

Justice Committee

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill

Written submission from the National Union of Rail, Maritime and Transport Workers

RMT welcome the Scottish Government's *Fatal Accident Inquiries and Sudden Deaths Etc. (Scotland) Bill* and the opportunity to contribute to the formulation of legislation to improve and modernise the Fatal Accident Inquiry process. We are also particularly grateful for the opportunity to submit evidence to the Justice Committee as part of its essential role in scrutinising Scottish Government legislation.

We note that the Bill's provisions are largely based on the recommendations emanating from Lord Cullen's 2009 Report in to the FAI system and elements of Patricia Ferguson MSP's *Inquiries into Deaths (Scotland) Bill*. As such, the union agrees with the general direction and most of the aims of the Bill, particularly on flexibility over location and accommodation of an FAI, the preliminary inquiry process, FAIs into deaths that occurred abroad and extending the categories of death to which a mandatory FAI will apply.

In the following areas, however, we either disagree with the Government's proposals or seek further clarification of the implications of the Bill's provisions as they stand. Therefore, we would like to bring the following concerns to the attention of Justice Committee members:

- **Requirements to respond to an FAI determination** – We are concerned that the requirement to respond to a determination is not sufficiently compelling. RMT accept the arguments made by the Scottish Government against making determinations legally binding but still regard the current proposals as lacking regulatory teeth. In our view, one of the major shortcomings of the FAI process under the 1976 legislation (as amended) is this lack of statutory compulsion and sanction around the sheriff's determinations. We do not see any significant changes in the Bill which would give determinations greater force, in terms of compliance.

Under the future FAI process envisaged by the Bill, witnesses are compelled to appear at an FAI under threat of criminal sanction. Yet those persons to whom a sheriff's determination or determinations are directed at the end of an FAI merely have to respond, explaining why they have or have not complied with the determination(s). We see no sanction on those who do not even respond and this must be addressed if FAIs are to become more relevant to the families of victims of fatal incidents at work and for the industries in question to learn any available lessons.

- **Start of an FAI** – as RMT stated in response to the Scottish Government's consultation last year on its draft proposals for FAI reform, we support statutory timeframes between the death of a worker and the start of an FAI. We note the arguments made against timeframes in the Policy Memorandum issued by the Scottish Government but continue to believe that the most effective way of reducing the time lag in the overall FAI process would be to

impose a statutory timeframe for the start of an FAI. We also contend that the fact that an FAI is usually mandatory is undermined by the lack of statutory certainty over the timeframe within which the FAI must start.

In RMT's experience, criminal proceedings into the circumstances of deaths at work do not necessarily guarantee justice for the families of victims or meaningful lessons for the industry over the safety of its future operations. For example, the FAI into the deaths of two offshore workers, Keith Moncrieff and Sean McCue on the Brent Bravo platform on 11 September 2003 only took place after concerted trade union pressure. This campaign was necessary because the employer, Shell pleaded guilty to all charges at the criminal trial. Although Shell was fined (£900,000, reduced because of an early guilty plea) and corporate culpability for the deaths of the two workers was established, the trial itself did not provide meaningful justice for the families, so an FAI was the only alternative.

However, Sheriff Harris's determinations, issued July 2006 were necessarily limited to the circumstances that led to the deaths of the two workers in question but provided clear grounds for action to improve the safety of repair operations on aging offshore hydrocarbon extracting platforms. Yet the lack of compulsion on Shell to respond makes it difficult to see how effective these determinations were in making the necessary operational and safety improvements, at that company and across the industry. We do not see the Bill as a means of substantially reducing delays in the FAI process or improving the overall effectiveness of determinations issued by the sheriff.

We acknowledge that this is a difficult area and we withdraw our previous proposal for a three month timeframe. FAIs should not, of course impede the full and detailed investigation of workers' deaths, particularly in complex circumstances like offshore helicopter incidents. However, we believe that the Bill as framed does not strike an effective balance between investigatory processes, the needs of victims' families and the adoption of new working practices or other changes to avoid potentially fatal industrial circumstances being repeated in the future. In our view, addressing the time lag between the death of a worker and the start of an FAI must be the focus of any legislation that seeks to make the FAI process more effective and efficient.

- **Clarity on the input of trade unions into the FAI process** – RMT continue to seek clarity on the role trade unions can play in the reformed FAI process envisaged by the Bill. Trade unions play a vital role in supporting and advising the families of victims of workplace deaths and in assessing workplace safety standards, both existing ones and those that may be introduced in response to a sheriff's FAI determination. As such, we believe that trade unions need to be named in the Bill as organisations that are entitled or likely to be entitled to submit evidence as part of an FAI.
- **Extension of the Bill to cover deaths caused by industrial illnesses** – We believe that this would be an effective means of requiring companies to maintain employer liability insurance records, in order to avoid any repeat of the tragic and unjust situation faced by mesothelioma sufferers who cannot

trace liable parties, having been diagnosed with an aggressive, terminal illness caused by the industry the worker was employed in.

- **Status of determinations in re-opened FAIs** – We support the proposal to permit re-opening of an FAI in light of new evidence and would simply compare this provision with the UK Government's recent and dangerous decision to abolish the duty on the Secretary of State for Transport to re-open a maritime accident investigation in light of new evidence. However, it is unclear whether or not existing determinations will be completely wiped from the record in the event of an FAI being re-opened in light of new evidence and we are concerned that a re-opened FAI can only issue one determination.

In our view, the existing determinations and any responses to them should remain valid, with no limit on the number of determinations that a sheriff can make following the re-opened FAI.

- **Jurisdictional issues** – RMT support the proposals on extending the FAI process to cover deaths abroad but we remain unclear over the status of the FAI process in the context of seafarer deaths in Scottish waters or in international waters off the Scottish coast. The union is especially concerned by the specific example of the tragic sinking of the *Cemfjord* in the Pentland Firth on 2nd January 2015 with the loss of all eight crew. The Maritime Accident Investigation Branch report is not expected until the end of this year, at the earliest and the flag state, Cyprus where the *Cemfjord* was registered will be responsible for conducting any subsequent safety investigation into the incident. The Cypriot register is an 'open' register, or Flag of Convenience (FoC) which attracts vessels by applying minimum international standards of safety and crewing levels. RMT believe that there is a moral duty on the Scottish and UK Governments to ensure that lessons are learnt from the sinking of the *Cemfjord*, as FoC registers are no guarantee that this will happen.

The *Cemfjord* tragedy also bears disturbing similarities to the sinking of another bulk carrier off the UK coast, the Cook Island registered *MV Swanland* in the Irish Sea on 27th November 2011 which resulted in the deaths of six Russian seafarer ratings. The MAIB investigation found a catalogue of structural problems going back over a decade and a failure of the Cook Islands register to conduct a structural survey since the vessel was registered with them in 2009 up until the vessel's loss. However, the legal limitations on MAIB investigations and subsequent reports prevented any compelling recommendations, despite the considerable evidence supporting the view that the *Swanland* was not seaworthy and should never have been in service. The Cook Island Register (which, bizarrely, is not classified as a FoC) has only provided general reassurances in response to the MAIB's Report into the *Swanland* in June 2013 which highlighted serious problems with the condition of the vessel. We do not wish to see a repeat of this disgraceful and immoral dereliction of duty in the case of the *Cemfjord*.

RMT
29 April 2015