

**Nelson G (Gillian)**

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**From:** Edgar R (Rachel)  
**Sent:** 25 November 2004 10:25  
**To:** Henderson RM (Richard) (Solicitor); Layden P (Patrick)  
**Cc:** Donnelly LM (Louise); Anderson L (Lindsay); Nelson G (Gillian); MacLean CR (Colin);  
 Laing SG (Shirley); PS/ED  
**Subject:** FW: Appt of rapporteur  
**Importance:** High



rapporteur.doc (39  
KB)

Sorry, amateur failure to enclose attachment.

Rachel Edgar  
 Head of Looked After Children and Youthwork Division  
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 ext. [REDACTED]

-----Original Message-----

**From:** Edgar R (Rachel)  
**Sent:** 25 November 2004 10:19  
**To:**  
**Importance:** High

Dear colleagues,

Further to our conversation last night, I enclose further information about the proposed appointment of a rapporteur.

I understand that Cabinet was supportive of the idea yesterday and that the Minister is exploring whether parliament may wish to play a role in appointment. I should therefore be grateful for your early advice on legal risks.

With apologies for the unreasonable deadline,

Kind regards,  
 Rachel.

I, and the rest of the group are at Heriot Watt today, but I will have my mobile. Please leave a message if you would like to discuss anything further. [REDACTED]

**Rachel Edgar**  
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**Proposed appointment of a rapporteur to consider the mistreatment of children in residential homes and schools in the past.**

1. You indicated that you would find it useful to have further information about the appointment of a rapporteur in order to consider whether there were additional legal risks on which we would wish to advise the Minister.
2. It might be useful to set out some of the background. As you know, there have been significant demands for a public inquiry into the abuse of children while they were resident in children's homes or residential schools. We are aware of allegations dating back to the 1910s, but most of the people who are now active in organisations like INCAS (In Care Abuse Survivors) attended these institutions in the 1950s, 60s and 70s. Most commonly the allegations relate to institutions run by religious orders, in particular the Sisters of Nazareth and the De La Salle Brothers, or by charities, such as Barnardos and Quarriers.
3. We have no reason to doubt that abuse took place in such institutions. In some instances, that abuse was of a sexual nature; more commonly it took the form of physical abuse or what we might describe as emotional abuse, such as separating children from their siblings without contact for many years. We are less clear about the extent of the abuse. There have been a small number of criminal cases where former employees of institutions have been convicted of sexual offences or assault. We are also aware of some people receiving compensation from the Criminal Injuries Compensation Board. We are not aware of successful civil actions in this area, although, as you know, *McEwan v. Hendron* is currently before the Court of Session. There are also believed to be about 1000 other cases awaiting the outcome of *McEwan*. At present Scottish Ministers are a defender only in those actions that relate to the former List D schools, not those that relate to children's homes.
4. Experience in other countries, where the same organisations and orders ran institutions, eg Canada, Australia and Ireland, suggests that the abuse was institutional in nature. There have been large numbers of successful civil actions and in some instances the organisations and orders have admitted liability.
5. INCAS and others have sought a public enquiry, which they see as the mechanism to address a range of concerns:
  - To secure public recognition of the abuse and an apology from the state and the institutions involved;
  - To ensure that all the relevant information that government and institutions hold is made publicly available
  - To obtain an explanation of why the abuse was allowed to take place without the perpetrators being held to account;
  - To ensure that adequate and appropriate services are available for the survivors of abuse;
  - To ensure that appropriate compensation is available to those who seek it.
6. The Executive's position is that there is no need for a public enquiry to achieve many of the outcomes that survivors seek. The Minister has already made clear in his evidence to the Petitions Committee that he recognises that abuse took place and that it was unacceptable. We are planning a working group to look at services available

to survivors and the Minister has indicated his willingness to fund some counselling services. We committed some time ago to making all our relevant files available and they are currently in the final stages of being redacted. The Minister has now written to the organisations and the churches to encourage them to do the same. As you know, the text of a possible apology is currently being considered. On the question of compensation, our position remains that this is a matter for the courts to determine and that we are doing all we can (by making our records available) to facilitate that process.

7. The purpose of appointing a rapporteur is therefore to meet the strong wish from survivors for an explanation of why the abuse was able to take place. We are currently considering the remit for the rapporteur and would appreciate your early advice on any unintended legal implications. At this stage, we envisage the role as set out below.
8. The rapporteur would consider what legislation, standards, quality assurance and inspection regimes were in place during the relevant period, and why they failed to identify and address abuse taking place. The focus would be on the sector rather than on individual institutions. The rapporteur would produce a report, which would be made publicly available. The rapporteur would have available to him or her all the information that is in our files and other public records. In addition he or she would have available, on an anonymised basis information collated by counselling services about the extent and pattern of abuse.
9. It is not envisaged that the rapporteur would take formal evidence from witnesses nor be granted any powers to require production of documents. He or she would certainly not consider nor report on individual allegations.
10. Given that the rapporteur would be looking with today's knowledge of child protection at why the systems then in place did not work, we would not regard the outcome as necessarily prejudicing the position that we are taking in *McEwan* in denying any liability on the part of Scottish Ministers. It is not our intention to change the position we are taking in the court cases.
11. We have discussed with the Minister the fact that the work of the rapporteur is likely to assist pursuers in collating information that may be used to make a stronger case against Scottish Ministers.
12. I should be grateful for your views on any other legal risks that should be drawn to the attention of the Minister.

**Rachel Edgar**

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