Northern Ireland Office
Stormont Castle
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Rt Hon Tom King MP
Secretary of State for Defence
Ministry of Defence
Whitehall
LONDON
SW1A 2HB

10 October 1989

Dear Tom,

INQUESTS IN NORTHERN IRELAND: DRAFT CORONERS ORDER

Your letter of 29 September to Patrick Mayhew crossed with mine of the same date to James Mackay. Inter alia your letter also commented on a proposal in my letter of 15 September to Patrick, which I substantially modified in my second letter. The principal purpose of this letter is to clarify where I now stand.

I hope you will agree that it is highly desirable that we should sort out any remaining differences between us in correspondence rather than at what would be then be a third Ministerial meeting to discuss substantially the same issues. I think that, in fact, there is a good deal of common ground between us.

First and foremost, we are all agreed on the desirability of ensuring that members of the security forces who are suspected of causing a death in Northern Ireland should not have to give evidence at inquests if the consequence of that is that their lives are put at risk, or that their further utility for security work in Northern Ireland is substantially diminished, or that security matters (including the integrity of possible future operations) is put at risk. Second, I agree with the conclusion that you and other colleagues have previously reached that the best (and indeed the only certain) way of ensuring that none of these unacceptable consequences arise is legislation by Order-in-Council to restore the

non-compellability of witnesses suspected of causing a death which was removed by the judgment in December 1988 of the Northern Ireland Court of Appeal.

For the record, therefore, let me say that I am not now seeking to overturn or set aside the twice-taken decision to proceed in this way. On the contrary, what I am now proposing is that we should regard our decision to legislate as having been firmly taken, but that we should delay its implementation until we have the result of our Appeal to the House of Lords. If we then lose, we should have our draft Order ready for immediate introduction so as to get in ahead of any inquest at which "compellability" might be an issue.

I make this proposal only after a lot of thought and with some temerity (not having been present at either of the substantive discussions of these issues which have already taken place). But, as I see it, the Parliamentary and political considerations pointing in favour of delay in present circumstances are overwhelming.

I will not rehearse the problems that will face our spokesmen in both Lords and Commons when they seek approval for what will by any standards be a controversial draft Order. It will be controversial not only because of what its effect will be on inquests in Northern Ireland but also because of its form (we will undoubtedly be accused of abusing the Order-in-Council procedure by using it to deal with what we will be told is basically a 'security' problem and therefore a matter for primary legislation). Nor will I refer in any detail to the response which we know the draft Order will provoke from all the constitutional parties in the Republic and some (if not all) of the parties in the North. We have agreed to face up to these difficulties. What I would like to do, however, is to suggest as strongly as I can that the period between now and the hearing of our appeal by the House of Lords would be the worst possible time in which to do so.

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I have looked again at the argument for introducing the legislation without further delay, including the considerations which you put forward in your letter of 29 September to Patrick Mayhew. But, having done so, I have to say that I remain wholly persuaded that the decision to set a date for the hearing of our appeal by the House of Lords (especially one as early as 15/16 January next) has materially affected the argument. It was always going to be enormously difficult (probably impossible) to convince the Irish Government and the political parties here (North and South) that the real reason for this Order was not simply to provide the final cover-up of the Stalker/Sampson affair. Our task both inside and outside Parliament will be made even more difficult and complicated if we have to explain why, if we had always been determined to legislate without waiting for the result of our appeal, we should choose to do so only after the Lords had fixed a date to hear it. We would, moreover, be more vulnerable to the charge of discourtesy to their Lordships.

If we now wait now until the Appeal is determined we can at least claim that we have been consistent in our approach. We could say in defence of legislating after we had lost the Appeal (if that does prove to be the case) that we had been, from the first, concerned about the implications of the LCJ's judgment; that was why we had decided to appeal it. We believed that there was a reasonable chance that a decision over-turning a view of the law which had long been accepted and acted upon might itself be over-turned on appeal. It had turned out that we were wrong, but our concern remained. Hence, our legislation. There is nothing unusual or reprehensible about legislation over-turning a decision of the House of Lords when it conflicts with the Government's view of what is desirable.

My feeling is that, if you and I could agree to the proposal which I am now making - ie that we should maintain our decision to legislate but that we should implement it only if and when the decision of the

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House of Lords makes this necessary, our colleagues would also be content. I would be most grateful therefore if you would give further and sympathetic consideration to what I am now proposing.

Finally, and very much on a point of detail, I feel that I must comment, if only so that silence is not taken as acceptance, on the point you make in the third paragraph of your letter about the suitability of Order-in-Council procedure for Northern Ireland because of what you describe as 'the double jeopardy' aspect peculiar to Northern Ireland. My understanding is that, in respect of the action of the police and the DPP, Northern Ireland is in no different case than England and Wales. There, just as much as in Northern Ireland, both the police and the DPP have finished with the case before the substantive inquest is held. It is, of course, true that inquests in England and Wales are usually formally opened (inter alia to facilitate disposal of the body) at an early stage, and before any criminal investigation is complete, but for the purpose of your argument this is irrelevant. The fact is that the possibility of having to give evidence (and face hostile questioning) at an inquest, after the conclusion of criminal proceedings in which he was acquitted or after it had been decided not to proceed with a prosecution, could also face a "suspect" witness in England and Wales.

Copies of this letter go to the Prime Minister, James Mackay, Geoffrey Howe, John Major, Douglas Hurd and Patrick Maynew, as well as to Patrick Walker, and Sir Robin Butler.

Yours ever

Pat

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