CROWN OFFICE
25 CHAMBERS STREET
EDINBURGH EH1 1LA

Telephone: 0300 020 3000

Linda Fabiani MSP
Convener
Committee on the Scottish Government Handling of Harassment Complaints
The Scottish Parliament
By email

25 November 2020

Dear Convener

I refer to the meeting of the Committee at which I gave evidence on 17 November 2020. I undertook to revert to the Committee in writing on certain matters which arose in the course of that meeting; and I deal with those matters below. I stand ready to assist the Committee further, should there be any other questions which it would wish to raise with me about the Government's legal position from time to time.

Contesting permission

During the meeting on 17 November, Margaret Mitchell MSP asked me to provide further information on the decision not to contest permission in relation to the judicial review, specifically on the basis of time bar.

Section 27A of the Court of Session Act 1988 provides that an application to the supervisory jurisdiction of the Court of Session (a petition for judicial review) must be made before the end of: (a) the period of three months beginning with the date on which the grounds giving rise to the application first arise, or (b) such longer period as the Court considers equitable having regard to all the circumstances.

Section 27B provides that no proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed. The Court may grant permission only if it is satisfied that the applicant can demonstrate a sufficient interest in the subject matter of the application and the application has a real prospect of success. The Court has made clear that whilst the "real prospect of success" test

should "sift out unmeritorious cases", it is not designed to present a barrier to an apparently weak case, which nevertheless has a "real prospect of success", being argued in due course: *Wightman v. Advocate General for Scotland* [2018] CSIH 18, paras. 2-9.

The Government does not oppose permission in all judicial review cases; nor would it be appropriate for the Government to do so. Each case depends on its own circumstances. As I explained in my oral evidence, the Government decided not to oppose permission in this case. Whilst the Government considered that it had a strong basis for resisting the various complaints set out in the petition, it recognised that it was highly unlikely that the Court would refuse permission for the petition to proceed. The Government was, in these circumstances, content to address the arguments on their merits at a full hearing in due course.

The background to the time bar point was that the Permanent Secretary had written to the petitioner on 7 March 2018 informing him that an investigation had commenced into two formal complaints, and was being conducted under the Procedure, a copy of which was provided to him. The petitioner was informed of the decision reached following the investigation on 22 August 2018. The judicial review petition was served on 31 August 2018. The judicial review petition was accordingly lodged very quickly after the conclusion of the process; but this was more than three months after the intimation to the petitioner of the Procedure and that it was being applied to him.

The Scottish Government's position, reflected ultimately in its pleadings, was that certain of the complaints advanced in the petition for judicial review were time barred, on the basis that they had arisen more than three months before the petition was lodged. The complaints in question were those related to the competency of the procedure itself and its application to the petitioner, since he had been aware of these more than three months before the petition was lodged. The Government accepted that the other complaints in the petition were not time barred.

It followed that taking a time bar point would, on no view, have disposed of the petition as a whole at permission stage. Further, the Government recognised that the petitioner would likely be able to advance a strong case for an extension of the statutory three month period in relation to those claims which were prima facie time barred, on the ground that it was reasonable for him to await the outcome of the proceedings before bringing any challenge before the court. In these circumstances, the Government considered that it should not insist in the time bar point as a basis for opposing permission, but that this should be held over to be dealt with along with the other issues in the case at a full hearing.

The Commission Process

Jackie Baillie MSP asked me why the Government opposed the establishment of the commission, and I offered to follow that up in writing. As I explain below, although the Government initially marked opposition on a number of grounds to the motion to approve the specification, by the time of the hearing of the motion – and, in particular, in light of its appreciation that the process of searching for and producing relevant documents had not, in fact, been exhaustive - the Government opposed the specification only to a limited extent, with a view to protecting the confidentiality of the complainers.

It may be helpful if I provide some general background to the process for disclosure of documents in the context of civil litigation. The Committee will appreciate that litigation is an adversarial process, in which the issues in the case, upon which the Court is being asked to adjudicate, are identified and defined in the pleadings. The parties may voluntarily disclose documents to one another. A party who wishes to obtain documents which have not been disclosed voluntarily may enrol a motion seeking a Court order to approve a specification of documents (which sets out the documents, or categories of documents, which the party is seeking) and to authorise a commission. It is open to the other party to contest that motion on various grounds. When a motion is enrolled, the other party, if it wishes to oppose the motion, requires to "mark" opposition in writing with an explanation of the grounds of opposition. The court then fixes a hearing at which parties' counsel present submissions in relation to the motion.

On 2 November 2018 the petitioner's solicitors intimated a motion for approval of a specification and to authorise a commission and diligence for the recovery of documents. This was considered by the Court on 6 November. At that stage both parties were engaged in adjusting their pleadings, and the Scottish Government intended to disclose relevant documents voluntarily. As the timeline produced by the Government to the Committee explains, the judge indicated that he did not consider that, at that stage, there was a need for a commission. The petitioner's motion was not insisted on. The judge stressed his expectation of full compliance by the Scottish Government with the duty of candour. Thereafter, as the timeline discloses, the petitioner's lawyers made requests for documents (12 November and 26 November), and the Scottish Government disclosed documents to the petitioner's lawyers (16-21 November).

On 6 December, the petitioner's lawyers enrolled in writing a further motion for approval of a specification of documents and a commission and diligence. On 7 December the Government marked its opposition to that motion on the following grounds:

> "(1) The specification is unnecessary. The respondents have provided, voluntarily, a large volume of documents relating to the matters that form

the basis of the petitioner's calls. Many of those calls have already been "exhausted" by that voluntary disclosure.

(2) The specification is irrelevant. It seeks information that is not relevant to any of the grounds of review advanced by the petitioner. The history of the development of the Procedure is irrelevant. The petitioner knows and has always known the terms of the Procedure in terms of which the complaints against him were investigated.

(3) The specification seeks the recovery of privileged legal advice.

(4) The specification seeks the recovery of material that was the subject of confidentiality undertakings given by the second respondent to complainers A and B.

(5) The specification, if granted, would prejudge the substance of the petition for judicial review. It seeks to obtain access to material including informal communications and formal complaints to which the petitioner is not entitled to access in terms of the Procedure. The fairness of that non-disclosure is itself in issue in the Petition.

(6) The specification is a fishing diligence, not least because it does not provide for excerpting."

These were all standard grounds upon which a party to litigation may seek to oppose a specification. The court fixed a hearing for 14 December 2018 to consider the motion. During the period between 7 December and 14 December it became evident to the Scottish Government that it had not, in fact, exhausted the process of searching for and producing relevant documents, and that assurances which had been given by counsel in relation to the production and redaction of documents were incorrect. The petitioner was content that the Government redact or withhold documents to protect legal professional privilege. In light of these circumstances, at the hearing of the motion, the only ground of opposition argued was in relation to material covered by a commitment given to the complainers that their complaints would be treated in strictest confidence; and the Government acknowledged that if the petitioner could show that sight of the documents which had been withheld as a result of that commitment was essential, and the information was not available elswhere, that commitment would yield to the order for recovery. The judge concluded, on that issue (which was the only issue argued) that the complainers would be adequately protected by the court orders which had been made; and approved the specification without qualification.

Accordingly, although the Government had initially opposed the motion to approve the specification on a number of grounds, by the time of the hearing of the motion – and, in particular, in light of its appreciation that the process of searching for

and producing relevant documents had not, in fact, been exhaustive - the Government did not oppose the specification other than to the limited extent which I have described.

Previous instances of waiver of LPP

The Committee has already been advised of three instances when the Scottish Government has provided material subject to legal professional privilege to statutory public inquiries. Angela Constance MSP asked me to provide some further details of how material was released to those inquiries.

(i) *Edinburgh Tram Inquiry.* In response to a request for all documents relating to the Edinburgh Tram project held by the Scottish Government, the Scottish Ministers provided around 17,000 documents to the Inquiry in electronic form on memory sticks. As it was likely to take some time to review these documents, they were provided on a confidential basis (i.e. on the basis that it would not be released outwith the Inquiry team) so that the Inquiry could make progress, but on the understanding that SGLD would subsequently notify the Inquiry of the documents for which Ministers claimed LPP. SGLD duly carried out that assessment, and intimated Ministers' claims of LPP to the Inquiry with a request that, if the Inquiry Chair disagreed, Ministers should be given an opportunity to make representations to him on the matter. After a process of dialogue, there was agreement as to which documents were covered by LPP; and the Inquiry respected Ministers' assertion of LPP over those documents and agreed not to release those publicly. It follows that, in this case, although material to which LPP attached was provided to the Inquiry, the Government's assertion of LPP was ultimately maintained and respected.

(ii) *Infected Blood Inquiry.* This Inquiry deals with a time period dating back to 1970. Most records over 30 years old will be released to the Inquiry without assertion of LPP. In relation to more recently created records, LPP will be waived, but subject to the following exceptions: (i) Law Officer advice (where a decision will be made on a case by case basis); (ii) legal advice in relation to the Penrose inquiry, legal advice in respect of any ongoing litigation cases and legal advice given after the date the Inquiry was announced. The material is being provided to the Inquiry via an electronic document sharing system, accessible only to the inquiry and Government officials.

(iii) *Scottish Child Abuse Inquiry.* The Inquiry's remit extends "within living memory" to 17 December 2014. In response to the service of notices by the Inquiry under section 21 of the Inquiries Act 2005, the Government agreed to provide documentation to the Inquiry and to waive LPP, with the exception of: (i) formal Law Officer's opinions (where a decision will be made on a case by case basis); and (ii) litigation files (with the exception of pleadings and court

documents, which will be released). Documents have been shared with the Inquiry via electronic document management platforms or as pdf attachments to emails.

The Committee may wish to note that section 19 of the Inquiries Act 2005, which applies to those inquiries, allows for restrictions to be imposed on disclosure or publication of any evidence or documents provided to an inquiry, either by the Scottish Ministers or at the initiative of the inquiry chair.

Contact with the police

Margaret Mitchell MSP asked me whether I had any contact with the police regarding the Scottish Government's handling of the harassment complaint. Having reviewed the transcript, it seems to me that I can, properly, answer that question without breaching the Law Officer Convention, since (by contrast with the preceding questions) that specific question was directed to contact with an agency external to Government. I am accordingly free to advise the Committee that I have had no contact with the police in relation to the Scottish Government's handling of the harassment complaint, or, indeed, otherwise in relation to the matters which have given rise to the Committee's work.

I hope that this further information is of assistance to the Committee.

Yours Sincerely

W. JAMES WOLFFE, QC