

**Laing SG (Shirley)**

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**From:** MacLean CR (Colin)  
**Sent:** 30 November 2004 07:33  
**To:** PS/ED; Edgar R (Rachel); Laing SG (Shirley); Henderson RM (Richard) (Solicitor)  
**Subject:** Re: IMMEDIATE - RAPPORTEUR - LIABILITY ISSUES

Mike

Thank you.

Rachel - can you please arrange for the formal exchange requested by Mike?

David - can you please let the Minister see this exchange, for information?

Colin  
 Colin MacLean  
 Children, Young People and Social Care Group

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

**From:** PS/ED <[REDACTED]>  
**To:** MacLean CR (Colin) <[REDACTED]>; Edgar R (Rachel) <[REDACTED]>; Laing SG (Shirley) <[REDACTED]>; Henderson RM (Richard) (Solicitor) <[REDACTED]>  
**Sent:** Mon Nov 29 20:09:16 2004  
**Subject:** Re: IMMEDIATE - RAPPORTEUR - LIABILITY ISSUES

Colin

Copy Rachel, Shirley, Richard

Thank you for the opportunity to reflect on the issues here from the Accountable Officer perspective. I had of course seen the advice from OSSE and the Minister's response at the time.

Plainly there is no question of propriety or regularity here. The issues are around whether the Minister has taken an appropriate decision in the light of the best available advice. I am satisfied that Mr Peacock has properly considered the views expressed by OSSE and intends to proceed having taken a clear view of the risks associated with his preferred course. His judgement - one he is entitled and best able to take - is that the proposal to appoint a rapporteur is necessary to manage the political risk of a considerably more damaging outcome emerging from the debate or subsequently. As I understand Mr Peacock's position, he is clear that there is no realistic "no investigation" option. The choice is between a relatively controlled investigation with a remit designed as you describe or an investigation whose scope and parameters are set by others. The Minister knows that all the possible ways carry the risk of increased financial liability - he has identified this way forward as having least risk in his assessment. I do not believe that we have any information which would justify challenging his view.

To avoid any doubt that all the issues have been considered, OSSE's concern about possible third party liability should be put to the Minister and he should be asked if this alters his view.

Mike

**Laing SG (Shirley)**

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**From:** PS/ED  
**Sent:** 29 November 2004 20:09  
**To:** MacLean CR (Colin); Edgar R (Rachel); Laing SG (Shirley); Henderson RM (Richard) (Solicitor)  
**Subject:** Re: IMMEDIATE - RAPPORTEUR - LIABILITY ISSUES

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To avoid any doubt that all the issues have been considered, OSSE's concern about possible third party liability should be put to the Minister and he should be asked if this alters his view.

Mike

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**From:** MacLean CR (Colin) <[REDACTED]>  
**To:** PS/ED <[REDACTED]>; Edgar R (Rachel) <[REDACTED]>; Laing SG (Shirley) <[REDACTED]>; Henderson RM (Richard) (Solicitor) <[REDACTED]>  
**Sent:** Mon Nov 29 18:43:32 2004  
**Subject:** FW: IMMEDIATE - RAPPORTEUR - LIABILITY ISSUES

Mike Ewart

I am writing to you in your capacity as Accountable Officer for SEED to draw your attention to the attached email exchange.

As you are aware, the Minister is planning to make a contribution to the debate on Wednesday 1 December about Petition 535. As part of that contribution, he is minded to announce the appointment of a rapporteur to investigate how abuse in children's care homes was able to take place. He intends that the rapporteur would review existing material, and not publish any material relating to individual cases.

We have had a number of very helpful discussions with OSSE colleagues. They are concerned that, even with these limitations on the scope of the work, such an exercise might increase our risk of financial liability arising from current and pending civil cases.

There are at least two alternatives: either that no investigation is carried out – or that an investigation is carried out by a third party (for example the Parliament). The first leaves us exposed to the existing legal and financial risks. (It also leaves us exposed to the political risk that failure to announce even a limited inquiry prompts a Parliamentary vote for a much more open ended inquiry than currently envisaged by the Minister). A review by a third party is less predictable, since we have no indication of the likely scope of such a third party inquiry, or how its results might influence the courts. Our view is that potential costs of all three options are high. It is hard to estimate the relative likelihood of these potential costs arising.

OSSE colleagues believe that risk is greater if the Minister asks someone to undertake the rapporteur exercise as outlined above, than if no such exercise is carried out. Specifically, that we would provide the evidence needed by those bringing cases against the Executive. We understand that position, although there is a counterargument that - if the rapporteur was only reading and offering a view on files that were already in the public domain, and made no public comment on individual cases, his/her report would not materially affect the evidence available to any of the parties to the cases.

At this stage, our only estimate of total cost is a figure of £30m. This estimate (see para 4.3 in the attached email) was made by OSSE on the assumption that all known cases result in the Executive making a payment at the upper end of the expected scale.

At this stage, it is not clear whether the outcome of the debate would be a process managed by the Executive, or one managed separately (or jointly) by the Parliament. Whether or not it was Parliament or the Executive that carried out the exercise, costs would fall to the Executive.

Rachel has made the above points to the Minister. He has indicated to her that he understand the advice, and the risks associated with his proposed plan of action.

One specific risk that is associated with an investigation commissioned by the Minister is that he is held liable by a third party who claimed that their legal liability was increased by the outcome of the investigation. That theoretical risk emerged in discussions with OSSE today and has not yet been discussed with the Minister. OSSE have not given any indication of the potential scale of the financial implications of that risk.

Because of the uncertainty surrounding all of the above (since it depends on the outcome of a large number of legal cases), and because OSSE believe that the action being proposed by the Minister might increase his financial liability, it seemed prudent to seek your opinion as Accountable Officer before finalising the speech and supporting material for Wednesday..

Do you have Accountable Officer concerns about either the advice that we have given to the Minister, or the action proposed by the Minister in the attached email?

We will, of course, update you as appropriate as the Minister firms up on the lines he plans to take on Wednesday.

Colin MacLean

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

From: Laing SG (Shirley)

Sent: 29 November 2004 14:50

To: MacLean CR (Colin)