railway traffic on the owner's ability to "undertake those activities that the easement was intended to facilitate".

11.17 The Office of Rail Regulation neither agreed nor disagreed with this proposal, but it noted that it can be difficult to determine the extent to which use has changed or increased. It queried which body would be tasked with enforcing a court decision on excessive use.

Conclusion

11.18 The consultees who answered this question were generally supportive of the proposal to introduce a statutory list of criteria for deciding the question of excessive use. However, two consultees stressed that the question is a matter of fact that the courts are capable of deciding without a statutory list of factors.

We provisionally propose the following factors:

the impact on safety of the railway and crossing users;

the operational requirements of the railway, including how heavily used the railway line is;

whether the use is of a substantially different character to the original use;

the frequency of use compared to the original frequency of use; and

whether the use will have such an impact upon the railway as to require expenditure on the part of the railway operator [CP para 11.50].

If consultees agree that there should be a list of factors, is the list above satisfactory or are there any other key factors which should be taken into account when assessing whether increased use of a private level crossing amounts to excessive use [CP para 11.52]?

Introduction

11.19 Of the 114 consultation responses that were received, 21 consultees addressed whether the above list of factors is satisfactory or whether other key factors should be taken into account when assessing whether increased use of private level crossing amounts to excessive use. Eleven consultees were satisfied with the list of factors, while ten suggested other factors that should be taken into account.

Additional factors

11.20 Approximately half of the consultees who answered this question approved the proposed list of factors, without additional suggestions or modifications.

11.21 The British Horse Society, the Country Land and Business Association and the National Farmers' Union all stressed the need to make reference to the operational needs of businesses and activities required for daily life. Likewise, these three consultees and the Department for Transport each suggested including the consideration of alternative means of crossing the railway (such as bridges, underpasses and diversions) in the statutory list of factors. The Country Land and Business Associated explained that this factor should take into account any "other measures [that] could be undertaken by the railway company to reduce such excessive use". The British Horse Society commented that this factor needs to be considered not only in terms of railway expenditure, but also in terms of the safety and convenience of the level crossing users.

11.22 The Conwy East Local Access Forum opposed the proposal to have a statutory list of factors, but suggested that any such list ought to take account of factors such as changes in transport provision and construction material in any consideration of whether current use is consistent with the use for which the crossing was originally created. Community Safety Partnerships commented that "provision needs to be made allowing increased use of a crossing when this results from a scheme which in aggregate reduces the number of level crossings".

11.23 The Heritage Railway Association suggested including a factor for "local issues".

Modified factors

11.24 The first proposed factor was "the impact on safety of the railway and crossing users". Network Rail and the Rail Safety and Standards Board commented that this factor must include consideration of "any likely increase in the risk of collision at the crossing or the consequences of such a collision".

11.25 The second factor was "the operational requirements of the railway, including how heavily used the railway line is". The Department for Transport and the Bodmin and Wadebridge Railway Company both pointed out that the character of use by the railway must be included in this criterion. The Department commented that:

> Point (2) factors in how heavily used the railway line is, but does it also need to factor in the character of that usage, e.g. short stopping steam train vs fast intercity service? … The planned or future usage of the line might also be considered, for example if additional train paths are being sought that will increase rail traffic.

11.26 The third factor in the provisional statutory list was "whether the use is of a substantially different character to the original use". The National Farmers' Union considered that this factor was too vague and did not take adequate account of the expected changes to a person's business over time:

> It must be remembered that a considerable period of time has passed since the introduction of the railways and the original grant. As such, any changes in the use of the crossing are likely to have been gradual over time as a result in of the natural changes in the user's operations or business and it would be difficult to evaluate these changes as a change in 'character'.

Likewise, the Department for Transport thought that the term "substantially different character" would need to be carefully defined. It compared a horse and cart to a modern tractor trailer, suggesting that while a tractor is capable of crossing the railway much more quickly than a horse and cart, its increased weight could make a collision more serious. These difficulties would have to be taken into account.

11.27 John Tilly added that the third factor would need to also consider any changes in use to the land, such as the change from a farm to a housing development. He pointed to case law suggesting that some changes of use have been held by courts to be unreasonable.

11.28 No consultees commented on the fourth factor, which was "the frequency of use compared to the original frequency of use".

11.29 The fifth factor was “whether the use will have such an impact upon the railway as to require expenditure on the part of the railway operator”. Both the National Farmers’ Union and Nia Griffith MP suggested removing this factor all together. The Department for Transport suggested adding, for the sake of clarity, the words “increased or changed use” to the proposed factor. Network Rail and the Rail Safety and Standards Board commented that this factor should “explicitly include increased staff and maintenance costs as well as one off capital costs”. John Tilly noted that the Railways Clauses Consolidation Act 1845 already specifies that upgrades such as these would have to be paid for by the level crossing user, rather than the railway.

Conclusion

11.30 The responses to this question were fairly evenly divided. While one half were satisfied with the proposed statutory list of factors, the other half made suggestions for insertions, deletions or modifications to the list. Many consultees noted the importance of accounting for the operational needs of the crossing user (and their business) and the potential use of any alternative means of crossing the railway.

Do consultees think there should be such a statutory list of factors to be taken into consideration when construing the extent of a general right of way [CP para 11.51]?

Introduction

11.31 Of the 114 consultation responses that were received, 17 consultees addressed the question of whether there should be a statutory list of factors to be taken into consideration when construing the extent of a general right of way. Fifteen consultees agreed that there should be a statutory list of factors, one disagreed, and one was equivocal.

General support for the proposal

11.32 Overall, this proposal was supported by consultees who addressed it in their response. Most agreed with the proposal without elaboration. Network Rail was among those consultees to support the proposal, adding that any statutory list of factors should not be exhaustive.

11.33 Bodmin and Wadebridge Railway Company Limited was equivocal in its response. It commented that it might be more difficult to establish the past usage of a general right of way as compared to a private right of way:

> It should be simple to establish by evidence the use of a private level crossing in the past and present. For a general right of way, this may be more complicated. Different highway authorities may conduct usage surveys of varying rigour, duration and frequency. Some may not conduct specific surveys across all general crossings.

11.34 The National Farmers' Union did not support the use of a statutory list of factors for construing the extent of a general right of way. Its opposition rested on the fundamental difference between rights acquired by grant or by user:

> The approach of the Courts in determining the extent of rights of way in law generally differs depending on whether the rights are acquired by user or by grant. The NFU does not believe that it would be appropriate to include a statutory list of factors in respect of rights acquired by grant as each case will turn on its own facts and will require the Court to interpret the individual drafting of the deed / conveyance.

11.35 It commented further that the proposed list of factors was biased toward railway interests, with insufficient attention paid to the operational and business needs of level crossing users.

Conclusion

11.36 Most consultees who answered this question did not explain their reasons for supporting the proposal. Of the two consultees who discussed this issue in detail, one disagreed with it and the other was equivocal.

Do consultees think that it would be helpful for the law expressly to state that private rights over a level crossing can be extinguished by agreement between the rights holder(s) and the railway operator [CP para 11.59]?

Introduction

11.37 Of the 114 consultation responses that were received, 26 consultees addressed the question of whether the law should expressly state that private rights over a level crossing can be extinguished by agreement between the rights holder and the railway operator. Eighteen consultees agreed with the suggestion, four disagreed, and four were equivocal.

Utility of statutory recognition for deed of release

11.38 Several consultees, including the Office of Rail Regulation and the Department for Transport, suggested that the proposal would be helpful and would provide much-needed clarity. The National Farmers' Union agreed that it would be beneficial to enshrine in legislation the rights holder's ability "to freely negotiate and agree any extinguishment or release of rights of way over a level crossing with the railway operator". It took the view that the legislation should not go any further than "a simple statement confirming the legal position", as it was important to ensure that parties were free to tailor their agreement to their particular circumstances.

11.39 Others were more less certain about the usefulness of the proposal. Network Rail, for instance, thought that a change in the law was not strictly necessary since it was clear that rights could be extinguished by agreement. However, it thought that it might be sensible to include such a provision in any update of the law relating to level crossings, "for the sake of completeness and to put the matter beyond any possible doubt". The Conwy East Local Access Forum opposed the proposal on the grounds that it was unnecessary.

Practical problems with the proposal

11.40 The Land Registry and the Rail Safety and Standards Board commented on the difficulty of ascertaining all parties with an interest in the crossing. The Rail Safety and Standards Board outlined the problem as follows:

> There are some crossings at which it is impossible to identify all the persons who had rights (or easements) to use a crossing at the time of construction, possibly because of lack of clarity of the area of land a private access road lead to and sometimes due to loss of or damage to deeds. (At least one railway suffered a fire in its deed store prior to 1923). Consequently if all known users have been identified and consented to give up their rights there can remain some doubt as to whether there are other persons who could claim a right to use the crossing.

11.41 The Land Registry commented that the inability to determine all beneficiaries of the easement typically resulted in a deed of release not being effective:

> In the normal course of registration of land we have to consider deeds of release of easements and one of the main problems is establishing that all the appropriate parties have joined in, in order to make the release effective. It is because of the difficulty, in many cases, of establishing this, that frequently it is not possible to treat the easement as effectively released, and in practice we commonly make an entry in respect of the easement (or, if it is already on the register, leave the entry on) and make a further entry relating to the purported deed of release which makes its existence apparent on the face of the register but does not guarantee its effect.

It questioned how the proposal would address this difficulty, querying whether the proposal was aimed at making the release effective in law even if all beneficiaries of the easement were not capable of being ascertained.

11.42 The Rail Safety and Standards Board suggested that the problem of identifying all the relevant parties might be remedied if the legislation could specify that all unidentified parties were subject to forfeiture of their rights by a deed of release. It added that "such a process would require some sort of publicity to alert such persons of the need to identify their claim to a right".

11.43 The Land Registry pointed to a second problem with the proposal. It explained that if the benefit of the easement is registered with the dominant land, it would be necessary to ensure that the easement is not transferred to a new proprietor upon transfer of the dominant land:

> If no application is made to Land Registry to remove the benefit of the easement from the registered title following its release, then on registration of a transfer of the dominant land section 58 of the Land Registration Act 2002 may operate to vest the benefit of the right of way (which remains in the register) in the new registered proprietor. This could potentially lead to disputes and possibly a call on Land Registry's indemnity fund.

11.44 It proposed that this problem could be averted by making a deed of release a "registrable disposition" under section 27 of the Land Registration Act 2002.

Other concerns

11.45 A few consultees expressed some more general reservations with the proposal. The Bridgend Local Access Forum was concerned with the need to protect landowners from pressure by Network Rail to agree to the extinguishment of their right of way. The access group Scotways opposed the proposal, on the grounds that it did not think it should be possible to extinguish a right of way by agreement. It commented that it favoured "statutory rights … to be permanent unless a closure order has been obtained".

11.46 Ken Otter, also rejected the proposal. He noted that a period of public consultation was required in all cases. The Country Land and Business Association also emphasised the need for consultation, particularly in cases involving the compulsory purchase of land. It supported the proposal but added that:

> [The legislation] should also state that progression to compulsory purchase should only take place after a prolonged period of consultation, consideration of representations and an informed decision making process.

11.47 It stressed that any new proposals involving powers of compulsory purchase should make clear that they are to be used only as a power of last resort.

Conclusion

11.48 Generally, the consultees who answered this question thought it might be helpful for the legislation to state expressly that private rights over a level crossing can be extinguished by agreement between the rights holder and the railway operator. However, several consultees, among their other reservations, commented on the difficulty in determining with any certainty whether all rights holders have been identified and are joined in the deed of release.

Do consultees agree that the law should be as laid down in *Midland Railway Company v Gribble*? If so, should this rule be given statutory effect, or is it sufficient that it remains a matter of case law [CP para 11.68]?

Introduction

11.49 Of the 114 consultation responses that were received, 25 consultees addressed the question of whether the law should be as laid down in *Midland Railway Company v Gribble*, and whether the rule should be given statutory effect or should remain a matter of case law. Nineteen consultees agreed that the law should be as laid down in *Gribble*, three disagreed, and three were equivocal.

11.50 Of those who agreed that the law should follow *Gribble*, ten took the view that it should be given statutory effect, six believed it should remain a matter of case law, and one was equivocal.

Support for Gribble

11.51 The majority of consultees who answered this question agreed that the law in this area should reflect the court's decision in *Midland Railway Company v Gribble* ("*Gribble*").[1] This case is taken to stand for the proposition that when land on one side of a crossing over which there is a private right of way is sold without reserving the right or granting the right to the purchaser, the right is abandoned and ceases to exist.

11.52 A significant number of those consultees believed that this rule should be given statutory effect, including the Office of Rail Regulation, the Department for Transport and Network Rail. Network Rail commented that the decision correctly interpreted section 68 of the Railways Clauses Consolidation Act 1845 and section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 and should be given statutory effect, as the case is not widely known outside the rail industry.

11.53 The Rail Safety and Standards Board and Transport Scotland noted that enshrining the rule in *Gribble* in legislation would prevent it from being overturned by a higher court. Network Rail added that case law is at risk of being overturned "on the basis of other legislation which was not at the time considered to affect that particular area". The Department for Transport cautioned that it would be necessary to ensure there was an appeal mechanism and scope for adequate public consultation, to ensure that the rule did not disadvantage landowners.

11.54 Community Safety Partnerships wished to see the rule in *Gribble* replaced by a statutory provision specifying that one's rights over a private accommodation crossing lapse when the land on either side of the railway is no longer owned by the same person. It added:

[1] [1895] 2 Ch 827.

> The law should be constructed in a way that does not also eliminate a public footpath right over the level crossing when a private vehicular right is extinguished. There should be an obligation on the railway to remove all traces of an accommodation level crossing where rights have lapsed and reconfigure the crossing if only vehicular rights have been eliminated.

11.55 Some consultees agreed that the law should be as laid down in *Gribble*, but did not want to see it given statutory effect. The Heritage Railway Association, Conwy East Local Access Forum, Lincolnshire County Council, Karl McCartney MP, and Nia Griffith MP agreed that it was sufficient for the rule in *Gribble* to remain a matter of case law.

Problems with the rule in Gribble

11.56 Several consultees made equivocal or negative responses to the question of whether the law in this area should follow *Gribble*. The National Farmers' Union commented that *Gribble* turned on its facts and should not be applied "in a broad fashion" to rights of way granted by conveyance and statutory easements. It noted that the facts in a given case might suggest that the right of way should not be taken as having been abandoned by the transfer of adjoining land. The Country Land and Business Association made this same point, suggesting that the sale of land on one side of the railway does not necessarily indicate that access by the original landowner is no longer necessary:

> The person exercising the right of way across a railway no longer holds the ownership of land on both sides of the railway but might be some distance removed (e.g. a house sold away from the estate) or indeed the land may have been sold but the shooting rights either retained or sold separately. Therefore it should not automatically be assumed that just because land is sold that there is no further interest in the use of the crossing.

11.57 The Land Registry also noted that it might be difficult to enshrine a general rule in legislation, as "cases of abandonment turn so much upon the very specific facts". It also pointed to a practical problem with the proposal: that it may not always be clear whether the Land Registry should extinguish an easement on the register. It commented that according to the rule in *Gribble*, an easement should be extinguished if the land on one side of a railway is sold without reservation or grant. However:

> The difficulty is that the beneficial entry will be on the whole title initially. While it may not be carried forward to the new title (Land Registry assesses this when dealing with the registration of the transfer of part, based on the benefit/intention test), if the easement falls as a result of the points in *Gribble*, it is difficult to see how Land Registry could identify this situation so as to take steps to remove the entry from the transferor's title?

11.58 Both the National Farmers' Union and Professor Roddy Paisley of Aberdeen University warned that legislation in this area might amount to a violation of article 1, Protocol 1 of the European Convention on Human Rights. The National Farmers' Union commented that:

> A rule of extinguishment, particularly in relation to implied easements could raise questions of human rights infringements because an extinguishment could be argued to be a deprivation of property. In addition, it is worth noting that *Midland Railway Company v Gribble* was decided long before the Human Rights Act 1998 came into force.

11.59 Professor Roddy Paisley drew attention to the House of Lords decision in the *Monkland and Kirkintilloch Railway* case ("*Monkland*").[2] He explained that, although *Monkland* can be understood narrowly as establishing simply that "*Gribble* is not and never has been part of Scots law", it has a wider meaning that warrants exploration:

> The broad principle that is clear in the short House of Lords judgement is this. The legitimate use which the landowner makes of his land (split by the railway) is not frozen in time (when the railway was established) but is what he wants to do at any time then or in the future. His right marches with time - it is not a servitude construed by reference to the facts of creation.

He went on to explain that the railway has an obligation to ensure that it is safe for "legitimate traffic" to cross at a private crossing, and this obligation is not diminished by the railway's increase in line speed or traffic over the years.

Conclusion

11.60 Although the majority of consultees who answered this question were content to see the law follow the rule as laid down in *Gribble*, many of those consultees were less confident about enshrining the rule in legislation. Furthermore, some concerns were raised about *Gribble*'s fact-specific nature, its relation to the case of *Monkland*, and its potential human rights implications.

[2] *The Monkland and Kirkintulloch (sic) Railway Co v William Dixon of Govan Colliery and William Dixon and Company of Calder Iron Works*, 27 May 1842, (1842) 1 Bell. 347.

Do consultees think there should there be a statutory prohibition on the future implied dedication of highways over the railway [CP 11.99]?

Introduction

11.61 Of the 114 consultation responses that were received, 36 consultees addressed the question of whether there should be a statutory prohibition on the future implied dedication of highways over the railway. Fifteen consultees agreed that there should be such a prohibition, 19 disagreed, and two were equivocal.

Prohibition is unnecessary or excessive

11.62 More consultees disagreed with the proposal for a statutory prohibition on the future implied dedication of highways over the railway than agreed with it. All but one of the access groups who answered this question opposed the idea, as did most of the local authorities. Many of these consultees suggested that a prohibition would be unnecessary, as instances of implied dedication would be relatively rare and can be dealt with by existing legislation. Devon County Council explained:

> The occasions that might give rise to this are rare and [we] not aware of any instances where successful claims of this nature have been made and where problems have then arisen with the usage. Such a change in the law would be considered excessive.

This statement was echoed by a number of other access groups and local authorities.

11.63 Several consultees commented that a prohibition on implied dedication of a highway over a railway would conflict with existing legislation. For instance, the Hampshire Countryside Access Forum commented that such a prohibition would conflict with the provisions for claiming historic rights of way under the Countryside and Rights of Way Act 2000, particularly the cut-off date of 1 January 2026 in section 57 of the Act. The Institute of Public Rights of Way and Access Management and Monmouthshire County Council reiterated this concern.

11.64 Northamptonshire County Council suggested more generally that existing legislation was adequate:

> In order for a new right of way to come into being through usage, the public must show that their use has been without permission, has been without force and has been done openly. Providing that rail operators are taking necessary precautions to prevent this type of usage i.e. they are taking measures to prevent persistent trespass, the integrity of the railway is already protected by existing statute and common law.

Cambridgeshire County Council also suggested that section 31 of the Highways Act 1980 was sufficient for dealing with the implied dedication of highways, noting that there was no reason to provide a different legal system for railway landowners in particular.

Fairness and the importance of public access rights

11.65 A few consultees pointed out that a statutory prohibition on implied dedication of a highway over the railway could lead to unfair or impractical results. Ramblers, for instance, commented that the prohibition could break up the network of public paths by applying only to that part of the path that crosses the railway:

> We do have particular concerns over the closure of occupational crossings which have, over time, been used by the public as part of the *de facto* path network. It might prove possible to claim, as public rights of way, the paths leading to the crossing point but if the route of the occupational crossing could not be claimed then there would be cul-de-sac paths on either side and the inherent possibility of trespass.

11.66 The joint response from the Southern Snowdonia and Northern Snowdonia Local Access Forums suggested that landowners who fail to enforce against the public using their private right of way should not be able to rely simply on the fact that their right of way crosses a railway "to deny the public the rights they have won". Similarly, the Bridgend Local Access Forum did not think that Network Rail should have any greater rights than other landowners. It noted the usefulness of dedicating a public highway over a disused railway:

> Network Rail will very often not distinguish between an abandoned railway and a live one and if there is clear benefit to registering a route on a disused railway that is obviously never going to be brought back into use this should not be disallowed by statute.

11.67 The Cyclists' Touring Club believed that the proposal reflected an attempt to reduce consultation with road users or highway authorities over the closure of public rights of way. It opposed the idea of a statutory prohibition on the grounds that it was not in the interest of road users.

The issue of criminal trespass

11.68 Several consultees addressed the question raised in the consultation paper of whether the general rule – that presumptive dedication of a highway is precluded by criminal illegality – would apply in the case of level crossings. Northumberland County Council, the North Yorkshire Local Access Forum and the Ramblers all acknowledged the lack of clarity in the law, requesting that it be remedied.

11.69 Ramblers suggested that implied dedication of a highway over a railway could arise in spite of section 55 of the British Transport Commission Act 1949, which criminalises trespass over a railway. They commented that the House of Lords' reasoning in *Bakewell Management Limited v Brandwood* ("*Brandwood*")[3] would apply:

[3] [2004] UKHL 14, [2002] 2 AC 519.

> If the public start trespassing on the railway in circumstances which could give rise to a claim elsewhere, and no action is taken (i.e., nobody is prosecuted or warned off), then a public right of way could come into existence. Here the railway company could be said to have been acquiescing in or permitting the use in the sense of not preventing it.

11.70 They also noted that section 31 of the Highways Act 1980 does not prohibit the dedication of a public highway in circumstances where the conduct giving rise to the dedication is criminally illegal. Although section 31(1) prevents dedication from applying to any "way of such a character that use of it by the public could not give rise at common law to any presumption of dedication", Ramblers believed that a more narrow reading of this provision is warranted. They commented that the court ruled in *Oxfordshire County Council v Oxford City Council*[4] that the provision simply required that it be "a more or less defined route, i.e. you cannot under section 31(1) acquire a right to wander at will".

11.71 Not surprisingly, Network Rail took the opposite view of this question. It noted that it, and previous railway owners, had been able to rely on section 55 of the British Transport Commission Act 1949 to defeat claims for prescriptive rights over the railway arising from trespass over the railway. Although it conceded that recent case law has cast doubt on the presumption that prescriptive rights cannot be implied through criminal conduct, it noted that *Brandwood* related to the particular circumstances of rights of way over a common.

Support for a statutory prohibition

11.72 Less than half of the consultees who answered this question agreed that there should be a statutory prohibition on the implied dedication of a highway over a railway. The Department for Transport, the Rail Safety and Standards Board, Network Rail, and heritage railway interests were among its supporters. The North Yorkshire Local Access Forum was the only access group to agree with the proposal, though it noted that existing public rights of way that have not yet been added to the definitive map should be protected.

11.73 The Rail Safety and Standards Board and Michael Haizelden commented that the current law in this area is uncertain, and suggested that the proposed statutory prohibition would have the effect of resolving this uncertainty. The Rail Safety and Standards Board commented that:

> There are a number of road level crossings which were certainly constructed for private use at which the present position is very unclear. In general the 'railway' makes no attempt to question the right of any person to use the crossing but does not necessarily accept the existence of public rights, the highway authority often but not always maintains the highway on both sides of the crossing. … It would be very helpful if this review included a relatively simple mechanism for resolving these uncertainties … .

[4] [2004] EWHC (Ch) 12.

11.74 Michael Haizelden added that improved clarity would be particularly helpful to heritage railways, which have "relatively fewer resources for contesting legal cases". The Heritage Railway Association and the Bodmin and Wadebridge Railway Company supported the proposal.

11.75 The Department for Transport supported the proposal on the grounds that "it is not desirable for future rights of way to be imposed upon the railway, as these are potentially burdensome and counter to the policy on new level crossings". The Office of Rail Regulation did not take a position on it, but did pose the practical question of who would be tasked with enforcing the statutory prohibition. Community Safety Partnerships agreed with the proposal for a statutory prohibition but with an exception for public rights over the railway where "the crossing is provided to effect a net reduction in the number of level crossings".

Conclusion

11.76 A small majority of consultees who answered this question were opposed to a statutory prohibition on the implied dedication of a highway over a railway. Generally, consultees were concerned that a prohibition was unnecessary in light of the few instances in which an implied dedication of a highway over a railway could arise and the adequacy of existing legislation. Its supporters, on the other hand, emphasised the need for greater clarity in the law. Several consultees pointed to the lack of certainty regarding the impact of criminal trespass on the ability to imply the dedication of a highway over the railway.

PART 12
RIGHTS OF WAY AND ACCESS ISSUES: SCOTLAND

Do consultees agree that it should be competent for the owner of the railway to grant a servitude of way [CP para 12.6]?

Introduction

12.1 Of the 114 consultation responses that were received, six consultees addressed the question of whether it should be competent for the owner of the railway to grant a servitude of way. Five consultees agreed with the proposal and one disagreed.

Limited circumstances for the grant of a servitude

12.2 Most of the few consultees who answered this question agreed that it should be possible for a railway owner to grant a servitude of way over the railway. However, their support was conditional on certain specified factors.

12.3 The Heritage Railway Association indicated that railway owners should have the power only when it is demonstrably safe to grant the servitude. It commented that it must be "demonstrated from a safety perspective that the crossing is appropriate in the particular circumstances and the risk associated with its use is tolerable".

12.4 The Department for Transport and John Tilly hoped that this power would be exercised only in limited or exceptional circumstances. Network Rail also limited its support for the proposal to those instances in which the grant "does not conflict with the statutory purpose for which the land was acquired and is used". It commented that the question of whether a grant of a servitude of way is *ultra vires* is a matter of fact to be determined in each case, with regard to whether it would interfere with the statutory purposes for which the land is held. As such, it did not accept the conclusion at paragraph 12.5 of the consultation paper that "the grant of access rights over the tracks is not ultra vires and that level crossings are not inconsistent with the proper running of a railway network". It stressed the fact-specific nature of this question.

12.5 The access group Scotways agreed with the proposal unconditionally. Transport Scotland was the only consultee to disagree with the proposal. They stated that decision-making power should rest with the railway authority.

Conclusion

12.6 Although most of the consultees who answered this question agreed that it should be competent for the railway operator to grant a servitude of way, several noted that the power should be used only rarely or only where it would not conflict with the statutory purpose for which the land was acquired and held by the railway.

Should it be possible for prescriptive use to create a servitude across a railway [CP para 12.8]?

Introduction

12.7 Of the 114 consultation responses that were received, eight consultees addressed the question of whether it should be possible for prescriptive use to create a servitude across a railway. Two consultees agreed with the proposal, five disagreed, and one was equivocal.

Concerns about creation of a servitude by prescription

12.8 The access group Scotways and William Bain, a member of the public, were the only consultees to agree to this proposal. Scotways emphasised that the ability to create a servitude across a railway by prescriptive use was particularly important in the event that level crossings can be closed by way of a closure order.

12.9 The Heritage Railway Association, Network Rail, Transport Scotland, the Association of Train Operating Companies, and John Tilly did not support the proposal. Network Rail provided three reasons why it should not be possible for prescriptive use to create a servitude across a railway. First, it stated that "such rights of way would inevitably interfere with the running of a railway". Second, it took the view that the existence of unknown servitudes created by prescription could be dangerous, as Network Rail would be unable to monitor them given the length of the railway network in Scotland. Network Rail would also be subject to increased health and safety obligations without its knowledge. Third, it believed that prescriptive servitudes could impact on the ability to make operational changes to the railway:

> Once a servitude is established, we will then face restrictions in what we can do with the railway as at all times we would have to respect the servitude right. This would cause difficulties where there is an increase in traffic or new apparatus is required on the line (eg walls and electrified tracks).

12.10 The Department for Transport and Transport Scotland focused their comments on the creation of a public right of way by prescription, rather than a servitude (a private right of way). The Department queried whether this proposal contradicted the proposal in Part 11 of the consultation paper to introduce a statutory prohibition on the implied dedication of a highway over the railway. The latter consultee commented that he opposed the creation of a public right of way "through long unopposed use by members of the public", as it would undermine the level of control needed to ensure the safe operation of the railway.

Conclusion

12.11 Although few consultees answered this question, the majority opposed the creation of a servitude over a railway by prescriptive use.

For Scotland, a suitable approach might be something on the following lines:

The use made of the statutory right of way over a crossing is not to be such as would:

(1) be unreasonably detrimental to the safety of the railway users and crossing users;

(2) interfere unreasonably with the operational requirements of the railway;

(3) be substantially different in character (including frequency) as compared with the original use; and

(4) give rise to unreasonable expenditure on the part of the railway infrastructure manager [CP para 12.23].

12.4 Would it be desirable to clarify the extent of use permitted under the Railways Clauses Consolidation (Scotland) Act 1845 [CP para 12.24]?

Introduction

12.12 Of the 114 consultation responses that were received, seven consultees addressed the question of whether it would be desirable to clarify the extent of use permitted under the Railways Clauses Consolidation (Scotland) Act 1845. All seven consultees agreed with the proposal.

Clarity

12.13 The consultees who answered this question all agreed that clarity was important, and that a statutory list of factors would be useful in helping to construe the extent of use permitted for statutory rights of way across a railway.

12.14 John Mackay, a member of the public, noted that it would be useful to have "some means of adjudication over whether the degree of change is unreasonable". The access group Scotways also noted that it was preferable to clarify the law by way of statute rather than by aligning it with the law of servitudes. Transport Scotland noted that clarification of the law in this area could have a positive effect on the safe operation or closure of level crossings.

12.15 The Department for Transport, Network Rail and the Heritage Railway Association also supported the proposal to clarify the extent of use permitted for statutory right of way crossings.

Conclusion

12.16 The small number of consultees who answered this question unanimously supported the proposal to add clarity to this area of the law.

If this is the case, would such a list of factors be useful [CP para 12.25]?

Introduction

12.17 Of the 114 consultation responses that were received, nine consultees addressed the question of whether the list of factors would be useful in clarifying the extent of use permitted under the Railways Clauses Consolidation (Scotland) Act 1845. Six consultees agreed with the list of factors, one disagreed, and two were equivocal.

Comments on the proposed list of factors

12.18 At paragraph 12.23 of the consultation paper, we proposed that a suitable approach to clarifying the extent of use permitted for statutory right of way crossings might be as follows:

> The use made of the statutory right of way over a crossing is not to be such as would:
>
> (1) be unreasonably detrimental to the safety of the railway users and crossing users;
>
> (2) interfere unreasonably with the operational requirements of the railway;
>
> (3) be substantially different in character (including frequency) as compared with the original use; and
>
> (4) give rise to unreasonable expenditure on the part of the railway infrastructure manager.

12.19 Overall, the consultees who answered this question were in broad agreement with the proposed list of factors. The only consultee to disagree was John Mackay, who thought that the criteria were "unduly inclined to the interests of the railway, rather than the other parties".

12.20 Two consultees – the Department for Transport and Community Safety Partnerships, an independent consultancy – suggested that the same criteria should apply in Scotland as in England and Wales. The Department for Transport explained:

> Though we recognise the legal differences between England & Wales and Scotland the list of factors and language used should be as aligned as closely as possible. For example it is not clear why point (4) of the English & Welsh factors is subsumed into point (3) for Scotland.

12.21 William Bain commented that the first and second criteria are "unlikely in rural Scotland, especially the Highlands". The other consultees who agreed to the list of factors were the Heritage Railway Association, Network Rail, Transport Scotland, the Association of Train Operating Companies, and Scotways.

Conclusion

12.22 The proposed list of factors was not controversial among these consultees. Only one consultee suggested that the list was biased in favour of the railway.

Alternatively, would alignment with the law of servitudes be helpful in determining the permissible extent of use of a statutory right of way crossing [CP para 12.26]?

Introduction

12.23 Of the 114 consultation responses that were received, six consultees addressed the question of whether it would be preferable to align the permissible extent of use of a statutory right of way crossing with the law of servitudes. All six consultees disagreed with the proposal.

Problems with relying on the law of servitudes

12.24 The consultees who answered this question were in unanimous agreement that alignment with the law of servitudes was not the most appropriate means of determining the permissible extent of use of a statutory right of way crossing. Instead, they preferred the option (above) of introducing a list of factors to clarify the permitted extent of use.

12.25 Network Rail and John Tilly emphasised the importance of clarity and certainty in this area of law. Network Rail commented that reliance on the law of servitudes "leaves room for doubt and certainty is what should be the aim". It added that this proposal would also lead to "issues concerning monitoring and cost".

12.26 The Department for Transport and Transport Scotland also preferred clarification by means other than alignment with the law of servitudes. Transport Scotland relied on safety arguments in his response, suggesting that alignment with the law of servitudes would not be helpful as "level crossings are matters where public safety is at the fore", whereas the law of servitudes concerns property rights.

12.27 The Heritage Railway Association and the access group Scotways also disagreed with the proposal to rely on the law of servitudes to clarify the extent of use permitted for a statutory level crossing.

Conclusion

12.28 All six consultees who answered this question agreed that alignment with the law of servitudes would not be a helpful way to clarify the law relating to extent of use of a statutory right of way crossing. They preferred other means of clarification that provided greater certainty and more reliance on safety issues.

Should the law expressly state that the authorised user of a statutory right of way crossing can enter into a discharge agreement with the railway operator validly to extinguish the right to use the crossing, as happens in practice at present [CP para 12.28]?

Introduction

12.29 Of the 114 consultation responses that were received, 11 consultees addressed the question of whether the law should expressly state that the authorised user of a statutory right of way crossing can enter into a discharge agreement with the railway operator to extinguish the right to use the crossing. Eight consultees agreed with the proposal, one disagreed, and two were equivocal.

The need for clarity

12.30 This proposal did not prove to be controversial among those consultees who addressed it in their response.

12.31 Transport Scotland and Network Rail noted that explicit legal recognition of the right of an authorised user to enter into a discharge agreement with the railway operator to extinguish a statutory right to use a level crossing would serve the interests of clarity and certainty. Network Rail also added that the law should provide a mechanism for compulsory purchase and compensation, and for closure orders, in the event that agreement cannot be reached. It commented that the law should also state explicitly that a discharge agreement is binding on the authorised user's successors, and should be recorded or registered for public use.

12.32 Community Safety Partnerships held equivocal views on the proposal, but noted simply that the law should be the same in Scotland as it is in England and Wales.

12.33 The other consultees to support the proposal were the Department for Transport, the Office of Rail Regulation, the trade associations the Associated Society of Locomotive Engineers and Firemen and the Association of Train Operating Companies, the Heritage Railway Association, and John Tilly.

Safeguarding access rights

12.34 The access group Scotways opposed the proposal. It did not agree that voluntary closure agreements should be used to extinguish rights of way over a crossing, as it would threaten public access rights. The Cyclists' Touring Club did not state its position on the proposal, but noted that any proposals should be advertised in order to safeguard the interests of "those wishing to exercise their right of access".

Conclusion

12.35 In general, the consultees who answered this question were in agreement that a railway operator and the authorised user of a statutory right of way crossing should be able to enter into a binding discharge agreement to extinguish the right of way over the railway. Those who explained the rationale for their support pointed to increased clarity in this area. Two consultees expressed some concern about the impact of the proposal on public access rights.

If so, are any qualifications or exceptions necessary [CP para 12.29]?

Introduction

12.36 Of the 114 consultation responses that were received, six consultees addressed the question of whether any qualifications or exceptions were necessary with respect to the ability of an authorised user of a statutory right of way crossing to enter into a discharge agreement with the railway operator to extinguish the right to use the crossing. Two consultees agreed that some qualifications or exceptions were necessary, three disagreed, and one was equivocal.

Qualifications to the use of discharge agreements

12.37 As noted above, two consultees expressed their concern that explicit recognition of discharge agreements would have a negative impact on public access rights. The access group Scotways commented that the closure of level crossings by agreement would result in a gradual decrease in the number of "crossing points" over the railway, an issue of particular importance in Scotland where there are public rights at stake. It noted the possibility of access being curtailed by the closure of crossings "when a public right of way is claimed, and no alternative and reasonably convenient crossing point is available". The Cyclists' Touring Club also noted that "the existence of any core path route should immediately require a referral of a closure proposal".

12.38 The remaining consultees who answered this question, including the Heritage Railway Association and Transport Scotland, did not believe that any qualifications or exceptions were necessary. Network Rail explained that the usual law of contract would apply to discharge agreements, while Community Safety Partnerships reiterated its position that the law in Scotland in this area should mirror that in England and Wales.

Conclusion

12.39 The only consultees to suggest qualifications or exceptions to the use of discharge agreements to extinguish statutory right of way crossings were those who either opposed or were equivocal toward the earlier proposal to explicitly recognise in law the ability to enter into such a discharge agreement, on the grounds of its potential impact on public access rights. The remaining consultees did not suggest any qualifications or exceptions.

In consultees' experience, are there any practical difficulties involved in the current process of extinguishing a right of way over a level crossing [CP para 12.30]?

Introduction

12.40 Of the 114 consultation responses that were received, five consultees addressed the question of whether there are any practical difficulties involved in the current process of extinguishing a right of way over a level crossing. Three consultees agreed that there were some practical difficulties, one disagreed, and one was equivocal.

Practical problems in extinguishing a right of way

12.41 The Heritage Railway Association was not aware of any practical difficulties, though it noted that it did not have any experience in this area.

12.42 The three remaining consultees provided a varied list of issues that arise in the existing system for extinguishing a statutory right of way crossing. John Tilly noted that there were many such issues (though he did not list them), which commonly arose with respect to people such as ramblers "who have no right to use a purely private level crossing".

12.43 Network Rail listed four common difficulties in the current system for extinguishing statutory right of way crossings. First, it explained that authorised users tend to seek very high levels of compensation for the closure of level crossings by agreement. It suggested that a compensation calculation similar to the procedure for compulsory purchase orders could be useful, along with a mechanism for dispute resolution. Second, it noted the difficulty in identifying all authorised users of the crossing. It explained that the task was made more difficult by reliance on old special Acts and by the lack of clarity in the Book of Reference entries. Third, it noted that the process could become more difficult if it were possible to acquire servitude rights of way by prescription over private level crossings. Finally, it commented that "agreements do not assist where there is a public right of way or a core path over the level crossing".

12.44 Transport Scotland commented that, in their experience, "applications to close public level crossings almost always fail". They pointed to a proposed crossing closure in Inverness where an adequate alternative crossing had been provided (a bridge), but the highway authority still refused to stop up the road.

Conclusion

12.45 Of the few consultees who answered this question, three provided examples of practical difficulties they had faced in the extinguishment of statutory right of way crossings by voluntary agreement.

Should the *Robertson* rule (assuming that it correctly states the law) be replaced by the *Gribble* rule, for existing crossings as well as for new ones [CP para 12.39]?

Introduction

12.46 Of the 114 consultation responses that were received, 10 consultees addressed the question of whether the *Robertson* rule should be replaced by the *Gribble* rule for existing and new level crossings. Seven consultees agreed with the proposal and three disagreed.

Those in favour of Gribble

12.47 In *Midland Railway Company v Gribble*, the Court of Appeal in England and Wales held that a statutory right of way crossing over a landowner's bisected land was extinguished when the original owner sold their land on one side of the railway without reserving or transferring the interest over the railway.[1] Conversely, the first instance decision in *Robertson v Network Rail Infrastructure Ltd*[2] concluded that statutory rights over a railway do not come to an end even if division of the property means that the rights can no longer be exercised. The facts in both cases were nearly identical.

12.48 A majority of consultees who answered this question believed that the rule in *Gribble* should be stated expressly to apply in Scotland. The Department for Transport,Transport Scotland, Network Rail, the Heritage Railway Association, the trade association Associated Society of Locomotive Engineers and Firemen, and John Tilly and Mike Lunan took this view.

12.49 Network Rail took the view that "the reasoning in *Robertson* is unsound". It commented that the 1845 Act does not "preclude release from the obligation either by express discharge or by implied abandonment by those entitled to enforce performance". Rather, it suggested that the statutory obligation to make accommodation at a crossing does not exist in perpetuity and that the extent of the obligation would turn on the individual facts and circumstances. Mike Lunan commented that *Gribble* might be helpful in improving safety at level crossings, suggesting that "Network Rail would surely not have contested the case in Inverness in 2007 [*Roberston*] had they not thought it beneficial to railway interests to do so".

12.50 Transport Scotland also contested the argument in favour of *Robertson* at paragraph 12.36 of the consultation paper, such that the intention of the Railways Clauses Consolidation (Scotland) Act 1845 was for the accommodations over the railway to be permanent:

> This argument is flawed in that the provision of a crossing was a response for the time of railway construction and remains whilst it is needed, but if it is no longer needed its purpose has gone, so the statutory right of way should also go.

[1] [1895] 2 Ch 827 ("*Gribble*").

[2] Inverness Sheriff Court 28 May 2007 (unreported).

12.51 They noted, however, that the rule in *Gribble* should not apply to existing crossings as it would "diminish the existing rights of one party over another".

Those in favour of Robertson

12.52 Professor Roddy Paisley of Aberdeen University, Scottish Natural Heritage, and the access group Scotways preferred the rule in *Robertson* to the rule in *Gribble*. Scotways emphasised the scope for *Gribble* to affect public access rights, particularly in light of the "more aggressive anti crossing stance of the operator and the regulator". However, it did propose that statutory right of way crossings should be subject to the proposed system for closure. Scottish Natural Heritage also noted that *Robertson* was favourable to *Gribble* in terms of the public interest in access.

12.53 Professor Roddy Paisley highlighted the importance of the House of Lords judgment in *Monkland Railway v William Dixon*.[3] He noted that *Monkland* made it clear that "the English decision in *Gribble* is not and never has been part of Scots law". He argued that the case was decided by the House of Lords on even wider grounds than this, holding that a landowner's legitimate use of their property is not frozen in time at the moment the railway is established, but instead "marches with time". He criticised attempts by the railway operator to measure a landowner's use of the crossing against their modern-day operation, with greatly increased levels of railway traffic.

Conclusion

12.54 Most of the consultees who answered this question preferred *Gribble* to *Robertson*, contesting the idea that statutory right of way crossings should exist in perpetuity even if land on one side of the railway is transferred to another without reserving or transferring the crossing. However, a few consultees suggested that *Robertson* is (or should be) the law in Scotland, in part because of the public interest of protecting access rights.

[3] *Monkland and Kirkintulloch Railway Co v William Dixon of Govan Colliery and William Dixon and Company of Calder Iron Works,* 27 May 1842, (1842) 1 Bell. 347 ("*Monkland*").

If so (and assuming that that would in fact result in a change in the law) would you agree that the owner of the track would in principle be liable to compensate those who suffered loss as a result? If so, do you have views about how such compensation should be calculated [CP para 12.40]?

Introduction

12.55 Of the 114 consultation responses that were received, eight consultees addressed the question of whether, if the *Robertson* rule were replaced by *Gribble*, the owner of the track would be liable to compensate those who suffered loss as a result. Five consultees agreed that the owner would be liable for compensation, two disagreed, and one was equivocal.

The principle and value of compensation

12.56 The Department for Transport, Transport Scotland, Network Rail, Professor Roddy Paisley of Aberdeen University, and Mike Lunan agreed that the track owner would be liable to pay compensation if the rule in *Gribble* were adopted in Scotland.

12.57 Professor Roddy Paisley pointed out that any diminishment of a landowner's right by legislation would amount to a deprivation of property in contravention of article 1, Protocol 1 of the European Convention on Human Rights. He commented, however, that the question of whether the deprivation was justified and the amount of compensation to be paid would still have to be considered. As to the quantum of the compensation, he believed that it could be fairly high:

> When one starts from the proposition that the landowner's right is a free right to cross between his lands whatever they may be now or in the future, the compensation could be greater than expected. What will be claimable is therefore not only calculated on the state of the fields now but may include the potential development value.

12.58 To the contrary, John Tilly and Mike Lunan were doubtful of the actual value of the loss. The latter consultee believed that the compensation should be only "of a token nature", while the former did not believe that compensation should be paid at all:

> Why would you pay compensation if *Gribble* accepted – the original landowner who has disposed of land one side of the railway has not lost anything at all; the new landowner has no need for the level crossing so also has not lost anything and presumably buys it knowing there is not a right of access; thus no one needs compensating.

12.59 The Associated Society of Locomotive Engineers and Firemen agreed that the track owner would not be liable to pay any compensation if the rule in *Gribble* were adopted.

12.60 The Department for Transport, Transport Scotland, and the Heritage Railway Association did not take a position on the question of compensation. However, the Department for Transport suggested that it might be helpful to look to precedents in the European Court of Human Rights jurisprudence, while Transport Scotland noted that the calculation of compensation should take account of the track owner's "removal of maintenance and renewal liability for a closed level crossing". The Heritage Railway Association suggested that the party who suffered the loss would be responsible for placing a value on the loss, noting that the loss would be of little value if the statutory right of way were not being used. Network Rail suggested calculating the amount of compensation according to the same procedure used to determine compensation for the compulsory acquisition of land.

Conclusion

12.61 Opinions were relatively mixed on whether a track owner would be liable to pay compensation to those who suffer a loss if the rule in *Gribble* were adopted in Scotland, though a slight majority preferred that compensation be paid. Consultees suggested a number of ways to calculate the quantum of compensation, such as by reference to the compulsory acquisition of land procedures or by looking to the European Court of Human Rights for guidance.

Would it be useful for there to be express legislative provision as to the extinction of statutory crossing rights by negative prescription? If so, what should the law provide [CP para 12.44]?

Introduction

12.62 Of the 114 consultation responses that were received, six consultees addressed the question of whether it would be useful to have express legislative provision as to the extinction of statutory crossing rights by negative prescription. All six consultees agreed that there should be express legislative provision in this regard. Of those, three believed that the law should state that statutory crossing rights should be capable of being extinguished by negative prescription, one disagreed, and the remaining two made no comment.

Negative prescription and statutory crossing rights

12.63 All of the consultees who answered this question agreed that it would be helpful for the law to state expressly whether statutory crossing rights can be extinguished by negative prescription. Network Rail, for instance, suggested that it might be useful to put the question "beyond doubt" by making reference to it in legislation. The Department for Transport, Transport Scotland, John Tilly, Scotways, and the Heritage Railway Association agreed.

12.64 The Heritage Railway Association, the Department for Transport, and Network Rail took the view that the legislation should state that statutory right of way crossings can be extinguished by negative prescription. The Heritage Railway Association suggested a period of non-use of 10 years for negative prescription. Network Rail did not specify a time limit, but noted that under section 8(2) of the Prescription and Limitation (Scotland) Act 1973, negative prescription applies to "any right relating to property". As such, there was no reason to believe that it would not or should not apply to statutory crossing rights. The Department for Transport warned, however, that "careful structuring would be needed to provide for appropriate appeal mechanisms in the event that it could have the effect of disadvantaging some landowners".

12.65 Scotways was the only consultee to suggest that the legislation should state that negative prescription does not apply to statutory crossing rights. John Tilly and Transport Scotland did not make any suggestion for the content of the legislative provision.

Conclusion

12.66 Although all of the consultees who answered this question were in agreement as to the need for legislative provision regarding the effect of negative prescription on statutory crossing rights, only half expressly supported the extinguishment of those rights by negative prescription.

Should the jurisdiction of the Lands Tribunal for Scotland be extended to include statutory rights of way over level crossings created under section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 [CP para 12.48]?

Introduction

12.67 Of the 114 consultation responses that were received, eight consultees addressed the question of whether the jurisdiction of the Lands Tribunal for Scotland should be extended to include statutory rights of way over level crossings created under section 60 of the Railways Clauses Consolidation (Scotland) Act 1845. Four consultees agreed with the proposal and four disagreed.

To extend or not to extend?

12.68 Four consultees agreed unreservedly that the jurisdiction of the Lands Tribunal for Scotland should be extended to allow it to discharge statutory right of way crossings, as it currently can for title conditions (including servitudes): the trade association Associated Society of Locomotive Engineers and Firemen, John Tilly, Transport Scotland, and the Cyclists' Touring Club. Transport Scotland commented that it would "clarify the closure process".

12.69 On the other hand, the Department for Transport, the access group Scotways, Network Rail, and the Heritage Railway Association all opposed the proposal to extend the jurisdiction of the Lands Tribunal for Scotland in this way. These consultees pointed to the proposed closure procedure as providing a more appropriate procedure for the extinguishment of statutory rights of way crossings. However, the Department for Transport deferred ultimately to the view taken by the Scottish Government, the Office of the Solicitor to the Advocate General for Scotland, and the Lands Tribunal for Scotland.

12.70 Network Rail acknowledged that extending the jurisdiction of the Lands Tribunal for Scotland could provide much-needed clarity to the question of extinguishing statutory rights of way, but did not believe that such a move was necessary. It noted not only that the proposals in Part 8 of the consultation would provide a more appropriate avenue for extinguishing statutory rights of way crossings, but also that the Lands Tribunal for Scotland may not have jurisdiction to discharge a statutory right of way crossing on the grounds of safety concerns. It added that the Tribunal also does not have the power to make the necessary ancillary orders along with a discharge order, "such as compulsory purchase and roads consent".

Conclusion

12.71 The consultees were evenly split in their responses to whether or not the Lands Tribunal for Scotland should have the power to discharge statutory rights of way crossings. Network Rail provided the most detailed response, highlighting the shortcomings of extending the Tribunal's jurisdiction as a means of clarifying the law on the extinguishment of statutory rights of way crossings.

Is legislation needed to clarify the power of a track/railway owner to make a voluntary grant of public rights of way [CP para 12.14]?

Introduction

12.72 Of the 114 consultation responses that were received, nine consultees addressed the question of whether legislation is needed to clarify the power of a track/railway owner to make a voluntary grant of public rights of way. Eight consultees agreed with the proposal and one disagreed.

The need for clarity

12.73 The consultees who agreed with the proposal emphasised that legislation stating that a track or railway owner has the power to make a voluntary grant of a public right of way would provide useful clarity in this area.

12.74 Transport Scotland, for instance, took the view that the proposal "would help clarify the issue as this leads to a whole range of rights and obligations on a number of parties". They added that it would be important to seek the views of the railway safety authority. The Department for Transport also agreed that legislation would be useful in terms of clarifying the powers available to track or railway owners, noting that it could result in increased use of the powers.

12.75 Network Rail commented that clarifying these powers in legislation would be helpful, but cautioned that the powers should not be used indiscriminately:

> To the extent that there is uncertainty about the point, clarification would be helpful, but it is important that in so doing no impression is created that such a grant will be made in anything other than unusual circumstances and, certainly, where there is no impact on safety or the running of the railway.

12.76 The other consultees who supported the proposal were John Tilly, the Fife Access Forum, Scotways, and the Cyclists' Touring Club.

12.77 Associated Society of Locomotive Engineers and Firemen was the only consultee opposed to the proposal. It stated that a track or railway owner should not have the power to grant public rights of way over a railway line.

Conclusion

12.78 The proposal to clarify the power of a railway or track owner to make a voluntary grant of a public right of way over the railway in legislation was not controversial, with only one consultee opposed to it. Network Rail suggested limiting the use of the power to exceptional circumstances.

Should the public use of a private level crossing be capable of giving rise to a public right of way through the operation of prescription [CP para 12.80]?

Introduction

12.79 Of the 114 consultation responses that were received, 15 consultees addressed the question of whether the public use of a private level crossing should be capable of giving rise to a public right of way through the operation of prescription. Five consultees agreed with the proposal, 9 disagreed, and one was equivocal.

Support for the creation of public right of way by prescriptive use

12.80 Several consultees noted that it would be helpful to clarify, perhaps in statute, that a public right of way over a private crossing can arise by prescription. The Office of Rail Regulation explained that this would serve to recognise the reality that "many private crossings have substantial public use". The Highland Council pointed out that, as many of these crossings have been used by the public without incident for over 20 years, there was little cause for concern over the safety implications of the proposal. They also went one step further than the other consultees, suggesting that the public should have rights over all private level crossings:

> We would support the basic position to be clarified as being that the public has a common-law 'right of way' across all crossings regardless of whether or not they are regarded as 'private'. This would be extremely helpful and more efficient if it applied consistently to all crossings, without each one having to be proved individually.

12.81 The Fife Access Forum, Scotways, and the Cyclists' Touring Club also agreed with this proposal.

Concerns about the proposal

12.82 Network Rail opposed the suggestion that a private level crossing should be capable of giving rise to a public right of way through prescription on the following grounds:

> (a) Network Rail cannot monitor the creation of such rights of way; (b) Network Rail's safety obligations change if such a right of way is created; (c) Network Rail may need to change the running on the railways system in order to take account of the crossing (eg speed restrictions); (d) cost; (e) it is contrary to the Office of Rail Regulation's request that level crossings be closed; and (f) such use is not "as of right" but it is necessarily illegal.

12.83 Transport Scotland also expressed concern that the creation of public rights of way over a private level crossing could change the usage and therefore the risk involved in the crossing. They commented that "prescription might be part of the justification, but it cannot lead to an automatic right". The Department for Transport was primarily concerned that the proposal would prove to be "burdensome".

12.84 John Mackay commented that although it is right in principle that a private level crossing should be capable of giving rise to a private right of way by prescription, it "does not seem like the right way forward". He took the view that:

> It would be dependent on there being use that could be attested to, and not all private crossings are so used. There are other problems in that it is not clear whether a right of way could be created by prescription if the use were to be unlawful, in this case counter to bylaw, or on land where the right to cross was limited to adjacent proprietors. … This position of the user having no basis to cross and a weak position in claiming any right, suggest that the system is broken and a solution is need to cut through the impasse. It may be, as suggested earlier, that private crossings might have swept up some public rights, now subsumed under the private interest: but this is now history – we must move on.

12.85 Scottish Natural Heritage objected to the proposal on quite different grounds, commenting that a process that depends on individual review by the courts would not provide sufficient clarity or consistency with regard to access rights:

> As long as such rights have to be asserted on an individual case-by-case basis, it would remain a cumbersome and incoherent process for considering access rights, unlikely to provide a clear consistent approach across the railway system as a whole.

12.86 John Tilly, the Association of Train Operating Companies, the Heritage Railway Association and the trade association Associated Society of Locomotive Engineers and Firemen also opposed the proposal. Perth and Kinross Council was equivocal, noting strengths and weaknesses of the proposal.

Conclusion

12.87 Nearly twice as many consultees opposed the idea of a private level crossing giving rise to a public right of way through the operation of prescription as supported it. Their objections ranged from the increased cost and burdens associated with the proposal, to concerns about the safety implications and the lack of clarity about the scope of public access rights.

Should the Land Reform (Scotland) Act 2003 be amended to clarify whether access rights do or do not extend over private level crossings [CP para 12.102]?

If so, which policy approach should be adopted [CP para 12.103]?

Introduction

12.88 Of the 114 consultation responses that were received, 17 consultees addressed the question of whether the Land Reform (Scotland) Act 2003 should be amended to clarify whether access rights do or do not extend over private level crossings. Fifteen consultees agreed that the 2003 Act should be amended, one disagreed, and one was equivocal.

12.89 Eighteen consultees (not all the same consultees as above) commented on what the policy approach should be, with 10 suggesting that the legislation should clarify that access rights *can* extend over private level crossings and seven suggesting that access rights should *not* extend over private level crossings, and one expressing equivocal views.

Should the 2003 Act be amended?

12.90 Most consultees who answered this question agreed that the Land Reform (Scotland) Act 2003 should be amended to clarify whether access rights extend over private level crossings.

12.91 The only consultees to address this issue in particular were Paths for All and Scottish Natural Heritage, who both described the option of amending the 2003 Act as "last resort". They emphasised instead the need for a modern legal framework that would allow local and national park authorities and representatives of other interests to "engage with decisions about the location and management of crossings which are important for public access". They suggested other means of establishing more clearly the extent of public access rights over private crossings, such as the "responsible land management of crossings to avoid severance of access to and from contiguous land where access rights apply".

12.92 Perth and Kinross Council did not agree that the 2003 Act should be amended. It noted that an amendment was not necessary in light of section 28 of the 2003 Act, which "provides a mechanism to determine the extent of access rights to land specified in an application to a sheriff".

Should the 2003 Act state that access rights extend over private level crossings?

12.93 A slight majority of consultees believed that access rights should be extended over private level crossings.

12.94 Many consultees favoured the extension of access rights on the grounds of safety. For instance, the Cyclists' Touring Club and Mike Lunan suggested that formally permitting public access over private crossings would prevent the public's unsafe, covert use of the crossings. Mike Lunan added that Network Rail should "be empowered to construct (or to permit to be constructed) pedestrian crossings to cater for well-used if informal pathways".

12.95 The Highland Council, and Perth and Kinross Outdoor Access Forum also commented that fears of safety hazards at private crossings subject to public access rights were over-stated. Highland Council noted that, in remote areas, "there are usually no difficulties in seeing or hearing approaching trains" and suggested that ramblers and others exercising their access rights were unlikely to create any disturbances or damage to the railway line. Perth and Kinross Outdoor Access Forum emphasised that safety hazards are unlikely to attach to the non-motorised use of crossings:

> The statistical evidence does not support imagined concerns over non-motorised access taking. In any event, particularly in Scotland, there are many scores of miles of track which bisect wilderness areas. These are obviously of significant interest to access takers who will with appropriate care cross tracks in perfect safety. This is aided by the relative infrequency of rail services. Enforcing so-called trespass renders vast areas of countryside legally inaccessible even though, for the vast majority of time, there are no trains running - which means that the actual risk is exceedingly low. In addition, of course, many tracks in Scotland are not electrified, so, in those cases that hazard does not exist.

12.96 On the other hand, the Heritage Railway Association opposed the extension of public access rights to private crossings in part because of safety concerns. It took the view that, as people exercising public access rights do not have access to the safety information provided to owners of private user-worked crossings, they should be discouraged from using those crossings. It also stated that the public does not currently have a legal right to use a private crossing. This point was addressed by Highland Council, which commented that public access must be allowed over private level crossings as to do otherwise would be to "make a mockery" of public access rights:

> If use is prevented then access to large areas of land would be severely restricted often with no alternative crossing point for many miles in either direction. This then makes a mockery of the notion that 'responsible' access takers can assert their access rights and cross over Network Rail land.

John Mackay also commented that the public access should extend to private crossings that have access rights on either side, as "it is unreasonable to deny [the public] the right to cross where a physical crossing exists". He noted that monitoring of private level crossing use has been generally positive.

12.97 Scottish Natural Heritage supported the application of public access rights to private level crossings, taking issue with several of the points raised in paragraphs 12.86 to 12.96 of the consultation paper. In particular, it noted that section 6(1)(a)(i) of the 2003 Act, which excludes access rights from land on which there is a "building or other structure or works, plant or fixed machinery" should not be read as excluding level crossings simply because some railway lines have been referred to as "works". Further, it noted that reliance on section 55 of the British Transport Commission Act 1949 to ground the interpretation of section 6(1)(d) of the 2003 Act – which excludes land "to which public access is, by or under any enactment other than this Act, prohibited, excluded or restricted" – was unusual, as Part 13 of the consultation paper concludes that section 55 of the 1949 Act may contravene the European Convention on Human Rights.

12.98 Those consultees who did not agree that public access rights should apply to private level crossings did so for a variety of reasons. The access group Scotways noted that it would render the creation or upgrade of high speed railway lines more difficult, while Network Rail commented that there would be no benefit to closing a private level crossing by agreement if the public could still use the crossing. Transport Scotland suggested that "access rights could only be extended over private crossings by agreement of the railway operator, who may apply conditions". They went on to explain that access rights must be exercised in accordance with the Access Code guidance, which states explicitly that access rights are curtailed on "railway infrastructure". They took the view that railway infrastructure should include level crossings.

12.99 It should be noted that, in light of Network Rail's comment above, the Rail Safety and Standards Board proposed a "compromise" position: that non-vehicular public access should be permitted over private level crossings, but access rights would cease if the level crossing were closed.

Other issues

12.100 Two consultees made suggestions regarding the cost. John Tilly stated that if the 2003 Act were amended to extend access rights to private crossings, then the "pedestrian leisure seeker … should be obliged to meet safety upgrade costs if required". Community Safety Partnerships suggested instead that the costs associated with such a measure should be split evenly between the railway and the local authority. It also proposed that a different policy be adopted, not suggested in the consultation paper:

> The granting of such rights shall not increase the prevailing level of risk and that there is a duty incumbent on the railway and local authority to agree the measures to deliver the required effect. This agreement should be enshrined within a revised interface agreement on a crossing specific basis.

Conclusion

12.101 A majority of consultees supported amendment to the 2003 Act to clarify that public access rights do extend over private level crossings. Some consultees raised issues including safety, the ability to exercise access rights fully, and the closure of private level crossings in their responses.

Should it be competent for the appropriate public authority to require the railway operator to install new non-vehicular public level crossings in order to facilitate the exercise of access rights [CP para 12.106]?

Introduction

12.102 Of the 114 consultation responses that were received, 19 consultees addressed the question of whether the appropriate public authority should be competent for the appropriate public authority to require the railway operator to install new non-vehicular public level crossings in order to facilitate the exercise of access rights. Eleven consultees agreed that public authorities should have this power and eight disagreed.

Improved access and safety

12.103 More consultees agreed than disagreed with the proposal to allow the appropriate authority to require the installation of a new level crossings. Many of these consultees agreed with it on the ground that it was a useful step toward facilitating access for the public. The Caithness Local Access Forum, for instance, explained that the empty moorland passed over by the North Highland line (referred to as "the Flow Country") is difficult to access and depends on the existence of access tracks:

> In attempting to restrict or prevent access the railway effectively cuts the only through track linking the interior of Caithness to the neighbouring county of Sutherland. The recognition of the "Flow Country' as a place of international interest for natural heritage, and potentially tourism, is being championed by several local agencies. The loss of an established through route by virtue of crossing a railway track is considered both burdensome and excessively autocratic.

12.104 The Department for Transport also acknowledged the need to facilitate access, highlighting another issue raised by consultees, namely safety. It commented that public access rights may at times "contribute to safety concerns" and that the creation of new crossings could help to address those concerns. Likewise, the Highland Council commented that the creation of new crossings could improve safety, by specifying that members of the public should cross at a location determined by the railway operator to be safe for crossing:

> From the land manager's perspective it surely is more sensible to encourage users to take the safest route through their property and by providing crossings the railway operator will have recognised and identified the safest place to do so.

12.105 The Cyclists' Touring Club also stated that it is sensible to "provide a crossing point at a location where the users and train drivers have clear visibility", noting that the crossing can be designed in such a way as to minimise safety risks.

Concerns or qualifications

12.106 A few consultees noted that the public authority should only be capable of requiring the creation of new crossings in exceptional circumstances, including the Office of Rail Regulation (which opposed the proposal), Tilly and Fife Access Forum.

12.107 Transport Scotland and the Rail Safety and Standards Board emphasised the need for the relevant bodies to reach agreement on the creation of any new crossings. The former consultee explained:

> No public authority should have the right to compel the installation of new non-vehicular level crossing. However this does not preclude the installation of new non-vehicular public level crossings by negotiation.

12.108 Network Rail was opposed to the idea of allowing the appropriate authority to compel construction of a new crossing in order to facilitate access. It took the view that such a power would increase the risk of accidents and would give rise to a conflict of interest for the local authority because of its duties under sections 13 and 17 of the Land Reform (Scotland) Act 2003. Section 13 of the 2003 Act imposes a duty on local authorities to uphold access rights, but not to the extent that it would conflict with the authorities' other functions. Under section 17, local authorities are under a duty to draw up a system of core paths to enable access within their area. Network Rail commented that core paths may not be designated over the land used by statutory undertakers for their undertaking; statutory undertakers include railway undertakers. Therefore, it concluded that local authorities could not, without giving rise to a conflict of interest, compel the creation of a core path across a railway.

12.109 The Heritage Railway Association objected to the proposal on the grounds that it would impose "an unreasonable burden on the railway operator" in terms of cost and the increased responsibility for maintaining crossing surfaces, safe sight lines, and warning systems. The Department for Transport also warned that the proposal would carry significant resource implications, an issue explored further in proposal 12.20 below.

Other suggestions for facilitating access

12.110 A few consultees suggested other means of facilitating access that would not require the construction of new level crossings. John Mackay noted that it would be preferable to "be bold and simply allow access rights to apply at private crossings provided that access rights apply on either side". Second, he suggested that it should no longer be an offence to cross a single track line:

> …provided that they do so responsibly, with caution, and do not attempt to walk along the track. This parallels the simple solution in the 2003 Act to the 1865 Trespass (Scotland) Act prohibition on camping on open country (Schedule 2 para 1) which is backed by advice in the Scottish Outdoor Access Code on what is responsible camping.

Likewise, David and Kathryn Gordon suggested that consideration be given to:

> …legalising the "informal" crossing of single-track railway lines in remote areas where there is generally little practical alternative to such action other than a significant detour on foot on rough and often wet country.

12.111 William Bain suggested that lengths of railway track could be designated as pedestrian crossings, “where common sense would apply”.

Conclusion

12.112 More than half of the consultees who answered this question took the view that the appropriate authority should have the power to require the installation of new crossings in order to facilitate the exercise of access rights and to ensure that access is achieved safely. However, many consultees objected to the use of compulsion to create new crossings or considered that new crossings should only be created in exceptional circumstances. Some other suggestions were made as to how to facilitate access without creating new crossings.

If so, should that authority be the local authority or the Scottish Ministers, or should the decision be a joint one?

Introduction

12.113 Of the 114 consultation responses that were received, 15 consultees addressed the question of whether the appropriate authority to require the installation of a new non-vehicular public level crossing should be the local authority, Scottish Ministers, or both. Eight consultees took the view that it should be a decision by the local authority, three took the view that it should by Scottish Ministers, one took the view that it should be a joint decision, and three considered that no authority should have this power.

Local authority

12.114 The majority of consultees who answered this question favoured the local authority having the power to order the installation of a new non-vehicular public level crossing in order to facilitate the exercise of public access rights.

12.115 Mike Lunan and the Fife Access Forum were of this view. The six other consultees who opted for the local authority believed that the decision should first be taken locally, with a right to appeal the local authority's decision to either Scottish Ministers or the Secretary of State. The Cyclists' Touring Club, for instance, commented that "given the national infrastructure delivered by the railway it is appropriate for the process to have a ministerial overview". The Rail Safety and Standards Board agreed, though its response was premised on the need for agreement to be reached between the local authority and the railway operator concerning the appropriate location for the crossing. The access group Scotways, Community Safety Partnerships, and Perth and Kinross Council also favoured a decision by the local authority with a right of appeal to Scottish Ministers.

12.116 The Department for Transport commented that:

> The case for devolving powers to open level crossings is not clear, and even less so when safety is a key factor of that decision. It may be that an opening procedure similar to the preferred option for closure, where decisions are taken locally with appeals to a national authority, but where that appeal is to a devolved government, may not be appropriate here. Instead, a procedure of appeal to the Secretary of State only, given the rail safety considerations, might be appropriate.

Scottish Ministers

12.117 Three consultees suggested that Scottish Ministers should have the authority to compel the installation of a new public level crossing: John Tilly, Transport Scotland, and Network Rail. Transport Scotland commented that Scottish Ministers were the only authority capable of adopting a "wider view" in a process that, he argued, should mirror the process for the closure of a level crossing. Although Network Rail opposed the idea of granting an authority the power to compel the installation of new level crossings in certain circumstances, it noted that any such power would need to be held by Scottish Ministers as local authorities would have a conflict of interest.

Other options

12.118 The Highland Council was the only consultee to suggest that the decision should be made jointly by Scottish Ministers and the local authority. The Heritage Railway Association, the Office of Rail Regulation, and the trade association, the Associated Society of Locomotive Engineers and Firemen did not agree that any authority should have the power to require a railway operator to install new public level crossings in order to facilitate access rights.

Conclusion

12.119 Just over half of the consultees who answered this question took the view that the local authority should have this power, rather than Scottish Ministers. However, most of those consultees suggested that there should be a right to appeal the local authority's decision to Scottish Ministers or the Secretary of State. The remaining consultees either did not agree with the proposed power at all or favoured a decision made by Scottish Ministers; only one consultee preferred that a joint decision by taken by Scottish Ministers and the local authority.

Who should be responsible for the expense of new crossings [CP para 12.108]?

Introduction

12.120 Of the 114 consultation responses that were received, 12 consultees addressed the question of who should be responsible for the expense of new crossings. Four consultees said the promoter should pay, three said the users of crossings or those benefiting from the crossing should pay, two said the local authority should pay, two said the railway operator should pay, and one said the local authority and the railway operator should jointly pay.

Promoter or user pays

12.121 Transport Scotland, the Department for Transport, the Heritage Railway Association and Mike Lunan all agreed that the promoter of the new crossing should be responsible for the expense of its construction.

12.122 The Department for Transport commented that it would not be fair for the railway operator to be liable for the cost, as the decision to create a new crossing may have been imposed upon it. It added:

> The ongoing maintenance costs of the crossing should also be covered, while crossings also undergo upgrades or replacement at set intervals, which will likewise need to be accounted for.

It noted that another option would be for the decision-maker to apportion the costs of installation and maintenance as part of the decision-making process.

12.123 Mike Lunan suggested that, while the promoter should bear the cost associated with the creation of a new crossing, the railway operator should seek to reduce the costs as much as possible:

> In the past Network Rail has charged substantially more for simple construction work that would have been charged for the same work in a non-railway environment carried out by private contractors. Network Rail should therefore be prepared to allow construction to be carried out by volunteers (or paid private contractors) acting under the supervision of Network Rail staff. The cost of Network Rail staff should be borne by Network Rail with those seeking access providing the cost of labour and materials. Network Rail could properly levy a fixed fee for the necessary oversight.

12.124 The Heritage Railway Association suggested that the entire cost should be covered by the promoter, "in a similar way to that of new bridges over/under the railway".

12.125 Three consultees suggested that level crossing users, or those benefiting from the creation of the level crossing, should bear the costs of creation of a level crossing. In many but not all cases, the person benefiting from its creation will also be the promoter.

12.126 This position was taken by the Cyclists' Touring Club, the Rail Safety and Standards Board, and John Tilly. The Rail Safety and Standards Board commented that the expenses could be raised by users of the level crossing:

> The capital and future ongoing maintenance costs should be borne by the users of the crossing, either from general local authority finances or possibly a local tax on recreation accommodation, the sale of maps, walking boots etc, or even a local path pricing scheme.

12.127 John Tilly made an alternative suggestion namely that Scottish Ministers should be responsible for the expense of new crossings.

Railway operator pays

12.128 Two local authorities – the Highland Council and Perth and Kinross Council – suggested that the railway operator should cover the expense of a new crossing. The Highland Council explained that this was appropriate as it has overall responsibility for the installation of level crossings:

> Network Rail should be responsible as they possess the expertise to install these crossings and have the necessary procedures to do so. When the various Railways Acts were passed it was the operating companies who were responsible for installing accommodation works. Network Rail has now inherited the mantle of those operating companies and has responsibility for accommodation works. If a new crossing is required then it may have been that one should have been placed there originally.

12.129 It added that it would also be appropriate to collect developer contributions through the planning law system, wherever a new crossing is required as part of a planned development.

Local authority pays

12.130 Network Rail and Community Safety Partnerships proposed that costs should be borne by the relevant local authority. Network Rail noted that this would be in accordance with the duty on local authorities in section 15 of the Land Reform (Scotland) Act 2003.

12.131 The access group Scotways preferred that costs be split between the local authority and the railway operator.

Conclusion

12.132 Responses to this question with fairly evenly divided, with only a slight majority of consultees suggesting that the promoter should bear the expense of new crossings. Other suggestions were the users of level crossings, the relevant local authority, and the railway operator.

Should it be competent for the appropriate public authority to order that a private level crossing become subject to access rights [CP para 12.110]?

Introduction

12.133 Of the 114 consultation responses that were received, 17 consultees addressed the question of whether it should be competent for the appropriate public authority to order that a private level crossing become subject to access rights. Nine agreed that the public authority should have this competence, seven disagreed, and one was equivocal.

Improved access, safety, and clarity

12.134 More than half of the consultees who answered this question, including several access groups and local authorities, agreed that the relevant public authority should have competence to order that a private level crossing be subject to access rights.

12.135 William Bain and the Highland Council stressed that this proposal would help to facilitate the exercise of public access rights. The Highland Council commented that this would help local authorities to discharge their statutory obligations with respect to access rights:

> These crossings are already shown on Ordnance Survey maps and many are used by the public in remote areas. Without the use of these crossings the public would be unable to exercise their statutory access rights over large areas of the Highlands. … By being able to order such crossings as subject to access rights the access authority is further able to perform its statutory duty and to uphold access rights.

12.136 The Highland Council also noted that this means of improving access would prove to be relatively easy to implement, since little new infrastructure would be required. Perth and Kinross Council added that the "core paths procedure set out in the Land Reform (Scotland) Act 2003 already provides an adequate mechanism for this". The Department for Transport, however, suggested that private crossings subject to access rights would require "an upgrade in protection measures". It queried who would bear the costs of these measures.

12.137 Mike Lunan made the point that this proposal could also help to improve safety at level crossings, as the failure to designate private level crossings as subject to access rights would do nothing to stop misuse.

12.138 The Highland Council commented that this proposal could go some way to addressing the difficulty for users in distinguishing between private and public level crossings:

> It would possibly have the added advantage of enabling a quicker resolution to any dispute or confusion by the public over whether a crossing was private or public – as access takers they are unlikely to make a distinction.

The Caithness Local Access Forum suggested that the proposal should apply not only to crossings that are private in law, but also to crossings that are private in the view of Network Rail.

12.139 The Rail Safety and Standards Board supported the proposal, but emphasised that public access rights should only apply to the extent that the private rights continue to exist. If the private rights are extinguished, then it suggested that the public right of access should also cease to exist "until a new arrangement for the public rights was put in place".

12.140 Finally, the access group Scotways and Community Safety Partnerships noted that the public authority should have this competence, but it should be subject to an appeal to Scottish Ministers.

Problems with the proposal

12.141 Seven consultees disagreed with the proposal. The Office of Rail Regulation and the Associated Society of Locomotive Engineers and Firemen objected to it on the grounds that they did not support the creation of any new crossings. John Tilly also stated that a public authority should not have this competence, while Transport Scotland were opposed to any changes to the status of level crossings by compulsion, rather than negotiation. Network Rail reiterated its concern that this proposal would give rise to a conflict of interest on the part of the local authority, and highlighted the safety risk and potential cost impact of the proposal for Network Rail and the train or freight operating companies.

12.142 The Heritage Railway Association was generally opposed to the idea of allowing a public authority to grant public access rights over a private crossing. However, it conceded that it might be appropriate in rare cases when "the closure of adjacent level crossings on the same line" required the upgrade of a single crossing from private to public "on the basis of 'one in lieu of many'".

12.143 The Fife Access Forum was the only consultee to oppose the proposal on the grounds that it did not go far enough to facilitating the exercise of public access rights. It suggested instead that "all level crossings should be subject to statutory access rights".

Conclusion

12.144 This question elicited mixed views from consultees, with only a small majority favouring the idea of empowering an appropriate public authority to order that a private level crossing become subject to access rights. Those who supported it thought that it would, among other things, improve the safety and ability to exercise access rights of level crossing users, while those objecting to it voiced concerns about cost, safety, and the undesirability of creating "new" crossings.

PART 13
CRIMINAL OFFENCES

We provisionally propose that the general road traffic offences should continue to regulate the conduct of drivers at level crossings over public highways/roads. [CP para 13.47]

Introduction

13.1 Of the 114 responses received, 29 responses addressed the proposal that the general road traffic offences should continue to regulate the conduct of drivers at level crossings over public highways/roads. Twenty-eight of those agreed with the proposal and one was equivocal.

The benefits of existing road traffic offences

13.2 A wide range of organisations and agencies agreed with this proposal, including the Rail Safety and Standards Board, the Highways Agency, the Association of Directors of Environment, Economy, Planning and Transport, the Association of Transport Co-ordinating Officers and the Local Government Association. The majority of consultees who addressed this proposal did not provide any substantive feedback.

13.3 The Department for Transport strongly agreed with the proposal, and stated that:

> Retaining [general road traffic offences] provides both choice for prosecutors (if new level crossing offences are also established), and have the advantages of established regulatory penalties, as well as providing continuity.

13.4 Passenger Focus stated that they see:

> …no reason why the fact that a particular section of road is located on a crossing should exempt drivers from compliance with the general body of road traffic law which regulates their conduct on the highway network in general.

The need to strengthen enforcement

13.5 Several consultees agreed with the proposal, but argued that there is a need to address enforcement and sentencing for general road traffic offences. For example, Cambridgeshire County Council – while agreeing that "the behaviour of drivers is well-catered for within" current road traffic legislation – argued that enforcement has to be addressed:

> County and Metropolitan Forces do not have the resources to enforce LCs especially in rural areas and this should fall to British Transport Police. The provisions should also consider automatic enforcement devices through new technology with the use of digital equipment.

13.6 Similarly, Tom Naughton, an Inspector in the British Transport Police, stated that while the Road Traffic Act 1988 is adequate, "greater sentencing power and awareness within the courts in England, Wales and Scotland" is required.

Conclusion

13.7 The vast majority of consultees agreed that the general road traffic offences should continue to regulate the conduct of drivers at level crossings over public highways/roads. Several consultees, while agreeing with the proposal, argued that there is a need to better address enforcement and sentencing.

Do consultees think that any new offences should be limited to circumstances where existing road traffic offences do not apply? [CP para 13.70]

Introduction

13.8 Of the 114 responses received, 29 responses addressed the question whether any new offences should be limited to circumstances where existing road traffic offences do not apply. Seventeen of those agreed that the new offences should be limited in this way, eight disagreed and three were equivocal.

Avoiding duplication

13.9 Most consultees who agreed did not elaborate further on their reasons for agreeing. Michael Haizelden stated that "if there is any benefit in creating new level crossing specific offences, it derives from plugging gaps in existing legislation". Passenger Focus stated that such a limitation "would be consistent with the long-held view both of governments and the Commissions that duplication of law is generally undesirable".

Prosecutorial discretion

13.10 On the other hand, several consultees argued that this would be undesirable. For example, the Department for Transport – while accepting that "there might be value in limiting the new offences to cases where existing road traffic offences do not apply" – stated:

> However, there is also a risk that there would be cases where doubt could be created about whether or not the dangerous driving (or death by dangerous driving) offence or the proposed dangerous use of level crossing (or death by dangerous use) applied, for example due to the status of private roads on public rights of way - thus we are not fully satisfied that such a measure would necessarily reduce confusion. Further we are concerned that such a prescriptive approach could deny a prosecutor the ability to bring charges which are appropriate for the particular facts of an incident.

13.11 Bruce Houlder QC argued that this is "usually a matter of prosecutorial policy, although the police might like to have something like this in their own guidance". Similarly,solicitor Anthony Edwards stated that:

> It would be unhelpful and cause unnecessary litigation to limit the new offences to circumstances where existing road traffic offences do not apply. It is common in criminal law for particular activity to amount to a breach of more than one statutory provision. A prosecutor properly selects the most appropriate or charges alternatives. This is the most effective way to bring the relevant issue before the courts.

Conclusion

13.12 The majority of consultees agreed that any new offences should be limited to circumstances where existing road traffic offences do not apply. Two consultees stated that this would avoid duplication. On the other hand, several consultees argued that it is important to maintain prosecutorial discretion to select the most appropriate offence.

We propose that there should be a new scheme of level crossing offences, comprising:

(1) An offence of failing to comply with an authorised sign at any kind of level crossing, punishable by a fine;

(2) An offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (not to behave in such a way as to create a risk of injury or serious damage to property); and the accused was aware his or her conduct risked creating a danger of injury or serious damage to property. This offence would be punishable by a prison term similar to that for dangerous driving; or

(3) An offence of dangerous use of any kind of level crossing, where the accused's behaviour had breached an objective standard of conduct (with no requirement that the accused was aware of any risk). This offence would be punishable by a prison term similar to that for dangerous driving; and

(4) An offence of dangerous use of a level crossing, intentionally or recklessly causing death, punishable, as with causing death by dangerous driving, with a maximum prison term of 14 years; or

(5) An offence of dangerous use of a level crossing, causing death (with no requirement of intention or recklessness). This offence would be punishable by a maximum prison term of 14 years. [CP para 13.73]

We would welcome the views of consultees on the proposed offences and penalties.[CP para 13.74]

Introduction

13.13 Of the 114 responses received, 42 responses addressed the proposal that there should be a new scheme of level crossing offences. Of those, 20 agreed with the proposal that there should be a new scheme of level crossing offences, and a further eight agreed to the offences suggested without commenting on the general desirability of introducing new offences. Three responses agreed that there should be a new scheme of level crossing offences relating to pedestrians, but not vehicles. On the other hand, six responses disagreed that there should be a new scheme of level crossing offences and one disagreed with the suggested offence without commenting on the general desirability of introducing new offences. Four responses were equivocal.

The need for clarity

13.14 Several consultees agreed that the current system of criminal offences needed to be clarified and modernised. For example, Passenger Focus acknowledged that:

> The existing body of criminal law relating to misuse of crossings is complex, sometimes difficult to access (where it is contained in special acts), and incomplete in its coverage, e.g. in relation to the conduct of pedestrians and to users of private crossings.

13.15 Similarly, the Office of Rail Regulation agreed that:

> The plethora of wide-ranging criminal offences that might or might not apply to level crossing misuse is confusing and that a modern set of offences designed specifically for this purpose could be advantageous.

13.16 The Highways Agency agreed with the analysis in the consultation paper, that the British Transport Commission Act 1949 is likely to contravene articles 6(3)(a) and 7(1) of the European Convention on Human Rights "due to it being a private act, its obscurity and difficulty in finding it". It therefore expressed its support for "moving on to a new modernised, clear and consistent system" and stated that the proposed new scheme of offences would provide for this.

13.17 The Crown Office and Procurator Fiscal Service stated that "it is clear that the existing varied number of offences that are applicable are confusing and that there is scope for greater clarity and rationalisation in this area". The Rail Safety and Standards Board and Network Rail both agreed with the proposal in the hope "that any new offence is easier to prosecute than is currently the case".

The necessity of new offences

13.18 Consultees disagreed about the necessity of new offences, in particular in relation to drivers. For example, the Glasgow Bar Association commented that it did "not see much evidence to suggest that there is a problem with the current legislation covering all types of conduct that may occur." The National Farmers' Union expressed concern that the introduction of any new road traffic offences at level crossings over public highways and roads "may be unnecessary and could create greater complexity and confusion".

13.19 The Royal Society for the Prevention of Accidents argued that "it seems unnecessary to create new offences for drivers (and motorcyclists)" but that "there is a case for new offences related to pedestrian behaviour at level crossings". Similarly, the North Yorkshire Local Access Forum suggested that the existing road traffic offences were appropriate for dealing with drivers and cyclists, and the list of offences set out in the proposal was appropriate for pedestrians.

13.20 Ramblers expressed support for the introduction of the new scheme of level crossing offences because it "is not persuaded that the existing Road Traffic Act offences are appropriate for pedestrians".

13.21 On the other hand, the Highways Agency stated that:

> Given that maximum fines and prison tariffs would be similar to current potential, the resources needed to educate road users about the new offences are likely to be more effective at programs on improving behaviour.

The need to review existing offences

13.22 Michael Haizelden stated that he would have been "more supportive of new offences had these been created as part of a broader simplification of rail related offences". Similarly, Perth and Kinross Council stated that "it would seem odd to create a new scheme of level crossing offences without reviewing the existing general railway offences".

13.23 The Crown Office and Procurator Fiscal Service stated that:

> It would be helpful to examine evidential issues that can cause difficulties in such prosecutions, for example, the requirement to issue warnings in terms of the Road Traffic Offenders Act 1988 with a view to simplifying such procedures and reviewing timescales for compliance as this can create difficulties in prosecuting more serious statutory offences such as dangerous driving.

The absence of culpability

13.24 The Department for Transport argued that these offences are not strict liability offences. It stated that:

> It would be extremely difficult to justify creating any new strict liability offence, particularly as this is not shown to have been Parliament's intention in section 36(1) of the Road Traffic Act 1988. We also believe it would also potentially contravene Article 6 of the European Convention of Human Rights.

Deterrence

13.25 Anthony Edwards stated that there is "no real deterrent effect" at level crossings:

> It is usually the driver or pedestrian inappropriately using the level crossing who is greater at risk of death and deterrence therefore has little place. If risk of death does not deter, risk of custody is unlikely to do so.

13.26 Michael Haizelden was doubtful about the value of prosecutions in improving safety by reducing misuse:

> It appears to me that misuse by pedestrians more generally arises through ignorance, mishaps or those spur of the moment actions that do not include any consideration of the consequences, and that the creation of new offences specifically directed at pedestrians is likely to achieve little (aside from punishing after the event).

The proposed offences

13.27 Passenger Focus agreed that the maximum penalties should – "for the sake of consistency" – be the same as for existing road traffic offences. However, it stated that this "should not necessarily be taken as implying that we are automatically of the view that those maxima are correct".

PROPOSED OFFENCE (1)

13.28 The Bodmin and Wadebridge Railway Company Ltd stated that the proposed offence (1) is "realistic, and easy for investigating authorities to determine".

13.29 Network Rail stated that it should be clear that this includes signals as well as signs, and suggested that "red lights could be specifically mentioned" because the "most widespread offence of this nature relates to ignoring red lights".

PROPOSED OFFENCES (2) AND (3)

13.30 Anthony Edwards expressed a preference for option (2) over option (3) because it requires "a personal awareness of risk".

13.31 On the other hand, the Heritage Railway Association, and John Tilly preferred option (3). The Confederation of Passenger Transport (UK) and London Tramlink stated that they would prefer option (3) to option (2) on the ground that drivers "ought to be aware of such risks at level crossings".

PROPOSED OFFENCES (4) AND (5)

13.32 The Confederation of Passenger Transport UK and London Tramlink expressed a preference for option (4) over option (5) "on the grounds that it is somewhat a matter of chance as to whether an injured person dies or not". They explained:

> The punishment should reflect the degree of intention or recklessness: the maximum penalty is only appropriate where someone has been dangerously reckless, not merely careless.

13.33 Anthony Edwards also expressed a preference for option (4) over option (5), arguing that "the number of incidents (compared with those of dangerous driving generally) do not require an offence lacking any element of intention or recklessness".

13.34 On the other hand, the Heritage Railway Association, and John Tilly preferred option (5).

13.35 Transport Scotland suggested that offences (4) and (5) should include serious injury as well as death, since "the nature of trains often results in luck playing a big part in the difference between death and serious injury as a result of an accident".

13.36 The parliamentary advisory group the Parliamentary Advisory Council for Transport Safety argued against the use of the word "reckless" in these offences, and proposed that the definition of dangerous driving should be applied instead:

> A person drives dangerously when the way his standard of driving falls far below what would be expected of a competent and careful driver *and* it would be obvious to a competent and careful driver that driving in that way would be dangerous.

13.37 Similarly, the British Transport Police stated that neither dangerous driving nor causing death by dangerous driving require "intentional or reckless intent, as dangerous driving is where standards of driving fall *far below* what would be expected of a competent or careful driver".

Conclusion

13.38 The majority of consultees agreed that there should be a new scheme of level crossing offences, and a number of them agreed with the proposed scheme. Several consultees argued that the creation of new level crossing offences should bring more clarity. Other consultees disagreed as these new offences would not be part of a broader simplification of existing offences. Also some consultees questioned whether there is a real need for new offences and expressed scepticism that new offences could improve deterrence.

If consultees do not think that new offences should be created, we would welcome views on whether penalties for existing offences relevant to level crossing misuse should be increased. [CP para 13.75]

Introduction

13.39 Of the 114 responses received, 15 responses addressed the question of whether penalties for existing offences relevant to level crossing misuse should be increased. Of those, nine agreed that they should be increased, one disagreed and five were equivocal.

Whether sentences should be increased

13.40 Several consultees, such as Network Rail, agreed that penalties for existing offences should be increased so as to increase deterrence. On the other hand, Passenger Focus stated that "higher penalties might be justified if there is reason to believe that this would affect the future conduct of existing offenders" but highlighted that more research is required into public awareness of the risks arising from the misuse of crossings because:

> We do not know what level of reoffending currently occurs, and to what extent non-offenders have knowledge of (and are affected in their behaviour by) the current level of penalties.

13.41 On the other hand, the Glasgow Bar Association stated:

> As far as sentencing is concerned the Road Traffic legislation has sufficient punitive powers to deal with driving offences on level crossings particularly in the case of dangerous driving.

13.42 Mike Lunan stated "magistrates seem unwilling in many instances to give as heavy sentences as they are empowered to do". The Department for Transport stated that the Department, the Office of Rail Regulation and the British Transport Police have been working with the Sentencing Council to highlight the "aggravating" nature of offences committed at a level crossing:

> Our aim is to secure changes to the sentencing guidelines that recognise the additional context of level crossing offences, that provide greater consistency of prosecution, and also provides guidance on appropriate penalties for this type of offence.

13.43 The Highways Agency – while expressing no views on maximum tariffs - stated that:

> Guidance on setting appropriate fines or tariffs may be helpful in providing greater consistency in sentences between offences at level crossings with those committed on other sections of the network.

Conclusion

13.44 A small majority of consultees agreed that the penalties for existing offences relevant to level crossing misuse should be increased. One consultee argued that more research needs to be carried out to understand the reason behind committing offences at level crossings. One consultee argued that there are sufficient punitive powers currently, and another argued that they are working on bringing about changes to the sentencing guidelines.

What other steps do consultees think should be taken in order to reduce the incidence of offending at level crossings? [CP para 13.76]

Introduction

13.45 Of the 114 responses received, 29 responses addressed the question of what other steps should be taken in order to reduce the incidence of offending at level crossings.

Education

13.46 The majority of consultees who responded to this question highlighted the importance of education in reducing the incidence of offending at level crossings. For example, Anthony Edwards stated that:

> Education and publicity of the dangers will always be more effective than the slow ex post facto penalisation of individuals as to which the extent of publicity will depend on extraneous factors, with only the rare but most serious incidents becoming widely known.

13.47 Lunan argued that:

> Central Government should be prepared to commit funds to a programme of education about the dangers of level crossing misuse, focused as needed to deliver the message to schools, young people (especially inexperienced drivers), and adults. Even some supposedly well-trained professional drivers (eg ambulance drivers) are unaware that a flashing red "wig-wag" at a level crossing forbids them to cross it (unlike a red traffic light).

13.48 Several consultees highlighted the limited and insufficient reference to level crossings in the Highway Code and requested that it should be amended accordingly. Similarly, several consultees, such as Suffolk County Council, the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum suggested that questions relating to level crossings should be a compulsory element in the theory part of the driving test.

13.49 The Automobile Association stated that "drivers are not clear on all road signs, and it is perhaps unreasonable to think they will ever be". It explained that its research through the Populus panel suggests that many drivers "are not totally clear on level crossing signs". They highlighted that in many parts of the country, drivers may very rarely use a level crossing.

Enforcement

13.50 Some consultees argued that better enforcement would reduce the incidence of offending at level crossings. For example, Network Rail stated that "it is important that offences are prosecuted, otherwise the deterrent effect is lost".

13.51 Several consultees suggested that the use of technology could improve conduct at level crossings. For example, the trade association the Associated Society of Locomotive Engineers and Firemen and Fife Access Forum both suggested that "greater use of CCTV at level crossings … would help prevent accidents".

13.52 The Egham Chamber of Commerce called for a greater use of camera technology to enforce compliance at level crossings. It drew a parallel with the 100% enforcement of the congestion charge by Transport for London using cameras, and argued that "the reason why Network Rail does not manage level crossings this way is that there is no incentive for them to consider the needs of the road user".

13.53 However, the British Transport Police included an extract from the Scottish Area Justice Unit, which highlighted the difficulty with using closed-circuit television footage to prosecute offenders:

> At present it is not possible to prosecute persons from CCTV evidence if the *red* lights cannot be seen. With the various fail safes and the design of certain crossings it is possible to prove that an offence has been committed and it is felt that other sources of evidence should be allowed to stand in order to prove that the red [light] was illuminated for court procedures.

13.54 It explained that many level crossings "have monitoring equipment that records the crossings activity including that the red lights were illuminated" and argued that:

> If this was accepted as evidence it would allow detections by frontal photography where the road layout on the approach was not suitable for vehicle mounted or stand alone equipment to be used.

Design and layout at level crossings

13.55 Several consultees stated that improving signage at level crossings would reduce the incidence of offending. For example, the British Transport Police's Wales and Western Area Justice Unit stated that "some signage at private road level crossings appears ambiguous" and suggested that the wording should be more "prescriptive". Similarly, the British Transport Police's Scottish Area Justice Unit stated that there is "evidence that many drivers do no fully understand that the light sequence [at level crossings] indicates a requirement to stop" and suggested that "they may believe that the lights are merely a warning that the barriers are about to operate".

13.56 The feedback from defendants included in the British Transport Police's response highlights several issues that have impaired drivers' ability to comply. First, they stated that "warning signs on the approach to level crossings are obscured either by overhanging vegetation or the signs are faint and not easily legible". Similarly, some defendants "frequently feed back that the rising/setting sun impairs their sighting of the warning lights at level crossings". Finally, some defendants suggested that some level crossings are badly sited, in that "they have joined the main road from a side road which is practically on top of the level crossing and they are unable to see any signs or warning lights clearly".

13.57 The British Transport Police suggested that:

> Perhaps the feasibility of the introduction of 'rumble strips' on the road surface on the approach the level crossings could be researched as a tool to slow vehicles down on the approach to the level crossing.

13.58 South Gloucestershire Council suggested “a new sign for all users where the line speed exceeds 50 miles per hour advising users what the line speed is”.

Understanding the cause of offending

13.59 Passenger Focus suggested that “an effective strategy for reducing crossing misuse must be based on a proper understanding of the relative contributions of error and violation”.

13.60 Similarly, Andrew Fraser, argued that the railway industry should take “an interest in how people *actually* see”.

Multi-agency working

13.61 The Crown Office and Procurator Fiscal Service stated that it was engaged in organising a multi-agency approach involving the Scottish Government, Scottish police force, British Transport Police, Transport Scotland, Network Rail, First Group and the Office of Rail Regulation. They argued that “the success of Operation Galley demonstrates that enforcement measures and education of the public are more effective when approached in this manner”.

13.62 Similarly, Community Safety Partnerships Ltd stated that:

> The British Transport Police and the applicable territorial force should be required to enter into an agreement concerning the enforcement strategy to be delivered at level crossings within the territorial force’s domain.

Conclusion

13.63 In response to the question of what other steps should be taken in order to reduce the incidence of offending at level crossing there was a strong emphasis from consultees on the importance of education. Other consultees argued that improving enforcement at level crossings would increase deterrence. Finally consultees argued that improvement to the design and layout of level crossings would help to reduce offending, and so would multi-agency working.

PART 14
SIGNS AND THE HIGHWAY CODE

We would be interested in views about whether the *legal structure* relating to the specification of signs is adequate, or is in need of a general review. [CP para 14.15]

Introduction

14.1 Of the 114 responses received, 17 responses addressed the question whether the legal structure relating to the specification of signs is adequate, or is in need of a general review. Ten of those agreed and seven disagreed that there is a need for a general review.

The need for a review

14.2 Several consultees, such as the Fife Access Forum, argued that the current review of level crossings provides an opportunity to review the legal structure in relation to signage at level crossings. Nia Griffith, MP for Llanelli, stated that it would be helpful for such a review to take place, "to make [the legal structure] more coherent, comprehensive and accessible"

14.3 Conversely, Cambridge County Council argued that the Traffic Signs and General Directions Regulations "are well-known and meet the requirements of Highways Regulation". They added that "this is reviewed on a regular basis and takes into account the signs used at level crossings". Similarly, the Association of Directors of Environment, Economy, Planning and Transport and the National Traffic Managers' Forum stated jointly that the "current legal structure is adequate" and that "highway authorities are not aware of problems concerning the legal structure relating to the specification of signs". Suffolk County Council – while also stating that it is not aware of problems with the legal structure relating to level crossings – suggested that the question of whether a review was necessary "would best be informed by a comparison to other countries".

14.4 The Department for Transport disputed the need for the Law Commissions to undertake this review in light of research currently being undertaken by the Rail Safety and Standards Board. They argued that "given that the Rail Safety and Standards Board research is producing evidence that the fundamental system of signing is understood, it would appear that the issue is actually its application". Similarly, the Highways Agency stated that "inconsistent application of the guidance on signing is of greater concern".

14.5 Network Rail stated that:

> Current legislation allows the mandating of appropriate signage (including lights) but it is not clear whether the responsibility lies by default with the railway authority or the highways authority for signs on highway property on the approach to a crossing.

14.6 Network Rail highlighted that in light of the proposed move to HSWA, "a gap in the framework may appear, as the specification might not have legal status in describing who carries the responsibility for the signage".

Conclusion

14.7 A small majority of consultees argued that there was a need for a general review of the legal provisions relating to the specification of signs. On the other hand, some consultees argued that the current legal structures are adequate, or that the Law Commission may not be the best body to undertake such review. One consultee stated that the proposed move to HSWA may create a gap in the legal framework for signage.

Are the current legal structures providing for signs and warnings at level crossings, and for providing guidance in the form of the Highway Code to motorists or others, adequate? [CP para 14.17]

Introduction

14.8 Of the 114 responses received, 25 responses addressed the question whether the legal structures providing for signs and warnings at level crossings, and for providing guidance in the form of the Highway Code, are adequate. Seven of those responded that the current legal structures are adequate, eight responded that they are not adequate and three were equivocal. Seven consultees made comments or suggestions about the design of signs at level crossings, without commenting on the adequacy of the legal structures providing for signs and warnings.

The adequacy of current legal structures

14.9 Devon County Council stated that the Traffic Signs Regulations and General Directions 2002 "is considered sufficient for controlling the road safety element in relation to level crossings". They noted that section 39 of the Road Traffic Act 1988 places a duty on the local authority to take appropriate measures. Finally they noted that there are "also regulations relating to highway signage on the approaches to level crossings which reflects the Traffic Signs Regulations and General Directions 2002 and are considered sufficient".

14.10 Several consultees argued that the content on level crossings in the Highway Code needs strengthening.

Signs at private level crossings

14.11 Despite arguing that the questions in this part do not fit well within the overall project, the Department for Transport welcomed the Commissions' consideration of the issue of signs at private crossings which fall under the Private Crossings (Signs and Barriers) Regulations 1996. It acknowledged that "the provision of signage under this mechanism is both inflexible and administratively burdensome, whilst also in need of significant updating" and stated that the review

> Is an opportunity to evaluate the best format/process for sings at private crossings, and most appropriate place for them to reside – for example, if guidance or an ACoP is produced then private signs issues may merit inclusion there.

14.12 John Tilly argued that the Private Crossings (Signs and barriers) Regulations "need thorough review". He further argued that all level crossing signs should be in one place whether for private or public level crossings.

14.13 The Office of Rail Regulation argued that "requirements for private crossing signs should be incorporated into the Traffic Signs Regulations and General Directions 2002". They stated that:

> This would allow private crossing signs to be legally placed on public footpaths without seeking special authority from the Secretary of State, would provide a greater choice of signs for use on private crossings and would conveniently place all signs for level crossings in one place.

14.14 Similarly, Andrew Harvey described this as a "serious shortcoming" in the legal provisions relating to level crossing traffic signs in that:

> Technically at every place where a sign from the "Private Crossings" Regulations are used on a road or other highway to which the public has access, it currently needs a traffic sign authorisation, even if placed in compliance with a level crossing order. Very few have such authorisation.

This is because "the 'Private Crossings' signs are only authorised (and therefore can only be legally placed and have effect) on roads to which the public does not have access".

The design of level crossing signage

14.15 Several consultees discussed issues of signage design. Conwy East Local Access Forum stated that "there needs to be more clarity and definition regarding the positioning and/or visibility of signing". The joint response from the Guide Dogs for the Blind Association and the Joint Committee for the Mobility of Blind and Partially Sighted People recommended, for example, the consideration of providing "tactile warning surfaces on all approaches to level crossing" and providing "audible, tactile and visual signals to indicate when it is safe to cross a level crossing" as a matter of priority.

14.16 Several consultees complained that the flashing lights at level crossings are confusing for motorists who are accustomed to the traffic light sequence at road junctions. Ralph Rawlinson, a former railway signal engineer, stated that from his experience, people understand the lights to mean "'take care when crossing' or 'slow down' but never 'stop'". Furthermore, the Association of Directors of Environment, Economy, Planning and Transport, the Association of Transport Co-ordinating Officers, the Local Government Association and Hampshire County Council gave this as a reason as to why "the current system of signs, warnings and guidance needs a complete overhaul".

14.17 The Railway Industry Association drew attention to "the increasingly international mix of road users, and of drivers in the road haulage industry in particular" and questioned their ability to "understand highway signs (including textual instructions) at level crossings". Likewise, Ramblers stated that "all signage used at footpath and bridleway level crossings should be reviewed to ensure that it can be understood by all (ie by the use of pictograms)".

14.18 Network Rail stated that it "would find it useful if highways or roads authorities could be compelled to install measures which would improve the road approach to the crossing". It stated as an example the countdown markers that are in place before exit roads on the motorway.

Conclusion

14.19 The majority of consultees who argued that there was a need to review the legal structures for sings and warnings at level crossings focused on the inadequacy of the legal structures in relation to private level crossings. Several consultees made suggestions for design, raising concerns about the flashing lights for example, or issues of visibility or accessibility for those with disabilities.

APPENDIX A
INDEX OF SUBMISSIONS

Number	Organisation/individual	Category
01	Rev Kenneth Warner	Member of public
02	E. Sutherland-Loveday	Member of public
03	Dave Thompson MSP	Member of Parliament (Scotland)
04	William Grasby	Member of public
05	The Mountaineering Council of Scotland	Access group (Scotland)
06	Bruce Houlder QC	Legal profession
07	Kenneth Munnoch	Member of public
08	Tom Craig	Railway professional
09	William Bain	Member of public
10	David & Kathryn Gordon	Member of public
11	Sills & Betteridge Solicitors	Legal profession
12	Professor Roddy Paisley, University of Aberdeen	Academic
13	English Heritage	Advisory body - heritage
14	Edinburgh Trams	Tramway operator
15	Northumberland County Council	Local authority
16	Guide Dogs for the Blind and the Joint Committee on the Mobility of Blind and Partially Sighted People	NGO - disability
17	Mike Lunan	Railway professional
18	Chris Dugdale, Europe Rail Consultancy	Railway professional
19	HM Land Registry	Government department (non-ministerial)
20	Glasgow Bar Association	Legal profession
21	Ralph Rawlinson	Member of public
22	ASLEF	Trade association - rail
23	Anthony Edwards, Solicitor	Legal profession
24	Tram Power	Tramway operator
25	Geoffrey Claydon, Heritage Railway Association (tramways)	Heritage railway
26	Nottingham Express Transit	Tramway operator
27	David Walmsley, Confederation of Passenger Transport (tramways)	Trade association - transport
28	Michael Haizelden	Railway professional
29	Fife Access Forum	Access group (Scotland)
30	Sanjeev Kumar Appicharla	Railway professional
31	Egham Chamber of Commerce	Business association
32	Conwy East Local Access Forum	Access group
33	Pembrokeshire Local Access Forum	Access group
34	Caithness Local Access Forum	Access group (Scotland)
35	Railway Industry Association	Trade association - rail
36	George Muir	Railway professional
37	Stephen Glaister, RAC Foundation	NGO - transport
38	East Riding of Yorkshire and Kingston	Access group

	upon Hull Local Access Forum	
39	Perth and Kinross Council	Local authority
40	Andrew Fraser	Member of the public
41	Central Bedfordshire and Luton Joint Local Access Forum	Access group
42	Perth & Kinross Outdoor Access Forum	Access group (Scotland)
43	The Institute of Public Rights of Way & Access Management	Access group
44	Monmouthshire County Council	Local authority
45	Health and Safety Executive	Independent regulator - health and safety
46	Bodmin & Wadebridge Railway Co Ltd	Heritage railway
47	Welsh Assembly Government	Government
48	Parliamentary Advisory Council for Transport Safety (PACTS)	Advisory body - transport
49	The Highland Council	Local authority
50	Heritage Railway Association	Heritage railway
51	London Tramlink	Tramway operator
52	Vale of Glamorgan Council	Local authority
53	Nia Griffith, MP for Llanelli	Member of Parliament
54	Scotland National Access Forum	Access group (Scotland)
55	Lincolnshire County Council	Local authority
56	Community Safety Partnerships Ltd	Independent consultancy - safety
57	Suffolk County Council	Local authority
58	Bower Community Council	Local authority
59	Hampshire Countryside Access Forum	Access group
60	Central Bedfordshire Council	Local authority
61	ORR	Independent regulator - rail
62	Lady Elizabeth Akenhead	Member of public
63	Mobility and Access Committee for Scotland	Advisory body - access
64	John Mackay	Member of public
65	Confederation of Passenger Transport	Trade association - transport
66	John Irven and Clive Gray	Members of public
67	Network Rail	Railway infrastructure operator
68	Association of Train Operating Companies (ATOC)	Trade association - rail
69	Devon County Council	Local authority
70	Paths for All	Access group (Scotland)
71	Wiltshire and Swindon Countryside Access Forum	Access group
72	The Ramblers	Access group
73	Newcastle City Council	Local authority
74	Passenger Focus	Advisory body - transport
75	GMPTE	Tramway operator
76	Open Spaces Society	Access group
77	Bridgend Local Access Forum	Access group
78	Ken Otter	Member of public
79	South Gloucestershire Council	Local authority
80	Powys County Council's Countryside Services	Local authority
81	Professor Andrew Evans, Imperial College London	Academic
82	Automobile Association	Lobby group - roads

83	David Allen	Member of public
84	Cambridgeshire County Council	Local authority
85	Scottish Natural Heritage	Advisory body - heritage
86	Country Land and Business Association	Trade association - landowners
87	Andrew Harvey	Railway professional
88	Clive Robey	Railway professional
89	Transport Scotland	Government department
90	National Farmers' Union	Trade association - farming
91	British Horse Society	NGO - equestrians
92	John Tilly	Railway professional
93	ADEPT and National Traffic Manager Forum	Local authority
94	Scotways	Access group (Scotland)
95	Royal Society for the Prevention of Accidents	NGO - accident prevention
96	Highways Special Interest Group of Solicitors for Local Government	Local government association
97	ADEPT, Local Government Association, Association of Transport Co-ordinating Officers (ATCO) and Hampshire County Council	Local government associations
98	Hampshire County Council Countryside Service	Local authority
99	Department for Communities and Local Government	Government department
100	Rail Safety and Standards Board	Research body - rail safety
101	Highways Agency	Government agency
102	Northamptonshire County Council	Local authority
103	Karl McCartney MP	Member of Parliament
104	Cyclists' Touring Club (CTC)	NGO - cycling
105	Ramblers Scotland	Access group (Scotland)
106	Crown Office and Procurator Fiscal Service	Government agency (Scotland)
107	Alastair Young, Transport Scotland (as advisory group member)	Railway professional
108	British Transport Police	National police force
109	Department for Transport	Government department
110	North Yorkshire Local Access Forum	Access group
111	Arfon-Dwyfor, Southern Snowdonia (Joint) and Northern Snowdonia Local Access Forums	Access group
112	T Dale	Member of public
113	London Tramlink (2)	Tramway operator
114	Rail Freight Group and Transport Association	Trade association - rail

APPENDIX B
INDEX OF CONSULTATION EVENTS

Number	Date	Event
01	5 August 2010	Scottish Law Commission meeting with Michael Smith
02	18 August 2010	Scottish Law Commission meeting with Ramblers Scotland
03	6 September 2010	Law Commission meeting with Isabel Sutcliffe, Head of Policy, Sentencing Council
04	13 September 2010	Law Commission meeting with ORR and DfT economic advisors
05	21 September 2010	PACTS rail safety working party
06	28 September 2010	ORR seminar
07	30 September 2010	Law Commissions' advisory group meeting
08	6 October 2010	Rail Safety and Standards Board AXIAT briefing session
09	11 October 2010	Law Commission meeting with Ken Otter
10	12 October 2010	British Transport Police seminar
11	18 October 2010	Rail Industry Association workshop
12	29 October 2010	Site visit to West Somerset Railway
13	8 November 2010	Law Commission meeting with Network Rail signal engineers Paul Mann and Brian Mulvana
14	9 November 2010	Presentation by John Tilly to the Permanent Way Institution
15	10 November 2010	Heritage Railway Association meeting
16	15 November 2010	ORR wash-up session
17	16 November 2010	Law Commission meeting with John Cartledge of Passenger Focus
18	22 November 2010	West Sussex level crossing site visit with Network Rail, ORR and Sussex County Council
19	24 November 2010	Law Commission meeting with Joint Committee for Mobility of Blind and Partially Sighted People and Guide Dogs for the Blind Association
20	25 November 2010	Law Commission meeting with National Farmers' Union
21	15 December 2010	Scottish Law Commission meeting with Alastair Young, Transport Scotland
22	10 January 2011	Law Commissions' road-rail incursions seminar
23	18 January 2011	Law Commission site visit to Sheffield trams
24	21 January 2011	Scottish Law Commission meeting with ORR, Transport Scotland, Network Rail, British Transport Police, Crown Office & local authorities
25	24 January 2011	Law Commission meeting with Country Land and Business Association
26	8 February 2011	Law Commission meeting with Rail Accident Investigation Branch inspector Ian Capewell
27	8 February 2011	Law Commission meeting with Rail Freight Group and Freight Transport Association
28	16 February 2011	Law Commission meeting with DfT lawyers
29	11 April 2011	Law Commissions' advisory group meeting
30	18 April 2011	Law Commission meeting with DfT lawyers

31	17 May 2011	Law Commission meeting with Network Rail

APPENDIX C
SITE VISITS

WEST SOMERSET RAILWAY

C.1 The management team of West Somerset Railway, together with Geoffrey Claydon of the Heritage Railway Association, organised a day of site visits for us to see level crossings that illustrated issues, some of which were particular to heritage railways and others which were of more general relevance.

C.2 At Water Deane Farm, we saw a private road, user-worked gated crossing where the farmer consistently leaves the gates open. Milk tankers and other heavy vehicles visit the farm regularly. The gates were open when we visited. We closed them but they were open again when we passed later in the day.

C.3 At Dunster West, an open level crossing ran over a public road. Incremental developments had brought the crossing to the brink of being unsafe so as to require the crossing to be upgraded. As each new home was built, the number of users of the level crossing increased by a few. Individually none of these developments would have led to a material increase in traffic, so that the local planning authority could not have required the developer to contribute to the cost of the upgrade or replacement level crossing through a section 106 agreement[1]. This level crossing was said to illustrate the limitations of the planning process, or its operation, in considering future developments when assessing an individual application.

C.4 At Watchet we saw a user-worked public footpath level crossing, which could be reached from the station platform on one side of the railway. The crossing was very busy, as the main pedestrian route from a large area of housing at the south of the railway to Watchet town and harbour on the north side. On the north side of the tracks, the crossing was approached by a difficult zig-zagging slope from the highway. A footbridge, which had not been transferred to the heritage railway when they purchased the station and railway line and was still owned by the local authority, had fallen into disrepair and was closed. We stood by the level crossing for some 15 minutes, during which time we saw a large number of people use this crossing.

C.5 This had been an open crossing protected by red and green warning lights, but due to constant vandalism of the lights, West Somerset Railway had erected gates with the agreement of the Office of Rail Regulation. A level crossing order was drawn up and gates installed. The gates were stolen on the same day they were installed and had been vandalised on several occasions and also been left tied open. The railway operator then erected heavy, metal gates, self-closing on a spring and also moved the gates further back from the track, providing more time to consider whether it was safe to cross. These gates posed significant difficulties to wheelchair users, as well as cyclists or those with pushchairs. We saw one

[1] Pursuant to the Town and Country Planning Act 1990, s 106.

person in a motorised wheelchair who could not open the gate and control his wheelchair as the controls were both on the same side. Wheelchair users have complained that the level crossing does not meet the requirement to make reasonable adjustments under the Disability Discrimination Act 1995. The level crossing at Watchet exemplified the difficulties in balancing safety and convenience of all users of a level crossing.

C.6 At Blue Anchor, we saw a traditional full-barrier, manually-controlled level crossing and traditional signal box. Members of the West Somerset Railway saw the signal box and gates as a piece of heritage in themselves, although the signal box was not a listed building. We visited the signal box and watched the mechanical systems in action. The railway used the traditional system of tokens which must be collected and inserted into the token holder from one train before another can leave. The highway turned a sharp bend immediately before reaching the crossing. The highway authority had made improvements to the road on the approach to the crossing by agreement, without a level crossing order.

C.7 At Minehead we saw a public, automatic barrier, locally-monitored crossing. The crossing is adjacent to a new commercial development, including a large supermarket and a fast food outlet. Part of the planning process for this development included the construction of a roundabout 110m south of the level crossing. West Somerset Railway was consulted by the planning authority on this application, and submitted a detailed response outlining its concerns about the impact of the development on the safety of the level crossing. The heritage railway was worried, in particular, about the short distance between the roundabout and the crossing, and the possibility of cars backing up over the crossing. The traffic assessment prepared during the application process projected a 25% increase in traffic along the road crossing the railway, but made no reference to the likely impact on the level crossing.

C.8 Planning permission was granted, without conditions. West Somerset Railway continues to oppose these developments and wishes to upgrade the level crossing to a manually controlled, full barrier crossing. The Office of Rail Regulation also noted in its response that the development has led to an increase in pedestrian traffic. The present automatic barrier, locally-monitored crossing does not provide sufficient protection to pedestrians, who are not prevented from crossing the railway even when the barriers are down. We visited during the October half term holiday and saw traffic backed up from the crossing as far as the roundabout.

C.9 Finally, we were able to view the railway line from the train driver's perspective with a short ride on the footplate of a heritage steam engine.

C.10 This level crossing illustrated the difficulty in achieving planning solutions that met the needs of all concerned: the developers; the railway operator; road users and the importance of effective consultation and co-operation between the railway operator, the highway authority and, where different, the planning authority.

WEST SUSSEX

C.11 Clive Robey, Network Rail's Operations Risk Control Co-ordinator for the region, together with Peter Atkins, the highways officer from West Sussex County

Council and the Office of Rail Regulation organised a visit to the manned signal box at Chichester and crossings of various types in the area.

C.12 First, we visited the modern signal box at Chichester Station. There was a modern signal panel, built in 1991. The signal box was constantly manned. There were 55 level crossings between Brighton and Havant. Six trains ran each way per hour and five per hour off peak. The signalman had video link screens showing some of the crossings, but vehicles could not be seen clearly enough to identify them when misuse occurred. The signalman on duty explained that the failure position in the system was to keep the crossings closed so that if the signalman failed to take action the crossing would remain closed to the road, causing delay rather than danger.

C.13 At Stockbridge Road and Basin Road in the centre of Chichester, we saw manually-controlled full barrier crossings covered by closed-circuit television. During the consultation period, we had received complaints that these crossings were closed for up to 45 minutes in each hour at bust times. We saw a bus terminal just off the approach road to the level crossing, where the traffic backing up when the crossing gates were closed blocked the entrance and exit of buses, causing further delays to transport systems. Network Rail was keen to close these level crossings and replace them with a bridge and initial economic screening had shown that this would be cost effective. A bridge would, however, require compulsory purchase of a large area of land, and the relocation of a police station, fire station and bus station as well as numerous private businesses and residences. Transport assessments carried out for the proposed extension of the main road indicated that the weight of road traffic would be reduced significantly by the construction of this ring road, so that the level crossing replacement scheme would not be necessary.

C.14 At Fishbourne footpath crossing, the user-worked gated crossing was also protected by red and green warning lights. The gates at Fishbourne footpath crossing were similar to those at Watchet on the West Somerset Railway, in that the gates were rather crudely weighted to close automatically. A person in a wheelchair or motorised buggy would have difficulty opening the gate without assistance. Power-operated gates would solve the accessibility problem, but would be vulnerable to vandalism and misuse. It was difficult to strike a balance between safety and convenience to disabled users in these instances, and safety would always outweigh convenience. Significant numbers of school children used this crossing, both at each ends of the school day and to reach a local supermarket at lunchtime.

C.15 At Lower Pratts the crossing had been upgraded to a remote controlled gate and mini warning lights with closed-circuit television at the request of the owner of the private road and property on one side of the crossing. The mini warning lights were linked to a signalling system, but the closed-circuit television was not. Prior to the upgrade, the crossing had been controlled by a telephone to the signal box. In 2007 the number of trains increased on this section of the line from two to four per hour. The long signal sections meant that a person could wait up to 18 minutes to cross. On one occasion, a user had telephoned the signalman and been told that it was safe to cross when in fact a train was approaching. A near miss had resulted. In addition, Network Rail planned to increase the line speed on this section of the railway. This increase would reduce the amount of time

between the train becoming visible to the level crossing user and the train reaching the level crossing. Network Rail accelerated their plan to put in mini red-green warning lights. The remote-controlled gate was installed at the same time at the owner's request.

C.16 The land owner explained that it had taken years for Network Rail to install new gates and lights on his property, and he felt that action had only taken place after he had threatened legal proceedings. This exemplified the many impediments in the current system to making swift and effective changes to level crossings, even where necessary for safety purposes and with the best efforts of Network Rail's staff on the ground.

C.17 Similar protection had not been added to the crossing at Vale Wood, a few hundred yards further along the line. Vale Wood provided another example of incremental increase in use. Houses had been built at different times near this crossing so that cumulatively the use of the crossing had materially increased, although each individual development had not resulted in a material increase in use.

C.18 Vale Wood was illustrative of the need to have powers of compulsory purchase. The crossing was used frequently by residents for whom it was the only way of reaching the highway and the town. One of the residents owned an accommodation right of way through a tunnel under the railway, but would not allow access to other residents. With powers of compulsory purchase, the crossing could be closed and the tunnel used instead, a safer option for all concerned.

C.19 Vale Wood also illustrated the importance of a good working relationship between those responsible for the highway and railway. The track leading from the highway to the level crossing was in a poor state of repair and became very slippery when snow fell. An incident had occurred during the previous winter where a car became stuck on the railway side of the gates after crossing the track as it was unable to climb the slope. The highway authority was responsible for the track where it was cut out of the verge at the side of the highway, but Network Rail took responsibility for the track between the gates. In West Sussex, the effective partnership between the Network Rail staff and the highway officer meant that an agreement could be reached to improve the surface of the track.

C.20 Concerns were expressed about both the safety and convenience of the footpath level crossing at Nutbourne station. The highway authority proposed the closure of the footpath crossing at the east of the station and the diversion of the footpath to lead to the safer automatic half barrier crossing at the westerly part of the station. Pedestrians currently misused the crossing, walking to the end of the platform and down the unsafe slope to gain access to the footpath.

C.21 This level crossing illustrated the difficulty of closure. Network Rail staff informed us that they could only initiate closure of the level crossing on safety grounds. If they did so, they surmised that they would then be asked why they had not done more to ensure safety. The reason the crossing was unsafe was because the crossing was not used safely, and the only way to prevent that type of misuse was to close it and create another, safer option.

STAGECOACH SUPERTRAM

14.20 During the consultation period, Edinburgh Trams alerted us to the difficulties for tram operators of our proposed definition of railways, which distinguished between segregated and non-segregated tracks, so that all crossings on segregated tracks would be within our definition of level crossings, whereas crossings on non-segregated tracks would not. The Confederation of Passenger Transport put us in contact with tram operators throughout the United Kingdom and we consulted them on this issue. Responses showed that tram systems and the ways that crossed them were more complex than we had been aware. The Confederation of Passenger Transport, with the kind assistance of Stagecoach Supertram, organised a site visit for us to see the tram system in Sheffield, where we could gain a better understanding of the types of crossings and why, in their view, tramways should be excluded from this project. A meeting was organised with representatives from Edinburgh Trams, Nottingham Express Transit, Manchester Metrolink, Network Rail, the Office of Rail Regulation, and Sheffield City Council, the local council responsible for both transport in Sheffield and the highway authority.

14.21 The majority of tram crossings we saw were not on segregated track and were controlled by traffic lights. We also saw sections on segregated track, controlled by traffic lights. We discussed examples of tram crossings where the tram is controlled by railway signals and is not, therefore, operating on a line of sight basis. We also discussed the unusual example of the crossing at David Lane in Nottingham, where a tram crossing controlled by traffic lights sits immediately next to a level crossing controlled by railway signals.

14.22 It was invaluable to hear the detailed and practical examples given by the various tram operators and to see the operation of the tram. For example, riding on the tram, we were able to see not only that the tram operated entirely on a line of sight basis, but also that the tram controlled the traffic lights. We were able to see the crossings from the tram driver's perspective and to hear the history of their development, showing the close working relationship between the tram operator and the highway authority in developing appropriate road system solutions for the effective and safe running of the tram system. We also heard from the highway authority and tram operators that they were keen to encourage as many access points and crossings across the tramway as would benefit local users, so that the concerns that railway operators had about the creation of level crossings did not apply here. We also benefitted from discussing future plans with tram operators, such as proposals to develop tram-trains which are trams that will run along existing railway lines.

14.23 As a result of this site visit and meeting, we concluded that trams run largely on a line of sight basis and that the crossings with highways or other rights of way are appropriately controlled by ordinary traffic signals. Tramways should be excluded from the definition of railways, with certain exceptions, discussed above in Part 1.