

# Crown Office and Procurator Fiscal Service

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Dear Ms White

## **FAI BILL – Evidence Re Deaths of Service Personnel**

At the Committee Session 5 May 2015 the committee heard evidence in relation to Deaths of Military Personnel and in particular whether a Fatal Accident Inquiry was considered mandatory in those circumstances. Having read the transcript of the evidence given that day I am writing this letter in order to assist the Committee's deliberations concerning whether a Fatal Accident Inquiry is mandatory in the event of the death of service personnel whilst on duty, and to explain Crown Counsel's view of the law as it currently stands.

The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 at section 1(1)(a) provides for mandatory inquiries in deaths where,

*"it appears that the death has resulted from an accident occurring in Scotland whilst that person who has died, being an employee, was in the course of his employment or, being employer of self-employed person, was engaged in his occupation as such;"*

The 1976 Act therefore states that in order for an FAI to be mandatory the deceased must be in an employer/employee relationship and he or she dies in the course of that employment or be a self-employed person who dies the course of his or her occupation.

Historically, a member of the Armed Forces is not an employee of the Crown. The Stair Memorial Encyclopaedia, an authoritative textbook on the law of Scotland supports this interpretation providing that the terms of engagement of members of the Armed Forces are not contractual. Members of the Armed Forces are appointed by the Crown under the Royal Prerogative, and hold an appointment at the Crown's pleasure. That statement is supported in the case law. It is also supported by the 3<sup>rd</sup> Edition of Carmichael on Sudden Deaths and Fatal Accident Inquiries which states at paragraph 2-07 that deaths of members of Armed Forces whilst on duty are not deaths in the course of employment. It is therefore a matter of law that deaths of Service Personnel in the course of their duties are not mandatory Fatal Accident Inquiries. There is no employer/employee relationship between the parties.

The Committee may also wish to note in this regard that section 1A of the 1976 Act (added by the Coroners and Justice Act 2009, section 50(2)), which gives the power of the court in Scotland to have a Fatal Accident Inquiry into the death of service personnel abroad, provides that such an

inquiry can take place where the Lord Advocate decides that it is appropriate in the public interest to hold one. That is to say it makes such an inquiry a discretionary rather than mandatory one.

The terms of section 1A support the view that had the United Kingdom Parliament considered that a Fatal Accident Inquiry into the death of military personnel be mandatory, they would not have made the Lord Advocate's power in this regard a discretionary one.

In his evidence to the Committee, Flight Lieutenant James Jones suggested that Lord Neuberger, President of the Supreme Court of the United Kingdom had given an opinion that military personnel were employees. I understand Jones' comments to refer to the case *Smith v Ministry of Defence* [2013] UK SC41. That case from the United Kingdom Supreme Court arose out of the deaths of servicemen who lost their lives serving with the British Army in Iraq. Various claims based upon the English law of negligence including a claim that the Ministry of Defence breached Article 2 of the European Convention in Human Rights by failing to take steps to protect the lives of those deployed in "Snatch" Land Rovers were brought. The Ministry of Defence had applied to have the actions struck out. The case was originally heard in the Queen's Bench Division of the High Court in England before being appealed to the Court of Appeal in London. In 2012 the case at the Court of Appeal was heard by a bench which included Lord Neuberger sitting as the Master of Rolls, the most senior English civil judge. Lord Neuberger did not give a substantive judgment in that case but agreed with the decision of Moses LJ who gave the decision of the court. The case was then appealed to the Supreme Court where it was heard in 2013 by a bench chaired by Lord Hope as Deputy President and consisting of Lord Walker, Lady Hale, Lord Mance, Lord Kerr, Lord Wilson and Lord Carnwath.

Whilst there was a discussion in the High Court and in the Court of Appeal in relation to the duties of care owed by the Ministry of Defence as an employer in the law of negligence there was no ruling by Lord Neuberger on that point. The matter was not considered in any great detail by the Supreme Court and no submissions were made to the court on this point. The case cannot be said to be an authoritative statement of the law in relation to the terms of service of military personnel nor does it support an interpretation of the Fatal Accident and Sudden Deaths Inquiries (Scotland) Act 1976 in which the death of military personnel on duty in Scotland would mean that there must be a mandatory FAI. Rather the case is an authoritative statement of the rules of jurisdiction in relation to UK forces deployed overseas particularly in combat situations and the limits of the law of negligence in that context.

I hope that this clarifies Crown Counsel's view of the current law and is of assistance to the committee.

Yours sincerely



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