

**RESPONSE OF ROAD SENSE TO THE DRAFT FINDINGS OF THE
COMPLIANCE COMMITTEE WITH REGARD TO COMMUNICATION
ACCC/C/2009/38 CONCERNING COMPLIANCE BY THE UNITED
KINGDOM**

Road Sense notes with some dismay the conclusion by the Committee that it does not find that the matters examined by it in response to the communication establish non-compliance by the United Kingdom with its obligations under the Convention.

Road Sense has brought a Statutory Appeal under the Roads (Scotland) Act 1984 in respect of the Scottish Parliament's approval of the Schemes and Trunk Road Orders. The hearing of the Statutory Appeal is set down for eight days commencing 22 February 2011. Inevitable preparation for the Appeal has taken a great deal of time for an organisation that simply comprises ordinary members of the public

Road Sense has therefore had some difficulty in complying with the request for a response by February 9th to the Draft Findings. While grateful to the Committee for a short extension of this period, Road Sense has nevertheless found it difficult to respond in the time available. We have had to confine our comments to only some of the points raised by the Committee.

We will deal with these points under a series of headings.

Information on location of freshwater pearl mussels – articles 1, 4, paragraph 4(h) and article 5

In paragraph 69 the Committee notes that since the discussion of the communication at its twenty-seventh meeting, the Scottish Information Commissioner (SIC) has released his decision regarding Dr Hawkins' application for access to the information on the location of the pearl mussels. The Commissioner found that SNH should have disclosed the Freshwater Pearl Mussels reports, redacted only for the locations of the freshwater pearl mussels.

In paragraph 70 the Committee goes on to say that the Committee now only needs to consider whether the withholding of the remaining redacted information is in compliance with article 4.

RoadSense submit that the withholding of the redacted information is not the only issue arising. The Scottish Information Commissioner has said that SNH now admitted that it should have disclosed further material on freshwater mussels to Dr Hawkins, and that it would now provide that material. In effect, SNH redacted more than they should have done from the report on the mussels. The material has now been provided. However, it was not provided at the time it was required – to support the arguments being presented by Road Sense at the Public Inquiry.

It seems to Road Sense that the admission by SNH to the Scottish Information Commissioner that material had been withheld is tantamount to an admission that the Convention had been breached. We ask the Committee to consider whether the action of SNH in withholding more information than it should have done constituted a breach of the Convention.

Badger report – articles 1, 4, paragraph 4(h) and 5

In paragraph 79 the Committee finds that in choosing not to make a request under the Scottish Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations for access to the report on the location of badger setts, the communicant has failed to have recourse to the available domestic remedies. In the circumstances, the Committee decides that it should not consider this allegation further.

Road Sense submits that recourse to the available domestic remedies was not available to it during the Public Inquiry – when the information on badgers was required. Such a request would have taken many weeks to resolve. In reality, the withholding of the Badger Report during the Inquiry seriously impaired Road Sense's ability to mount effective opposition to the Party's proposals for the AWPR. That suggests that domestic remedies are insufficient and inadequate. In this case the

Scottish Government was able to withhold important information on badgers, to the detriment of the arguments being presented by those concerned over the effects of the AWPR upon badgers.

Inadequate public participation on the route chosen - article 6

RoadSense asks the Committee to reconsider its draft finding that the Party concerned has complied with Article 6.

The Scottish Government announced their policy decision on 1 December 2005 to build the AWPR and Fastlink along specified routes. This represented a firm commitment by the Scottish Ministers. The need in strategic terms for the AWPR and Fastlink was presented as (and has remained) a given; and the means to meet that need had, subject to matters of technical detail, been determined, and have remained so. The news release of the 1 December 2005 is in these terms:

The future route of the Aberdeen Western Peripheral route was announced today. It is a combination of the Milltimber Brae and Peterculter/Stonehaven options. In Aberdeen, Transport Minister Tavish Scott said:

“The Aberdeen bypass needs to be an integral part of the transport network of the North East. The route I have announced today will ensure that, not only will the people of Aberdeen and Aberdeenshire benefit from a new bypass, but also that the transport needs of the whole region are met for the future. This bypass is more than a road. As well as cutting congestion and reducing pollution, it will provide a significant boost to the local economy and bring welcome benefits to businesses in the area. It was therefore extremely important that very careful consideration was given to the planned route and I would like to thank the many people who contributed to the public consultation.”

The chosen route combines the Milltimber Brae option with part of the Peterculter/Stonehaven option. This addresses the problem of getting traffic round Aberdeen quickly, while including a fast link from Stonehaven, off the A90.

This will also relieve traffic numbers on the A90 between Stonehaven and Aberdeen.

It is expected that the design of the new route and subsequent road orders will be ready by the end of 2006 with the bypass completed by 2011.

The estimated cost for the completed road will be between £295 million to £395 million, with the final cost expected to be at the lower end of the range.

The Committee may wish to note that the Public Participation Directive (implementing Article 6 of the Convention into the EIA Directive in EU law) had not been implemented in Scotland prior to the Minister's announcement (and was not implemented until the Regulations made in 2006 took effect on 1 February 2007 subject to transitional provisions excluding the AWPR from their scope). The right to be given "early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) [of the EIA Directive] and ... to express comments and opinions when all options are open" had not, therefore, been transposed into Scots law. However, the failure to transpose the Public Participation Directive does not negate the need for the UK to comply with its obligations under the Convention.

We would respectfully ask the Committee to consider the following points prior to making a final determination on the issue of compliance on this point.

First, although the announcement dated 1 December 2005 cannot be described as the outcome of a decision-making procedure, it represented a commitment by the Scottish Ministers to the construction of dual carriageways within the corridors then identified (and subsequently refined in terms of the announcement of 2 May 2006) by the end of 2011. The Scottish Ministers continued to maintain that construction would commence that year (indeed the National Planning Framework for Scotland 2, published in 2009, alludes to "the completion of the Aberdeen Western Peripheral Route in 2012"). Steps preparatory to that end have already been taken (including the relocation of the Aberdeen International School in August 2010 to purpose-built new premises at an 11 acre site near Cults which was purchased in May 2008). The timing is particularly relevant when it is recalled that the final orders were published in

September and October 2007 and the public inquiry pre-inquiry meeting took place in May 2008.

The context of the decision-making procedure is that it was initiated by the publication of the original draft orders in December 2006, subsequently replaced by the orders of September and October 2007. The announcement that a public inquiry would take place was by the Transport Minister on 12th October 2007.

However, the scope of the Public Inquiry was limited at the express instruction of the Scottish Ministers. Road Sense recovered documents under the Freedom of Information Scotland Act showing that Transport Scotland and the Scottish Ministers wished to prevent environmental NGOs such as Friends of the Earth Scotland attending the public inquiry and arguing that there was no need for the AWPR in policy terms.

The Scottish Ministers have power under section 139 of the Roads (Scotland) Act 1984 and paragraph 1 of the Fourth Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (which makes provision for the holding of inquiries in relation to compulsory purchase orders) to determine the scope of a public inquiry of this kind. The Ministers decided to exercise such power by restricting the remit of the public inquiry process. The Reporters (who hear the evidence and provide a report back to the Scottish Ministers to ultimately make the decision) were formally given their remit by way of formal Minutes of Appointment dated 18th June 2008. However, the restricted remit was decided at a much earlier stage, and the Scottish Ministers formally announced the restricted remit by letter dated 17th April 2008.

The Minutes of Appointment provided:

“The Scottish Ministers have taken a policy decision to construct a Special Road to the west of Aberdeen (known as the Aberdeen Western Peripheral Route, or AWPR), including a new dual carriageway link to Stonehaven (known as Fastlink). Having accepted the need in principle for the road they do not wish to be advised on the justification for the principle of the Special Road scheme in economic, policy or

strategy terms. Scottish Ministers consider that strategies and policies referring to the Special Road scheme are only relevant to the Inquiry in so far as they set the context for the AWPR and Fastlink.

Scottish Ministers therefore only wish to be advised on the technical aspects of the route chosen including the Environmental Statement published in connection with the Special Road scheme and any opinions expressed thereon. Given the assessment approach taken in the Environmental Statement, Scottish Ministers wish to be advised on the technical and environmental issues associated with the individual components of the Northern Leg, Southern Leg and Fastlink, as well as the entirety of the Special Road scheme.”

The minute of the Pre-Inquiry Meeting, which took place on 13 May 2008, having paraphrased the Scottish Ministers’ statement as set out above, stated:

“Accordingly the Reporters do not intend to permit the presentation of evidence or questioning on the need for the scheme. ... Some objectors intend presenting evidence on alternative routes and alternative designs – concerning, for example, the location of junctions. They should provide sufficient information about their preferred alternative to allow it to be properly considered. However, the inquiry is into the scheme proposed by Transport Scotland, and it cannot turn itself into an inquiry into a series of assumed alternative proposals.”

Accordingly, there has never been any scope for public consideration of at least one alternative to the proposed scheme – namely, to dispense with the scheme altogether. The Scottish Ministers made clear, in fixing the remit of the inquiry, that the justification in principle for the scheme in economic, policy and strategic terms was considered as established and that they only wished, therefore, to be advised on technical aspects of the route choice reflected in the draft orders. As that necessarily implies, what was also excluded from the remit of the inquiry was the possibility of a bypass without the Fastlink – even though there has never been any opportunity for public scrutiny of the merits of the policy decision embodied in the announcement of 1 December 2005.

The report of the pre-inquiry meeting indicates that, although the reporters would consider evidence on alternative routes and alternative designs, they had in mind only matters of technical detail such as the location of junctions. It is stated in terms that the inquiry was an inquiry into the scheme as proposed and “cannot turn itself into an inquiry into a series of assumed alternative proposals.” Throughout the inquiry this theme was maintained by the reporters of their own volition and at the invitation of Transport Scotland. The closing submissions made on behalf of Transport Scotland also reflected this theme.

At paragraph 10.59 of the inquiry report, the reporters state: “We do not consider any of the five alternative corridors examined in 2005 to have a clear overall advantage over the proposed scheme.” Furthermore, at paragraph 10.63, they state:

Bringing forward an alternative could result in the implementation of the scheme being delayed. All alternatives would necessitate further design work and in some cases this would be a major exercise. Most alternatives would probably involve further EIA work. All alternatives would necessitate the drafting of new orders. Most alternatives would involve land outwith the ownership of the parties proposing them, and if statutory objections were received a further inquiry would probably have to be held. We consider that the delay associated with an alternative, and in particular the cost resulting from any such delay, is a factor that should be weighed when considering the relative merits of the promoted scheme and the alternative.

In conclusion (at paragraph 11.4):

Given the Ministers’ policy decision about the AWPR, we have not been persuaded that any of the alternatives which have been proposed would have a clear overall advantage over the proposed scheme.

As this makes clear, the reporters gave no consideration (because they could give no consideration) to the possibility of not having a bypass and/or Fastlink at all. But even within the parameters of the inquiry it is equally clear that the reporters were not prepared to entertain any alternative to the scheme as proposed unless it showed a “clear overall advantage” sufficient to justify the delay in implementation of the scheme that would result from “bringing forward” an alternative at this stage. Against

this backdrop, the appellants submit that it is impossible to maintain that the inquiry afforded an opportunity for effective participation in the decision-making process at a time when all options remained open.

It is no answer to this objection, furthermore, to say that the five original routes were consulted upon and rejected in 2005 and did not need to be revisited. As senior counsel for Transport Scotland was at pains to stress in her submissions to the inquiry, the consultation exercise in 2005 was informal and non-binding. It took place outwith the confines of the decision-making procedure initiated by publication of the draft orders in December 2006. It is only within the confines of that procedure that the rights conferred by Article 6(4) of the Convention become operative. And in any event, even if the informal consultation did assist with the Party concerned in showing compliance, the Committee is reminded that the Fastlink played no part in this earlier informal consultation.

We formally lodge a news release of October 2007, which announces that there would be an inquiry into the AWPR whilst the consultation was still ongoing.

For all of these reasons, therefore, the appellants submit that the procedure followed in the present case failed to comply with the right of public participation as set out in Article 6 of the Convention.

Access to Justice: Article 9.

In paragraph 88, the Committee notes that Road Sense has brought a Statutory Appeal under the Roads (Scotland) Act 1984 in respect of the Scottish Parliament's approval of the Schemes and Trunk Road Orders. The Committee also notes that the communicant has applied for an order to cap its potential liability for expenses with respect to the appeal.

The Committee therefore finds that it would be premature for it to consider the communicant's allegations regarding access to justice at this stage while both the communicant's applications are still pending.

We can now report to the Committee that Road Sense's application for a Protective Expenses Order has been partially successful. Road Sense has been granted an Order by Lord Stewart in the Outer House of the Court of Session.

However, Lord Stewart's decision has profound implications for Road Sense. As well as paying its own legal expenses, Lord Stewart decided that Road Sense should bear responsibility for £40,000 of Scottish Ministers' expenses. Road Sense submits to the Committee that such a decision is not in accordance with the Aarhus Convention with respect to the costs of proceedings. Road Sense maintains that £40,000 is in fact extremely expensive.

Lord Stewart notes in his preamble that Article 10a of the EIA Directive 85/337/EEC, provides that procedures such as the present Appeal should be 'not prohibitively expensive.' He notes that the Aarhus Convention also requires access to an expeditious procedure established by law that is free of charge or inexpensive. He takes the view (§ 12) that in the case brought by Road Sense the Court is bound to make a Protective Expenses Order.

Lord Stewart notes (in § 5) that England & Wales has for some time had a Protective Costs Order [PCO] regime for public interest litigation. He remarks that the Aarhus Convention Compliance Committee has identified shortcomings in this regime [Findings of Aarhus Convention Compliance Committee, ACCC/C/2008/33, 24 Sep communicated on 18 Oct 2010, §§ 128—136.] In addition, by Letter of Formal Notice to the UK Government in October 2007, the European Commission alleged failure to comply with *inter alia* Article 3(7) of Directive 2003/35/EC which inserted Article 10a into the EIA Directive 85/337/EEC. On 18 March 2010 the Commission issued a Reasoned Opinion. The process is ongoing and may lead, as in the case of Ireland, to compliance proceedings under Article 226 EC.

He also notes (§ 16) that the Aarhus Convention Compliance Committee has taken notice of the recommendations of the *Scottish Civil Courts Review* [Findings of Aarhus Convention Compliance Committee as mentioned above]. The *Review* addresses Aarhus Convention compliance and makes recommendations about

‘Protective Expenses Orders’. He concludes that given... that PEOs have been identified as the way forward and that parties are agreed that I can make such an order, I shall make a PEO.

We note that this is the first time that such an order has been awarded to an environmental organisation and are pleased that there has been some movement in Scotland, albeit slow, towards meeting the requirements of the Aarhus Convention.

However, we dissent from the findings of Lord Stewart in relation to his pronouncement on assessment of the amount of the PEO. There is a real issue over his decision on how the amount of expenses should be determined. We respectfully submit that the Compliance Committee must examine his decision in detail, as we believe there are shortcomings in the approach adopted by Lord Stewart.

Lord Stewart refers to an English decision (*R (Garner) v Elmbridge Borough Council* [2010] EWCA 1006) where the judge asked *Should the question whether the procedure is or is not prohibitively expensive be decided on an ‘objective’ basis by reference to the ability of an ‘ordinary’ member of the public to meet the potential liability for costs, or should it be decided on a ‘subjective’ basis by reference to the means of the particular claimant, or upon some combination of the two bases?*

The judge (Lord Justice Sullivan) in that case decided, with the agreement of other judges, that *‘a purely subjective approach... is not consistent with the objectives underlying the Directive.’*

However, Lord Stewart subsequently concluded:

“It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of an objective approach, but this has yet to be finally determined.

Given the uncertainty the Supreme Court decided that the matter should be referred to the Court of Justice of the European Union for a preliminary ruling under

Article 267 TFEU. In the meantime, of course, the ‘state of uncertainty’ persists with the existing guidance pointing in different directions.”

After reviewing the position, Lord Stewart decided that he found it profoundly counter-intuitive, in a variety of scenarios, including cases covered by legal expenses insurance, to apply the ‘ordinary member of the public’ yardstick. He concluded that a reasonable award against Appellants and in favour of the Respondents would be £40,000 maximum; and he proposed to make a Protective Expenses Order in that amount. He remarked that he had taken account of the fact that the cost estimates did not include an allowance for the present incidental procedure. His assessment was that, with the order in place, the proceedings as a whole would not be prohibitively expensive for the Appellants.

We submit to the Committee that the cost to Road Sense of taking the case to Judicial Review will be excessively expensive. Lord Stewart has taken a decision on a subjective basis, by reference to the means of the claimant. We should point out here that Road Sense does not currently have the full resources in hand to meet the costs if the PEO is to be for £40,000. All we have is a number of pledges from members to pay individually fixed sums towards the costs. These pledges are not binding legal agreements, and those pledging the sums may well default on them. We have to proceed with the Judicial Review with the chilling prospect that the officers of Road Sense may well be faced with crippling bills if the case is lost.

We have considered appealing against this decision with respect to the PEO, but have decided that we cannot – purely on financial grounds. The costs of appeal, in terms of legal support and potential expenses, would be of the order of £30-40,000 with no guarantee that this sum would be recovered. Paying costs of that magnitude for an appeal would preclude us having sufficient money for proceeding with the Judicial Review.

We maintain that the PEO should have been decided on an objective basis – by reference to the ability of an ordinary member of the public to meet the costs. It is our belief that the setting of the PEO for Road Sense at £40,000 is not in accordance with the provisions of the Aarhus Convention.

We have lodged a copy of Lord Stewart's Opinion, to allow the Committee to take a view on whether it is in accordance with the Convention.

We conclude this letter by asking the Committee to reconsider its findings in view of the submissions we have made above. Moreover, we ask formally for further time to consider more fully the draft findings. Road Sense has been fully occupied since January in preparing for Judicial review and in seeking a Protective Expenses Order. We have simply not had time to respond to all the points raised by the Committee. We wish to make further supplementary points after the Judicial Review hearing is concluded and seek the Committees approval to do this.

A handwritten signature in blue ink, appearing to read 'William Walton', with a long horizontal flourish extending to the right.

William Walton, on behalf of Road Sense

20th February 2011