PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION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 We have drafted this note for the eyes of the Lord Advocate and Paul Cackette only.

2 It has been prepared in response to a series of events in the week of 10 December 2018 which led us to consider very seriously whether we were bound to withdraw from acting for the respondents in this matter. Having given the question anxious consideration we concluded that we would be entitled to so withdraw but at this stage are not bound to do so.

3 We introduce matters in this way to convey the seriousness of matters from our perspective.

4 It is a matter for the recipients of this note to decide on its wider circulation but our own preference is that the note itself is not circulated more widely. We would wish to avoid damaging working relations with the wider SGLD and Scottish Government team involved in instructing us. We also do not wish to add to any perception there may be that we are not committed to the case.

5 We have prepared a separate note dealing with practical matters that need to be attended to and have no difficulty with that being circulated more widely.

Disclosure of documents

6 On Tuesday 11 December we met with counsel for the petitioner to discuss their specification of documents with a view to narrowing the scope of any order to be sought. In the course of that meeting, counsel for the petitioner were told that the redactions made to documents already disclosed had been made on the instruction of junior counsel for the respondents. We understood that to be the case.

7 On Wednesday 12 December, in the course of preparation for the hearing fixed for 14 December, junior counsel identified a redaction that had not been instructed by her. The document redacted was an email chain involving Nicky Richards, [Redacted] and Gillian Russell. Two emails in the chain had been copied to a [Redacted]. We understand that the inclusion of [Redacted] in the email chain was an error arising out of a predictive email address function: [Redacted] intended to copy in Nicky Richards but [Redacted] was copied instead. [Redacted] is a former colleague of [Redacted].

8 Instead of the unredacted email being supplied to the petitioner's agents and an explanation provided for the error, the email was redacted. The petitioner's agents subsequently sought an explanation for the redaction and they were told that the email had been sent to a recipient in error.

9 The issue had not been specifically flagged with counsel at the time of original disclosure or subsequently (albeit junior counsel had been copied into a draft of an email to the petitioner's agents that answered a long list of queries about redacted documents and which made reference to an email having been wrongly addressed).

10 When this issue was identified on Wednesday 12 December an immediate and clear direction was given that the unredacted email should be disclosed to the petitioner's agents in advance of the hearing on Friday 14 December. It was intended that the disclosure should be made at the same time as a small number of additional documents, identified in the course of further searches and including an email that we had not previously seen from Ms A to the Permanent Secretary of 3 November 2018 indicating support for the Permanent Secretary's announcement of the review of harassment policies and expressing views on the content of that review, were also to be disclosed.

11 Disclosure was thought to be essential not only on grounds of candour but to try to defuse what we feared would be the reaction of the petitioner to the unredacted email. It is an email chain in which Gillian Russell asks questions of Judith Mackinnon about the circumstances in which complaints of harassment should be reported to the Police and is in the context of wider exchanges about the developing policy for handling complaints against ministers and former ministers. We were (and remain) concerned that it will add fuel to the fire of the petitioner's 'conspiracy theory'.

12 We were both committed to other matters on Thursday 13 December (junior counsel being engaged in a debate in another matter for Scottish Government). On the evening of 13 December, having reviewed emails that had been sent in the course of the day, junior counsel asked for confirmation that (as it appeared) the unredacted email had not been disclosed. That confirmation was given together with an explanation that there was a concern about the GDPR implications of releasing an email with an addressee outside of Scottish Government.

13 No advice had been sought from us about this issue and we had not been told proactively about the non-disclosure.

14 After considerable discussion on Friday morning, we reached the view that we could not properly advise the Court that the Scottish Government had discharged its duty of candour. We sought and received instructions that the motion for commission and diligence should be conceded. In advance of the hearing, and in an effort to minimise any damaging comment that might be made by counsel for the petitioner, we disclosed the unredacted email to counsel for the petitioners, tendered the explanation that had been given to us about the error and agreed to 'lead' in the hearing.

15 In the event senior counsel for the petitioner did not make reference in open court to the further disclosure. However, in relation to the motion more generally, senior counsel for the respondents

felt bound to make the early concession that the petitioner was justifiably able to say that he was not satisfied that searches are exhausted. Lord Pentland asked senior counsel for the petitioner whether the petitioner's concern that essentially for whatever reason the Scottish Government may not have carried out an entirely comprehensive search of any possible place where documents may be held. Senior counsel for the petitioner, of course, concurred.

16 It is envisaged that there will be an open commission in the course of the week of 17 December.

17 We trust it will be obvious why this matter has given rise to such concern on our part about our ability to continue to act. Assurances had been given on a counsel to counsel basis about the reasons for redaction of documents. Counsel for the petitioner withdrew their application to have the commissioner consider redactions that had been made on grounds of legal professional privilege because they were prepared to accept the assurances given that such redactions had been made on the instruction of junior counsel.

18 Having identified that the assurances that had been given required qualification, we expected that our direction as to disclosure of the unredacted email would have been acted upon timeously. That it was not so disclosed left us in an extremely difficult position professionally.

19 The way in which this has been dealt with has also been damaging to the respondents' interests.

20 It is clear that the Lord Ordinary is unimpressed at being faced with a situation in which it appears that the Scottish Government has not acted with full candour and in which a commissioner has had to be appointed.

21 It seems inevitable that parties will now be put to expense and inconvenience of a commission. It is not yet clear whether the petitioner will accept the presence at that commission of a senior civil servant such as [Redacted] rather than, for example, the Permanent Secretary herself (as was adverted to by senior counsel for the petitioner as a possibility).

22 All of this is extremely frustrating because it seems to us it was entirely avoidable. Had the email been disclosed in full at the outset any questions about the circumstances in which the error was made could have been addressed at that time.

The Permanent Secretary

23 As was discussed at the consultation on Monday 10 November, the petitioner's most recent adjustments have introduced a case of apparent bias against the Permanent Secretary based on her knowledge in November and December 2017 of the complaints being made by Ms A and Ms B and her knowledge of the involvement of Judith Mackinnon in the management of those complaints.

24 We had understood from the consultation that a full statement was to be taken from the Permanent Secretary to allow those adjustments to be answered. After the consultation junior counsel indicated to those instructing us that the Permanent Secretary should, in particular, be taken

through the documents that had been disclosed and that indicated knowledge on her part. Junior counsel asked for that statement to be available by the morning of Thursday 13 December at the latest to enable adjustments to be prepared and intimated in the course of Thursday.

25 By email around noon on Thursday we received a note concerning the Permanent Secretary's position. It was not a precognition: it comprises 4 short paragraphs and it is not clear to us that it is in the Permanent Secretary's own words.

26 Junior counsel prepared very limited adjustments for intimation. They do not in our view answer fully the issue of apparent bias put by the petitioner in his pleadings. The respondents' position on record is weaker than it might be.

27 It is not clear to us why a full precognition has not been taken. We have the 'advantage' that the Court has allowed further adjustment of the petition and answers until the week before the substantive hearing and so further adjustment is possible. However it ought to be possible for us to put the Permanent Secretary's position fully and clearly in early course. We would wish to have the precognition previously discussed.

28 As with the disclosure of documents, the approach to this aspect of matters is making it (unnecessarily) difficult for us to put the respondents' best foot forward.

Resources

29 We hesitate to raise matters that are not properly our province. We are concerned, however, that the difficulties that have arisen particularly (but not exclusively) in the last week have been contributed to by limitations on the resources available for management of the case at solicitor level. We would emphasise that this is not intended as a criticism of any individual (and hence our desire to limit the circulation of this note).

30 We are conscious that there is one principal solicitor with responsibility for management of the case. [Redacted] was previously supported by a second solicitor [Redacted] but we understand that solicitor is [Redacted]. It seems clear to us that the further preparations that will be needed – particularly in the organisation of documents – requires additional resource dedicated to this case.

The petitioner's approach to the hearing

31 It has become increasingly clear that the approach of the petitioner in this matter is one which may appropriately be described as a "scorched earth" one. It is clear that there is no concern on his part as to who might be criticised, or harmed, as a result of these proceedings. We understand that this is well understood by those "in the crosshairs" – most obviously the Permanent Secretary and the First Minister. If instructions are to proceed notwithstanding then so be it – we are not in a position where we are professionally unable to mount a defence (because, for example, there is no statable defence). We are, however, perilously close to such a situation. We are firmly of the view that at least one of the challenges mounted by the petitioner will be successful. We are told that there are

other aspects to the case which justify the running of the defence and that, accordingly, there is no prospect of the petition being conceded. That decision is not for us to take and as long as informed consent is given the decision to proceed is one which we must obey. We are, however, entirely unconvinced as to what benefit that might arise from the hearing in January that might outweigh the potentially disastrous repercussions thereof. Leaving aside the large expenses bill that would inevitably arise, the personal and political fallout of an adverse decision – especially if, as may be the case, it is attended by judicial criticism – seems to us to be something which eclipses by some way the possibility of helpful judicial comments. That being so, and recognising as we do that the wider political picture is something that others are far better than are we to comment upon, we cannot let pass uncritically the suggestion that the petition cannot be conceded. It would be possible simply to accept (as is our genuine advice as a matter of law) that the appointment of JM as Investigating Officer was, whilst made *in bona fide,* on reflection indefensible. That would render nugatory all of the other, potentially more harmful, aspects to the challenge. Accepting that a technical error was made could not sensibly be criticised. This would protect those that might otherwise be harmed by the vigorous nature of the challenge that is to be mounted. It would stem the substantial expenses bill that we have no doubt is presently being incurred. Given that we genuinely cannot see the defence prevailing in any event, that seems to us to be the only sensible approach.

32 We are acutely aware that much of this has already been said, and discounted. The decision to proceed has been taken by very experienced legal and political minds, who are entitled to proceed as they wish. However, we are – independently but also mutually – unable to see that the benefits in proceeding come close to meeting the potential detriments in so doing. Given the potential for harm we simply wish all concerned – and we include the First Minister in this – to be absolutely certain that they wish us to plough on regardless notwithstanding the concerns which we have outlined.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

17 December 2018