



URGENT Note by Senior Counsel

for the Scottish Government

re

Scottish Government Procedural Matter

SGLD

By email only

Ref: PC

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1. I refer to recent communications regarding this case, in which various deadlines expire on Friday and in which a procedural hearing is fixed for Tuesday.
2. My apologies for the hour at which this is sent, and for recent difficulties in my availability: as I think is known, I am presently engaged in a 3 week proof.
3. By telephone call and email yesterday, the First Standing Junior alerted me to a potential concern, not hitherto known to either Ms O'Neill or myself. The concern arises in this way:
 - a. By adjustments intimated on 23 October, the Petitioner inserted the following Call into the Petition:

“The respondents are called upon to aver: **when, by what means and in what terms the complainers first initiated their complaints**; whether those complaints were first made under and in terms of the Procedure; when those complaints were first deemed to be formal complaints in terms of paragraph 10 of the Procedure; when and by what means the Procedure was brought into effect; whether and if so in what terms the First Minister replied to the Note production 7/7 of process; the relevance of the Fairness At Work 2018 document referred to in Answer 6 to the decision; when and by what means the Fairness At Work 2018 document came into effect and was published on the second respondent’s intranet.”
 - b. At first blush, this appeared to be of no moment, other than perhaps to betray some sort of insinuation that the complainers had been encouraged to come forward. Nevertheless, Ms O'Neill – quite properly – sought instructions on the issue.
 - c. The concern that arises is that the answer to the question “when, by what means and in what terms the complainers first initiated their complaints” is that Complainer B, as I now understand the position, first made her complaint to Judith McKinnon, Deputy Director of the People Directorate, in December 2017.
 - d. That is of concern because it was, of course, Ms McKinnon that was subsequently appointed as the Investigating Officer under the Procedure which is presently under challenge.
4. The reason why this is a concern is that the Procedure says, at para 10:

“In the event that a formal complaint of harassment is received against a former Minister, the Director of People will designate a senior civil servant as

the Investigating Officer to deal with the complaint. *That person will have had no prior involvement with any aspect of the matter being raised.*"

5. I am told that it was thought that this did not present a problem to Ms McKinnon's appointment, as she had no prior involvement with the events giving rise to the complaint.
6. I regret that I do not read the procedure in that way. Rather, I read the emphasized sentence as stipulating that the IO should have had, as the words themselves say, "**no** prior involvement with **any aspect** of the matter being raised". The person to whom the first complaint was made, and who gave express advice to the Complainer as to her options including the possibility of making a formal complaint, has – as at the time of her appointment as IO – had "prior involvement" with "an aspect" of the matter being raised (and a fairly fundamental aspect at that).
7. Two questions arise from this: (i) do we have to disclose it; and (ii) if so what effect will this have?
8. As to the first, there is no real question. Arguments might be raised as to the extent to which the Petitioner is entitled to detail as to how the complaints were made. But where, as here, the true facts give rise to a potential flaw in the entire procedure, there simply cannot be any question of not disclosing this. There may be judicial compulsion to answer the call – and that would be extremely damaging – but even if there were not there simply cannot be any question of lack of candour here. Accordingly, this point will require to be disclosed.
9. As to the second, as presently advised I consider that this presents a very real problem indeed. The Petition is resisted on the basis that a fair Procedure was instituted and then followed. If I am correct in the views expressed at §6 above, then the Procedure was not followed: rather, an express embargo was ignored in a way which may well vitiate the entire proceedings.
10. In this latter regard, I understand that further information has been requested as to how it came about that Ms McKinnon was appointed as IO. A final view on the repercussions will require to await receipt of that further information. But it would be wrong for me to suggest that this revelation is anything other than an extremely concerning one.
11. I should stress, of course, that I am not suggesting bad faith on the part of anyone, least of all Ms McKinnon. But the fact remains that the Procedure indicates – to my mind, at least, that she was not eligible to be appointed as IO. If I am right in that regard then arguably that infects all that followed thereon.
12. I understand that it is hoped that a consultation can take place on Friday after court. That would be most welcome, especially given the procedural hearing next week. Hopefully, the further information mentioned above at §10 will be available in advance thereof.

13. In the meantime, I should indicate that I was sufficiently concerned by the foregoing to contact the Lord Advocate – both to alert him and, frankly, as a sense check. He has suggested that this Note be made available, and has also indicated that he shares both my firm advice (at §8) that this issue will have to be disclosed, and my concern (at §9 above) as to the potential repercussions for the wider case.
14. Depending on the information available on Friday, a swift decision is going to have to be taken thereafter as to whether (a) the issue is disclosed and any argument based thereon then resisted, or (b) the issue is disclosed and the Petition then conceded as a result thereof. I can well understand the angst that even suggesting (b) will provoke, but if the proceedings are vitiated then it makes little sense to continue to defend the indefensible. There is a (small) upside to such an eventuality: the Procedure would simply be reset, and safeguards could be put in place to minimize the risk of a further challenge to the renewed investigation.
15. All of that is, however, presently hypothetical. A final decision will require to await the information discussed above. This Note is simply provided to ensure that the main decision makers are fully sighted in advance of Friday's consultation.

[Redacted]

Roddy Dunlop QC
Axiom Advocates
Wednesday, October 31, 2018.