

## **Re The Network Rail (Essex and Others Level Crossing Reduction) Order**

### Note on Behalf of the Ramblers on the Public Sector Equality Duty Requirements and the Diversity Impact Assessment Documentation (NR-INQ-119-121)

#### **Introduction**

1. Mott MacDonald carried out a Diversity Impact Assessment Scoping Report, dated August 2016 (NR-INQ-119), 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 proposed for inclusion in the Network Rail (Essex and Others Level Crossing Reduction) Order (the “Order”).
2. Mott MacDonald also produced, on behalf of Network Rail, an “Equality and Diversity Overview” report, dated September 2018 (NR-INQ-121), in response to updated site proposals.<sup>1</sup>
3. Following the Scoping Report and Equality and Diversity Report, Network Rail has also carried out a number of DIAs for specific level crossing proposals included in the Order (NR-INQ-120).
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. However, the findings of the Scoping Report and individual DIAs in relation to each crossing were summarised within the relevant crossing-specific part of Ms Tilbrook’s proof. This led to rebuttal points on these findings being raised by the Ramblers.<sup>2</sup>
5. On 12 September 2018, the Ramblers made a request that Network Rail disclose the DIA Scoping Report and the individual DIAs relating to the crossings that the Ramblers objected to.<sup>3</sup> The Ramblers noted that the equivalent DIA documentation

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<sup>1</sup> NR-INQ-121, p. 1, section 1.1. In an e-mail dated 21 September 2018, Network Rail explained that the Report is dated September 2018 “because it has been updated before submission to inquiry to reflect the fact that full DIAs have now been undertaken for all crossings where they had been recommended, whereas not all had been completed at the date the report was first produced...”

<sup>2</sup> See, for example, the Ramblers rebuttal proof (OBJ/148/REBUTTAL) at paragraphs 20, 25, 32 and 35 – 37.

<sup>3</sup> E02 Camps, E05 Fullers End, E10 Dixies Newport, E30 Ferry, Castle Point, E31 Brickyard Farm, E41 Paget Road, T04 Jeffries and T05 Howells Farm.

had been disclosed to both of the Inquiries into the Proposed Network Rail (Cambridgeshire Level Crossing Reduction) Order (NR-INQ-18) and the Proposed Network Rail (Suffolk Level Crossing Reduction) Order (NR-INQ-22). What is more, the Ramblers referred to a previous note submitted to the Cambridgeshire Inquiry on behalf of the Ramblers (OBJ-26-INQ-09), in which the Ramblers had taken the opportunity to request that the DIA documentation be disclosed in relation to the Essex Inquiry, prior to it resuming.<sup>4</sup>

6. Following this further request, the Ramblers received the DIA documentation requested on or around 20-21 September 2018 (less than three working days before the Inquiry resumed on 24 September 2018).

### **Non-production of relevant information**

7. Before addressing the Ramblers' more specific concerns relating to the DIA documentation, the Ramblers must highlight concerns arising from Network Rail's failure to provide this information at an earlier stage in the application process.
8. In short, Network Rail's prior non-disclosure of this DIA documentation is of serious concern. Not only have objectors, including the Ramblers, had limited time to consider the information prior to the start of the Inquiry (and prior to the examination of Network Rail's evidence) but it is the Ramblers' submission that 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.<sup>5</sup>

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<sup>4</sup> Whilst it is recognised that the Cambridgeshire Inquiry is a separate procedure, the practical overlap between the two Inquiries and the principle parties involved cannot be ignored.

<sup>5</sup> 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."*

9. 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 evidence<sup>6</sup>).
10. 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 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...
11. 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.
12. 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.

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<sup>6</sup> In particular, see Ms Tilbrook's Proof of Evidence, section 1.16.

## **Inadequacies of the DIA documentation**

13. The Ramblers note below their overarching concerns about the rigour and scope of the diversity impact assessment process itself, which the Ramblers will seek to highlight, where applicable, through the crossing-specific part of the Inquiry process in relation to the DIAs for specific crossings.

### ***Road Safety Risks***

14. Firstly, 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.<sup>7</sup> It is apparent, from reviewing the “DIA scoping analysis” tables 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 crossings<sup>8</sup> 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.

### ***Accessibility constraints***

16. Secondly, whilst the Overview Report and Scoping Report both recognise that accessibility challenges can arise if a level crossing is replaced “by a bridge, underpass or diversion which does not fully accommodate the needs of all those using

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<sup>7</sup> See Table 3.1 (p. 11) of the Scoping Report and Table 2 (p.11) of the Equality and Diversity Overview Report.

<sup>8</sup> Scoping Report at 3.1.1 and Equality and Diversity Overview Report at 2.2.

it”,<sup>9</sup> it appears that current restrictions on accessibility of the level crossings (such as the presence of stiles, uneven paths or approaches) were unduly relied upon as a basis for not carrying out DIAs for a number of crossings.<sup>10</sup>

17. The Ramblers recognise that carrying out a DIA is not necessarily a requirement to discharge the public sector equality duty; rather, it is a means to an end, with the end goal being to ensure that “due regard” is had to the three aims, summarised in the DIA documentation<sup>11</sup> as:

- Eliminating unlawful discrimination, harassment and victimisation;
- Advancing equality of opportunity between different groups;<sup>12</sup> and
- Fostering good relations between different groups.

The Ramblers are, nevertheless, concerned that, more generally, the potential for a number of Network Rail’s proposed diversions to *increase* accessibility constraints for protected characteristics groups (most notably, people with disabilities and older people) has not been fully assessed.

### ***Limited data sources***

18. Finally, having now had the opportunity to consider some of the individual DIAs in more detail, the Ramblers are also concerned that there has been significant reliance placed on the 9-day camera census to document users with protected characteristics who may be affected by the proposals. This census will, however, only document

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<sup>9</sup> Scoping Report at 3.1.2 and Equality and Diversity Overview Report at 2.3.

<sup>10</sup> See, for example, Equality and Diversity Overview Report, p. 39 (on E38 Battlesbridge), pp. 51-2 (on HA04 Eve’s) and p. 52 (on T01-131).

<sup>11</sup> See the Equality and Diversity Overview Report on p. 5 and the Scoping Report on pp. 2-3.

<sup>12</sup> It should be noted that section 149(3) further provides, in relation to this goal, that:

*Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

users with visible disabilities. It will not document the proportion of users who have non-visible physical disabilities or mental disabilities.

19. Furthermore, the surveys used for the two rounds of public consultation did not ask consultees whether they considered themselves to fall within a protected characteristic group. There does not appear to have been an appropriate assessment of the potential impacts on users with protected characteristics who would not have been identified through these evidence bases.

## Conclusion

20. The Ramblers accept that the duty to have “due regard” is a duty to have “the regard that is appropriate in all the circumstances”<sup>13</sup> and that DIAs should not be unduly burdensome on public authorities but should rely on a proportionate evidence base to the matters at hand. Further, as mentioned above, the Ramblers also accept that the key question is not whether or not a DIA has been carried out *per se*, but whether “due regard” has in fact been had to the specified matters in section 149 of the Equality Act 2010 (whether through a DIA or not).
21. Nevertheless, on the basis of the concerns raised in this note, the Ramblers are unconvinced that Mott MacDonald has fully and objectively considered the impacts of the Order proposals on protected characteristics groups. As a result, the Ramblers do not consider that “*due regard*” can be had to the specified matters in section 149 of the Equality Act 2010 by simply relying on the outcomes of the DIA Overview Report and individual DIA assessments.
22. Notwithstanding the above, it remains open to the Secretary of State, when applying his own mind to the specified matters in section 149 (for purposes of discharging his own public sector equality duty), to consider the issues further than what is discussed in the DIA documentation and findings of Network Rail. But, it is the Ramblers’ submission that he cannot be confident in discharging his public sector equality duty

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<sup>13</sup> *Baker and others v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2008] EWCA Civ 141 at [31].

by solely relying on the DIA work that Mott MacDonald and Network Rail have so far carried out.

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