14 October 2020

Dear Ms Fabiani

Committee on the Scottish Government Handling of Harassment Complaints

I have responded below to a range of points raised in your two letters to me of 7 October, your letter of 12 October and in correspondence from the Clerk to my officials.

Providing documentation to the Committee

I want firstly to address the misrepresentation of some of the Scottish Government’s actions contained in some of the submissions made to your Committee, which also seems to inform points made in your letters of 12 and 9 October. The Scottish Government is not seeking to provide any information to the Committee about the substance of the complaints, and has never done so. The Committee has made it clear it does not wish to receive such information: a position we have understood since the outset and agree with not least because releasing that information would risk identification of the individuals who made complaints. As was the case with the 1,000 pages of documentation provided to the Committee so far by the Scottish Government, all information about the substance of the complaints has been and will be redacted from documents which are submitted by the Scottish Government. I hope that clarifies any misunderstandings which have arisen.

I also want to be clear that the Scottish Government’s legal action, to which you also refer, is not seeking the court’s permission to submit to the Committee information about the substance of the complaints. Neither has the Scottish Government ever suggested to any party that it wishes to submit to the Committee documents which are specifically mentioned in the undertaking which the Government gave to the Court of Session on 8 January 2019 and to which you refer in your letter of 12 October. The Scottish Government accepts that those documents are covered by the undertaking not to publish or disseminate them, particularly the Investigating Officer’s reports. Instead, the legal action is necessary because in an objection received by the Scottish Government it is argued that the undertaking covers documents other than those specifically mentioned in the undertaking, including documents which we wish to submit to the Committee because we believe they relate directly to the...
Committee’s remit and to questions asked of us by the Committee. Specifically, the Committee has asked us for:

“A written statement plus supporting documents in respect of how the Scottish Government handled the specific complaints under the harassment procedure. In particular, the Scottish Government has been asked to address: what the process was in conducting the investigation; who conducted it; who took final decisions on the outcome of the investigation and when contact was made with Alex Salmond; and whether the findings were going to be published.”

Given the substance of the objection received the Government has no choice but to seek confirmation from the court that it may provide the Committee with documents which are not mentioned in the undertaking. The Scottish Government also wishes to seek confirmation from the court that documents reduced by the Court of Session which are not covered by the undertaking can be provided to the Committee. This too has been disputed in the objection received by the Scottish Government. These documents are directly relevant to the questions asked by the Committee, they remain in existence and in the possession of the Scottish Government, and we wish the all the relevant information to be provided to the Committee – clearly noting of course those which have been reduced by the court.

This process will enable the Scottish Government to submit its fourth tranche of documents in relation to the Committee’s request outlined above. The Scottish Government is also compiling and redacting further tranches of documents as requested by the Committee in relation to the judicial review. These include the Scottish Government’s productions, and documents provided by the Scottish Government which were ‘recovered’ in the Commission. They also include the answers for the Scottish Government as originally lodged and as at each adjustment date. I will provide a further update on progress this work in advance of the Committee’s meeting on 27 October.

Judicial Review phase of the Committee’s inquiry

You asked which Scottish Government officials in Senior Civil Service (SCS) positions were involved in the oversight and handling of the judicial review process. The following SCS officials, referred to by the job roles they held at the time of the judicial review as you suggested, had varying levels of involvement:

- Permanent Secretary
- Director General, Organisational Development & Operations
- Interim Director, Scottish Government Legal Directorate
- Deputy Director, Scottish Government Legal Directorate

The content of legal advice provided by staff in the Scottish Government Legal Directorate is subject to legal professional privilege, and accordingly these members of staff will not be in a position to answer questions about the source or content of legal advice. However as the Lord Advocate has previously made clear to the Committee he is able to provide an explanation of the legal position taken by the Scottish Government at any given point in time. In considering whether to ask individuals to provide oral evidence to the Committee I would also ask the Committee to note that the individual who was at the time Interim Director of SGLD is currently playing a critical role in responding to the COVID pandemic as SG Director for Outbreak Control Management.
You also asked which officials gave evidence, or were scheduled to give evidence, to the Commission as part of the judicial review process. Members of Scottish Government staff received citations to attend the Commission direct from Mr Salmond’s legal representatives. However our understanding of the position is as follows. The Senior Civil Servants who were cited and appeared before the Commissioner were the Permanent Secretary, Barbara Allison, James Hynd, and Judith Mackinnon. In addition, two other civil servants below SCS level gave evidence whose names are withheld for confidentiality reasons in line with the Committee’s approach to its inquiry. Two other Senior Civil Servants (Gillian Russell and John Somers) were scheduled to give evidence but had not done so at the point when the proceedings concluded.

You indicated that the Committee will consider whether it wishes to ask civil servants to provide further oral evidence beginning on 27 October. Before any civil servants provide further oral evidence to the Committee I would be grateful if you would respond to my letter of 14 September in which I raised issues about upholding civil servants’ data protection rights and not breaching the Committee’s own data protection rules, and to my request that the Committee to change its practice in order to provide witnesses with a copy of any document to which they are referred or asked to comment upon.

Finally, on 12 October you asked for a significant amount of further written information from the Scottish Government by 21 October, including preparing a third written timeline about the judicial review in addition to those provided by the Scottish Government on 7 and 21 September. We will provide as much as possible of the material requested by that date, however some of it may take longer to provide.

Yours sincerely

JOHN SWINNEY