PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION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 A consultation has been fixed for 3.30pm on Tuesday 4 September at which we anticipate discussing a number of matters including the prospects of resisting permission for the petition to proceed.

2 This note sets out our current thinking in advance of the consultation.

Permission to Proceed

3 Our view is that it is inevitable that the Court will grant permission to proceed.

4 As set out below, it may be possible to attempt at the permission stage to exclude certain of the petitioner's grounds of review on the basis of time bar.

5 It is a question for clients whether they would wish to take the time bar points at the permission stage or to raise them in answers lodged after permission is granted.

6 The grant of permission will undoubtedly be reported both by the petitioner and by the press as a 'victory' for the petitioner and a defeat for the respondents. That reporting will likely be more emphatic if permission is contested (on even a limited basis). Equally, the sting can largely be taken out of any such report by the respondents making it clear that a decision has been taken, in the interests of expedition and on the basis of legal advice, to concede permission and to focus on resisting the Petition on its merits.

Real prospect of success

7 The Court may grant permission only if it is satisfied that "the application has a real prospect of success": Court of Session Act 1988, s27B.

8 As clients are aware, the proper approach to that test was set out by the Inner House in *Wightman v Advocate General* 2018 SLT 356:

"The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test. It is not enough that the petition is not "manifestly devoid of merit", since that, in essence, reflects the

"manifestly without substance" test adopted in EY. The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough." (per the Lord President at §9).

9 We think there is no prospect of a Lord Ordinary concluding that the petition does not have substance.

10 The petitioner advances eight separate grounds of challenge to the Procedure on the Handling of Harassment Complaints Involving Current or Former Ministers ('the Procedure') and to the application of the Procedure in the petitioner's case: (i) *ultra vires*; (ii) error of law; (iii) incompetency; (iv) procedural unfairness; (v) general irrationality; (vi) article 6 ECHR; (vii) legitimate expectation, irrationality and oppression in relation to Allegation D; and (viii) privacy and confidentiality.

11 While answers m y be given to each of these grounds of challenge, we are certain that in the context of a permission hearing the Lord Ordinary would be persuaded that there is sufficient 'substance' in each ground of challenge to justify the granting of permission in respect of all of them. The Lord Ordinary will undoubtedly be influenced by the identity of the petitioner and the public interest in testing the lawfulness of the Procedure and its application.

Time Bar

12 Clients will also be aware that in terms of s27A of the 1988 Act, an application to the supervisory jurisdiction of the Court must be made before the end of—(a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or (b) such longer period as the Court considers equitable having regard to all the circumstances.

13 It is arguable that at least some of the grounds of challenge set out in the petition are out of time.

14 At statement 12 the petitioner complains that the Procedure has no statutory or other legal basis and is *ultra vires* the powers of the Permanent Secretary. The petitioner has been aware of the terms of the Procedure, and of the fact that complaints against him were being investigated under the Procedure, since 7 March 2018. It is clear that the petitioner took legal advice immediately in response to the Permanent Secretary's letter of 7 March 2018. To the extent that he has a complaint about the lawfulness of the Procedure itself, the date on which that ground of review first arose was 7 March and a petition for judicial review ought to have been raised by 6 June 2018.

15 The same response could be made to the complaint of incompetency at statement 14 and to the complaint at statement 27 concerning Allegation D to the effect that this complaint was "*res judicata*". For all of these points, it can cogent y be argued that the Petitioner was aware of the grounds of challenge of which he now complains more than three months before presentation. Whilst in the limited time available we have not been able to find a directly analogous precedent, reliance might be placed on *R (Risk Management Partners Ltd) v Brent London Borough Council*

[2010] PTSR 349 at [250] as applied to (English) judicial review proceedings in *R (Nash) v Barnet London Borough Council* [2013] P.T.S.R. 1457 at [68].

16 The time bar point could be taken at the stage of permission or 'held over' for answers lodged after permission has been granted.

17 The advantage of taking the point at the permission stage is that, if successful, the relevant grounds of challenge would be excluded from subsequent proceedings. It would be highly desirable to see off, at an early stage, the complaints about the *vires* of the Procedure and about the illegitimacy of 'resurrecting' Allegation D. It would represent a degree of 'success' for the respondents in relation to the petition.

18 The disadvantage of taking the point at the permission stage is that if the respondents were unsuccessful their 'failure' to exclude these grounds that would be reported as a victory for the petitioner. That is the only disadvantage: the time bar point could be revisited at any substantive hearing.

19 The time bar point will not be successful if the Lord Ordinary is persuaded that there are grounds on which the three month time limit might be extended. The petitioner might argue that he 'waited' until he knew the outcome of the process before bringing judicial review proceedings because he was in a cleft stick: raising a challenge would bring about the very reputational damage he wished to avoid.

20 Given the "low bar" for permission, we anticipate that trying to argue time bar at the permission stage would simply hand the Petitioner an "easy win", as we imagine that he will be able to assert at least a case for extension of time, and probably also an answer that time only started to run when the actual decision was made (cf. *R (Burkett) v Hammersmith and Fulham London Borough Council and another* [2002] 1 W.L.R. 1593) which will at least pass muster for the purposes of permission.

The Permanent Secretary as respondent

21 We are asked whether there are prospects of having the Permanent Secretary 'dropped' from the petition as a respondent in her own right.

22 In our view the Permanent Secretary is the appropriate respondent so far as application of the Procedure to the petitioner is concerned.

23 The Procedure confers on the Permanent Secretary a series of responsibilities in relation to the handling of complaints of harassment against ministers and former ministers. It is the Permanent Secretary, rather than a minister or the Scottish Ministers collectively, who is required by the Procedure to decide whether a complaint is well-founded (Procedure, §11).

24 The Permanent Secretary is therefore the person who, in the language of *West,* has been given a "power to decide" and whose decision-making is amenable to judicial review (*West v Secretary of State for Scotland* 1992 SC 385 per Lord President Hope at p413).

25 That is not to say that the Permanent Secretary is the appropriate respondent in respect of all of the grounds of review relied upon by the pet tioner. As we understand it, the Procedure itself is the creation of the Scottish Ministers (in their role as 'employers' of civil servants in Scotland) rather than of the Permanent Secretary and any complaint about the *vires* of the Procedure is properly a matter for the second respondents.

26 Clients should consider whether the interests of the Permanent Secretary and of Scottish M nisters are sufficiently aligned for there to be no need for separate instruction/representation and to consider matters such as the extent of any indemnity for costs that might be offered to the Permanent Secretary.

Impact on criminal investigation/prosecution

27 We have been asked for our views on whether the respondents should seek to have the judicial review proceedings sisted pending the outcome of any police investigation and/or criminal proceedings that may follow that investigation.

28 In the week commencing 20 August 2018, in the course of discussions about the extent to which the Permanent Secretary might publish information about the complaints against the petitioner, it became clear that the Crown Agent was highly concerned about the risk of prejudicial pre-trial publicity that might arise if information about the complaints was put into the public domain.

29 In particular, he was concerned about the risks arising from a combination of information (a) that a referral had been made to the Police; and (b) as to the findings made by the Permanent Secretary.

30 The fact that matters have been referred to the Police has been the subject of widespread reporting in the media. We are not aware of any reporting that discloses the Permanent Secretary's findings. We assume, but it can be confirmed, that the Crown Agent would remain concerned about the potential for information about the Permanent Secretary's findings to create a risk to a future trial.

31 The petition narrates the Permanent Secretary's findings and the Decision Report of 21 August has been lodged. It would seem to us impossible for a substantive hearing of the judicial review to take place without the findings and the contents of the Decision Report being discussed very fully.

32 This risk of prejudicial pre-trial publicity could be addressed by:

32.1 sisting the petition proceedings until the criminal investigation is concluded; or

32.2 imposition of sufficiently wide reporting restrictions in connection with the conduct of the petition proceedings.

33 On the second option, clients may have concerns about endorsing a situation in which the petition for judicial review is effectively argued 'behind closed doors' given the concerns expressed earlier in the process about the need for transparency and given the general public interest in the issues raised by this case.

34 Equally, in relation to the first option clients may not wish to be seen to be delaying the judicial review proceedings. However, the reasons for seeking to do so would in our view be likely to attract the sympathy of the Court.

35 We can also see strength in the argument that the criminal investigation may make the entire Petition pointless: if there is a criminal conviction then surely this case will not proceed; and if there is a trial and an acquittal then the Ministers would be faced with a very different situation than that which presently obtains.

36 It would be helpful, in this regard, to have the views of the Law Officers: from the point of view of the criminal investigation, would they prefer this Petition to be sisted?

Reporting restrictions

37 We have been asked for our views on the making of reporting restrictions. We consider that this issue should be considered more fully following further discussion of the pre-trial publicity issue set out above.

Roddy Dunlop QC

Christine O'Neill, Solicitor Advocate