



OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 1 September 2020

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 1 September 2020

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**COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT
COMPLAINTS**

5th Meeting 2020, Session 5

CONVENER

*Linda Fabiani (East Kilbride) (SNP)

DEPUTY CONVENER

*Margaret Mitchell (Central Scotland) (Con)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Jackie Baillie (Dumbarton) (Lab)

*Alex Cole-Hamilton (Edinburgh Western) (LD)

*Angela Constance (Almond Valley) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Alison Johnstone (Lothian) (Green)

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Malcolm Clark (Council of Scottish Government Unions)

Dave Penman (FDA)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 1 September 2020

[The Convener opened the meeting at 10:16]

Decision on Taking Business in Private

The Convener (Linda Fabiani): Good morning, and welcome to the fifth meeting in 2020 of the Committee on the Scottish Government Handling of Harassment Complaints.

Our first item of business is to decide whether to take in private the committee's work programme discussion at next week's meeting.

Do members agree to take that in private?

Members *indicated agreement.*

Development of Policy on Handling Harassment Complaints

10:16

The Convener: Agenda item 2 is the closing evidence session in phase 1 of our inquiry into the development of the Scottish Government's handling of harassment complaints policy. Today's session is with trade union representatives, and will focus on union involvement in development of the procedure.

I remind all those who are present of my statement at the start of our meeting on 18 August. We are bound by the terms of our remit and the relevant court orders, including the need to avoid being in contempt of court by identifying certain individuals, including through jigsaw identification. The committee as a whole has agreed that it is not our role to revisit events that were a focus of the criminal trial in a way that could be seen to constitute a rerun of that trial.

Our remit is:

"To consider and report on the actions of the First Minister, Scottish Government officials and special advisers in dealing with complaints about Alex Salmond, former First Minister, considered under the Scottish Government's 'Handling of harassment complaints involving current or former ministers' and procedure and actions in relation to the Scottish Ministerial Code."

The more we get into specifics of evidence—time, people, cases—the more we run the risk of identifying those who made complaints. The more we ask about specific matters that were covered in the trial, including events that were explored in the trial, the more we run the risk of rerunning the trial. Wherever possible, please avoid discussion of the specifics of concerns or complaints, including those that pre-dated production of the harassment complaints procedure, and avoid naming specific Government officials.

With that, I welcome Dave Penman, who is the general secretary of the FDA union; and Malcolm Clark, who is the convener of the council of Scottish Government unions and Scottish Government group president of the Public and Commercial Services Union.

Dave Penman *made a solemn affirmation.*

Malcolm Clark *made a solemn affirmation.*

The Convener: I invite Mr Penman to make a very brief opening statement to explain his role in the FDA and in development of the policy.

Dave Penman (FDA): I am the general secretary of the FDA, which is a union that represents managers and professionals in public service—mainly the civil service, but also the

national health service. We tend to represent the most senior people in the civil service. We have been around for about 100 years—we celebrated our centenary last year.

As members can tell from my accent, I am from these parts. I grew up in Scotland and worked for unions in Scotland before I moved down to London to work for the FDA. I have worked for the union for 20 years; I have been its deputy general secretary and, since 2012, its general secretary.

We are a small trade union of about 18,000 members, and we deal with the more senior civil servants in the country. When there are politically sensitive issues, they tend to come across my desk, which is one of the reasons why I am sitting in front of the committee to give evidence from the union.

On the matters that are before the committee, we have made it clear in our evidence that the dialogue on a review of the existing processes for dealing with complaints about ministers started around summer 2017. There was informal dialogue in our trade union about a wish to look at processes and procedures. That did not really take off until the explosion of concern around the #MeToo movement and what it meant. It is clear that there were scandals related to that at Westminster. The civil service as a whole decided to consider whether its existing policies were fit for purpose; as part of that, the Scottish Government indicated that it wished to review its process.

At this point, the Scottish Government is still the only part of the United Kingdom civil service that has a bespoke policy for dealing with the concerns of civil servants against ministers. Despite three years of dialogue with the Cabinet Office, no such equivalent policy exists at Westminster. As members will be aware from events at Westminster, the only opportunity to raise a concern is through the ministerial code. That process is completely inadequate for dealing with such issues; indeed, no written process is provided for dealing with concerns.

The Scottish Government already had a process, but, as with all processes, we wanted to improve it. An exchange of views was part of the dialogue. From talking to the people who negotiated at the time, the process was very ordinary; negotiation on procedures and policies is routine for trade unions. We had a series of informal and semi-informal dialogues about principles, and there was an exchange of drafts. Comments were made by all the trade unions, including ours, and we eventually ended up with the policy that came out of the other side of that dialogue.

In many ways, the creation of the latest iteration of the policy was an unremarkable event, because

such work is, essentially, what we do, as trade unions. We will have raised issues, and we will not have got everything that we wanted, which is the nature of dialogue and engagement in negotiations. At the other side, we ended up with a policy that we saw as being an improvement on the policy that existed before it.

The Convener: Thank you very much, Mr Penman.

I ask Mr Clark to make a brief opening statement to explain his role in PCS Scotland, and in the development of the policy.

Malcolm Clark (Council of Scottish Government Unions): Thank you. I have prepared a brief statement, which I will read.

Good morning. I am president of the Public and Commercial Services Union group in the Scottish Government, and convener of the council of Scottish Government unions, which is the umbrella body that covers unions in the Scottish Government. I first joined the civil service in 1985. After time at Whitehall, I joined the then Scottish Executive in 2000. Over my career, I have alternated between official and lay trade union roles. I was elected to my current union positions in May 2017.

Although I am a serving civil servant, I am appearing before the committee today in my trade union capacity. Within the Scottish Government, I am, effectively, on an internal secondment to the council of Scottish Government unions, with facility time in an ungraded post. As such, I would be grateful if any remarks that I make this morning could be considered under the guidance for officials giving evidence at the Scottish Parliament, which states that elected representatives such as me may attend and comment on policy matters, with the understanding that I express views as a representative of my union and not as a civil servant on behalf of the Scottish ministers, or to reflect any personal views that I may hold.

The Public and Commercial Services Union proposed my attendance today primarily because of my involvement in development of the “Handling of harassment complaints involving current or former ministers” policy document in 2017.

That document was developed under the partnership arrangements that have been in place since devolution. Partnership working ensures that staff representatives are consulted and involved at all stages of policy development, and helps to guarantee that the voices of staff are heard, to the benefit of all. Although such arrangements can always be improved, and we still have our disputes and disagreements, I contend that the staff and officials’ side engagement that currently applies in the Scottish Government is the best across the United Kingdom civil service.

I welcome this chance to assist the committee to the best of my ability. Consistent with declarations that were made last week, I am sure that it will not surprise you that I confirm that I am a member of the PCS union.

The Convener: Thank you, both. I open the meeting out to questions from committee members.

Margaret Mitchell (Central Scotland) (Con): My questions will concentrate on the written submissions—possibly more on the FDA submission than on the PCS submission—and to a freedom of information release from February 2018, which referred to the work that went on with the unions and the Scottish Government between 2008 and 2010 to change the policy. We know from the FOI release that there were communications between the TUs about development of the fairness at work policy, in particular regarding complaints against ministers, and that a more robust process was sought, to be agreed to. There was also a reference to serious allegations.

I am keen to understand exactly how the discussions evolved. I see reference to a central committee and board, and to partnership meetings. Who attended? How frequently did they meet? What were the unions' expectations for the issues that were raised at the meetings? Would they expect the issues to go to the Cabinet? Would they expect the issues to go to the permanent secretary? What would the unions expect to get back on who would be briefed? Would a specific minister be briefed on what was discussed and decided on at the meetings?

Would you like to start, Mr Penman?

Dave Penman: Yes. I have spoken to representatives who were involved at that time. Unfortunately, our national officer who was involved then sadly passed away, this year. Clearly, we have discussed the issues that have been around over the past few years, and the creation of the first policy between 2008 and 2010. I do not have detail on how many meetings took place or who attended them.

To understand industrial relations is to understand that trade unions are trying to influence issues. Influence can be exerted in many ways. Quite often, that takes place with formal and informal dialogue, particularly in an organisation in which, essentially, as Malcolm Clark has mentioned, there is quite a positive relationship between the employer and the trade unions.

I will set out my understanding of the dialogue around that time. As you can imagine, existing policies covered civil servants. As in most large organisations, there were already policies for dealing with bullying and harassment. That was

relatively straightforward. Of course, people are always looking to make improvements, but there was a relatively long-term and established process for dealing with and handling such issues.

At the time when there was to be a review of the policy, concerns had been raised with our trade union about the conduct of ministers. I need to make it clear that that was about the conduct of multiple ministers in multiple Administrations. As a result, we sought, in partnership with the other trade unions and the employer, to have the process for dealing with complaints for employees expanded to include ministers. That is quite a difficult dynamic, because ministers are not employees.

As we have discovered in our work in the House of Commons around this, not having an employment relationship with an individual is a very real issue, because, essentially, the idea was to expand a set of employment rules to include individuals who could not necessarily even be compelled to co-operate.

The expansion of the policy was quite an unusual and dynamic thing to do, but it was done on the basis that concerns were being raised about behaviours to such a degree that we considered that a process had to be put in place. As part of the dialogue and review of the process, the expansion of the policy was one of the unions' objectives.

Margaret Mitchell: Who attended the central committee meetings or the partnership meetings? There is an expectation that the partnership meetings involved human resources and, perhaps, Scottish Government officials. It is important that we understand who was attending those meetings. That is my initial question.

10:30

Dave Penman: My understanding is that it would have been our representatives at the time who attended, and occasionally our national officer would also have been involved. Again, although it was unusual in relation to the expansion to include ministers, that is a relatively normal process. It would have been dealt with by the representatives who were dealing with the day-to-day industrial relations of the union from our side. We expect the same from the other side; it would have been dealt with through the normal HR functions and industrial relations processes.

Margaret Mitchell: Mr Clark, would that be your understanding?

Malcolm Clark: Yes. I was a trade union official at the time, but I do not think that I had much involvement in the development of the policy. As I recall it, it was largely colleagues who were

involved in it. It would have largely been engagement between the unions—through the council of Scottish Government unions—and HR and people services colleagues. I cannot recall any external involvement beyond, perhaps, the occasional involvement of full-time union officials.

Margaret Mitchell: [*Inaudible.*—was there an expectation that what was discussed at those meetings would go to the Cabinet or the permanent secretary, or did they have any other involvement? Perhaps the permanent secretary or the head of HR even attended sometimes. That would have been flagged up to the Scottish Government in some form.

Malcolm Clark: I was not directly involved, but I have seen the FOI release that you referred to, and I note that a lot of the names are redacted. I am not even sure to whom they might relate. It is probably worth noting that at that time what was happening was about moving from a dignity at work policy to a fairness at work policy. That might seem like semantics, but there was a significant change to the policy; it was improved a lot. As I recall it, the unions were keen that we introduce a particular element that would deal with engagement with ministers.

Margaret Mitchell: Could I go on to that policy and ask some specific questions? We know that HR had come out with a policy that ensured that ministers would be covered, because the unions had said that it would be unacceptable if the fairness at work policy no longer did that. The initial policy that HR came out with included going directly to the permanent secretary, and the complaint then going to the Deputy First Minister, who would work as an arbitrator, then there would be a conciliation process.

The unions rejected that. My understanding is that they rejected it because HR should have been involved earlier and because it was not acceptable or appropriate for ministers to investigate ministers. That was taken on board by the then permanent secretary, Sir John Elvidge, who raised points about the history of bad behaviour and about it being inappropriate for ministers to investigate ministers.

Trade unions were, at that point, sufficiently annoyed that they said that if they did not get the procedure back by a certain date—I think it was at the end of January—they were going to go to the Advisory, Conciliation and Arbitration Service. It was made clear that if that happened there would be scrutiny from outside the Scottish Government and there might well be press interest.

Taking cognisance of that, the permanent secretary went to the First Minister to look at the policies. Was that appropriate, if the First Minister may have been the subject of those complaints?

We know from the policy that if the Deputy First Minister had been the subject of complaints, they were to go to another cabinet secretary or minister. Could I have your view on that?

Dave Penman: That goes to the heart of one of the problems that we deal with when we deal with Government: ultimately, the people who have the authority to approve a policy or procedure are the people to whom it might apply. It is very difficult to separate the issues. That is one of the difficulties around any such policy, and one of the reasons why I believe that there should be a wholly independent process. Essentially, when we deal with the Scottish Government as an employer, we expect the officials who sit on the other side of the table to have whatever appropriate authority they need to reach an agreement. We do not necessarily go into that on each individual case.

Margaret Mitchell: Specifically, the previous policy covered a situation in which the Deputy First Minister might be the subject of a complaint. If that was the case, the complaint would not go to her door—she would not look at it; another minister would.

Taking on board the concerns about ministerial behaviour, was it appropriate that this new policy went to the First Minister? The new policy was bringing in HR, was more informal and still involved the Deputy First Minister, who, at that time, was Nicola Sturgeon. Given that you were aware of lots of serious allegations and that there was a culture in ministerial offices such that the seniority of the person could stop the discussion going as it should, was that appropriate? Also, what was your view of the revised policy and the informal basis that you had requested?

Dave Penman: On the point about whether it was appropriate, we are dealing with a policy that applies across the Government and across all ministers. We are not dealing with specific allegations about an individual. Having a minister involved in the process of authorising a policy—because that is part of their job as a minister, even though some elements of that policy may apply to them—is the only way we can get an agreement with the Scottish Government. If we do not go to ministers or the First Minister, how will we get a decision and how will the Scottish Government civil service get political buy-in? The process was not dealing with any individual; it was dealing, in the broadest sense, with the policy.

We would absolutely prefer that process to be wholly independent. We would prefer not to have to involve ministers in any decision making about how these issues are dealt with, including the process itself. However, at that point in time, this was the first Government department that had done anything and we were getting improvements in the policy—

Margaret Mitchell: I understand that; I am not dealing with the specifics.

My last question is this: in your experience, during the period from 2008 to 2010, with particular reference to 2010, under the revised policy, and thereafter, did any complaint or expression of concern about inappropriate behaviour go, on an informal or a formal basis, to the permanent secretary and the Deputy First Minister?

Malcolm Clark: Not that I am aware of.

Dave Penman: We are aware of concerns being raised by members about ministerial behaviour, which is why the policy was being pushed by trade unions in the first place. Up to the point when the policy was in existence, the only way in which that could be dealt with would be through the informal raising of concerns. Clearly, after the implementation of the policy, there was an opportunity to use that policy to raise concerns, and I believe that individuals raised those concerns. I am unclear about the numbers who did so formally as opposed to informally, but issues were raised, both before and after the implementation of the policy.

Margaret Mitchell: Were those issues raised with both the permanent secretary and the Deputy First Minister?

Dave Penman: I do not know whether any issue went to the Deputy First Minister. I would have thought that, given the nature of the concerns, if they were raised about a minister, they would have reached the permanent secretary's door. If you look at the evidence from the two previous permanent secretaries—

Margaret Mitchell: I am sorry to interrupt you, but in your submission you said that you raised the concerns with a number of permanent secretaries.

Dave Penman: Yes.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning. I have two baskets of questions and, as I did last week, I will break before the second basket in order to allow other members in.

The FDA submission introduces some worrying revelations. The first is that the numbers of bullying and harassment allegations “stand out quite significantly” when compared with the rest of the UK civil service, and that that is particularly the case regarding allegations against ministers—all told, there were some 30 complaints made against five ministerial offices over 10 years. Should we infer from that that incidents of bullying and harassment were just more prevalent among Scottish ministers?

Dave Penman: That is one of the most difficult things for us to assess. What we can talk about is what we know. We have sat down with a group of representatives and officials and have collated evidence in order to come up with an understanding in terms of the numbers. That is where the figure of 30 that I included in our evidence came from.

As I indicated in my opening statement, I am the general secretary of a small union that deals with the more senior staff, and issues relating to ministers in Whitehall—you will be aware that there have been quite a few over the past few months—would normally come to my door. Although there is no guarantee that that means that issues have not been raised, as they might have been dealt with elsewhere or involve people who are not trade union members, it still seemed to stand out that, whereas we would deal with only a handful of cases across Whitehall—that is, across the rest of the UK Government—when we looked at the matter as a group of representatives here, we could account for about 30 people who had approached us as members with concerns. That does not mean that they raised complaints or that they went through a formal process, but 30 individual members over a period of more than a decade came forward with concerns about ministerial behaviour.

That suggests to me, in looking at the issue of culture, which is what the committee asked about, that the prevalence of issues that we are aware of is much more significant in relation to the Scottish Government than it is in relation to other Government departments. That is not empirical evidence, because it does not guarantee that people in other Government departments have not dealt with matters differently, but the numbers that we are talking about do seem quite extraordinary.

Alex Cole-Hamilton: That is what it would suggest. We also learned from the written submission by Sir Peter Housden, who was the permanent secretary at the time that Mr Salmond was First Minister, that allegations of bullying and harassment were addressed to him in “ad hominem terms”. He said that complaints would be dealt with by him personally and informally. That speaks to the general hum of concern about Alex Salmond and others that we now know existed at the time. To what extent are the 30 complaints that the FDA heard about and which needed union involvement just the tip of the iceberg? Would you say that a much bigger number of concerns were also being dealt with informally through the permanent secretary?

Dave Penman: That is impossible for us to know. Just as I do not know whether complaints in other Government departments have been dealt with, I do not know whether people who were not

members of the trade union would have gone elsewhere or whether they are the people whom Sir Peter Housden and others talk about.

Alex Cole-Hamilton: I just want to drill down into that point. You would expect, though, that there were additional concerns that were never raised with the unions that members of staff would seek to resolve informally internally.

Dave Penman: I have no doubt that that would have been the case. Not everyone is a trade union member, so it is impossible to say whether, as you are suggesting, it was the tip of the iceberg in numerical terms.

Alex Cole-Hamilton: The data that we have from the people survey and research held by both your union and Mr Clark's suggest that the majority of staff did not have a great deal of confidence in complaints processes in the Scottish Government and that they said that they would not even raise concerns informally, citing concerns about confidentiality and, indeed, the impact on their career. Does that suggest that there is a third tier of concerns that might never even have seen the light of day and would never even be raised with a line manager, because of the fears that those staff cited?

Dave Penman: Clearly. I think that you would find that in relation to concerns in any organisation, whether it was just employment concerns or concerns about the Government. You will have people who raise concerns through the union, those who raise them individually and those who do not have the confidence to raise them themselves. Inevitably, therefore, any organisation will face those three categories. What is quite clear, though, from the concerns that were raised with us is that there was a lack of confidence. We have tried to summarise that, because it was about culture and it was over the longer term, as people were concerned about how effective the process would be for dealing with concerns. The question is whether a culture had developed in which individuals felt that, having seen issues occur that were not addressed and were repeated, there would not be a lot of point in raising concerns.

People were obviously concerned, as they would be in those circumstances, about what raising a complaint would mean for them. Inevitably, anyone raising a complaint against someone in power worries about what the impact would be on their career. Organisations need to work hard to ensure that the most powerful people in any organisation can be held to account in a way that builds confidence for those who want to raise a complaint. However, it is quite clear from the evidence that we have had from members that that is not where people felt the organisation was.

Alex Cole-Hamilton: Thank you.

This is my final question before I hand over to other members and come back in later. If there was such a deep level of concerns over three layers—the ones that you heard about as a union; the ones that were raised with line managers and dealt with internally and informally; and the ones that never saw the light of day—why did it take until 2017 for people to start suggesting that we needed a policy to deal with the behaviour of ministers and former ministers?

Dave Penman: Well, it did not, because in 2010 we dealt with the issue in relation to ministers. As we indicated earlier in the evidence, that related specifically to current ministers.

Alex Cole-Hamilton: Sorry—I phrased that badly. My question should have been: if there was this sort of pathway of wreckage behind ministers who had left office, why did it take until 2017 for staff and unions to recognise that there was a gap in the market for a complaints process that addressed the behaviour of former ministers?

10:45

Dave Penman: That is a fair point. In relation to how these policies develop and what we do as a trade union and as an employer, we are dealing with the day to day and with multiple people. A lot of that may be concerns that individuals have raised confidentially with one of our representatives and, as an organisation, we do not necessarily have that breadth of view. It was only after we reviewed that that we recognised that there had been 30 cases, because we sat and thought about it. That is not necessarily always understandable or clear from a trade union point of view such that we recognise that there is something to deal with.

In the main, when dealing with issues to do with bullying and harassment, we are dealing with the event as it is happening. As such, as in an employment context, we are thinking about people who are currently employees or who are currently ministers. It would be unusual to have a situation in which we developed a policy in relation to previous employees. Again, I note that there is a very particular and unusual dynamic around ministers, and therefore former ministers, and around why we would want to do that.

It is something that evolves over time and with experience, and we are constantly trying to improve it. Our job is to try and protect employees and it is very difficult for us as a trade union when we sit and say, "Why did we not think of that seven years previously?" We inevitably revise these things in the light of experience and understanding.

To be honest, most employers, politicians and society had a significant moment around that time in 2017 when we perhaps sat on our laurels and then recognised, as a result of the revelations that were coming out, that we had to do better. It allowed everyone to think about that and to move forward.

The Convener: Would you like to add anything to that, Mr Clark?

Malcolm Clark: As with previous answers, Dave Penman has given quite an extensive response. I add simply that—as has already been commented on—when the policy was developed in 2010, we were the first to develop anything with regard to ministers, and we are still largely in that position. It was therefore groundbreaking.

Hindsight is a great thing and, if more could have been done around former ministers, we would probably have introduced that earlier as well. However, Dave Penman also highlighted quite a significant point with regard to that. When we are looking at employees, we will usually be looking at current employees. Perhaps the additional factor that was introduced in 2017 was looking at matters of sexual misconduct which, obviously, have more of a historical character. When the focus went there, it seemed a lot more appropriate that we also look at the position with regard to former ministers. That was, I suppose, an added justification around that time.

The Convener: In 2010, the policy on current ministers was brought in. Just to get it clear in my own mind, who instigated that, where did the wish for that to happen come from, and what discussions were going on simultaneously with other Administrations in the UK?

Malcolm Clark: I will cover the Scottish Government position. Let me just think. Back in 2010—as I recall it anyway—it was the unions that were particularly keen to introduce that element into the policy. With regard to the position elsewhere, as we have said, we do not believe that it was present anywhere else—was it?

Dave Penman: It was not. As the committee will be aware, it has been an issue for us over a long period in relation both to significant issues in the House of Commons and to how it would be dealt with across the rest of the UK civil service, with the ministerial code in the Cabinet Office. To be honest, there was a lack of willingness over a long period of time to address that in the way that the Scottish Government had.

Although this is, clearly, an examination of things that went wrong, it is important to remember that, a decade on from that initial policy, this was still the only area in which there was any kind of meaningful set-out process where people could

see, if they were to raise a complaint, how it would be dealt with.

Malcolm Clark: It is worth noting that, as was mentioned earlier, the policy development in 2010 was in the context of a major revision of the overarching policy. It was only one element—although clearly a very important one, as subsequent events have shown—of the totally revised policy that we were seeking. It was for all staff, and it was about what was happening in the workplace. At that time, engagement with ministers was a relatively small part of that.

The Convener: I have one little question. In response to Mr Cole-Hamilton, you talked about a lack of confidence in the process. Is that something that you would generally find as representatives across the civil service?

Dave Penman: It depends. Each Government department is an employer and has its own culture. The departments have ministers and senior managers who set behavioural standards, and most of them will have a fairly mature process for dealing with such issues.

If you look at the survey that we did, or the people surveys that are done across the civil service, you will see that issues around bullying and harassment in particular tend to flow and peak in different departments at different times. The level of confidence around the handling of those issues can be different in different departments.

It would be fair to say that, when we did our survey in response to the #MeToo movement, the responses showed that there was a general lack of confidence across the piece. As with the issues in the Scottish Government that you are dealing with, the theme of the responses was around not so much whether the policy was the right one but how it was implemented and resourced and whether it produced outcomes. A lack of confidence in that respect would probably be the picture across most of the civil service, to a greater or lesser extent in different employers at different times.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Good morning, gentlemen. I want to get something clear in my mind. The development of a policy in Scotland in relation to these issues came as a result of what was happening across the Administrations, but it was instigated, if you like, specifically by Westminster based on what had arisen from the survey that went out to all members across the UK. Is that correct?

Dave Penman: Are you talking about 2017?

Maureen Watt: Yes.

Dave Penman: In summer 2017, there was some dialogue on looking at a revision, but it was

a relatively informal dialogue about a potential review of how the process applied and whether there was a separation between how it dealt with ministers and civil servants, and it never went anywhere. As a result of the #MeToo moment, the UK civil service undertook to review all its procedures, and that was the catalyst for a review of the Scottish Government's procedures. Of course, that applied across every Government department.

Maureen Watt: So you are saying the Scottish Government was the only one that really took that up and ran with it, and you are still waiting for similar policies from the others.

Dave Penman: In relation to ministers, that would sit with the Cabinet Office. It would require the Cabinet Office, under the ministerial code, to make changes for most other Government departments rather than just for itself. Any number of Government departments will have looked at their own processes for dealing with bullying and harassment—at that point, it was about not just ministers but the entire process—and sought to make improvements. We have been in dialogue with dozens of Government departments about minor changes.

A review was done and a report was produced centrally, with recommendations for the entire civil service going forward. That process was on-going, either in departments or across the whole civil service. The Scottish Government was looking at its processes and at how those applied to individuals, including civil servants. As the only Government department with a policy that applied to ministers, it was looking at that aspect as well. It was the only place where those two elements were considered at once.

Maureen Watt: To be clear, you are saying that the Scottish Government is the only department in the whole civil service that has a policy in relation to ministers.

Dave Penman: Elsewhere, the ministerial code applies. For example, you can look at what is happening in Whitehall just now. There has been an investigation of the Home Secretary under the ministerial code as a result of allegations of bullying that came to the fore. That investigation is being conducted by the Cabinet Office, and there is no written procedure for dealing with such allegations. The decision on whether a minister has breached the ministerial code sits with the Prime Minister, as it has done in this case for several months. There are no rights for any individual who raises complaints, or any process for dealing with that or for how they can challenge a decision or how the decision will be made. A decision is made only on whether the minister has breached the ministerial code. That is the only

process that applies to the rest of the UK civil service.

Maureen Watt: As unions, would you rather see what is happening in Scotland with regard to the fairness at work policy and the ministerial code being replicated elsewhere in the UK?

Dave Penman: Yes—but, based on our experience we think that we need to go further than that. Experience with Government departments and Parliament demonstrates that a wholly independent process is needed in order to be fair to both employees and employers.

The second question that we were asked was how the people who, in essence, would be judged by a process, get to make a decision on what that process should be or, indeed, get to be involved in decision making either way. For example, there is the issue at Whitehall, where a Prime Minister is sitting on a report and is, presumably, making a political decision about what decision will be made and when, instead of actually making a proper decision to deal with the concerns that have been raised.

We believe—we have been successful in achieving this in the Scottish Parliament, where the same dynamics apply—that politicians, whether in Parliament or in Government, cannot mark their own homework. We need independent investigation and decision making, and, critically, we needed transparency around the whole process.

Maureen Watt: Are the unions consulted on revisions of the ministerial code?

Dave Penman: A very light-touch consultation process would take place on such issues. We have been in dialogue with the Cabinet Office for three years about this, unsuccessfully. It is not like dealing with an employer such as the Scottish Government, where we have that kind of relationship. The frustrations for us have come to the fore in relation to that issue, particularly around what happened in the Home Office and the inadequacy of the process for dealing with it.

Maureen Watt: Were you involved in the latest revision of the ministerial code in Scotland? Was a draft shown to you?

Dave Penman: I do not think so, but I do not know specifically.

Malcolm Clark: I do not think so, but I cannot recall exactly.

Maureen Watt: Would you say that the fairness at work policy was developed in the same way as other policies that you have been involved in? Did you feel that it was rushed in any way, or was it a normal procedure for development of a policy?

Malcolm Clark: The one that we are still operating under is the 2010 fairness at work policy, and certainly the—[Inaudible.]—of information, as was mentioned earlier, that—[Inaudible.]—was over an extended period. I think it took 18 months or something like that to finalise that policy.

Obviously, there is also the more bespoke ministerial policy that was developed in 2017-18. That was undertaken at pace, I would say, but it was a very specific and narrow piece of work, and the timescale seemed appropriate at the time.

Maureen Watt: When you are involved in development of a policy like that, what professional advice do you take on HR policy from within your organisation or elsewhere?

Malcolm Clark: That depends on the circumstances. As Dave Penman mentioned, we often involve full-time officers for their expertise. Sometimes, we might even take it to legal and other support within the union.

Dave Penman: In an employment context, both our unions deal with hundreds of employers, and therefore there is broad experience of dealing with HR matters.

As I said in my opening remarks, in many ways, although the process is now the subject of an inquiry, it was unremarkable. There is an HR process, there is a consultation, we seek expertise, we try to reach agreement between the unions, we feed in ideas and comments for revisions, employers take them on board—or not—and an agreement is reached. It is what we do every day, with hundreds of employers, so it was relatively unremarkable. It obviously depends on the issue at hand. We, as trade unions, have individuals with expertise—we have a broad range of experts who work for us and other unions—and, if need be, we seek legal advice. That is what we do every day.

11:00

Maureen Watt: Did the unions have any contact with special advisers during development of the policy on the handling of harassment complaints?

Dave Penman: I do not think that we would have consulted or involved special advisers, in particular. We would have been concerned about whether special advisers, as a group of employees, would be covered by the policy—if a special adviser wanted to raise a complaint or there was a concern about a special adviser's behaviour, as there has been at times in the past. We would not have consulted special advisers in relation to the policy; we would have been dealing with that through our internal processes.

Maureen Watt: If I heard you correctly, you said that 30 members in Scotland complained specifically about ministers. Over what timeframe were those complaints made? How does that figure compare with the figures for the whole civil service or for other Administrations?

Dave Penman: That was a figure that we got from talking to the representatives in the FDA; it is in our submission. We felt that that was about the number of people who had come forward to us to raise complaints or concerns about ministerial behaviour, some of which never went anywhere and were just raised with individuals, while others might have been taken forward on an informal or formal basis. We are talking about a period of about a decade.

The reason why we raised the matter in our submission is that I was aware that over a similar period, for the rest of the United Kingdom civil service probably a handful of instances came to the union. That is why, for us, the numbers felt quite remarkable. As was explored earlier, there is no guarantee—this is not empirical evidence but evidence that a trade union got. Normally, the general secretary would be made aware of such issues—or I would certainly be aware that a ministerial issue was in the offing, either from that team or from the Cabinet Office team, if that was the case. It felt as though there was an unusual number in the Scottish Government compared with the rest of the UK civil service.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I want to ask the witnesses to respond to some of the themes that we have picked up from people who have previously given evidence to the committee. A number of members have referred to how unions lobbied—if that is the right word—for a more independent element in the process that was being devised for complaints. We have heard from witnesses that an independent element is more normal at the end of a process than it is at the beginning of it. Do you have a view on that or on where an independent process might have been inserted more profitably?

Dave Penman: I think that we all learn from experience of this, as we go through it. As a trade union, we developed that approach as a policy objective over time. We raised the issue as part of the process here in Scotland—it was a relatively novel idea at the time—and we pursued it in the House of Commons, as you will be aware, where we were, ultimately, able to achieve such an approach.

As I said, given our experience we feel that, ultimately, if we want to build confidence among employees—and among ministers themselves—having a process that is quick and independent, with no potential for conflicts of interests, is really the best way to deal with the issue in the unique

circumstances that exist in relation to the role of Government ministers in an employment context. Similarly, in relation to politicians as members of Parliament, where people kind of control their own destiny, similar conflicts can arise.

The independent element evolved as a policy objective for us over a period of time. We raised it as part of the discussions, but it was not something that the Scottish Government wanted to do, at the time. Therefore, we were seeking improvements and changes. As with any number of things that a union raises, there are changes that we do not necessarily get.

In the light of everything that has happened, the conclusion that I hope that most people would reach is that, when we are dealing with bullying and harassment, which are abuses of power, we must balance that power somehow and that—given how Governments work and given ministers' power in Government departments—we need to take the process outside. I honestly think that that would be better for ministers as well as for civil servants, in building confidence in the process.

Malcolm Clark: I concur with that. If it were feasible, I would like that principle to be extended a little bit further. As has been noted at various points, the civil service and even the Scottish Government remain extremely hierarchical organisations. There can also be challenges at other levels because of the power dynamic. There being some opportunity or avenue for people to take significant matters outwith the normal chain would be a positive step and would probably instil a lot more confidence in some of the procedures that we have. I can certainly see that argument with regard to the ministerial element.

There was a greater degree of independence in the civil service in the past. For example, there was the Civil Service Appeal Board, which was eradicated under, I think, the coalition Government, and we have not done anything to replace it here in Scotland or elsewhere. Anything that could be done to address the hierarchy that we have to deal with would be very welcome.

Dr Allan: I appreciate that the Government is different from other employment situations, for the reasons that you have outlined very persuasively. To be clear, are your arguments for there being an independent element early on in the process based on that, or is your position that there should be that element in other employment settings?

Dave Penman: The critical issue relates to ministers. We can think about the issue in terms of the power dynamic in having civil servants investigating ministers, getting to a decision-making process and who knows what, when. All the issues that have come to the fore, including the influence of political parties, should be taken

out of the process. Those matters should be dealt with from day 1 in a process that is wholly independent of such potential influence.

The situation relating to the power of ministers in Government departments and, as I have said, in Parliament is unique, so such a process would be to the benefit of both ministers and employees. We want to see independence and transparency from the moment when an individual raises a concern. That would give confidence to all sides.

Dr Allan: It is clear from the evidence that the committee has heard and read that the unions were involved in development of the process. You have mentioned things that you asked for but did not get. What is the unions' perspective on the timeframes? Was the process expedited in any way in the course of 2017? Was it a normal timescale?

Malcolm Clark: For understandable reasons, there was a clear ambition to get something on the books fairly quickly. The issue was in the public eye, and there was a lot of political interest in it. The unions were pleased to engage on that basis, because we recognised the value that could come out of the process.

As I said earlier, the work was conducted at pace; there is no denying that. Although the document was relatively long—about four pages—it was a very narrow piece of guidance or policy. I think that the timescales were appropriate for what we were trying to achieve at the time. Consideration of the broad fairness at work policy took a lot more time—understandably so. What was done in 2017 and 2018 was a narrow piece of work, so the timescales seemed right.

Dr Allan: The committee's evidence so far has also touched on the issue of lived experience. I offer that as an open-ended statement and invite you to comment on how lived experience should or does fit into the process.

Dave Penman: As we have said, hindsight is 20:20. I do not want to repeat myself about independence, but had the process been wholly independent from day 1, we would have had a different outcome and we would not necessarily be here.

Part of the difficulty in dealing with Government is that you are dealing with politics. Everyone around this table has their own agenda that they want to pursue, and it is difficult to separate out the issues. We are dealing with employees in relation to what would, essentially, be employment issues.

Dr Allan: I do not mean to be rude but, before you continue, I want to be clear about what I meant. I appreciate that my question was very open ended. I am talking about whether you felt

that it was appropriate—or whether it is appropriate, in general—to involve in the development of a policy people with lived experiences of the issues that lie behind the policy.

Malcolm Clark: Given how we undertake negotiations at the Scottish Government, there will be engagement between people services, senior management, people in specific areas and the unions. It is not done directly with individuals; it is not a matter of inviting them along to meetings to give their lived experiences.

I now appreciate the point that you are touching on. That engagement was undertaken by our colleagues in HR, but that is not how we would undertake things. We certainly go to members, as we are very keen to get their views and their input on different aspects. Dave Penman has mentioned the survey that FDA undertook, which is mentioned in its submission. Earlier this year, PCS undertook a survey on bullying and harassment. We draw on such documents and on input from members, but we would not go in saying that certain members had experienced certain behaviour. We take their views in on their behalf; that is how we approach negotiations.

Dave Penman: In many ways, what the employer does in negotiating with and consulting the trade union involves getting lived experience. Thirty people have come to us over the decade, and we all hear stories about what happened. They will explain frustrations that they have had with processes, and we get that broad experience. That is what trade unions do; we take that employee experience, we apply it, and we try to inform what the employer does. A good employer listens to that, as the legitimate voice of employees. That is where we get lived experience. Rather than go to one individual or certain individuals with their own narrow elements, our job, as trade unions, is to try to understand what that means across the piece, by relating that to our experience elsewhere and trying to apply it as part of a process.

Lived experience is essentially what we, as trade unions, deal with every day when representing the interests of our members and negotiating with the employer.

The Convener: Before we take Angela Constance's questions, can I ask what happened with those 30 people? What did the union do?

Dave Penman: I referred to 30 individuals over a decade. There will be individuals among them whom we have counselled and advised and others who have done nothing—they have not taken the matter forward. There will be individuals who have raised matters informally and others who perhaps raised them more formally. They will have raised a

range of issues. We have summarised that as a total number, but there may potentially have been extremes of behaviour and issues as well as relatively low-level things. Inevitably, that is what happens with trade unions: people come to us, but it often does not result in anything. We are the safe space where people come and talk through issues. Ultimately, they must have control over what happens.

Whether or not we feel that a person should make a formal complaint, it is ultimately down to the individual whether to take the matter forward. As we note in our evidence, it is clear that increasingly people did not have confidence. We normally get that on a range of issues, such as bullying and harassment. Every union will have that experience, and I talk to members about that. Our perception over time was that people were increasingly talking to us on the basis that they did not feel confident about going to the next stage, even if that was what we were recommending.

Angela Constance (Almond Valley) (SNP): I wish to pick up on the issue of independent external scrutiny. A few weeks ago, the permanent secretary told the committee that

“the issue of whether we should have an independent element was not raised by the unions.”—[*Official Report, Scottish Government Handling of Harassment Complaints Committee*, 18 August 2020; c 42.]

Westminster followed us with a written procedure and was subsequently successfully pressured by the FDA to include an independent element.

In your written evidence, you said that you were “actively involved throughout 2017” and were “for independent scrutiny” regarding processes

“of complaints against Ministers in all administrations.”

For the record, can you clarify what you were aspiring to achieve in 2017, what you achieved and what you have still to achieve?

11:15

Dave Penman: I saw the permanent secretary's evidence. It does not surprise me that the permanent secretary might not be aware of the dialogue that took place three years previously with human resources around a process development. I have talked to our representatives, and the issue was raised in dialogue in a specific meeting that took place in the middle of December. As a trade union, we were developing that policy, mainly in relation to what was happening in Parliament, to be honest—that was the big driver and the focus for us. As a result of that, it was clear that the issue of how we would deal with conflicts of interest would be solved by having independence in all processes, whether in the Government or the Parliament.

It was an emerging and developing policy initiative from us, and independence was specifically raised as part of the dialogue in mid-December, when the first drafts of the new procedure were produced. There was no appetite for that from the Scottish Government. You could ask whether we should have pushed harder, but we recognised that we were in a more advantageous place than the rest of the UK civil service. Trade unions never get everything that they want from processes, so you move on. That is how that was dealt with.

As I have indicated several times, the Scottish Government is still the only part of the UK civil service with this sort of policy and process. We had a major achievement in the House of Commons, where there was a two-and-a-half-year battle, about full independence. We achieved that only in June, when Parliament finally voted to absent itself from any decision making in relation to issues around investigations of and sanctions on MPs.

In terms of Government institutions, the Scottish Government remains the only place with this kind of policy. As you have seen, the Home Office investigation has laid bare the inadequacies and potential conflicts in the current position in the rest of Whitehall. The Prime Minister stood in Parliament and said that he was backing the Home Secretary before an investigation had even been conducted. He knew that that investigation would come to his desk and that he would make the decision. If that is the position in the civil service in the rest of the UK, no one is going to have confidence that it has any form of independent process.

Angela Constance: That is a clear articulation of the benefits of an independent process. Obviously, it is for the committee to pick up why, at the height of the policy's development in mid-December 2017, there was perhaps less-than-fluid communication between HR and the permanent secretary.

Last week, we heard evidence from Nicola Richards, who, we are led to believe, led engagement with the trade unions. She said:

"the harassment policy was quite unusual. Normally, when we bring in a policy, we have an extensive process with the trade unions."

However, I think that you said, Mr Penman, that your engagement actually felt quite normal.

Could both panel members give their views on how unique, in reality, the challenges in developing the policy were, particularly in relation to ministers and former ministers? Ms Richards also said in evidence:

"Complaints about third parties—which is, in essence, what a minister or former minister would be in this

instance—are a fairly routine part of other policies and are included in our fairness at work policy."—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 25 August 2020; c 29, 32.]

Dave Penman: I can only repeat that both unions' view of the consultation process—which Malcolm Clark fairly described as having been undertaken "at pace", although it was fully adequate—is that we had no concerns. We have reflected on that, with hindsight. Were there concerns? A lot of dialogue takes place that is not formal and does not take place through official meetings—you are exchanging emails and having conversations. This was an amendment to an existing policy, so it was not unique. As Malcolm Clark described, between 2008 and 2010, we had a much longer period, because the process and scope around that policy were much broader. I think that, for our part, we had no concerns at the time, and we have no concerns on reflection since then, about the extent of the consultation and what it was dealing with.

You mentioned third parties. I will raise an issue in that regard. Of course ministers are third parties, but a third party could be a contractor working in an organisation. Being a minister brings a very different power dynamic from being a contractor. In terms of those issues, I do not think that you can just talk about ministers being third parties. How employers protect people where they have no employment connection with them is a real issue. Clearly, there is a similarity there in relation to ministers, because they are not employees—

Angela Constance: Just for clarity, it was not me who described ministers or former ministers as "third parties"; it was Ms Richards.

Dave Penman: No, I appreciate that. However, there is a difference.

I can only repeat that we have no concerns about that time or about the nature of the engagement. Malcolm Clark will probably repeat himself, too.

Malcolm Clark: Absolutely. As members will have picked up from the paperwork, there were elements that we would have liked to have changed or improved on and developed, particularly around the scope of the policy. Originally, it just covered sexual harassment. Eventually, it was agreed that it would cover all forms of harassment. We would have liked to have seen it replicate everything that is covered by the fairness at work policy, for example, including bullying in the workplace. The policy remains fairly narrow—it is just around harassment.

I agree with Dave Penman's comments about the process.

Angela Constance: I would be interested in hearing both your views on whether we are in danger of overinflating the uniqueness of the challenges in and around developing the policy.

Ms Richards also said:

"It would be very challenging for any workplace policy to withstand the kind of scrutiny and test that this policy has been through."—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 25 August 2020; c 30.]

Do you agree? Surely, at the end of the day, workplace policies—this is your bread and butter—must be solid, sound and robust.

Dave Penman: I take the point that, ultimately, most HR policies are not subject to the scrutiny or litigation that we have seen in this case. I come back to the point about the unique nature of the role and power of ministers, and the appetite for politics to get in the way of issues in relation to this matter. My view is that that, in part, has led us to where we are.

Again, I come back to the point that I do not think that we would be here if we had had a fully independent process. The matter would have been less subject to challenge or accusation around malevolent intent or motivation. An independent process would have taken all those aspects and all the politics out of it.

Such issues are not usually dealt with when it comes to employees—that would be very unusual. Of course there can be challenges: employees can challenge processes and we as trade unions can challenge processes. However, it is not usual to find ourselves with the level of scrutiny that we are facing in this case. Again, the lesson that has to be learned is how we try to avoid repeating the situation and how we get to a point whereby ministers and employees can have confidence in any process and get on with the business in hand—the running of Government.

Malcolm Clark: I regularly have reason to question the application in the Scottish Government of some of the policies, particularly around complaints and fairness at work. However, as indicated, members generally do not have the same access and opportunities, and matters are not gone into in the detail that has been gone into in this case.

There are regularly issues around application. That, in part, is why I would possibly go even further than Dave Penman and suggest that there could be grounds for looking at having an independent avenue more generally, rather than having that just on the ministerial side.

Angela Constance: On Mr Clark's point about the application of policy, we heard from James Hynd last week. In articulating events, he made a

differentiation between the development of policy and the application of policy. Where is the nub of the problem? Is it in the development of the policy, or is it in the application of the policy?

Malcolm Clark: Obviously, the matter was taken to a much higher level when it went to judicial review and the court came to its view. On my understanding of the situation, the issue seems to be around the application of the policy. The policy document itself is quite clear about the handling of harassment complaints and how the policy should be applied—we still do not have any real difficulty with that. My understanding is that the issue is entirely about how one key sentence in the document has been interpreted.

Dave Penman: It is an interesting point, because we can have all the processes in the world—processes that are signed off—but the outcome will depend on how they are applied.

In our evidence, we say that, on the one hand, this is the only part of the UK civil service that has had a meaningful process for investigating ministers' behaviour, yet it seems to have significantly more concerns about ministerial behaviour. We could ask why it is the case that, in the one place where people can raise concerns, the process does not seem to be changing behaviours. Part of the point of such processes is to prevent people from being bullied in the first place, rather than simply to catch people out. That is an issue about the culture, the approach of those with responsibilities in the process and how the process is applied.

We would not say that people still have confidence in the process for dealing with complaints. We would indicate that the issues that we talk about are not historical; they are current. That can only be due to a failure in how the policy has been applied, whether that is about individuals, a broader culture or the responsibilities of those who are ultimately in the most powerful positions and set a tone for how such things will be dealt with.

From our perspective and our evidence, it is quite clear that the issues that we are talking about here are extant with regard to the conduct of ministers and the approach from civil servants.

Alison Johnstone (Lothian) (Green): In our papers, annex B of the FDA's submission includes an annual general meeting report card that is dated 22 February 2018. The report card reads:

"We have been struck by issues of trust around the organisation ensuring that there is a space that is safe, confidential, and that there can be no impact on the career of any complainant."

The FDA union has also raised concerns that civil servants felt

“unable to speak truth unto power”,

and operated in a

“culture of fear”.

When we heard from the permanent secretary, she rejected that view and stated that she had

“read the FDA’s submission with interest”.

She said that she did not

“recognise the term ‘culture of fear’—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 21.]

and that it is not a term that she would use. Were you surprised by that response?

Dave Penman: Quite often, the information and the context that we get as trade unions is different from the context and information that the management in an organisation gets. It is part of the point about lived experience that we touched on earlier. People will talk to a trade union in a way that they might not with their managers or more senior managers. It does not surprise me that, at times, there can be a different perception of what is going on between the most senior people in an organisation and those who work in it day to day. There can always be such a dichotomy of views, and that is the point of good consultation with trade unions. We have intelligence and information that people do not necessarily get through their management chains.

We thought very carefully about the language that we used in our written evidence. We have sought to summarise a long period in the Scottish Government and to try to talk about the culture of the organisation over a decade, which is the timeframe that we have looked at, rather than at particular instances. Clearly, some of those issues may have been more prevalent at one time than another.

In terms of lived experience, we are confident that we have tried to reflect in our evidence the view point that members were bringing to us. As a trade union, we have to take what members are sitting down and explaining to us as evidence and fact.

When we are dealing with concerns around bullying and harassment, the issue of safe space and what it means is a really important one for organisations to try to deal with.

As you have seen from the development of the 2017 policy, the employer tried to create a safe space outside a formal complaints process so that people could explore and discuss issues before considering whether they wanted to raise a complaint or what else they might want to do. People have always done that with trade unions and it is the sort of thing that we have looked to develop, particularly around dealing with

harassment in places such as the House of Commons.

11:30

Alison Johnstone: Prospect’s written submission notes that

“there was concern about bullying behaviour in the Scottish private office, this had been a long standing concern across a number of administrations”.

We have learned from our evidence so far—the permanent secretary told us—that a final draft version of the harassment policy had been shared with an individual who later went on to make a complaint under that policy. You have spoken at length about lived experience. Trade unions have dealt with a great many people over a great number of years and you will have considerable capacity to share that lived experience. Was the draft policy shared with your union and other unions?

Dave Penman: Yes, and that is part of the normal consultation process.

Alison Johnstone: Was it your view that there was a need to ensure that the policy could never be interpreted as anything but independent taken on board fully enough?

Dave Penman: No, because the process is not independent. In any industrial relations process, we come with a shopping list of the things that we want to achieve, and, at various points, we have to concede what we will get and what we will not get.

I am sure that we raised other issues at the time that we did not get; Malcolm Clark was closer to the negotiations than I was. It is not a surprise that we would have raised issues, particularly the ones that were unique at that point, including on independence, that there would have been less of an appetite to achieve. Ultimately, we are trying to reach an agreement, and we work out whether we are likely to achieve something or not and then we move on.

With hindsight, we should probably have dug our heels in a bit more, but I say that on the basis of lived experience since that time and what we have experienced elsewhere. At that time, the Scottish Government was the only part of the civil service in the UK that had a policy, and, essentially, we were improving it. That would have been the context in which to judge any concession or change that was made.

Alison Johnstone: It is clearly your view that the policy is welcome progress, but is it your view that, as long as it can be interpreted that it is not being applied wholly independently, this could happen again?

Dave Penman: I do not know what you mean when you say, “this could happen again”.

Alison Johnstone: We could be in a position in which the independence of the process is called into question.

Dave Penman: Yes; of course. The largest piece of evidence that we have seen in relation to the whole issue is the Dame Laura Cox inquiry into the House of Commons. It looked at bullying and harassment, and the ability of those who are potentially the subject of an investigation to have influence over its outcome. Hundreds of people were spoken to, and it was quite clear that confidence in the independence of the process and the outcome is critical to whether any individual will raise a complaint. Until that is solved all the way through to the final stage, people will not start the process.

While the process is not fully independent, whatever the merits are of what is happening in the Scottish Government compared with elsewhere, people will still potentially ask themselves, “If I raise the issue, do I have confidence in how it will be handled, how a decision will be made, and what that will mean for me?” Some of those issues are about power and culture, but it is also about the independence of the process.

Alison Johnstone: In an email to staff on 2 November 2017, Leslie Evans said:

“We will work with the trade unions given their important role both in supporting individual members and informing the policy review.”

However, a Scottish Government email of 20 December 2017 says:

“We will try and position things with the unions that this reflects their comments but that the intent now is to sign off on a process for the investigation of harassment complaints”.

What do you think of that language?

Dave Penman: I would say that that is relatively normal language.

Malcolm Clark: During this scrutiny process, the unions have had access to a bunch of papers that we would normally never see, which has been illuminating. It is fascinating to see what has been going on behind the scenes, to put it mildly. I appreciate that the members of the committee have had to go through thousands of pages, too—and it looks like there is a lot of duplication. I think that I read only last night the document that you just referred to, and I agree that it was interesting. However, I would expect those sort of discussions to be undertaken, and for that sort of language to be used, because we go into these things very much as two sides. We aim to work in partnership to achieve outcomes, but we go into the

discussions with different perspectives and agendas, and each side tries to achieve the best outcome for it, based on what is available. I had no qualms about that sort of language being used.

Dave Penman: I am glad that minutes of our internal discussions about management do not necessarily always see the light of day.

This is a normal industrial relations process. Employers have to make their decision, and we will have a dialogue about that before we reach an agreement. We keep talking about the process being unremarkable, and that is the case. I would not be surprised for any employer to have, on other issues, emails flying around about the unreasonableness of trade unions and about the possibility of there being no agreement. That is just the nature of industrial relations.

Alison Johnstone: I want there to be absolute surety on this point. You consider that, in the development of the proposals, the Scottish Government engaged sufficiently with stakeholders who had expertise.

Dave Penman: Yes.

The Convener: Alison Johnstone and others have raised the fact that Nicola Richards said to us last week that she had shared the draft policy to get the benefit of someone’s lived experience. Were the unions ever asked to share the draft policy with members of theirs who had lived experience?

Malcolm Clark: Not that I can recall, but as we said earlier, we seek, in effect, to represent some of the lived experience of other members that we learn about in our daily working lives, and we take an element of that into the discussions. However, I cannot recall the draft policy being shared in that way, although the document was discussed among the union leads at that time. That would not normally be appropriate during negotiations between ourselves and the employer.

The Convener: Would it be appropriate for a member of the human resources staff to share it?

Malcolm Clark: That is not really for me to say.

Dave Penman: An employer has to work out what their position is. They have to decide what they will do about whatever the issue is. Clearly, one of the ways that they get that information and context is through dialogue with trade unions. That is what we do. We bring to the table the lived experience of our members and the information that we have gathered through dialogue, and that is what the employer gets.

We are talking about real-world issues in relatively small employers. In the cold light of day, it is hard to say whether doing one particular thing is appropriate, but trying to understand what you

are trying to achieve and to understand what that means when you are talking about people issues—we are not talking about abstract policies; we are talking about things that impact on individuals—is just what you do as part of that industrial relations process. We are trying to bring people's experiences into the process.

On any other management decision, there would be consultations about what the objectives are and how people's experience and evidence can be pulled in to ensure that the policy can be developed properly. In the HR field, that is normally done through engagement with trade unions, but it might also involve talking to the management team about what an operational issue is and what the HR aspects of it might be.

You would expect employers to consider a number of ways of gathering experience and evidence that could influence a process and a policy outcome. We think that trade unions have a critical role in that, and that, if trade unions are involved in that regard, there is less chance that an individual will have undue influence, because trade unions will ensure that a more collective view is heard. However, it is normal for employers to engage in such processes to work out what their position should be. When it comes to people issues, that can be quite difficult.

Jackie Baillie (Dumbarton) (Lab): I say to Malcolm Clark that we have not yet received all the papers. When we do, I am sure that there will be more bedtime reading in them for you.

In the interests of transparency, is Leslie Evans an FDA member or a PCS member?

Dave Penman: That is confidential information, so I would not recommend that you ask the question, to be honest.

Jackie Baillie: Oh. Okay.

Dave Penman: The information about whether someone is a member of a trade union is protected under the Data Protection Act 1998.

Jackie Baillie: There you go. Well, I am happy to declare that I am a member of a trade union and would encourage all staff to join one.

The Convener: I have just been reminded that Ms Evans said in her evidence that she is a member of the FDA.

Jackie Baillie: Oh. There you go. She has declared it. Thank you, convener.

Dave Penman: It is a matter for Ms Evans, if she wants to make that public.

Jackie Baillie: I have a number of short questions. How long did the fairness at work policy take to negotiate between the civil service, trade unions and the Government?

Malcolm Clark: I do not have the exact details. The information was in the FOI release that was mentioned earlier. However, I think that it took about 18 months—it was roughly from about December 2008 to well into 2010 before it was finalised.

Jackie Baillie: Okay. Malcolm Clark said that the policy for handing complaints was done at pace. Was it two months?

Malcolm Clark: If that.

Jackie Baillie: It was less than two months. When were you aware that the Government intended to have that kind of stand-alone policy that extracted ministers from the fairness at work policy?

Malcolm Clark: That was at the commencement of the proper discussions—it was about mid-November, when we started to see the drafts.

Jackie Baillie: Can you tell me when the review of fairness at work was completed?

Malcolm Clark: I am sorry? What review?

Jackie Baillie: There was a review of fairness at work.

Malcolm Clark: There was due to be a significant review of the fairness at work policy. That was going to be one of the steps following on from the specific policy on ministers and former ministers, but it stalled in 2018.

Jackie Baillie: So, that has not happened.

Malcolm Clark: It has not been concluded. We have had quite a number of discussions and extended negotiations, but then it largely stalled as events overtook us, with the judicial review and everything else that was happening with that specific policy. The review of the fairness at work policy was also going to look at the ministerial elements that still remain in the policy. Bullying and other behaviours are still in the 2010 policy; only harassment is in the bespoke stand-alone policy.

Jackie Baillie: I am sure that we would all agree that those are all critically important, but it would be fair to say that, somehow, they seem to have been put on the back burner.

Malcolm Clark: Yes.

Dave Penman: As Malcolm Clark said, events overtook that.

Jackie Baillie: Yes, but nevertheless—

Malcolm Clark: There is an ambition, certainly on our side and, I expect, on the management side, to return to the review. We have touched on some of this already, but there are still a lot of

issues with the fairness at work policy, which does not really carry the confidence of staff. There is a need to revise the policy, but we have still to reach that point.

Jackie Baillie: I will stick with Mr Clark for the moment. You wrote to James McConnell on 20 December with amendments, following the meeting with unions the day before. Do you know when those amendments were considered?

Malcolm Clark: I do not know.

Jackie Baillie: You do not know.

Malcolm Clark: Not offhand. I might have some details, but I do not have them to hand.

Jackie Baillie: Would it surprise you that the policy was signed off on 20 December, without consideration of your amendments?

Malcolm Clark: No. Again, from the papers that we have recently been looking at, we certainly got that impression.

Jackie Baillie: From my reading of it, it felt to me like consulting the trade unions was almost a tick-box exercise. I know that you said that they were normal negotiations, albeit that they were done at pace. However, it strikes me that, at the critical moment when you were making positive suggestions for change, they simply ignored you and signed off the policy. No changes were made as a result of your involvement in that exercise. Is that correct?

Dave Penman: You also have to understand the nature of the dialogue that we have. The dialogue was not simply around what happened when we received a draft and sent amendments; there would be dialogue beforehand, both formal and informal, over a period. The draft that comes that there were amendments to could therefore have been subject to influence in terms of how it was created in the first place.

Jackie Baillie: Indeed, but at the critical point of the end product, your comments were substantively ignored. That is what the papers tell us.

I will move on. Quite a few of my colleagues touched on the issue of independent investigation, which I think is critical, as I think that you acknowledge. You mentioned a meeting in December 2017. Who was at that meeting? Who said to you, "There's no appetite from the civil service to do this."?

11:45

Dave Penman: One of our representatives. From an FDA perspective, I would prefer not to name a civil servant who was our representative. We had nominated one of our lay representatives

to lead on the issue, and they were involved in the meeting in question, which I seem to recall was on 14 December 2017.

Jackie Baillie: Who from the Government attended that meeting?

Dave Penman: Malcolm Clark would probably know. I think that it would have been the HR team.

Malcolm Clark: Yes.

Jackie Baillie: The Government's HR team was at the meeting.

Malcolm Clark: Yes—it would have been at that level that the Government was represented, rather than anything higher.

Jackie Baillie: Okay, but the HR team was clearly acting on the part of the permanent secretary, who was driving the process.

Malcolm Clark: It would have been acting on behalf of the Scottish Government.

Jackie Baillie: Would it surprise you to know that there were emails to the permanent secretary from the lead policy official, James Hynd, and from Nicola Richards and HR people, that said that there needed to be an independent element in the investigation, which is exactly what you have been arguing for?

Dave Penman: It would not surprise me, because I would have thought that, as part of any policy development, there would be a dialogue between the people who were leading a discussion with the trade union and the broader management team, whether that was the permanent secretary, directors general or others. Therefore, it is no surprise that there was that sort of back-and-forth dialogue around how employers make decisions.

Jackie Baillie: Good. I would have imagined the same thing.

There were two emails to the permanent secretary that said that independent investigation was necessary, and there was dialogue with the trade unions that said that independent investigation was necessary, but the permanent secretary does not appear to have listened to you or, indeed, to her senior officials. Is that the normal industrial relations process? Do they never listen to you?

Dave Penman: Of course they listen to us. Most decisions are not taken by one individual. The permanent secretary may have made that decision; I have no idea. We would expect most decisions to be taken by a management team rather than by an individual. On issues that were pretty critical, I would have thought that there would have been a dialogue across the management team.

Clearly, there will be an HR perspective, and HR people will front up negotiations, but when it comes to policy decisions on HR issues, I would have thought that, under the decision-making process in the Scottish Government, those would normally be taken by the more senior management team in the organisation, rather than by one individual. Obviously, if you are the boss—if you are the permanent secretary or whatever—you may hold sway and you may get to make the final decision, but most decisions are taken as part of a team, because the team has to deal with the consequences of those decisions.

Jackie Baillie: Of course, but the permanent secretary made it clear that she was dealing with a commission from Cabinet, which occupies a pretty special place in the civil service, so it would have been her driving the process.

For my final question, I want to take you off to one side. Were you aware of the concern that the Cabinet Office expressed to the Scottish Government about the policy? If so, did that cause you any concerns, considering that you represent the UK civil service?

Dave Penman: I was not aware of it.

Jackie Baillie: Okay. Thank you.

The Convener: We move to Murdo Fraser, who has been waiting patiently.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning. It is—just—still the morning.

I want to go back to the organisational culture. Mr Penman, in your written submission, you make some quite strong comments about the situation in the Scottish Government as far back as 2010, and you talk about the culture in the former First Minister's office in relation to bullying behaviour, how that became a concern for you, and how it was raised with successive permanent secretaries. You say:

"Some civil servants expressed to us that they were operating in a culture of fear and were unable to speak truth unto power and discharge their duties effectively."

When the permanent secretary, Leslie Evans, was before the committee two weeks ago, I put that to her. In effect, she rebutted a lot of your criticism. She said:

"I do not recognise the term 'culture of fear', and it is not a term that I would use."

She went on to say:

"I do not remember ever being given a specific complaint from a trade union about a specific bullying behaviour."—*[Official Report, Committee on the Scottish Government Handling of Harassment Complaints, 18 August 2020; c 21, 23.]*

Is the permanent secretary in denial, or are you overstating your case?

Dave Penman: As I indicated earlier, when it comes to the information that a trade union gains—we have talked about the idea of a safe space—the issues that people are able to approach us with are different to those that, in any ordinary circumstances, management would necessarily receive.

We are saying that there were issues with the culture in the Scottish Government over a long period of time, running through a number of Administrations. They were not simply about the former First Minister, but about other ministers as well. That created concerns among people about whether such issues would be addressed and whether they felt that they could raise complaints, even though a process was in place. That was our lived experience, if I can use that term.

As we heard in evidence from previous permanent secretaries, those in management positions in the Scottish Government were aware of some of that. It is for them to give evidence on whether they were aware of all of it, whether they joined the dots and whether, in looking at those matters, they took a view that there was a broad cultural issue or simply a series of individual instances and concerns.

With hindsight, we think that that raises issues around the broader culture. If members tell us that they did not feel confident about raising concerns or that their concerns would be dealt with and addressed, that is a very real experience. If that conflicts with what an employer—whether it is the current permanent secretary or a previous permanent secretary—has said, that is not necessarily a surprise. You quite often get different views from employers and trade unions when you are dealing with such issues and experiences, particularly when there is a culture in which people are already reluctant to raise such issues. It might well be that, for the permanent secretaries, those issues did not come to the fore.

If you look at the number of concerns that we are talking about, over a decade, it seems that people in the Scottish Government probably were aware that there were issues. You cannot look at the number of concerns and say that everyone thought that everything was fine. Whether, with hindsight, those issues could perhaps have been addressed earlier, either by ministers or by those in positions of authority in the civil service, is an interesting point. I do not think that those issues would come as much of a surprise to many people who work in the Scottish Government.

Murdo Fraser: I will bring in Malcolm Clark in a moment, but first I have a follow-up question for Dave Penman. You mentioned the evidence from previous permanent secretaries. The evidence from Peter Housden has already been mentioned

today. He talked about how he sought to resolve issues

“without recourse to formal procedures”

and tried to take action on an informal basis.

Given that evidence, and what you have said about a culture of fear, is it possible that the scale of the problem is much more dramatic than it may seem from the bare numbers that you have indicated to us?

Dave Penman: The numbers that we indicate are pretty dramatic on their own. As we have indicated in response to other questions, it is not beyond the realms of possibility that the number of individuals with concerns could be much higher than that, which is a point of concern.

We were specific in our evidence about that because, from our experience as a trade union that represents the most senior people in Government, who interact daily with ministers across Government departments, it seems that the number of people who have raised concerns in the Scottish Government is significantly greater than the numbers that we are aware of elsewhere that they suggest that something in particular has happened in the Scottish Government over the longer term. As I said, in our assessment, that relates to multiple Administrations. The current dialogue started in 2008, and it was about the lived experience of civil servants in relation to ministerial behaviour before the Scottish National Party Government was in power. It is not simply about one individual; it is about a number of ministers. That suggests that there is a broader cultural issue in the Scottish Government.

Murdo Fraser: Mr Clark, do you want to add anything?

Malcolm Clark: I do not have much to add. I have not had any personal experience of any of the cases that have been highlighted or of those that have led to external proceedings and all the rest of it. I do not have anything specific to add from my own experience with regard to the cultural matters that have been brought forward.

Murdo Fraser: Okay. Thank you. The FDA submission referenced the former First Minister's office but, in relation to that and other ministerial offices, are you aware of any changes in working practices that were introduced as a result of concerns that were expressed by staff?

Dave Penman: To summarise it, as is also highlighted in the former permanent secretary's evidence, those issues were managed. That is not an unusual situation with employers in the civil service; when those things happen, they try to manage them.

When we conducted our survey on bullying and harassment, not just in relation to ministers but more broadly, it was often the experience of people that, when they raised a concern about inappropriate behaviour, whether it was from an employer or minister, the person who raised the concern was the one who was moved. The employers solved the problem by solving a series of problems, rather than stepping back and looking to address the broader problem. That would probably be the experience of people; that is how things were dealt with.

That might be critical of the employers with regard to whether they should have done something about it at the time. They are running Government, which is a high-pressure environment, and dealing with multiple issues day to day while trying to manage and keep going. At some point, they should step back and say, “Actually, are we addressing the real problem here?” That is probably how those issues are dealt with over a long period of time. Potentially, that contributes to the culture but they are not addressing the patterns of behaviour or the culture of expected or accepted norms; they are just trying to deal with each individual problem and solve that problem as it is raised.

Murdo Fraser: I have a final question to follow that up. If there were situations where issues were, as you said, “managed”, would it be done quietly or would it be more widely known among your members, people in the civil service and ministers?

Dave Penman: Probably both. Earlier, I said that when an individual gets to the point of raising a concern, whether informally through the union or directly, it is really important for them to have ownership of what happens. Quite often, if you ask those individuals what they want, they just want the behaviour to stop. Therefore, moving an individual is one way of stopping that behaviour. It might not be acceptable or it might be exactly what the person wants to happen. They do not want to raise a complaint, either because they are genuinely concerned about what it would mean for them, or because that is just the solution that they want. The responsibility of employers is to address what an individual is raising as their problem and facilitate the solution that the individual wants, but also to understand whether that is telling them something that they need to address more directly as an employer. Therefore, if they have 30 complaints from people about ministerial behaviour, all of whom say that they just want to be moved, the employer cannot say, “We do not have to do anything, because no one raised a formal complaint.” They have information that says a different approach is needed, because otherwise, they would not have 30 individual problems.

The issue is about whether there was sufficient information about those managed problems that should have resulted in a change of approach, either through the civil service raising ministerial behaviour with ministers and trying to address it, or whether ministers also have a responsibility to deal with that.

Murdo Fraser: Does Mr Clark want to add anything?

Malcolm Clark: No. I agree with everything that was said there. Obviously, to some degree, because we are not directly involved in some of those matters, we are dealing with known unknowns. However, if the issues that have been highlighted were brought to the unions, we would seek to bottom them out and get them addressed. I am not aware of those sorts of behaviour or practices that were introduced being brought to our attention at that time.

The Convener: Thank you. We are almost at a close, gentlemen, but Alex Cole-Hamilton and our deputy convener would like to come back in at the end.

Alex Cole-Hamilton: Thank you, convener; I will try to be quick. I am grateful to Murdo Fraser for bringing the discussion back to culture, because I want to bookend my earlier lines of questioning. I will take Mr Penman back to the three layers of concerns and complaints that he confirmed existed in answer to my earlier questions. First, we have significantly more complaints about ministers than any other jurisdiction in the UK does, and many additional concerns are being dealt with informally.

Furthermore, there was such a lack of confidence in the system that many others would not even come forward to raise concerns because of the impact on their career or confidentiality. However, during that time, there was not a single ministerial resignation over conduct. It sounds like a horrible place to work, where, in effect, a group of ministers were ranging around as untouchable and all-powerful villains and predators. Is it therefore reasonable to conclude that the Scottish Government's organisational culture and systems at the time were designed to protect ministers rather than staff?

12:00

The Convener: The use of the word "predators" is probably a bit over the top. I think that you should withdraw that word.

Alex Cole-Hamilton: I withdraw that word. I apologise.

The Convener: Thank you.

Dave Penman: The language that Mr Cole-Hamilton has used indicates part of the problem. Political point-scoring often influences how such issues are dealt with, which is why politicians and ministers should not have responsibility for marking their own homework.

I do not recognise the picture that Mr Cole-Hamilton has painted. Organisational culture is formed over a long period. There will be lots of civil servants who did not have that experience, but a number of them did. As we have tried to indicate, that culture reflected different previous Administrations and colours of Administrations.

There is an issue about how the culture in the Scottish Government has developed over more than a decade. There has been a reluctance to challenge the inappropriate behaviours of ministers. This is only my assumption but, over time, that might have had the effect of almost encouraging such behaviour, because it has not been challenged and has become learned behaviour. That is obviously not the experience of every civil servant.

We are looking with hindsight at individual decisions that were taken at the time. As we said earlier, you might be managing a situation or there might be a point at which you have to sit back, reflect and say, "Actually, we need to deal with an underlying and systemic problem." That is the challenge that every organisation faces, whether it relates to ministers, the management team or anything else.

Alex Cole-Hamilton: On a completely unrelated topic, when the procedure, in its infancy, was first tested when the allegations about Mr Salmond were first lodged in early January 2018, were either of your unions involved in supporting the complainers or in the application of the procedure?

Dave Penman: No, we were not.

Alex Cole-Hamilton: Would you have expected to have been involved at any point?

Dave Penman: It would depend on whether the individuals were trade union members and, even if they were, whether they chose to involve trade unions.

Malcolm Clark: The PCS is not as centralised as the FDA. We have 10 branches in the Scottish Government. I was not made aware of any such cases. There might have been discussions with other colleagues, but nothing came to me at that point.

The Convener: Out of interest, what percentage of Scottish Government employees are union members?

Malcolm Clark: It is hard to be precise about that. As is noted in the PCS's statement, we have

roughly 3,300 members. We are by far the biggest union, but the FDA and Prospect both have a substantial membership. I estimate that somewhere in the region of 60 per cent of staff are union members.

The Convener: Is that overall?

Malcolm Clark: Yes.

The Convener: We have referenced Westminster and Whitehall quite a lot. Is that percentage typical across the UK?

Dave Penman: Yes—relatively. There are three main civil service unions, so there is that kind of density. Other trade unions, which might operate differently, are involved in different Government departments. It would be relatively normal for 50 to 60 per cent of staff in such places to be union members. Every union is looking for that to be 100 per cent. In the case of big employers with well-organised negotiating processes and trade union visibility—a lot of such employers are in the public sector—there tends to be higher levels of union density than there are elsewhere.

The Convener: Thank you.

Margaret Mitchell: The FDA submission, in talking about the culture in ministerial offices, says that

“despite the support of FDA, some members made clear to us that they did not trust SG to handle complaints effectively or to ensure confidentiality of the complainants.”

When the fairness at work policy was reviewed and made to include former ministers, an informal role of sounding board—a confidante—was created.

I direct my question first to Mr Clark, in his CSGU role. Was CSGU consulted about the informal role of confidante, given that one of your key members had expressed concerns about a—I suppose the term is “gap”—in that confidential space?

Malcolm Clark: Not that I can recall. I am not sure; I would have to double-check on that.

Margaret Mitchell: Is that the same for you, Mr Penman?

Dave Penman: My recollection of dialogue with the representative at the time is that we were consulted about the introduction of that type of role, although not about who was going to play it.

It is something that we would support. As I indicated earlier, at the House of Commons we saw the development of something similar—a kind of hotline—and that approach of trying to create a safe space—

Margaret Mitchell: I was getting to you welcoming it, but I want to know whether you were

told that a person would be appointed to take on that role and whether your views were sought on it.

Dave Penman: We talked about that issue prior to the evidence and have discussed it with our local representatives. My understanding is that we were consulted about the nature of that role, and it would have been something that we supported. We can double-check that to confirm.

Margaret Mitchell: Did you make any representation to ask who would be in that role, what their qualifications would be or what they would be asking? Given that it proved successful, in that people felt confident enough to come forward and some of them went on to complain formally, did you make any representation when the role was suddenly dropped? It was best practice and it was what you had asked for, and yet it did not continue.

Malcolm Clark: I am sorry, but I am not 100 per cent clear about what you are referring to. I would prefer to take that question away and come back to you.

Margaret Mitchell: I am asking about the informal confidante. Gillian Russell was the person who was appointed. Did you know who had been appointed? Did you ask about her qualifications? Did you know exactly what she would be doing and who she would be liaising with?

At the end of the day, the appointment was a success because people came forward and many made complaints. That is what you had been asking for, Mr Penman. When the post was not continued, although it was best practice and it had given that space—the confidential sounding board had given people the confidence to move forward, which is the very thing that you had said was lacking—was any representation made? Should it have been continued?

Dave Penman: I would need to come back on whether representation was made.

My recollection from my discussion with the representatives is that we were aware of the role and supportive of it. In many cases, management would be expected to deal with appointing an individual with the appropriate qualifications or experience, because that is a management role—an HR role. Whether we were consulted directly about or had influence in that, I do not know, but to some degree that is a management job, as it is part of the HR field. You would say “That is the role” and HR would pick someone who has the time and experience to deal with it.

I do not know about the representations that were made in relation to withdrawal of the role. We can come back on that question.

As I have indicated, we are supportive of the role. Very much in the field of harassment—

Margaret Mitchell: Can I stop you there?

Dave Penman: —that type of trusted individual who can deal with those issues and is part of an employer, in almost a kind of counselling role—

Margaret Mitchell: I understand all that. Were the unions not letting their members down by not insisting that a role like that continue? It worked, it had been effective and it was dropped. Your members then did not have that support. People who would have come forward in future did not have that support. It is surprising that the unions did not make something of that and make a very active case for it to continue.

I know, Mr Penman, that you have questioned the committee on what we can do. It seems to me that we are highlighting a policy that the unions should have put in place to ensure that it continued, so that those people who were so badly let down, and continue to be badly let down, had the very best facility available for them to talk in confidence and bring forward their concerns.

Dave Penman: First, we have not said that we did not contest that; what I said was that I do not know whether we contested it and I will check that. Secondly, as trade unions we are limited in what we can achieve, because there are decisions that employers take. We can insist and we might well have insisted, but that does not mean that we get a veto on whether something happens or not.

You can accuse us of letting members down, if you think that that is the case. We try our best to achieve things in negotiations with employers. We very rarely achieve everything, and ultimately employers will make any number of decisions that we disagree with, and we have to live with them. We are limited in what we can achieve.

We do not get to insist. We get to negotiate and we get to influence, but we do not get to insist. Ultimately, those are decisions for employers.

Margaret Mitchell: Well, it would be good to know whether you made any representations.

The Convener: I thought that we were coming to the end of the meeting, but Angela Constance is insisting on coming in. I thought that Alison Johnstone had also put her hand up, but she has not done so. This will be the final question.

Angela Constance: Thanks convener. My question is brief. In annex C to the FDA's submission there is an extract from an email dated January 2019—I am not asking the witnesses to comment on what was happening with the judicial review at the time or anything to do with that. It says in the email that the

“mood ... is one of anger/despair at the conduct of HR ... HR reputation is not in a good place”.

Will you comment on that, for the record?

Dave Penman: We mention in our evidence that there was frustration that we had found ourselves in a position in which the application of a policy had been the subject of a successful challenge. When we are dealing with these issues, I do not think that anyone would suggest that that is a good place for an employer to be in. The fact that a court had found that and the challenge had been successful had an impact across the whole organisation. There was frustration about that.

Given the timing of that extract, those were the concerns that were being raised. It is not where any employer, HR group or trade union wants to be; we want these things to be settled, not to be subject to court proceedings and successfully challenged in court. The extract reflects the frustration that, in the circumstances, we ended up with what we ended up with: there was still a period of limbo around what processes would apply and when and how they could be successfully delivered.

Angela Constance: Do you have anything to add to that, Mr Clark?

Malcolm Clark: I have nothing to add.

The Convener: Mr Penman and Mr Clark, thank you very much for giving up so much of your time. It is very much appreciated by everyone on the committee. That was a lengthy session.

12:12

Meeting continued in private until 12:43.

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