

**PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION**

## JOINT NOTE BY SENIOR AND JUNIOR COUNSEL

for the Respondents in the Petition of Alex Salmond, Petitioner, for Judicial Review

1 This note deals with practical matters that require to be dealt with in early course in relation to the disclosure of documents and further adjustment.

**Disclosure of Documents**

2 The petitioner's motion for commission and diligence was granted on 14 December 2018. Morag Ross QC has been appointed as commissioner.

3 In discussions with Lord Pentland at the hearing on the specification, counsel for the petitioner was not entirely clear about whether the petitioner would insist on holding an open commission. It *may* be possible to avoid such a commission taking place but clients should proceed on the assumption that a commission will take place in the course of the week of 17 December.

4 If a commission is to take place, it will be open to the petitioner to cite persons thought to be the havers of relevant documents. That includes the Permanent Secretary who is a respondent to the petition in her own right.

5 The availability of the Permanent Secretary and of the other persons most likely to be cited as havers – Judith Mackinnon, Gillian Russell, Barbara Allison and [Redacted] – should be checked as soon as possible and they should be advised of the possibility of being cited. We understand that Nicky Richards is abroad until 8 January.

6 It was suggested to the petitioner's counsel that [Redacted] may be the appropriate person to cite to speak to the searches that have been undertaken and it remains to be seen whether the petitioner's agents would be satisfied that he can speak 'for' the respondents on this matter.

**Searches undertaken**

7 We have an email from [Redacted] of 18.22 on Thursday 13 December describing the process that was undertaken of searching for documents. That email describes in general terms what was done and refers to work done by Scottish Government officials.

8 If a commission is to be avoided it will be necessary to provide the petitioner's agents with a more detailed explanation of what has taken place:

- 8.1 Who has undertaken searches? Each person who has done so should be identified, including the Permanent Secretary herself.
- 8.2 Has each person had sight of the specification of documents? Has it been explained to them by a solicitor?
- 8.3 What searches has each of them undertaken? Chapter and verse is needed in relation to hard copy and electronic documents, emails etc.
- 8.4 Barbara Allison has produced text messages. Are there any other relevant text messages about the development of the Procedure or about the complaints of Ms A and Ms B? From discussions with the petitioner's counsel it seems inevitable that further questions will be asked about social media applications including, for example, WhatsApp.
- 9 This work needs to be done immediately with a view to providing a comprehensive explanation to the petitioner's agents early in the week and in the hope of avoiding the need for a formal commission.

#### **Signature of a certificate**

- 10 At the end of last week there was discussion about the possibility of Sarah Davidson signing a certificate confirming that, to the best of her knowledge, all relevant material has been disclosed.
- 11 Such a certificate may or may not now satisfy the petitioner but if it can be given we can see no reason not to give it.
- 12 Ms Davidson should however be given advice about the implications of signing such a certificate and the need for her to be satisfied as to the searches that have been undertaken.

#### **Adjustments**

- 13 We do not consider that the respondents' pleadings are as full as they could or should be on the knowledge and involvement of the Permanent Secretary in the development of the Procedure and in the handling of the complainers concerns prior to formal complaints having been made.
- 14 We had understood that a full precognition would be taken by reference to the various documents that have been disclosed and lodged and that involve the Permanent Secretary sending or receiving emails and other documents.
- 15 The document we received on Thursday 13 December and which sets out the Permanent Secretary's position is not sufficient. It states, for example, that "I knew that some of those contacting senior staff had expressed about the conduct of the former First Minister, Alex Salmond – and that those concerns appeared sufficiently serious to warrant concern and might lead to formal complaints." We are not told how the Permanent Secretary came to know that or indeed how much she knew about the seriousness of the complaints. It also does not deal with what she knew about Judith Mackinnon's involvement in the management of complaints. It refers to Nicky

Richards and Barbara Allison but not to Gillian Russell (who was the recipient of a request from the Permanent Secretary to act as a person to whom staff members could come forward).

- 16 We would wish to have a full precognition as soon as possible dealing comprehensively with the Permanent Secretary's involvement and knowledge. We ask for this not with a view to lodging an affidavit but to enable us to respond fully to the petitioner's averments. That should be done at an early stage to avoid further criticism from the petitioner.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

16 December 2018