

**Gerrish AL (Audrey)**

**From:** McFadyen N (Norman)  
**Sent:** 29 November 2004 12:50  
**To:** Henderson RM (Richard) (Solicitor)  
**Cc:** PS/ED; PS/LPS; PS/COPFS; PS/JD; Lord Advocate; Foubister SR (Stuart); Lugton CMA (Michael); Layden P (Patrick); McNicoll G (Gordon); Nicoll L (Lindsey); Anderson L (Lindsay); Donnelly LM (Louise); MacLean CR (Colin); Edgar R (Rachel); Gilchrist B (Bill) (COPFS); Baxter CM (Colin); Elvin J (Janice)  
**Subject:** RE: Note re possible appointment of reporter in relation to child abuse  
**Importance:** High  
**Sensitivity:** Confidential

Richard

1. Robert Gordon copied me in to your minute, which we have discussed briefly by email and which I have also been able to discuss briefly with the Lord Advocate. Coming to this rather cold I do have concerns - which are shared by the Lord Advocate - about how what is proposed might affect (or trigger) criminal investigations and prosecutions, and in particular how this would relate to decision making by Procurators Fiscal and Crown Counsel. I appreciate that such concerns could be allayed by firming up on the scope and remit or an inquiry.
2. I do not know whether such an inquiry might cut across actual criminal investigations or prosecutions, but given the possible breadth of the inquiry it may be necessary for COPFS to trawl all eleven COPFS areas and for our areas to trawl police forces; I am aware that there is at least one possible prosecution in the Central Scotland area (under consideration by Crown Counsel) and there is no shortage of potential 'new' complainers in that area.
3. It would certainly be necessary to have very clear ground rules as to what the rapporteur could do and say - and when s/he required to defer to the Procurator Fiscal and any police investigation, or indeed report to the Procurator Fiscal, in relation to criminality. It may be easier to regard aspects of live investigations as out of bounds than to deal with allegations arising in the course of the inquiry.
4. But fundamentally from the position of the prosecution service, it would be necessary at the outset to be clear as to the remit of the rapporteur in relation to decision making by prosecutors. There is, of course, much lore on that subject - but previous inquiries - going back to the Waters Inquiry in 1959 and more recently the Dunblane Inquiry - have recognised that prosecution decision making should not be reviewed by an Inquiry.
5. It would be helpful if this office and in particular Bill Gilchrist, the Deputy Crown Agent could be closely involved in the development of this proposal. I am copying to him and to Colin Baxter, given the possible involvement of the police.

Norman

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

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