

## **Opening Statement of Michael Kingston**

**1300 29 January 2021 Committee Room 4, LH2000, Leinster House**

### **The Joint Committee on Transport and Communications Networks meeting regarding Pre-legislative scrutiny of the General Scheme of the Merchant Shipping (Investigation of Marine Casualties) (Amendment) Bill 2020.**

I would like to thank the Chair and all members of the Committee for the opportunity to appear today, and the Committee Secretariat for their enormously hard organizational work and for affording me such courtesy and assistance in amongst the difficulties of this COVID 19 pandemic. I deeply commend the Committee members for the earnest manner in which you are continuing the business of Ireland on behalf of Irish society.

The fact that we are here today is symptomatic of that work, that desire to ensure our citizens are afforded the opportunity to be heard in the development of important legislation. The Committee has of course read my correspondence dated 4<sup>th</sup> January 2021 and my briefing Note. I am accompanied today by barrister, Ciaran McCarthy.

We come here with solutions in order to help the Committee and indeed the Government, through the Transport Department, to get this legislation right. I say that the Department of Transport must take a step back, and listen, so that collaboratively we learn from the mistakes of the past, and work together for a better future, one that will save lives in the maritime community: our merchant seafarers, pleasure craft users, fishers, and emergency services; one that will protect the environment, and will save millions in wasted resources surrounding unnecessary tragedies.

I make it clear that, although at this stage I have quite a lot of experience working with multiple world Governments, International Organizations, and the United Nation's International Maritime Organization, as set out in my letter, I appear here today in my personal capacity.

But I also come here with a very heavy burden on my shoulders, one that I did not ask to carry, but that my life's work, given the circumstances I evolved into, in my own father's tragic death in the Whiddy Island Disaster in 1979, lent to many people contacting me to help them, people from all over Ireland, from all your constituencies, who have lost beloved relatives or been involved in accidents, where they have not got to the bottom of what happened or are confused by the investigative process. They have heard me explaining continuously the importance of implementing maritime safety regulation correctly in Ireland, including the issue that is before us today. Ciaran McCarthy has echoed those sentiments. I have also been contacted by a multitude



of Department officials, MCIB investigators, former MCIB investigators, and former Department surveyors, with deep reservations about the current system, and its short comings. The CJEU Judgment of 09 May 2020 has affirmed what was being said. I would like to pay tribute to their bravery in putting their trust in me, and I would like the Committee to know that they, like me, appreciate your engagement and vest their faith in you, in our democracy. Because, until you acted, there has been a very serious democratic deficit in the manner in which the Department of Transport have pursued maritime casualty investigations. That includes the misleading, unwittingly, of this very Committee and the Oireachtas by successive well intentioned Ministers and MCIB chairpersons, regarding the independence of the MCIB, and more recently the findings of the CJEU in respect of impartiality.

This legislation has to be fit for purpose, given the very serious consequences of the past, of the Departments determination to ignore international best practice and, as we know, ultimately, ignore international mandatory law, first the United Nation's 2008 Casualty Investigation Code, and then the 2009 EU Directive, resulting in the CJEU Judgment, knowing this to be wrong, and despite clear direction to rectify it by Minister Noel Dempsey in 2009, and it is clear that it was not brought to the attention of the incoming Minister in 2011, who unwittingly signed off on the incorrect transposition into Irish law of the EU Directive in July 2011. How this happened is a very serious matter for the Oireachtas, given the consequences for Irish citizens, and not least the issue of faith we as a society place in public officials and the standard of ethics expected of them.

The simple fact is that the MCIB was doomed from the start, because, despite the 1998 Report of the Investigation of Marine Casualties Policy Review Group initiated by Sean Barrett T.D in 1996, analyzing International best practice and recommending that it was imperative that the MICB be independent, it then went against its own findings in its conclusions to say that, *'because we are a small country'* we can ignore international best practice, and it accordingly advised that the Chief Surveyor and the Secretary General or/ her his nominee should be on the Board. We now know that International best practice has finally caught up with the Department through our membership of the European Union. The 1998 report also set out the required competence investigators should have in seafaring, engineering and naval architecture, and that of the MCIB Chairperson in maritime experience, and it set out that investigators must have adequate resources, including technical and financial. That has not happened. There are too, so many other findings of the 1998 Report that have not been implemented and now is our chance to rectify this.

For reasons that I have explained in my Briefing Note to the Committee the Proposed Act does not address these issues sufficiently. And in particular, amongst several other issues set out, we need



an independent investigative unit headed by a full-time principal investigator, with full time assistance from qualified maritime professionals, in line with Aviation and Rail, in an independent office from the Transport Department, finally bringing us in line with International best practice-

I, with the advice of Ciaran McCarthy, am here to discuss all these issues and elaborate on further detail as per my briefing note, and any other issues the Committee wish to raise, to the best of my ability.

We are all proud of Ireland and want to help our nation to get things right. Now is our chance, with Minister Ryan's leadership for the maritime community, and for that we are indebted to your Committee.

Thank you Chair

Michael Kingston

Committee Room 4

LH2000

Leinster House



Head 1 Definition	Provide that  In this Bill, “Act of 2000” means the Merchant Shipping (Investigation of Marine Casualties) Act 2000.	
Head 2 Amendment of section 2 of Act of 2000	Provide that  Section 2 of the Act of 2000 is amended by the deletion of the definition of “Chief Surveyor”.	
Head 3 Amendment of section 9 of Act of 2000	Provide that  The following section is substituted for section 9 of the Act of 2000:  “9.—  (1) The Board shall consist of a minimum of 5 members and a maximum of 7 members appointed by the Minister.  (2) The members of the Board appointed under subsection (1) shall be persons who, in the opinion of the Minister, have particular knowledge, experience and expertise, including, but not limited to, one or more of the following:  (a) corporate governance and management;  (b) accident investigation;  (c) marine engineering, nautical science or navigation, naval architecture;  (d) health and safety management;  (e) maritime law and regulation;  (f) legal and legislative matters;  (g) risk management, finance, business or administration;  (h) a special interest or expertise in matters relevant to the functions of the Board.  (3) A serving officer or a former officer of the Department of Transport shall not be appointed as a member of the Board.  (4) The Minister shall appoint one of the members appointed under subsection (1) to be the Chairperson of the Board and another to be its Deputy Chairperson to perform the duties of the Chairperson during any vacancy in the office of the Chairperson or where the Chairperson is absent from, or for any reason is unable to perform the duties of, his or her office.  (5) When appointing the members of the Board under subsection (1), the Minister shall have regard to the objective that at least 40 per cent of the members of the Board shall be women and at least 40 per cent shall be men.”.	For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded and an independent full time, permanent Investigation Unit established with a Principal Investigator and team of investigators, all of whom should be drawn from, and collectively include long -term experience in:  (a) Merchant Seafaring as a Master;  (b) Chief Engineer;  (c) Naval Architecture.  There should also be requisite experience in the fishing industry and leisure craft sector, and where not, in incidents involving particular disciplines an expert must be engaged. I.e., canoeing Kayaking/ small fishing vessels etc.  <b>9(3)</b> Former Dept of Transport staff should not be precluded. Not only is this foolhardy given the breath of maritime experience that some hold, it is unconstitutional in that it denies a whole swath of individuals a right to earn a living. Irish Constitution Article 45.  <b>9 (5)_</b> The Act should remain silent on this due to unintended consequences. It does not reflect the current reality of the maritime Sector. Most of the country’s sea-farers and presumably, the future holders of such offices are educated in the National Maritime College of Ireland, where the overwhelming majority of students are male. While it is necessary to push for inclusion into all sectors, including the maritime sector, this is the wrong way to do it. The push for the inclusion of women must come from the college and from industry, not from an Act of the Oireachtas which will have the unintended consequence of excluding qualified candidates because of their gender.



Head 4 Amendment of section 10 of Act of 2000	<p>Provide that</p> <p>Section 10 of the Act of 2000 is amended –</p> <p>(a) by substituting for subsection (1), the following:</p> <p>“(1) Subject to this section –</p> <p>(a) the Chairperson shall hold office as Chairperson and member of the Board for a period not exceeding 5 years as shall be specified by the Minister when the person is being appointed, and may be reappointed for a second term of office in either or both capacities,</p> <p>(b) the other members of the Board appointed under section 9(1) shall hold office for such period, not exceeding 5 years, as shall be specified by the Minister when appointing them, and may be reappointed for a second term of office not exceeding 5 years.”,</p> <p>(b) in subsection (2), by substituting “section 9(1)” for “section 9(1)(a), and</p> <p>(c) by the deletion of subsection (3).</p>	
Head 5 Amendment of section 11 of Act of 2000	<p>Provide that</p> <p>Section 11 of the Act of 2000 is amended by substituting “section 9(1)” for “section 9(1)(a)”.</p>	
Head 6 Amendment of section 14 of Act of 2000	<p>Provide that</p> <p>Section 14 of the Act of 2000 is amended –</p> <p>(a) by substituting for subsection (1) the following:</p> <p>“(1) (a) Subject to paragraph (b), the quorum for a meeting of the Board shall be 3 members of the Board.</p> <p>(b) For the purposes of paragraph (a), the 3 members may consist of:</p> <p>(i) the Chairperson and 2 other members;</p> <p>(ii) the Deputy Chairperson and 2 other members;</p> <p>(iii) the Chairperson and Deputy Chairperson and one other member;</p> <p>(iv) where the Chairperson and Deputy Chairperson are not in attendance or are both required to withdraw from a meeting of the Board at the same time in accordance with section 17(1)(c), 3 other members of the Board who are present, who shall choose one of their number to chair the meeting.”,</p> <p>(b) in subsection (3), by substituting “section 9(1)” for “section 9(1)(a)”, and</p> <p>(c) by the deletion of subsection (4).</p>	<p>For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded</p>



<p>Head 7 Amendment of section 16 of Act of 2000</p>	<p>Provide that</p> <p>Section 16 of the Act of 2000 is amended –</p> <p>(a) by substituting for subsection (1), the following:</p> <p>“(1) The Board may, from time to time, engage such consultants, advisers, investigators and other expertise as it considers necessary for the performance of its functions and any fees due to a consultant or adviser or investigator or other person so engaged shall be paid by the Board out of moneys made available by the Oireachtas.”,</p> <p>(b) in subsection (2), by substituting “, investigator or provider of other expertise” for “or investigator”, and</p> <p>(c) in subsection (3), by the insertion of “or provider of other expertise” after “investigator”, each time it occurs in the subsection.</p>	<p>For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded</p> <p>Provision for adequate additional expertise is referenced above in the commentary to section 9 of the Act.</p>
<p>Head 8 Amendment of section 17 of Act of 2000</p>	<p>Provide that</p> <p>Section 17 of the Act of 2000 is amended –</p> <p>(a) in subsection (1), by substituting “, investigator or other person engaged by the Board under section 16” for “or investigator engaged by the Board” and by inserting “or had” before “a pecuniary”,</p> <p>(b) in subsection (2)(a), (b) and (c), by substituting “is or was” for “is”, each time it occurs, and</p> <p>(c) in subsection (2)(d), by substituting “has or had” for “has”.</p>	



Head 9 Amendment of section 18 of Act of 2000	<p>Provide that</p> <p>The following section is substituted for section 18 of the Act of 2000:</p> <p>“18.– (1) A person who discloses confidential information obtained by the person in his or her capacity as Chairperson or other member of the Board, secretary of the Board or consultant, adviser, investigator or other person engaged by the Board under section 16, unless the person is authorised by the Board to do so or as otherwise authorised by law, commits an offence.</p> <p>(2) Without prejudice to the Data Protection Acts 1988 to 2018, in subsection (1) “confidential information” includes the following:</p> <p>(a) all witness evidence and other statements, accounts and notes taken or received by the Board in the course of an investigation;</p> <p>(b) records revealing the identity of persons who have given evidence in the context of an investigation;</p> <p>(c) information relating to persons involved in a marine casualty that is of a particularly sensitive and private nature, including information concerning the health of such persons;</p> <p>(d) information, or information of a particular class or description of information, expressed by the Board to be confidential.</p> <p>(3) The High Court, on application to it by an interested party, may disclose matters referred to in subsection (2) where there is an overriding public interest to do so.”.</p>	<p>For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded and this section re worked accordingly for the Maritime Investigation Unit.</p> <p>Additionally, very careful consideration needs to be given in relation to <b>18 (3)</b> The principle of not making an MCIB investigation available for criminal or civil proceedings is emphasised in the IMO Code for Marine Incident Investigations, and in international legal precedent in other Common law jurisdictions. This needs careful consideration, but it is probable that the “overriding public interest” qualification is appropriate.</p>
Head 10 Amendment of section 23 of Act of 2000	<p>Provide that</p> <p>Section 23(1) of the Act of 2000 is amended by substituting “the Board” for “the Chief Surveyor or any other marine surveyor in the Marine Survey Office of the Department of the Marine and Natural Resources”.</p>	<p>For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded. Needs to be replaced with appropriate name for new Investigation Unit</p>
Head 11 Amendment of section 26 of Act of 2020	<p>Provide that</p> <p>Section 26(1)(b) of the Act of 2000 is amended by the deletion of “after consultation with the Minister,”</p>	<p>For the reasons set out in M. Kingston Briefing Note the Board needs to be disbanded and this section re worked accordingly for the Maritime Investigation Unit.</p> <p>Minister should have minimal input if any</p>



<p>Head 12 Amendment of section 34 of Act of 2000</p>	<p>Provide that</p> <p>Section 34 of the Act of 2000 is amended –</p> <p>(a) by substituting for subsection (2), the following:</p> <p>“(2) The Board shall endeavour to publish the report within 12 months of the date of the occurrence of the marine casualty notified to the Board under section 23.”</p> <p>(b) in subsection (3), by substituting “12 month” for “9 month”, and</p> <p>(c) by substituting for subsection (4), the following:</p> <p>“(4) (a) Subject to subparagraph (b), the Board may, at any time during an estimated period indicated by it under subsection (3), publish one or more interim reports of the investigation.</p> <p>(b) Where the Board is unable to publish a final report of an investigation within 12 months of the date of the occurrence of a marine casualty notified to the Board under section 23, it shall publish at least one interim report of the investigation within 12 months of the occurrence of the marine casualty.”.</p>	<p>The purpose of the MCIB investigation is to identify safety learnings / recommendations and issue to the Dept. to make the maritime industry safer, but this proposed amendment is allowing further delay in publishing reports and their safety recommendations. This in-itself is prolonging the suffering of those involved in accidents and risks delaying additional safety measures being actioned. Some reports have taken over 2 years (Kilkee 27 months)</p> <p>Clear guidance must be provided, as to when a statutory interim report has to be provided and its contents. Again, this amendment is not helpful to those awaiting reports to be published, either in draft or final report format.</p> <p>(b) MCIB has not attempted to adhere to this stipulation</p> <p>This is a resource issue as explained in M. Kingston briefing Note. An independent full time Unit will sort this out so these extended periods should not be made. Expediency for those involved was an extreme concern of the 1998 Review Group</p>
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<p>Head 13 Notification of marine casualties to Marine Survey Office</p>	<p>Provide that</p> <p>(1) An owner, charterer, master, skipper, person in charge, ship's agent, ship's manager or ship's husband of a vessel involved in a marine casualty shall, by using the quickest feasible means, notify the Chief Surveyor or any other marine surveyor in the Marine Survey Office of the Department of Transport of the casualty immediately he or she is aware that the marine casualty has occurred or commenced, or as soon as practicable thereafter.</p> <p>(2) There shall be included in the notification such relevant information as is known to the person notifying the marine casualty including the name and description of the vessel, its position, the number of persons on board and as accurate a summary as possible of the marine casualty.</p> <p>(3) A person required by subhead (1) to notify a marine casualty who without reasonable excuse fails to do so commits an offence and is liable –</p> <p>(a) on summary conviction to a Class A fine or to imprisonment for a term not exceeding 6 months, or to both,</p> <p>(b) on conviction on indictment, to a fine not exceeding €100,000 or to imprisonment for a term not exceeding 2 years, or to both.</p> <p>(4) An offence under this Head may be prosecuted by the Minister for Transport.</p> <p>(5) In this Head – “Chief Surveyor” means the person from time to time holding (including temporarily), or performing the duties of, the position with the designation Chief Surveyor in the Marine Survey Office of the Department of Transport; “owner, “vessel” and “marine casualty” have the meanings assigned to them by section 2(1) of the Act of 2000.</p>	<p>It's an offence to not notify but there is no reference to channels to educate the public of their responsibility under this revised act. Should this be addressed?</p> <p>(b) Extreme level of punishment proposed. Is this level appropriate?</p> <p>(4) Why the minister for Transport? Need to consider this.</p> <p>(5) The MSO should not have anything to do with the reporting of incidents under this Act. The MSO is a prosecutorial body and this obligation undermines the IMO Code's purpose to encourage people to report to the Investigatory Board/ UNIT knowing that they can avail of the 'no fault of blame' principle and be safe from 'self-incrimination'</p>
<p>Head 14 Transitional Provision – continuation of ongoing investigations, etc.</p>	<p>Provide that</p> <p>Where on the day this Bill is enacted, an investigation of a marine casualty or the preparation of a report that relates to an investigation of a marine casualty has been commenced under the Act of 2000 but has not been completed, the investigation or, as the case may be, the preparation of the report shall be continued and completed by the Board as constituted under the amended section 9 of the Act of 2000 in Head 3 and the Board shall publish the report of the investigation in accordance with Part 3 of the Act of 2000.</p>	<p>Amended accordingly in light of Board being dis banded</p>



<p>Head 15 Safety Convention Head 16 Short title, collective citation and construction</p>	<p>Provide that</p> <p>Section 3(1) of the Merchant Shipping (Safety Convention) Act 1952 is amended by substituting for the definition of “Safety Convention” (inserted by section 69 of the Merchant Shipping (Registration of Ships) Act 2014) the following: “ ‘Safety Convention’ means the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 1 November 1974 together with the Protocol to the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 17 February 1978 and the Protocol to the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 11 November 1988 and any amendments made to it up to and including those adopted by the 99th session of the Maritime Safety Committee of the International Maritime Organisation held between 16 and 25 May 2018 and which have entered into force in respect of the State pursuant to Article VIII prior to the passing of the Merchant Shipping (Investigation of Marine Casualties) (Amendment) Bill 2020.”.</p>	<p>See M Kingston letter 04.01.2021 at paragraph 5.4 and 5.5 and Briefing Note at paragraph 3.14.</p> <p>The Irish Maritime Legal framework need to be urgently codified and it is in that work that these amendments should appear.</p>
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