Submission of Alex Salmond on publication of legal advice with reference to Ministerial Code aspect of the Inquiry.

In my submission on the Ministerial Code I stated that;

"Further once the Judicial Review had commenced and at the very latest by October 31st 2018 the Government and the First Minister knew of the legal advice from external counsel (the First Minister consulted with counsel on 13th November) that on the balance of probability they would lose the Judicial Review and be found to have acted unlawfully. Despite this the legal action was continued until early January 2019 and was only conceded after both Government external counsel threatened to resign from a case which they considered to be unstateable. This, on any reading, is contrary to section 2.30 of the Ministerial Code."

The belated publication of the Government's external legal advice in three batches on Tuesday 2nd March, Thursday 4th March and Friday 5th March from Roddy Dunlop QC, now Dean of the Faculty of Advocates, and Christine O'Neill QC shows that my arguments were understated. In fact the Government were told that they were in substantial difficulty in September, and by October 31st were warned that they could be "defending the indefensible". The accompanying note from senior counsel puts these extraordinary revelations in proper legal context. As an interested party to the Judicial Review action the First Minister was fully sighted on all these matters and attended a consultation with both Government counsel on November 13th 2018. This meeting according to the Deputy First Minister (9th March 2021) was focussed on "adjustments to pleadings for the judicial review". Significantly the consultation notes from that meeting have not been published by the Government.

The First Minister's defence of these circumstances is twofold.

One, that the case was still "stateable" and two, that this was the view of the law officers. Neither argument is convincing.

In terms of the Ministerial Code 2.30 the "overarching duty" on Ministers to ensure that the Government complies with the law is not met by the low bar of pursuing legal cases which are merely "stateable". The duty on Ministers is to pay respect to the range of legal advice being received. To disregard the advice of counsel was reckless, in breach and very costly to the public purse.

In terms of the Law Officers, the Government have not published their advice, if any was given. The fragmentary indications that we have from published material indicates that they were supporting continuation of action against the advice of external counsel. However this position is placed in context on December 17th when it is clear in the note from external counsel to the Lord Advocate their view is that the case could only be being continued for "political" reasons given that "we are firmly of the view that one or more challenges mounted by the petitioner will be successful"

Further the joint note from Senior and Junior Counsel of 19th Dec 2018 puts the matter beyond any possible doubt. This note written after the first part of the document commission begins “With regret our dismay at this case deepens”.

When the dramatic contents of this note were put to the First Minister in her evidence session before the Committee on March 3rd she agreed with committee member Mr Fraser that it was “catastrophic” and said;

“Had I, at that point, said that we would steam ahead anyway, I would potentially be sitting here with there being some - or a lot of - justification for the charges that are being made against me”

The point is clear and obvious. The Judicial Review was NOT conceded at that point. It continued on for another two hearings of the Commission on the 21st and 28th of December before being finally collapsed by the Government on 3rd January 2019, after counsel had threatened resignation.

I have asked Levy and McRae for a broad estimate of our recovered costs over that period from 19 December to 3 January 2019. They are £135,000. In addition there will a similar percentage of the Government’s own costs. That is substantial public money wasted in unlawful pursuit of a doomed case.

Thus on any reading, and even reduced to its absolute minimum, this constitutes a breach of section 2.30.

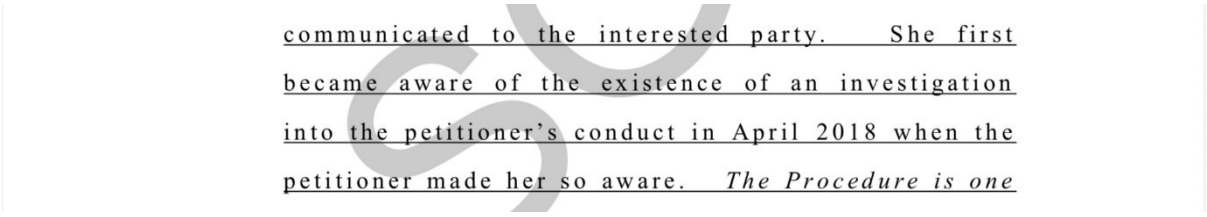
Two further matters should be noted from the Judicial Review in terms of the Ministerial Code.

Firstly it is clear from the published notes of external counsel and, in particular, their note to the Lord Advocate of 17th December 2018 that some civil servants were engaged in actions which would have misled government counsel, my legal representatives and the court. This is in conflict with section 1.3 (e) of the code and the duty on Ministers which states

1.3
(*e) Ministers should similarly require civil servants who give evidence before Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code;*

This is written for Parliamentary Committees but in the spirit of the code must also apply to court actions which the Government is contesting. In addition none of these circumstances, now revealed in the external counsel note of 17th December which led to the Government first disputing and then accepting the motion to court establishing the Documents Commission, were shared with the Parliamentary Committee by these same civil servants speaking on behalf of Ministers. They were only revealed by publication of the legal advice last week. The civil servants were aware of the seriousness of the actions uncovered by senior counsel but did not reveal it to the Committee. Neither did the Lord Advocate when questioned by the Committee on this matter despite the fact that the counsel note of 17th December was addressed to him as well as to the Government’s own lawyers.

Second and finally, the claim by the First Minister that she was "first aware of the existence of an investigation" in April 2018 was not just made to Parliament but exactly in these terms in pleadings to the Court of Session. As an interested party these pleadings could only have been made with the full authority of the First Minister, as indeed Mr Swinney's statement of 9th March also confirms. This position is incompatible with even the First Minister's latest explanations of the circumstances of the March 29th 2018 meeting in her office. I attach a copy of the relevant section of the Open Record of the court pleadings which is already with the Parliamentary Committee.



communicated to the interested party. She first became aware of the existence of an investigation into the petitioner's conduct in April 2018 when the petitioner made her so aware. *The Procedure is one*

Ends.