



OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 27 October 2020

Session 5



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Tuesday 27 October 2020

CONTENTS

	Col.
INTERESTS	1
JUDICIAL REVIEW	2

**COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT
COMPLAINTS
11th 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:

Barbara Allison (Scottish Government)

Tom Arthur (Renfrewshire South) (SNP) (Committee Substitute)

Judith Mackinnon (Scottish Government)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 27 October 2020

[The Convener opened the meeting at 10:16]

Interests

The Convener (Linda Fabiani): Good morning everyone, and welcome to the 11th meeting in 2020 of the Committee on the Scottish Government Handling of Harassment Complaints. Our business will be an evidence session in our inquiry's phase 3, which is on the judicial review.

Alasdair Allan cannot be with us today and Tom Arthur is attending as a committee substitute. I invite Tom to declare any relevant interests.

Tom Arthur (Renfrewshire South) (SNP): Thank you, convener. I have no relevant interests to declare.

The Convener: Thank you.

Judicial Review

10:17

The Convener: I remind all those who are present and who are watching that we are bound by the terms of our remit and the relevant court orders, including the need to avoid 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 trial in a way that could be seen to constitute a rerun of the criminal trial.

Our remit is clear; it 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' procedure and actions in relation to the Scottish Ministerial Code."

The more we get into specifics of evidence—such as time, people and 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, will witnesses and members please avoid discussing the specifics of concerns or complaints? Please also avoid naming specific Government officials.

Will members please ensure that when they ask a question about a particular Government record they give the document reference and the footnote reference to the witness, for their ease?

We held an exploratory session with the permanent secretary and the Lord Advocate on 8 September in the absence of documentation about the judicial review that we had requested. We have now secured the release of more documentation, most notably the open record from the proceedings. Although the committee is still waiting for a lot more documentation, we agreed to begin taking oral evidence from Scottish Government officials who were involved in the judicial review process—in particular, those who appeared before the commission and diligence hearing in December 2018.

This is the first of those evidence sessions. I welcome Judith Mackinnon, who is the director of people advice. Ms Mackinnon, is there anyone else with you who should be introduced?

Judith Mackinnon (Scottish Government): No.

The Convener: Thank you. The committee has agreed that Ms Mackinnon's evidence will be

broadcast in audio only. I begin by inviting Ms Mackinnon to take the oath.

Judith Mackinnon took the oath.

The Convener: I invite Ms Mackinnon to make an opening statement.

Alex Cole-Hamilton (Edinburgh Western) (LD): Convener—I am sorry, but I have a point of order. The audio from Judith Mackinnon is not very good. Is it possible to increase the volume?

The Convener: Ms Mackinnon, please hold on. We are having a problem hearing you, so we will try to sort it.

The sound should now be better. I again invite Ms Mackinnon to make a short opening statement.

Judith Mackinnon: Thank you, convener. The—[Inaudible.]—context about my role—[Inaudible.]—director of people advice in the Scottish Government's people directorate. I have been head of people advice since August 2017, when I joined the Scottish Government. My—[Inaudible.]—relevant to the committee—[Inaudible.]

The Convener: Can I stop you there? It is not a problem on your part; we are having trouble with our audio and our ability to hear you clearly here. Please bear with us for a short while. I will suspend the meeting for a short time. I apologise to all involved.

10:20

Meeting suspended.

10:24

On resuming—

The Convener: The meeting is reconvened. I apologise for having had to suspend. No matter what we do to prepare information technology, sometimes it just goes wrong. We will attempt to start again; I hope that the sound will be clearer this time.

Judith Mackinnon: My opening words aim to give context for my role and responsibilities as deputy director for people advice in the Scottish Government people directorate. I have been the head of people advice since August 2017, when I joined the Scottish Government. My division includes HR policy, reward, employee relations and people advice and wellbeing.

Of particular relevance to the committee will be my responsibilities for development of HR policies, and the translation of those into practice via the people advice and wellbeing team. The team advises managers and staff on employee relations

matters including discipline, grievance, attendance management and early intervention.

I have responsibility for more than 50 staff, and a high percentage of them are professionally qualified. I have a postgraduate diploma in personnel management and a masters degree in employment law. I am a fellow of the Chartered Institute of Personnel and Development, and until last year I was active in the CIPD Scotland network. I have worked in HR management positions since 1992—including 15 years at director level—in a range of private, public and voluntary sector organisations. I have considerable experience in carrying out and advising on workplace investigations and employment tribunals, and I am the head of profession for HR in the Scottish Government.

Conduct that amounts to bullying and harassment is not—and should never be—tolerated in the workplace. As a result of the #MeToo movement in 2017, the focus on that increased substantially. That reinforced the importance of a range of work being done within the people directorate to tackle bullying and harassment, and to promote an inclusive workplace.

When I joined the Scottish Government, much of the work on that was under way, and I had particular responsibilities to deliver its commitments. My role in the judicial review process was as a provider of information as the investigating officer, which included attending the commission and diligence hearing on 21 December 2017. I was not a decision maker in the judicial review process.

In the interests of full disclosure, I say that I am a member of the FDA union.

As has been set out previously, I am giving evidence to the committee on behalf of ministers and am not doing so in a personal capacity.

This is complex legal territory. Therefore, I ask for the committee's forbearance if I have to stop to take advice or follow up in writing with detail to ensure accuracy and that all the Government's legal duties are fulfilled.

The Convener: Before I open up to questions from the committee, I have a question. I would like to know where you sit in the staff structure. Who are your immediate line manager and your director general, and what are the steps up to the permanent secretary?

Judith Mackinnon: My immediate line manager is Nicola Richards, who is the director of people. Nicola reports to the DG of organisational development and operations, and the DG reports to the permanent secretary.

The Convener: Who was the DG at the time of the judicial review?

Judith Mackinnon: At that time it was Sarah Davidson.

Margaret Mitchell (Central Scotland) (Con): Good morning, Ms Mackinnon.

By way of background information, I say that on 16 January 2018 you were appointed as investigating officer for Miss A, and on 24 January 2018 Miss B raised her complaint with you directly. Prior to that, in November 2017, you were included in emails concerning the development of policy. You provided a checklist of questions for use when talking to people who make complaints. You sought legal advice on how to handle complaints and were aware of the—then informal—complaints of Miss A and Miss B. In December 2017, you met Miss A to discuss her complaint and the draft procedure, and you spoke to Miss B about her complaint and how it might be progressed.

Therefore, my question is whether, given that previous involvement, you had any doubts—even for one nanosecond—when you were appointed as investigating officer, that it might not be appropriate for you to take on that role?

Judith Mackinnon: No, I did not have any doubts about taking on the role of investigating officer. When we discussed the requirements of the investigating officer, there were four main requirements. The person had to be a relatively senior member of staff, to have experience in such matters, to be unconnected to any of the individuals and to have had no involvement in what was being complained about.

Very sensitive issues were being raised, so it was important to retain confidentiality around them, and there was a need for the IO to dedicate time to carrying out the investigation. Therefore, our focus was on my lack of involvement with anything to do with what was being raised, and my role in the prior contact was absolutely in line with my role as head of people advice.

10:30

Margaret Mitchell: Some people might find that strange. However, at what point in the judicial process, given all your prior involvement with the complainers and the substance of their complaints, were you aware of the fact that there could be a perception of bias? Did you acknowledge that?

Judith Mackinnon: I was always up-front about prior contact—as it was happening and later on, as the judicial review process developed. I became aware, through development of the pleadings back and forward between the lawyers,

that there were questions being asked about the nature of the prior contact in November 2018. My understanding was that the basis of the original petition was not about prior contact; it was about a range of other issues that were raised. The issue of prior contact came up and further questions were asked in November 2018. I was asked to provide information about the nature of the contact, which I did at that time.

Margaret Mitchell: When were you aware of and when did you acknowledge that there could be a perception of bias?

Judith Mackinnon: At that point in time, I do not think that there was acknowledgement of a perception of bias; there were questions about what the prior contact was. My understanding is that the decision about apparent bias came through the judicial review process, and that was the—[Inaudible.]

Margaret Mitchell: I will put it another way. Do you now accept that there could have been a perception of bias, given all that involvement with the complainers and the substance and narrative of their complaint? [Inaudible.]—judicial review and prior to you being appointed as investigating officer.

Judith Mackinnon: I understand the reason that was given for the concession, which was apparent bias. However, I thought that my involvement was appropriate throughout the prior contact and appointment as investigating officer. I would not even have thought at that point in time that apparent bias would be a problem.

Margaret Mitchell: So, you do not acknowledge it as a problem. Is that the case?

Judith Mackinnon: I acknowledge that that was the reason for the petition to be conceded. Part of the challenge was the role of the investigating officer as set out in the procedure. In earlier drafts of the procedure, we clearly set out the role of the investigating officer, which included a clear description of the engagement that the investigating officer could have with potential complainers. Through drafting changes in the procedure, that detail was removed, and the final phrase that was left in paragraph 10 of the procedure, which was that the IO would have no involvement with the issues that were being raised, has, it seems, left that open to interpretation and potentially to accusations of apparent bias.

Margaret Mitchell: I have a final question. You sought legal advice, which is in footnote 23 to document XX037. At that point, you sent an email confirming that you had been made aware of the complaints, and that it would be helpful if some of the individuals could provide corroboration of them. Does not that indicate that you had

substantially made up your mind about the complaints, even before you were appointed as investigating officer?

Judith Mackinnon: No—I absolutely refute that I had made up my mind about anything. The complainers came forward, and I investigated as appropriate.

Angela Constance (Almond Valley) (SNP): Good morning, Ms Mackinnon.

In your opening statement, you gave an outline of the thrust of your job responsibilities; I am keen to unravel some of the distinct strands of your involvement. Although we are here today to focus on the judicial review, it would be helpful if you could give a brief summary, for the record, of your involvement in the development of the new harassment policy that included current and former ministers. It appears that you were quite involved in that.

Judith Mackinnon: Development of the procedure was led by James Hynd, who was supported from an HR perspective by Nicola Richards, me and members of my team. He was also supported by a senior employment lawyer. James Hynd was leading on the procedure because of his knowledge of and expertise in the ministerial code. I had wider responsibilities in terms of the fairness at work procedure and development of the new route map to allow people to come forward in various ways. I was not leading in any way on development of the procedure. I saw iterations—over email, mostly—and I provided comment as appropriate, as did other individuals.

Angela Constance: So, you were not performing a leading role, but you were most certainly involved in development of the policy. That is accurate, is it not?

Judith Mackinnon: Yes.

Angela Constance: During questioning from Margaret Mitchell, you spoke about your other role in this affair as the lead investigating officer. That was certainly an area in which you led. Is that correct?

Judith Mackinnon: Yes.

Angela Constance: How often did you report to your line managers, Nicola Richards and Sarah Davidson? Did you do so weekly, fortnightly or monthly? Was the supervision informal or was there written documentation? How did they oversee your work?

Judith Mackinnon: I sought legal advice all the way through the investigation, and I updated my line manager regularly on progress; for example, in relation to numbers of witnesses and seeing X

witnesses the next week. I updated my line manager on the progress of the process.

Angela Constance: As part of your work as investigating officer, did you have any direct involvement or contact with the permanent secretary?

Judith Mackinnon: No, I did not, during the investigation.

Angela Constance: Was the legal advice that you were seeking during the investigation solely in terms of the investigation?

Judith Mackinnon: Yes.

Angela Constance: You have already said, with regard to the judicial review, that you were not a decision maker. However, your involvement was required. Will you give a brief overview of your involvement in the judicial review process?

Judith Mackinnon: Yes. I was required to provide information to help to inform the responses for the Scottish Government's pleadings. I attended regular update meetings with a range of colleagues to consider how that was progressing and any communications and media aspects that might have to be considered. I had a particular role to update the complainers on the progress of the judicial review process, which I did on a regular basis.

Angela Constance: You mentioned earlier in reply to Margaret Mitchell that—I am paraphrasing your words—you were always up front about your prior contact with the complainants. What information did you share with whom, and when, about your prior contact?

Judith Mackinnon: In planning to meet the individuals, I was taking legal advice to help inform those meetings. Nicola Richards knew and I understand that she was briefing her line manager, so the nature of the prior contact that I was having was all absolutely known by the people who were involved.

Angela Constance: Is there a written record of that anywhere other than in what emerged during the judicial review process?

Judith Mackinnon: I guess that it is in some of the documents that have been provided to the committee, such as my one-to-one notes, which show clearly that Nicola Richards and I were talking about what was happening or what might have to happen and scenario planning. I was also having discussions with my contact in the legal department on an on-going basis.

Angela Constance: This is my final question, convener. Ms Mackinnon gave quite a detailed justification of her actions and involvement to the deputy convener, but can I just put it slightly differently? Hindsight is always 20:20. With

hindsight, therefore, would you have done anything differently in your role in the development of the policy, your leading role in the investigation or your involvement in the judicial review?

Judith Mackinnon: I have experience in HR procedures and investigations. What I did not have was experience of a judicial review process. I did not understand the separate and distinct legal tests that take place in the judicial review process and would have found it beneficial to have understood that in a lot more detail prior to the process beginning. The process was unusual because it affected civil servants as well as ministers and former ministers, so maybe we could have retained the clarification in the policy that had set out initially the detailed role of the investigating officer, to avoid any doubt about what the role of the investigating officer could be.

Angela Constance: Forgive me, Ms Mackinnon, but is that not the job of Government lawyers and legal advice, which you said you and your colleagues were seeking throughout the process?

Judith Mackinnon: As you said, we now have the benefit of hindsight. We were clear at the time of those early drafting stages about our interpretation of, and intention for, the role of the IO. It was merely a tidy-up of policy that effected a change; it was not a change of intent for what was expected of the investigating officer.

Angela Constance: I will leave it there, convener.

The Convener: Thank you.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, Ms Mackinnon. You received a note from Ms Russell on 22 November outlining the concerns raised by Ms A. Was that the first time that you were aware of any concerns about the behaviour of Alex Salmond?

Judith Mackinnon: Yes.

10:45

Alex Cole-Hamilton: One of the concerns that would ultimately be investigated under the procedure was historical—from 2013. It had initially been handled internally, with an apology proffered by Mr Salmond. Had you no knowledge of that prior to the investigation?

Judith Mackinnon: No, I did not.

Alex Cole-Hamilton: I turn to the procedure and your involvement in it; you have already confirmed that you had a role in drafting it. As part of that drafting process, at some point in November, you gave a copy of the draft to one of the complainers, did you not?

Judith Mackinnon: No, that is not true. A copy of the draft policy was provided to one of the complainers by Nicola Richards on 14 December.

Alex Cole-Hamilton: I understand, but did that happen with your knowledge or in your presence?

Judith Mackinnon: I was aware that Ms Richards was sending it to her.

Alex Cole-Hamilton: Did you feel that that was appropriate at the time?

Judith Mackinnon: If someone is considering making a formal complaint, it is common practice to make sure that they understand the process that we would have to invoke, so that they know what to expect of the process and what we expect of them.

Alex Cole-Hamilton: Is it common practice to share a procedure that has not been signed off and is still in draft form?

Judith Mackinnon: I do not know whether that is common practice, but it was not ideal that the policy was not finished and had not been signed off. However, it was at the very late stages and Ms A was notified that it was still in draft—she was made aware of that.

Alex Cole-Hamilton: In your discussions with Ms A or Ms B, did you reveal that other people with concerns were considering coming forward?

Judith Mackinnon: Again, I think that Nicola Richards mentioned that in her email to Ms A. That is common practice in a person-centred approach and we had also taken advice from Police Scotland on that matter.

Alex Cole-Hamilton: Did that come up in the private discussions that you had with either of the complainers?

Judith Mackinnon: No.

Alex Cole-Hamilton: As we know, you were appointed as the senior investigating officer; I would like to bottom out the semantic issue in paragraph 10. It states that the investigating officer “will have had no prior involvement with any aspect of the matter being raised.”

That paragraph is there to prevent the appearance of bias, is it not?

Judith Mackinnon: Yes.

Alex Cole-Hamilton: Can you explain to the committee why paragraph 10 of the policy permitted you to be a senior investigating officer in charge of the complaint, when you had had prior contact with those complainers?

Judith Mackinnon: As I explained to other members of the committee, the role of the IO had been set out in more detail in earlier iterations.

When, through those drafting iterations, paragraph 10 changed into what it became, the intended role of the IO had not changed, so the intention for what an IO would do was still there. It was a tidying-up, because it was a policy that would not normally have that level of detail in it. Because of circumstances at the time, we were unable to do what we would normally do across our standard HR policies in the Scottish Government; policies generally have procedures and guidance attached to them, which contain more information and detail. We had not had time to create that guidance to go with the policy at the time. However, from early doors, what was expected from the IO role was very clear.

Alex Cole-Hamilton: Therefore, in your answer to Angela Constance's question about hindsight, you suggested that you would have made clearer the meaning in paragraph 10 of "no prior involvement" in the matter being discussed. Therefore, I take it that the committee should infer that the intent of paragraph 10 does not preclude an investigating officer having prior contact, taking the complainers through the procedure and perhaps even revealing the existence of other complainers to those potential complainers.

Judith Mackinnon: The initial drafting was very clear about the prior contact that could take place, and that is how I operated.

Alex Cole-Hamilton: I will move off that subject for my final question. Obviously, like all of us, you were following the process of the judicial review. It became clear, ultimately, that the penny-drop moment was around the suggestion of apparent bias in your application of paragraph 10. Were you at any point aware of the repeated requests by Mr Salmond to have the lawfulness of the application in the procedure determined by formal arbitration, rather than judicial review? That would have resolved matters behind closed doors but would have had equal legal weight.

Judith Mackinnon: I was not aware of arbitration offers. I was aware of mediation offers, which are different.

Alex Cole-Hamilton: Thank you.

Alison Johnstone (Lothian) (Green): Good morning. Were you shocked at the outcome of the judicial review and the finding that the permanent secretary's decision report and letter were unlawful in that they were taken in circumstances that were procedurally unfair and they were tainted by apparent bias? Was that a shock to you?

Judith Mackinnon: Yes, it was—that is the straightforward answer. I felt that, throughout, I had acted appropriately, objectively and fairly and in line with the policy and the process. I am not a lawyer, so I am not best placed to understand the technical nature of the decisions that were made

or the basis for them, but, yes, I cannot say that I was not shocked by the final decision.

Alison Johnstone: Mr Cole-Hamilton talked about the fact that the developing policy for handling complaints against former and current ministers was shared with the complainant, and there is a suggestion in an email—footnote 46, document YY008—that the complainant might test whether it might have helped them at the time. You suggested to Mr Cole-Hamilton that that would be normal practice. Is that something that you would recommend, or do you think that it would be far better to share that with a complainant when it was a procedure that was agreed and in place?

Judith Mackinnon: That would have been the ideal scenario. However, as I explained earlier, circumstances did not allow for that. It is important for us to ensure that the HR policy and processes that we develop are workable. Part of the transition from the development of HR policy and the translation of it into practice involves consulting and engaging with people. Asking Ms A whether seeing the developing policy would have helped at the time provided us with a learning opportunity.

Alison Johnstone: Obviously, the Scottish Government decided to oppose the issue in court, so it must have felt that it had a robust case. Were you asked to identify information, communications and documents such as texts and emails that were relevant to the Scottish Government's case in order for a thorough assessment of that case to be made?

Judith Mackinnon: Do you mean at the beginning?

Alison Johnstone: Yes.

Judith Mackinnon: No, I was not asked to do that.

Alison Johnstone: With regard to the offers of mediation and arbitration from the former First Minister, was there anyone on the Scottish Government side who thought that that might be a productive way forward? Did anyone urge that that course should be followed?

Judith Mackinnon: I do not know the answer to that question. I am sorry.

Alison Johnstone: I have no further questions.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning. I would like to follow up on some of the questions around the judicial review that Angela Constance and Alison Johnstone touched on.

We know that 15 meetings were held in the Scottish Government between 23 August 2018

and 2 January 2019 to discuss the judicial review. How many of those meetings did you attend?

Judith Mackinnon: I attended meetings about the judicial review process regularly—perhaps two or three times per week. I do not know whether those were the only meetings that were being held to discuss it. The meetings that I was at were very much about updates, communications with the media and our being able to provide information to the complainers.

Murdo Fraser: Was the permanent secretary present at the meetings that you attended?

Judith Mackinnon: No, she was not.

Murdo Fraser: Was the First Minister present at them?

Judith Mackinnon: No, she was not.

Murdo Fraser: I think that earlier, in response to Margaret Mitchell, you said that you were not involved in the decisions that were being taken in relation to the judicial review. Can you tell us who was taking those decisions?

Judith Mackinnon: I assume that it would have been lawyers—people from the legal directorate—but I do not know.

Murdo Fraser: Were you involved in any discussions—either internal or external—with lawyers about the judicial review?

Judith Mackinnon: I was asked to attend one meeting with our counsel, on 19 October. She was gathering information, and she asked about a couple of things in particular: the development of the procedure, and my understanding, from the complainers, of how the incident in 2013 had been handled at that point. She was also interested in the balance of fairness that we applied in relation to the former First Minister. Counsel set the agenda for that meeting. Those were the three main issues that she wanted to talk about.

Murdo Fraser: So the one meeting that you held with lawyers was on 19 October. Did you ever have sight of the legal advice that the Scottish Government had in relation to the judicial review?

Judith Mackinnon: No, I did not.

Murdo Fraser: We know that the Scottish Government then took the decision to concede the judicial review. Do you have any understanding of the legal advice that it had received as to why it should do so?

Judith Mackinnon: No, I do not.

Murdo Fraser: You do not. Thank you. I have no more questions, convener.

Jackie Baillie (Dumbarton) (Lab): I will start by welcoming Judith Mackinnon to the committee. I

want to pursue a couple of points that my colleagues have already touched on, just for further clarity.

On 8 September, the Lord Advocate told the committee:

“The identification of further documents, and ... the interactions between the investigating officer

—which was you, Ms Mackinnon—

and the complainers”—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 8 September 2020; c 28.]

made the case indefensible. Were those all your documents that were subsequently disclosed to the Court of Session?

Judith Mackinnon: I do not know whether they were all mine, but I certainly did provide documents.

Jackie Baillie: Can you tell me when that was? I do not think that it was in the first release of documents to the court.

Judith Mackinnon: Late provision of documents was made in the week starting 17 December 2018. At that point, I had received a citation to attend the commission and diligence hearing. Attached to that was a very detailed specification that requested information from a range of sources that I had not previously searched.

Jackie Baillie: Why was that? Receiving a documentation request from the Court of Session is obviously quite a serious matter. Why did the Scottish Government not get you to search for and provide those documents at the start of its response to the petition?

Judith Mackinnon: I do not know the answer to that question.

Jackie Baillie: My understanding is that the Court of Session was told on 5 November about your prior involvement with complainers. However, of course, as a matter of fact, you and the permanent secretary knew of your involvement prior to your appointment in January 2018. Is that correct?

Judith Mackinnon: Yes.

11:00

Jackie Baillie: Okay. When did you or your superiors have a discussion with the Government’s legal team about that point?

Judith Mackinnon: In relation to the judicial review, do you mean?

Jackie Baillie: No, I mean in relation to your prior involvement, before being appointed as the investigating officer, in relation to the judicial

review that was on-going at the Court of Session. At what point was that discussed with the legal team? It was the basis on which the case was conceded. Was there any discussion about it at any point?

Judith Mackinnon: As I said earlier, the issue of prior contact was known. I was up front about that. My line manager was up front about that. It was known, and—

Jackie Baillie: Sorry for interrupting—when you say that it was “known”, who was it known by, and was it known by the Government’s legal team?

Judith Mackinnon: It was certainly known by the lawyer from whom I took advice directly, who works in the Scottish Government legal directorate, so I am assuming that they knew about—

Jackie Baillie: Sure. Let me try to unpack this. You are trying to be helpful. Who was the lawyer that you took advice from in the Scottish Government legal directorate, and when did you take that advice?

Judith Mackinnon: I took advice throughout the whole process, and it was from the same individual.

Jackie Baillie: Who was that? I ask because it is quite a key point; it is the point on which the judicial review changed. Will you recollect? Who did you take advice from about that particular issue, and at what point?

Judith Mackinnon: I need to be very clear about what you are asking me. I took advice from SGLD from the beginning—it was involved in developing the procedure and providing advice, and it had knowledge and awareness of the fact that—

Jackie Baillie: That is not—

The Convener: I would like to intervene for the benefit of both of you. I am sensing a reluctance to name a person. Can we have the job position of the person in SGLD from whom you took advice?

Judith Mackinnon: He was an employment lawyer.

Jackie Baillie: I am finding this quite difficult, because Judith Mackinnon advised us through her own evidence that she took advice from a lawyer from the Scottish Government legal directorate on that particular point. I was simply pursuing that.

Can you tell us when advice was provided on the specific question of your having had prior involvement with the complainants before you were appointed as the investigating officer? I understand that you will have taken advice as you have gone along, but it is on that specific point that the judicial review turned, so I am interested to

know whether you took that specific advice—from whoever; we will find out eventually who it was.

The Convener: I am sensing that people would like to know who that person was. If we cannot have the exact job title of that person, if they are a senior civil servant it is perfectly acceptable for them to be named. I ask Judith Mackinnon to respond to that, as well as to Ms Baillie.

Judith Mackinnon: He is not a senior civil servant. I am referring to the employment lawyer with whom I deal, day and daily, about a range of things. He happened to be involved, at that time, in the development of the procedure, including issues around prior contact, and so on. I was consistently engaging with SGLD.

The Convener: Thank you. We go back to Ms Baillie, and I am sorry for that interruption.

Jackie Baillie: Do you know whether the employment lawyer you spoke to was part of the Scottish Government legal team that was dealing with the judicial review?

Judith Mackinnon: I do not know for sure.

Jackie Baillie: You referred to a meeting on 19 October that you attended with counsel. Did counsel understand that you were involved with the complainants prior to being the investigating officer?

Judith Mackinnon: I do not know whether that was the case at that meeting, because that is not what we discussed.

Jackie Baillie: No reference was made to that at the meeting.

Judith Mackinnon: No.

Jackie Baillie: I understand that there were meetings on 23 and 25 October, and on 2 November. Were you involved in those?

Judith Mackinnon: With counsel?

Jackie Baillie: I do not know who they were with.

Judith Mackinnon: I was not involved in any other meetings with counsel or lawyers about the judicial review process.

Jackie Baillie: You did not contribute to any discussions with the Scottish Government legal team, or anyone involved with the judicial review process, other than, as you described it, the “update meetings”, with comms and media people.

Judith Mackinnon: Yes, that is correct. I was not involved in any oversight or decision-making part of the judicial review process.

Jackie Baillie: Okay. Can you tell us, without naming names, who was at the update meetings?

Judith Mackinnon: A range of people were present: comms people; a legal person, maybe; someone from the perm sec's office; the people directorate—

Jackie Baillie: Sorry—there were lawyers present? You just said, “a legal person”.

Judith Mackinnon: Yes.

Jackie Baillie: So, people from the Scottish Government legal team, who would have been involved in the judicial review, were at those meetings, which is contrary to what you told us before. You previously told us that you were not involved with lawyers.

Judith Mackinnon: Yes, but those meetings were not about legal decisions; they were to provide updates, including about progress, and about how the judicial review process was progressing.

Jackie Baillie: Okay. There may be a separation for you, but the same lawyers were working on the judicial review.

I will move on to an area that Angela Constance explored with you. I refer you to documents YY023, YY021 and YY073, all provided to us by the permanent secretary on 11 September 2019. I will give you a chance to find the documents.

Judith Mackinnon: It might help if you could describe what those look like.

Jackie Baillie: Ah! I cannot help you, because we have lots of pieces of paper from the Scottish Government. The documents were provided to the committee on 11 September by the permanent secretary. Basically, they show a route map and flowchart drafted on 7 November 2017 that includes former ministers, which followed a discussion with the permanent secretary. Do you recall the documents to which I am referring?

Judith Mackinnon: Yes—the route map document.

Jackie Baillie: That is perfect. It shows that you looked at a route map and a flowchart on 7 November 2017, which included, for the first time, former ministers. That was following a discussion that you had with the permanent secretary. Was that not the day before James Hynd produced the first iteration of the policy?

Judith Mackinnon: I think that the issue of the inclusion of former ministers in the policy was established from the very beginning. From an HR perspective, we had identified that as a gap in our existing fairness at work procedure. I understand that James Hynd had also made that assessment.

Jackie Baillie: When was “the very beginning”, as you described it? What communication was

there with James Hynd before the first iteration of the policy?

Judith Mackinnon: I cannot recall exactly what that would be. I will have to check that and come back to you.

Jackie Baillie: You said, “from the very beginning”. When, for you, was “the very beginning”?

Judith Mackinnon: That was when we started drafting the policy, or reviewing the policies. That was after the permanent secretary had announced to the workforce that she had asked us to do a review of our procedures. I think that that was at the end of October or the beginning of November. That was our request to review what we had in place, to make sure that it was suitable, or, if not, whether it had to be reviewed. That was the start of the whole process for me.

Jackie Baillie: Okay. So at that point, in a discussion between you and the permanent secretary, the inclusion of former ministers was identified as a gap. The route map and flowchart flowed from that. Is that accurate?

Judith Mackinnon: I am not sure where you are getting that that was following a conversation with the permanent secretary.

Jackie Baillie: My understanding is that you produced a route map and a flowchart on 7 November, which included former ministers, following a conversation of some description—it might have been a minute, rather than a discussion—between you and the permanent secretary. That was the day before James Hynd produced the first iteration of the policy.

Judith Mackinnon: Well, I would need to check my records on that, Ms Baillie, if that is alright.

Jackie Baillie: Absolutely. I appreciate that it is a long time ago. You are not alone in having a failing memory.

Do you remember who told you to include former ministers, or is that something that you want to come back to the committee on?

Judith Mackinnon: No one told us to include former ministers. After a review of our existing procedures, we identified, from an HR perspective, that there was that gap.

Jackie Baillie: Okay. Thank you. If you can recall anything else, I would be grateful if you would let the committee know.

Alex Cole-Hamilton pursued this point with you. We were told that you and others were in frequent contact with both complainants during November and December 2017. Could you tell us what that involved?

Judith Mackinnon: First, it is an exaggeration to say that it was frequent contact. My prior contact with the complainers was that they came to HR after they had already approached other members of the senior civil service. They approached HR when they wanted to consider options for what to do next. I had limited contact with each of them. I met Ms A on 5 December, along with Nicola Richards. Nicola Richards followed that up on 14 December with an email to Ms A, and copied me in. At that point Nicola went on holiday. Ms A responded to that email with some queries for Nicola Richards and copied me in. I responded because Nicky was on holiday.

Nicky Richards asked me to contact Ms B, which I did. We spoke on the phone on 7 December. At that time, I did not know what the substance of her experience had been. She was just exploring the options that were open to her. Following that call, on 8 December, I issued an email with various options for her to think about. I did not hear anything back from her, so on 14 December, I dropped her a quick text to check that she had got my email. She responded to say that she had got the email and that she was thinking about things. My response to that was to say that she should take her time and come back to me after Christmas. I did not hear from Ms B again until 23 January, more than a month later.

Jackie Baillie: Did you tell either of the complainants that you were going to be appointed the investigating officer before the appointment actually happened?

Judith Mackinnon: I did not. I did not tell them that. At that point in time, I did not know that that would be the case.

Jackie Baillie: Your pause suggests to me that someone else told them. Is that an accurate inference from the pause before you answered my question?

Judith Mackinnon: In evidence that I have given today, I said that, in an email to Ms A, Nicky Richards had said that it was likely that I would be the IO.

11:15

Jackie Baillie: Your defence in relation to questions about paragraph 10 seems to be that the earlier iteration of the policy allowed you to be involved with complainants at the same time as you were involved in the development of the policy. Did you not read the policy document once it was signed off, given its importance? Did you simply not read paragraph 10 and understand what your responsibility was? I genuinely find that hard to believe.

Judith Mackinnon: I was very clear about my role and responsibility in relation to the procedure.

Jackie Baillie: I am sorry, but that does not answer my question. You said that you looked at early iterations of the policy and that they allowed you to be involved at the beginning and as the IO. I find it hard to believe that, as a senior HR professional—as you have demonstrated to us—you did not read the finished policy document, in which paragraph 10 makes clear the absolute separation of roles. I cannot believe that you did not refer to that at all, particularly in your role as investigating officer, and that your defence is that early iterations of the policy, which was in draft form, allowed you to do both. You are straining credibility in asking the committee to believe that, as an HR professional, you did not read paragraph 10 when the policy was completed.

Judith Mackinnon: I read paragraph 10, but it does not make explicit the separation of roles. It is open to interpretation, and that is the challenge that we faced. Our original intention was still there, but the detail was not there in what finally appeared in paragraph 10, which meant that it was open to another interpretation from the one that we had taken.

Jackie Baillie: It is not just me; the Court of Session interpreted the paragraph differently from you, Ms Mackinnon.

I have no more questions, convener.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): I want to clarify a number of things that were brought up earlier and probe them a bit further. You said that advice was taken throughout from a senior employment lawyer in the Scottish Government legal directorate. Was advice also taken from external employment lawyers and, if so, from whom was it taken?

Judith Mackinnon: Such advice was not taken by me, on this matter.

Maureen Watt: So you are not aware of anyone outwith the Scottish Government who gave advice on the matter.

Judith Mackinnon: No, I am not.

Maureen Watt: You said that the police were consulted at one point. Was that on a specific matter?

Judith Mackinnon: No—Police Scotland was consulted on the generic issues that we were facing relating to the permanent secretary's announcement to all staff, which essentially invited people to come forward and speak to us. We took advice on how best to respond to individuals who might have been involved in difficult situations. The advice from Police Scotland was about how to support and take forward the cases of individuals

who stepped forward to raise issues that were of significant concern to them. Police Scotland provided us with quite a lot of sources of possible support for staff from outside organisations, such as voluntary organisations. Police Scotland provided general information that helped to inform our approach to what we might have to deal with.

Maureen Watt: It is important that we separate out mediation and the subsequent arbitration. Was the former First Minister's preference for mediation in relation to dealing with complaints discussed with the complainants and, if so, how many times? Did the complainants reject mediation? Were they of one voice, or were there different voices between the two?

Judith Mackinnon: That matter will be specifically addressed with the next statement and the tranche of documents that is still to come.

I know that mediation was against the wishes of both complainers. The opportunity was put to them, and they declined.

Maureen Watt: Was a note on that put to ministers?

Judith Mackinnon: I do not know.

Maureen Watt: Was arbitration rejected unanimously by the Government? Did you have any advice fed into that?

Judith Mackinnon: I was not involved in anything to do with the offers of arbitration, I am afraid.

Maureen Watt: Why do you say "afraid"?

Judith Mackinnon: You were asking me if I was involved, but I was not involved, so I cannot help you on that matter.

Maureen Watt: You were involved throughout the process. If you were not involved in that matter, however, who, to your mind, was involved in taking the decision about arbitration?

Judith Mackinnon: I do not know. I would assume that it would be someone more senior—certainly someone more senior than me—but I really do not know.

Alex Cole-Hamilton: Further to your answers to Jackie Baillie, it is clear that the collapse of the judicial review hinged on your interpretation of paragraph 10 of the procedure versus the other interpretation. That difference of interpretation cost the public purse more than £500,000.

We have been told repeatedly in this inquiry that the same procedure exists to this day. Can you clarify to the committee that paragraph 10 has sufficient guidance behind it so that that difference of interpretation cannot ever happen again?

Judith Mackinnon: Not yet, is the short answer. The Dunlop review has been instigated to review the policy as it currently stands.

Alex Cole-Hamilton: So, the public purse is currently exposed to the same risk as it was back in 2018.

Judith Mackinnon: We have not used the policy again since, and it is now under review.

Margaret Mitchell: You say that Police Scotland was contacted, in the course of a generic review, I think. When were the police first contacted, and who within Police Scotland was contacted? You said that that was following the PS's email to all staff.

Judith Mackinnon: I cannot remember the full name of the department, but it was the specialist crime division or something like that. A number of officers came to speak to me in December 2017.

Margaret Mitchell: Who made the initial contact with Police Scotland?

Judith Mackinnon: I got in touch with the police; I asked a colleague for a contact name, I got in touch with them and I asked to speak with them.

Margaret Mitchell: Who was that contact?

Judith Mackinnon: Within Police Scotland?

Margaret Mitchell: Yes.

Judith Mackinnon: I cannot recall the name, but I will check and I will come back to you.

Margaret Mitchell: That would be very helpful, thank you.

The Convener: I have a couple of questions, Ms Mackinnon, picking up on some of what has been said during this evidence session. Most of it has been covered, but I noted one thing that you said in response to a question from Alison Johnstone. I think that Ms Johnstone asked whether it would have been better to wait until a policy was finalised before sharing it with a potential complainant. You said that

"circumstances did not allow for that."

Could you explain what those "circumstances" were?

Judith Mackinnon: What I meant by that was that the policy was not concluded. The policy was still in its final drafting stages, and people were coming forward with particular concerns.

If people make a complaint, we have to investigate it. We are obligated to do that—we have a duty of care to do so. The policy was still in draft at that point in time, but it was better to use something that was in the final drafting stage to show them.

The Convener: I will move on to the judicial review. First, you mentioned—as you have probably sent in to the committee—that scenario planning had been carried out. Can you give us a verbal outline of the scenarios that were being planned in relation to the judicial review?

Judith Mackinnon: I was not referring to the judicial review when I said that. I was referring to the possible concerns becoming formal complaints, and how we would deal with those.

The Convener: I see—I picked you up wrongly; apologies for that. Can you give me an outline, to the best of your recollection, of the evidence that you gave to the commission and diligence?

Judith Mackinnon: Yes. I was asked about a range of documents that I had already submitted, and I was asked to conduct further searches because there were still some gaps. I provided further documents, but I was still not able to source all of them, so I gave a commitment to the commission that I would go away and do further checks.

The Convener: So that was it. Were you able—

Judith Mackinnon: No, I provided—

The Convener: Were you able—

Judith Mackinnon: [Inaudible.]—I provided—

The Convener: We will start again. You can go first.

Judith Mackinnon: I was able to submit documents to SGLD on 27 January, and I continued to search over that weekend. That is when I came across some of the texts—I think that they are included in the bundle for the judicial review statement—which were on my iPad. I was aware that I had been texting with the complainer, Ms B, but I had deleted the texts from my phone. On the off chance, I checked my iPad, and the texts were still there—they had not been deleted. Those texts set out information about my contact with the complainer, Ms B, almost right through the entire time that I had a connection with her. There were logistical back-and-forth texts with her.

There were also texts between Nicola Richards and myself about the meeting on 16 January, which made it clear that I had not travelled to Edinburgh, so I certainly was not physically at the meeting. When I contacted the relevant director on 31 December and said that I had found those further documents, I was told, “Look—just pause on sending anything else through right now; there are discussions going on about potential next steps for the judicial review process.”

The Convener: Can you run that last part by me again, please? You were in the middle of putting documents together, and you were asked to pause in doing that.

Judith Mackinnon: [Inaudible.]—to send them to SGLD because there were discussions happening about the next steps.

The Convener: When was that? Refresh my memory.

Judith Mackinnon: That was on 31 December.

The Convener: Thank you. There are no further questions, unless someone has something pressing to say at the last minute.

I see that no one else wants to come in. I thank Judith Mackinnon for her evidence. I suspend the meeting for a break before we move to the next witness.

11:30

Meeting suspended.

11:38

On resuming—

The Convener: I welcome Barbara Allison. Thank you for coming along again, Ms Allison. I ask you to take the oath.

Barbara Allison took the oath.

The Convener: Thank you. I now invite you to make a brief opening statement.

Barbara Allison (Scottish Government): Thank you for the opportunity to make an opening statement for this meeting, in addition to the statement that I gave to the committee on 15 September.

For ease of reference and by way of a brief reminder about my current role and responsibilities as director of communications, ministerial support and facilities, and my previous role and responsibilities as director of people, with regard to the matters that relate to the committee’s remit, I have worked with the Scottish Government since 2008, following 14 years with the Scottish Prison Service, latterly as director of HR for five and a half years. I was asked to join the SG as head of HR in January 2008 and was subsequently promoted to director of HR and corporate services in 2009. Since 2016, I have been director of communications, ministerial support and facilities.

This evidence session is focused on the judicial review and the related commission process. As I said in my previous opening statement, I had early and limited contact in November 2017 with two individuals who ultimately became complainants under the policy on the handling of harassment complaints. Given the confidentiality restrictions that apply, I ask for the committee’s forbearance if I hesitate about whether I can answer questions or

if I seek advice from the convener or from the SGLD's legal team before answering.

In relation to my early contact with the two individuals, I was asked to provide documents as part of the judicial review, and I attended the commission for evidence in December 2018. However, I was not involved in the judicial review in a decision-making capacity. To the extent that it might be relevant to today's session, although I had early and limited contact with the complainers, I was not involved in the investigation process.

I repeat that I give evidence to the committee on behalf of ministers and not in a personal capacity. As the committee appreciates, this is complex legal territory and, as I explained, I am privy to some information that was the subject of legal proceedings and which is now protected as confidential. I ask for the committee's patience if I am cautious in answering questions on certain matters, if I have to stop to seek advice or if I follow up questions in writing with detail to ensure accuracy and fulfil the Government's legal duties.

I declare again that I am a member of the FDA union.

The Convener: Committee members have many questions to ask. I go first to our deputy convener.

Margaret Mitchell: I will ask questions on the theme of the commission and the decision to concede. As well as being cited as a haver, were you involved in the Scottish Government's response to the commission?

Barbara Allison: I was asked to provide information to the commission on occasions.

Margaret Mitchell: Will you outline those occasions?

Barbara Allison: I was asked to provide a copy of the texts that I had with Ms B. There was a specification of documents for 17 December, to which I responded. Other than that, information was provided ad hoc.

Margaret Mitchell: Was that the limit of your involvement in the Scottish Government's response?

Barbara Allison: Yes—I was involved in regular update meetings in connection with the judicial review but not in meetings in which decisions were taken.

Margaret Mitchell: Without going into the specifics of the documents, will you say what documents you were cited as a haver to give evidence on? You mentioned a text and 17 December. Were you cited to give evidence on anything else?

Barbara Allison: There was a list of requirements in the specification for 17 December. I said that I had already provided the texts that I had with Ms B and I confirmed that I had no other texts with her. I had no texts or WhatsApp contact with Ms A. From the additional searches that I did in relation to the 17 December specification, I handed over two additional documents to the commission.

Margaret Mitchell: What were those documents?

Barbara Allison: One was a response to Ms Russell. She and I had met Ms A on—I think—22 November 2017, when a statement of her concern was taken. I provided to the commission the tracked changes of the note of that meeting, which I had provided to Ms Russell. The other document was an email to Ms B that provided the text of the permanent secretary's all-staff message of 13 November.

Margaret Mitchell: If Ms Russell's concern was not to do with the substance of the complaint, will you say what it was?

Barbara Allison: Ms Russell—

Margaret Mitchell: I think that you said that she stated concern in one of the documents.

Barbara Allison: No—sorry. Ms Russell and I met Ms A on 22 November, and a draft note of that meeting was produced. I responded to Ms Russell with tracked changes to that note.

Margaret Mitchell: That is fine. You gave evidence to the commission hearing on the first day. Did you do so on any other days?

Barbara Allison: I gave evidence on 19 December.

Margaret Mitchell: In what capacity did you give evidence? Did you do so as director of communications, in your pastoral role, in any previous role or any other capacity?

Barbara Allison: It was not clear what my capacity was.

Margaret Mitchell: With regard to the evidence that you gave then, which role did it relate to?

Barbara Allison: The evidence that I gave was in relation to my early contact with Ms A and Ms B.

Margaret Mitchell: When you say "early contact", how long ago are you talking about?

11:45

Barbara Allison: That was in November 2017.

Margaret Mitchell: Okay. Moving on a little bit, in terms of the ministerial oversight of the judicial review process, which Government ministers were

regularly advised on the outcomes of the legal discussions?

Barbara Allison: I was not involved with that, but I am aware that the Lord Advocate was involved. I am not aware of any other ministers being involved.

Margaret Mitchell: Did you update any ministers directly in your capacity as director of communications?

Barbara Allison: No.

Margaret Mitchell: Thank you.

Jackie Baillie: Welcome back, Ms Allison. I thank you for your further letter to the committee, which identified that you were indeed the recipient of the text message from the permanent secretary. Let me refresh your memory and everybody else's about what was said. This is from Leslie Evans:

"Thanks Barbara—battle maybe lost but not the war. Hope you are having lovely & well deserved break. L".

Your response was:

"Thanks Leslie. It is lovely here. My mind and thoughts are with you all there tho. Best wishes, B".

What was the message that you sent that Leslie Evans was replying to?

Barbara Allison: I do not know—I do not have that. As I said, I did not recall having received the message, and I was answering to the best of my recollection at the time.

After I left the committee, I realised that you had concerns with my reply. I searched my phone for the messages, but I did not have them. I contacted the Crown Office to ask about anything that had been handed over in relation to the criminal proceedings. Those were the two messages that came back in relation to the question that you asked.

Jackie Baillie: Here was me thinking that I had a poker face, Ms Allison—clearly I do not.

Surely what that message was in reply to would have been handed over to the Crown Office. Are you saying that that message simply does not exist?

Barbara Allison: It was not handed back to me, so I am assuming that it does not exist.

Jackie Baillie: Can you tell me when the messages were sent?

Barbara Allison: On 8 January 2019.

Jackie Baillie: That would be significant because that was after the collapse of the judicial review.

Barbara Allison: It was after the judicial review was conceded, yes.

Jackie Baillie: Okay. What do you interpret to be "the battle" and what do you interpret to be "the war"?

Barbara Allison: Obviously, I did not write the text, but I think that in the permanent secretary's earlier evidence she talked about her continual focus on equality.

Jackie Baillie: In fairness, you do not disturb somebody on holiday in the Maldives to send a message about broader equality issues. It was directly linked to the collapse of the judicial review for the Scottish Government, was it not?

Barbara Allison: It was at that time, yes.

Jackie Baillie: Given that she interrupted you on a "well deserved break"—or you interrupted her—what was "the battle"?

Barbara Allison: I assume that it was connected with the judicial review, but, as I said—

Jackie Baillie: Okay—that is fine. That is what I would assume too. What, therefore, would you assume was "the war"?

Barbara Allison: As I said, I did not write the text, so I do not know what—

Jackie Baillie: I am asking you to interpret a text that was sent to you by somebody who clearly was close to you.

Barbara Allison: My view is this. Since the permanent secretary came in in 2015, she has made a concerted effort to ensure that people feel included and heard. I am assuming that it related to the broad context of trying to ensure that women can come forward.

Jackie Baillie: Okay. Let me move on to responses that you gave to me the last time you were before the committee. I ask again: did you write to or contact former staff to encourage them to complain to the police about the former First Minister?

Barbara Allison: No.

Jackie Baillie: Really?

Barbara Allison: No, I did not write to—there was one—sorry, I am very conscious of identification—

Jackie Baillie: I am not asking you to name anybody. I am simply asking whether you wrote to a former staff member, or contacted them, to encourage them to complain to the police about the former First Minister.

Barbara Allison: No.

Jackie Baillie: You are quite certain about that.

Barbara Allison: Yes.

Jackie Baillie: You did not do it at the instigation of a special adviser. You did not do it after the police started their investigation.

Barbara Allison: No. I remember that there was contact when the police investigation was initially announced. There was some concern that names of potential witnesses might be handed over and whether they would be concerned about a police investigation. There was some correspondence about whether we had to make contact and so on—I am aware of one particular person who was mentioned who was not a former member of staff—and about whether we should make sure that that person was aware and was okay.

Jackie Baillie: Did you make that person aware?

Barbara Allison: I did not, because I was told that they were already aware. I am sorry, Ms Baillie: I realise that you once again seem to have evidence that I do not have.

Jackie Baillie: I am smiling. I am not expressing disbelief; I am simply testing the point.

Barbara Allison: If there is something that you feel that I am not providing, perhaps you could give me information about that and I would be happy to respond.

Jackie Baillie: Excellent; thank you.

Have you ever expressed concern, or had concerns expressed to you, about interference by special advisers in the civil service complaints process?

Barbara Allison: Could you ask me that again?

Jackie Baillie: Have you ever expressed concern, or had concerns expressed to you, about interference by special advisers in the civil service complaints process?

Barbara Allison: During the investigation, there was some correspondence between me and some other people about somebody who was perhaps going to give evidence or be a witness. In my pastoral care role, I was asked whether I could offer support at that time. That is probably what you are referring to.

Jackie Baillie: I will leave it there for now. Thank you.

Angela Constance: You previously told us that you had no direct involvement in the development of the new policy on harassment but that you had a role in pastoral care; you also said that you had some contact with complainants but were not involved in the investigation. Today, you have said that you were a participant in the judicial review process, but were not a decision maker. Can you explain, as far as you can, why the commission

was interested in you? Can you explain the substance of the evidence that you had and why that was considered to be important?

Barbara Allison: As I understand it, as the judicial review went on, there was a particular interest in early contacts with Miss A and Miss B. Judith Mackinnon referred to that earlier. I had early contact with both women. I am conscious that the committee has not yet had the final tranche of evidence, which, I am sure, would be helpful.

I had early contact with Miss B. That contact was a series of texts. I also had, I think, three telephone calls with her, but no meetings. No record was ever taken of any of her concerns.

My one contact with Miss A was in relation to the meeting that Gillian Russell and I had with her, in which a note of her concerns was taken.

Angela Constance: Okay. Why do you think that that contact and that information were important?

Barbara Allison: I think it was because that was the early contact and an understanding of how it came about was wanted. I understand that both contacts were a result of the permanent secretary's staff message on 2 November, when she put out a note to all staff about cultures and behaviours, and ensuring that people felt that they were supported to come forward, and so on. My understanding is that both individuals came forward as a result of that.

Angela Constance: Okay. Just to be clear about the information that you held—the texts and a note of a meeting with one of the complainants—was that information made freely available in the early course of the judicial review process, or did you have to be asked for it?

Barbara Allison: I made it known to Scottish Government officials that I had texts from Miss B. I was then asked to provide them on 12 December. The note from the meeting with Miss A was already known about prior to that.

Angela Constance: Okay. When did you tell colleagues about the texts? When did you tell the Scottish Government that you had texts from one of the complainants?

Barbara Allison: I cannot recall—sorry.

Angela Constance: Okay; thank you. What involvement did you have in seeking legal advice and support? Was that internal to SGLD or external? What was the nature and flavour of that?

Barbara Allison: In relation to what? Sorry, which—

Angela Constance: In relation to your involvement with the judicial review process.

Barbara Allison: I did not seek any legal advice, to be honest. We were just asked to do the searches and provide what we found.

Angela Constance: For your involvement in the commission, you were not supported with internal legal advice or support. Did you just pitch up yourself, like you did here today?

Barbara Allison: Before the appearance at the commission on 19 December, there was a session with colleagues who were attending the commission and SGLD colleagues the evening before, when we were provided with an explanation about what a commission was and provided with the documents that had already been handed over, so it was quite ad hoc and quite late.

Angela Constance: Okay. Is there a written record of that meeting at all?

Barbara Allison: I have not seen it. I do not think that there is one; I think that it was more of an informal meeting.

Angela Constance: Okay. Can you remind me to whom you report?

Barbara Allison: I currently report to the DG of organisational development and operations.

Angela Constance: At the time concerned, to whom did you report?

Barbara Allison: The same DG.

Angela Constance: That relates to the position. Are you able to name the person? I think that they are senior enough.

Barbara Allison: At the time, it was Sarah Davidson.

Angela Constance: That is fine.

This is my final question. You have substantial public sector experience. Given that experience, in hindsight, is there anything that you or your colleagues could have done differently?

Barbara Allison: As someone who is not a lawyer, and who had not previously been involved in a judicial review, it would have been helpful if what was required and expected of us in terms of providing information had been clearer. In hindsight, it would have been helpful if the people involved ultimately had more information at the start.

Angela Constance: Okay. You have pointed to, perhaps, a lack of support from legal colleagues, or a lack of awareness around judicial review processes. I suppose that my question is more about whether there is anything that you or your colleagues in your roles could have done differently.

Barbara Allison: I am not aware of anything. I think that we did everything that we were asked to do at the time, and we thought that we were doing everything correctly. However, I think that, in hindsight, we would have done it differently.

Alex Cole-Hamilton: Good morning again, Ms Allison—thank you for coming back to see us. I will start by following up on a couple of Jackie Baillie's questions. What kind of phone do you have?

12:00

Barbara Allison: I have an iPhone.

Alex Cole-Hamilton: Regardless of whether you have the same handset as you did in 2017, do you have the same contract? You have not changed contracts, so you would not have to restore what was on it or completely restart with a new phone, or anything like that.

Barbara Allison: No.

Alex Cole-Hamilton: Okay. I will not ask you to do this—I am speaking hypothetically—but, if we needed you to do so, could you access right now the text messages from the complainers that appeared in the judicial review?

Barbara Allison: Yes.

Alex Cole-Hamilton: So, you could access messages on your phone that were sent in 2017. However, you told Ms Baillie that, when you searched your phone for the message to which the permanent secretary's response was about losing the battle but winning the war, you could not find it.

Barbara Allison: Yes.

Alex Cole-Hamilton: Did you delete that message?

Barbara Allison: Yes. I have deliberately kept the text messages from Miss B because I was conscious that they were the only record that I had of my contact with her. As I said, there were texts and some calls. When I took the first call from Miss B, I was walking to work, and I did not make a note of the call or of anything that was said. In fact, one of my texts to her later on said, "I'm conscious that I've never taken a note of this."

It was a strange time, as you might imagine. People were coming forward with concerns. Somebody had come forward with something that they did not feel that they were able to share with the organisation at the time, and I felt that I was trying to hold a space open for her. Basically, I did not want to be seen to be in any way closing down or dismissing her or anything like that; likewise, I did not want to be seen to be forcing her to come forward.

I was conscious that I had not made a note of that call. The only thing that I had relating to my

contact with Miss B were the texts, so I kept them. I do not routinely keep all my texts. I will clear out texts, so I must have deleted some, but I specifically kept the texts with Miss B for a reason.

Alex Cole-Hamilton: Forgive me if I am not getting this right. You sent a text to Leslie Evans, to which her response was about winning the battle but losing the war. You had kept texts from the previous year from complainers, but at some point soon after you received that text from Leslie Evans, you deleted the original text that you had sent to her. Do you have any recollection of what you sent to Leslie Evans that precipitated that response?

Barbara Allison: No, I do not—I am sorry. I did not remember getting Leslie Evan's reply, so I do not remember what I initially sent.

Alex Cole-Hamilton: I will move on. This is slightly off-topic, but I think that it is important, considering that you are here in front of us again.

Last week, we received a letter from Sir Peter Housden to clarify that he had never discussed concerns about bullying behaviour on the part of Alex Salmond. However, we know that the dignity at work policy was changed in 2010 after trade unions raised concerns about bullying behaviour from Mr Salmond specifically, while you were the director of people.

One of the 2010 changes was that escalated complaints against ministers would henceforth be dealt with by the permanent secretary and the Deputy First Minister. The former is the person in charge of the civil service but, interestingly, the latter is not the person who is in charge of the Government—it is the number 2, not the First Minister. It is hard to believe that Nicola Sturgeon would take on that role without understanding the subtext as to why. Was she ever clear as to why those changes were being made, and why she was being given that central role in dealing with complaints?

Barbara Allison: I am not aware of that. I know that, at the time, the permanent secretary spoke to the First Minister about the change in policy, but I do not know whether he spoke to the Deputy First Minister at the same time.

Alex Cole-Hamilton: I accept that. However, can we infer that, in reality, the response of changing the policy, following the intervention by the unions in which they raised concerns around the former First Minister's behaviour, is another example of a procedure being redesigned so that it might one day potentially fit complaints against Mr Salmond?

Barbara Allison: At the time, the unions had raised concerns about behaviour with ministers. I recall that the former First Minister was mentioned.

Alex Cole-Hamilton: Is it reasonable for us to say that the policy was retrofitted in order to be deployed—should it ever be needed—if a formal complaint were made against the First Minister?

Barbara Allison: I cannot recall why that particular provision was put in place.

Alex Cole-Hamilton: Let us move on to the handling of complaints. Without going into any detail that might identify the complainant, can you describe the conversation in which Miss A revealed her allegations against Mr Salmond? For example, how did it come about, who made the initial approach, and what precipitated her coming forward?

Barbara Allison: As I mentioned, the permanent secretary sent an all-staff note on 2 November. I understand that that precipitated a contact with Miss A. She then came forward to Gillian Russell to say that she wanted to share a concern. Separately, someone approached me to say that Miss A would like to have a chat with me in my pastoral care role and we agreed that we would see her together.

Alex Cole-Hamilton: Did you get the impression that, given the environment at the time, with the #MeToo movement and the knowledge that the harassment complaints procedure was being updated, Miss A was sharing that concern with several individuals in her circle in the civil service?

Barbara Allison: I do not know.

Alex Cole-Hamilton: We know that Judith Mackinnon knew of the complaints shortly after that—on the same day, in fact. Two weeks previously, the permanent secretary stated, quite publicly, that Judith Mackinnon would play a leading role in the management of harassment complaints. When those complaints surfaced, was paragraph 10 and the need to avoid apparent bias ever discussed?

Barbara Allison: No.

Alex Cole-Hamilton: Okay. I will move on to the judicial review. At any point, were you aware of the repeated requests by the former First Minister to ascertain the legality of the handling process through arbitration rather than judicial review?

Barbara Allison: I was aware that arbitration had been mentioned.

Alex Cole-Hamilton: Can you expand on that? Who made you aware of that?

Barbara Allison: In regular update meetings, we were made aware of how things were progressing. I was aware that mediation or arbitration had been mentioned. That was just in an update meeting.

Alex Cole-Hamilton: I am sorry to press you on this, but can you expand on how it was mentioned? Was it a topic for discussion, or was it a matter of fact that arbitration had been suggested but also rejected?

Barbara Allison: It was more along those lines. The meeting was not one in which we were making decisions or comments—it was just an update meeting so that we knew what the current position was.

Alex Cole-Hamilton: Given your pastoral role with the complainers, were they ever made aware that arbitration had been suggested?

Barbara Allison: At that point, it had gone beyond the stage at which I had any contact with the individuals.

Alex Cole-Hamilton: I understand.

In relation to the judicial review itself, it was clear that there was a drip-feeding of documents; additional documents were requested on five or six separate dates. If you could see the line of inquiry that the judicial review was taking, why was the Government not more forthcoming in simply producing everything of relevance at the one time?

Barbara Allison: I do not know. We were responding when we were asked for things. I do not know why a particular approach was taken.

Alex Cole-Hamilton: When the judicial review concluded and the case was conceded, were there any wash-up meetings in the higher echelons of the Government to consider lessons learned and any follow-ups?

Barbara Allison: I am not aware of any. I was not in the country when the case was conceded, so I am not sure whether there was anything immediately following that.

Alex Cole-Hamilton: It was a £500,000 mistake. We have just learned from Judith Mackinnon that, two years after the case collapsed, the policy is still live and still open to the misinterpretation that led to the judicial review's collapse. In your experience, has there been any attempt in the past two years, other than the Dunlop review, to take remedial action, particularly on paragraph 10 of the procedure?

Barbara Allison: I am not aware of any.

Alex Cole-Hamilton: Thank you.

Alison Johnstone: Are you aware of the make-up of any group overseeing the judicial review and informing the key decisions that the Scottish Government took—for example, which ministers were involved, as well as special advisers, legal advisers and Government officials?

Barbara Allison: I was not involved in the handling of that at all. I am aware that there were meetings and that, on occasion, the permanent secretary attended. I think that the FM attended some meetings, as did some special advisers and so on, but I was not involved.

Alison Johnstone: In your role as director for communications and ministerial support, I assume that you would want to be assured that the Government was confident that its case was robust. Did you have any discussions in that regard?

Barbara Allison: No. The permanent secretary would have a view on that.

Alison Johnstone: Do you have any knowledge of the legal assessment that was made between 27 December 2018 and 2 January 2019 relating to the decision to concede?

Barbara Allison: No.

Alison Johnstone: So you do not know what the key change was as at 2 January 2019.

Barbara Allison: No. Subsequently, I have seen correspondence that I was copied into at the time and I understand that it was in connection with paragraph 10 and the investigating officer prior contact.

Alison Johnstone: I asked Ms Mackinnon this question. Were you shocked at the outcome of the judicial review? It is fairly stark. I refer to the finding that the permanent secretary's decision report and letter were unlawful in respect of the decision being taken in circumstances that were

“procedurally unfair and tainted by apparent bias”.

At the time when that became known, were you shocked at that outcome, having been involved previously in some regard?

Barbara Allison: Yes.

Alison Johnstone: I have no further questions.

Murdo Fraser: A lot of the ground that I was going to cover has already been gone over, so I just have a few short questions to follow up on some of the questions around the judicial review.

Alex Cole-Hamilton asked you about arbitration. It would seem to me that trying to resolve this by arbitration would have been preferable on a number of grounds. In most cases, it is cheaper and quicker, and it would have kept the matter private, which, from the point of view of the complainants, might have been seen as an advantage. Do you have any understanding of why the Scottish Government refused to go down the arbitration route?

Barbara Allison: No.

Murdo Fraser: Were you involved at any point in discussions with legal counsel, either in-house or external, about the Scottish Government's legal position?

Barbara Allison: No.

Murdo Fraser: Did you see the Scottish Government's legal advice at any point?

Barbara Allison: No.

Murdo Fraser: One final area that I want to cover is the role of special advisers. Were you involved at any point with special advisers in relation to the judicial review process?

Barbara Allison: As I mentioned, we had regular update meetings and special advisers would be involved in those meetings.

Murdo Fraser: Okay. What was their role in those meetings?

Barbara Allison: Their particular role was in relation to media lines and comms lines. We might be getting press interest, so they would be interested in how we were responding to that.

Murdo Fraser: That was the extent of their role.

Barbara Allison: Yes.

Murdo Fraser: Okay—thank you. I have no more questions.

Maureen Watt: Good morning, Ms Allison. You said that you had more contact with Ms B than with Ms A. In terms of the mediation that was offered, did you convey that offer to either Ms A or Ms B?

Barbara Allison: No. My understanding is that the mediation offer was made when the investigation started, so that was beyond my point of contact. I had a point of contact up until HR took over; I had no contact with either of them thereafter, other than two texts with Ms B in January 2018.

12:15

Maureen Watt: Did those subsequent texts relate to the on-going possibility of mediation, or the judicial review?

Barbara Allison: The context was that I texted Ms B to say, "Thank you for my Christmas card," and she texted back to say, "You're welcome." So it was not connected—however, for the sake of completeness, I mention those two contacts.

Maureen Watt: So it was not you who relayed the possibility of mediation.

Barbara Allison: No.

Maureen Watt: In relation to arbitration—

Barbara Allison: No.

Maureen Watt: That was HR.

Barbara Allison: As I understand it, yes.

Maureen Watt: In your senior role in Government, were you copied in to the judicial review decisions, and did you have any input into the judicial review decisions that were made by the Scottish Government?

Barbara Allison: No.

Maureen Watt: That is all. Thank you.

Jackie Baillie: I have a question about a small thing. In response to Murdo Fraser, you referred to regular update meetings. Would those be the same meetings as Judith Mackinnon described to us?

Barbara Allison: Yes.

Jackie Baillie: Media and communications people would be there. I am curious, because Judith Mackinnon was asked a question about special advisers and she said that there were no special advisers at those meetings—but you have just said that there were.

Barbara Allison: Yes—there were.

Jackie Baillie: So who should I believe?

Barbara Allison: Their interest was particularly around communications; perhaps Ms Mackinnon had not recognised that.

Jackie Baillie: Okay. Which special advisers were there on a fairly regular basis, or at all?

Barbara Allison: I do not know whether I am at liberty to give names; I am sorry. I am happy to come back on that.

Jackie Baillie: They are senior people.

Barbara Allison: Let me ask whether that is okay.

Liz Lloyd would be there on occasion and—this is dreadful; I have forgotten his name—Stuart Nicholson.

Jackie Baillie: I am sure that he will not be offended at that. *[Laughter.]* I am sure that he would want to be incognito. Liz Lloyd and Stuart Nicholson were the two special advisers—

Barbara Allison: —who would be there on occasion, yes.

Jackie Baillie: How often would they be there? From Judith Mackinnon's evidence, meetings were held twice, if not three times, a week. Would it be once a month or once a week? How often?

Barbara Allison: One or the other would be there regularly, from a communications interest.

Jackie Baillie: Okay. I am sorry to press you, but "regularly" is a very loose term. Would it be

weekly or every meeting, for example? I am just trying to get a feel for it.

Barbara Allison: It would be at most meetings.

Jackie Baillie: I will take that as meaning the majority of meetings; we can agree on that.

Barbara Allison: Yes.

Jackie Baillie: Thank you very much. That is all.

Margaret Mitchell: Ms Allison, you mentioned the police investigation and contact with the police, as director of communications. What direct contact did you have with the police on anything to do with the handling of complaints, or on any complaints against the former First Minister?

Barbara Allison: I had no contact with the police at that stage. My contact with the police was on the criminal investigation. Because I had texts from Ms B, I offered my phone to them to get those texts from my phone.

Margaret Mitchell: Are you aware of when Police Scotland was first contacted? I think that Ms Mackinnon mentioned that contact was made with Police Scotland after the permanent secretary sent out a generic email. Were you aware of that?

Barbara Allison: I was aware that contact had been made with Police Scotland, in connection with things such as support to potential complainants.

Margaret Mitchell: Were you, as director of communications, kept advised?

Barbara Allison: No.

Margaret Mitchell: How, then, were you aware of it?

Barbara Allison: I cannot recall how I became aware. I think that it must just have been through an update that Police Scotland had been in touch to seek advice on how it might take forward such complaints. I cannot really recall how I became aware; I am sorry.

Margaret Mitchell: Contacting the police is quite a big thing, really. It would not happen every day. As director of communications, would you have expected to be fully informed about it?

Barbara Allison: No. My understanding is that HR got in touch about how it might handle those types of complaint.

Margaret Mitchell: Would that decision be taken by Nicola Richards? We know that Ms Mackinnon contacted the police; would that be her decision alone?

Barbara Allison: I do not know.

Margaret Mitchell: Finally, I recall that in your previous evidence you said that you are quite a fan of mediation. Although you did not make any decisions about arbitration or mediation, did you have a view on whether they would have been appropriate in the management of the complaints?

Barbara Allison: I was not asked for a view. As I said, I think that mediation can be very successful; it depends on the particular complaint. However, I was not asked for a view at the time.

Margaret Mitchell: What about arbitration? Again, you were not part of the decision making, but was it your view that arbitration might in any way be advantageous to the complainers, given the level of publicity that would inevitably result—and did result during the judicial review process and when the case went to trial?

Barbara Allison: I was not asked to give a view on that at the time.

Margaret Mitchell: Do you have a view now?

Barbara Allison: It would depend on the circumstances. As I said, I was not involved in the investigation, so I did not know what the full complaints were. Therefore, I do not think that it would be appropriate for me to comment.

Margaret Mitchell: Yes, but you were involved prior to the investigation.

Barbara Allison: I was involved prior to the investigation but I was not involved at that stage.

Margaret Mitchell: Given your involvement prior to the investigation and your knowledge of the narrative, and so on, do you think that arbitration might have been something to be considered, at least?

Barbara Allison: I assume that these things were given full consideration at the time. As I said, I was not involved in how things progressed from my early contacts, so I do not think that it would be appropriate for me to comment.

Margaret Mitchell: Right. Who rejected mediation? Do you know that? Who rejected arbitration?

Barbara Allison: I understand that the complainants were asked about mediation, at least, but I do not know the detail of who took decisions on that.

Margaret Mitchell: So none of that was discussed at Cabinet.

Barbara Allison: Sorry—at Cabinet?

Margaret Mitchell: I know that you attended some Cabinet meetings where the procedure was—

Barbara Allison: No. I was not involved in Cabinet. I do not attend Cabinet meetings.

Margaret Mitchell: Okay. Thank you.

The Convener: Well, that seems to be us. I thank Ms Allison very much for her evidence today. That concludes today's public evidence session. We move into private.

12:22

Meeting continued in private until 13:53.

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