
From: [redacted]

Sent: 06 July 2016 17:12

To: Deputy First Minister and Cabinet Secretary for Education and Skills

Cc: First Minister; Lord Advocate; DG Education, Communities & Justice; Johnston P (Paul); Director for Children and Families; Director Communications, Ministerial Support & Facilities; Rennick NS (Neil); Henderson D (Donald); [redacted]; Sinclair MA (Murray); Cackette PH (Paul); [redacted] French C (Craig); [redacted]; McAllister C (Colin); Lloyd E (Elizabeth)

Subject: OFFICIAL (SENSITIVE) - SCAI Potential Chair Candidates

PS/Deputy First Minister & Cabinet Secretary for Education & Skills

SCAI - POTENTIAL CHAIR CANDIDATES

Please find attached a briefing note ahead of Mr Swinney's meeting with the Lord President tomorrow afternoon.

Thanks,

[redacted]

Care & Protection Division
Scottish Government

[redacted]

 Please consider the environment before printing this e-mail

From: [redacted]
Care & Protection Division
6 July 2016

Deputy First Minister & Cabinet Secretary for Education & Skills

SCOTTISH CHILD ABUSE INQUIRY - POTENTIAL CHAIR CANDIDATES

Purpose

1. You are due to meet with the Lord President (along with the Lord Advocate) on Thursday 7 July for an initial discussion about potential candidates that could Chair the Scottish Child Abuse Inquiry. This note provides you with relevant background information ahead of that meeting.

Timing

2. Urgent – you are due to meet the Lord President tomorrow.

Background

3. Section 4(1) of the Inquiries Act 2005 states that the appointment of Chair to an Inquiry is made by Scottish Ministers. In accordance with the Act, when appointing a Chair to the Inquiry Ministers must have regard to ensure they have the necessary expertise to undertake the Inquiry. The Chair must be sufficiently independent and impartial and will be required to demonstrate that they have no conflicts of interest though links to key institutions, religious organisations or provider agencies which may be the subject of the Inquiry as per Section 9 of the Act.
4. The appointment should take account of the attributes required of a Chair that were identified during the prior consultation process with survivor groups and other interested parties which was carried out by CELCIS in early 2015. **Annex A** provides a full list of the attributes identified.

Potential Candidates

5. In advance of your meeting, we have provided some background information [redacted] that the Lord President is likely to discuss with you as potential candidates to Chair the Inquiry. Some brief information on each individual appears below and additional information is included at **Annex B**.

- [redacted]
- [redacted]
- **Lady Anne Smith QC** - Lady Smith was appointed a Judge of the Supreme Courts in 2001 and was appointed to the Inner House in November 2012. She has extensive experience of sitting in tribunals and working with tribunal judges and members. She was a judge of the Employment Appeal Tribunal for eight years and she chairs the Scottish Tribunals Forum and the Reserved Tribunals Group. She also represents the interests of the Lord President in relation to tribunals where the relevant law has not been devolved to the Scottish Parliament, on the Tribunals Judicial Executive Board, chaired by the Senior President of Tribunals.

Background Checks/Conflicts of Interest

6. At this stage, only very initial checks have been carried out to identify any possible conflicts of interest or wider issues and we have been unable to carry out full pre-checks at this point. [redacted].
7. In addition, the primary means of checking for possible conflicts is to ask the nominated person to self-declare any matter which might be regarded by a third party as a potential conflict. Section 9 of the Inquiries Act 2005, requires all appointed members of the Inquiry panel to be impartial. This includes any person appointed to chair the Inquiry. Section 9(1) sets out what matters might affect the impartiality of a member of the panel in this context. Section 9(2) requires that, prior to being appointed to the Inquiry panel, a person must notify Ministers of any matter which may affect their eligibility for appointment, having regard to the matters set out in section 9(1).
8. In relation to the attributes of the Chair set out in Annex A, it is unlikely that any of the proposed candidates (at para 5 above) will have direct experience of child care institutions or child abuse in care settings. Whilst this can be explored during further conversations it is recognised that there is likely to be a very limited pool of individuals who will meet all elements of the attributes of the Chair and will be of a sufficient status and calibre to Chair the Inquiry.
9. It would be our intention that you will meet or speak to the preferred candidate or a small number of candidates before making any final decision on the appointment of a new Chair. You will also have the opportunity to hear the views and opinions of survivors on the options for a replacement Chair at your meeting with them on Thursday 7 July.

Challenge of Previous Chair's Appointment

10. Finally, it may be helpful for you to be aware that following the appointment of Susan O'Brien QC as Chair of the Inquiry, the "*Congregation of the Poor Sisters of Nazareth and the Daughters of Charity of St Vincent de Paul*" brought a Judicial Review of the appointment to the Court of Session.
11. The case was brought on the grounds that Ms O'Brien had previously acted in a case against two of the parties who are likely to come under scrutiny as part of the Inquiry. In 2007 Ms O'Brien had represented two clients before the House of Lords in an appeal in which they sought damages from the *Poor Sisters of Nazareth* for alleged abuse. The petitioners relied on the common law principle of apparent bias, contending that: "a fair-minded and informed observer would conclude that Ms O'Brien was moving from the role of adviser to adjudicator in the same cause and that by appearing in the previous House of Lords case, that she had supported the claims of her clients." It was also contended that Scottish Ministers had not been entitled to appoint Ms O'Brien because she had a "close association with an interested party" to the Inquiry, contrary to s 9 (1) of the 2005 Act.
12. The case was considered by Lord Woolman and, on 1 July 2015, the Court of Session found in favour of Scottish Ministers and rejected the Petitioners' challenge. Further details on the judgement can be provided if helpful.

Recommendation

13. To invite you to:

- **Note the content of this submission ahead of your meeting with the Lord President.**

[REDACTED]

Care & Protection Division
[redacted]

6 July 2016

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
First Minister Lord Advocate			X		X

DG Learning and Justice
Director for Children and Families
Barbara Allison
Neil Rennick
Donald Henderson
[redacted]
Murray Sinclair
Paul Cackette
[redacted]
Craig French
[redacted]
Colin McAllister
Liz Lloyd

SCOTTISH CHILD ABUSE INQUIRY – APPOINTMENT OF A REPLACEMENT CHAIR

ATTRIBUTES OF THE CHAIR OF THE INQUIRY

In early 2015 a consultation process was undertaken by CELCIS (Centre for Excellence for Looked After Children in Scotland) at the University of Strathclyde on behalf of the Scottish Government. Survivor groups and individuals as well as others with an interest were asked to consider what an independent inquiry into historical child abuse should look like. As part of the consultation they were asked what attributes a Chair should have. The following summarises the response that was provided:

- Ability, skill and willingness to productively challenge those in authority, including the state.
- Able to build and maintain the confidence of survivors, relevant organisations, the general public and Ministers throughout the Inquiry process. Able to relate to, understand and engage with survivors throughout the work of the Inquiry, including awareness of the difficult experiences they will have had with government, authority and judiciary. Also a knowledge and understanding of the long-term consequences of trauma and abuse for survivors and their families.
- Command the respect of participants. Treat all participants with dignity and respect, particularly where sensitive information is concerned.
- Demonstrate no conflicts of interest though links to key institutions, religious organisations or provider agencies which may be the subject of the Inquiry (*NB: During the consultation survivors raised links to the establishment in the context of whether the Inquiry should be chaired by a Judge. Some considered that the judiciary were too close to the establishment and some examples were identified which survivors felt showed how the judiciary is tainted in relation to child abuse*).
- Provide clear leadership; be decisive and prepared to challenge others where appropriate and necessary.
- Draw out evidence and manage the process so as to respect everyone's right to natural justice and human rights.
- Able to analyse and forensically examine evidence (written records and testimony) and reach conclusions to help in making clear, outcome focussed recommendations.
- Knowledge, understanding and appreciation of human rights and how these apply in the context of historical abuse in care.
- Knowledge of child care institutions and their operation in Scotland. Clear understanding of experiences of children in care, and the changing environment of care settings over time.
- Understanding of legislation, policy and practice and its impact on child care in Scotland.

SCOTTISH CHILD ABUSE INQUIRY – APPOINTMENT OF A REPLACEMENT CHAIR

ADDITIONAL BACKGROUND ON POTENTIAL CANDIDATES

[redacted]