



**Unite – the Union Scottish Region
Review of Fatal Accident Inquiry Legislation
Consultation Response**

Introduction

Unite – the Union represents around 200,000 working people and their families throughout Scotland. We are the UK's largest trade union with 2 million members in a range of industries including transport, energy, construction, financial services, manufacturing, print and media, the voluntary and not-for-profit sectors, local government and the NHS.

Unite's representation services cover a range of issues, both inside and outside the workplace. We help with personal injury claims, employment matters, wills, conveyancing and many other legal issues. Specific to this consultation, in conjunction with our legal partners, Unite represents our members and the interests of their families in matters of workplace fatality.

Overview

Access to justice is crucial to trade unions and their members not only from an employment perspective but also from the personal and social perspective too. Strong yet effective legislation is a necessity for working people and their families in Scotland today. In 2007/08, 32 employees were killed at work and approximately 12,000 other employees were injured at work. Among the dead were five Unite members – three who perished in the *Flying Phantom* tug tragedy on the Clyde and two more who were crushed to death at the Pennyvenie open cast mine in Dalmellington, Ayrshire.

Therefore, it is vital that not only do we have access to justice but also a justice system that is efficient, practical and transparent - fit for the 21st century, placing people before profit. If this consultation process brings about the necessary changes, the review of the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 will be a vital legal component to facilitating this objective.

Weakness of the Existing Legislation

Unite believes that working people and their families require more protection and access to the FAI process, specifically in ensuring that employers incorporate the determination of the Sheriff where appropriate.

Currently, the Act provides, 'that the Sheriff is to make a determination setting the circumstances of the death...including 'reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided', and 'the defects, if any, in any system of working which contributed to the death or any accident resulting in the death.'

However, the Sheriff has no power to make any finding as to fault or to attribute or apportion blame. Without additional powers to legally enforce recommendations pertaining from the Sheriff's determination the FAI is a constrained instrument. It can diagnose the problems which contributed to the fatality but cannot treat them to prevent reoccurrence.

The shortcomings of the law in its existing format are evident in two historical fatal rail accidents in Scotland with common denominators contributing to the loss of lives – Bellgrove (1989) and Newton (1991).

Bellgrove Rail Accident

On 6 March 1989 two commuter trains crashed near Bellgrove station in the East End of Glasgow. One passenger and the driver of one of the trains were killed. The accident was attributed to a Signal Passed at Danger (SPAD) in conjunction with the single-lead junction track layout, where two lines converged into one just beyond the platform end and then diverged again - a layout which is simpler to maintain but is vulnerable in the event of a SPAD.

Newton Rail Accident

On July 21 1991 two local commuter trains crashed just outside Newton station to the south eastern outskirts of Glasgow. The two trains collided head on at a single lead junction, killing both drivers and two passengers, while 22 others were injured. The accident was attributed again to SPAD in conjunction with a single lead junction.

The track arrangement was designed to be simpler than the double lead junction that it replaced. It also allowed faster running of services on this line, but was inherently less safe. The configuration adopted for this particular junction was unnecessarily constrained and was strongly criticised by experts at the time. It was replaced immediately afterwards.

The FAI held by Sheriff Mackay in Glasgow 1989 determined that the Bellgrove accident might have been avoidable stating that the configuration of the single-lead junction in its position near the platform was a contributor to a 'defect in the system of working'. British Rail contended that single-lead junctions were widely used, easier and cheaper to maintain, allow for higher-speed services and the root cause of the accident was human error in the failure of the driver to stop at a danger signal.

It is evident that human error was a key factor in both accidents but it is also evident that the single-lead junction system and British Rail's system of working also contributed greatly towards these fatalities. The contrasting positions of the Sheriff and British Rail resulted in no change in the system of working following Bellgrove and the use of single-lead junctions remained.

Subsequently, further lives were lost through this defect in the system of working less than two years later at Newton. However, it stands to reason that had British Rail implemented the Sheriff's determination to amend what was judged as a defect in the system of working at Bellgrove then lives may have been saved in Newton.

Unite believes the law should function to protect society. In the case of a FAI, its provisions need strengthened to ensure the Sheriff can legally enforce his determination(s) to minimise recurrence of failures in working practices which lead to fatalities of people at work. This should include the Sheriff being able to impose specific time-scales upon employers to comply with his/her recommendations and also having the power to liaise more effectively with bodies such as the Health & Safety Executive (HSE) to audit the compliance process and ensure time-bound delivery of these recommendations.

Improving FAI Process & Protecting Families Interests

The review of the FAI legislation reflects the obvious need for change in the system. The process which involves instigation by the Procurator Fiscal (PF) to the Police Force into the investigation of a death and back, incorporating views of the Crown Counsel and ultimately leading to a decision by the Lord Advocate about what is in the public interest - with little degree of transparency - is an invariably drawn out and bureaucratic affair. Greater transparency is unquestionably required in the rationale of Lord Advocate to either grant or deny an FAI, with particular sensitivity to the interests of families affected by fatalities.

This is particularly concerning with consideration to the decline in FAIs against a backdrop of consistently high workplace fatalities. Between the period 2005/06 (71 FAIs carried out) and 2006/07 (35 FAIs carried out) despite there being only a reduction of one workplace fatality in the same time period. In 2007/08 32 employees were killed at work; and approximately 12,000 other employees were injured at work. It is unacceptable that a comprehensive statistics package is not collated on FAIs in Scotland. For example, we do not know: how many FAI requests are made; how many of these requests are rejected; or the length of time it takes for an FAI to reach its first court hearing.

We also concur with the view that FAI should be taken out of the Sheriff Court with the Court of Session, the supreme court in Scotland, taking over the mantle. Irrespective of popular arguments that this is required for compliance purposes with Article 2 of the European Convention of Human Rights (ECHR), it stands to reason that the Court of Session will provide stronger precedence and - ultimately - significantly more influence over its recommendations. This could be achieved with the FAI taking place at the Court of Session itself or, alternatively, the Court of Session Judges being dispatched to the local Sheriff Courts.

Crucially, we believe that greater consideration must be given to the private interest (ie. the interests of the families of victims) where the Lord Advocate determines whether an FAI should take place in the public interest. Unite argues that where a fatal accident occurs in the workplace an FAI should be mandatory. It is in the interest of the victim's relatives that the justice system establishes: what happened; why it happened; and reaches a determination that recommends how the defects in the system of working can be addressed and prevented from reoccurring.

Furthermore, the determinations that can be set by the Sheriff that would deliver an outcome for the private interest can also set precedence that is very much in the public interest (such as the determination delivered by the Sheriff in the Bellgrove accident on the safety of aspects of public transportation).

Relatives of the deceased person(s) need the opportunity to reach closure on the cause of the loved one's death. An FAI can provide transparency and clarity on the events which led to a fatal accident. It can establish whether the death was preventable.

Conclusions

Unite believes that this is a crossroads moment for the Scottish justice system. The Scottish Government's justice proposals aim to effectively privatise our civil courts with the declared intention of making Scottish Citizens ultimately pay 100% of court fees prior to accessing justice. As a trade union, these proposals would restrict our ability to deliver for our members while disenfranchising hundreds of thousands of people on low incomes from accessing justice on issues from personal injury to asylum. *The justice agenda is shifting firmly from people to profit.*

The review of the Fatal Accident Inquiry legislation presents an opportunity to help redress the balance. As it stands the Sheriff can only make recommendations but cannot enforce these determinations. In the instance of workplace fatalities the employer is not compelled to make the necessary changes, it is a voluntary process. The Bellgrove – Newton examples highlight the failure of the law and nearly twenty years later change is long overdue. The FAI must be handed additional powers of enforcement on employers to remedy defects in the system of working which have contributed to fatalities. This is in the interests of both the public and private parties.

These additional powers must also be complemented by a more transparent and accessible FAI system that gives parity to both the public and private interest. With little information available to the public or our political representatives on key factors of the FAI process, such as the number of FAI requests turned down by the Lord Advocate, it is difficult to see how the Scottish public can have faith in its ability to provide justice.

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