

Scottish Child Abuse Inquiry

Witness Statement of

Gerald Charles Donnachie BYRNE

Support person present: Sinead Campbell (SGLD)

1. My name is Gerald Charles Donnachie Byrne. My date of birth is [REDACTED] 1966. My contact details are known to the Inquiry. This witness statement is to give information to the Inquiry regarding some of my responsibilities as an official working for the Scottish Executive, which was later called the Scottish Government.
2. This statement is based on my recollection aided by documents. I have seen documents provided to me by the Inquiry and the current Scottish Government

Qualifications and Employment history

3. I obtained a degree in English law at University College Oxford.
4. Between 1989 and 1999, I worked at the Ministry of Defence in Whitehall.
5. I have worked in the Scottish Executive/Scottish Government since devolution in 1999. From January 1999 to February 2002 I was Head of the Police Powers and Duties Branch within the Police Division. From February 2002 until August 2005, I was Head of the Adoption and Looked After Children Branch within the Education Department. Since August 2005, I have been in the Constitutional Policy Team. I am currently leader of the Constitutional Policy Team within the Scottish Government.

Children and Young Persons Group

6. When I was Head of the Adoption and Looked After Children Branch, the structure in the Scottish Executive was that departments were divided into groups, which are now called directorates. Within each group there were a number of divisions and within each division there were a number of branches.
7. In 2002, the Adoption and Looked After Children Branch was part of the Children and Young People Group (CYPG). Colin MacLean was Head of CYPG. There were three different divisional heads during my time, Rachel Gwyon, Maureen Verrall and then Rachel Edgar.
8. In July 2004, my post as Head of the Adoption and Looked After Children Branch was divided in two because of the workload. I retained responsibility for adoption policy as we were in the middle of the Adoption Policy Review Group. Looked After Children became the responsibility of a separate branch. From July 2004, Shirley Laing took up post as Head of Branch for Looked After Children and my major involvement in matters being considered by the inquiry ceased at that time.

Responsibilities

9. The civil service hierarchy was such that divisional heads reported to the head of their group, in my case Colin MacLean, although we all had lines to portfolio Ministers. Colin MacLean reported to Mike Ewart, who was head of the Education Department, and above Mike Ewart was the Permanent Secretary.
10. I did some work in conjunction with the Minister for Education and Young People, Cathy Jamieson then Peter Peacock.
11. My branch essentially had policy responsibilities. It was not operational. When I started in the role and before it was divided in two, my responsibilities included developing policy, consultation and legislative proposals both for adoption and for looked after children. For looked after children, my responsibilities included through

care and aftercare of young people who were leaving a care setting. In some areas my responsibilities were closer to the front line as we also did a degree of delivery, for example guidance, training and budgets.

12. My role as Head of Branch for Adoption and Looked After Children included the preparation of materials and some of the submissions made to Ministers between 2002 and 2004 on the matters being considered by the inquiry. I have looked at relevant files before giving this statement. Based on recollection alone, I do not remember very much of these events in any detail.
13. A submission is a paper to Ministers asking for a decision, whereas a briefing is a document that provides information. Submissions are the authoritative advice from officials to Ministers.

Chris Daly's petition PE535 and the Scottish Executive's response

November 2002 – May 2003

14. In August 2002, Chris Daly lodged a petition (the Daly petition) with the Scottish Parliament's Public Petitions Committee (PPC) which asked for various things, including an inquiry into past institutional abuse and an apology made through the Scottish Parliament. The petition also urged other bodies to apologise unconditionally and set out proposed terms of reference for a public inquiry.
15. The PPC sent a letter dated 9 October 2002 to Trevor Lodge, an official in the Scottish Executive Health Department, seeking comments on the matters raised by the Daly petition.
16. There was discussion about who was best placed to lead given the number of issues there were. My branch accepted the lead because of the responsibility of the state for children in care, which was more our policy area.

Submission of 13 November 2002

17. On 13 November 2002 I provided an initial submission to the Minister, Cathy Jamieson. Our branch drew on other divisions and departments for information, advice and opinions before providing that initial submission. From all that material, a draft submission was sent round the various departments and an homogenised piece of advice produced.
18. Submissions normally present a range of options, whereas this was addressing a sort of yes/no question. The Daly petition was asking for a public inquiry and an apology and asking us to change our then current policy, which was that we would not have an inquiry.
19. The initial submission focused on the call for a public Inquiry and whether the Scottish Executive's position on that should change. I was looking for agreement to send a response to the PPC that the Scottish Executive had no plans to hold a public inquiry at that time. I sought agreement to send out a memorandum in those terms to the clerk to the PPC by 15 November 2002, which had been the PPC's deadline that we were all working towards.
20. I made the point in the submission that I had consulted colleagues and we advanced two main reasons why there should be no inquiry at that time. One was that the nature and scale of the problem appeared to be different in Scotland than elsewhere and that there was not currently evidence of systematic widespread abuse throughout residential establishments in Scotland as appears to have existed elsewhere. The other was that the events were some time ago and there had been a number of review and initiatives to improve child protection since.
21. In saying that there was not currently evidence of systematic widespread abuse, that was based on information about criminal cases, civil claims, inspections and reviews. I do not now remember there being a precise meaning for the phrase "systematic

widespread abuse”, nor a distinction between “systematic abuse” and “systemic abuse”.

22. Cathy Jamieson was not happy with the initial advice as regards an inquiry. She felt there needed to be further consideration of what we could do and that the door should be left open. She was not convinced by the section of officials’ advice on the scale and nature of the problem. She did not think it “stacked up” that the Scotland’s practice was better than elsewhere. She was someone who had considerable personal experience in this area.
23. In the initial submission, we also addressed the issue of an apology, which was another aspect of the Daly petition. We stated that we did not think it would be appropriate for the Scottish Parliament or the Scottish Executive to issue an apology at that time when the extent of the state’s responsibility for institutional abuse was unclear.
24. Cathy Jamieson was not content with this part of the advice. She considered that notwithstanding whose responsibility it was, the Scottish Executive should make it very clear that such abuse was wrong. She thought we should acknowledge the fact that an apology had been sought. The initial draft, she felt, offered no comfort in that it advised there should be no inquiry and no apology and she did not want that.

Revised submission of 14 November 2003

25. Our response was very quick with further advice sent to the Minister on 14 November. The proposed memorandum to the PPC was revised to keep open the possibility of an inquiry. Rather than offering an apology, the revised memorandum offered expressions of regret.
26. The advice in the revised submission was that we did not think the Scottish Executive could agree to the request for an inquiry without all the pros and cons of that particular form of investigation or some other forum being discussed.

27. It would be fair to say that the advice was to maintain a holding position pending further discussion of the issues.
28. On 18 November 2002, Cathy Jamieson said she was content with the revised response.

Response to the PPC

29. The memorandum as revised was sent to the PPC, but was then pulled back because the First Minister's office referred the Daly petition to a special advisor, Jeane Freeman, on 19 November 2002. The First Minister's office requested comments from the special advisor on what was being recommended.
30. The formal response was officially given to the PPC on 17 February 2003. The final version of the response that went to the PPC in February 2003 was different to the one that Cathy Jamieson approved in November 2002, in particular the expression of regret was removed.

Meeting of 6 January 2003

31. A meeting was planned for 6 January 2003 at the request of Cathy Jamieson to discuss what she termed as institutional child abuse. In preparation for that meeting, more information was gathered from a variety of departments. I was at that meeting, but I have no recollection of it at all nor of events that led to the revised response to the PPC in February, and I have not seen documents relating to the drafting of that response.
32. Our initial response had been very focused but it would be fair to say that Cathy Jamieson was driving for a more general discussion of the wider issues such as what alternatives and what ways ahead there were. We considered the issues from a number of perspectives, including child protection and the regulatory regime.

September 2003 – December 2004

Submission of 23 September 2003

33. The next major period of activity in which I was closely involved seems, on the documents, to have started in September 2003. On 23 September 2003, Colin MacLean made a comprehensive submission, with contributions from my division and others, to the Minister of Education and Young People, now Peter Peacock. This submission was prepared for a meeting of Ministers on 25 September 2003. Its general purpose was to advise that the Scottish Executive should not set up an inquiry into historical claims of abuse in residential institutions, but should instead improve services for adult survivors and offer help to alleged victims with access to files held by the Scottish Executive.
34. There was a big distribution list for this submission, some for general awareness and some for portfolio interest. General awareness was for the First Minister (FM) and the Deputy First Minister (DFM) within the coalition that was in government at the time. There was obviously a high public or political dimension to the policy and so it was appropriate that the FM and DFM were made aware what was being considered.
35. In the submission, a range of options were identified that the Scottish Executive could take in response to the allegations. Those options were (1) a full inquiry, (2) a truth and reconciliation commission, (3) no inquiry, but a package of other measures and (4) to do nothing.
36. The advice from officials was that the Scottish Executive should not set up either an inquiry or a commission. The submission stated that neither the weight of cases nor the nature of the allegations indicated that there was either a systemic failure or evidence of organised abuse which might justify a full inquiry.

Research and a comparison with Ireland

37. Researching what had happened in Ireland was one of the first things officials did. That set of circumstances was probably the benchmark against which we were comparing ourselves.
38. The Irish situation was one that everybody was very conscious of. An official, Peter Beaton, had prepared a Minute dated 23 October 2002 for the Minister of Justice, Jim Wallace, as the legal advisers had highlighted that there were court cases ongoing against the Scottish Executive arising out of alleged abuse of children in institutional settings. In his minute, Peter Beaton had considered the Irish position and it formed a constant backdrop. As I recall, the Irish Inquiry was set up not long before these events and I am not sure how far along they had got at this time. The challenges that the Irish Inquiry were facing were becoming manifest at that point and it was therefore very important for us to keep up to date with what was happening. Ms Jamieson asked specifically about Ireland in November 2002, and my further submission to her of 14 November had an Annex on the subject.
39. The Scottish Executive's Research Team provided some information regarding other international perspectives.

Arguments against an inquiry

40. There were quite a lot of arguments in the submission to support the advice not to have a public inquiry. Inquiries are very commonly asked for, but not commonly held. Furthermore, there are different models of inquiry. A full public inquiry is a very large undertaking, particularly those that are judge-led, and such inquiries are reserved for very serious and compelling circumstances. The level of evidence of a failure of the state apparatus must be such that such a level of response can be justified, as much as what the purpose of the exercise would be.
41. One of the major arguments that can be seen in most of the submissions is what would be the point of having a public inquiry. We asked what could be learned that

would be of prospective use. That, in our view, was one of the purposes of an inquiry, rather than necessarily establishing the truth about past events. The submissions show that we considered lessons had already been learned and there was not therefore a compelling argument for having an inquiry.

42. The ongoing civil legal proceedings against the Scottish Executive was seen as a complicating factor, rather than as something that would rule out an inquiry.
43. Officials considered what could be gained from holding a public inquiry including various things such as giving people a platform and giving people a sense of being listened to. We did, however, query what the objective was. Would it be recommendations or a compensation scheme, or would it be people having the opportunity to talk? Would people be satisfied and would that be sufficient? The answer to those questions was considered to be 'no' all the way through.
44. The submission of 23 September 2003 set out the options and the reasons for the advice that was being given. To do nothing was not recommended as an option. A truth and reconciliation commission was ruled out for different reasons. It was not thought a truth and reconciliation commission would serve any significant purpose and indeed, even if it was considered a form of closure, it might be more harmful rather than beneficial.
45. It was thought that it might be better to concentrate on improving services. What was put forward as being the most attractive option was to introduce a package of measures to that end as well as giving access to relevant records held by the Scottish Executive.

Compensation scheme

46. The submission of 23 September 2003 set out both the moral and the legal arguments for a compensation scheme. The advice was to put this issue on hold pending how the courts resolved the issue of time bar. We were relying on the normal processes in the civil justice system in the first instance. We considered a

legal remedy should still be pursued, but if that turned out to be blocked because of time bar or other issues, we might have to look at compensation schemes.

Meeting of Ministers on 25 September 2003

47. At the meeting of Ministers on 25 September 2003, the Ministers present accepted the advice given in the submission of 23 September 2003. I now have no recollection of this meeting, although I took the minutes. The meeting was chaired by the Minister for Education and Young People, Peter Peacock.
48. There would not commonly be many speaking parts for officials present at such high-level meetings. The only circumstances would be if officials were asked questions and any points officials might make would not be recorded in the same way. Officials' comments would not be given the same prominence.
49. It is noted in the minute that one of the Ministers said that a public inquiry was unlikely to help individuals or improve things for the future and that any lessons had already been learned. The cost implication was also raised by some of those present and there was a lot of discussion about accessing of files.
50. There was also discussion at that meeting about legal liability for compensation and that legal liability, rather than moral liability, might be limited because of the nature of involvement of the Scottish Executive in List D schools, which were the subject of claims. The point was made that compensating where there was no strict legal liability would raise difficult issues.
51. It was discussed that consideration needed to be given to how other organisations were handling claims against them and how they were supporting people who had come forward as victims. There seemed to have been some feeling that Barnardo's had a particularly enlightened approach.
52. Consideration was given to what the experiences of other countries had been, although doubts were expressed by one of the Ministers about the effectiveness and

cost of the Irish approach. There was reference to the Canadian model, the no fault scheme, and to the Australian approach.

53. The chair, Peter Peacock, is recorded as concluding that the package of measures had been agreed as the preferred option of Ministers, accepting the officials' recommendations.

Submissions of 8 and 20 October 2003

54. I was involved in preparing a submission of 8 October 2003 to follow up the submission of 23 September 2003. This was a more specific submission about responses to outstanding correspondence from the PPC and from MSPs. This is what is known as a "handling strategy" for how we presented and handled correspondence in public-facing matters.
55. Response to the correspondence from MSPs was late and the PPC was by then looking for something by 24 October 2003. It was agreed that the Scottish Executive should not plan to have an inquiry or a commission, but should look at a package of measures as recommended in the previous submission.
56. There had been some pronouncements on various matters by Ministers and there is also a note of caution in this submission to check what might have been said publicly. There is specific reference to Cathy Jamieson being quoted in the Sunday Mail on 29 June 2003, in which she said that there were a number of areas that needed to be changed after the conviction of staff of St Ninian's. There was also some suggestion in that article that the Justice Minister was considering some form of commission or tribunal system.
57. On 20 October 2003, I made a submission to Peter Peacock to inform Ministers of planned next steps on historical claims of abuse at residential and List D schools following the meeting of 25 September.

Minute from Peter Peacock to Jack McConnell - 'Allegations of Historic Abuse at List D Schools' – December 2003

58. Just before Christmas 2003, Peter Peacock sent a minute to the First Minister, Jack McConnell, headed up 'Allegations of Historic Abuse at List D Schools'. Somebody would have drafted that minute for him. It may have been me, but I cannot remember. I cannot remember events during the period between September and Christmas 2003 when the Minute was sent by Peter Peacock, and I have not seen documents for the period between 20 October and December.
59. I think the First Minister was sent this Minute because he had expressed a personal interest in the subject. My handling strategy of 8 October 2003 refers to comments made by the First Minister and he had been copied into all of the submissions so far, which indicates his interest. Ordinarily we tried not to bombard the First Minister with anything unless he had an interest in the subject.
60. It was a big decision and this was a big political issue. To have the First Minister's blessing was critical. The First Minister's interest and commitment is clear from the comments made by him, which were passed from his Assistant Private Secretary to David Stewart in Mr Peacock's Private Office.

First Minister's comments in December 2003

61. The First Minister responded on the 22 December 2003 with a fifth option, which was the appointment of an independent expert. I read the First Minister's comments as indicating that a rather more limited option than a full inquiry would be his wishes. He was suggesting what became known as a *rapporteur* later on, which was something different from the other options that had been discussed. He was not ruling out some form of inquiry or investigation into the past, although it was quite difficult to know what his proposal actually was.

Submission of 20 May 2004

62. In my submission of 20 May 2004 to Peter Peacock, I addressed the further option put forward by the First Minister.
63. I do not have a particular recollection of what happened between Christmas 2003 and May 2004, but I have found notes that I put up to my team and to Colin MacLean at the time, which set out how we got to where we were. Those notes are essentially a *mea culpa* from me, acknowledging that we had become bogged down. We had been trying to trace various outstanding bits of correspondence and had not focused on the further option put forward by the First Minister.
64. The notes acknowledge that we had not directly taken on the First Minister's suggestion because other things were happening elsewhere and there had been a focus on another piece of work. Ideally at that stage we would have wanted to have been in the position to give a clear decision on the First Minister's suggestion.
65. This was what led to the reorganisation of my branch. It had become too much to try and run both adoption and looked after children.
66. The submission of 20 May 2004 actually went into circulation in draft in April before letters were sent by the PPC to Peter Peacock and the First Minister on 17 and 19 May 2004. The submission of 20 May 2004 was a long submission and would have taken time to compile. Between December 2003 and May 2004, there had been meetings and a degree of engagement with some organisations. However, I accept that for PPC to have written formally to the First Minister and the Education Minister would indicate a degree of impatience on their part by then.
67. I had been talking to the clerk to the PPC all the way through. However, I think it is fairly clear at that point that the Convener, Michael McMahon, was not satisfied with that channel of communication. He was not satisfied with an assurance that something was coming and so he escalated it.

68. As regards the First Minister's proposal, on which advice was given in the submission of 20 May 2004, it was not thought that proposal would have any clearer purpose than any other proposal that officials were advising against.

Submission of 8 June 2004

69. On 8 June 2004 Colin MacLean made a submission to Peter Peacock and the First Minister which restates the whole argument from the start and goes into a bit more detail as to why officials were advising against an inquiry.

70. This submission is what is called a 'one-two Minute', which is addressed to two Ministers and is asking them to agree something. In this case, the submission was addressed to both the Minister for Education and Young People, Peter Peacock, and to the First Minister, Jack McConnell. As this was a one-two Minute, it was specifically asking for the First Minister's agreement.

71. I am a bit unsure about the genesis of this submission, but it may be that Ministers had looked at the submission of 20 May 2004 and said that they wanted to think about it again.

72. In some ways this submission is expanding on some of the arguments surrounding the fundamental issue of an inquiry and is trying to get an agreed response to the two letters from the PPC. It comes to the conclusion that it would not be helpful to have an inquiry, although it recognises that there are strong arguments in favour.

73. There were responses from Cathy Jamieson and Peter Peacock to this submission, following which there was a fairly extensive discussion about media and the handling of the Scottish Executive's position on the issue. We were trying to prepare the ground for announcements of the decision. It would be wrong to make an announcement without preparing interested persons first and giving them as much forewarning as possible. At this point there had not been a substantive public response.

Email of 24 June 2004 from Colin MacLean to Angus Skinner

74. On 24 June 2004, Colin MacLean sent an email headed 'List D Schools' to Angus Skinner and copied in myself and Shirley Laing. There had been some discussion involving Angus Skinner about issues surrounding Kerelaw and I posed the question to Angus Skinner about whether there were any "hostages to fortune" or "smug complacency" with regards to the current problems at that time at Kerelaw.
75. In response, Angus Skinner said that the important point was the one made by Cathy Jamieson, namely that we accepted that abuse in this case happened and that there was absolutely no cover up. He said that it was a matter for police investigation and action and that there was no need for any further inquiry and that the Kerelaw situation did not alter that.

Emails of 25 June 2004

76. There are emails of 25 June 2004 I have recently seen which basically say that the letters to the PPC and MSPs did not go out on 25 June 2004 as had been planned because the First Minister had not cleared them. I talked to INCAS on the phone and I told them where we were.
77. The signed letters were cleared for release on 30 June 2004, right before the recess of the Scottish Parliament, which was not necessarily ideal.

Letter of 30 June 2004 to Michael McMahon, Convener of the PPC

78. The release of the letters enabled Peter Peacock to write to Michael McMahon on 30 June 2004. This letter was effectively the substantive response that had been promised and was also a response to the two letters in May 2004 sent by the PPC to Peter Peacock and the First Minister.

79. The letter of 30 June to the PPC set out the position the Scottish Executive had developed over the course of eighteen months. This was that an inquiry would not prevent future abuse, nor help the needs of survivors, nor be in the wider public interest. Peter Peacock was very open about all the factors and this was about as close to the advice he had been given by officials and the positions that had emerged as would normally be seen in public.
80. In his letter he says that after consideration an inquiry had been ruled out and that we had concluded on balance that an inquiry would not achieve the purposes that were desired. It is not clear in the letter whether the *rapporteur* investigation, suggested by the First Minister, would be taken further. There is certainly no evidence to suggest a *rapporteur* investigation was being considered in the background. I think there was much more active consideration of that later.
81. By the time the PPC received that letter they had already decided to call the Peter Peacock to give evidence to the PPC on 29 September 2004.

'Lines to Take' document

82. By early September 2004, my involvement was coming towards an end following the restructuring of my branch and Shirley Laing had taken up post.
83. In what is known as a 'Lines to Take' document, prepared for the Peter Peacock's appearance before the PPC on 29 September 2004, there was mention of the civil cases that were ongoing at the time. I assisted in collecting the briefing material to go into the overall pack that Shirley was preparing. The document addresses how the Minister should respond to a direct question regarding what was being alleged against the Scottish Executive and why we were defending those cases and on what basis.

Apology

84. I do not recall much discussion about an apology before 29 September 2004 when Peter Peacock appeared before the PPC. There was no mention of it in the submissions of 20 May or 8 June 2004.

Closing thoughts

85. In my time we were really making up our own mind about whether there should be an inquiry and once a decision had been made we would have been in a better position to start engaging with the organisations involved. What can be seen in the almost two years of my involvement is the Scottish Executive developing its own position in regard to the central question of whether there should be an inquiry. If the answer was to be 'no', we were looking at the alternatives.

86. That is not to say that the process was taking place entirely within the Scottish Executive. Discussions had been started with other groups, particularly INCAS. We were aware that we needed to be clear that those groups who had an interest were aware what the Scottish Executive's decision was.

87. I have no objection to my witness statement being published as part of the evidence to the Inquiry. I believe the facts stated in this witness statement are true.

Signed..... 

Dated..... 10 July 2020