

**Nelson G (Gillian)**

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**From:** Nicoll L (Lindsey)  
**Sent:** 25 November 2004 13:46  
**To:** Anderson L (Lindsay)  
**Cc:** Nelson G (Gillian)  
**Subject:** FW: Petition PE535

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

**From:** McNicoll G (Gordon)  
**Sent:** 25 November 2004 12:22  
**To:** Henderson RM (Richard) (Solicitor); Nicoll L (Lindsey)  
**Subject:** Petition PE535

Attached is a second draft, which I have not yet read, of a note to clients. It may be worth flagging up the need to check with the Crown Office that this latest plan is not going to interfere with current or future criminal proceedings?

 Gordon



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**From: Gordon McNicoll**  
**Solicitor's Office**  
 25 November 2004

Our ref: 2GE/C/004/019

Shirley Laing  
 SEED-LACY

Copy to: PS/Solicitor  
 Patrick Layden, Deputy Solicitor  
 Lindsey Nicoll, OSSE B2  
 Lindsay Anderson, OSSE B2  
 Louise Donnelly, OSSE A4  
 Rachel Edgar, SEED-LACY Division

**PETITION PE 535 – ALLEGATIONS OF INSTITUTIONAL ABUSE**

1. Louise has sent me a copy of the e-mail that you sent to her, and others in this Office, yesterday afternoon in which you provide a brief note of the issues discussed at the Minister's meeting with representatives of INCAS. I note that a new proposal was raised for the first time when the Minister suggested that he wished to appoint a "rapporteur" to inquire into why abuse was allowed to happen. I appreciate of course that this is an entirely new proposal as far as we are aware and it would therefore be appropriate to offer the Minister advice on the potential benefits and risks associated with this course of action. I note the intention that the Parliament would be making the appointment although it is not clear at this stage who would be determining the rapporteur's terms of reference. The implication might be that if the Parliament is making the appointment then the Parliament will determine the role that the rapporteur will have. The Minister does, however, appear to have reasonably clear views himself as to what he envisages that role would be.

2. Although we understand that the intention is that the rapporteur will be looking at systems in general, not at individual cases, we it may be extremely difficult for him/her to produce a Report that does not contain adverse findings in relation to specific individuals and/or specific establishments. At this stage we cannot be certain about the nature and detail of the findings. However, it might be argued that the individual's Convention rights had been infringed because they had not been given the opportunity to comment on the allegations or to defend themselves from findings which might infer that they are guilty of a criminal offence. As you may be aware, Article 6 of the Convention provides that in determining civil rights and obligations or any criminal charge everyone is entitled to a "fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law". While I appreciate that the purpose of any investigation by the rapporteur would not be to determine the civil rights and obligations of anyone involved in the management and running of these establishments or any criminal charge against him or them our concern is that in reality any Report could, unless extremely drawn, to have that effect.


3. There may also be issues concerning the application of Article 8 of the Convention which is concerned with the right to respect for private and family life. That is not an absolute right in that a public authority may interfere with it where such interference is "in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and

freedoms of others". While we could not say at this stage that the rapporteur's Report would necessarily interfere with anyone's Article 8 rights, because it would depend entirely on how the Report is framed, there must be a risk that it could have that effect.

4. The Minister would need to bear in mind that if the rapporteur named individuals this could trigger section 6 of the Protection of Children (Scotland) Act 2003, unless the view is taken that it is not a "relevant inquiry". However, it may be difficult to maintain the line that it is not a "relevant inquiry" if the findings are such that the named person should be included on the list of individuals who are considered to be unsuitable to work with children.

5. It may also be worth recording at this stage that our colleagues in the Court Division who are responsible for the conduct of the current litigation have serious concerns that the proposed investigation by the rapporteur may significantly undermine their ability to successfully defend the litigation. Even if we are successful in having the current Action dismissed on the grounds of relevancy it may well be that any Report prepared by the rapporteur would provide helpful information for prospective litigants that would assist them to pursue successful Actions against Ministers and/or others responsible for the management of these establishments. The Minister would of course be entitled to take the view that the benefits of conducting an investigation of the type he is proposing outweigh the financial consequences of losing the current or any future Court Actions as a result of the rapporteur's findings. Of course the rapporteur may also provide information that is of assistance to prospective litigants in successfully pursuing others. Ministers would collectively be entitled to take the view that the financial consequences of pursuing a course of action that assists litigants to successfully sue Ministers are outweighed by the benefits or the public interest in pursuing that course of action. Other defenders may not share that view although this is perhaps a presentational issue rather than a legal one. Were the rapporteur to unearth evidence that assist litigants to pursue their actions against other Defenders it is difficult to see how these Defenders would have a legal remedy against Ministers. Clearly however they would not be happy.

6. This is an issue that we think needs to be explored further with the Lord Advocate and it would be our intention to raise it with him in the next day or so although he is currently unavailable.



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25 November 2004