31 October 2020

Dear Ms Fabiani,

Committee on the Scottish Government Handling of Harassment Complaints

On 27 October 2020 I undertook to write to the Committee to provide further information in response to questions raised.

Development of the Procedure

Ms Baillie asked about my communication with James Hynd and with the Permanent Secretary before the first iteration of the policy. This communication can be found in the documents already submitted to the Committee alongside the statement on development of the Procedure. As is set out in the written statement, work was already planned earlier in 2017 to review Fairness at Work, the wide-ranging policy that covers discipline and conduct issues for civil servants and which has, since 2010, included provision for complaints against current ministers.

On 31 October 2017, the Permanent Secretary’s office passed on the request from Cabinet that SG take a fresh look at its approach to ensure it was well placed to respond to any sexual harassment complaints [Phase1FN10/YY002]. From 2 November my team began to consider this request in the light of the review work already underway [Phase1FN9/YY015]. Fairness at Work and related policies were considered through the lens of sexual harassment, as referred to in the Permanent Secretary’s message to all staff. Teams with responsibilities for HR policies reviewed potential gaps in policy to ensure that we fulfilled the commission from Cabinet. James Hynd led on the Ministerial Code element of the review process [Phase1FN11/YY021 and Phase1FN10/YY022]. Former Ministers were identified as a gap and this is included in the draft ‘Route Map’ [Phase1FN12/YY023] produced on 7 November.

Ms Baillie put to me that this was the day before James Hynd produced the first iteration of the policy. It was in fact happening in parallel, as is set out in paragraph 21 of the written statement and in the timeline provided, the first version of a new procedure that could be
applied in respect of former Ministers was created on 7 November 2017 (as the original date stamp of the Word document makes clear). This was circulated on 8 November [Phase1FN23/YY030].

Ms Mitchell asked about the contact within Police Scotland in December 2017. The then Director of Safer Communities, Gillian Russell, provided me with a contact in the Public Protection Specialist Crime division so that we could seek advice on handling cases of sexual harassment. If you need the name of the person, I would refer you to Police Scotland who will be able to consider this under their personal data obligations. This was a generic meeting about a person centred approach and did not include reference to any specific concerns, complaints or individuals. The contact with Police Scotland in relation to this person centred approach was all done through People Directorate.

Judicial Review

Mr Fraser asked about the 15 meetings that were held between the 23 August 2018 and the 2 January 2019 and how many of those meetings I had attended. The Scottish Government was asked in a Freedom of Information request of 24 April 2019 (https://www.gov.scot/publications/foi-19-01156/) for dates of meetings with Scottish Government counsel defending the Judicial Review and identified 17 meetings on 15 different dates. This did not include internal meetings between officials where counsel were not present. The meetings I attended were internal update meetings, they were not oversight or decision making meetings. I attended one meeting on 19 October 2018 with Scottish Government counsel who asked for some specific information, which I provided. This was also not an oversight or decision making meeting.

Mr Cole-Hamilton asked whether updated guidance had been provided regarding paragraph 10 of the Procedure. The Permanent Secretary reassured the trade unions in January 2019 that the procedure remained in force and that she would commission a formal review to learn lessons about its implementation. This review was commissioned in January 2019 to ensure we learn and apply learning to any future complaints. The review, along with other inquiries, was put on hold due to the announcement of criminal proceedings against the former First Minister and then by the impact of COVID-19, but it is now underway as the Permanent Secretary set out to the Committee in August.

In the meantime, issues about the implementation of the Procedure have been highlighted from the judicial review process. In the event of the Procedure being required, we would be mindful of all areas of potential challenge, including the interpretation of paragraph 10.

Having reviewed the Official Report I note that when asked by you about the evidence I gave to the commission on diligence, I said that I submitted additional documents to the Scottish Government Legal Department on 27 January but it was in fact 27 December 2018.

In the subsequent oral evidence session with Barbara Allison there was an exchange about who attended the update meetings on the judicial review process. I would like to request a correction to Ms Baillie’s paraphrasing of my evidence. When asked by Ms Baillie who attended those meetings, I started to describe a range of people who may have been involved at various points. I was stopped by Ms Baillie whilst in the process of listing these as she sought to clarify the involvement of legal advisers. Ms Baillie later put to Ms Allison that I had said that special advisers were not present at these meetings, but I had not.
Yours sincerely,

Judith Mackinnon
Head of People Advice