Government
Legal Department

Jonathan Jones QC (Hon)
Permanent Secretary
HM Procurator General & Treasury Solicitor

One Kemble Street
London WC2B 4TS

Direct Line: (020) 7210 3050
jonathan.jones@governmentlegal.gov.uk

Rt Hon Mark Drakeford AM
First Minister of Wales
Welsh Government
Cardiff Bay
Cardiff
CF99 1NA

3 July 2019

Dear First Minister,

Independent QC investigation into the actions and decisions of the former First Minister, Carwyn Jones AM in relation to Carl Sargeant's departure from the Cabinet in November 2017

Thank you for your letter of 11 June and accompanying documentation.

As agreed, I have reviewed the terms of the Operational Protocol (OP) governing the above investigation in the light of the High Court's judgment and Order in the case *R (Sargeant) v First Minister of Wales and another*.

As requested I have considered those representations about the OP from the investigator and from the family of Mr Sargeant referred to in your letter – but no others. In the interests of transparency I record that the Government Legal Department (GLD) previously acted for the investigator, Paul Bowen QC and instructed counsel to appear in a watching brief in the judicial review. I personally had no involvement in the case at that stage and my review of the OP has been undertaken entirely independently, without reference to any information held by GLD in that earlier capacity.

The High Court allowed the application for judicial review on the basis that, contrary to expectations raised in the press statement of 10 November 2017, the preparation for the inquiry, including the determination of the terms of the OP, had not truly been made "separately from the First Minister's Office". It is in order to restore "the benefit of the promised independent procedure" (as the High Court put it in paragraph 91 of its judgment) that I have now been asked to review and determine the OP.

I focus in turn on the four aspects set out in paragraph 112 of the judgment.

> *(1) That the OP should not empower the investigator to compel witnesses to attend to give oral evidence and/or to produce evidence (OP, paragraph 12).*

In paragraph 114 of its judgment the High Court confirmed (i) that it saw no substantive error of law in a decision that the investigator should not have powers of compulsion; and (ii) that that the First Minister has no power to compel witnesses in a non-statutory inquiry or to empower the investigator to do so. I have noted the argument on behalf of the Sargeant family that it would have been open to the First Minister, under section 71 of the Government of Wales Act 2006, to confer on the investigator a power to compel witnesses to attend and provide evidence[1]. However that argument is not supported by paragraph 114 of the judgment.

It follows that this aspect of paragraph 12 of the OP is correct as a statement of law and I see no basis for changing it.

> *(2) That any oral evidence given to the investigator should be heard in private (OP, paragraph 30).*

Whilst paragraph 30 of the OP provides for oral evidence to be heard in private, it goes on to provide for the investigator to determine that a person may attend where they have a sufficient interest in the subject matter of the evidence, and where this is necessary in the interests of justice, subject to the other provisions of that paragraph. The High Court held as follows:

> (i) It saw no legal principle requiring a different approach from that included in paragraph 30 of the OP (paragraph 115 of the judgment).
> (ii) The "flexible arrangements were a permissible option" and were "not inherently unfair" to any party (paragraph 116 of the judgment).
> (iii) Requirements of fairness (whether under Article 8 ECHR or at common law) did not require a different approach (paragraph 108 of the judgment).

In the light of these findings I conclude that paragraph 30 of the OP is justifiable and appropriate.

> *(3) To empower the investigator to refuse to permit the claimant and the family of Mr Sargeant to attend hearings if attendance will cause a witness to withdraw his or her consent to give evidence (OP, paragraph 30).*

Similarly, in light of the findings of the High Court in paragraphs 107-108 and 115-116 of its judgment, I consider that this aspect of paragraph 30 of the OP represents a justifiable and legitimate approach to encouraging witnesses to attend and give evidence.

> *(4) To refuse to permit the claimant and the family of Mr Sargeant to ask questions of any witness through their legal representative (OP, paragraph 32).*

---

[1] Letter from Hudgell solicitors to the investigator dated 22 May 2018; also Claimant's Statement of Facts and Grounds, paras 20-22.

Paragraph 32 of the OP reflects the inquisitorial nature of the procedure, under which questions are to be put to witnesses by the investigator or by counsel. It provides for any person (including the family of Mr Sargeant) to propose questions which they wish to be put to any witness. The High Court considered that such an approach was not uncommon and was not unfair to the claimant or to any of the other core participants (paragraphs 117-118 of the judgment). Also, in paragraph 108, the High Court again found that requirements of fairness (under Article 8 ECHR or at common law) did not require the claimant or her lawyers to have the opportunity to question all witnesses. I conclude that paragraph 32 strikes a fair and reasonable balance and is legitimate.

Conclusion

It follows that I do not consider that any substantive changes need to be made to the OP in consequence of the High Court's judgment.

I suggest that a technical change be made to paragraph 4 of the OP to reflect the exercise that I have undertaken. At present paragraph 4 says:

> *"The Terms of Reference have been determined by the Permanent Secretary following submissions by the family of Carl Sargeant and following discussions with the Investigator."*

I suggest adding words along the following lines:

> *"They have been independently reviewed by the Treasury Solicitor in light of the judgment of the High Court in the case of* R (Sargeant) v First Minister of Wales and another *[2019] EWHC 739 (Admin)".*

I would also propose that the cross-reference in paragraph 36 to the Investigator's recommendation (to enter into a contract for goods or services) ought to be corrected to a recommendation under paragraph 42 (not under paragraph 43).

I have not identified any other changes which I consider should be made to the OP.

Yours sincerely,

Jonathan Jones

JONATHAN JONES