



Linda Fabiani MSP
Convener – Committee on the Scottish
Government Handling of Harassment Complaints
c/o Clerk to the Committee
Room T1.03
The Scottish Parliament
Edinburgh
EH99 1SP

13 November 2020

Dear Ms Fabiani

Committee on the Scottish Government Handling of Harassment Complaints

Thank you for your letters of 6 and 10 November. I am grateful for the confirmation that the Committee is coming towards the completion of the judicial review phase of its inquiry.

I note the Committee's concern that additional information is being identified during oral evidence sessions and the specific examples you refer to. I hope the Committee will agree that it is not outwith the normal course of parliamentary scrutiny and evidence gathering for oral evidence sessions to give rise to additional information. As you note, more detailed timelines on the judicial review process have been provided. This reflects the Scottish Government's on-going willingness to respond to the Committee's requests for further detail.

The Committee asks about the extent to which legal professional privilege (LPP) is being applied to the handling of documents. The written submissions from the Scottish Government of 20 July and from the Lord Advocate of 4 August and my letter of 14 August set out the basis on which LPP applies and its importance to upholding the rule of law. The Committee is aware of the terms of the relevant sections of the Ministerial Code as they relate to LPP and the Lord Advocate has also provided oral evidence on the application of LPP. The criteria applied when considering waiving LPP are those set out in the Ministerial Code. LPP does not apply just to the content and fact of formal, written opinions from counsel, Law Officers or other legal advisers, but also covers any form of communication in which legal advice is provided or referred to (such as e-mails and written notes of oral advice) as well as communications seeking legal advice. As the Lord Advocate has noted, the protection of the Government's legal professional privilege is a routine part of good government.

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However, as I set out on 4 November, following the vote by MSPs on the motion in the name of Murdo Fraser, we always seek to respect the decisions that are taken by Parliament. I am, therefore, considering the implications of the motion, with my ministerial colleagues, consistent with our obligations under the Ministerial Code. During the debate, MSPs raised a number of arguments for why legal professional privilege should be waived in this particular case and we are considering each of these carefully, alongside wider considerations. As the Committee is aware, under the terms of paragraph 2.40 of the Ministerial Code, even if Ministers take the decision that the balance of public interest favours disclosure in a particular case, they must obtain the prior consent of Law Officers and that consent will be given only if there are “compelling reasons”. I cannot, therefore, give a specific timescale when an outcome will be confirmed, but I will aim to update Parliament on progress on this matter as soon as possible. I should emphasise that, even if a decision was taken to waive LPP on the legal advice relating to the judicial review, further work would be required to implement that waiver. Documents already provided to the committee, and those prepared for disclosure in the near future, which contain redactions because of LPP would need to be reviewed to remove the LPP redactions and add any redactions needed to protect the identities of the complainers or to comply with data protection law. This would need to be factored in to the time it would take to share relevant documents with the Committee if LPP was waived.

I note the question that you raise about the application of LPP to the note prepared by the former Director General for Organisational Development and Operations. As a document to which LPP applies, it falls to be considered with other legally privileged communications under the process set out in the Ministerial Code that I have described above.

Your letter comments on the process for the Scottish Government to release further documents to the Committee. My letters to you of 14 and 26 October set out the process that the Scottish Government is following to release a further substantial tranche of documents to the Committee. I can confirm that a set of securely redacted papers, totalling just under 400 documents were sent to Levy & McRae (L&M) on 30 October. We have asked L&M to confirm which documents they consider are covered by the undertaking given by Scottish Ministers in the judicial review. We initially asked them to respond to us by Friday 13 November and they have indicated that they will be able to do so for many of the documents. L&M have also asked for an extension to 20 November to review some of the documents which my officials have agreed to. My previous letters set out the process that we will follow once we have received the response from L&M. As confirmed previously, the Scottish Government’s position is that only documents expressly referred to or described in the undertaking are subject to it, and that we should be able to share other documents with the Committee. The Committee also asks for assurance about how LPP will be applied to documents relating to the complaints handling process. I confirm that LPP will be applied to these documents in line with the terms of the Ministerial Code.

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I note the Committee's request for early sight of a timeline or written submission giving information on the process undertaken by the Scottish Government in investigating the complaints. Work is progressing on both of these, although, clearly, we will need to ensure that the timeline and written submission align with the documents that we are authorised to share. I also note the Committee's concern earlier in your letter about timelines having to be updated and refined after they have been submitted to the Committee. We will look to provide material as soon as possible which aims to balance these requests from the Committee.

Internal Legal Advice

In addition to the issues raised in your letters, it may also be helpful to clarify a matter raised by the Committee during its evidence session with the former interim Director of Legal Services on 3 November. Members asked the interim Director about the number of lawyers involved in the judicial review process. As we have set out previously, including in the Permanent Secretary's letter of 11 September, it is not possible to provide a definitive figure for the total costs of legal advice to the Scottish Government, including for in-house lawyers. However, I am concerned from the evidence session and comments during the parliamentary debate last week, that there may be a misunderstanding amongst some members of the Committee about the scale of legal input to the judicial review process, which I should clarify.

The Scottish Government estimates that a total of 6 lawyers were involved in various stages of the judicial review and at any one time this would have consisted of between 1 and 5 lawyers, of a variety of grades, involved in the provision of legal advice. None of the lawyers worked on the judicial review exclusively, and the involvement of some will have been limited according to requirements of the case at any given time. A few legal support staff will have been involved on occasion, lodging documents, etc.; as well as external counsel, which may be reflected in the slightly higher figure indicated by the former interim Director.

Scottish Government Legal Directorate (SGLD) does not time record for the legal services it provides across the Scottish Government and does not seek full recovery for its work in the way that private practice firms of lawyers may do with clients. Any estimate of the time spent by lawyers and legal support staff, therefore, would be based on their personal recollections and hindsight now. Such an estimate would not produce a verifiable figure that the Committee could confidently rely on.

Where the Government is successful in a litigation case and expenses are awarded in favour of the Government, an account of expenses is prepared for payment by the opposing party. As well as outlays, the account can comprised the set fees for each stage of the court process, as published in the Court of Session Fees Orders. In addition, the Scottish Government can seek an additional fee, being a percentage uplift on the account. This does not necessarily equate to full cost recovery for legal time committed by SGLD staff on a specific case.

In conclusion, I confirm that the Scottish Government remains committed to providing relevant documentation to the Committee as far as possible within the terms of the Ministerial Code, legislation and other restrictions.

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I hope this reply is helpful to the Committee.

I acknowledge receipt of your further letter of 12 November, to which we will reply separately.

JOHN SWINNEY

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