

PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION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

Answer 6

- 1 Further to discussions with clients over recent days, we set out in the annex to this note proposed adjustments to answer 6 for consideration.
- 2 The proposed adjustments are shown in **bold underline**. Clients will note that there are a number of matters on which further information/clarification is needed: see the footnotes to the adjustments.
- 3 Clients may take the view that these adjustments are not sufficiently 'full' in their terms. Please note that the pleadings are of course complemented by the documents that are referred to in the pleadings and will be before the Court during any hearing. The Court will not expect (and will not react kindly to) the repetition in the pleadings of the whole content of documents that are lodged.

Further procedure

- 4 The permission of the Court will be required for the adjustments to be allowed to form part of the respondents' written case.
- 5 Permission will need to be sought at the procedural hearing on 6 November 2018. The Court was advised on Friday 2 November that the respondents could not yet confirm that they were ready to proceed to the substantive hearing on 15 January. Lord Pentland will expect to be addressed on the reasons for that.
- 6 The adjustments can be intimated to the petitioner's legal team before or after the procedural hearing.
- 7 The advantages of intimating them on Monday 5 November are that (a) we would be in a position to advise Lord Pentland that this had been done (and indeed to lodge to the adjustments in Court on Tuesday morning), hence minimising the disruption to the Court timetable and any prejudice to the petitioner; and (b) we would likely have an indication at the hearing of the petitioner's reaction to those adjustments.
- 8 The second advantage may of course also be a disadvantage: the petitioner's counsel may criticise the respondents at the hearing for the timing and the content of the adjustments and suggest that the adjustments contain important new, and previously undisclosed, information.
- 9 The advantages of holding back intimation of adjustments until after the procedural hearing are that (a) we would have additional time within which to finalise the terms of the adjustments (but likely no

more than 2 or 3 days); and (b) the petitioner's counsel would not be in a position to criticise the content of the adjustments at the procedural hearing.

- 10 The petitioner will be given time to answer the adjustments. It is possible that they will also in due course seek the permission of the Court to revise their note of argument to include material about this issue.

Implications

- 11 Clients should be aware that the following are possibilities:
- 11.1 The petitioner may apply to the Court for an order requiring disclosure of information relating to the process by which Ms A and Ms B first approached Scottish Government and eventually made their formal complaints about the petitioner. If that order was granted it would be necessary to disclose internal emails and notes concerning that issue. We have advised that there is certain material we have seen that might, if recovered, be used by the petitioner to attempt to impugn the integrity of the process.
- 11.2 We note from the material provided to us today that in the informal discussions that took place with Ms A and Ms B in December 2017 they were given sight of the draft Procedure (as it then was) for their views on whether it would have been a helpful process for them to have had access to in 2013. The petitioner might, if that was known, seek to argue that it was unfair that the complainers were invited to comment on the Procedure at a time when they were considering making complaints that would be dealt with under that Procedure.
- 11.3 The petitioner may suggest to the Court that evidence is needed to establish exactly what was done in terms of communications with the complainers between November 2017 and January 2018. It would be highly unusual but we cannot rule out the possibility of the petitioner applying to the Court for the evidence of the Investigating Officer (and others) to be taken orally in Court. We would of course resist that: the IO could provide an affidavit setting out what was done and the petitioner has not advanced any alternative account of the background that would provide a foundation for cross-examining the IO.
- 11.4 We are aware that clients will wish to understand the effect of this issue on our views of prospects of success. That cannot realistically be assessed until we see the reaction of the petitioner to the proposed adjustments.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate

3 November 2018

Annex – Answer 6

Admitted, under explanation to follow, that the Procedure was written in about December 2017. Admitted that the petitioner ceased to be a Minister in the Scottish Government in November 2014. The first respondent's letter of 7 March 2018 and the Procedure are referred to for their terms. *Quoad ultra* denied. Explained and averred that the Procedure was drafted by Scottish Government officials following a review of the Scottish Government's policies and procedures for handling complaints of bullying and harassment made by Scottish civil servants. The review was initiated by the interested party, in October 2017. She asked the first respondent to undertake a review of the Scottish Government's policies and processes to ensure that they were fit for purpose. The existence of that review was made known to the Scottish Parliament by the Deputy First Minister, Mr Swinney, at Topical Question Time on 31 October 2017. On 2 November 2017 the first respondent issued a Staff Message to all Scottish Government staff entitled "Sexual harassment – message from the Permanent Secretary". That message is produced and incorporated herein *brevitatis causa*. It invited anyone who wished to "help inform consideration of our approach or share concerns about current cultures or behaviours" to make contact. **It provided contact details for members of staff in the second respondent's HR function together with information about sources of support.** Separately, the first respondent received a letter from Sir Jeremy Heywood, Head of the Civil Service, of 3 November 2017, addressed to all Permanent Secretaries directing them, *inter alia*, "to work with your HR Directors, staff networks and others to satisfy yourselves rapidly that: information on conduct and on how to raise a concern is clearly and easily accessible for staff; channels for raising a concern are well publicised and easy to use, and that staff feel positively encouraged to speak up; and processes for investigating concerns and, where relevant, taking follow up action, are working well and ensure timely resolution". The letter narrates its context as being "extensive media coverage" of "allegations of sexual harassment and inappropriate behaviour in several industries and sectors, particularly in respect of those in powerful positions over others". Sir Jeremy Heywood's letter of 3 November 2017 is produced and incorporated herein for the sake of brevity. On 13 November 2017 the first respondent issued a further all staff message which is produced and incorporated herein *brevitatis causa*. **In that message she advised staff that the sources of support referred to in the message of 2 November remained in place and explained that, in addition, she had asked Gillian Russell to act as a confidential sounding board for individuals who had experienced sexual harassment. Ms Russell is the second respondent's Director of Safer Communities. On 8 November 2017 Complainer B contacted**

Barbara Allison. Ms Allison is the second respondent's Director of Communications, Ministerial Support and Facilities¹. Complainer B discussed with Ms Allison []². She did not at that time make a formal complaint. On 22 November 2017 Complainer A spoke to Gillian Russell and Barbara Allison to discuss events involving the petitioner in [Redacted]. She did not at that time make a formal complaint. [Redacted] In addition a number of members of staff of the second respondents approached Ms Russell to discuss concerns about the behaviour of non-ministerial colleagues. Ms Russell, with the consent of Complainer A, shared the fact of the approach by Complainer A and the nature of the information provided by her with the first respondent's Director of People, Nicola Richards, and Deputy Director of People Advice, Judith Mackinnon. Ms Allison, with the consent of Complainer B, shared the fact of the latter's approach and the nature of the information provided by Complainer B with the same people. Ms Richards advised Ms Russell and Ms Allison to ask Complainers A and B respectively whether they wished to speak to the HR team³. In December 2017 Ms Richards and Ms Mackinnon met with Complainer A and Ms Mackinnon [Redacted] to Complainer B. In each case the discussions concerned the options available to each complainer and their preference for how their concerns should be handled. Complainers A and B each indicated that they wished to reflect on what to do next. The Procedure was agreed by the interested party on behalf of the second respondent by email on 20 December 2017 at which time it came into effect. Complainer A made a formal complaint on 16 January 2018 and an Investigating Officer was appointed the same day. The complaint received from Complainer B was received on 24 January 2018. The Procedure is one of a number of mechanisms by which the second respondent as an employer discharges its duty of care to staff and by which it fulfils its responsibility to provide a workplace free from harassment and to provide an effective grievance procedure. The review initiated by the interested party was not restricted to consideration of complaints against ministers and former ministers. It also resulted in revisions being made to the second respondents' Fairness at Work Policy to address sexual harassment complaints

¹ Can we understand why Ms B contacted Barbara (given that she was not named specifically as a source of support in the messages issued by the Permanent Secretary?)

² We do not think we have information about what Ms B discussed with Barbara Allison at that time.

³ The note of the discussion with Judith Mackinnon of 2 November 2018 refers to emails to that effect being sent to Ms and Ms B. We do not think we have those yet.

more generally. It was carried out in consultation with the Council of Scottish Government Unions. Reference is made to Fairness at Work (2018). The Procedure is also a means by which concerns that a minister or former minister has failed to adhere to the standards of behaviour expected by the Scottish Ministerial Code can be addressed by that minister, the First Minister and/or a former minister's party leader.