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From Richard M Henderson  
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25<sup>th</sup> November 2004

PS/ED

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**PETITION PE 535 – ALLEGATIONS OF INSTITUTIONAL ABUSE – POSSIBLE APPOINTMENT OF A RAPPORTEUR**

**Purpose**

- 1 To outline certain legal issues which may be relevant to development of policy in relation to the possible appointment of a rapporteur in connection with child abuse allegations.

**Timing**

- 2 Immediate. This note is relevant to issues which are to be the subject of Parliamentary debate on 1<sup>st</sup> December.

**Issue & Summary of advice**

- 3 Advice has been sought from us as to the implications of appointment of a rapporteur to investigate, in broad terms, how abuse in children's homes etc from the 1950's to the 1980's was allowed to take place without the perpetrators being held to account. The precise terms of reference of and procedure to apply to the investigation by the rapporteur are not known.
- 4 There are a number of areas in which such an investigation might have serious legal implications for Ministers. Thus
  - 4.1 Any investigation in this context might significantly undermine the ability of Scottish Ministers successfully to defend pending litigation. There are currently some 80 actions for damages pending in the Court of Session and a further 20 legal aid applications. We understand that there may be up to 1000 claims in prospect including @300 arising from List D schools.
  - 4.2 There is a real risk that any such investigation would furnish claimants with the evidence which they need in order to make out their case based on an inadequate supervisory regime. If the findings and recommendations of the investigation suggest that there is a real issue to try between the parties on the merits of the claims then our view is that the Court will exercise its discretion to

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allow the claims to be brought out of time and that the case as pleaded against the Scottish Ministers is unlikely to be held to be time barred. It is possible, although not very likely, that a different view might be taken in relation to the claims against the other defenders.

4.3 It may not be useful to attempt to quantify the resultant liability and it would in any event be impossible to quantify any liability without detail as to individual cases, but on the basis of post traumatic stress disorder cases awards of between @£3K and @£30K would not be unprecedented<sup>1</sup>. Cases involving sexual or physical abuse involving young victims are likely to be at the upper end of the range. Applying such an award to @1000 claims would, at the upper end, produce a damages liability of @£30M. That figure would not take account of damages for loss of earnings or pecuniary loss.

4.3 Although the terms of reference, when adjusted, might not envisage that the rapporteur would make findings in relation to specific allegations of abuse or specific establishments at which abuse was alleged to have occurred, his or her report would have to be very carefully drafted to ensure that there were no adverse findings in relation to specific individuals who might seek to argue some detriment and in respect of which they might seek some redress.

4.4 In addition the religious orders, school managers or local authorities concerned might seek to challenge the adoption of a procedure such as this which may result in adverse findings against them without their having opportunity to challenge the evidence or make submissions about what conclusions should be drawn from the material before the rapporteur.

### Background

- 5 Patrick Layden and I along with Lindsey Nicoll and Lindsay Anderson of this office met with Colin MacLean and Rachel Edgar last night in response to a request from the Department for advice directed at the proposal; that a rapporteur be appointed to investigate circumstances surrounding probable instances of child abuse in a number of care facilities including list D schools in the 1960's and '70's. We discussed the nature of the proposed appointment and the possible terms of reference.
- 6 We understand there have been significant demands for a public inquiry into the abuse of children while they were resident in children's homes or residential schools. I understand that the matter was discussed at Cabinet on Wednesday 24<sup>th</sup> November in the context of consideration of the terms of an apology which might be offered by the Minister in the course of the scheduled Parliamentary debate at the instance of the Petitions Committee on 1<sup>st</sup> December. I understand that the terms of the apology have been and are being discussed with OSSE but that the issue of appointment of a rapporteur was not the subject of discussion within the Department before Tuesday 23<sup>rd</sup> November.
- 7 We are now aware from the Department that there are allegations of such abuse dating back to the 1910s, but that most such allegations now emanate from people who attended these institutions in the 1950s to '80's. Organisations such as INCAS (In Care Abuse Survivors) are active in this area. Most commonly the allegations relate to

<sup>1</sup> Figures derived from Kemp and Kemp and based largely on England and Wales awards

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institutions run by religious orders, in particular the Sisters of Nazareth and the De La Salle Brothers, or by charities, such as Barnardos and Quarriers.

- 8 INCAS are pressing for a number of matters including an explanation of why abuse was allowed to take place. They also seek compensation. Ministers see no need for a public enquiry to achieve many of the outcomes sought. The Minister has already made clear in his evidence to the Petitions Committee that he recognises that abuse took place and that it was unacceptable.
- 9 The purpose of appointment of a rapporteur is to meet the strong wish for an explanation of why the abuse was able to take place. The Department are seeking advice as to legal implications of such a course.

**Comment**

- 10 There are a number of levels on which this matter has to be considered. I have to emphasise that the following comments are essentially preliminary because we have not had time to consider the matter fully and in any event the proposal appears still to be in a state of development. However the matter is obviously very urgent. The following issues may be relevant.
- 11 Issues arising will include;
  - 11.1 whether the appointment and proceedings by the rapporteur are competent
  - 11.2 whether the appointment would expose the Executive to liability or prejudice its position otherwise.
- 12 *Competence – Article 6 issues* - We understand that the intention is that the rapporteur will be looking at systems in general, not at individual cases, it might 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. It might also be argued that an 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 we 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 tightly drawn, to have that effect.
- 13 *Competence – Article 8 issues* - 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

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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 may be a risk that it could have that effect.

- 14 *Protection of Children (Scotland) Act 2003*- 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.
- 15 *Possible effect to prejudice proceedings or attract liabilities – Current litigation* - There are currently some 80 actions for damages, which touch on this area, pending in the Court of Session and a further 20 legal aid applications. These have been sisted pending the hearing of a "test case": *Arthur McEwan v The Reverend Joseph Hendron & Others*. The claims against the Scottish Ministers relate to alleged abuse at List D Schools run by the De La Salle Order of monks during the period 1950-1980. The claims are directed against the religious institutions, the managers of the various schools, and the Lord Advocate. We understand, however, that around additional 1,000 claims may have been intimated against religious and local authorities in relation to alleged abuse which occurred in residential establishments.
- 16 The Scottish Ministers submit that (1) the Pursuer's averments that SED employed the monks and other staff or was otherwise responsible for them, and that SED had some knowledge of abuse or the risk of abuse, are irrelevant and lacking in specification; (2) the Pursuer's averment that SED was vicariously responsible for the headmaster's breach of statutory duty is irrelevant and lacking in specification; (3) the pursuer's averments do not show how performance of specific duties by SED would have prevented harm to the Pursuer, nor that SED had notice of the fact that boys were being regularly and routinely assaulted; (4) the pursuer's case is time-barred, and he does not address the averments made by the 18<sup>th</sup> Defender regarding when he acquired awareness of the facts stipulated in section 17(2)(b) of the Prescription and Limitation (S) Act 1973.
- 17 The 1<sup>st</sup>-8<sup>th</sup> Defenders (representatives of the De La Salle order) rely on the time-bar argument and the point at which the Pursuer became aware of the effects of the alleged abuse. They also argue that the Pursuer's averments that the Order is vicariously liable for the acts and omissions of its members are irrelevant, in the absence of specification of the relationship between the monks and the Order. These Defenders argue that the monks were not employed by the Order.
- 18 The 10<sup>th</sup>-15<sup>th</sup> Defenders (representatives of the managers) make similar points regarding time-bar, and the lack of a basis for attributing personal responsibility or vicarious liability to the managers. They also argue that the 'Managers' of St Ninian's Approved School is not a body existing as a separate legal entity from its individual members, and accordingly cannot be sued. They argue that the groups of managers or boards of management were voluntary associations, and that individual members of voluntary organisations are not liable for delicts carried out in the course of performance of the functions of such associations.

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- 19 A debate has been fixed on these various issues and has not yet been completed- a further day has been set aside on 13 December but it is possible that more time will be required. In the course of submissions for the pursuer made on 27 September their counsel Colin McEachran QC introduced a new argument which had not been touched on by his Junior and cannot be found in the Pursuer's pleadings. He submitted that the Scottish Education Department had been under a duty to take reasonable care to provide an adequate system to ensure that no child was exposed to a risk of injury. Senior Counsel for the Lord Advocate (Gerry Moynihan) has pointed out that this duty has not been pled at any point by the pursuer. Neither in pleadings nor in submissions has the pursuer offered any specification of the scope and content of any duty to provide an "adequate system", nor pled what the Secretary of State ought to have done in performance of such a duty, or how he was in breach thereof. At this late stage in the debate, the Pursuer is seeking to fundamentally alter the basis of his submissions, without amendment. Senior Counsel has prepared a Supplementary Note of Argument dealing with these points, which he intends to address at the continued hearing on 13 December 2004.
- 20 The points raised in the debate relate to the relevancy and specification of the pursuer's pleadings. In the event that the case is not dismissed at this stage the Court will have to go on to consider the issue of time bar.
- 21 We think that an investigation of the nature proposed might significantly undermine our ability to successfully defend the pending litigation. Even if the points taken at debate on the relevancy and specification of the pursuer's case based on a duty to provide a reasonable system to ensure that abuse did not take place are accepted it is likely that further claims with more refined arguments on the inspection and regulatory regime will be advanced. An investigation into the current and past regimes will inevitably draw attention to the inadequacies of the former system by today's standards. The question for the court will be whether the systems in place historically fell short of acceptable standards at that time but in the absence of a clear contemporaneous benchmark there will be a temptation for the court to judge the matter with the benefit of hindsight and to apply modern standards of duty of care to past events. There is therefore a real risk that the investigation will furnish claimants with the evidence which they need in order to make out their case based on an inadequate supervisory regime. The Executive has undertaken to make its files on this subject open to inspection by the public subject to redaction of personal material and some of this potential evidence will come into the public domain in any event. However, the rapporteur will analyse and comment on the evidence and may have access to documents currently in the hands of third parties which would not be covered by the undertaking.
- 22 If the findings and recommendations of the investigation suggest that there is a real issue to try between the parties on the merits of the claims then our view is that the Court might exercise its discretion to allow the claims to be brought out of time and that the case as pleaded against the Scottish Ministers is unlikely to be held to be time barred. It is possible, although not very likely, that a different view might be taken in relation to the claims against the other defenders.
- 23 In the lead case the pursuer seeks damages of £100,000 in relation to psychiatric injury. The pleadings are in brief terms and we have not seen any medical evidence

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in support of the claim so it is not possible to quantify the claim with any degree of accuracy but if it is established that the pursuer is suffering from severe PTSD the claim could be worth in very round terms between £29.9K and £62K. Other claims may be worth more or less than that figure. It is also worth noting that the pursuer in the lead case does not aver that he has suffered any financial loss. It is quite possible that other claimants may seek to argue that the psychiatric injury which they have suffered has adversely affected their earning capacity and that they have suffered financial loss as a result of the abuse.

- 24 I have had the opportunity of a brief discussion with the Lord Advocate on the matters set out above, although this note has not been cleared with him. It goes without saying that if you would like to discuss any of the issues arising then we would be happy to do that.

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25<sup>th</sup> November 2004