OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 3 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 3 November 2020

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COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT COMPLAINTS

12th 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:

Paul Cackette (Scottish Government)
Sarah Davidson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 3 November 2020

[The Convener opened the meeting at 10:20]

Decision on Taking Business in Private

The Convener (Linda Fabiani): Good morning and welcome to the 12th meeting of the Committee on the Scottish Government Handling of Harassment Complaints.

Our first item of business is a decision on taking in private our work programme discussion at item 4. Do we agree to take that item in private?

Members *indicated agreement.*

Judicial Review

10:21

The Convener: Our second item of business is an evidence session on the judicial review phase of our inquiry.

I remind all those present and 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 also 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:

"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, 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 discussion of the specifics of concerns or complaints? Please also avoid naming specific Government officials who are under senior civil service level.

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?

Finally, the Scottish Government has asserted legal privilege over many documents relating to the judicial review. I remind witnesses that the Deputy First Minister made clear in his letter of 14 August that

"this position need not impede the Committee's inquiry. It does not prevent Scottish Government witnesses from explaining in detail to the Committee in their evidence what the Scottish Government's legal position was at various points. The Lord Advocate indicated in his submission to the Committee, and I repeat this intention here, that the Scottish Government will be happy to give a full account of its legal position at different points in time in relation to areas of interest to the Committee."

The committee therefore expects a full account today. Where legal privilege is asserted on any details, we would appreciate that the grounds for that are set out clearly.

With that said, I welcome Paul Cackette, former director of legal services for the Scottish Government. I invite Mr Cackette to take the oath.

Paul Cackette took the oath.

The Convener: I now invite Mr Cackette to make a brief opening statement.

Paul Cackette (Scottish Government): Since 26 March 2020, I have been redeployed on Covid-related work, initially on organisational readiness and then, on temporary promotion, as the director of personal protective equipment from 10 April to 26 June. Since 26 June, I have been in post as director of outbreak management. My current formal role is chief planning reporter, which is the post that I have held since August 2016, after seven years as deputy solicitor in the Scottish Government legal directorate.

I was appointed as the director of legal services—as head of SGLD—on an interim basis on 8 May 2018, and held that post until 14 June 2019. SGLD sits in the Scottish Government's director general constitution and external affairs family. The director general there is, and was at the relevant time, Ken Thomson. In that period, I was responsible, as head of SGLD, to the law officers for all the legal advice that was given at that time and for the management of directorate-related matters. Thus, I was responsible for all SGLD advice in that period, the running of SGLD and for SGLD's financial and people management responsibilities.

I will obviously try to answer all the questions that I can in relation to those aspects, as well as other questions from the committee. The convener has already indicated the position in relation to legal professional privilege, which I need not repeat. Subject to that, I will endeavour to answer detailed questions on the conduct of the litigation as well as I can from my own recollection and based on the emails retained by me from that period. However, obviously, I was not directly involved in every single aspect of the case; nor was I copied into every email.

Where I am unable to provide the committee with a sufficiently detailed answer, and where this can be done without breaching LPP, answers will be provided in writing in a way that is consistent with the letter of 14 October from the Deputy First Minister. I am happy to return to the committee if it feels helpful for me to do so should any further questions arise from that.

Finally, I declare that, since 2012, I have been the Scottish Government nominated officer for compliance with the civil service code.

The Convener: We move to committee members who wish to ask questions. Alasdair Allan joins us remotely.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): Mr Cackette, could you say a bit more about the extent of the role that you personally had in decision making around the case, and particularly about to whom you reported in making those decisions?

Paul Cackette: I did not catch the very last bit of that question, which began with "particularly".

Dr Allan: What was your role in making decisions around the case and to whom did you report?

Paul Cackette: As I said in my opening statement, my role was that of senior lawyer in the legal directorate. I had a general overseeing role in relation to the case to ensure that the advice given to the permanent secretary was of the highest professional quality, initially—from when I was appointed—in relation to the operation of the procedure and until the final decision was made.

After the decision was reached by the permanent secretary and matters were referred—consistent with the procedure—to the First Minster and other ministers, I was responsible for providing advice through the course of the judicial review up until its conclusion. That involved the co-ordination of a number of areas of SGLD advice, primarily in relation to the operation of the procedure and how it applied in the particular circumstances, but also in relation to the management of the litigation itself.

We have a number of divisions with different responsibilities in SGLD, some of which are subject matter responsibilities. One division was advising on matters relating to employment law and it therefore had the overarching responsibility—if you like, it was the SGLD policy lead. It worked with the litigation team, which, because of the confidentiality of the issues prior to that, became involved only at the stage when the judicial review was intimated as being about to be served. Basically, those two divisions were involved, and my role was to ensure co-ordination and confidence from me when reporting to the Lord Advocate on the advice on the substance and the handling and running of the judicial review.

Dr Allan: Are you able to make any comparison with other judicial reviews? I am aware that the Government typically has to deal with many judicial reviews. Are you able to make any comparisons with regard to whether the spend on the case was typical or atypical?

Paul Cackette: I suppose that there were two differences from what might be regarded as a typical judicial review. There is no doubt that my role as director involved a greater level of involvement than in a typical run-of-the-mill judicial review. Although not unique—sometimes the

director takes a close involvement—this judicial review was different in that respect.

In relation to expenditure, from the legal directorate's perspective, it is fair to say that, because of the judicial review's multifaceted nature, larger numbers of lawyers than in most judicial reviews were involved in the different aspects.

10:30

Our costs, generally, were not wholly untypical in the sense that we instructed senior counsel. We instruct senior counsel for the most important cases, including those that go to the Supreme Court. However, our panel of junior counsel deals with the majority of litigation conducted by the Government, and that involves a lower amount of expenditure because it requires one counsel rather than two. Therefore, from our point of view, it was more expensive, but, given the profile of the case, it did not stand out any more than, say, a Supreme Court case.

Dr Allan: I appreciate that it is difficult to make comparisons for the reasons that you have given, but, given the number of judicial reviews that the Government deals with, how typical or atypical is it for a case to be conceded? Can you say more about the comparisons that might be made with other cases in that regard?

Paul Cackette: Happily for the Scottish Government, it loses a relatively small number of cases—the vast majority are won—and, certainly, the consequences of losing are very significant, as can be seen not only here, obviously, but in other cases where the implications are significant.

On the number of cases that we concede in advance, again, that is pretty rare. However, as I said in my opening statement, my current role is not as a lawyer but as chief planning reporter. In the planning context, which is what I am most familiar with, we have conceded cases, although I would not like to put a percentage figure on it. In one case, three years ago, I looked at the decision that we had made and decided that, even though it had not been appealed and was not due to be appealed, it was unsustainable, because the reporter had gone so wrong, and we offered to the other side that, if they appealed, we would not oppose that and that the decision would be set aside with expenses against us. Therefore, in the planning context, we concede cases from time to time. I am not trying to suggest that planning is any worse than anywhere else. As I said, my experience is specifically in the planning context, and we have sometimes looked at cases and said, "This cannot be supported", and we would concede a case in those circumstances.

The Convener: Margaret Mitchell is next.

Margaret Mitchell (Central Scotland) (Con): Thank you, convener. Mr Cackette, were you aware that the former First Minister had suggested arbitration as a means to settle the competency and legality of the procedure?

Paul Cackette: I am looking to the convener—I think that I can answer that question in light of some earlier issues in relation to privilege, and she is nodding, so I will take that as a yes. Therefore, the answer is that, yes, I was aware.

Margaret Mitchell: Who made you aware of that? Was your department involved in discussions about the decision to reject arbitration?

Paul Cackette: I became aware of the proposal about arbitration from lawyer-to-lawyer correspondence, which was in around June 2018. I came into post in May 2018, and I knew that there had been a previous suggestion of mediation before my time, and, as I remember, the suggestion of arbitration came around June.

Margaret Mitchell: Were you involved in discussions to reject that?

Paul Cackette: Yes, I was.

Margaret Mitchell: On what basis was it rejected?

Paul Cackette: I was involved in discussions on the basis of being a legal adviser at that point. I was also aware of the pros and cons of arbitration as a potential way forward from a previous policy job that I had.

Margaret Mitchell: Why did you think that it was not suitable and that it should be rejected in the judicial review? It was about competency and legality of the procedure.

Paul Cackette: I am not sure that I can answer the question about the legal advice given, but I can set out the Scottish Government's policy position in relation to the rejection of arbitration, if that would be helpful.

Margaret Mitchell: You were not asked for your view and you did not proffer a view.

Paul Cackette: The directorate gave a view.

Margaret Mitchell: What was that view? To reject arbitration? What was the basis for the rejection?

Paul Cackette: It was rejected for a range of reasons. The view that we had taken was that, at a general level, arbitration was something that could be used in relation to dispute resolution and the resolution of, if you like, outstanding technical and legal issues, where the parties had a desire for a quick resolution of an issue of a technical nature and an incentive to reach that. However, it

is not generally regarded as being an appropriate means of resolving a dispute where there is a significant degree of factual disagreement, particularly in relation to harassment-type—

Margaret Mitchell: I will stop you there. Arbitration had nothing to do with the substantive complaints. It was purely to do with the competency and legality of the procedure. Why was that rejected, and why did you think that it should be rejected?

Paul Cackette: The view that we took was that it was not possible to completely separate out the substance of the complaints from the arguments about procedural regularity or irregularity, because the circumstances and the nature of the complaints and the fairness of that procedure—

Margaret Mitchell: But the issue was not about the complaints; it was about the procedure. The complaints did not need to be involved at all. Arbitration does not do that. It was quite clear, and Mr Salmond made it quite clear in his views in emails to the First Minister and in his letters through his solicitors, that the offer of arbitration involved the legal basis—the competency and legality—of the procedure.

Paul Cackette: And we took the view that it was not possible ultimately to separate those issues out, or, if it had been possible, the issue about the substance of the complaints would not have been resolved through that arbitration process. The suggestion that that would have in some way avoided a later challenge and judicial review did not seem to us to be correct.

Margaret Mitchell: Perhaps we will make more progress if I ask you about the expenses, which were paid on an agent and client basis, which is a scale that the court has discretion to apply when one of the parties has conducted litigation incompetently or unreasonably. I have to say that, given your last answer, the use of that scale is perhaps unsurprising.

Can you outline the heads, as mentioned by the Lord Advocate, that justify the use of that highest of all legal scales?

Paul Cackette: It certainly seemed to us that the nature of the way in which the litigation had been required to be resolved—because of the nature of the interactions that the investigating officer had had with the complainers, the timings of how that had arisen and the way in which the process progressed from the specifications of documents on to the stages where a commission and diligence was required—made it quite difficult to say that, in that respect, this was normal litigation. In my experience, specifications of documents are relatively common, but I have never come across commission and diligence before. I have never come across a situation where, in effect, a petitioner was forced to go into a situation where a commission and diligence was not only served but proceeded in the way that it did. Whatever adjective you use to describe the situation, it certainly seemed difficult to me to say, given the way that events panned out, that it would be wrong to have allowed the higher level of expenditure on behalf of the petitioners.

Margaret Mitchell: That sounded a bit complicated. Perhaps you can write to the committee once you have had a chance to think about the question and explain precisely the heads that justify the expenses being paid on that basis.

The total cost associated with the judicial review was £630,000 of taxpayers' money, and that included the net cost of external legal fees incurred by the Scottish Government in defending the judicial review, which came to £118,523. Can you break down how that sum was arrived at?

Paul Cackette: I am sorry; I do not have that. Again, I can write with the detail of that, in so far as I am able to. I do not know the precise details of how that would be broken down—I am guessing that you are referencing the cost of counsel.

Margaret Mitchell: Obviously, it included the cost of senior and junior counsel. Can you confirm that?

Paul Cackette: Yes, indeed.

Margaret Mitchell: Are you aware of any other costs that were incurred by legal services as part of that £118,523?

Paul Cackette: Other legal costs were incurred. Other legal agents were involved, from the Scottish Government's perspective on the costs that we incurred. I do not know whether they are counted in that £118,000, and it is a little bit harder to calculate them in the sense of the legal time that was incurred by members of my directorate. An estimate could be made of that; we could sit down and work out how many hours individual lawyers spent doing things, and tot that up, to get an overall global cost. However, that is not normally collated as we go along; we do not record time in that sense, if that is what your question is about.

Margaret Mitchell: However, you can write back to the committee on how the £118,523—

Paul Cackette: Yes, I am sure that we can do that.

Margaret Mitchell: That would be very much appreciated; thank you.

The Convener: Alasdair Allan has indicated that he has a supplementary question.

Dr Allan: The deputy convener has asked about some of the reasons for declining the offer of arbitration. A letter dated 9 July 2018, which I think the committee has just released, from the former First Minister's legal team to the permanent secretary indicates that one of the arguments on offer was that arbitration would avoid

"propelling the matter into the public domain".

In making a decision about whether to accept such an offer, would it be normal to take into consideration, in one way or another, a request based on an argument of that kind?

Paul Cackette: It could be a factor. That was my understanding of one of the reasons why it was being proposed. We knew then what we knew then, when those decisions were made. As the course of what became the judicial review proceeded, the case was conceded. Obviously, at the time of that correspondence, we did not know that it would go to judicial review and that we would lose. However, at the time, it was certainly one of the factors.

I was trying to indicate earlier that, although that factor plays in, as important a factor is how long an arbitration would have taken to be resolved. Going back to the deputy convener's questions, I would say that it probably would have taken quite a long time to resolve who the arbiter was going to be and, although I know that we disagree about the remit, I suspect that it would have taken a little time to work out the remit and draw lines to protect the anonymity of the complainers.

That would have been absolutely fine if everyone had an incentive to get to an earlier resolution, but I am not sure that this case was necessarily in the set of circumstances for which arbitration is designed—in which both sides want a quick and ready resolution of legal disputes. I do not think that we viewed it in that way. If it had taken a long time—and, as I have said, it really could have taken quite a long time if someone had wanted to drag it out—that would have played into the question of maintaining confidentiality until the end. It would potentially have led to a situation in which the Government found itself being accused of covering things up, if it had maintained that confidentiality for a period longer than was reasonable.

There were all sorts of pros, cons and hazards about agreeing to a process that would have kept the issue out of the public domain—given that we were not sure at that point, and will never know, how long it would have taken to agree all those things and get the arbiter to make a decision.

As I said earlier, there was also no guarantee that the matter would not still have ended up in court, because, as the deputy convener said, if we had found a way to exclude the substantive and factual matters, there was every chance that the former First Minister would still have taken us to court on those aspects. We did not know that at that time. I would not have said that arbitration was necessarily a quicker way to resolve the issue, and it would not have avoided a court action.

10:45

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, Mr Cackette. I would like to follow up on arbitration. In your answer to Alasdair Allan, you suggested that, when arbitration was suggested by the former First Minister, the Government was unaware of a potential plan to take the issue to judicial review or of the fact that it would lose the case. Is that correct?

Paul Cackette: We were unaware that we would lose the case. I am making only that point. From our earliest correspondence with Mr Salmond's lawyers at the start of March, it was quite clear that they were indicating that they had a series of concerns about procedural irregularity and that, if they were not resolved, they were very much minded to take the matter to court.

Alex Cole-Hamilton: There was a WhatsApp exchange between Alex Salmond and Nicola Sturgeon on 7 June. The First Minister's written submission says that, in an extensive message, the former First Minister referred to multiple offers of arbitration. He also refers to his senior counsel's advice that, were he to take the matter to judicial review, it would be a slam dunk for the former First Minister. All of that was flying around and would have been a factor. When the offer of arbitration was on the table, to your knowledge, were the complainers at any point made aware, first and foremost, that there was a question around the legal competence of the investigation, and that these two routes could be taken to resolve that question?

Paul Cackette: I think that the complainers knew that there was correspondence or that an issue had been raised relating to the competence of the procedure being challenged. I was not directly involved; there was quite a narrow line of communication. My understanding is that the complainers did not know about arbitration, but they were asked about mediation.

Alex Cole-Hamilton: I know, but we do not want to confuse the two things.

Paul Cackette: No—let us keep them very much separate. As I understand it, the complainers did not know about arbitration.

Alex Cole-Hamilton: They were not told about that as an alternative to judicial review.

Paul Cackette: That is my understanding.

Alex Cole-Hamilton: Had a legally binding arbitration determined, as the judicial review did, that the process was unlawful, could the Government have then considered the complaints again? Could it have done a whole do-over, with new people and perhaps a revised process? It seems to me that, because the matter was not in the public domain, the Government might have been able to undertake consideration of the complaints again.

Paul Cackette: Yes—I think that that is right. Indeed, because the process was ultimately set aside by a court, the complaints have not yet been addressed. I will not say what will happen technically, because I do not know what could happen.

Alex Cole-Hamilton: That is absolutely accurate but, given the winner-takes-all nature of the judicial review and the public media circus around it, it is highly unlikely that the complaints will ever see the light of day through a Government process again.

Paul Cackette: I cannot say whether that is the case.

Alex Cole-Hamilton: It is a rhetorical question. I will move on.

I would like to talk about the legal advice. At the start of the meeting, we heard that the Government is citing legal privilege, but you are allowed to talk about the legal position.

Paul Cackette: Yes.

Alex Cole-Hamilton: The legal advice and the legal position might be different, and I would like to ask about the legal position specifically. I am not asking what the legal advice contained, but did the Government's legal position at any point deviate from the legal advice?

Paul Cackette: Are you asking whether the Government's position deviated from the legal advice?

Alex Cole-Hamilton: Yes. Did the legal strategy that the Government deployed ever deviate from the legal advice that it retained?

Paul Cackette: No.

Alex Cole-Hamilton: It was always commensurate with the legal advice.

Paul Cackette: It was informed by the legal advice. I am thinking about whether there was any difference between what the Government did and the legal advice, and I cannot think of anything.

Alex Cole-Hamilton: I will give you a hypothetical example. If the legal advice was not to engage in the judicial review but the Government engaged in the judicial review, that would be a deviation between the advice and the Government's strategy.

Paul Cackette: I cannot think of any examples where that happened.

Alex Cole-Hamilton: Okay—that is fine.

There was a lot of pressure at the time. Did everyone receive the legal advice in unison? Did they all agree that it made sense, or was there ever dissent?

Paul Cackette: Do you mean ministers?

Alex Cole-Hamilton: I mean ministers, the Lord Advocate and the permanent secretary.

Paul Cackette: I cannot answer in relation to the Lord Advocate, because that gets too much into the legal advice. However, there was no dissent. There was no suggestion of anybody saying that they were not willing to accept the advice or anything of that nature. Certainly, from my perspective at least, nobody said to me, "I do not accept that advice," or that we should go away and rethink it.

Alex Cole-Hamilton: I am struck by your setting aside of the Lord Advocate.

Paul Cackette: I do not mean that I am setting the Lord Advocate aside; I just mean that answering in that respect would get into the source and content of advice.

Alex Cole-Hamilton: You cannot tell us why. Okay.

Did the permanent secretary and the Lord Advocate always agree on the steps that the Government should take in the conduct of the judicial review?

Paul Cackette: There was no question of any disagreement on the core legal advice. The core legal advice would be framed in terms of what would get you into illegality and what you could not do, or at what point it would no longer be appropriate to defend proceedings. Of course, we got to that stage, and the proceedings were then conceded.

The reason why I phrased my answer in that way is that legal advice, properly taken—as it was throughout—in effect informs policy choices. A range of policy choices are open to ministers, and there are many legal ways to proceed that are obviously within ministerial discretion. The law does not determine what ministers do. Ministers have a range of policy options within the range of things that are legal. Some of those things involve higher risks than others, so I am not saying that the law is irrelevant in that. However, our view is that there is a range of things that you cannot do because it is illegal—in parliamentary terms, that might be because of the European convention on

human rights, for example—so there are places where you cannot go but, within the range of places where you can go, there is a series of choices. Each of those choices involves risk, some of which is legal risk, but there might be other sorts of risk.

Alex Cole-Hamilton: As with all policy choices, there are tensions.

Paul Cackette: Yes—absolutely.

Alex Cole-Hamilton: And with all policy choices that involve risk, there are heightened tensions.

Paul Cackette: Yes.

Alex Cole-Hamilton: Did those tensions ever cause anybody to threaten to resign?

Paul Cackette: Not that I am aware of, in terms of any kind of ministerial or official basis.

Alex Cole-Hamilton: I have more questions, convener, but I am happy to let other members come in now and I will come back in at the end, if that is okay.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning, Mr Cackette. Before I get on to my question, I want to follow up on Mr Cole-Hamilton's last question. You said that nobody threatened to resign at ministerial or official level, but did counsel threaten to resign?

Paul Cackette: Communications between us and counsel, and the source and content of that, are, I am afraid, within the context of LPP. Sorry—I should have made that point clearer to Mr Cole-Hamilton.

Murdo Fraser: Thank you—that is a very interesting answer.

I want to pursue issues around the detail and the progress of the judicial review. To put this into context, we know that the Scottish Government chose to defend the judicial review and that the case was then conceded. We know that, as the deputy convener referred to, the award of expenses made to Mr Salmond was at the highest level and that that normally happens in the case of a defence being either unreasonable or incompetent, which is quite a striking description. We know that the process went wrong and that the taxpayer had to pay £0.5 million to Mr Salmond. Something went catastrophically wrong, and the committee is trying to understand how that came about.

We know that Mr Salmond had taken counsel's opinion on his prospects of success. Did the Scottish Government commission counsel's opinion?

Paul Cackette: We commissioned counsel from the stage when the investigation by the investigating officer was under way. From then on—when a finding was made that there was a cause for concern—we had senior and junior counsel until the end of the process. At various points, in particular during the judicial review as the Lord Advocate has indicated, the prospect of success was constantly kept under review, including all the advice from those who were involved.

Murdo Fraser: I will come on to the detailed timeline as that is quite important.

Just so that I am clear, was external counsel opinion taken at the point when Mr Salmond initially intimated his judicial review claim?

Paul Cackette: Yes, counsel had been involved before and their views were reflected in the answers that were lodged at that point and in the conduct of the judicial review after that, which is reflected in the open record. That is one of the documents that the committee has.

Murdo Fraser: What assessment did the Scottish Government and its counsel make at that point of the prospect of success of the judicial review?

Paul Cackette: At that stage, the position was that it was proper to defend the proceedings on the basis of the arguments that were set out in the petition.

Murdo Fraser: What is meant by

"it was proper to defend"?

Paul Cackette: We thought that the case was winnable, understanding that litigation is always unpredictable. You can never absolutely say that you will win in any circumstances.

Murdo Fraser: So there was an arguable case to defend.

Paul Cackette: Yes.

Murdo Fraser: We now know that there was information that was not available or not disclosed until later in the process. Why was there that failure? Why was the legal position of the Scottish Government not informed by the information that subsequently came to light in November?

Paul Cackette: I became aware of that information only in the course of the judicial review proceedings as the information was emerging. Counsel were also in that position. The process and procedure that was being applied and the grounds that were taken by Mr Salmond in the judicial review when it was initially raised did not reference that, because it only became clear later in the process through the specification of documents—we will come to that. It was only through that process that the significance of that information came into play.

The member will have seen the Scottish Government's initial written statement. Paragraph 39 sets out the circumstances of the reasons for the case being conceded. The most recent timeline indicates—and it is also reflected in what the Lord Advocate said in his evidence—that the decision to settle reflected a conclusion, based on the review of the material that had then become available. The key was that the judicial review would be conceded for the reasons that were set out in the Scottish Government's response.

Murdo Fraser: You said a moment ago that an assessment had been made of the prospects of success and that there was an arguable case to defend but that there was information that was not available at that point and subsequently came to light. Does that not suggest that whoever made that assessment of the defensibility of the case had not done their job properly?

Paul Cackette: You can make an assessment about the prospects of the case only based on the information that you have.

Murdo Fraser: However, that information existed; it just had not been found. Whoever was making a decision to defend the case had not done their homework sufficiently.

Paul Cackette: I certainly was not aware of the information as it emerged in the course of the work around the specification and the commission and diligence.

11:00

Murdo Fraser: I turn to the timeline and process for the judicial review. The Scottish Government made various adjustments to the open record. On 5 November 2018, adjustments were made to provide

"detailed factual information on the development of the Procedure and contact between"

the complainants

"Ms A and Ms B and senior employees of the Scottish Government".

Was that when the Scottish Government realised that crucial evidence that had not previously been available to it made its legal position much weaker than it had been?

Paul Cackette: Those adjustments were made in response to adjustments that the petitioner made slightly earlier, which raised a question and placed a call on the Scottish Government—that is on page 9 of the timeline. The petitioner first asked the question on 23 October. Towards the end of October and into the beginning of November—a procedural hearing took place on 6 November—we started to respond first through the formal legal process of making adjustments, to ensure that the Scottish Government's position was accurately and correctly narrated to the court. Separate from that, a question arose about ascertaining what this meant—what had happened and what was going on.

From that process onwards, and in the period that led to the specification in the middle of November, questions started to be asked in two respects. One question was what the issue was. Separately, a specification by Levy & McRae that was provided in draft on 2 November and taken forward later led me to undertake an exercise to find documents.

There were two separate issues—what this means and who we need to ask to find out what this means. The number of people we needed to ask was relatively small because, for understandable reasons, the situation had been kept quite tight. We tried to work out the significance of this and what had happened. Those who were involved at the time knew about it, but they were being asked about it a year later. A bit of time was taken to work out what this was about and what its significance was. Separate from that was the finding of the documents.

Murdo Fraser: A further adjustment was made on 20 November, when the Scottish Government adjusted answer 19 to say

"that prior to her appointment as IO Ms Mackinnon had involvement and contact with the complainers".

Paul Cackette: Indeed.

Murdo Fraser: Did that come out of the commission and diligence?

Paul Cackette: No—the commission and diligence was a bit later. That adjustment came from the searches that were done for documents that were provided to Levy & McRae—that is on page 13 of the timeline. Page 12 says that, from 16 to 21 November,

"Three tranches of documents were sent ... to Levy & McRae."

One set was sent on 16 November, a further bunch was sent on 19 November, and they were collated into a third inventory of productions. Those documents were sent in response to Levy & McRae's call of 12 November.

The documents that emerged from then were gathered together. As the timeline recognises, there were 110 documents. The collation of the information as we had it plus the examination of what all that meant and the understanding of what had happened led to those further adjustments.

Murdo Fraser: When between 5 and 20 November did it become clear to you that that was a fundamental change in the Scottish Government's case?

Paul Cackette: It was clear from my first becoming aware of it that this was potentially a significant problem.

Murdo Fraser: When did you first become aware of it?

Paul Cackette: I first became aware of it towards the end of October 2018. I first saw something in writing on 31 October, but that was not the first that I knew of the situation—I knew of it a few days before that, in the last few days of October.

Murdo Fraser: At the point that you became aware of it, I presume that you must have realised that it was very damaging to the Government's case.

Paul Cackette: I realised that, if the circumstances were as they were set out by the petitioner, it was a potentially serious issue that had to be looked at. We had to find out and properly ascertain what the factual circumstances were. Once we had done that, we would take a view as to what that meant for our ability to defend.

Murdo Fraser: Were your concerns shared with the permanent secretary at that point?

Paul Cackette: I am pretty certain that they were. I cannot precisely say, but they were very much shared with the co-ordinating team who were taking responsibility for the policy instruction, and that was within the permanent secretary's office because it was her procedure. The officials who were our first port of call were in the perm sec's office. I presume that the perm sec would know, but I cannot say for certain. It was certainly through her office.

Murdo Fraser: Right, okay. Would the Lord Advocate have been aware of it?

Paul Cackette: Yes.

Murdo Fraser: So, there was a point at the end of October when it became clear that there was a significant flaw in the Scottish Government's position, of which you had not previously been aware. Why, then, did it take until January for the Scottish Government to make a decision to concede the case? Why did it take more than two months?

Paul Cackette: That led into the process of identifying the documents and trying to establish what the full factual circumstances were. As you can see from the timeline, that involved a number of stages. It is quite telling that the initial indication from Levy & McRae was towards the end of October, there was a specification and a further call on 12 November that intimated a further request and then a subsequent specification. It took time to work out what the circumstances really meant. It was not a slam-dunk moment. Work required to be done as we tried to establish what the full factual circumstances were and then work out, as is set out in the grounds for the ultimate concession, whether the combination of the wording of paragraph 10 of the procedure with the facts that were emerging, and continued to emerge as we found out more, had that effect.

Murdo Fraser: I have one more question. We have already talked about the award of expenses at the highest level. Did the award of expenses, which I believe was agreed by the Scottish Government, reflect the fact that it had taken some time for the Scottish Government to reach the point of conceding the case?

Paul Cackette: In a sense, yes, because having taken so long to get to that stage the commission and diligence became essential. They are all linked in. The fact that, as I said in response to an earlier question, a commission and diligence procedure is a pretty rare beast—

Murdo Fraser: And expensive.

Paul Cackette: Indeed, it is expensive. It was set down with a senior advocate, initially for three days, although as it turned out it ran only for two, because of the circumstances. The need to go to that certainly added to the expense.

Murdo Fraser: Thank you.

Jackie Baillie (Dumbarton) (Lab): Welcome, Mr Cackette. In response to Margaret Mitchell, you indicated that you would give us a breakdown of the £118,000 that was spent on external counsel. You also helpfully indicated that you could probably provide an estimate of the amount of money spent internally by the Scottish Government; I would be grateful if you would send that to the committee. It is clear that the process has involved a significant amount of time and effort within the Government and it would be helpful to have an appreciation of that, so I will take up that offer.

Can I take you way back, so that I am clear about timelines?

Paul Cackette: Yes.

Jackie Baillie: Were you responsible for any of the legal advice when the policy was devised in November and December 2017?

Paul Cackette: No—I was not in the legal directorate at that stage.

Jackie Baillie: Who was responsible for providing the legal advice for the development of the policy? I do not need a name; a title would do fine.

Paul Cackette: It would have been provided by my predecessor, effectively—if you like, in the

name of my predecessor. My predecessor would not have dealt with the individual minutiae of every aspect—I explained my role to you, and his would have been the same—but would have assigned the role to an appropriate official or group of officials within a division.

Jackie Baillie: Last week, Judith Mackinnon told us that she received advice throughout the process from an employment lawyer. I assume that that is someone in the civil service. Is it appropriate for us to know who that person is?

Paul Cackette: I am afraid that I would have to say no, because that would indicate a source and content. However, I can say that it was an employee of the Scottish Government.

Jackie Baillie: Okay. Were you aware, subsequently, of those discussions and the advice given at that stage? Obviously, you have a co-ordinating role. I assume that that lawyer worked for the Scottish Government at a later point, too, and would, therefore, have information to provide.

Paul Cackette: I was not aware of the minutiae of every bit of communication but, yes, looking backwards, I was aware of the generality of the advice that had been given and of who had given it.

Jackie Baillie: Did that cover the involvement of Judith Mackinnon as the investigating officer?

Paul Cackette: It involved all aspects of the advice, both in relation to the development of the policy and in relation to questions of appointment, based on the information available to the lawyer concerned.

Jackie Baillie: So, when did you have that discussion, given that you were new to the role of co-ordinator? Was that early on in the process, just to find out what had happened, by way of background?

Paul Cackette: I did not have that discussion in that respect. As I say, I found out a little bit later on. Obviously, I had a bit of a discussion. I found out that the complaint had been made and was being investigated as a cause for concern—I think that it had been held as a cause for concern at that stage—on my third day in post.

Jackie Baillie: Lucky white heather.

Paul Cackette: I know! That was the first I knew about it. In discussions on that day, the general background and context was explained to me, although not in minute detail. I knew enough at that time with regard to what the procedure was and who had been appointed to inform my understanding of what to do going forward.

I should say that quite a lot of work was on-going at that point—it was a bit like starting halfway through an 800m race from a standing start, when everyone else is sprinting. That was particularly the case because, when I started, we were in the middle of correspondence with Levy & McRae about its procedural concerns about the then on-going investigation with the IO.

Jackie Baillie: I appreciate the difficulty. What I am trying to establish is whether, at any stage when you were coming up to speed with this, anyone told you that Judith Mackinnon had prior involvement with any of the complainants.

Paul Cackette: No, I did not know that.

Jackie Baillie: Okay. Again, last week, Judith Mackinnon suggested that the final version of the policy was somehow different from earlier iterations, specifically in relation to paragraph 10. However, the first draft of the policy talks about nominating

"a member of the SCS who had no prior involvement in any aspect of the complaint".

Therefore, do you agree that the point was actually clear from the start?

Paul Cackette: Do you mean, in the initial version?

Jackie Baillie: Yes. I have just quoted to you the words that are in the very first version of the policy.

Paul Cackette: Could you read it again, please?

Jackie Baillie: Yes. The first draft of the policy says:

"nominate a member of the SCS who had no prior involvement in any aspect of the complaint".

My question is, do you agree that that point was clear from the start? I mean, there is no way of misinterpreting that, surely.

Paul Cackette: Again, you have heard evidence from James Hynd, and, indeed, attached to the timeline is his indication of what that meant.

Jackie Baillie: But I am asking you, as the person who was co-ordinating the Government's response to the judicial review—somebody who obviously thinks carefully about his words as a lawyer—whether you agree that there is no difference between the first draft of the policy and the final one, in terms of what the intent was. Surely we can agree on that.

Paul Cackette: I am certainly struggling to see a difference.

11:15

Jackie Baillie: Thank you. That is all that I am trying to establish.

When did you know that Ms Mackinnon had extensive prior involvement with complainants before she was appointed as the investigating officer?

Paul Cackette: Again, that was at the end of October 2018.

Jackie Baillie: Forgive me if I go over some of the same ground as my colleague, but I want to fix this in my mind. At the end of October 2018, did you warn colleagues of the implications of Miss Mackinnon's prior involvement? What action did you take?

Paul Cackette: As I said, we had to investigate the context of what that meant. I think that everybody who was involved realised that it was a potentially significant issue—no one needed to be told.

Jackie Baillie: What action did you take? Was there a discussion with counsel or Judith Mackinnon? I am interested in unpicking that.

Paul Cackette: At that stage, I did not have a direct discussion with Judith Mackinnon. However, as I said in answer to Mr Fraser's question, we co-ordinated the work through the permanent sec's office, which started at that stage a process of trying to work out what the correct factual and narrative circumstances were—who spoke to who and so on—and what it all meant.

Jackie Baillie: But, as you said earlier—if I have your words correctly—that that was the perm sec's procedure.

Paul Cackette: Indeed.

Jackie Baillie: She would have conceivably known what was happening, as she was party to some of the email traffic.

Paul Cackette: Yes, it was certainly her procedure and was adopted under her auspices, initially.

Jackie Baillie: I return to the issue of meetings. An interesting response to a freedom of information request was published on 13 September 2019 that listed 17 meetings with counsel. Was counsel first involved on 23 August 2018, which is the date of the first meeting listed?

Paul Cackette: No. Counsel was involved from around the time that I was appointed. Junior counsel was involved before, but I was involved in commissioning senior counsel. The first of the meetings to which you referred would have been specifically in relation to the judicial review, because on 23 August we were given intimation of a draft petition, which was served on us the following week.

Jackie Baillie: Counsel was involved before 23 August but was involved on that date only in relation to the judicial review.

Paul Cackette: Yes.

Jackie Baillie: Counsel was involved until 7 January 2019. Was it the same counsel throughout?

Paul Cackette: Yes.

Jackie Baillie: That is helpful to know. Is it fair to say that the position on the prospects of success—I am not asking about the advice—changed?

Paul Cackette: Yes, ultimately, it changed.

Jackie Baillie: You said in response to Murdo Fraser—you picked your words carefully—that

"it was proper to defend"

the case. At that initial stage, what were the prospects for success? I am not asking about the content of the legal advice. The question that I am posing is different from the one that you are responding to. With all due respect, you are answering a different question.

Paul Cackette: The prospects for success were kept constantly under review. It was only at the final stage, leading up to the concession on 2 January 2019, that it became clear that it would be improper to defend the case. Views on the prospects of any litigation go up and down as information arrives and we develop our potential answers, but the point of the concession was the point at which it became clear that it would be improper to defend.

Jackie Baillie: Forgive me, as I am not a lawyer, but I just want to explore that with you. You could have a position whereby you would consider it proper to defend a case even though the prospects of success were not good.

Paul Cackette: Yes. That can always happen. There can be circumstances in which we get different sources of advice. Counsel's advice is not the Scottish Government's position; it informs that position.

Jackie Baillie: Counsel could have said to you that the prospects of success were not good, but the Scottish Government could have decided that it was proper to defend and go ahead nevertheless.

Paul Cackette: It could have done that.

Jackie Baillie: That would be consistent with what you have told us.

Paul Cackette: That is right. If counsel had said that it was improper to defend, that would be very different. We did not defend beyond the point at which it was suggested to be improper.

Jackie Baillie: You got to a point where the game was up—I think that that is the description.

Please aid my understanding again. Lots of people are listed in the FOI response as being exempt from being named as being at the meeting. Would that list typically include the lawyers for the Scottish Government, the Lord Advocate, senior counsel and junior counsel? Is that a fair interpretation of the people who are likely to have been there?

Paul Cackette: There are two sets of people who are noted as exempt: one set is the lawyers involved, the other is non-senior civil servants.

Jackie Baillie: Okay; good.

Let me take you to the meeting on 19 October 2018. That meeting was attended by Judith Mackinnon, Dr Nicola Richards and James Hynd. In evidence last week, Judith Mackinnon said that she had spoken to external counsel. Was that at that meeting?

Paul Cackette: That is one meeting that I was not at—I am sorry; I was on leave that week.

Jackie Baillie: Lucky you—

Paul Cackette: As it turned out.

Jackie Baillie: —but I am sure that, as the co-ordinator, you knew all about it. That is your job.

Paul Cackette: No. As I referred to in one of my answers, I became aware of that in the period after my return from leave.

Jackie Baillie: You "became aware".

Paul Cackette: I became aware.

Jackie Baillie: Is it the case that counsel "became aware" of Judith Mackinnon's involvement at the meeting on 19 October?

Paul Cackette: I do not know that I can answer that factually. Counsel would have known that Judith Mackinnon was the investigating officer. I am not sure that I can say more about that. I was not at—

Jackie Baillie: Could you find out? I am wondering whether someone who was at the meeting prepared a report for counsel on the extent of her involvement. Was that when the red flag went up?

Paul Cackette: I can see whether we can provide a fuller answer to that, subject to any LPP issues.

Jackie Baillie: I am conscious that there was a meeting on 19 October with Judith Mackinnon and external counsel and then a meeting on 23 October with a cast of thousands who cannot be named. Judith Mackinnon was not at that meeting; nor was she at any other meeting thereafter. It seems to have been established on 19 October that there was a problem.

Paul Cackette: I cannot say what happened on 19 October. It was certainly in the period after that that an issue arose.

Jackie Baillie: It would be safe for me to infer, given that you were on holiday and not there, that 19 October was when the Government became aware of that. A report may or may not have been made to counsel. Then, on 23 October, a cast of thousands met because—as I am inferring from this—something seemed to be wrong. Would that be fair?

Paul Cackette: You can draw your own inference, but I do not think that I can comment further.

Jackie Baillie: Okay. If you can shed any further light on that, the committee would be most grateful.

At what point did external counsel tell you that there was a difficulty?

Paul Cackette: Again, I cannot answer. That involves the source and content of advice.

Jackie Baillie: I am sorry. I thought that I would be able to ask that question because it was about a process issue.

Paul Cackette: I do not think so, but I can take advice.

Jackie Baillie: You are a lawyer and I am not.

Paul Cackette: I am also a witness; I am not the current director of legal services.

Jackie Baillie: You never leave that behind.

Paul Cackette: You never can.

Jackie Baillie: Let me ask you this. You came back from holiday. You were aware of the issue at the end of October. Counsel could have been saying, between 19 October and the end of the month, "We have a problem."

Paul Cackette: They could have been.

Jackie Baillie: "They could have been." Thank you—that helps my understanding.

A meeting on 13 November 2018 is listed in the FOI response. It lists the First Minister, Elizabeth Lloyd and the permanent secretary as being in attendance. One would assume counsel was present, too. Why was no official from the Scottish Government legal department there? Do you know?

Paul Cackette: No, I do not know.

Jackie Baillie: You do not know what the meeting was about.

Paul Cackette: No.

Jackie Baillie: You do not know, even though you are responsible for co-ordinating everything.

Paul Cackette: I was not there.

Jackie Baillie: Okay; fine.

We have been told that—in addition to the 17 meetings with counsel—there were catch-up meetings three times a week. Were your staff involved in those?

Paul Cackette: There were a series of meetings; I think that the reference to three times a week was from last week's evidence session with Barbara Allison.

Jackie Baillie: It was—that was the first that we heard about it.

Paul Cackette: Absolutely. I was involved in daily meetings with the perm sec's co-ordinating team, which may or may not have been the same set of meetings that were held three times a week. The meetings in which I was involved were regular catch-ups on the handling of where we were and the planning of next steps. That involved officers from the perm sec's department, and almost invariably comms people as well.

Although I would not say that people such as special advisers—SPADs—were involved in all those meetings, or even to the frequency of three times a week, there were certainly occasions when SPADs would have been at those meetings, especially at times when there was an external statement of the Scottish Government's position, such as on a procedural hearing. They would have a close and legitimate interest in the comms handling of something like that. There were meetings that regularly took place that I would usually attend with members of my staff.

Jackie Baillie: Let me be clear about this. You mentioned daily meetings.

Paul Cackette: Yes.

Jackie Baillie: When did they start? When did they end?

Paul Cackette: The daily meetings took place more or less all the time from when I took up post, probably through to the end of the judicial review.

Jackie Baillie: Sometimes the perm sec, and certainly all her staff, would be there.

Paul Cackette: No—it was her staff. I do not think that she was ever at any of those meetings.

Jackie Baillie: But she would be aware of what was going on, if her private secretary was there.

Paul Cackette: I guess.

Jackie Baillie: That is fine.

At those daily meetings, did you discuss with them specifically the problem relating to Judith Mackinnon to which you were alerted at the end of October?

Paul Cackette: I cannot talk about the detail, but yes—

Jackie Baillie: You did.

Paul Cackette: We knew that there were things that had to be looked at, and which involved particular issues that were unfamiliar to laypeople, such as a specification of documents and a commission and diligence process.

Jackie Baillie: Sure. But you were aware at the end of October that there was a problem.

Paul Cackette: There was an issue to be addressed and explored—yes, absolutely.

Jackie Baillie: In that respect, did you provide advice to the permanent secretary, given that it was your role to do so?

Paul Cackette: I provided advice to the team with which I was working on that. There was on-going advice regularly given in that period.

Jackie Baillie: At that stage, did your advice touch on the prospects for the continued success of the case?

Paul Cackette: The advice at that stage would have been informed by such factors if we were reaching a stage at which the prospects were now moving to a position where it was becoming an unstateable case.

Jackie Baillie: Sorry—I am a simple soul. Does that mean you thought that you were on a hiding to nothing, and you told the perm sec as much in fancier language?

Paul Cackette: No, it was the other way round.

Jackie Baillie: Oh, it was the other way round? Do explain.

Paul Cackette: Unless and until we got to a stage at which we felt that the case was unsustainable, there was no reason every day to say, "By the way, the case is still okay," if you see what I mean.

Jackie Baillie: I do not, really.

Paul Cackette: I did not go home every night thinking, "Is the case still okay? Yes, it is; I'm fine", or give advice to that effect. That is not how advice works, if you see what I mean.

Jackie Baillie: Okay. I am curious, then. If you believe that there was a fatal moment, as we would see it, when the role of the investigating officer was clearly "tainted by ... bias"—I think that was the language that was used—because she had a substantive role in advance of her

appointment, you would have recognised that that was a real problem, but you did not advise the permanent secretary that, "Actually, we are in some difficulty".

I am curious to know why the Scottish Government chose to keep going for another two months, at a cost to the taxpayer, and not to concede the case when you, as a lawyer, would have known that the game was up.

Paul Cackette: Well, no—

Jackie Baillie: You are a good lawyer.

Paul Cackette: I do not know that it is right to say that I would have known at that point, because we had still to ascertain what the facts were.

Jackie Baillie: How long did it take you to ascertain what the facts were?

Paul Cackette: Work then proceeded in relation to the specification of documents, and more documents emerged during the specification and, ultimately, during the commission and diligence.

Jackie Baillie: Did you go back to the lawyer who advised Judith Mackinnon along the way and ask for more information?

11:30

Paul Cackette: The lawyers, including those who were involved at the time, continued to be involved at all stages in that, so yes.

Jackie Baillie: Therefore, that individual was still involved in the judicial review process and did not alert you to that information or provide the clarification required, so there was nothing—silence.

Paul Cackette: He alerted me to the information that he was aware of.

Jackie Baillie: Therefore, he was not aware of that.

Paul Cackette: No, I am not saying that he was not aware of the generality of it, but the detail of what emerged became clear only as we moved into the commission and diligence work.

Jackie Baillie: Did you, at any time, tell anybody—Judith Mackinnon or anybody else—that it would be possible to sist the judicial review if the police investigation could be progressed?

Paul Cackette: When put in that sense, no.

Jackie Baillie: And when it is put in any sense that you choose to take it?

Paul Cackette: In any sense, no. We could think of sisting cases, but the suggestion—

Jackie Baillie: Was that never suggested?

Paul Cackette: I am just trying to understand. The question implies that, if we could somehow persuade the police to do that, we could sist the judicial review. That is what I take issue with. There was no suggestion on my part that we try to influence the process. On the other hand, had it been the case that a police investigation were initiated, I would have been firmly of the view that the judicial review ought to have been sisted to allow the criminal process due process. A criminal process is more important than a civil process, for various reasons that are fairly obvious. Therefore, sisting—

Jackie Baillie: Did you ever discuss sisting the case?

Paul Cackette: Sisting would always be an option in relation to such cases.

Jackie Baillie: I am asking whether you discussed it.

Paul Cackette: Again, I need to be careful about the content of advice, but I would not dispute the fact that sisting would have been a perfectly appropriate thing to have done, had the circumstances required it. If I look back, the most obvious reason for that would have been had charges been preferred in, say, the autumn, when we were still working through the case. I will answer the question in the abstract to avoid my getting into specific legal advice. I think that, then, I would have said, "Definitely". I would have suggested that, from our perspective, that would have been something that they would want to do, if the court agreed.

Jackie Baillie: If I may, I will push you on one final question, as I do not wish to take in vain the convener's patience. I am still not clear why it took the Scottish Government until January 2019 to concede the case. Why did it take so long, knowing what you knew?

Paul Cackette: What we knew emerged and developed, and our assessment of the circumstances emerged as we went. This case, as much as any, was obviously extremely important and high profile. However, all litigation, in my experience, is something of a rollercoaster, where your prospects go up and down. I do not dispute that that was significant; I am not trying to diminish that aspect for a moment. However, we were due to go into a four-day judicial review on 15 January and we went through a process. I will reference the timeline—it might be relevant in examining how we were considering our responses and how our adjustments to our position could put our views in a fair position before the court. It was only in the development of that and in the thinking about what our response would be that we reached the view.

A number of things come into play, one of which is the factual circumstances. Another is the analysis of the documents that emerged and a third is the question of the legal prospects as you go. One of the things that you would think about—again, I am trying to put it on an abstract level—is that, notwithstanding the difficulty that had clearly come to our attention, did it follow that the case absolutely had to be conceded, or were there things that we could say, if you see what I mean? Time was taken—and time would be taken—to analyse any legal precedents and what procedural fairness and apparent bias mean. It takes time to work through that.

The Convener: Mr Cackette, thank you for giving us so much time. I hope that you will bear with me a little bit longer. We have heard a lot of information from you, and I would like to clarify in my mind a couple of things. Please excuse me if you have gone over it already; there has been a lot to take in.

The first thing that I want to get clear is that you reported to the director general for constitutional affairs.

Paul Cackette: Yes.

The Convener: Refresh my memory; who was that?

Paul Cackette: It was Ken Thomson.

The Convener: Did you deal with Ken Thomson a lot on this issue at the time, or was it, as you said earlier, very much the permanent secretary's procedure?

Paul Cackette: It was very much the permanent secretary's procedure. I did not deal in any way with Ken Thomson until the point at which the JR started because of the way in which we were structuring things to keep the confidentiality of the matter as narrow as we could. My dealings were effectively through the permanent secretary's office at that point.

Once the judicial review started, I said a bit more to Ken Thomson because I was more at liberty to do so. To all intents and purposes, however, it was the procedure of the permanent's secretary's office rather than those of my director general.

The Convener: Alison Johnstone, do you have a supplementary on that point?

Alison Johnstone (Lothian) (Green): It is not on that particular point, convener.

The Convener: We will have to try Mr Cackette's patience for even longer, then.

You also talked about the missing information. There has been quite a lot of discussion about that and when it came to light. Which department was tasked with supplying that information for the judicial review?

Paul Cackette: Is that in relation to the emerging difficulty?

The Convener: It is in relation to everything. Information is obviously required for a judicial review, so, who was responsible for that?

Paul Cackette: In that sense, the co-ordination was done by the permanent secretary's office. Because of the high-profile nature of the matter and the sensitivity of the information, the number of holders of documents and people who were looking for information was relatively small. In other circumstances and perhaps for more typical litigation, more people might be involved, but there was very much a narrow group in the permanent's secretary's office and the likes of James Hynd, from whom you have taken evidence, as well as the people who we thought were involved in the development of the policy and its application, such as Judith Mackinnon and Nicky Richards, from whom you have also taken evidence. It was a pretty small and compact group of people.

The Convener: Was the same group of people tasked with going back to see whether they had missed anything?

Paul Cackette: In effect, yes. A number of things were happening in tandem with each other, and the group of people that had the knowledge and understanding of what happened at the time and were trying to make sense of it was also the same tight group of people who were the holders of the documents concerned.

One of the difficulties that arose in trying to identify the documents, although later in the process when we were heading towards the commission and diligence, was that some officials had gone off on lengthy Christmas leave. One of them left on 14 December—remember those days when you used to be able to go to the far east for a long holiday over Christmas? That gave rise to some practical issues, especially at that point, in relation to searching for documents, because they were in people's email accounts and on H drives that only they had access to and knew the passwords for.

I am not talking about earlier, in November, but it was quite difficult at that stage as we moved towards the commission and diligence. The practical issue was about getting hold of documents. For example, although we ultimately required to find a way around it, it was not possible to ask other people, such as information technology people, to search inboxes because of the sensitivity of the information that we were looking for.

There were a number of practical problems, and if I had more time—

The Convener: You can have as much time as you like.

Paul Cackette: I would be delighted to give more colour to the challenges that were faced in dealing with the specification right from the beginning and throughout. One of them was an issue about people who were not there; others were issues about the extent to which we had properly identified things such as search criteria about what to look for. It was a relatively small number of people, which was an advantage and a disadvantage; the advantage of that was that we were able to ask for the information without asking the entire Government to search, because that would be completely inappropriate, so we could not treat it like an FOI request.

In some ways, a commission is quite similar to an FOI request, especially in relation to the location of documents, except that you do not apply the exemptions in effect; rather the commissioner applies the exemptions. It was a smaller number of people who were asked to do those things, but at the same time they also, by virtue of being a small number of people, had an enormous task, as it transpired, going by the amount of information that is there.

Again, the question was how we were able to access and check email accounts and, no doubt password-protected H-drive documents and various things when people were out of the country.

The Convener: I am glad that you are happy to be generous with your time, because other requests are coming in. I ask members to be brief with their questions.

Alison Johnstone: Is it your view that the Scottish Government considered that it had a robust procedure in place for dealing with the harassment complaints?

Paul Cackette: Yes; the collective legal view was yes.

Alison Johnstone: Would you agree, then, that, to be considered robust, a procedure would have to be very carefully adhered to?

Paul Cackette: Yes.

Alison Johnstone: The much-quoted paragraph 10 says:

"the investigating officer will have had no prior involvement with any aspect of the matter being raised",

It seems to me that that paragraph was always sitting there. Is it your view that the Government's case was ever okay or strong given that that paragraph in the procedure was sitting there and it had not been adhered to?

Paul Cackette: I refer generally to paragraph 39 of the Government's statement that was produced in September. I reference that because the legal position is assessed in the context of the reading of that paragraph with the facts of the circumstances applied, and that is where the concern arose that was the ground of concession eventually. Looked at in isolation, there is nothing wrong with paragraph 10; it is how it was applied in the circumstances. James Hynd, who has given evidence to the committee before, has produced a document that explains what the paragraph was endeavouring to cover, but if you look at its terms even now, I do not think that there is anything wrong with it as long as it is applied to the right facts. For example, if a different investigating officer had been appointed—

Alison Johnstone: Absolutely; if an investigating officer had been appointed who had had absolutely no prior involvement with any aspect of the case, I am sure that—

Paul Cackette: It would have been very different, so it is the combination of issues.

Alison Johnstone: Absolutely. For clarity, you suggested earlier that the Government's position did not deviate from the legal advice, or did not deviate substantially from the legal advice, so was the legal advice not fully informed?

Paul Cackette: In the development of the policy, it was fully informed. The facts, as they emerged towards the end of 2018, as they related to the policy, led us to the conclusion that the risk of an appearance of bias occurred.

Alison Johnstone: In your view, was the legal advice given on the basis of insufficient information or only part of the information that was required to fully formulate a proper view?

Paul Cackette: The final view was reached on the basis of the information that we then had. As has been said in the statement, it was based on a view of the information that had by then become available. I can only refer to the timeline from last week.

Alison Johnstone: So, is it your view that very pertinent and relevant documents simply were not made available at the time when they should have been?

Paul Cackette: Again—my view is consistent with what has been said in the statement.

11:45

Angela Constance (Almond Valley) (SNP): I am sorry to prolong the "Carry On Lawyers" routine, but I would like you to tell us, Mr Cackette:

how many lawyers have been involved in this saga, both internally and including junior and senior counsel?

Paul Cackette: There is a question. How many in total?

Angela Constance: More than 10? Less than 10? Pick a number.

Paul Cackette: Probably around that. I would like to think about the precise number but, at various points, for the whole process—

Angela Constance: For the whole thing—beginning to end.

Paul Cackette: Including the different aspects of things, probably around 10 or 12 from the legal directorate, I would have thought.

Angela Constance: Okay. That is a fair number of folk from the learned profession. Did anybody ask or even think about asking Ms Mackinnon if she had any prior involvement with the complainants before taking on the investigating officer's role?

Paul Cackette: I do not know what was asked around the time when she was involved in the taking on of that role. I did not ask that question from the time when I came into post, because I did not know of that issue and I did not really have any reason to ask for that, and I think that is probably true for a number of people.

Angela Constance: So, none of the lawyers involved in this situation thought that that was something that should have been asked of Ms Mackinnon with regard to her history with the complainants. Nobody thought about asking that.

I am struggling to understand why you, as the head lawyer, were not aware or apprised of what the entire legal team were asking or thinking, past and present. I appreciate that you were landed with the position.

Paul Cackette: I am not sure what the question is. Why was I not?

Angela Constance: Why were you not aware of what your colleagues were pursuing or asking? I am not a lawyer, but it would seem to be a basic need for all the information to be on the table for all the lawyers, yet you cannot tell me whether any lawyer thought to ask or indeed asked Ms Mackinnon about her prior involvement.

Paul Cackette: The absolute significance of that emerged only in the course of the judicial review. It may well be that that is why it was not thought to be something to be explored or investigated at the time. It was at the roots of the start of the process.

Angela Constance: I am just curious about why no lawyer thought it prudent to ask the investigating officer some in-depth questions about process, including prior involvement. It is all going to remain a bit of a mystery apparently, convener.

Could Mr Cackette summarise in plain English why the Government decided to concede the case?

Paul Cackette: I am sorry: I missed the very last part of the question. I got to "plain English", but I did not hear the last bit.

Angela Constance: Can you explain, in plain English, why the Government decided to concede the case?

Paul Cackette: The most that I can do is to repeat the reference in paragraph 39 of the statement—I can read it out again. It was

"a review of the case which was informed by legal advice"

and, as I said to Alison Johnstone, the combination of the two factors impacted on the case.

As the statement said:

"whilst the meaning of paragraph 10 of the procedure was clear to those involved in its development and operation ... the paragraph was open to a different interpretation".

The statement then referred to what "prior contact" meant, and it went on:

"having regard to the totality of the Investigating Officer's dealings with the complainers before her appointment as Investigating Officer, the reasonable observer would conclude that there was a real possibility that she could not act impartially as she was required to do by the procedure."

The Convener: Was that plain enough English for you, Ms Constance?

Angela Constance: I still do not know why nobody asked Ms Mackinnon the obvious question, but we will leave it at that.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Good morning, Mr Cackette. Clearly, all this work was going on in the Scottish Government's legal department, with advice coming from counsel and all that kind of stuff. How often were briefing papers on the case sent to ministers, and which ministers received them? Were you involved in writing any of the papers?

Paul Cackette: Given the nature of the case, anything that was given by way of briefing to ministers would have had legal content and legal involvement in it. I am trying to think about the frequency. I know that Sarah Davidson, who is due to appear before the committee after me, was the principal drafter of a paper at the end of the

process, when we gave advice collectively in relation to the conceding of the case.

The speed at which matters progressed was such that we did not give regular updates in that sense. I am not saying that ministers did not know; there were regular discussions, and regular information was given to them. However, there were not weekly briefings where we said, "This is what happened here." If there were significant changes of circumstance, advice would have been given. As I said, the crucial paper was the report that was prepared at the end. Ministers were involved and informed at all stages, but the speed at which matters went meant that information was not really set out in that kind of significant or methodical briefing.

Maureen Watt: Excuse me, but ministers are normally informed by written briefings.

Paul Cackette: Yes.

Maureen Watt: You are saying that ministers were not given a formal written briefing on the case until the end of the process.

Paul Cackette: They got written briefings, but they were not given a commentary, as we went, on what the prospects were at the time and on the current situation. They were given briefings, which included written briefings, on the development of the case and as matters emerged. They were fully informed.

Maureen Watt: But regular written briefings were not given.

Paul Cackette: Not written in the sense—

Maureen Watt: They were not given something that they could give feedback on.

Paul Cackette: Do you mean something that I could give feedback on or that ministers could give feedback on?

Maureen Watt: I mean something that ministers could give feedback on.

Paul Cackette: I suspect that they could give feedback on it, but the briefings were not really prepared in the way in which the people around the room who have been ministers would expect briefings to be given normally. That is not to say that ministers were not told about significant issues as they arose.

Maureen Watt: Are you saying that there was just informal chat?

Paul Cackette: No. There were discussions, but written advice was also given. However, that written advice was not given in the ministerial submission sense, to any great extent.

Maureen Watt: There were no regular ministerial submissions until the very end of the process.

Paul Cackette: It was such a fast-moving set of circumstances that there did not really need to be, in that sense.

Maureen Watt: Okay. Was the recommendation or decision to reject arbitration written, or was there just an informal chat?

Paul Cackette: That was written, but that was in June or July. At that point—whatever the WhatsApp messages might have said separately—the First Minister and other ministers were not aware of that through the procedure. However it might be suggested that they were otherwise aware, no advice was given to ministers in relation to those aspects of the conduct of the procedure, because it was the permanent secretary's procedure.

Maureen Watt: Okay. I think that we have heard that before.

The Convener: Mr Cackette will be pleased to know that I am putting my foot down. We will have a very quick question from Mr Cole-Hamilton followed by an extremely quick question from Ms Baillie.

Alex Cole-Hamilton: I thank you for bringing me back in, convener. I will be very quick. I have two very small supplementary questions.

The Convener: Two?

Alex Cole-Hamilton: They are on two linked areas. I did say when I finished my first round of questions that I had two more.

In your answers to Jackie Baillie, Mr Cackette, you very helpfully set out for us that legal advice is never binary. It is not "You are going to win" or "You are going to lose", but a balance of probabilities. It is, "Yes, you have an arguable case, but here are the chances of success." It is fluid and, as happens from time to time, those chances of success will diminish and there will be a tipping point.

There is a point at which legal counsel will tell the client—I am talking generally and not just about this case—that the chances of success are so small that it is not worth going on. I am sure that every client in history wants to believe that they can still win. They will cling on to that hope and they may do so to the point at which their counsel threatens to resign, because they are not being listened to. Would you imagine that that happens generally?

Paul Cackette: I would not have said that it would happen generally. I mean—[*Interruption*.]

Alex Cole-Hamilton: Let me be specific—did it happen in this case?

Paul Cackette: I cannot comment on this case. However, the scenario in which prospects change over time is a common feature of litigation.

Alex Cole-Hamilton: But can you see the scenario that I am getting at?

Paul Cackette: Yes, absolutely—

Alex Cole-Hamilton: Can you see the scenario in which the permanent secretary and other Government officials were so keen to press on with the glimmer of hope that, had they not heeded that advice about the diminished chances of success, legal counsel might have threatened to resign?

Okay, that was a rhetorical question. My final questions are on paragraph 10. We have been told that it is still active and that there is no amending guidance behind it. Do you feel, first, that that exposes the Government to further legal risk and, secondly, that it might prevent other people from coming forward to raise complaints about former ministers under the procedure?

Paul Cackette: It is still extant and unchanged just now. As I answered—or tried to answer—Alison Johnstone, I do not think that the wording in itself is necessarily wrong in all circumstances. We have obviously learned from its practical operation and, if anybody were to come forward now, we would not allow the situation that arose in this particular case to arise. Although the wording might not have changed, given that it was a combination of the wording plus the facts that led to the difficulty in this particular case, I do not think that the policy is necessarily inoperable.

Your second question is a slightly different one. I see the point that you are making in that a situation could arise in which people are discouraged from coming forward because of the past experience. I do not think that a change in the wording would, in itself, solve that. Nonetheless, it is a very legitimate point about trying to encourage people to have the confidence to come forward. It is important that there is a procedure in which people have confidence and trust. That is what the Government is reviewing.

Alex Cole-Hamilton: The judicial review collapsed two years ago. In those two years, not one single thing about that policy has changed. If you are in a position in which you have been thinking about what happened to you—something done by a former minister in a historical context—why on earth would you put yourself through that, given that nothing has been done to remedy that flawed procedure? That is a rhetorical question.

Paul Cackette: It is a rhetorical question, but it flags up just how difficult it is for people who have those concerns and who have been the subject of harassment in the past to have the confidence to come forward and have those concerns properly investigated. That is seen across the world. In that sense, it is obviously right to flag up that none of us wants a situation in which anything discourages people from having the confidence that, if they come forward, they will be believed and their complaints will be investigated properly. We all want a situation in which people—men and women—who could have been in that situation have the confidence to come forward and have their complaints investigated properly and thoroughly.

The Convener: We will see whether Jackie Baillie understands the concept of "quick".

Jackie Baillie: I will be very quick. My apologies for having missed this. Were external counsel asked for an opinion on paragraph 10 and what it meant for the prospects of success, and when was that opinion sought?

Paul Cackette: Counsel was asked for opinion throughout the process, but it was specifically when the issue arose that the focus became paragraph 10. They were not asked for an opinion prior to that, because none of us knew that that was going to be an issue.

12:00

Jackie Baillie: Can you tie down a date? I do not want to annoy the convener, but I am asking for a date.

Paul Cackette: I think that we can give an indication of when the issue came into focus. What I am not sure about is whether we asked them or they mentioned it to us, or whatever. I would need to look at the background and ask colleagues to do so.

Jackie Baillie: It could have been that they said that to you, rather than you alerting them. It could have been on 19 October.

Paul Cackette: It could have been—again, I was not at that meeting.

Jackie Baillie: I look forward to hearing from you.

The Convener: I will ask the final question. The first questions to you were about arbitration—that seems like a long time ago. Alex Cole-Hamilton was clear when showing the differences between arbitration and mediation. You talked about the decision not to go to arbitration. An element of that was to do with the potential effect that that would have on the complaints.

Paul Cackette: Yes.

The Convener: Will you summarise that? Will you also refer to mediation? Were you involved in that decision?

Paul Cackette: I was not involved in the decision to suggest mediation. My understanding is that the suggestion was put to the complainers and they rejected that. To my knowledge, arbitration was not put to them. I can only presume that that was because of their having rejected meditation—there was obviously a sensitive relationship of constantly going back to the complainers and asking them, "Have you thought about X? If you don't like X, have you thought about Y?"

I maintain my answer about the inappropriateness of arbitration in response to claims of harassment, or sexual harassment. That is also true—in one sense, it is truer—of mediation. Mediation does not really offer a means by which the matter could have been resolved in a way that could have avoided court proceedings and been agreed by the parties. By that I mean that there is a sort of matrix of decision making and dispute resolution. The courts are mandatory—you cannot avoid going to court if you are taken to court—and the outcome is binding. Arbitration is voluntary, but the outcome is binding. Mediation is voluntary, but the outcome is non-binding. To go down the mediation track would have led to a risk that either party, if they did not like how the mediation was going, could have said, "I'm not doing this any more".

Had I been involved in suggestions of mediation—I was not; it was before my time—I would have not suggested that approach, because of its non-binding nature. That would have seemed to me to be the position on the mediation aspect of things, had I been involved at the time. In any event, the complainers rejected that possibility.

The Convener: It has been an interesting session, Mr Cackette—thank you for the discussion. You have agreed to follow up certain things in writing, and we can liaise on that.

I suspend the meeting for a short break before we move on.

12:04

Meeting suspended.

12:13

On resuming—

The Convener: I welcome Sarah Davidson, a bit later than we asked her to come along. I am sorry to have kept you waiting like that.

Ms Davidson is the former director general of organisational development and operations in the Scottish Government.

Sarah Davidson made a solemn affirmation.

The Convener: I invite Ms Davidson to make a brief opening statement.

Sarah Davidson: Convener, thank you for the opportunity to make this short statement.

The key points that I want to convey to the committee are set out in my written statement, but I thought that it would be useful for context to briefly summarise my roles and responsibilities in the Scottish Government.

I began working for the Scottish Government in 1995 and was deployed in a variety of roles and business areas. Latterly, after a period of maternity leave in 2012-13, I returned as interim director of human resources for around five months at the start of 2014. I then took up the role of director general for communities, and then moved to the role of DG for organisational development and operations when that post was created in July 2017.

As DG for ODO, I was a member of the permanent secretary's executive team, and held a number of corporate responsibilities as well as providing leadership and line management to the directorates of communications, ministerial support and facilities, digital, financial management, procurement and commercial, people, and social security. As the permanent secretary set out in her evidence to the committee, staff in the majority of those directorates hold corporate professional roles across all of Government. My line management role therefore focused primarily on supporting wellbeing, development and leadership, as well as fulfilling formal financial and management accountabilities.

I left the Scottish Government in June 2019, in order to take up my current role. I have not retained any documents or information from my time with the Scottish Government, nor have I had access to its systems since June 2019, including for the purpose of giving evidence today. In the timeframe that has been available to me, I have looked at a few key documents that have been provided by the Scottish Government, which have been published by the committee, but I have not reviewed all the published material. Accordingly, I will answer the committee's questions without the benefit of having had such information to review, but to the very best of my ability, bearing in mind those limitations.

As a former civil servant, I am subject to some continuing obligations under the civil service management code, so there may from time to time be certain constraints that I have to respect.

I am aware that the Scottish Government has asserted legal privilege over certain documents and information to which I may refer, and I must respect that position.

I have noticed that other witnesses have declared membership of the FDA union, where applicable, and I therefore note that I am an FDA associate member.

The Convener: Thank you very much, Ms Davidson. We move directly to questions from the committee.

Margaret Mitchell: Good afternoon, Ms Davidson. In your written evidence, you stated clearly that you were not involved in the development of the 2017 procedure. If that is the case, will you confirm that you did not initiate any correspondence—including texts or emails—and that you were not copied in to any such emails or correspondence concerning it?

Sarah Davidson: Not to the best of my recollection.

Margaret Mitchell: Thank you. You were line manager to Nicola Richards, director of people, and you had oversight of her team, including Judith Mackinnon, head of people advice. Did either or both of them make you aware of any concerns about the judicial review during the period 16 October to 8 December—the Scottish Government's legal position was being established around then, and the first set of answers was given on 15 October—and, if so, who raised those concerns and what were they?

Sarah Davidson: I recall becoming aware at some point—probably within the broad timescale that you are referring to—that, in the judicial review procedure, questions had been raised about the role of the investigating officer. I did not know the detail of those. I was not close to the handling of the judicial review. My understanding was that they were being managed in the context of proceedings and that proceedings were continuing as had previously been planned. It is likely to have been Nicola Richards who brought it to my attention, but I cannot recall precisely when.

Margaret Mitchell: Did she express concern?

Sarah Davidson: I think that it would be fair to say that she expressed concern. She certainly knew that concerns had been raised, that further information was being sought from Judith Mackinnon about those issues, and that they were the subject of a discussion with lawyers. I was not at any point privy to those discussions with lawyers.

Margaret Mitchell: Will you elaborate on the specific nature of the concern that she expressed?

Sarah Davidson: I do not think that I can say anything further in relation to that. An issue had been raised; they were looking for further information; and it was clearly of some concern to the lawyers.

Margaret Mitchell: Are you unable to say whether that was about her involvement with the complainers up to and during the procedure and then the fact that she was investigating officer?

Sarah Davidson: I cannot recall the precise detail. It was about the role of the investigating officer, but I cannot recall which particular part it was about.

Margaret Mitchell: Okay. In her evidence to the committee last week, Judith Mackinnon said that on 31 December 2018 she contacted "the relevant director" to say that she had found further documents, including texts with Ms B, and that she was told to

"pause on sending anything ... through".—[*Official Report*, *Committee on the Scottish Government Handling of Harassment Complaints*, 27 October 2020; c 23.]

Are you the director to whom she was referring?

Sarah Davidson: Judith Mackinnon was dealing directly with SGLD on the provision of documents, at all points, so no—and I do not think that she would have referred to me as a director; I was the director general.

Margaret Mitchell: So she did not tell you that she had uncovered all those documents at that time.

Sarah Davidson: Not that I recall, no. She was dealing with the litigation team of SGLD in relation to the provision of documents.

Margaret Mitchell: Were you aware that she was told to pause on sending the information?

Sarah Davidson: I was aware, at that point, that the prospects of the case were under review and that, therefore, whether the further commission would go ahead must have been in doubt, to an extent, so it would not surprise me if she had been told to pause. However, I cannot recall whether I knew that at the time.

Margaret Mitchell: You said that you had no involvement with the judicial review until mid-December 2018, when the permanent secretary asked you to compile a report for her, to help to inform the next steps. How did you undertake that? For example, where and from whom did you source the relevant information?

Sarah Davidson: As I think that I said in my written evidence, my recollection is that there were three main parts to the advice that my report covered: financial advice, which I was given by the principal finance officer; legal advice, which came

from a variety of sources but was collated and passed to me by the director of legal services; and handling advice, which, as I recollect, reflected advice about, in some part, legal handling, which again would have come from SGLD, and in some part communications handling, which would have come from the communications directorate.

Margaret Mitchell: Specifically with regard to the further documents that were identified by Ms Mackinnon in late December 2018, in compiling your report and taking cognisance of that, was anything included that informed the Scottish Government's later decision to concede?

Sarah Davidson: Thinking about the timeline that the Scottish Government produced for the committee, by the time that I was pulling together and collating that advice, the further productions that Ms Mackinnon had passed into the process were known, and those informed the legal advice that I was given—so yes, that legal advice reflected the lawyers' view, at that point, of the additional information that Ms Mackinnon had found. My recollection is that I was pulling together that advice between something like 23 and 27 or 28 December, and the timeline suggests that the further productions that Ms Mackinnon had made predated that.

Margaret Mitchell: Thank you. Finally, are you aware of any timeframe for police involvement, with the police being asked either directly to look at something or to talk in a more generic manner about harassment cases?

Sarah Davidson: Do you mean in the organisation?

Margaret Mitchell: Yes.

Sarah Davidson: I was aware at a number of points that the police were approaching people in the organisation, as it was clearly their right to do, as part of an investigation. I cannot recall, now, how that mapped against the timeline of the judicial review.

Margaret Mitchell: Can you say when you were aware that there was police involvement at any level?

Sarah Davidson: I think that I would be misleading the committee if I attempted to put a date on that.

I was aware that at certain points—I am guessing that it was during the period from August right through the following year—there were times when the police were having conversations with members of Scottish Government staff, but I have no recollection of specific times. I was not personally involved in that at all, which is why the dates would not have stuck in my mind.

Margaret Mitchell: Was that August 2018 and right through the following year?

Sarah Davidson: Yes.

Margaret Mitchell: Thank you—that is helpful.

Angela Constance: Good morning, Ms Davidson. Am I correct in saying that you were not involved in development of the policy, but the permanent secretary was?

Sarah Davidson: That is correct.

Angela Constance: You line managed Nicola Richards directly and, therefore, you line managed Judith Mackinnon indirectly. However, you were not involved in the investigation. Have I understood that correctly?

Sarah Davidson: That is correct.

Angela Constance: Is not that quite unusual, because you were a very senior civil servant?

Sarah Davidson: In a way, nothing about that particular investigation was usual. In normal times, it would be unusual for the director general to get involved in investigation of an HR complaint. That would normally have been handled within the HR directorate, with senior HR oversight from either Judith Mackinnon or Nicola Richards. Because the complaint was being investigated under the permanent secretary's procedure, the decision was taken—I assume by the permanent secretary, although it was not something that I ever discussed with her—that she would take the lead, in being the person to whom the investigating officer reported. Given both the need to avoid unnecessary double handling and the desire to maintain very strict confidentiality in relation to the complaints, there was no role for me, as director general, in the investigation, given that the permanent secretary was playing the role that she played.

Angela Constance: I appreciate what you said about how "in normal times" in your previous role you would not be involved in HR investigations. However, in this instance your staff were involved, but you were cut out of the loop and they were reporting directly to the perm sec. Were you comfortable with that?

Sarah Davidson: That did not cause me any concern. As the permanent secretary said in her evidence, and as Mr Cackette indicated earlier when he was talking about his role, it was not by any means unusual for senior professional advisers within the Government to report directly either to the permanent secretary or to other DGs. The principal finance officer, for example, would quite often provide advice directly to my fellow DGs or to the permanent secretary. As somebody who is not an HR specialist, in this instance there was no obvious value that I would have added by

checking their homework before they presented it to the permanent secretary or to other DGs. It did not give me any difficulty; it was quite normal.

Angela Constance: Okay. That is clear. You were part of the permanent secretary's executive team and chair of the people board. You said something in your written evidence that struck me as being quite unusual, which was that you

"did not have any involvement in the Permanent Secretary's all staff communications".

I am curious to know why you felt the need to say that. It seems like an inconsequential thing to say, but civil servants are never inconsequential.

Sarah Davidson: What I was intending to convey was that the people board's role in the Government was essentially about corporate governance of the organisational development strategy. It occurred to me in drafting my submission that anybody who was not familiar with the corporate governance of the Government might, not unreasonably, think that the people board, because of its name, was involved in the harassment procedure, in clearing all-staff communications or something like that. Therefore, I included that point to make it clear that the people board did not have such a role and was not involved in any way in those proceedings.

Angela Constance: I apologise if you have already covered my next point with Margaret Mitchell, but it has been a long morning.

On about 19 December, you were advised that material had been found that had not previously been identified. That information was for the purpose of the judicial review. Who advised you of that, and how? Did you say that it was Nicola Richards, in the context of supervision or a meeting with her?

12:30

Sarah Davidson: I cannot recall precisely who alerted me to that fact, but it would not have been Nicola Richards because, I think, she was away, on holiday, by that point. It might have been the legal directorate or it might have been the permanent secretary's office—I think that it was possibly the latter. There was, clearly, as one would expect, a degree of concern about the fact that documents were turning up late in the process. Clearly, that would cause concern to the individuals and to the legal advisers. It is likely that, in that context, I would have been advised and, given that Nicola Richards was on holiday, it is most likely that that was done either by the permanent secretary's office or by someone in SGLD.

Angela Constance: Earlier in the year, you had requested advice from SGLD because some of your staff were going to have to give evidence at the commission. What did that advice cover?

Sarah Davidson: I think that it was just a few days prior to the hearing that I sought advice. It was certainly no more than a week or so before it. I think that I heard Mr Cackette say earlier that commission and diligence is a relatively unusual process; none of my colleagues who had been cited to attend had ever been involved in that before.

As one might expect, there was a degree of anxiety about what was involved in giving evidence in that format. I therefore asked the litigation team in SGLD to provide for colleagues some additional information about practical things, such as what they might be asked, in what capacity they would give evidence, who would be present and so on. It was that kind of advice.

Angela Constance: Were your staff advised at any point on how to do proper searches for documents to ensure that the right information was available at the right time?

Sarah Davidson: My understanding would have been that that advice would be provided from the outset by the litigation team in SGLD, either directly or via the co-ordination function in the permanent secretary's office, which Mr Cackette referred to. It became clear over time, particularly towards the end of December, that searches had not been as comprehensive as they might have been. Therefore, one might draw conclusions about whether the questions had been posed as clearly or as comprehensively as they should have been, at the outset. However, my understanding is that SGLD would have provided that advice and people would have been searching according to particular questions that were asked of them, some of which were informed by the lawyer-to-lawyer correspondence that was happening at the time.

Angela Constance: On the judicial review timeline, in your written evidence, you said that it "could be interpreted" that you had "direct communications" with counsel "between 21 and 29 December". However, you said that you did not have direct communications and that you asked the Scottish Government to clarify that. What communication did you have with counsel and when?

Sarah Davidson: I had none at all. I queried that because I did not recognise it.

Angela Constance: Were you sighted on any legal advice?

Sarah Davidson: As far as I can recall, I was sighted on no legal advice as the judicial review was proceeding. For the purposes of enabling me to collate the report to the permanent secretary at

the end of December, I was sighted on the legal advice that was relevant to the section of that report that SGLD contributed to—or, at least, I was sighted on the components of some of that legal advice. However, that was all related to that fairly late stage. I do not recall seeing any legal advice earlier in the process.

Angela Constance: We know that, around 21 December, the permanent secretary asked you—I think that this is from your written submission—to

"urgently collate ... various strands of advice received from senior professional advisers".

Why was that urgent? It might seem that I am asking you the obvious, but it is important to hear your understanding. Why was that urgent?

Sarah Davidson: Again, I was looking at the timeline that was supplied to the committee in order to refresh my memory on that. The second day of the commission was on 21 December. The timeline reminds me that, on that day as well, Judith Mackinnon had found additional documents that had been handed to the petitioner's senior counsel, and that there was a consultation that day with counsel. Although I was not privy to the discussions that took place, or to the legal considerations, it was clear that that triggered a need for the permanent secretary to take stock of where the case was, and to do so urgently.

Another commission date was set down. I forget whether it is in the information; I am sure that it is here somewhere. A commission date was set for either the very end of December or the beginning of January. The judicial review itself was due to begin in January. From looking at all that, it seems to be self-evident that if the permanent secretary needed to take stock it would have to happen quickly.

Angela Constance: Why you? You were out of the loop. You had been cut out of the loop for investigation and for the judicial review process. Why did she come to you?

Sarah Davidson: It was in no way unusual for the permanent secretary to ask one of her directors general to carry out a particular task for her: that was something that we all did from time to time. My recollection is that it could have been any one of a number of us. I remember a discussion in the permanent secretary's office, at which both I and one of my fellow directors general were present, about commissioning the report.

I cannot remember precisely why that task fell to me. It might have been because I was due to be at home over Christmas and might have had more flexibility. That was the context in which I was asked to do it. It might well have been—although, again, I cannot recall, and it was the permanent secretary's decision to commission me—that the fact that I had not been close to the detail was seen by her as an asset, because it would mean that I was able impartially to pull together the advice that she needed.

Angela Constance: So, unlike some of your colleagues, you were not in the Maldives.

Would not it have been more the norm for someone from SGLD to pull all that together?

Sarah Davidson: Had the permanent secretary been looking purely for legal advice, she would normally have gone to the director of legal services. It could be that she wanted to have financial advice, too, and the chief financial officer sat within my area of responsibility. It might be that she wanted that to be pulled together by somebody who had not been close to the matters on which she was seeking advice. That might be why she asked me. You would have to ask her precisely why that was. That was my understanding at that time.

Angela Constance: I appreciate that.

You provided a report to the permanent secretary. You stated in your written submission to the committee that you made no recommendations in that report. Nonetheless, the permanent secretary came to the view that the case would be conceded. The committee understands extensive legal privilege, but can you give us an insight into the content of your report? We know that the headlines indicated that there was a section on finance, one on legal advice and one on handling. Your report might have made no recommendations, but it clearly had an impact on the permanent secretary.

Sarah Davidson: My recollection, which is partly prompted by my having listened to Paul Cackette earlier, is that the component of the report that dealt with legal advice would have reflected what he was conveying, which was that—I forget the exact terminology that he used—a point had been reached at which the prospect of success looked very slim. I am not saying that those were the views, but that was clearly what was being conveyed. The financial advice that was given would have reflected that legal assessment. The bringing together of those was intended to enable the permanent secretary to take what was, effectively, a formal decision about how she wished to proceed.

Angela Constance: That is quite a process-driven answer. I say that with respect. Let me put my question another way.

The Scottish Government was pursuing a course of action. It was on the train lines and was heading in a set direction informed, we are told, by legal advice at every step. Then you provided a

report and the train was brought to a screeching halt. How can that be explained?

Sarah Davidson: It is important for me to be clear that the report did not contain my personal assessment of the legal advice and financial advice. I was—I was going to say "merely", but that would perhaps understate the importance of the document—putting together in one place, for the permanent secretary to assess, the advice from lawyers that had been got by that point, along with other points for consideration. Therefore, I do not in any way suggest that something unique that I said led the permanent secretary to reach the conclusion that she reached. The advice that was in the document represented SGLD's presentation of the legal advice at that point.

Angela Constance: Okay. You were collating everything in one place, so can you pinpoint the point at which legal advice changed?

Sarah Davidson: I am relying on recollection and what is in the timeline, but it was clear that a combination of the substance of the documents that Judith Mackinnon had identified later on and the timing of finding them led to a reassessment of the prospects for the case. I was not close enough to the legal process up to that date to understand fully how that was the case. I would have needed to be able to slot that into an understanding of how the pleadings had developed over time, but I had not been close to or seen them, at the time of producing the report. Clearly, the timing of production of the additional documents, and their contents, were such that they led the lawyers to have the types of concerns that Mr Cackette set out for the committee earlier today.

Angela Constance: Okay. I have a final question. It is a matter of public record that the court found the permanent secretary's decision report letter "unlawful" in respect of actions that were taken in the circumstances, which were perceived as "unfair" and "tainted by apparent bias". Were you surprised by that finding of the court? You were involved in two lessons-learned exercises in relation to the investigation and the judicial review. Although those exercises were halted, even if it was with the benefit of 20/20 hindsight, you must have got an impression.

Sarah Davidson: I want to be clear in relation to the lessons-learned exercises that you identified—in particular, the second one, which was in relation to the procedure. At the time that I was involved in it, there was no opportunity for it to make significant progress. Was I surprised by the terms of the concession? I suppose that I was not, at that time, because I had seen the final stage of evidence, which was developing towards the point of concession. Of course, the Court of Session never took a view on that, because the case was conceded.

Taking the whole process together, was I surprised that it ended at that point—in other words, that that had been the case? Yes, I was, but that was in the context of not having been close to the investigation or the process of the judicial review. I do not think that I can add more to that.

Angela Constance: Bearing in mind the fact that you commenced work on two lessons-learned exercises, was anything learned in the short term?

Sarah Davidson: The first lessons-learned exercise that I referred to in my written statement was intended to be the exercise that is provided for in paragraph 11 of the procedure, which requires the permanent secretary, at the conclusion of an investigation, to see whether there are lessons to be learned by the organisation, arising from the matters that were under consideration. As I said, I began to draft that. It is important to remember that that was during the summer before any of those matters were in the public domain or were, indeed, known about in the organisation beyond a small number of people.

It quickly became clear in our lessons-learned exercise that comment on procedures that might have been inadequate in particular parts of the organisation was difficult to do without it leading to identification of where those things had taken place, and therefore to a risk of identification of the complainer. That was one of the issues that made us pause. The instigation of the judicial review proceedings meant that it quickly did not feel appropriate to be learning lessons from events that were being publicly challenged.

12:45

Angela Constance: To cut to the chase, although I understand your point about process, which you detail in your written submission, I was asking whether anything was learned at the time, in the immediate aftermath.

Sarah Davidson: My recollection of the lessons-learned exercise—the one that we are talking about at the moment, not the one about the procedure—was that it led us to consider the gaps in HR processes that the complainers had identified and given as reasons for why they felt that they could not come forward at the time. We looked at whether there had been progress over the years since then—I think that that was two or three years prior to what we were doing.

We satisfied ourselves that significantly better mechanisms were in place for people in that area of the office to raise complaints than those that had been in place at the time. We looked at the people survey results for that part of the office, which were significantly better than they had been

at the time when the alleged events took place. We also, I think, identified further potential enhancements for ways in which people in that area of the office could be supported. That is my recollection of the exercise, which was very much about learning lessons from events that had happened around 2014, if I remember correctly, as opposed to more contemporary ones.

The Convener: Murdo Fraser has indicated that he has a supplementary question.

Murdo Fraser: I have a couple of supplementaries. If I ask both, I will not need to come back in later. Would that be a good compromise?

The Convener: That sounds like a good deal.

Murdo Fraser: I have a couple of questions around the issue of the permanent secretary's instruction on 21 December. We know that the permanent secretary was involved in the oversight group that had been established around the judicial review. Did she explain to you why it was necessary to get another opinion on the matter? Would she not have had all the available information as part of that group, of which she was a member?

Sarah Davidson: You would need to ask the permanent secretary about that. She asked me, as a senior colleague, to ensure that the information was brought together in a way that would be apt for her to take a decision—she might have concluded that it was appropriate to ask one of her more senior team to do that. You would have to ask her precisely for her reasoning.

Murdo Fraser: The permanent secretary is coming in next week, so we can pursue the matter. She gave you that instruction on 21 December—I hope that it did not spoil your Christmas too much. Did she ask you to prepare the advice within a certain timeframe?

Sarah Davidson: I cannot recall the specific timeframe, but it would be unusual in such a commission not to specify a date by which the advice was required. My guess is that the fact that it was provided by 28 December suggests that that was the deadline.

Murdo Fraser: You mentioned in your answers to Angela Constance that you were bringing together financial advice. Can you explain the relevance of that point to this particular issue?

Sarah Davidson: Accountable officers—the permanent secretary is the principal accountable officer for the Scottish Administration—always have to have regard to a number of accountable officer tests in relation to anything that they do: the formal delegations that allow the Scottish Administration to spend money require those tests to be taken into account. Regularity, propriety and value for money is the formal way of describing those tests. Any accountable officer, whether at principal accountable officer level or anywhere else in the system, if considering a particularly knotty or contentious issue, would want to have regard to those accountable officer tests in relation to the decisions that they were making.

Murdo Fraser: If I can press you a little bit further, when you say financial matters, are we talking about legal costs or is there something other than legal costs here?

Sarah Davidson: My recollection is that it would have been the legal costs—in other words, the costs inherent in proceeding with the action. Those were all inherently related to the continued defence of the judicial review or otherwise.

Murdo Fraser: Right. So you might have had to provide an estimate of what the additional costs might have been if the case had continued.

Sarah Davidson: Again, I cannot recall the detail of whether that was in it; I suspect that the advice from the principal finance officer covered that. Certainly, it would be normal in such cases for the advice from the principal finance officer to say that in continuing to spend public money in such a case, these are the things to which we would wish to have regard.

Murdo Fraser: Thank you. That was very helpful.

Alison Johnstone: On reading the evidence provided today, I cannot help reaching the conclusion that your actions certainly seem to have been decisive in bringing matters to a close. Can you elaborate on why you decided to take a more hands-on approach at the point that you did, around 20 December, in directing senior officials in relation to the judicial review?

Sarah Davidson: Again, my recollection, and I think that the timeline speaks to this to a large extent—as, indeed, I think Mr Cackette did—is that pressure was ramping up considerably over that time. As Mr Cackette said, a relatively small number of people were involved, who were being asked to look for further documents and to give evidence in a formal legal process. That was all being done under immense time pressure; people were very pressured, anxious and stressed by that process.

Not all those people were within my area of formal responsibility but some of them were and it therefore felt important to me to provide whatever help and support I could in order to enable them to discharge their responsibilities appropriately, as part of the legal process but also as part of my duty of care to them as Scottish Government staff.

For example, asking SGLD to provide additional support and advice to them was in line with that—

again, I cannot recall precisely why I was asked to issue the email that I refer to in my written evidence, seeking to be very clear about the nature of searches, but I think that it may well have been because of my seniority. It was helpful for people to get that clear line from a senior official, albeit that the content of that email would have been drafted for me by the lawyers.

Alison Johnstone: On the nature of searches and the need to be very specific in order to obtain optimal information, were information technology specialists involved, for example? Did you have any assistance from those who would really know how to get to the bottom of it? Sometimes, I struggle with searches, but there are those who have great expertise in that. Did you seek such advice or input?

Sarah Davidson: At the point of issuing that email, the purpose, as I recall, was to be clear about where people should be searching. For example, I do not know whether this was made clear before, but for the avoidance of doubt, it was made clear that things such as WhatsApp messages and so on should be brought out.

Later on—on 24 December in the Scottish Government timeline—our IT specialists were involved; I was involved in bringing them in. Digital was also within my area of responsibility. As Mr Cackette said earlier, there had previously been concern about bringing in more people to search because of the sensitive nature of what was being searched.

I recall that I was part of a discussion on or around 24 December, which recognised that we would have to bring in specialists from the IT team. At that point, there was an agreement about some specific terms that they should be asked to search for and specific mailboxes and H drive files that they should be asked to search in.

Although I cannot recall specifically, I think that it would have been my role, as the senior officer responsible for the digital directorate, to sanction that search. Searching people's information was a sensitive thing to do. I think that I did sanction that, on or around 24 December.

Alison Johnstone: Did you feel frustrated that that level of specificity had not been suggested earlier?

Sarah Davidson: I am hesitating, because I do not know precisely what was specified before then. I cannot say for certain. I shared the general frustration that documents were being found late in the process, which assisted nobody. There was a general frustration about that.

Alison Johnstone: For absolute clarity, what prompted you to advise the permanent secretary to concede the judicial review?

Sarah Davidson: To be clear, I did not advise her to concede; I provided the information. I did not draw a conclusion. It was deliberately left to her. I had been asked to provide the information in a way that would enable her to take a decision to concede. It was her decision.

Alison Johnstone: Did she discuss that information with you?

Sarah Davidson: I do not recall discussing the content. There may have been a call involving a number of people, principally legal advisers, following my submission on 28 December. I think the timeline suggests that the permanent secretary requested additional legal advice on 31 December. That request may have been made in a call that a number of people were on, not just me, in which she was feeding back her thoughts about and reactions to the report that I had given her, and on the basis of which she requested additional advice. That advice was not from me nor passed through me. My recollection is that I had no further role in providing her with information at that time.

Alison Johnstone: Can you confirm the basis on which the Scottish Government conceded the case?

Sarah Davidson: I do not have it to hand, but my understanding of the basis is as Paul Cackette stated at the end of his evidence when he read out the basis of the concession. That was my understanding. I was not close to all the detail and I cannot attest to the legal arguments. My understanding is the same as that of anyone reading those words.

Alex Cole-Hamilton: For the record, Ms Davidson and I have a long-standing professional friendship that dates back to when I was in the voluntary sector and we worked together.

I have a semi-personal question. You had been talked about in my earshot as a potential permanent secretary. A lot of people were surprised when you left the Government in 2019. Was your departure from Government linked in any way to your feelings about the episode and how it had been handled?

Sarah Davidson: Absolutely not.

Alex Cole-Hamilton: That is fine.

I move on to the reference in your written advice to citations issued around 17 December. A number of staff were issued with citations to appear before the commission. It would be helpful if you could provide us—perhaps in writing at a future date—with your recollection of who was cited to appear.

I have one specific question. Was the First Minister's principal private secretary, John Somers, cited to appear before the commission?

Sarah Davidson: Not by my recollection. Page 17 of the Scottish Government timeline, which relates to 17 December, sets out those who received citations. I am pausing because the timeline does not say that the list is comprehensive. But, had you asked me who I recalled as having received citations, the names that I would have recalled would have been those listed against 17 December.

Alex Cole-Hamilton: I asked for your recollection to see whether there was any variance from the list that we have been given. That is fine; you do not have to follow that up.

A number of members have already asked about the report that you were urgently commissioned to write on 21 December. I would like to clarify the urgency. The catalyst for that report was a new recognition that the likelihood of success against the arguable case was now so poor that there was a pressure to concede. Is that right?

Sarah Davidson: The reason why I am hesitating is because I do not recall that that was the way in which the commission was presented to me. In other words, I do not recall that the presentation or commission said—as you described—"This is now so poor, can you help us to concede?"

However, it was clear that a point had been reached where, based on what had come to light, lawyers were saying that whatever the permanent secretary had heard—presumably, but I do not know—during that consultation, on that date, led her to think "I need to take stock, now."

Based on what one knows by way of background information, the thing that one would want to take stock of in her role as permanent secretary would be the prospects for success.

13:00

Alex Cole-Hamilton: So, in your written submission, when you were talking of the project that you finished on 28 December, you said:

> "I submitted this to the Permanent Secretary on or around 28th December. My understanding is that following receipt of this advice, and I believe after having obtained further legal advice, the Permanent Secretary concluded that the petition should be conceded."

I infer from that that the catalyst to your report was legal advice. I am not asking you to go into detail on the legal advice, for obvious reasons. However, that is what strikes me.

Was your report there to help the permanent secretary break some kind of impasse, because perhaps she was at loggerheads with the legal counsel as to whether to continue with the case? I am asking that because of the fact that after receiving that report she went back to legal counsel either to say that she thought you should continue or vice versa.

Sarah Davidson: No. I had no impression of that at all. It would be quite normal for a permanent secretary—indeed, anyone senior who had to take a decision—to ask for something formal to enable them to take that decision. They would do that partly for the record, but also so that they could satisfy themselves that in a fast-moving situation they had properly considered all the matters before them.

Alex Cole-Hamilton: I understand.

I will move on to your being commissioned to look at paragraph 10 of the policy in the immediate aftermath, and lessons learned. Obviously, we know that that was taken out of your hands, so to speak, with the commissioning of the Dunlop review. Did you have a chance to—or did you—make any recommendations for immediate remedy to the policy? To put it another way, did you recognise that leaving it unchanged would present a barrier to potential future complainers coming forward, given what had happened with the judicial review?

Sarah Davidson: I did not have an opportunity to make progress or even scope the review. The decision that it should be done externally was taken within a day, or thereabouts, of the review being suggested. The answer to the first part of your question, therefore, is no.

It is hard to recall precisely, but I certainly remember that there were discussions about what would happen in the eventuality of another complainer coming forward—not that any particular instance was in view. There was a recognition that if somebody else did make a complaint under the procedure, the lessons that had been learned, not in the sense of being written down, but that were clearly learned by everybody who had been through the previous 12 months, would have to be taken into account in decisions such as the appointment of the investigating officer and the way that the investigation was carried out.

Alex Cole-Hamilton: Okay, that is fine. Thank you very much.

Jackie Baillie: On 19 December 2018, further material turned up that had not been previously identified, and you were asked to intervene. Who was responsible for the collation of that material in the three months prior to your intervention?

Sarah Davidson: My understanding was that the responsibility lay both with the litigation team in the Scottish Government legal directorate and with the point of co-ordination in the permanent secretary's office.

Jackie Baillie: Who is the point of co-ordination in the permanent secretary's office?

Sarah Davidson: The permanent secretary's private secretary.

Jackie Baillie: Who was that at the time?

Sarah Davidson: Their role is below senior civil servant level, so I do not think that the Scottish Government has released their name.

Jackie Baillie: Okay, thank you.

You were then asked to compile the emergency report, which we have heard about, on 21 December. Given that you did not make recommendations or have meetings with counsel, do you understand why your report has been withheld from the committee?

Sarah Davidson: No, I do not. I understand that the Scottish Government has withheld it, but that is a matter for it. It told me that that was the case, but I do not know.

Jackie Baillie: I am trying to understand why. It contained no recommendations and no legal advice. It was a narration of the facts. Is that correct?

Sarah Davidson: It contained legal advice. It contained advice that was given to me by the SGLD, which the directorate would have obtained from a number of sources.

Jackie Baillie: Did your report touch on the timeline of when the information about Judith Mackinnon's dual role of both supporting the complainants and being the investigating officer was first revealed?

Sarah Davidson: My recollection is that it would have contained advice from the legal directorate about what was contained in the documents that Judith Mackinnon had turned up late in the process. If I knew, I cannot recall precisely how they bore on the overall timeline, but the legal advice in the report would have said something about the import of those late productions.

Jackie Baillie: Did you have access to external legal advice that was provided to the Scottish Government?

Sarah Davidson: It was not provided directly to me. If there was any external legal advice, it would have been reflected in what Mr Cackette gave me.

Jackie Baillie: Based on what Mr Cackette knew, is there a timeline for when external legal opinion was taken in relation to the role of the investigating officer?

Sarah Davidson: I am sorry—I am not sure what you mean. Can you be clear about the question?

Jackie Baillie: Sure. I am trying to establish at what point external legal advice was taken and how that was reflected to you in relation to Judith Mackinnon's role as the investigating officer. You will have seen the conversation about 19 October and 23 October—that kind of thing.

Sarah Davidson: Yes. I do not know when that advice was obtained.

Jackie Baillie: Given that we heard Paul Cackette say that there were daily meetings with the permanent secretary's office, and given your lack of involvement up to that point, were you surprised that you were asked to do the report?

Sarah Davidson: No. As I said, it was not unusual for the permanent secretary to ask a DG, on her behalf, to do a bit of senior work like that, so I was not particularly surprised.

Jackie Baillie: After you submitted your report on 28 December, what follow-up was there?

Sarah Davidson: As I said in response to Alison Johnstone's questioning, I recall a telephone conference call, which I think—again, I am trying to jog my memory by looking at the Scottish Government timeline—would have been on 31 December. Again, to the best of my recollection, that was the opportunity for the permanent secretary to feed back to a number of people, including her legal advisers and others, her response and reaction to the advice that I had given her.

Again, my recollection—it is reflected in the time entry for 31 December—is that the permanent secretary had some further questions, which were essentially about the legal advice. She asked for some additional legal advice; I cannot recall precisely what that was, and I see that the Scottish Government is applying LPP to it anyway, but it was not advice that I sought or indeed advice that I think I saw.

Jackie Baillie: Who was on that conference call?

Sarah Davidson: I cannot recall. The likelihood is that Paul Cackette would have been on it. It is likely that her permanent secretary would have been on it, and possibly a communications adviser, but I cannot—

Jackie Baillie: Not the Lord Advocate?

Sarah Davidson: I honestly cannot recall. I would be misleading the committee if I suggested that it was one way or the other—I cannot recall.

Jackie Baillie: That is a shame.

You say in your submission that

"in January 2019"

you were

"asked ... to ... review ... paragraph 10 of the Procedure."

Why just paragraph 10? There were other grounds in the petition.

Sarah Davidson: My recollection is that the Scottish Government conceded only on the matters relating to paragraph 10, and it therefore took the view—as far as I can recall—that there was nothing else to be reviewed at that point. Whether the Scottish Government has changed its mind since, I do not know, but that was the position at that time.

Jackie Baillie: Why were you being asked to do that in January, two months after it was known that there was a problem? It is a bit slow.

Sarah Davidson: Again, you would have to ask the permanent secretary that question. I was being asked to do it in the light of the fact that the judicial review had been conceded, and it was clear that, at that point, the Scottish Government and the permanent secretary had conceded that the application and the interpretation of paragraph 10 required to be reviewed.

Jackie Baillie: To your knowledge, has anything happened to paragraph 10 since you provided that report in January 2019, or does it remain the same?

Sarah Davidson: I did not provide a report at all.

Jackie Baillie: Ah.

Sarah Davidson: I said that I did not. Within days, if not hours, of my being asked to review paragraph 10, the decision was taken that, in fact, it would be more appropriate for that to be done externally. I do not know what has happened since then.

Jackie Baillie: This is my final question, convener. We heard from Paul Cackette that it was the permanent secretary's procedure and that she drove the policy development and clearly had a key role in implementation. Did she drive the judicial review process, too?

Sarah Davidson: She was the respondent to the judicial review process—

Jackie Baillie: Yes. I meant, internally, was she the person to whom everyone reported?

Sarah Davidson: If there was a client, as it were, in the judicial review process, the permanent secretary was the client, yes. That role was often discharged through her office, for obvious reasons, given other business, but she was the client.

Jackie Baillie: She was the person to whom people reported and she was the person commissioning the report from you, so she was the person in charge.

Sarah Davidson: Yes, that is correct.

The Convener: For clarity for the *Official Report*, in answer to a question from Jackie Bailie about the conference call, I think you said her "permanent secretary", and my presumption was—

Sarah Davidson: I am sorry—I meant her private secretary.

The Convener: You meant her private secretary—thank you.

Margaret Mitchell: Were you aware of the offer of arbitration to deal with the dispute over the competence and legality of the procedure?

Sarah Davidson: Not at the time—certainly not as I recall.

Margaret Mitchell: You were never made aware of it by anyone.

Sarah Davidson: I was not made aware contemporaneously, as far as I recall. Clearly, I know about it now, but I do not recall being aware of it at the time that the offer was made, and nor would there be any reason for me to have been aware, because I was not involved in the legal discussions.

Margaret Mitchell: Do you know when you did become aware of that?

Sarah Davidson: No, I do not recall, but it could have been as recently as when the evidence was provided for the committee. I cannot say for certain.

Margaret Mitchell: Therefore, there would be absolutely no possibility of your knowing who took the final decision to reject arbitration.

Sarah Davidson: No, I was not involved in that at all.

Maureen Watt: You will have heard me ask Paul Cackette about how often and by what means any ministers were kept abreast of what was happening in all these legal discussions. Are you aware of, or were you copied into, any briefings that went to ministers? Are you aware, for example, of whether your report was shared with ministers, or was that report purely to the permanent secretary?

Sarah Davidson: I was not copied into, and nor would I have expected to be aware of, any briefings to ministers during the process of the

judicial review. My recollection is that my advice to the permanent secretary would not have been copied to ministers, and that would have been normal. You would have to ask her what she then did with it. However, I certainly was not aware that my report went to ministers, and it was not directed to them.

The Convener: Ms Davidson, you just answered a question from Margaret Mitchell about arbitration. Were you aware of the offer of mediation when that was made?

Sarah Davidson: I do not recall. I might have been aware of that, but I certainly was not involved in any decision about how it should be handled. I might have been aware at the time. Nicky Richards might have updated me as part of our routine management meetings, but I could not say with certainty, and I certainly was not involved in handling it.

The Convener: In your submission to the committee, under the "handling complaints" heading, you said that

"In January 2018, Nicola Richards informed me that two of the individuals who had previously raised concerns were likely to make a complaint ... She had, in a previous regular catch up meeting, discussed the appointment of the Investigating Officer with me."

Did she say to you who that investigating officer was?

Sarah Davidson: Yes, she did. She told me, as I think that I said in my written evidence, as part of a normal catch-up meeting, that, should the matters that were being treated as concerns at the time ultimately evolve into formal complaints under the procedure, she was considering appointing Judith Mackinnon as the investigating officer.

The Convener: Were you aware at any point that Judith Mackinnon had had previous involvement?

Sarah Davidson: Again, my recollection is that it is likely that I would have been aware of some previous involvement. There was no reason at that time for that, per se, to have given me any concern, but I think that I would have been aware.

13:15

The Convener: In answer to a member earlier, you referred to having to undertake another check on the documentation for the judicial review and you said that clear advice had not been given previously about what information was required. Who gave that previous advice?

Sarah Davidson: My assumption is that advice about how to conduct searches in relation to a legal process would come from the litigation team in the Scottish Government legal directorate either directly to individuals who were required to search or indirectly via the co-ordination point in the permanent secretary's office. As Mr Cackette set out earlier, the grounds for the judicial review were clearly evolving, so I imagine that a number of requests for documentary checks might have been required. I do not know how many there were, as I was not close to that, but that is the process that I would expect to have taken place.

The Convener: Were you shocked by what was found by the second trawl that was instigated as you described?

Sarah Davidson: I was not close enough to the process to be able to slot that into an understanding of the pleadings such that I would have a reaction one way or the other.

The Convener: You said at the beginning of this evidence session that it was fairly normal for you as DG not to have been involved in human resources issues and that those would very much be left to Nicola Richards and her team. Is it normal in the civil service set-up for a DG to be separated from day-to-day workings at director level?

Sarah Davidson: The model that the Scottish Government has followed since 2007 is one that we describe as a director-led model, so directors have both formal delegations of quite significant financial and other responsibilities and a large degree of operating autonomy on a day-to-day basis in their areas of responsibility. There are a large number of directorates—I forget how many—and I was not the only DG with a large number of portfolio areas in their area of responsibility. In practical terms, that was therefore entirely normal, whether in policy areas or areas of professional specialism. However, it is fair to say that, in areas of professional specialism, there was a particularly high degree of autonomy.

As a DG, I was not a qualified specialist in HR, finance or any of the other areas in my area of responsibility. My role was therefore to support my directors and to seek assurance from them that the way in which they were going about their jobs and discharging their responsibilities was what I would expect. I would ask questions to check that they were thinking things through properly and going about them properly. My fellow DGs would do exactly the same, but it would be entirely normal for the directors to have a high degree of autonomy in discharging their functions.

The Convener: Would it also be normal for the directors at that level to report directly to the permanent secretary on specifics, bypassing their own DG?

Sarah Davidson: Yes, particularly on corporate issues. I think that I mentioned in my opening statement that my role was created only at the

point that I took it up. There had been a variety of ways of handling corporate functions over the years before that, but the heads of corporate functions often reported directly to the permanent secretary rather than to anyone in-between. When the DG role was created, it was recognised that there were some matters, particularly sensitive senior staffing issues and issues on which advice had to be provided to the permanent secretary in her role as principal accountable officer, on which directors would normally provide that advice directly to the permanent secretary.

The Convener: You said that you are not an HR professional and would not be expected to be, but my recollection is that the director concerned is not an HR specialist either.

Sarah Davidson: Not at the moment, but Judith Mackinnon, who was responsible for the bit of the people directorate that required specialist HR expertise, is highly qualified in that respect.

The Convener: This is an open question, but it has been asked by colleagues of other people. Hindsight is a wonderful thing, but do you regret that the organisation's structure is such that you did not have a more direct role in the matter before us?

Sarah Davidson: As somebody who was bringing neither specialist HR expertise, nor specialist legal expertise, and given my understanding of the process, which is, as I have set out, necessarily limited, it is hard for me to see what I could have brought that was additional to that, other than just another pair of eyes.

The Convener: As there are no further questions, I thank you for your evidence today.

That concludes the public evidence session, and we now move into private session.

13:20

Meeting continued in private until 13:42.

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