

Permanent Secretary

Copy to: Ken Thomson, DG Constitution and External Affairs  
Director of Legal Services  
Chief Financial Officer  
Director, Communications, Facilities and Ministerial Support

## JUDICIAL REVIEW – NEXT STEPS

1. You asked me to coordinate the provision of urgent advice in order to allow you to consider how to proceed in relation to the Judicial Review which is set down to commence before Lord Pentland in the Court of Session on January 15<sup>th</sup>. In doing so, I have drawn heavily on contributions from the Director of Legal Services, who has in turn consulted on key points with Counsel and the Lord Advocate; from the Chief Financial Officer, and from the Director of Communications, Facilities and Ministerial Support. I am grateful to them all for responding so promptly to this request.

### Prospects: advice from Counsel

2. As you are aware, Counsel has offered advice on a number of occasions in relation to the prospects of the Scottish Government's (SG's) arguments prevailing in court. This advice has principally turned on Counsel's views on the appointment and actions of the Investigating Officer. The full chronology and summaries of that advice are set out at **Annex A**.
3. The key point to note is the "watershed moment" of last Friday (21<sup>st</sup> December 2018), at which point the SG's case became, in Counsel's view, unstateable, given what emerged that day about the degree and nature of the contact between the IO and the prospective complainers prior to their formal complaints having been made. This information was contained in documents which were identified and produced for the Commission and Diligence Hearing last week, and had not been elicited by previous document searches. While there is no reason to believe that the IO was motivated by anything other than her desire to fulfil her role properly, we recognise that her actions give rise to a perception that there was an unfairness in the operation of the procedure in this case.
4. Counsel has said in terms that there was nothing about the way in which havers gave evidence to the Commission that would suggest that they were acting in bad faith in relation to the production of information, but it is clear that the process of searching for and producing relevant documentation under the duty of candour has not been systematic and comprehensive. It is for this reason that the full picture of the IO's actions and the risk of the perceptions that these could give rise to, only became visible to Counsel and to SGLD at the end of last week.

5. The Lord Advocate and the Director of Legal Services share the view of Counsel about the likely prospects of success in defending the decision at Judicial Review and the consequent advisability of conceding the petition at the earliest possibly opportunity.

Conceding the petition

6. If a decision is taken to concede the petition, the process would involve a Counsel to Counsel discussion of the SG's offer and the best and most efficient way of achieving settlement, with a view to agreeing a Joint Minute setting out the basis of conceding and appropriate declarators (making clear what is and is not the basis of the concession), and agreeing expenses. In parallel, the Court would be advised of SG's decision not to proceed with our defence on the basis that there were ongoing discussions about disposal.
7. In such circumstances, the decision which was being Judicially Reviewed would be set aside and referred back to the decision maker. In this case, for a range of reasons (not least the views of the complainers about going through the process again), consideration needs to be given to whether the SG could restart and re-run the procedure and ensure fairness. The Petitioner may look for assurances that this will not happen, but it is premature to decide or indicate whether and how this would happen, and the views of the complainers would of course be something you would want to take into account.
  8. Legal advice is that it is unlikely that SG would be able to formally withdraw from the Court case without conceding flaws in the application of the procedure in this particular case. The Petition contains a number of pleas-in-law, most of which SG would not be conceding. However, I am advised that we would need to concede all or part of two of the pleas-in-law, as part of the formal disposal by the Court. These are as follows (the section in square brackets might be argued out by Counsel):
    - The decision having proceeded on an error of law by the first respondent, decrees of declaratory and reduction should be pronounced;
    - The decision being irrational and separately unlawful as a result of the application of unfair procedures and being tainted with bias [and being in breach of the petitioner's article 6 of ECHR rights], decrees of declaratory and reduction should be pronounced.
8. While we will be simply indicating a decision to concede when announced, the terms of disposal by the Court will be adjusted by counsel in the days ahead (in a Joint Minute) and we will seek to narrow the terms to the minimum of conceding that the decision cannot legally stand and is set aside and, as above, the pleas-in-law which the court will uphold in doing so. We would not be negotiating in any way about future decisions. If the Joint Minute cannot be agreed, the court will itself make an Order to the same effect.

10. In handling terms, once a decision has been taken it would be beneficial to intimate the concession as soon as practicably possible following the events of last week: SGLD advise that it would be essential for the Court to be told at the same time as the Petitioner's Counsel and that it should be possible to get a message to Lord Pentland next week. This would be easier on Monday or Thursday when the Court is open, but might still be possible, although less straightforward, on Tuesday or Wednesday when the Court is closed. The Court would not look favourably on any public statement being made before Lord Pentland was advised of the position.

#### Implications of conceding

11. Clearly, conceding the petition gives rise to a new set of issues and risks which would require to be managed. The immediate practical implications are dealt with in the section below on communications and handling.
12. It is impossible of course to be certain how the Petitioner will react, although we can certainly speculate about how he may seek to portray the concession in public statements. The only limitation in practice on what information he may deploy in the public domain are the reporting restrictions on naming the complainers. It is less easy to imagine what, if any, legal remedies he might pursue and there are limits to the value at this stage of second-guessing how he will respond, on what grounds, or with what prospects of success. These issues are of course not germane to the decision on how to proceed, and further, separate advice on these issues has been provided to you separately by SGLD.

#### PAO Considerations

13. In reaching a decision in relation to these proceedings, you will also want to have regard to your duties as Principal Accountable Officer. The overall Accountable Officer test addresses the four key considerations of regularity, propriety, value for money and feasibility. You will be familiar with these of course, but the application of each as they might apply in current circumstances is summarised at **Annex B**.
14. In considering the PAO tests, you will wish to take account, in particular, of both the costs to date and further projected costs that might be necessary to continue to defend the action to its conclusion. You will also wish to give consideration to the possibility of having to meet even greater opposing counsel costs should you decide not to concede now and the Petitioner is ultimately successful in both his petition and recouping his costs.

#### Communications and handling

15. As noted above, in the event of a decision being taken to concede the petition, there are strong arguments for moving to confirm this quickly. In order to allow you reasonable time to consider this advice, we are using Thursday 3<sup>rd</sup> January as a central planning assumption, but can of course update this if required. Further detailed handling advice including a draft statement has therefore been developed

separately by Communications colleagues, and is attached for illustrative purposes as **Annex C**. We anticipate that in any external and internal statements, you would wish to be clear on two points in particular: the fundamental robustness of the procedure itself and the fact of having responded appropriately to the complaints which were made. Conceding the JR does not erode either of these positions.

16. Although not within the scope of this advice, there are clearly a number of lessons to be learned by the organisation and we can discuss in due course how best to ensure that this is done.
17. Subject to decisions taken and further refinement, an SG statement might therefore read along the following lines, (subject to agreement by the Lord Advocate):

“We remain confident that the procedure under which complaints are investigated is robust, fair and necessary and that it would have been found to be so had it been tested by the Court. However, we acknowledge that the operational application of the procedure may have fallen short. We have therefore [today] informed the court and the petitioner that we have decided to concede the Petition on this basis. We will consider and decide on our next steps in the light of this decision.”

18. We are also mindful of our duty of care obligations to the complainers and to other members of staff who would be affected by the concession and its aftermath in different ways. This will include our next steps in relation to the complaints raised by Ms A and Ms B which still, of course, sit with us for determination. Work is being undertaken to identify all those who would require to be informed about a decision to concede and the support that might be offered to them. We can discuss this with you when convenient.

### Conclusion

19. Having reviewed the material contained in this note, you may conclude that the Scottish Government is in a position where the only sensible and defensible action is to concede the petition and to plan for managing the attendant reputation and legal risks. The risks associated with proceeding to defend the Judicial Review could appear to be greater.
20. I hope that this advice provides you with the necessary basis on which a formal decision to concede on the terms set out in paragraph 8 above can be reached.
21. Colleagues and I stand ready to discuss any aspect of this note.

**Sarah Davidson**

DG Organisational Development and Operations

29<sup>th</sup> December 2018

**ANNEX A****SUMMARY OF COUNSEL’S ADVICE – SALMOND v SCOTTISH MINISTERS & PERM SEC**

This summary sets out the development of advice from counsel, as assessed by SGLD & the Lord Advocate in relation to the following two issues-

1) Whether paragraph 10 of the Procedure requiring the IO to have had no prior involvement “in any aspect” of the matter being raised creates a difficulty where the actings of the IO, though not a member of SG staff in 2013, indicate that she was involved in discussions of any nature around the time of the complaints being made and the IO being appointed (issue 1)

2) Whether, if issue 1 is answered in the negative, the actual actings of the IO in her discussions with one or both complainers in the period from November 2017 to January 2018 created in the eyes of a reasonable, objective outsider an impression that of a real risk (whether in fact correct or not) that there was an unacceptable possibility of bias in her role as an impartial gatherer of the facts – a concept known as apparent bias (issue 2).

In considering this note, it should be recalled (a) that – although, prior to the emerging of these matters, counsel were strongly of the view that the grounds of challenge could generally be considered weak – they had identified at least one other ground (around non-disclosure of the complainers’ statements) where there was a risk that the court might consider that non-disclosure to be procedurally unfair and (b) that the view of SGLD – at least until last week – was that even if these issues were undoubtedly problematical and likely to be a focus in the JR, there was a reasonable prospect that the judge might nevertheless take a wide view, given the nature and purpose of the procedure, of what fairness entailed and accordingly reach a view based on the overall fairness of the procedure in the round, if persuaded that these two issues did not vitiate the whole of the procedural steps that followed and were taken, in order to secure fairness.

The position on these two issues is summarised in the following table.

Issue	View of Counsel	View of SGLD/Lord Advocate
Issue 1 and 2 pre-31 Oct	No reason to assess risks/prospects, based on facts as then known	No reason to assess risks/prospects, based on facts as then known
Issue 1 after 31 Oct	Concerned that SG arguments more likely to fail than succeed, but stateable	While understanding risks, good arguments supporting the SG interpretation, on a natural reading of the Procedure
Issue 2 31 Oct-19 Dec	Concerned that the evidence could appear to the judge as creating a risk	Concerned that the evidence could appear to the judge as creating a risk

	of apparent bias (& hard to explain in light of paragraph 10), but no reason to consider not stateable.	of apparent bias (& hard to explain in light of paragraph 10), but no reason to consider not stateable.
Issue 2 19 Dec- 21 Dec	Very concerned that IO documents produced at the Commission pointed clearly to a significant risk of apparent bias and that there must be more undisclosed documents pointing in the same direction, probably now making proceeding on 15 January unstateable	Very concerned that IO documents produced at the Commission pointed clearly to a significant risk of apparent bias and that there must be more undisclosed documents pointing in the same direction, probably now making proceeding on 15 January unstateable
Issue 2 21 Dec -	Evidence of IO to the Commission on 21 December confirmed that view, making the case unstateable.	Evidence of IO to the Commission on 21 December confirmed that view, making the case unstateable.

In more detail, Counsel has provided three notes, plus three emails since 21 December, on the basis of the following chronology.

19 October: Meeting with counsel to consider in detail the documents around the development of the procedure and the appointment of the IO, in assessing what should be disclosed in fulfilment of the respondents duty of candour

31 October: Counsel having reflected on the documents so discussed, raised concerns about how the involvement of the IO could be reconciled with her duty to be an impartial gatherer of the facts, as required by paragraph 10 of the procedure (issue 1). At that stage, issue 2 was not in focus. The only documents seen were a series of emails (albeit that one of them had part which could be read – in our view out of full context – as implying an encouragement for Ms A to complain if Ms B did and that the IO would tell Ms A if that occurred). Counsel raised the possibility at that point of conceding based on issue 1.

2 November: Consultation between counsel and Sol Gen (the Lord Advocate being out of the country but having been consulted first) and Director Legal Services confirming the importance of complying with the duty of candour and disclosing the materials identified in the 19 October meeting. Focus at the consultation was on paragraph 10, with discussion about the proper interpretation of that paragraph. Sol Gen inclining to the SG interpretation which was supported by documents indicating the clear intention and understanding of how it had been applied, including note from James Hynd.

6 November: Procedural hearing when the judge stressed his expectations of full compliance with the respondents duty of candour.

6 December: Note by Counsel raising concerns about issue 1, the level of involvement of the IO with the complainers based on information emerging from the searches for information, leading to adjusted averments by the Petitioner that “the appointment of the IO was in contravention of the Procedure” (statement 2) and that “Prior to her appointment the IO (Ms Mackinnon) had involvement and contacts with the complainers” (statement 19) and that that the Permanent Secretary’s decision, in the view of the Petitioner was ‘tainted by bias’ (statement 4). Counsel’s view was that the “least worst” option would be to concede the Petition.

10 December: Consultation between counsel and the Law Officers (& Director Legal Services) to consider note of 6 December. Discussion in depth about the natural meaning of paragraph 10 (issue 1) and the prospects in connection with the alleged apparent bias (issue 2) based on the level of involvement of the IO as then understood. Counsel expressed serious concerns in both respects (and in particular taken together) but indicated that they were not saying, as advised at that date, that the case was unstateable and were willing to argue it, if so instructed. It was noted that the natural reading of paragraph 10 accorded with the reading which SG had given it at the time of the IO’s appointment; that the requirements of fairness depended on context, and that the context could, arguably, be seen as different from a disciplinary procedure in the employment context. The view was expressed that, even if there was a risk (as counsel had described) of losing on the grounds identified by them – and the level of risk was not regarded as clear – there remained a public interest in proceeding based on the benefit of a judicial determination: (a) that having such a procedure was legally permissible (to counter the vires challenge in the JR); (b) that the procedure itself was legally sound (to support its use going forward), even if its application on the instant facts was at risk of being seen as flawed; and (c) if the application of the procedure were to be found to be flawed, identifying the flaw.

19 December: Note by counsel following first day of the Commission expressing the gravest of concerns on issue 2 as it was emerging from documents from the IO produced that day (& causing her evidence not to be heard that day but adjourned to 21 December). In light of the late uncovering and production of two key documents, counsel said “we are now in a position where we think that maintaining a defence of the appointment of the IO may be unstable. Given the timescales we are reluctant to take a final view on this, but there is a real risk that we so conclude” and raised concerns about their professional relationship with the petitioners counsel in consequence.

Later that day (following a discussion between the Lord Advocate and the Perm Sec and FM), a phone consultation took place between counsel and the Law Officers (& Director Legal Services) in which counsel repeated those concerns but agreed that, whatever view might be taken on completion of the commission, they would continue to act until 21 December when the IO gave evidence.

21 December: IO gave evidence, in a way which created significant additional concern both on her credibility as a potential witness in the JR and on the events of 16 January concerning other documents and the implications of her inability to remember that meeting.

21/22 December: On feedback from that evidence, Counsel confirmed their view in a series of emails that, though they had not reached that view before, they had now concluded that events on 19 and specifically 21 December were a “watershed” moment and that the case thereby had become unstateable. The Lord Advocate and Director, Legal Services agreed with that assessment.

28 December: Junior Counsel indicate (& it seems clear that Senior concurs) that, in light of their professional duties and their view of the case, they will require to withdraw from acting on 3 January if matters are not resolved by then.



## ANNEX B

### PAO Considerations

When a course of action is it not immediately obvious, the need to make a difficult decision calls for judging risks, balancing competing objectives and dealing with uncertainty. It is the Accountable Officer's role to make the best assessment he or she can, integrating, sifting and weighing all the factors. Rather than rely on piecemeal advice, it is usually most helpful to bring all the considerations which have been applied together in an overall Accountable Officer test that addresses the four key considerations:

- Regularity (of expenditure) – The key test here is whether there are legal powers. Given this would have been flagged by SGLD at the outset if there was any doubt, unless anything associated with the types of expenditure being incurred has changed significantly, it is unlikely that the initial test applied here will now be in doubt as a consequence of the current status of the case.
- Propriety – The key test here is whether expenditure falls within the boundary of what Parliament might expect for the use of taxpayers' money. Just because expenditure is regular, does not automatically mean that it can be assumed to meet a propriety test too. Unlike the regularity test, it is possible for the propriety test to shift over time. Three specific areas are worthy of consideration here:
  - Expenditure must be sustainable, which includes whether sufficient public resources are available and are likely to continue to be available. Any doubt here calls into question whether further spending would meet the propriety test in the future.
  - If risks deemed acceptable to people, resources, assets etc. at the outset have escalated to the point whether they are no longer manageable or able to be sufficiently mitigated, again there is a question about whether the initial propriety test can continue to be met.
  - Finally, consideration must also be given to the reputation of the Civil Service or the Government itself – where action that might initially have been considered within the bounds of acceptability might now result in unacceptable damage to that reputation, again the propriety test is in doubt.
- Value for money – This can often be a subjective test that can again shift over time, in particular if the costs shift beyond initial expectations. There is no identifiable point at which initially justifiable expenditure tips over to no longer being unjustifiable, even when the initial benefits associated with that spending remain constant (e.g. would a 10% increase be acceptable but a 20% not?). Where both costs escalate beyond initial estimates and the 'benefits' associated with the action taken deteriorate to a level where they are questionable that should be a stark warning to the Accountable Officer that overall value for money may no longer be justified. It can often make sense to bring into account unquantifiable factors when

considering benefits, in the value for money assessment, as is likely to be the case here, in particular the impact on reputation and behaviours of either action or inaction. Accountable Officers are always urged to treat these factors with caution and when they are in play there is usually, as noted above, resonance with propriety.

- Feasibility – This test is normally reserved for government's ability to practically deliver on its initially intended course, but there is some relevance here too. In particular, whether that intended course can continue to be carried out both effectively and credibly and is likely to be successful in securing its initially intended result at reasonable cost. Where either or both are in doubt, again there is a risk to whether this test can continue to be met. It is worth noting that there are clear overlaps with value for money and/or propriety here.

These four tests must be taken and considered together and the overall judgement is whether the Accountable Officer can **confidently defend spending (or further spending) as a satisfactory use of public resources and do so in a dispassionate fashion**. It is also important to carry out this test periodically as circumstances change, rather than rely simply on the initial judgement, in particular if one or more of the four tests no longer complies with the standards expected and/or there is a material change that calls into doubt that initial assessment.

## **ANNEX C**

### **Judicial Review – Day One plus seven illustrative handling plan**

#### **Day One – Thursday, January 3**

- 12noon. Communication between Counsel or SGLD and Levy and MacRae notifying SG position.
- Immediate release of statement to Press Association.
- Immediate statement on SG website
- Immediate internal comms statement on Saltire

#### **Other actions**

- Reactive media calls to be handled by Newsdesk but nothing to issue before following process outlined below.
  - All calls to be logged by Newsdesk – no initial response given.
  - 4pm - All calls to be taken in to central hub discussion attended by Comms, SGLD and HR. This to ensure consistency across replies and due consideration given to consequences of responses.
- All subsequent responses and to whom to be logged by Newsdesk.
- A previously cleared QandA will be held by Comms upon which to draw for responses or to build on for responses.
- Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

#### **Bids**

Permanent Secretary not to undertake bids. Statement sets out position.

#### **Duty**

Comms Officers on duty over the period will not handle calls on this matter. They will forward any calls directly to either [Redacted] or [Redacted] who will work shifts handling duty calls in the initial period.

#### **Day Two – Friday January 4**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

Media monitoring pull together press cuts.

9am Meeting to consider media reaction, next steps.

12noon Comms meeting to consider lines

4pm Comms meeting to consider lines.

Duty to route any queries about the above to [Redacted] in the first instance

### **Day Three – Saturday Jan 5**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

10am Conference call to assess coverage and any next steps.

Duty to route any queries about the above to [Redacted] in the first instance

### **Day Four – Sunday Jan 6**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

10am Conference call to assess coverage and any next steps.

Duty to route any queries about the above to [Redacted] in the first instance

### **Day Five – Monday Jan 7**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

9am Meeting in SAH to discuss coverage

Mid-morning – FM is in Perth to announce additional funding for Tay Cities. Media attendance will be considered in advance in discussion with FMPO and Spads on Thurs, Jan 3 or Fri Jan 4.

12noon Comms meeting to consider lines

4pm Comms meeting to consider lines.

Duty to route any queries about the above to [Redacted] in the first instance

#### **Day Six – Tuesday Jan 8**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

Media monitoring pull together press cuts.

9am Meeting in SAH to discuss coverage

12noon Comms meeting to consider lines

4pm Comms meeting to consider lines.

Duty to route any queries about the above to [Redacted] in the first instance

#### **Day Seven – Wednesday Jan 9**

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

Media monitoring pull together press cuts.

9am Meeting in SAH to discuss coverage

12noon Comms meeting to consider lines

4pm Comms meeting to consider lines.

Duty to route any queries about the above to [Redacted] in the first instance

#### **Day Eight – Thursday, January 10**

First FMQs of New Year

Consideration to be given to movements of FM and Perm Sec on the day, as well as that of named key players who may also be approached by media. Support to be offered by Comms.

Media monitoring pull together press cuts.

9am Meeting in SAH to discuss coverage

12noon Comms meeting to consider lines

4pm Comms meeting to consider lines.

Duty to route any queries about the above to [Redacted] in the first instance