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KNSG 1/56, Pt. 8From: Colin MacLean
ED-CYP
23 September 2003**Minister for Education and Young People****ALLEGATIONS OF ABUSE AT RESIDENTIAL INSTITUTIONS****Purpose and recommendation**

1. To advise that the Executive does not set up an inquiry into historic claims of abuse in residential institutions but that we look to improve service responses for adult survivors, and offer to help alleged victims with access to files held by the Executive. This advice has been agreed by colleagues across the Executive.

Priority

2. **Urgent.** Ministers are meeting to discuss this matter on 25 September.

Background and discussion

3. There have been a number of allegations of abuse, sexual and physical, at residential schools over the last 40 years or so. These have resulted in a few criminal convictions, and a larger number of ongoing civil claims against those involved, mainly religious institutions but including the Executive through the role of the HMIE. A petition requesting a wide ranging inquiry has been lodged in the Scottish Parliament. Further details of the background are at Annex A.

4. We have identified a range of options the Executive could take in response to these allegations. These are:

- i. a full inquiry, in public or private, chaired by a senior figure, involving a wide ranging remit, evidence from witnesses, counsel for parties affected;
- ii. a 'truth and reconciliation' commission, allowing survivors of abuse to tell their stories, in private, not as evidence and probably without counsel;
- iii. no inquiry, but a package of other measures including access to files for legal advisers, improved health and social care services for survivors of sexual abuse, and, in some cases, compensation;
- iv. to do nothing: let existing criminal and civil cases run their course in the normal way, but retaining the health dimension.

These are discussed further at Annex B.

5. Our advice is that the Executive should not set up an inquiry or commission into these cases. Neither the weight of cases nor the nature of the allegations indicates a systemic failure or organised abuse that might justify a full inquiry. We are confident that work being done, through the Child Protection Reform Programme will address any remaining institutional issues. A commission does not provide a satisfactory forum for these issues to aired. The issue of compensation should be looked at again in the light of the Courts' decisions on the civil cases in the next few months.

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6. There are a number of immediate handling issues that we need to consider. There are outstanding replies to GFs from Fiona Hyslop MSP and Jim Wallace MSP. We also owe the Petitions Committee a further response. Draft replies to these will be submitted in the light of Ministers' meeting on 25 September.

7. More generally, we will have to examine our presentation strategy for the route that Ministers wish to follow. This would include reference to recent work on child protection, possibly the role of the Care Commission in inspecting residential establishments and other improvements in the system over recent years, as well as our more immediate plans.

Recommendation

8. We recommend that:

- i. the Executive concentrates on the service responses for adult survivors of childhood abuse as our main response to the needs of victims
- ii. the Executive looks to help those alleging abuse to access information from Executive files

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23 September 2003

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Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constituents Interest	General Awareness
First Minister					X
Deputy First Minister					X
Minister for Justice			X		
Minister for Health and Community Care			X		
Minister for Finance and Public Services			X		
Deputy Minister for Justice			X		
Deputy Minister for Education and Young People			X		
Deputy Minister for Health and Community Care			X		
Deputy Minister for Finance and Public Services			X		
Lord Advocate			X		

- PS/Perm Sec
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- PS/LPS
- PS/CSD
- Maureen Verrall, ED-YPLAC
- Gerald Byrne, ED-YPLAC
- Sarah Smith, ED-C&F
- Catherine Rainey, ED-C&F
- John Galilee, ED-ISU
- Jinny Hutchison, HD-CCD
- Dave McLeod, HD-CCD
- Elizabeth Carmichael, JD-CJS
- Fiona Robertson, OSSE
- Gillian Nelson, OSSE
- Neil Ross, OSSE
- John St Clair, OSSE
- Gordon McNicoll, OSSE
- Tim Ellis, FOI Unit
- Mike Neale, FOI Unit
- Peter Beaton, Civil Justice & International Division
- Jane MacKenzie, Records Management
- Ian Taylor, Records Management
- Laura Mitchell, NAS
- Hugh Hagan, NAS
- Press First Minister
- Press Education
- Press Justice
- Press Finance and Public Services
- Press Health
- Lindsey Anderson, Crown Office
- Adrian Colwell - Special Adviser
- Sam Ghibaldan - Deputy Principal Special Adviser
- Jeane Freeman

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ANNEX A

ALLEGATIONS OF ABUSE AT RESIDENTIAL INSTITUTIONS**Criminal and civil proceedings**

1. In the past few years there have been a series of allegations of abuse of children in residential institutions, primarily List D schools (known as approved schools before 1972) in the 1940s, 50s, 60s and 70s. Attention has recently focused on the schools run by the De La Salle Brothers, a Roman Catholic Order, following a criminal case in July 2003 in which two members of staff and a former member of the De La Salle Order were found guilty of various offences of physical and sexual abuse, and received prison sentences. There have been previous police investigations of alleged abuse at other residential institutions, some of which also ended in criminal prosecutions.

2. There are also a number of civil cases before the courts seeking damages for alleged abuse at these institutions. Most are being handled by the law firm Ross Harper (through their partner Cameron Fyfe). The Lord Advocate, on behalf of Scottish Ministers, is cited as one of the defenders along with the religious orders, managers of the schools and the local authorities. We understand that 78 such cases have applied for Legal Aid. Ross Harper have suggested that there are potentially 300 such cases. The cases are currently adjourned to see the outcome of one test case. Initial legal arguments in the case (for example, whether the actions are time-barred) are not due to be heard until June 2004, although OSSE colleagues are looking into whether this could be brought forward. Following these legal arguments, provided a relevant case has been made out against at least one of the Defenders, there will be a full hearing on the factual evidence, which may take up to another year.

Requests for access to information held by the Executive

3. As a result of the convictions at the De La Salle school in July a journalist (Marcello Mega) asked to see four Executive files relating to De La Salle schools. The files were open at the time but were referred to the relevant policy division for advice. Two were immediately closed by officials on the basis that they contained personal information about pupils and should not have been open in the first place. As a result of this the *Sunday Mail* published a further article inviting former pupils of De La Salle schools to request information from the Executive under the Data Protection Act (DPA). Strictly speaking the information they have requested does not fall within the DPA as the files are not structured on the basis of an individual, but following Ministerial agreement, the Executive has offered to examine relevant files for these individuals to see if there are any references to them on the files. This approach is practical because of the small number of applicants. However, it is planned that such files will be brought within the scope of DPA from January 2005. We would therefore have no option but to respond to future similar requests.

4. There have also been requests for information relating to the court cases. These have been handled in the normal way, with the Executive only producing information from closed files in response to a court order. For example, a file on the HMI Inspections of St Ninian's Gartmore during the 1960s has been produced for court, with some sections blanked out (redacted) when it was passed to the pursuer's solicitors.

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Files

5. We are not confident that we have a complete list of files that may be relevant to List D schools and other residential institutions. Given their age, most of the files are in the National Archives of Scotland. The Scottish Office had various functions relating to List D schools, ranging from providing funding, providing advice to the schools, staff pensions, policy issues and HMI inspections. Various searches have been done for files producing a number of them, some of which have produced relevant information as discussed above. We are not yet clear how many more relevant files may be in the archives.

6. Searching files for information relating to specific individuals could become a major, labour intensive exercise, especially if it has to be repeated many times for different applicants. If information is found and provided, the files would probably have to be redacted to hide the names of other individuals, whose privacy must be respected and who may have additional rights to protection under the DPA when it applies to such files (see Paragraph 3). Experience of a similar exercise for files relating to the Dunblane inquiry demonstrated that this can be an extremely time-consuming exercise.

7. We are currently undertaking a scoping exercise, with help from colleagues at NAS, to identify how many files may need to be recalled and examined. An initial examination of file lists suggest that are up to 1,600 files which may be relevant although we are hoping that many can be discounted without examination (on the basis of dates of papers and other factors).

Requests for Scottish Executive action on alleged abuse in List D schools

8. In February 2003, the Executive sent a memorandum to the Public Petitions Committee of the Scottish Parliament in response to Petition PE535 from Mr Christopher Daly which requested that an inquiry be held into past institutional child abuse, in particular of children who were in the care of the State under the supervision of religious orders. The memorandum stated that:

The Scottish Executive is considering whether an inquiry of the sort requested, or some other forum, should be established to look into cases of abuse in institutions in Scotland, having regard to cases that have come to light in recent years, and what other role the Executive might take in addressing these cases. The Scottish Executive will also consider the experiences of institutional child abuse in other countries.

The Public Petitions Committee has asked for a further memorandum on when the Executive might decide how to proceed.

9. No interest in this subject has so far been shown by the Cross Party Group on Survivors of Childhood Sexual Abuse.

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ANNEX B

SCOTTISH EXECUTIVE RESPONSE**Options**

1. The main options identified for a Scottish Executive response are:
 - i. **a full inquiry** – an inquiry headed by a senior figure with a wide ranging remit to look at allegations of abuse (sexual, physical, psychological) at residential institutions in Scotland over the last 40-50 years. The inquiry would have to look at individual cases and take evidence from witnesses. Given the nature of the allegations, legal representation for those being accused of abuse would be required. The inquiry could either be in public or in private. Its aim would be to establish the truth of the claims made and possibly any lessons that could still be learnt from events.
 - ii. **a truth and reconciliation commission** – a commission of experts to hear evidence in private from survivors (and possibly abusers) who wanted to come forward and tell their stories. There would be no evidential rules and no legal representation, nor would the commission come to any conclusion on the truth of these accounts. The aim would primarily be to give survivors an opportunity to be heard, although the commission could also draw lessons from patterns or common features in the information they were given.
 - iii. **a package of other measures** to address particular concerns of survivors. This would focus on the work already underway in the Health Department through their Short Life Working Group on improving services for survivors of childhood sexual abuse, its link with the National Programme for Improving Mental Health & Wellbeing, and, possibly, commitments within the Justice Department to improve responses for Victims of Crime. We would also look at giving either survivors or their legal representatives access to the files held by the Executive, both to help them and indicate we were not covering up any information. We could also consider compensation, although this might be more difficult.
 - iv. **do nothing**. We could allow existing and future criminal and civil court cases to proceed in the normal way, which is effectively what the Executive is doing at the moment. However, the HD work on survivors would continue to be relevant.

Discussion

2. The pressure for the Executive to act on this issue has not been intense. Aside from the petition to the Parliament and the two stories in the *Sunday Mail*, there has not been widespread Parliamentary or press interest. It is noticeable that the Cross Party Group has not taken up the case, and that the *Sunday Mail* story attracted less than 20 requests to see our files from former List D pupils. The criminal convictions so far have been isolated and no evidence has emerged of widespread or organised abuse at Scottish institutions. It would

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therefore be feasible at this stage to **do nothing**. This is the approach that the DfES is taking to similar allegations in England and Wales.

3. On the other hand, there have been criminal convictions, and it is hard to believe that there were no other instances of abuse at these institutions in Scotland. The civil claims now number in the hundreds. Whether or not these are justified, there is a strong case for the Executive acting now on this issue, rather than waiting for further evidence to emerge in the Courts or for political and press pressure to grow.

4. A **full inquiry** headed by a senior, probably legal, figure would provide the best opportunity to establish events in our institutions over the last 30-40 years. The aim of the inquiry would be to come to conclusions on the truth of the allegations and make recommendations. Advantages of such an inquiry include that it would not be bound by strict rules of evidence and would not be time barred. However, as these are serious allegations, we would have to look at how the evidence was given and what procedural safeguards were need for the victims and the alleged perpetrators. This would probably involve legal representation, at a minimum. The standard of proof would also have to be considered. The inquiry need not all be in public, as private sessions can encourage candour, particularly from staff members.

5. There are other issues with this option. For example:

- i. drawing up a practical remit. The allegations range from the 1940s onwards and cover sexual, physical and psychological abuse. There would be criminal allegations against individuals and failures of management. The most wide-ranging remit might be open ended, and any limitation on that would exclude individuals. We would have to let the inquiry interpret its remit in a practical way but it will need to be given direction.
- ii. the level and nature of the allegations do not seem adequate to justify a full inquiry. The allegations are against isolated individuals rather than widespread evidence of systemic failure or conspiracy by management across a number of schools.
- iii. the relationship between the inquiry and the criminal and civil justice systems would have to be considered. For example, what would happen with existing live civil proceedings (which would normally bar the Executive from taking action as the inquiry would risk prejudicing the issues before the court), would)? Would the inquiry have power to make compensation awards, or would individuals have to return to the courts? Could the jurisdiction of the Courts be excluded if individuals were unhappy with the inquiry's conclusions?
- iv. the time and costs of the inquiry are likely to be substantial. For example, the Savile Inquiry on Bloody Sunday, which will take some six years, is currently estimated at £155 million. The Hutton Inquiry, on a very short timescale, will cost over £1 million. The Executive can expect to be invited to pay for legal representation, at least for victims.

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- v. it is not clear what useful lessons could be learnt or recommendations for improving current practice could be made by such an inquiry.

We do not recommend the full inquiry option. It does not seem that the allegations that have emerged are sufficient to justify this route, nor do they disclose a pattern that would allow a sensible and practical remit to be drawn up. The inquiry is unlikely to make recommendations relevant to modern practice in residential institutions and any findings it makes with regard to compensation or the culpability of individuals would need to work with the criminal and civil courts.

6. **The truth and reconciliation commission** would avoid some of these difficulties. It would not be taking evidence in a legal sense, so representation would not be required and it would not be taking the place of the criminal and civil courts. It could have a more open ended remit as its purpose would not be to inquire into events but to allow people to come forward if they wished. It might encourage people who would not want to give evidence in a court or to an inquiry to come forward (although there could be defamation issues that would arise from unanswered and untested testimony, and those coming forward and the commission would have to be protected from such actions, provided the claims were not genuinely malicious.)

7. The major difficulty is to establish what the purpose of the commission would be. If it is to aid the (mental) health recovery of survivors by providing a vehicle for airing past grievances, there is ample evidence of disclosure of abuse resulting in traumatic episodes through the reliving of experiences. Those feeling a need to disclose past abuse would, we suggest, be better served through accessing the health and social care services available to them. If it is to learn lessons, then again their relevance to the modern system must be questionable, particularly as the evidence heard by the commission would be self-selecting, unbalanced and untested.

8. Finally, it must be questionable whether anyone would find the commission a satisfactory conclusion to this process. By its nature it could not make awards of compensation or condemn individuals. It could act as a gateway to more flexible and responsive health and social care services but it is not necessary for this process. Overall, we therefore conclude that the commission has little to recommend it as a way forward.

9. The final option we have considered is a **package of other measures**. Our main focus would be on current activity to improve services for adult survivors of childhood sex abuse. HD has a short life working group on this issue which is due to report to Mr Chisholm in February of next year. It is common for survivors of CSA to have complex needs e.g. co-existing alcohol/substance misuse problems, low self-esteem, and meeting their needs requires more flexible, integrated, and responsive care services – pointing to multi-disciplinary, inter-agency co-operation to break-down traditional service barriers. There are significant challenges for statutory providers, not least in improving education and awareness-raising of CSA, so that care workers are better trained to identify signs of abuse, and to cope with disclosure of it. Survivors wish to access services at times when they most need help and support, and the SLWG will be framing its recommendations on how best to achieve this, highlighting good practice models, and including a key role for voluntary sector providers – who are presently struggling to cope with demand for their services. This would not cover the survivors of other abuse, which make up the vast majority of the allegations so far, but would look at the services for the most serious cases. We would have to look again at

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services for survivors of physical and psychological abuse. Again, HD's National Programme for Improving Mental Health & Well-Being offers positive and concrete evidence of Ministers' responding to the identified need for improved services.

10. The other area we have looked at closely is how we could allow access to files on residential establishments held by the Executive. Officials are concerned that there may be material on the files that would be useful to those pursuing civil cases which would currently only be revealed in response to an order from the court. We also have to consider how we would handle an increase in requests to see materials under the Data Protection Act (DPA).

11. The options are:

- i. to open the files to public access;
- ii. to identify individuals named in the files and allow them access to the relevant sections;
- iii. to block out (redact) all the names on the files and allow public access to the redacted files;
- iv. to allow limited access to unredacted files by individuals or legal advisers;
- v. to continue to allow access only in response to court orders.

12. We have to respect the privacy of those identified in the files. Although we are working to clarify the precise legal position under the DPA and human rights legislation we clearly cannot simply disregard the legitimate expectations to privacy of identifiable individuals. Simply opening the files may therefore not be a viable option. If we give access to the file to a person named in it, we would probably need to redact the names of other individuals identified. A different set of papers would require to be produced for each individual who sought access. This clearly would involve considerable work, as was required when papers relating to the Dunblane inquiry were prepared for release. An alternative might be for officials to determine which papers might be relevant and redact only those, but this would require us to make a number of judgements as to causes of action which officials are not best placed to make, would not look open, and would still involve considerable work from officials.

13. A possible way forward would be to allow only the legal advisers of those taking action access to the papers. The legal advisers are better placed to make judgements on the relevance on material and we would avoid charges that the Executive was vetting material. There are also exceptions in the DPA which can allow disclosure of otherwise sensitive information to professional advisers in the course of litigation, so we may not need to redact the files. We could also approach the Law Society of Scotland to ensure that those legal advisers taking advantages of this offer were reminded that any personal information about individuals other than their clients was not to be revealed or used. However, we have doubts about the effectiveness of such warnings and this may set a precedent for lawyers to undertake "fishing expeditions" in our files. On the other hand, we would not want to deny a possible course of action to an individual if there is evidence that would support their claim.

14. An alternative might be for a neutral third party, for example a solicitor appointed by the Executive, to consider requests and trawl the files on our behalf. This would avoid the Executive being directly involved and the difficulties of disclosing personal data to people not entitled to view it.

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15. These options require further work and we recommend that Ministers agree that we examine them further with a view to allowing individuals with claims to access our files in some way.

16. We have also considered whether the Executive should set up a no fault **compensation scheme** for those alleging abuse. There could be argued to be a general moral responsibility for the Executive to meet claims, as victims would have been in the public care system under the general supervision of the Government when they suffered abuse. (The Executive's strict legal liability is one of the matters to be determined by the Courts in the current civil cases.) This case would be strengthened if existing civil claims prove to be time barred when the test case gets to court next June, leaving some genuine claimants with no recourse to compensation. On the other hand, there are arguments about setting a precedent for Executive compensation schemes in the absence of legal liability, and we would want to establish our possible compensation. A mechanism for testing claims (modelled on Criminal Injuries, for example) would have to be established. We recommend that this issue is considered further when the test case has been resolved.

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September 2003