Dear Mr Swinney,

Thank you for your letter of 21 September 2020.

As you are aware, the Committee has been pressing for some considerable time both in correspondence and during oral evidence sessions for documentation relating to the judicial review to be made available. The Committee notes that the Government has now sent a chronology which has been published on our website and the ‘Open Record’ as adjusted to 13 December 2018 from the Judicial Review itself. This is currently being processed by us, in line with our Written Statement on the handling of information and documentation and will be published in due course. To aid understanding of what is a complex document, the Committee would ask that you provide it with a list of dates that correspond to the relevant colour coded pleadings in the Open Record.

The Committee also notes the Scottish Government’s intention to provide it with a copy of the original Petition which initiated the judicial review as well as other pleadings subject to the consent of Levy & McRae’s client. The Committee notes that the Government has sought confirmation from Levy & McRae of their client’s position as regards sharing with the Committee court-generated documents such as interlocutors. We have also written to Levy & McRae in response to their letter to the Committee of 21 September 2020.

The Committee also notes the Scottish Government’s intention to initiate legal proceedings in order to share further documents, including to seek a ruling from the Court on whether specific documentation the Scottish Government holds is, or is not, covered by the undertaking given to the Court. The committee expects that this will
include any documentation submitted by the Scottish Government in the Judicial Review via the Commission and Diligence procedure and I would be grateful for your confirmation of this.

While, the Committee is pleased that the Scottish Government is now releasing a number of documents, it is worth repeating the frustration it feels at the time taken to get to this position. While the Committee notes the Scottish Government's intention to release further information it is mindful of the delays that have already been caused by the Scottish Government's previous refusal to provide documentation and therefore, it has also written to the Court of Session to request confirmation of the extent to which the Court will be able to make documentation available to the Committee, should this not be forthcoming.

We have corresponded previously on the waiving of legal privilege and your letter of 7 September confirmed the Scottish Government would not waive legal privilege but that the Government would be happy to give a full account of its legal position.

To that end, the Committee took evidence from the Lord Advocate and from the Permanent Secretary. The Lord Advocate confirmed the position that the content of legal advice would not be disclosed to the Committee but he suggested that the documents which he hoped would be released to the Committee would give a clearer picture of the Scottish Government’s legal position at particular points in the judicial review.

Notwithstanding this, the Committee remains of the view that the Scottish Government should release details of when and what legal advice was made available during the Judicial Review without any further delay. The Committee notes that the Scottish Ministers have, on previous occasions, chosen to waive legal privilege. It did not impose a restriction notice on the disclosure of legal advice to the Scottish Child Abuse Inquiry or the (UK) Infected Blood Inquiry as well as limited disclosure in the Trams Inquiry. Such disclosure is necessary to enable this Committee to properly discharge the constitutionally important functions of the Parliament: to promote the public interest by ensuring that the First Minister and Scottish Government are held to account for their actions in dealing with complaints about the former First Minister and to maintain public confidence in the conduct of Government litigation having due regard to the public purse.

Finally, the Committee is aware from your letter of 31 August 2020 that you have not been able to submit the fourth tranche of Scottish Government documentation in relation to the handling of complaints in light of a formal objection to some information being released. It is not clear whether some of these documents are among those where you are currently seeking a view from the Courts and the Committee would be grateful for clarification on this. It is imperative the Committee receives this documentation and therefore asks whether the Scottish Government is in a position to release documentation which is not subject to this objection and potentially further court proceedings at this stage.
Yours sincerely

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