

Re The Network Rail (Cambridgeshire Level Crossing Reduction) Order
Note on Behalf of the Ramblers on the DIA Information (NR-INQ-18)

Introduction

1. Mott MacDonald carried out a Diversity Impact Assessment Scoping Report, dated August 2016, on behalf of Network Rail, which assessed whether Diversity Impact Assessments (“DIAs”) would be necessary to lawfully assess each of the individual level crossing closures and downgrades proposed for inclusion in the Network Rail (Cambridgeshire Level Crossing Reduction) Order (the “Order”).
2. Mott MacDonald also produced, on behalf of Network Rail, an “Equality and Diversity Overview” report, dated February 2017, in response to updated site proposals.
3. Following the Scoping Report and Equality and Diversity Report, Network Rail has carried out DIAs for three of the level crossing proposals in Cambridgeshire:
 - (i) C07 – No. 37;
 - (ii) C28 Black Horse Drove; and,
 - (iii) C31 Littleport Station.
4. Network Rail did not include any of these documents in its Core Documents, nor as appendices to any of the proofs of evidences submitted by Network Rail’s witnesses. Following a request made by the Inspector, these documents were eventually disclosed on 15 December 2017, over half way through the Inquiry.¹
5. The Inspector has asked if the Ramblers have any particular objections to, or concerns about, the DIAs. This note seeks to set out the Ramblers position in this regard.

¹ The Ramblers had also raised concerns, through cross-examination of Network Rail’s witnesses, that the DIA documentation had not been disclosed.

Non-production of relevant information

6. Before addressing the Ramblers' specific concerns relating to the DIA documentation, the Ramblers must highlight concerns arising from Network Rail's failure to provide this information in advance of the Inquiry.
7. In short, Network Rail's prior non-disclosure of this DIA documentation is of serious concern. Not only have objectors, including the Ramblers, been unable to consider the information prior to the start of the Inquiry (and prior to the examination of Network Rail's evidence) but the failure to disclose this information demonstrates a clear disregard, on the part of Network Rail, as to the Secretary of State's obligations to carry out his public sector equality duty ("PSED") under section 149 of the Equality Act 2010 when determining whether or not to make the Order.²
8. Network Rail appear to have assumed that the Secretary of State could, or would, be satisfied that his PSED had been met, simply by relying on Network Rail's assurances that it had carried out a proper DIA process in order to comply with its (Network Rail's) own PSED (these assurances were provided, in large part, through Ms Tilbrook's evidence³).
9. Such an approach is woefully inadequate. The Secretary of State's PSED is separate and distinct from Network Rail's PSED and both must be satisfied. It is accepted that the Secretary of State may draw from Network Rail's assessments, as part of the evidence base on which he relies on in order to discharge his duty, but case-law has made it clear that PSEDs are non-delegable, see per Aikens LJ in *R (Brown) v SSWP* [2008] EWHC 3158 (Admin) at [94]:

Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty. The duty will always remain

² The Secretary of State is a "public authority" as defined by section 150 and Schedule 19, para 1 of the Equality Act 2010. In determining whether or not to make the Order, the Secretary of State would be carrying out his "functions" for purposes of s149(1) of the Act and, therefore, must do so having "due regard" to the need to:

- (a) *eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) *foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

³ Susan Tilbrook's Proof of Evidence, section 1.16.

on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have “due regard” to the needs identified will only be fulfilled by the relevant public authority if (i) it appoints a third party that is capable of fulfilling the “due regard” duty and is willing to do so; and (ii) the public authority maintains a proper supervision over the third party to ensure it carries out its “due regard” duty...

10. Following *Brown*, it would have been impossible for the Secretary of State to “maintain a proper supervision” over Network Rail in a manner that could ensure the “due regard” duty has been carried out, had the DIA documentation not been disclosed to the Inquiry.
11. The PSED is not a question of “ticking boxes”; it is a duty of substance, rather than form, requiring a “conscious approach and state of mind” and “exercised in substance, with rigour and with an open mind” (*Haque v Hackney LBC* [2017] PTSR 769 per Briggs LJ at [22], providing a useful summary of previous case law). This further emphasises the need for the Secretary of State to be satisfied, having regard to an appropriate evidence base (which must, in this case, include the DIA documentation), that his PSED has been discharged.
12. The Ramblers have sought to emphasise this point as a matter of principle, but they also take this opportunity to put Network Rail on notice that they will be making the same point in relation to the proposed Network Rail (Essex and Others Level Crossing Reduction) Order and the proposed Network Rail (Suffolk Level Crossing Reduction Order). The relevant DIA documentation in relation to these proposed orders should have been disclosed to objectors already and must be so disclosed prior to the Inquiries commencing or resuming.

Inadequacies of the DIA documentation

13. The Ramblers have now had an opportunity to consider the DIA documentation and would like to highlight two key concerns with its content.

(1) Issues with DIA Scoping

14. Section 3 of the Scoping Report and section 2 of the Equality and Diversity Overview Report (which mirror each other in content) address the “at risk groups” and identify the “potential issues associated with level crossing closures and the groups likely to be affected by those issues”. This assessment led to a scoping of the groups with relevant protected characteristics that might be affected by the proposals and what the potential impacts would be.⁴ It is apparent, from reviewing the “DIA scoping analysis” tables⁵ that this initial assessment of “at risk groups” helped to frame the crossing-specific assessments of whether there would be any potential impacts on persons with protected characteristics for the proposals in the Order. This crossing-specific assessment led to a decision as to whether a crossing-specific DIA was required.
15. These sections deal in depth with “user safety” of the level crossings⁶ and how associated safety risks at level crossings can disproportionately affect people with particular protected characteristics. However, the Ramblers are concerned that there has been inadequate consideration of the safety risks associated with roadside walking in relation to Network Rail’s proposed alternative routes that will direct users alongside or across roads.
16. The Ramblers recognise that it appears that some of the general impacts on safety associated with roadside walking have been considered for C11 Furlong Drive (Equality and Diversity Overview Report, p. 26) but nonetheless remain concerned that there has been no scoping assessment as to how roadside walking can disproportionately affect people with protected characteristics (in particular, people with disabilities and younger or older people). Overall, the Ramblers are concerned that the potential impacts of roadside walking on persons with protected characteristics have not been adequately assessed.
17. The relevance of safety issues in relation to roadside walking is readily apparent when reviewing the “Step 4: Consultation” section of the DIA for C07-No. 37. The majority of responses concerned road-user safety.

⁴ See Table 3.1 (p. 11) of the Scoping Report and Table 2 (p.10) of the Equality and Diversity Overview Report.

⁵ For Cambridgeshire, see p. 145 *et seq* of the Scoping Report and p. 22 of the Equality and Diversity Overview Report.

⁶ Scoping Report at 3.1.1 and Equality and Diversity Overview Report at 2.2.

(2) Inadequate evidence base for the DIA of C07- No.37

18. It appears that the DIA carried out to assess the potential impacts of the proposal to close C07-37 relies on a general evidence base (“Step 2: The evidence base”), consisting of (i) the 9-day census; the (ii) existing census data for South Cambridgeshire (pp. 7-8 DIA C07-37); and, (iii) a consideration of “local amenities” (p.8 DIA), which considers “places of importance to people” that are situated within 2km of the crossing.
19. The Ramblers are concerned that this evidence base is inadequate. Clearly the reliance on broad census data for South Cambridgeshire (evidence base (i)) provides little detail as to who is likely to be affected by this proposal.
20. The 9-day census (evidence base (ii)) only provides a snapshot. In particular, those who have non-physical disabilities,⁷ or physical disabilities that are not outwardly visible (for example, pulmonary disabilities), would not be documented by the 9-day census and so the potential scale of any impact on them does not appear to have been appropriately considered.
21. It is notable that the DIA states on p.10 in relation to the potential negative impacts on persons with a disability:

However, as the kissing gates presently make the crossing inaccessible to most mobility impaired people and there were no visibly disabled people documented using the crossing during the nine-day survey period, the realisation of both positive and negative impacts for this group is likely to be limited; the baseline situation will not change significantly for disabled people.” (Emphasis added.)

This highlights the inadequacy of relying on then 9-day census data, which can only document “visibly disabled people”. Impacts on those with non-visible disabilities, such as pulmonary diseases, are likely to have been under-reported.

⁷ Disability is defined in section 6 of the Equality Act 2010 as:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

22. It is accepted that the duty to have “due regard” is a duty to have “the regard that is appropriate in all the circumstances”⁸ and that DIAs should not be unduly burdensome on public authorities but should rely on a proportionate evidence base. However, it would have been easy for Network Rail to include in their consultation surveys (which they were conducting in any event as part of their preparation for the Order) a request for information on users’ protected characteristics. This would have allowed a far better understanding of the population make-up for users of the crossing. Although the surveys for round one of the public consultation did ask whether users use the crossing by means of a wheelchair or mobility aid, the consultation surveys failed to ask, more generally, about users’ protected characteristics.⁹
23. Any focus on local amenities (evidence base (iii)) is a blunt tool for assessing who may be affected by the crossing proposal. It undervalues the benefits of walking for walking’s sake and will likely underestimate the numbers of users who may be using the crossing for such purposes.
24. Finally, whilst the DIA does refer to consultation responses in “Step 4” (pp. 15-17) it is stated at the outset of this section that the “views are not necessarily received from or relevant to those who share a protected characteristic”. This undermines any reliance that can be placed on the consultation process to provide a further evidence base.
25. Overall, and using C07-No.37 as an example, the Ramblers are concerned that the DIAs lack sufficient information on the numbers, or proportion, of people with protected characteristics who use the crossing which is under consideration. This lack of crossing-specific information significantly undermines the DIA assessments.

Conclusion

⁸ *Baker and others v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2008] EWCA Civ 141 at [31].

⁹ NR05, c.2 and c.3. The private user questionnaire does ask about some protected characteristics, in relation to potential difficulties in reading/observing/understanding signs/lights (NR05, B, p.2) but this does not ask, more generally, about the presence of protected characteristics.

26. The Ramblers would like to thank the Inspector for the opportunity to provide further comments on the DIA documentation and hope that the few concerns raised above may be of use to the Inquiry.

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