



John Swinney BPA/MSP

Rt Hon Ken Macintosh MSP
Presiding Officer

Linda Fabiani MSP
Convener - Committee on the Scottish
Government Handling of Harassment Complaints

1 December 2020

Dear Presiding Officer and Convener

Legal Professional Privilege

I refer to the letter of 26 November 2020 from the Convener to me asking for access to the written legal opinions provided by external Counsel relevant to the judicial review brought by the former First Minister. I felt it was appropriate to write to you both given that the Committee and Parliament have deliberated on this issue.

During the debate in Parliament on the motion in the name of Murdo Fraser on 25 November, I confirmed that Scottish Ministers were considering carefully the request from the Committee for access to legal advice relating to the judicial review. I also set out for Parliament some of the issues being taken into account in identifying an appropriate way forward on this matter.

As you are aware, under the terms of section 2.38-2.40 of the Scottish Ministerial Code, Ministers must not divulge either the contents of legal advice or who provided it. The Code allows for disclosure of legal advice only in exceptional circumstances, taking account of the balance of public interest in disclosure versus the public interest in the confidentiality of legal advice, and only following the prior consent of the Law Officers that there are compelling reasons for disclosure.

As the Lord Advocate indicated in evidence to the Committee on 8 September and 17 November, there are very strong reasons of public policy for Government to be able to seek and receive confidential and candid legal advice, including in the context of litigation. The assertion of legal professional privilege by Government, as for other clients of legal advice, is based in common law and is routine. The occasions since devolution when Scottish Government has released or provided access to legal advice have been exceptionally rare, in the context of judge-led public inquiries relating to significant matters of public policy. Importantly, access to legal advice relating to litigation was explicitly excluded on those occasions.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire
Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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There is no clear precedent for the Scottish Government to waive legal privilege in the circumstances of litigation, which is by its nature adversarial and requires the ability for candid and confidential advice. There is potential, in reaching a decision on this specific matter, to create a new precedent that would undermine the ability of not just the current Government, but future Scottish Governments to receive legal advice with necessary candour, including in the context of litigation.

As I indicated during the recent parliamentary debates, Ministers take very seriously the role and decisions of Parliament. We have considered carefully the issues raised by MSPs during the debates and also our commitment to provide the Committee with relevant documents to fulfil its remit, including with reference to the judicial review phase of its work.

I have discussed this issue with Cabinet colleagues this morning and I am keen to consider with you how we might establish a practical way that enables the Committee to have access to the information it seeks. Ministers are anxious to avoid creating a precedent that will impact negatively on the future ability of Scottish Government administrations to seek and receive legal advice in confidence consistent with the long-standing principle of legal professional privilege.

I recognise, given the timescale for the Committee to complete its evidence gathering, the need for urgent progress on this matter. I would like to propose an initial discussion between officials tomorrow at which the Government will propose mechanisms to establish an appropriate way forward on this matter. I am committed to resolving this issue swiftly to respond positively to the decisions of the Committee and of Parliament and would be grateful for your assistance in taking this forward.

JOHN SWINNEY

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