Justice Committee

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

Written submission from Flt Lt James Jones, RAF (Rtd)

Preamble

1. On 3rd July 2012 two Tornado GR4 aircraft collided over the Moray Firth, killing three crew members. The aircraft were operating in what is known as class G airspace (uncontrolled, “see and avoid”) and in poor weather conditions (fog/mist). Following the accident a Service Inquiry (once know as a Board of Inquiry) was carried out by the Military Aviation Authority (MAA), which is part of the Ministry of Defence (MoD). The inquiry was governed by strict terms of reference set out by the MAA.

2. Since the completion of the Service Inquiry (SI) in November 2013, and the report’s release to the general public in June 2014, the President of the Inquiry Panel has made it known through a series of emails that (a) he felt bound by the terms of reference, (b) that he was prevented from pursuing certain issues for fear of drawing the Duty Holder (a senior RAF officer into court, and (c) that he did not feel that the Panel had the expertise to explore all aspects of the accident.

3. The President is of the belief that his report should not prejudice an Fatal Accident Inquiry, as this would be the only forum were the accident could be examined by more qualified people (as per his recommendation) and the legal aspect of the Duty Holder’s safety statement could be examined. All of the above facts have been made known to the Crown Office.

Call for a Fatal Accident Inquiry

Aim of a Fatal Accident Inquiry

4. According to recent statements from the Crown Office the purpose of a FAI is simply to establish the cause of death and any lessons which are to be learned are learned for the future. For me this is where the Crown Office’s case not to hold an FAI falls down, as they are only prepared to consider issues brought out by the Service Inquiry. The President of the SI Panel has made it clear that he was prevented from exploring other areas, and that his Panel did not have the necessary expertise to analyse the issue fully.

5. From the Determination set out by Sheriff Principal Derek Pyle in the Super Puma case, he sees one of the main purposes of an FAI as being “an opportunity for the whole circumstances of an accident to be aired in public. [Where] witnesses are examined and cross-examined under oath and documents are considered and scrutinised” The Tornado investigation falls well short of that, and in doing so fails to learn lessons for the future.
6. The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 makes provision for what can be regarded as the mandated route, and the discretionary route.

**Mandated route**

7. Since the release of the Service Inquiry report into the public domain there have been numerous calls for a Fatal Accident Inquiry, from the families, the media, and local politicians. To this end the Crown Office’s attention was drawn to the fact that the 1976 FAI Act mandates a FAI for an employee who dies whilst engaged in the course of his/her employment. The reply from the Crown Office was a little surprising:

   *The current legal position in Scotland is described in The Stair Memorial Encyclopaedia on Armed Forces Chapter 6 which notes “the terms of engagement of members of the Armed Forces are not contractual. All such members are appointed by the Crown under the Royal Prerogative and hold their appointments whatever their rank at the Crown’s pleasure. They may be dismissed at any time without notice and without any cause being assigned.” Consequently members of the armed forces on duty are not considered to be within the course of “employment” and therefore not within the scope of s. 1(1) (a) (i) of the 1976 Act. N.B. See email attachment.*

8. This interpretation of the employment status for members of the Armed Service seems to be at variance with that presented by Lord Neuberger in the Smith v MoD (Snatch Land Rover) case. At the 2012 appeal regarding loss of life due to inadequate equipment Lord Neuberger said: "The duty of care owed by the Ministry of Defence, as employer, to the members of the armed forces, as employees, does exist and has been recognised, without demur, by the courts. It includes a duty to provide safe systems of work and safe equipment.” In the case of the Tornado accident MoD (the employer) failed to provide a safe system of risk assessment and safe equipment for the three crew members (employees) who lost their lives.

9. Whilst the Smith v MoD case focussed on “duty of care”, Lord Neuberger clearly identifies members of the Armed Forces as “employees” and the MoD as their “employer”.

**Discretionary route**

10. The basis of the discretionary route rest on public interest, however this has been rejected by the Crown Office on the grounds that the Service Inquiry was very detailed, considered all relevant factors relating to the accident, and any FAI would simply duplicate the months of thorough work undertaken by the MAA. Clearly, the post inquiry statements made by the President have been ignored.

11. In rejecting this route the Crown Office seems to overlook an important aim of an FAI/Inquest, namely providing public reassurance. There has been no independence (MoD is allowed to judge their own case), so almost by definition there can be no public reassurance. One has tried to demonstrate to the Crown Office in Scotland that public reassurance has NOT been provided because MoD omitted key
facts from the SI report - e.g. the ejection seat safety case, CWS history, validity of risk assessment Tornado Airworthiness Review Team Report etc.

12. Furthermore, it should be borne in mind that "public reassurance" and "airworthiness" are inextricably linked, something the Crown Office may not appreciate. That is because airworthiness is defined as "the ability of an aircraft or other airborne equipment or system to operate without significant hazard to aircrew, ground crew, passengers (where relevant) or to the general public over which such airborne systems are flown". It follows that, by MoD's own definition, the airworthiness of military aircraft is in the "public interest". The MoD regard the risk of collision as a “Societal Risk”.

13. Returning to the Super Puma case Sheriff Principal Pyle makes it clear that the detailed investigation by the AAIB took 30 months, twice as long as the Tornado SI, and whilst no party questioned the technical data an FAI was established in the public interest. This alone should set a precedent for the Tornado case.

Preventing re-occurrence

14. An important goal of any FAI/inquest is preventing reoccurrence. Whilst most of the discussions to date have focussed on the lack of a Collision Warning System in Tornado aircraft, the accident could have been prevented if the risk of collision had been correctly identified, assessed and managed. As things stood at the time of the Moray Firth collision the safety standard (Tolerable and ALARP) set by the MAA was so subjective that Duty Holders choose to state whether it is or is not safe depending on how they feel the risk is mitigated. (SI Presidents opinion, but not reflected in report). In 2012 the Duty Holder signed off to say that the risk was Tolerable and ALARP, and three people lost their lives. THAT SAFETY STANDARD IS STILL IN PLACE TODAY.

15. In accordance with MAA regulations, set up post Haddon-Cave, MAA RA 1210 makes it clear that Duty Holders are legally accountable for safe operation of systems in their area of responsibility and for ensuring that Risk to Life are at least Tolerable and ALARP. The same regulation goes on to say "the ODH [Operational Duty Holder] is required to make an argument that the risk is ALARP ..................The validity of this argument can only be decided definitively by the courts, if an accident occurs." As things stand at the moment, the Duty Holder’s safety statement will never be tested in a court, and if flawed will remain in effect.

16. It is worth noting that the previous DG MAA, in a letter to the 2nd PUS dated 8th Feb 2011, stated that the ALARP argument was flawed. Both he and the President of the SI Panel do not believe that the risk was/is Tolerable and ALARP (Safe).

Common application of law

17. In September 2012 a change in English and Welsh law meant that investigations into the death of Scottish service people killed abroad (away from home) could take place in Scotland in the form of a Fatal Accident Inquiry, rather than at an inquest in England. The first Chief Coroner of England and Wales was
granted the power to recommend to the Lord Advocate, Scotland's top law officer, that an investigation be transferred to Scotland. It came after changes were made to the Coroners and Justice Act 2009 and it is hoped the new provisions will reduce the ordeal families who have lost a loved one face.

18. In addition, on 20\textsuperscript{th} March 2015, just one week after the Crown Office decided not to hold an FAI into the Tornado collision, a bill was presented in the Scottish Parliament with the aims to enact new provisions to modernise the system of FAIs in Scotland, to extend the categories of death in which it is mandatory to hold an FAI, and permit discretionary FAIs into deaths of Scots abroad where the body is repatriated to Scotland. Minister for Community Safety Paul Wheelhouse stated:

"Fatal Accident Inquiry legislation needs to be brought into the 21\textsuperscript{st} century and this Bill will undoubtedly improve the FAI process in this country. In particular, the introduction of the possibility of a Fatal Accident Inquiry for deaths abroad is a hugely important step in providing answers for families."

19. In view of all the changes to the laws affecting Scottish personnel, it only seems fitting that the families of English personnel, killed outside England, should have the right to seek a public inquiry in the form of an Inquest in England rather than an FAI in Scotland.

20. Furthermore, it also makes sense that there is commonality in the way that air accidents are dealt with in England, Wales and Scotland. It seems totally unacceptable that had the accident occurred over the Lake District, for example, there would have been a Service Inquiry followed by a Coroner's Inquest. However, because it happened over Scottish territorial waters an FAI is denied because the Tornado crews were not employees, and the Crown Office does not consider the event to be in the public interest.

21. It is ironic to think that had the crew of Nimrod XV230 been repatriated to Scotland for an FAI, rather than an inquest, then applying the same logic as that applied to the Tornado case, no further examination of the facts would have taken place. No Coroner's Inquest and no Haddon-Cave.

The way forward

22. The interpretation of the current Act, by the Crown Office, discriminates against members of the Armed Forces in that (a) They are not regarded as "employees" (b) Written evidence from MoD in the form of Service Inquiries reports is regarded as being sufficient to satisfy the requirements of a Fatal Accident Inquiry, (c) Public interest is not given the same importance as in civil accidents, and (d) Fails to consider the wider implications of accidents in Scotland, which have safety implication throughout the United Kingdom.

23. It is therefore recommended that the new bill should;

- Make it clear that members of the Armed Forces are “employees” when carrying out their duties.
Ensure that written evidence from MoD should be seen as just one source and "an opportunity for the whole circumstances of an accident to be aired in public. [Where] witnesses are examined and cross-examined under oath and documents are considered and scrutinised"

Ensure that the criteria for public interest should be common to both civil and military accidents.

Provide non-Scottish families, whose deceased were killed in Scotland, an opportunity to select a coroner's inquest.

Ensure that when a military accident occurs, as a result of factors that affect the whole fleet, the most stringent inquiry route is adopted (FAI or Inquest)

In the event of fresh evidence coming to light, subsequent to an FAI being rejected, the need for an FAI should be reviewed.

James Jones
10 April 2015

Emails regarding employment status of armed services personnel

Dear Mr Jones,
The current legal position in Scotland is described in The Stair Memorial Encyclopaedia on Armed Forces Chapter 6 which notes "the terms of engagement of members of the Armed Forces are not contractual. All such members are appointed by the Crown under the Royal Prerogative and hold their appointments whatever their rank at the Crown's pleasure. They may be dismissed at any time without notice and without any cause being assigned."

Consequently members of the armed forces on duty are not considered to be within the course of "employment" and therefore not within the scope of s. 1(1) (a) (i) of the 1976 Act.

I hope this explanation is helpful.

A MacDonald
SFIU North Principal Investigator

Dear Mr MacDonald,
Please can you advise me on a matter relating to FAIs? I read on the COPS website that:
"Fatal Accident Inquiries in Scotland are held in terms of the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976. There are two classes of inquiry in terms of the Act, mandatory inquiries in terms of Section 1 (1) (a) of the Act which apply to deaths which have either resulted from an accident occurring while the person was in the course of his or her employment or where a person was at the time of their death in legal custody."

In view of the fact that the three Tornado crew members died in an accident whilst employed by the MOD place the event in the mandatory category?

James Jones