

List D

Troup C (Colin)

From: Cuthbert-Kerr S (Sarah) on behalf of Communications Education
Sent: 25 May 2006 17:41
To: Communications Education; Minister for Education and Young People
Cc: Edgar R (Rachel); Thomson KAL (Ken); Deputy Minister for Education and Young People; Lyon C (Caroline); Troup C (Colin); Communications Justice; Ferguson SE (Shirley)
Subject: RE: MCEWEN V HENDRON

All

The following lines have now been cleared by the Minister.

This case is ongoing and the appeal will be heard in July. It would be inappropriate to comment further at this time.

Grounds of appeal in this particular case were lodged in November. Timebar is being looked at by the Law Commission.

Why are we appealing?

There are a number of issues arising from the case which have wider implications. These issues are about primarily about roles and responsibilities, and questions of timebar.

Sarah

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

From: Cuthbert-Kerr S (Sarah) **On Behalf Of** Communications Education
Sent: 25 May 2006 16:17
To: Minister for Education and Young People
Cc: Edgar R (Rachel); Thomson KAL (Ken); Deputy Minister for Education and Young People; Lyon C (Caroline); Troup C (Colin); Communications Justice; Ferguson SE (Shirley); Communications Education
Subject: RE: MCEWEN V HENDRON

Minister

We discussed yesterday. In terms of handling, I recommend holding lines.

Suggested lines:

This case is ongoing and the appeal will be heard in July. It would be inappropriate to comment further at this time.

Grounds of appeal were lodged in November.

Why are we appealing?

There are a number of issues arising from the case which have wider implications. These issues are about primarily about roles and responsibilities, and questions of timebar.

We are sympathetic to the individuals who have been victims of abuse but it is for the courts to determine questions of responsibility.

Sarah

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

From: Cuthbert-Kerr S (Sarah) **On Behalf Of** Communications Education
Sent: 25 May 2006 15:09
To: Ferguson SE (Shirley); Communications Education
Subject: RE: MCEWEN V HENDRON

Shirley

Ken,

I am hoping to speak to Rachel, and I will discuss what is needed. I anticipate that we will be involved in making sure that there are clear lines prepared, although some of this work will have been done already for the last stage, when the grounds of appeal were lodged.

I will keep you posted.

Shirley

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

From: Thomson KAL (Ken)
Sent: 24 May 2006 17:05
To: Lord Advocate; Ferguson SE (Shirley); Lyon C (Caroline)
Cc: Communications Education; Troup C (Colln); Communications Justice; Edgar R (Rachel)
Subject: RE: MCEWEN V HENDRON

Shirley -

I know you are getting in touch with Rachel. Grateful if you would discuss and agree how to deliver what FM has instructed. I suggest the lead on the handling strategy should be with Comms Education; and that OSSE should help colleagues there and in ED to develop and clear lines on why we are appealing the earlier judgement (to clarify the law etc). Colleagues will also want advice on when the grounds of appeal are likely to come into the public domain and when they might attract attention. The two are unlikely to happen at the same time, I think - which might suggest that the handling strategy should be to monitor interest and deploy lines in response to interest rather than to brief up front.

Please let me know what you agree on the way forward, since I expect the Advocate will ask us about this at next week's briefing meeting (you might therefore cover it in the usual briefing notes).

K

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

From: McGulgan K (Karen) **On Behalf Of** Lord Advocate
Sent: 24 May 2006 16:41
To: Communications Justice; Thomson KAL (Ken); Ferguson SE (Shirley); Lyon C (Caroline)
Cc: Communications Education; Troup C (Colln)
Subject: FW: MCEWEN V HENDRON

Ken

As discussed. Please see e-mail below from FM's office. I understand you will take this forward in discussion with Communications Justice.

Many thanks

Karen

Karen McGuigan
 PS/Lord Advocate

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

From: McElhinney M (Michael) **On Behalf Of** First Minister
Sent: 24 May 2006 15:46

To: Minister for Education and Young People; Lord Advocate; Minister for Justice
Cc: First Minister; Deputy First Minister & Minister for Enterprise; Deputy Minister for Justice; Minister for Parliamentary Business; Minister for Health and Community Care; Solicitor General; PS/Perm Sec; PS/LPS; PS/ED; PS/JD; PS/HD Health; PS/Solicitor; Communications Education; Troup G (Gill); Thomson KAL (Ken); Ferguson SE (Shirley); Lyon C (Caroline); MacLean CR (Collin); Edgar R (Rachel); Smith S (Sarah); Phillips D (Danny); Clark M (Matthew)
Subject: RE: MCEWEN V HENDRON

PS/Lord Advocate
 PS/Minister for Justice
 PS/Minister for Education and Young People

Following discussion with the Lord Advocate, Mr Peacock and Mrs Jamieson, the First Minister is content all available grounds of appeal should be relied on, including time bar.

He would be grateful if Press Education and the Lord Advocates office could consider the presentational implications of this course of action and agree a handling strategy. He would also be grateful if Mr Peacock and Mrs Jamieson could discuss the wider and ongoing issue of compensation for victims of abuse.

Mike McElhinney
 DPS/First Minister

Ext [REDACTED]

All e-mails and attachments sent by a Ministerial Private Office to another official on behalf of a Minister relating to a decision, request or comment made by a Minister, or a note of a Ministerial meeting, must be filed appropriately by the primary recipient. Private Offices do not keep official records of such e-mails or attachments. Thank you.

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

From: Minister for Education and Young People
Sent: 23 May 2006 11:49
To: Lord Advocate
Cc: First Minister; Deputy First Minister & Minister for Enterprise; Minister for Justice; Deputy Minister for Justice; Minister for Parliamentary Business; Minister for Health and Community Care; Solicitor General; PS/Perm Sec; PS/LPS; PS/ED; PS/JD; PS/HD Health; PS/Solicitor; Communications Education; Troup G (Gill); Thomson KAL (Ken); Ferguson SE (Shirley); Lyon C (Caroline); MacLean CR (Colin); Edgar R (Rachel); Smith S (Sarah); Phillips D (Danny); Clark M (Matthew)
Subject: MCEWEN V HENDRON
Importance: High

PS/Lord Advocate

Copy: As above

MCEWEN V HENDRON

Further to your minute 8 May please find attached a 2 page response

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First Minister
 Minister for Education and Young People
 Minister for Justice

**MCEWAN V HENDRON AND OTHERS (LIST D SCHOOLS - ABUSE CASES):
 ARGUMENT ON TIME BAR**

Purpose and priority

1. Immediate. We need to agree our approach to this appeal quickly, since Thursday (25 May) is the last day for lodging written submissions. I suggest we should have a word in the margins of Cabinet tomorrow.

The issue

2. The background is in my minute of 8 May to the Minister for Education and Young People and his reply of 22 May. Concisely, we have to decide whether to run time-bar arguments in our appeal against an earlier judgement about whether Ministers have a non-delegable duty of care to victims of abuse in List D schools.

3. For reasons I understand and with which I sympathise, Peter sees arguments for not pursuing the timebar argument in circumstances where the criminal courts have found that abuse took place and the First Minister has apologised to the victims.

4. My concern is that giving up the timebar argument in these cases will make it much harder to maintain it in other legal challenges including those on slopping out and segregation. In those cases, also before the courts, Ministers' exposure without the timebar argument is very large: if timebar does not apply, Ministers may have to compensate every prisoner held in slopping out conditions since 1999.

5. Whatever the merits, the timebar point has not been clearly and persuasively argued against Ministers and the other defendants in earlier proceedings. The existing judgement is unsatisfactory as a result. Other defendants are likely to run the timebar argument even if Ministers do not. I believe Ministers should appeal it in order to clarify the law. That would be consistent with the Scottish Law Commission's recent recommendation that timebar should apply in historic abuse cases just as elsewhere.

Conclusion

6. For reasons set out in my earlier minute, counsel are at present instructed to include the timebar argument in the written submission they must lodge on Thursday. If we are to take another course, counsel will have to be instructed accordingly and will need time to amend their written submission. I therefore suggest that we should have a word in the margins of Cabinet tomorrow.

COLIN BOYD
 22 May 2006

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From: Lord Advocate
8 May 2006

Minister for Education and Young People

**McEWAN V HENDRON AND OTHERS
LIST D SCHOOLS – ABUSE CASES
ARGUMENTS ON TIME BAR**

You will recall that in November there was an exchange of views on the merits of maintaining a defence based on arguments as to time bar in this case. At that time, and in accordance with advice from counsel, grounds of appeal were lodged which stated all available grounds. The question is whether we wish to continue to insist upon the time bar ground of appeal. The time has now come for a final decision to be made on whether to insist on that particular ground. Our Note of Argument, which will contain the detail of our argument on each ground, must be lodged by 25 May, and Counsel await instructions as to whether we are to continue to rely on all stated grounds of appeal. (The appeal has been set down for 6 days commencing 6th July.)

Ultimately it is for Ministers to decide whether they wish to proceed with all arguments in any particular case. However, in this case, while I appreciate that there are sensitivities about being seen to rely upon what may look like a “technical” argument, it is my view that we should continue to use all available and legitimate arguments. Counsel and OSSE are of the same view.

There are good legal reasons for this stance.

Rules on time bar exist to protect defenders against stale claims which are extremely difficult to investigate and to respond to in a proportionate manner. There are two aspects to time bar in this case. Firstly, the pursuer has to show why the commencement of the normal period of limitation (that an action must be commenced within three years of the events in question) should be postponed to a later date. In this case the pursuer appears to assert that he was only aware of the possibility of a claim at a late date because his memories of the events were suppressed, but gives little information in support of his assertion. Secondly, even where a pursuer cannot succeed on the first point, he may be able to persuade a court to extend the normal three year period on the basis that it is equitable to do so. The pursuer here is asking the court to exercise its discretion in his favour.

It is a fundamental legal principle that a pursuer should be required to state with precision the case which he alleges, so that a defender is properly equipped to be able to answer it. It is also of fundamental importance that any legal ruling should be accurate and clear so that parties and others may understand the basis on which it has been reached. In this case the pursuer has not clearly stated his arguments as to why he should succeed on either point; and the court’s reasoning appears to be defective on the general principles. Counsel’s view, with which I concur, is that there are reasonable prospects of success on the first point and that – while prospects are not so good – it would be “entirely respectable and reasonable” for Ministers also to take the second point. If Ministers were to be successful at appeal on both points then the effect of this would be to remove Ministers as a defender in this action. It would not necessarily remove Ministers from any of the other historic abuse cases where different averments may be made on time bar points.

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The Scottish Ministers are guardians of the public purse and should not expose themselves to claims simply because it may seem desirable that someone should pay. Very serious consideration must be given to the abandonment of a line of argument which is entirely proper and available. In my view it is right that the pursuer should be required to demonstrate why the normal rules on commencement of the three year period should not apply to him – particularly where, as in this case, it appears that his position is confused, deficient and lacking in candour. As counsel suggest, this is even more the case in relation to the argument on the second point, where a pursuer should be expected to provide a full and coherent explanation of his delay in raising proceedings.

Whether or not we take the time points, the other defenders will do so on very similar grounds and our failure to do so will be highlighted. It is also highly relevant that failure to take a good time point which is properly available is likely to send the wrong signal in the context of other litigation against the Scottish Executive in which time points are also very much to the fore (for example in relation to prisons cases concerning slopping out, segregation and hepatitis C). No legal precedent as such would be set but it will send a signal in these other cases where a different view is being taken. It might also be perceived as implying that Ministers have already decided, in advance of the Law Commission's ongoing consideration of this subject, that the law is deficient.

Finally, given the unsatisfactory nature of the judge's reasoning on a matter of such general importance, in this case, it would be extremely useful to obtain a decision of the Inner House which will provide general guidance on the points raised.

COLIN BOYD

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constiti Interest	General Awareness
First Minister Deputy First Minister Minister for Justice Deputy Minister for Justice Minister for Parliamentary Business Minister for Health Solicitor General					

PS/Perm Sec
 PS/LPS
 PS/ED
 PS/JD
 PS/HD
 PS/Solicitor
 Press Education
 Shirley Ferguson
 Colin Troup

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From: Minister for Education and Young People
22 May 2006

Lord Advocate

**MCEWAN V HENDRON AND OTHERS
LIST D SCHOOLS – ABUSE CASES
ARGUMENT ON TIME BAR**

Thank you for your helpful note of 8 May 2006 outlining the reasons you consider it appropriate to continue to insist on the time bar grounds of appeal in this case.

As you know, I have previously expressed a view that we should not be pursuing time bar arguments in such cases. I understand your reluctance to forego any legitimate and available argument and your concern for the public purse. I wonder though whether there may be merit to forgoing such arguments in this particular case for the following reasons:

- In this case, the actual abuse has already been proven in the criminal case;
- If we successfully pursue time bar points, the courts will not have the opportunity to fully consider the question of who should be held liable in such cases;
- If people are unable to obtain a remedy through the civil courts, even where the abuse has already been proven, it is likely to increase the political pressure for a compensation scheme, although placing us in a position where it would be difficult to design such a scheme as we would have little guidance from the courts about appropriate levels of compensation.

Colleagues may also have a view on these issues, and so I am copying to First Minister and Minister for Justice in case they have comments on the wider implications.

PETER PEACOCK

22 May 2006

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister		X			
Deputy First Minister					X
Minister for Justice		X			
Deputy Minister for Justice			X		
Minister for Parliamentary Business					X
Minister for Health and Community Care					X
Solicitor General			X		

Crace S (Sandra)

From: Ferguson SE (Shirley)
Sent: 19 April 2006 15:10
To: Troup C (Colin)
Cc: Henderson RM (Richard) (Solicitor); Thomson KAL (Ken); Lyon C (Caroline)
Subject: FW: McEwan v Hendron

Colin,

Some time ago we spoke about whether the Lord Advocate was still intending to brief Cabinet colleagues about the above case. The position was not then clear and it appears not to have moved forward. You will recall that draft briefing was prepared in the event that it was required, and I am attaching that below for ease of reference. There was the suggestion, as noted, that the Lord Advocate might wish to speak to Paul Cullen, our senior Counsel and to Mr Peacock.

We are now at the stage in proceedings where we have to lodge written Notes of Argument by 25 May and Counsel has the papers to enable our Note to be prepared. Our clients have been asking if the arguments on timebar are to be maintained. It would be helpful to have an indication as to whether the Lord Advocate remains of the view that we should proceed with all available arguments including timebar, or if this may be subject to further discussion. We have suggested to Counsel that they await our further instruction on this aspect of the Note.

Perhaps you could let me know how matters should be taken forward. Obviously, I should be happy to discuss or to provide any further information which may be required.

Shirley

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

From: Ferguson SE (Shirley)
Sent: 16 December 2005 16:38
To: Troup C (Colin)
Cc: Henderson RM (Richard) (Solicitor); Thomson KAL (Ken)
Subject: McEwan v Hendron



ARTHUR MCEWAN v
 THE REVEREND J...

Colin,

I have now managed to discuss with my clients and have made a couple of minor changes to address their comments. I have left these in track so that you can easily see their limited extent. They were really for clarification rather than points of substance.

I have not added in the argument about the public purse. I am not sure on reflection that it would necessarily be helpful to include, but if you feel that it is a point which should be made, then let me know.

I am not sure how the matter is to be taken forward. If the Lord Advocate does intend to speak to Senior Counsel and to Mr Peacock, then obviously I am happy to do any revision of the Note which may then be necessary to reflect any discussion. Otherwise, if there is anything further which is needed by way of information, then please let me know.

Shirley