

PS/Mr Peacock

**Copy: Lord Advocate
PS/First Minister
PS/ED
PS/LPS
PS/Solicitor
PS/JD
Miss Edgar
Mr McNicoll
Mrs Donnelly
Mr Foubister**

Committee debate on Petition PE 535

1. As you know, the Lord Advocate and Mr Peacock are now content with the First Minister's statement. This minute deals with Mr Peacock's draft speech.

2. The outstanding issue relates to what legal risks there may be in relation to the appointment of a rapporteur to look into the regime and procedures in place at the time when these events were happening, with a view to enabling those affected to discover how it was that this conduct had been allowed to happen..

3. It appears that a decision to set up such a process would run the following risks – depending upon the precise terms of reference which were settled.

- First, one of the defenders to one of the current litigations might seek a judicial review of the decision, on the basis that the issues under investigation were precisely those which were in dispute before the courts. The Executive would be said to be interfering with matters which were sub judice.
- Second, even if none of the parties to the litigation were sufficiently concerned to take action, the court might take note of the matter, and raise questions with the Executive, perhaps through the Lord President.
- Third, if objection were not taken to the production of the report, there is a further possibility. It is that once the report was completed, it would effectively amount to an expert report on the deficiencies or otherwise of the processes in place at the time. We appreciate that Mr Peacock wishes to publish it. Even if that were not the case, parties to the litigation might well seek publication of it to assist their case in court.
- If the report's conclusion was that the then administration adequately performed all the duties incumbent upon them, and did not omit to do anything which they might reasonably have done, then that would be helpful – at least to the Scottish Ministers. On the other hand, if it pointed up perceived deficiencies of commission or omission then, even if any limitation period had expired, it might be difficult for Ministers to refuse to consider some *ex gratia* compensation scheme.

4. It is not possible to suggest an absolutely safe way of avoiding all these risks, not least because it may prove impossible to devise terms of reference which would meet the aims set out above and avoid cutting across what is happening in the court. Once a firm decision to set up such an investigation has been taken, and announced, the Executive is vulnerable..

5. In the light of the above, we would suggest that the Minister should not commit himself to doing more than exploring the possibility of setting up an investigation. He might also wish to undertake to discuss the issues with other interested parties. We could then consider, in the light of any representations made by them, what the longer-term risks were.

6. We understand that Mr Peacock is considering a version of his speech which reflects the above advice.

Patrick Layden

P J LAYDEN
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