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Department for
Constitutional Affairs
Justice, rights and democracy

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(28)

Submission

To: 1. Lord Falconer
2. Harriet Harman
cc: See end of document

Date: 9 March 2007

From:
Coroners Division
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Steel House

Tel:

Subject: **Legal representation in military inquests**

Issue

1. Your (Harriet Harman's) request for a letter to Des Browne requesting a meeting to explore two options:
 - (i) that neither the MoD nor the bereaved family are legally represented in military inquests; or
 - (ii) that the MoD fund the family's legal representation in military inquests where the military are legally represented and the family would not be otherwise legally represented by publicly funded legal aid.

Recommendation

2. That you (Harriet Harman) send Des Browne the attached letter. Legal Aid Strategy Directorate and Finance Division have seen this submission.

Timing

3. Urgent. You requested a draft by close of play on 6 March.

Background

i. The current position with legal aid

4. Legally aided representation at inquests and before most tribunals is excluded by the Access to Justice Act 1999. Legal aid is not normally available for representation at inquests because the relative informality of the process means that legal representation is not necessary. The courts have recognised that a coroner will, in the vast majority of cases be able to carry out an effective investigation into the circumstances surrounding a death without interested persons being legally represented. This is because an inquest is an inquisitorial fact-finding process rather than an adversarial trial.

5. "Exceptional funding" legal aid can, however, be approved (by Ministers) under section 6(8)(b) of the Access to Justice Act 1999 if strict criteria are met. As well as passing the means test (although this can be waived in certain circumstances), these are:

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- there is a significant wider public interest, as defined by the Funding Code (potential of the proceedings to produce real benefits for individuals other than the client), in the client being represented, or
- the applicant is a member of the deceased's family and the circumstances of the death are such that funded representation is likely to be necessary to enable the coroner to investigate the case effectively, as required by Article 2 ECHR.

ii. The current position at military inquests

6. The MoD estimate that there is some form of legal representation at 10% of all inquests into deaths of military personnel. This would include road traffic accidents, suicides, negligent discharge of firearms as well as live operations i.e. military exercises or conflicts. However, they estimate they have some form of legal representation at 20% of inquests into deaths that occur during live operations.

7. This is confirmed by our records of the Iraq and Afghanistan Inquests. Of the 45 inquest hearings (into 63 deaths) that have been completed and where we have records for:

- o MoD have been represented at 8 inquest hearings (18%). These 8 hearings have looked into 16 deaths (25%)
- o In 5 of these 8 hearings (into 12 deaths) the families have also been represented
- o Families were also represented at 3 inquest hearings (into 3 deaths) where MoD were not represented

8. The MoD estimate that the cost of their legal representation in the Iraq/Afghanistan inquests (19 to date, some completed, some ongoing) has been £334k to date. This includes the cost of Counsel, Treasury Solicitors, travel and subsistence, transcript charges and other disbursements. These estimates are, however, very approximate.

9. Legal Aid Strategy Directorate can only confirm two cases where families received legal aid for representation at an Iraq related inquest (and none as yet for Afghanistan). The first was an application granted in December 2005 concerning a soldier () training in Iraq who accidentally shot himself. The estimated cost to the legal aid fund was about £11k. The second case is the inquest in February 2006 into the deaths of six royal military police where five of the families were represented during the 2-week hearing at an estimated cost to the legal aid fund of £27k.

10. The legal costs to the MoD of the inquest into the death of a soldier () who died at Deepcut Army Barracks in controversial circumstances were in the region of £150k. We have no information on the Deepcut inquests but believe that, as these inquests were dealt with briefly, any legal costs would have been quite insignificant. The family received legal aid for representation at the inquest. Legal aid has also been granted for families for other military inquests e.g. death in a training exercise in Germany.

iii. Blake Review Recommendations about representation

11. Following the fourth death in nine years of a trainee soldier at Deepcut Army Barracks in 2002, and subsequent police investigations, media attention and calls for a public inquiry, the Government announced in November 2004 that it would commission

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a Review to look further into the circumstances surrounding the deaths. The Review was undertaken by Nicholas Blake QC.

12. The Review Report was published at the end of March 2006. Blake recommended (recommendation 30) that there should always be an inquest, or in Scotland, a Fatal Accident Inquiry, into a sudden death of a soldier, wherever the death has occurred. He found that the participation of the family of the deceased in inquests or fatal accident inquiries was of general benefit in the interests of a thorough investigation whose outcome can be accepted by all. He made the point that such representation was assisted by the ability of the family to have experienced legal professionals to advise them whether there were reasons for concern, and how they can be properly addressed.

13. 12.110 of the Report reads as follows:

"It seems unfortunate that a family who is suffering the trauma of having lost a child in military service should also have to spend significant sums of money on legal fees to understand whether and, if so, how they should participate in an inquest. Since death in service is an inherent risk of military service, and an inquest or FAI is an inevitable outcome of such deaths (given Recommendation 30 above), in the opinion of the Review, there is good case for the Military Covenant to be interpreted as requiring the provision of reasonable assistance to families with respect to legal costs arising in such proceedings. Reasonable funds should be provided for the purpose of obtaining legal advice so that a family is not required to deplete its own resources to participate in such an inquest, or FAI, or required to seek discretionary funding from the civil legal aid authorities...

...The participation of lawyers experienced in this area can promote [the] objective (of a prompt, full and effective inquest which benefits both the Armed Forces and the family.) Where the circumstances are such that representation is necessary at the inquest or FAI, it is invidious for the Army to be represented at such an inquest at public expense whilst the family is not."

14. Accordingly, Recommendation 31 of the Report was that "as part of the Military Covenant with the soldier, the MOD should ensure that the family of a deceased soldier have access to legal advice and, where appropriate, legal representation prior to, and during, the inquest or FAI".

15. The MoD response to recommendation 31 was as follows:

"An Inquest is an inquisitorial, non-adversarial fact finding process of limited scope which does not make findings of civil or criminal liability. It is the general presumption that legal representation is not necessary, and it is quite appropriate for those deemed interested persons by the Coroner to ask questions of witnesses at an inquest without legal assistance. Government provision of legal aid through the LSC is not therefore normally available to interested persons. However, under Access to Justice Act 1999 application may be made to the LSC for exceptionally funding."

Accordingly, MoD have not implemented recommendation 31 of the Blake Report and have no plans to do so in the future.

iv. Meeting with families on 4 December

16. My submission of 1 March sets out the detailed background to the meeting. Amongst the main issues and problems reported by the families of bereaved

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servicemen attending was the difficulty that low income families had in paying for legal representation in the absence of legal aid.

v. Meeting of All Parliamentary Group on Army Deaths (APGA) on 27 February

17. As you (Harriet Harman) will recall, there was considerable discussion about who should have the responsibility for funding legal representation for families at military inquests. One of the families said that they had not had any representation at the inquest and felt totally out of their depth. They thought that there had to be legal representation for families at military inquests and that the MoD should pay for it. There seemed to be a general consensus from the families that funding legal representation should be the MoD's responsibility.

18. Joan Humble MP, the APGA chair, said that the Blake Review had recommended that the MoD should fund representation for families as part of the military covenant. However, Fiona Murphy of solicitors Bhatt Murphy which undertakes considerable inquest work and who had been invited to contribute to the Blake Review thought that the existing legal aid framework through the Legal Services Commission was a more appropriate source of funding. She also took the view that *all* inquests into deaths during military service, even road accidents and suicides, fulfilled the second of the two criteria for legal aid i.e. that the applicant is a member of the deceased's family and the circumstances of the death are such that funded representation is likely to be necessary to enable the coroner to investigate the case effectively, as required by Article 2 ECHR.

19. Other lawyers at the meeting also emphasised that if funding did come from the MoD it was essential that families could obtain their own representation rather than the MoD doing it for them.

20. Joan Humble also made the point that the Blake Review had made a number of recommendations on the issues of legal representation and disclosure and that Blake had also said he would revisit his recommendations if the Government did not act upon them. The Government had so far failed to act on the review recommendations and this needed to be looked at

Argument

21. We have always maintained that legal representation at military inquests needs to be fair. If MoD maintain the line that inquests are not adversarial (see paragraph 15 above) so that families do not need to be represented, this begs the question as to why MoD needs to be represented.

22. **One option** might be for all interested persons to rely on the coroner's fairness and ability to explore all the issues, taking into account the interested persons' views as necessary. The risk is that some will "break ranks" and decide to bring a lawyer after all. The other interested persons will then feel they have been cheated and seek an adjournment in order to obtain legal representation. It is, however, very largely the MoD who brings lawyers (albeit not in many cases) to the dissatisfaction of the families, not the other way round. The MoD really need to justify why, in all the circumstances including their response to the Blake Review, they consider lawyers to be necessary.

22. Given that the costs of legal representation are potentially substantial, the proposal that neither family nor the military should be legally represented should appeal to both families and to the MoD on the ground of significant savings. The inquest may well be shorter, too, because the coroner could control the proceedings more effectively. At the APGA meeting on 27 February it was argued by some lawyers that any equality of arms would be more apparent than real if neither the family nor

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MoD was legally represented as the families would always be at a disadvantage vis à vis the army. This argument has little merit, however, as we understand from our initial inquiries of the MoD that in inquests where the military is not currently legally represented, only an observer from the relevant force will be sent to monitor the proceedings. Further, we do not accept that 'equality of arms' arguments apply in respect of inquisitorial inquests. In any event, it is worth noting that we could not prevent families from applying for legal aid for representation at inquests – such applications are considered (by Vera Baird, if recommended by the Legal Services Commission) against the statutory criteria and guidance.

Financial implications

23. **An alternative option** would be for MoD to fund legal representation in all cases where the families are not otherwise represented. We have very limited information about the *numbers* of inquests where there is representation (as opposed to the percentage of inquests where there is representation (see ii above)) and we have had to make broad brush assumptions. On the assumption that the average inquest will last between one and two days and the costs of legal representation for families including preparation time, would be about £3K a day, and on the assumption that there would be a need for legal representation in about 20% of inquests, and that in total there would be no more than 80 service deaths of all kinds each year, **we estimate** that there would be 16 inquests at between £3K to £6K each which would cost in the region of £48K to £96K to fund.

24. On the assumption, however, that MoD would fund these costs, and none of the cases would fall within the legal aid provisions, there should be no resource implications for DCA. Nevertheless, if MoD were to agree to fund in this way and were to routinely pay for families' representation at inquests, it would increase pressure on Government – no doubt through an extension of legal aid – to fund families in other areas e.g. hospital or rail deaths which would increase the cost to legal aid (and to other Government Departments.) As a result, if MoD were minded to fund families where the military is funded, we would need to consult more widely within Government. (You may be doing so shortly on the general principle, following the separate advice from the Coroners Unit on legal representation in any inquest for families when a public organisation has chosen to have lawyers.)

25. You may wish to discuss this option with Vera Baird before approaching the MoD, as there is an issue as to whether MoD should be approached to reimburse the legal aid costs of military inquests, in addition to providing the costs of representation where families would not otherwise be represented.

Presentation and media handling

26. The deaths resulting from the conflicts in Iraq and Afghanistan continue to receive media and parliamentary coverage. The recent hearing of the inquest into the death of Lance Corporal of Horse Hull gave rise to considerable media interest. The media have also reported considerably on the backlog of inquest delays and whether US service personnel will attend friendly fire inquests.

27. At the meeting with military families on 4 December you (Harriet Harman) agreed to take away the participants' concerns. The media coverage at the time centred on the lack of inquests for Scottish military victims, and the fact that one man had been charged £600 for the transcript of his son's inquest.

28. More recently, at the APGA meeting you said, and were later reported by media as saying: "Nobody wants to find themselves in an inquest... obviously, everything possible must be done to make sure that you get the answer to the questions you need

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and that the system looks after you properly." You were also quoted as saying: "None of us really think... that enough is being done."

29. Such an approach could be perceived as being in opposition, or possible opposition, not only to the MoD but also to DCA legal aid policy under Vera Baird. When handling calls on legal aid for inquests hitherto, the DCA press office has been careful not to set your (Harriet Harman's) views against those of Vera Baird. Press Office have instead explained that inquests are not adversarial, and when asked more generally about your earlier comments repeat the line that that militarily bereaved families like all bereaved families expect an inquest to determine, as far as is possible, how their loved one died.

30. The Press office does not comment on ministerial correspondence but if your letter to Des Browne became public, the press office would say it is part of ongoing discussions between DCA and MoD ministers regarding assistance for military families.

Coroners Unit

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cc Vera Baird

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