

## **Response to Committee on the Scottish Government Handling of Harassment Complaints: Scottish Government participation in the judicial review**

1. This statement is provided by the Scottish Government in response to a request from the Scottish Parliament's Committee on Scottish Government Handling of Harassment Complaints ("the Committee"). In its letter of 19 May 2020<sup>1</sup> the Committee asked for a written statement from the Scottish Government about the judicial review of the Scottish Government's handling of harassment complaints made against the former First Minister Alex Salmond. The Committee asked that this statement should cover the following points:

- the roles and responsibilities in relation to the Scottish Government's conduct of litigation generally and in this case in particular;
- the extent to which the Scottish Government kept emerging details and prospects of success under review; and
- how the decision to settle was taken, including the timing of the decision and what factors contributed to the cost of settlement.

2. This statement responds to the questions asked by the Committee and within the restrictions discussed below is supported by key documents relating to the actions described in this statement.

### **Restrictions on the provision of information and documents**

3. Legal professional privilege exists in two forms. The first form, also called legal professional privilege, applies to communications between a client and their legal representative. The second form is litigation privilege which applies when litigation is in contemplation or taking place. The Committee will be aware because of the subject matter of this statement litigation privilege applies to much of the

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<sup>1</sup> <https://www.parliament.scot/HarassmentComplaintsCommittee/20200519ConvenertoPermSec.pdf>

information held by the Scottish Government about the judicial review proceedings. In addition, the Law Officers' Convention, as referenced in paragraphs 2.38 to 2.41 of the Scottish Ministerial Code (2018)<sup>2</sup>, means that Ministers do not disclose whether or not advice has been taken from the Law Officers or the content of such advice.

4. The maintenance of legal professional privilege (in both its forms) and the Law Officer Convention support good government. They promote the ability of Ministers and officials' decisions to be informed by appropriate analysis of the legal considerations (see paragraph 2.30 of the Scottish Ministerial Code<sup>3</sup>). The Scottish Government asserts its privilege over all communications it holds about or in relation to legal advice to the Scottish Government and litigation involving the Scottish Government.

5. That is not to say that the Scottish Government will not give a full account of its legal position at various points, just that, in accordance with usual practice, it will not disclose the internal processes of taking and receiving advice or the scope and nature of any requests for legal advice or any legal advice provided.

6. In addition, documents which form part of the court process in relation to the judicial review are the property of the Court and cannot be disclosed by the Scottish Government, unless they are already in the public domain. The Committee will also be aware that an order<sup>4</sup> remains in force preventing disclosure of the names and designations, past and present, of the two complainers whose complaints gave rise to the procedure reviewed in the court action by the former First Minister.

7. Further restrictions arise from the order of the court on settlement of the case, as explained below, which reduced (made devoid of legal meaning) the decision report dated 21 August 2018 and covering letter by the Permanent Secretary dated 22 August 2018, and bound the Scottish Ministers and Permanent Secretary by an

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<sup>2</sup> <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

<sup>3</sup> <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

<sup>4</sup> <https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders> - HMA v Alexander Elliot Anderson Salmond (under section 11 of the Contempt of Court Act 1981), High Court of Justiciary, Edinburgh, 10 March 2020

undertaking not to publish or disseminate the Investigating Officer's reports or witness statements except in certain specified circumstances.

## **Background**

8. The Committee has requested a separate written statement providing information about the investigation under the Scottish Government Procedure for Handling Complaints Involving Current and Former Ministers ("the Procedure") into the complaints that had been raised about the former First Minister Alex Salmond ("the former First Minister"). That statement will be provided in due course.

9. During the course of the investigation into the complaints, the former First Minister was represented by Levy & McRae Solicitors. Levy & McRae corresponded with the Permanent Secretary and her office about the investigation during that time. On 22 August 2018, following the conclusion of the investigation, the Permanent Secretary notified the former First Minister of her decision. This took the form of a decision report and covering letter ("the decision").

9. On 23 August 2018, reports appeared in online media that the former First Minister was the subject of sexual harassment complaints made by members of Scottish Government staff dating back to the period of time when he had been First Minister.

10. Also on 23 August 2018, Levy & McRae notified the Scottish Government that the former First Minister would raise a petition for judicial review of the decision, and on 31 August 2018 legal proceedings were raised by him.

11. The Rules of the Court of Session<sup>5</sup> apply to judicial review proceedings and set out the procedure to be followed. The timescales involved are also set out in those rules but can be modified at the discretion of the Court. The judicial review raised by the former First Minister followed the normal process, as set out below, for this type of court action and took place over timescales which were typical of cases

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<sup>5</sup> <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>

where the petitioner (the person seeking judicial review) does not ask the court to consider the case as a matter of urgency.

12. In the normal course, the petitioner would lodge a petition (an application) with the Court of Session. The petitioner would get authority from the Court to formally intimate (serve) the Petition to the respondent (the party or parties whose decision is being challenged) and any other interested party, and the respondent would normally have 21 days within which to decide what to do.

13. It is necessary for the petitioner to get permission from the Court to proceed and the Court will only grant permission if satisfied that the petitioner can demonstrate a sufficient interest in the subject matter of the application and the application has a real prospect of success.

14. The respondent can either decide to oppose the grant of permission to proceed (in which case they would require to lodge written Answers to the Petition setting out the basis on which permission is opposed), give notice that they will not oppose permission but will contest the Petition if permission is granted, or do nothing if the Petition is uncontested.

15. After the 21 day period a Court of Session judge would decide whether or not to grant permission to proceed – this can be based on the papers or after an oral hearing. If the respondent contested the grant of permission and the judge was minded to refuse permission, an oral hearing would normally be fixed. There are rights of appeal against refusal of permission.

16. Once permission is granted, normally the Court will at that point issue a timetable. This will fix the date for a procedural hearing (the rules envisage no later than 6 weeks after the grant of permission) as well as a substantial hearing (envisaged no later than 12 weeks after the grant of permission), and fix the dates for a period for lodging written Answers (if not already lodged) and a period for adjustments to Petition and Answers. The timetable will also set out when documents in support of each party's case, Notes of Argument, Statements of Issues and affidavits, must be lodged in the period up to the date of the procedural hearing.

Judicial review proceedings generally can take a number of months from start to finish.

17. Incidental procedure can also be initiated by either party in a judicial review, for example to alter the timetable or to recover evidence in advance of the substantive hearing.

18. The substantive hearing is when the merits of the whole case are argued before a Court of Session judge. There are rights of appeal against the judge's decision to the Inner House of the Court of Session and from there, with permission, to the UK Supreme Court.

### **The judicial review**

19. The conduct of this specific judicial review followed the normal procedures described above.

20. The Petition raised by the former First Minister on 31 August 2018 was against the Permanent Secretary and the Scottish Ministers. The Permanent Secretary is the decision-maker under the Procedure at issue in the proceedings<sup>6</sup>.

21. Under the devolution settlement the Civil Service is a reserved matter<sup>7</sup> and, as Crown employees, civil servants in the Scottish Administration are part of the UK Civil Service. Scottish Ministers have delegated authority to exercise the statutory functions of an employer for staff in the Scottish Government and in doing so set out terms and conditions of appointment.

22. In this case, the Respondents (the Permanent Secretary and the Scottish Ministers jointly) did not oppose the grant of permission to proceed, but did contest the Petition for judicial review.

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<sup>6</sup> <https://www.gov.scot/publications/handling-of-harassment-complaints-involving-current-or-former-ministers/>

<sup>7</sup> Schedule 5 of the Scotland Act 1998: <https://www.legislation.gov.uk/ukpga/1998/46/schedule/5>

23. On 27 September 2018 the Court issued a timetable order. The timetable allowed for Answers by the Respondents to be lodged by 16 October 2018, and a period for adjustment of the pleadings until 23 October 2018. The procedural hearing was fixed for 6 November 2018, with final pleadings, Notes of Argument, Statements of Issues, documents and affidavits for both parties to be lodged by that date. A substantive hearing was fixed for 4 days to start on 15 January 2019.

24. On 4 October 2018 the Court made an order under section 11 of the Contempt of Court Act 1981 protecting the identities of the two complainers in the Scottish Government's internal investigation of their complaints. The order required the two complainers to be referred to in the case as "Ms A" and "Ms B". That order remains in force. It should be noted that the designations of Ms A and Ms B are unrelated to any other designations used in any other proceedings.

25. In the course of the proceedings from September 2018 to January 2019, the Court allowed several motions to deal with procedural matters: by the Petitioner to alter the timetable and to allow for the recovery of evidence, and ultimately a motion to allow a joint minute to dispose of the case.

26. As part of the process for the recovery of evidence, a Commission (a formal hearing) was held between 19 and 21 December 2018 before a Commissioner appointed by the court after the Petitioner had lodged a description of further evidence that he wanted to obtain from the Scottish Government (a specification of documents). The specification detailed specific source material that needed to be included in the search such as calendar entries and text messages. During the Commission it became apparent to the Scottish Government that the decision under review had been taken in circumstances in which an impression of partiality would have been created for a reasonable observer by the totality of the prior contact between the individual who was later appointed as the Scottish Government's Investigating Officer and the two members of staff who made formal complaints. Further details about this are provided in paragraphs 36-40 below.

27. The Petitioner and Respondents agreed to settle the case on the basis of that acceptance. On 8 January 2019 they lodged a joint minute with the Court setting out

the terms on which settlement of the case had been agreed, including that the decision under review was unlawful in that it was taken in circumstances which were “procedurally unfair and tainted by apparent bias”. The judge in the Court of Session accepted the joint minute and issued a final order bringing the case formally to an end<sup>8</sup>. The substantive hearing no longer required to take place and substantive arguments in the case did not require to be heard.

28. As part of the agreed settlement an undertaking was given by the Scottish Ministers and Permanent Secretary to the Court of Session that “save insofar as necessary to comply with any lawful requirement, to cooperate with any criminal investigation, or as may otherwise be approved by the Court, the Respondents will not cause or permit the publication or dissemination to any other person of the said Investigating Officer’s report or any statements or other material taken or prepared by her in the course of preparing the same”. This undertaking remains in force.

29. Also on 8 January 2019, immediately after the court hearing, the Permanent Secretary issued a statement to the media<sup>9</sup> and the First Minister made a statement to the Scottish Parliament detailing the reason for the decision to settle the case<sup>10</sup>.

30. The following paragraphs provide more specific information sought by the Committee.

### **Information about roles and responsibilities in relation to the Scottish Government’s conduct of litigation generally and in this case in particular**

31. Where the Scottish Government is a party to litigation, its involvement is usually in the name of the Scottish Ministers or the Lord Advocate. The Lord Advocate is a member of the Scottish Government<sup>11</sup> and litigation on behalf of the Scottish Government can be raised in his name<sup>12</sup>. Litigation by or against the Scottish Government is usually conducted on its behalf by solicitors from the Scottish

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<sup>8</sup> The hearing in court was covered by media organisations and part of the judge’s interlocutor is available at the attached link: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-46428570>

<sup>9</sup> <https://www.gov.scot/news/statement-from-permanent-secretary-leslie-evans/>

<sup>10</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11871&i=107364>

<sup>11</sup> <http://www.legislation.gov.uk/ukpga/1998/46/section/44>

<sup>12</sup> <http://www.legislation.gov.uk/ukpga/Vict/20-21/44/section/1>.

Government Legal Directorate (SGLD) or by solicitors in an external firm of solicitors which provides relevant outsourced litigation services. The solicitors will instruct an advocate or advocates (“Counsel”) to appear in Court as appropriate. Legal representatives take instructions in relation to any case from the Scottish Ministers, with support from officials in the relevant policy areas.

32. A range of Scottish Government officials from the Permanent Secretary’s office, the First Minister’s office, People Directorate, SGLD and Special Advisers were involved in aspects of this case, in line with their areas of responsibility within Government and knowledge about the particular issues being challenged in the judicial review proceedings. Officials provided information, advice and relevant documentation to inform Ministers’ decision making and the instructions on handling the case. SGLD provided solicitor legal representation for the Respondents and instructed Senior and Junior Counsel.

33. The Petitioner, the former First Minister, was represented by Levy & McRae, Solicitors, along with Edinburgh agents, DAC Beachcroft Scotland, with Senior and Junior Counsel instructed also.

### **Information about the extent to which the Scottish Government kept emerging details and prospects of success under review**

34. As with any litigation by or against the Scottish Ministers, there was regular contact between officials and legal representatives about the progress of the litigation including regular consideration of the prospects of success<sup>13</sup>. The Permanent Secretary and Scottish Ministers were likewise regularly advised on the outcomes of these discussions.

35. Communications between officials in the Scottish Government and their legal representatives are covered by legal professional privilege as noted above. When the judicial review proceedings by the Petitioner were in contemplation and whilst they were ongoing, all communications between officials, Scottish Ministers and their

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<sup>13</sup> The meetings referred to in FOI 19/01156 although specific to the particular scope of that FOI request, are examples of such regular contact: <https://www.gov.scot/publications/foi-19-01156/>

legal representatives and other advisers and other information are covered by the litigation privilege.

### **Information about how the decision to settle was taken and what factors contributed to the cost of settlement**

36. Paragraph 10 of the Procedure under which the complaints were investigated states that the Investigating Officer “will have had no prior involvement with any aspect of the matter being raised.” This reflects provision typically found in employment policies and refers to personal involvement in the matter being investigated<sup>14</sup>. Reference to “prior involvement” was intended to refer to involvement in the incident under investigation itself or its immediate handling. Later involvement, especially many years later, was not intended to compromise an Investigating Officer’s ability to be an impartial collector of facts unless there is some other factor which debars them. In this case, the Investigating Officer (the Deputy Director for People Advice) had had no involvement in any aspect of the events being investigated. She had not been part of the Scottish Government at the time of the events in question, which – along with her experience as an HR professional – had informed her appointment as Investigating Officer. Further detail about the handling of the complaints will be provided in a separate written statement as set out in paragraph 8 of this note.

37. The Deputy Director for People Advice, had contact, before her appointment as Investigating Officer, with the two members of staff who lodged concerns in advance of their decisions to make formal complaints.<sup>15</sup> This took the form of ensuring they could have access to support from other sources if required and that the process and choices available were understood by the two members of staff. This was in keeping with the role for the Investigating Officer set out in more detail in earlier drafts of the procedure<sup>16</sup>, and in line with her professional HR role. The

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<sup>14</sup> [https://archive.acas.org.uk/media/4483/Conducting-workplace-investigations/pdf/Conducting\\_Workplace\\_Investigations.pdf](https://archive.acas.org.uk/media/4483/Conducting-workplace-investigations/pdf/Conducting_Workplace_Investigations.pdf) (p.9)

<sup>15</sup> [https://www.parliament.scot/HarassmentComplaintsCommittee/Phase2FN15\(1\).pdf](https://www.parliament.scot/HarassmentComplaintsCommittee/Phase2FN15(1).pdf)

<sup>16</sup> <https://www.parliament.scot/HarassmentComplaintsCommittee/Phase2FN16.pdf>

individuals also shared reflections about what they thought might prevent harassment occurring in the future.

38. As noted in paragraph 26 above, previously undisclosed documents were provided as part of the Commission for Evidence held between 19 and 21 December in relation to the prior contact between the individual who was subsequently appointed as the Investigating Officer and the two complainers. These documents indicated the nature of this contact was in line with that described in paragraph 37.

39. Nevertheless, it became apparent to the Scottish Government, based on a review of the case which was informed by legal advice, that the combination of two issues could now impact on the case. Firstly, that whilst the meaning of paragraph 10 of the procedure was clear to those involved in its development and operation (i.e. not being involved in the matter being investigated), the paragraph was open to a different interpretation – to mean no prior contact with the complainers in addition to any involvement in the subject matter of the complaint. Secondly, having regard to the totality of the Investigating Officer’s dealings with the complainers before her appointment as Investigating Officer, the reasonable observer would conclude that there was a real possibility that she could not act impartially as she was required to do by the procedure.

40. The Permanent Secretary therefore concluded on 2 January 2019 that the Scottish Government should concede the judicial review proceedings because of the apparent bias issue (described in paragraphs 39 above).

41. As part of the settlement of the case, it was agreed by parties that the Petitioner’s legal expenses in the judicial review should be paid for by the Respondents. The order by the Court on 8 January 2019 reflected this agreement and awarded expenses “on an agent and client, client paying” basis.

42. In any case where expenses have been awarded by a court, an account of expenses is drawn up by the party whose expenses are to be paid and the account is intimated to the paying party. The preparation of an account and consideration by the paying party are routinely handled by law accountants instructed by each party.

Law accountants are specialists in assessing the work done in a case and what can and cannot be claimed for in expenses in accordance with court rules. They will negotiate on behalf of the parties with the aim of reaching agreement. Negotiations can lead to parties agreeing the amount of expenses to be paid.

43. If agreement of expenses is not possible, the Auditor of the Court of Session will tax the account (assess the account) and decide on the appropriate level of fees and outlays. The Auditor charges a percentage fee for their consideration. They will then prepare a statement of the amount of expenses as taxed to the Court. Any party may object to the Auditor's statement and the Court will hear the parties and decide whether or not to uphold any objections, decide on the amount of expenses to be paid and find any party liable in the expenses of the procedure.

44. In this case the negotiations over the account of expenses lasted several months, the outcome of which was agreement, without the need to proceed to a taxation with the Auditor.

45. An interim payment of £346,000 was agreed to and paid by the Respondents on 13 May 2019 whilst negotiations in relation to a final sum continued. Parties agreed a final amount of £512,250, and the balance of £166,250 was paid on 2 August 2019<sup>17</sup>.

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<sup>17</sup> <https://www.parliament.scot/HarassmentComplaintsCommittee/20191031PermSectoConvener.pdf>