OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 17 November 2020

Session 5

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COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT COMPLAINTS

14th 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:

Leslie Evans (Scottish Government)
Rt Hon James Wolffe QC (The Lord Advocate)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 17 November 2020

[The Convener opened the meeting at 10:27]

Judicial Review

The Convener (Linda Fabiani): Good morning, and welcome to the committee's 14th meeting in 2020. Our public business is an evidence session on the judicial review phase of our inquiry.

I remind all those who are 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 agreed that it is not our role to revisit events that were a focus of the trial, as that could be seen to constitute a rerun of the criminal trial.

Our remit is clear. It is

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

The more we get into the specifics of evidence—time, people and cases—the more we run the risk of identifying those who made complaints. The more we ask about specific matters that were covered in the trial, including the events that were explored in it, the more we run the risk of rerunning the trial.

Wherever possible, can witnesses as well as members please avoid discussion of the specifics of concerns or complaints, and avoid naming specific Government officials under senior civil service level?

When members ask a question on a particular Government record, can they please ensure that they give the document reference and the footnote reference to the Government witness, for their ease of reference?

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

With that, I welcome the Lord Advocate, the Rt Hon James Wolffe QC, and begin by inviting him to make a solemn affirmation.

The Lord Advocate (Rt Hon James Woffe QC) *made a solemn affirmation*

The Convener: I invite the Lord Advocate to make a brief opening statement.

10:30

The Lord Advocate (Rt Hon James Wolffe QC): When I last attended the committee, I described the constitutional and legal framework within which I give my evidence. That framework includes the principle of collective responsibility, the principle that it is—in general—ministers and not officials who are accountable for the actions of Government, the law officer convention and legal professional privilege.

In relation to legal professional privilege, I am aware of the debate in Parliament on 4 November. The Deputy First Minister has written to the committee advising it that the Government is considering the implications of the motion, consistent with ministers' obligations under the ministerial code. He stated his aim to update Parliament as soon as possible. The committee will appreciate that it would not be appropriate for me to pre-empt the outcome of that process.

That will not prevent me from giving evidence to the committee today about the Government's legal position from time to time in relation to the judicial review. As an introduction, I will briefly describe the evolution of that position.

The petition that was served at the end of August 2018 contained a wide-ranging attack on the procedure and its application. The grounds for that attack included fundamental attacks on the lawfulness of the procedure itself. The Government addressed those grounds and was satisfied that all of them could, and should, be resisted. The Government's position on those grounds is set out in its pleadings.

At the end of October 2018, the contact between the investigating officer and the complainers was identified by the Government as a matter that required to be addressed. Investigation of that issue resulted in both parties adjusting their pleadings to make averments about that contact, and resulted in voluntary production of documents by the Government.

The Government made factual averments about that matter on 5 November 2018. It was introduced into the petitioner's case as a specific ground of challenge in mid-November that year. Adjustment of the pleadings continued into December 2018. The Government was satisfied at that stage that it could properly continue to defend

the case, and that the matter should be argued in, and determined by, the court.

That decision was fully informed by consideration of the legal position. In particular, the Government's position was that paragraph 10 of the procedure was directed at prior involvement of the investigating officer with the matters being complained about, such that the contact between the investigating officer and the complainers in the case was not a breach of the procedure. Although the Government recognised that the procedure was open to an alternative reading, it considered that the arguments could properly be advanced in favour of its interpretation, and that the issue should be put before the court for determination. Based on the factual information that was available at that stage, the Government concluded that it could properly defend the allegation of apparent bias.

The voluntary production of documents by the Government led to calls for more documents. On 14 December 2018, the court approved a specification of documents that resulted in a commission for recovery of documents. On 19 December, during the commissioning process, two documents were produced that disclosed previously unidentified contacts between the investigating officer and the complainers. As the committee is aware, production of those documents led to a review of the case, and to the conclusion that was reached on 2 January 2019 that the petition should be conceded.

I look forward to discussing those matters further with the committee.

The Convener: The committee has many questions for you.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): At what point were you first involved in the judicial review? What was your role in that review? Were you involved in any of the meetings about the judicial review during the timeframe that you gave us of 31 August to 8 January? If you were not involved in the meetings, were you given regular updates?

The Lord Advocate: As the committee is aware from both my initial letter and my previous evidence, ministers do not confirm the involvement or non-involvement of law officers in any particular matter. I have explained the basis for that to the committee.

The corollary of that is that I appear before the committee and accept responsibility for accounting to the committee for the Government's legal position, regardless of which lawyer or lawyers were involved in any particular aspect, and regardless of whether either of the law officers was or was not personally involved.

Maureen Watt: Are you saying that you are not prepared to tell the committee whether you had hands-on involvement in all the legal work that we have heard was being done frantically by the Scottish Government legal department?

The Lord Advocate: As I have explained to the committee previously, when ministers appear before Parliament or committees, they respect the law officer convention that is part of the constitutional framework within which we operate. The effect of that convention is that ministers do not confirm the involvement or non-involvement of law officers in any particular matter.

As I said, that does not imply in the least that I do not accept responsibility for accounting to the committee for the Government's legal position. The ministerial code makes clear my responsibility in that regard. The important point is that, regardless of which lawyer or lawyers were directly involved, I am here to answer the committee's questions.

Maureen Watt: Can you tell me, in that case, whether you were the only minister involved? Were other ministers kept fully informed of what the SGLD was doing?

The Lord Advocate: I am aware that other ministers were informed and involved, but the precise detail of other ministerial involvement is, I am afraid, not something on which I can give chapter and verse today.

Maureen Watt: Well, that is funny because, in evidence to the committee on 27 October we heard:

"I am aware that the Lord Advocate was involved. I am not aware of any other ministers being involved."—[*Official Report*, *Committee on the Scottish Government Handling of Harassment Complaints*, 27 October 2020; c 27.]

Then on 3 November, we heard that ministers were "fully informed", in so far as

"They got written briefings, but they were not given a commentary".—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 3 November 2020; c 35.]

Would you like to comment on that?

The Lord Advocate: I know, and it is apparent from information that the committee has had already, that the First Minister was involved at certain stages. I cannot answer today on precisely what nature and form the briefing that was provided to ministers and to the First Minister took, at any particular point.

Maureen Watt: Can you tell us whether any external legal advice was sought and what the extent of it might have been?

The Lord Advocate: The committee will appreciate that I will not go into the content of

legal advice, but it is aware that the Government instructed senior and junior counsel. The committee has information about the meetings that were attended by senior and junior counsel, who were involved in providing advice throughout the process.

Margaret Mitchell (Central Scotland) (Con): Before we start on my substantive questions, I wonder whether you could clear up something that I raised when the permanent secretary and you appeared before the committee. I asked the permanent secretary who informed the First Minister that the decision had been taken to refer complaints to the police. The permanent secretary suggested that it might well have been you who informed the First Minister of that. Can you confirm whether that was the case?

The Lord Advocate: To be consistent with law officer convention, I am afraid that I cannot, Ms Mitchell. It would not be appropriate for me, as a minister, to confirm my involvement or non-involvement at any particular stage.

Margaret Mitchell: So you cannot do something as simple and basic as saying that you told the First Minister that a complaint had been made about the former First Minister to the police.

The Lord Advocate: It would not be consistent with the law officer convention for me to confirm the involvement, or non-involvement, of law officers at any particular stage in the process.

Margaret Mitchell: Can I also take it that it would not be appropriate for you to confirm whether you had any contact with the police regarding the Scottish Government's handling of the harassment complaint?

The Lord Advocate: It would not be consistent with the law officer convention for me to confirm my involvement, or non-involvement, in the Government's consideration of the matter.

Margaret Mitchell: So those are questions that you will not answer today.

The Lord Advocate: As I have said, I do not think that it would be consistent with the law officer convention for me to answer those questions, for the reasons that I have set out very fully in my initial letter to the committee and in the evidence session in September.

As I have also said, that in no way prevents me from answering questions—in whatever level of detail the committee would like—about the Government's legal position from time to time in relation to the judicial review, the procedure in relation to that, or the considerations that were taken into account from a legal perspective and which were relevant in the context of the Government's handling of it.

Margaret Mitchell: For the avoidance of doubt, perhaps we could absolutely confirm the capacity in which you are appearing before the committee this morning. Is it as the principal legal adviser to the Scottish Government, as a member of the Scottish Parliament with collective responsibility, or in your role as the head of Scotland's independent Crown Office and Procurator Fiscal Service?

The Lord Advocate: Well, I am the Lord Advocate at all times, and so I have the range of functions that the Lord Advocate has at all times. Those include my independent responsibilities as head of the system of prosecution. They also include my responsibilities as the Government's principal legal adviser.

Margaret Mitchell: So you are appearing in both capacities today.

The Lord Advocate: I am the Lord Advocate. I cannot escape the various capacities that go with that role—nor would I wish to.

Margaret Mitchell: The question that therefore has to be answered is this. Given that dual role, your advice to the committee and the fact that you are the head of the independent prosecution service, is not there a danger of compromising that position? Is not there also a danger of there being a conflict of interests, given what a former Lord Advocate has said about it being absolutely essential that the Lord Advocate gives judgments that are fair, balanced and appropriate?

The Lord Advocate: I am absolutely satisfied that there is neither a conflict of interests in those roles nor any compromise in the integrity with which they can be fulfilled.

Margaret Mitchell: I will follow on from Maureen Watt's line of questioning. Did you give any legal advice regarding the judicial review?

The Lord Advocate: I am sorry; I did not quite catch the question.

Margaret Mitchell: Did you give any legal advice regarding the judicial review?

The Lord Advocate: I have made clear the applicability of the law officer convention, which precludes me from disclosing the involvement, or non-involvement, of law officers. However, that in no sense prevents me from answering any questions that the committee might have about the Government's legal position from time to time, the process of the judicial review, the decision making in relation to it, or the various considerations that were brought into play at various points in that process. I will be very happy to answer the committee's questions on all those matters.

Margaret Mitchell: I am asking whether you gave any legal advice regarding the judicial review.

The Lord Advocate: I am not sure that I can add to the answer that I have just given to the member.

Margaret Mitchell: So, is that a refusal to answer, Lord Advocate?

The Lord Advocate: Not at all; I am explaining why—consistent with the constitutional legal arrangements that apply to all ministers who appear before committees—I cannot answer on the particularities of the question that has been asked.

Margaret Mitchell: It was a very general question, Lord Advocate. Either you gave legal advice or you did not.

The Lord Advocate: I will answer all the committee's questions in relation to the Government's legal position, the procedures that were followed and the legal considerations that were brought into play in relation to the Government's handling of the judicial review. It would not be consistent with the approach that ministers take to any appearance before a committee or any debate in Parliament to discuss the involvement or non-involvement of law officers. That is a well-established convention that is respected by all Governments in the United Kingdom, of all parties, and it has been respected over a long period of time for very good constitutional reasons.

10:45

Margaret Mitchell: The problem is, Lord Advocate, that you are refusing to answer one very basic question—

The Convener: Ms Mitchell—

Margaret Mitchell: —and therefore I will move on, convener.

The Convener: I know that the Lord Advocate is more than capable of answering for himself, but I am aware of the time, and many other committee members have questions to ask. Can we accept that position and move on?

Margaret Mitchell: Lord Advocate, were you aware of the offer from the former First Minister of arbitration in the dispute over the competency and legality of the procedure?

The Lord Advocate: Again, I am not going to get into my involvement or non-involvement in any particular issue, but I am perfectly happy to answer substantive questions in relation to the decision not to take up the proposal for arbitration.

Margaret Mitchell: Will you explain that, then, Lord Advocate? That might help us to get somewhere.

The Lord Advocate: Indeed. As a general rule, where an allegation is made that the Government has made a decision that is not valid because it is in breach of some public law or rule, that is, generally speaking, not an issue that it is appropriate to submit to a private arbitration. A Government decision ordinarily stands until it is set aside, and the only bodies that can ordinarily set aside Government decisions are courts. It would be unusual, to say the least, to submit a public law challenge to a private arbitration. In addition—

Margaret Mitchell: Would that arbitration have settled the question on the competency and legality of the procedure?

The Lord Advocate: It is perhaps important to appreciate that an arbitration involves submitting a legal dispute to, as it were, a private judge who is appointed by the parties. One has to identify an individual who has the qualifications and authority to determine the particular dispute that is at issue. Ordinarily, it is a matter for the public courts, which authoritatively decide on legal questions, to rule on those matters—

Margaret Mitchell: With respect, will you answer the question, Lord Advocate? Would it have addressed the legality and competency—

The Convener: Ms Mitchell, I think that the Lord Advocate was answering the question, having already been cut off in answering the previous one. Perhaps it is just due to my particular interest in the question, but I would like to hear the explanation of arbitration and how it works.

Margaret Mitchell: Okay.

The Lord Advocate: An arbitration involves two parties deciding to submit a dispute to a privately appointed judge. In many contexts, there are advantages to arbitration. In other contexts, it is either not appropriate or, for a variety of reasons, not the right thing to do.

I suppose that the first thing to say is that there is no reason—and, as I understand it, there was no reason in this case—to believe that arbitration would be quicker or cheaper. The judicial review proceeded from a petition at the end of August to an expected first hearing in January. Frankly—perhaps regrettably—in terms of legal process, that is pretty swift. Also, if you go to arbitration, you have to pay for your judge as well as meeting all the other associated costs.

As Mr Cackette observed, there were questions about whether it would be appropriate to resolve an issue of the kind that was at the heart of this matter by a confidential procedure. One of the key

benefits that parties may see in arbitration generally is that it is confidential.

Given the nature of the dispute here, which was about whether the Government had gone wrong in law in relation to its handling of the harassment complaints—to put it no higher—very serious questions would arise as to whether that was something that should be dealt with by a private procedure. An arbitration might simply give rise to further legal issues, so it might not necessarily result in finality, although our arbitration laws are designed to secure finality.

It is also important that, where a procedure has been laid down in advance—as there had been for dealing with harassment complaints—one has to be careful about departing from that procedure. At that stage, the Government believed that it would be difficult to separate issues of process from issues relating to the underlying complaint. Therefore, there was a set of questions about whether arbitration would truly achieve finality, whether it would in fact be quicker or cheaper and whether it would be possible to separate out the legal issues.

Overlying that, from my perspective, is a question as to the appropriateness of submitting a public law question—that is, one about whether a Government decision has breached the public law constraints that apply to Government decision making—to a private process, instead of to the courts, whose job it is to determine issues of law authoritatively and, in particular, to supervise, through the judicial review process, the actions of the Government.

Margaret Mitchell: It is my understanding that arbitration would have sorted out the competency and legality of the procedure. We are not talking about the substantive complaints.

More crucially, can you confirm what weight the Government gave to the fact that arbitration is a confidential process that would have enabled the existence of the complaints to remain confidential; the media speculation about the complainers, which has been so damaging and so distressing to them, to be avoided; and the arguments about the legality of the procedure, or a revised procedure, to be heard in full in private? That would not have stopped the trial from continuing and the substance of the complaints progressing, as inevitably happened.

The Lord Advocate: As I said a moment ago, there are real questions about whether a public law dispute of this sort can appropriately be submitted to arbitration. It is the job of the public courts to exercise a supervisory jurisdiction over the decision-making processes of Government. Ordinarily, those sorts of questions are appropriate for the courts and not for private processes, as courts are where Government ultimately is held to account publicly for what it has done.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, Lord Advocate. I have a brief supplementary to Margaret Mitchell's last line of questioning, and then I will go on to my substantive points.

For clarity, are you saying that, if the Government had decided to take the route of arbitration, that would not necessarily have ended satisfactorily and perhaps would have led to a judicial review in any case? Could arbitration not have resolved things so that, as Margaret Mitchell pointed out, they were dealt with quietly so that the whole process could have been restarted and the complaints given a fair hearing under a lawful process?

The Lord Advocate: None of us can rewrite history and know how things would have unfolded. I suppose that one might ask whether, when going into a decision about whether this matter could and should appropriately be dealt with by arbitration, one could have had confidence that arbitration would draw a line one way or another. At the point when a decision would be made about arbitration, June 2018, the Government would contemplate whether going into arbitration—let us suppose a successful outcome—would draw a line under subsequent legal disputes. One could legitimately have that question in mind when deciding whether arbitration would actually draw a line under that matter or whether it might turn out to be the first in a series of issues.

Alex Cole-Hamilton: I will explore the roles that you have defined already to a certain degree in some of your previous answers. You are simultaneously the independent head of the prosecution service in Scotland and the Scottish Government's senior lawyer. I want to explore how that works in the context of the issues that we are discussing and exploring in the committee. Some of the detail of who said what to whom, which may be relevant to our work, is material that was seized by the police and which was held by Mr Salmond only because it was disclosed by the Crown for use in his trial. Is it correct that you have warned Mr Salmond not to reveal that to the committee?

The Lord Advocate: I think that the committee has seen correspondence between the Crown Office and Procurator Fiscal Service and Mr Salmond's lawyers.

Alex Cole-Hamilton: Therefore, that is in the affirmative that you head up that—

The Lord Advocate: Well, you have perhaps personalised it to me—

Alex Cole-Hamilton: It was at your direction.

The Lord Advocate: Well, the Crown Office and Procurator Fiscal Service has corresponded with Mr Salmond's lawyers, yes.

Alex Cole-Hamilton: Therefore, you had access to that information—the correspondence, text messages or whatever—as head of the prosecution service in Scotland, and that would have informed your decision to prosecute Mr Salmond. Is that right?

The Lord Advocate: It is a matter of public record that, as is the case in the great majority of cases that the Crown deals with, neither the Solicitor General for Scotland nor I were personally involved in any part of the Crown's consideration of Mr Salmond's case. That was conducted by professional prosecutors in the Crown Office and Procurator Fiscal Service and a senior advocate depute, as is entirely normal with the most significant and serious crimes that we prosecute.

Alex Cole-Hamilton: However, you would have been across the detail. You would have had access to that information prior to the trial.

The Lord Advocate: No. As I have said, neither the Solicitor General for Scotland nor I were personally involved in any part of the Crown's consideration, which, as I said, is entirely normal. Although cases may be brought to us, the great majority of the significant and serious case load that the Crown carries is not dealt with personally by law officers.

Alex Cole-Hamilton: However, you have intimated that you have knowledge of the material that is held by Mr Salmond in respect of the work of the committee and why he should not disclose it to the committee.

The Lord Advocate: I, personally, do not.

Alex Cole-Hamilton: You do not—that is fine. On the on-going dispute about the legal advice, John Swinney wrote to the committee on Friday last week suggesting that the Government was considering the implications of the motion passed by Parliament and that, under the Scottish ministerial code, releasing the advice would require exceptional circumstances—I think that we have met that test—and the permission of law officers. I presume that he meant you. Is that right?

The Lord Advocate: There are two law officers—me and the Solicitor General for Scotland.

Alex Cole-Hamilton: Yes, absolutely. Therefore, might it come down to a circumstance where you and/or the Solicitor General for Scotland were the only barrier to the will of Parliament, or is Mr Swinney trying to use you as a human shield?

The Lord Advocate: The ministerial code sets out the procedure that must be followed by ministers in reaching a decision. It speaks for itself.

Alex Cole-Hamilton: That is understood. On 11 September—

The Lord Advocate: I should say that all that Mr Swinney is doing in his letter is describing what the process is.

Alex Cole-Hamilton: Thank you for the clarification.

On 11 September 2018, the Scottish Government met with counsel, presumably to decide whether it would contest the permission that had been granted to proceed with the judicial review.

The Lord Advocate: Sorry—can you remind me of the date that you have?

11:00

Alex Cole-Hamilton: The date that I have is 11 September 2018; it is in the timeline of events with which we have been provided by the clerks. I do not have a reference to that meeting in particular, but that was roughly the time at which the court was deciding whether it would grant permission for the judicial review to proceed.

Without going into the case—you made it very clear that the law officer convention prevents you from doing so—can you tell me the reasons, in general, why counsel would suggest not contesting permission to proceed with a judicial review against the Government? What are the kinds of reasons that it would come up with?

The Lord Advocate: In any judicial review, the first question for a respondent—a public authority that is responding to a judicial review—is whether it should contest permission. Essentially, at that stage, the question will involve consideration of the nature of the case and the test that has to be met before the court grants permission.

Question 1 is whether that test, which is a relatively low hurdle—it is deliberately set at a level that is intended to allow a seriously arguable case to proceed rather than to stop cases proceeding—is met in the particular case. Other considerations may come into play in particular cases, such as whether it is appropriate to resist permission or whether the Government recognises that the issue ought properly to be fully aired in court.

With regard to the specifics of what happened at a particular meeting, I cannot help the committee, but I can say that, at that stage of the case, the Government was addressing a number of issues. Those included whether the Government should

contest permission; who was the appropriate respondent; whether the issue needed to be aired; and how to deal with the potential for prejudice to the criminal investigation, which by that point was under way.

On the last point, the Government considered—I think that this point was raised with Paul Cackette—whether it would be appropriate for the petition to be sisted or whether the public interest in relation to the on-going criminal investigation could be adequately protected by reporting restrictions. On that issue, the Government took the view that the public interest could be adequately protected by reporting restrictions and, ultimately, that was a matter of agreement. A number of issues were being addressed at that preliminary stage, one of which was the question of whether to contest permission.

Alex Cole-Hamilton: We know that a court will grant permission for a judicial review to proceed only if it believes that the application has real prospects of success.

We come back to the legal advice. I am not asking for the content of the legal advice, but we understand that legal advice is never absolute—it is about the balance of probabilities. Given that permission was granted, did that not give some pause for thought about the Government's assessment of the chance of success?

The Lord Advocate: No, because, as I said, the test of real prospects of success has been interpreted in case law to make it clear that it is not intended to be a significant hurdle, as it were, to a case that is properly arguable. All that the court is doing at that stage is saying that the petition passes that threshold. As I said, it is intended to be a hurdle that allows properly arguable cases to go forward; it does not reflect the ultimate merits of a case.

Alex Cole-Hamilton: That is it for now, convener, but I might have a couple of small follow-up questions later.

The Convener: Okay. At this point, I will bring in Angela Constance.

Angela Constance (Almond Valley) (SNP): I have a few supplementary questions following what we have heard so far this morning, which I hope the Lord Advocate can answer.

We know that Governments rarely confirm or disclose their legal advice, but when the Scottish Government has chosen to do so in the past, how has it done that—not why, but how? For instance, has it published the advice online, has it released paper copies, has it released the advice generally, or has it released it to named individuals? Has someone been locked in a cupboard in St Andrew's house with the one and only paper copy? How have you done it in the past?

The Lord Advocate: I am afraid that I cannot help on the physical transfer of material.

As for the particular examples, the committee is aware that there are three statutory inquiries to which legal advice has been released: the child abuse inquiry, the infected blood inquiry and the trams inquiry. The information is passed to the inquiry itself, and it is then dealt with in accordance with the rules and regime that apply to statutory public inquiries.

I will make one point about the trams inquiry. As I understand it, the legal professional privilege was not waived generally; the material was passed to the trams inquiry under reservation of the privilege but on the basis that the chair of the inquiry would determine whether particular matters were covered by privilege. That is something that I can perhaps follow up with the committee in writing, to provide absolute clarity.

There have also been certain exceptions in relation to the other inquiries, particularly for litigation files. I can have that followed up if the committee is interested.

Angela Constance: It would be helpful if you could confirm in writing how information was released to the inquiry on in-care survivors of childhood sexual abuse, the trams inquiry and the infected blood inquiry.

As for here and now, let me confirm that I have understood you correctly to be saying that, when the Government decides to release information, as it has done in the past, it has options on how to do that.

The Lord Advocate: The difficulty is that, once you have waived privilege, you have waived privilege. That has been done in the context of particular inquiries, which operate according to a particular set of rules and within the context of a particular statutory regime.

Angela Constance: I understand that. Correct me if I am wrong, but I think I heard you say that, in one of the previous inquiries—perhaps you said that it was in the infected blood inquiry—information was released to the chair of that inquiry.

The Lord Advocate: It was the trams inquiry. As I understand it, the material was transferred on the basis that the chair, who is of course a distinguished former judge, would adjudicate on whether matters were privileged and, therefore, on the question of onward disclosure.

Angela Constance: We obviously have a distinguished parliamentarian as our chair, Lord Advocate.

The Lord Advocate: Yes.

Angela Constance: I have a final question, just for clarity—although it is on a slightly different topic. Will you confirm whether written advice was received from counsel? Were written opinions on the prospect of success of the judicial review received and, if so, when? Can you answer those questions?

The Lord Advocate: I can say that written advice was received at various stages throughout the process. An important point is that legal advice is not a single thing at a single point in time—in the context of a seriously fought litigation, advice is an on-going process. As the committee will appreciate, different lawyers might take different views, and the same lawyer might take a different view as their consideration of a case develops. That is all part of the normal process of taking advice. Ultimately, the Government must reach a legal position on which it is prepared to stand and defend itself in front of the court.

Throughout this case, the process continued of advice being taken and considered and of lawyers expressing and refining their views. Members will appreciate that I will not go into the detail of that, because the Government does not waive its legal professional privilege.

Advice comes in many forms—in writing in a formal document, in an exchange of emails and verbally at a meeting. In any given case, the process of developing a legal position might involve all those features.

Angela Constance: Lawyers changing their minds or disagreeing with each other—imagine that.

The Convener: Of course, committee members never do that, do they?

Alison Johnstone (Lothian) (Green): In his letter of 13 November to the committee, the Deputy First Minister wrote:

> "As the Lord Advocate has noted, the protection of the Government's legal professional privilege is a routine part of good government."

However, as you just discussed with Angela Constance, protected advice has been shared in at least three instances. Was good governance not applied in those instances?

The Lord Advocate: The basic point is that the Government routinely maintains its legal professional privilege. One might say that the examples to which you referred demonstrate how unusual it is for the Government to waive its privilege, and show that it has done so only in the very particular contexts that involved the statutory inquiries that were described, in relation to which a particular regime operates. For all the reasons that I discussed when I appeared before the committee in September, such privilege is an important feature of maintaining good governance and its waiver is exceptionally rare.

Alison Johnstone: In his letter, the Deputy First Minister also said:

> "The written submissions from the Scottish Government of 20 July and from the Lord Advocate of 4 August and my letter of 14 August set out the basis on which LPP applies and its importance to upholding the ... law."

It is fair to say that the committee has discussed the subject at length. It is possible to share legal advice—you spoke about "particular" statutory inquiries, but this is a particular inquiry, too. The Parliament has set up an inquiry, and it is difficult—if not impossible—for us to fulfil our remit without the sharing of such advice. Can the committee properly fulfil its remit without such a waiver?

11:15

The Lord Advocate: That is a very important question; I will answer it in just a moment. It is important that I do not say anything that pre-empts the Government's reconsideration of the question of legal professional privilege. I would not want my agreement that it is an important feature of good governance that is waived exceptionally to be taken as pre-emption of the position, one way or the other. The Government is going through a process of looking again at the question, and it is not for me to prejudge or pre-empt that.

I am here to answer, in as much detail as the committee wishes, questions about the Government's legal position, the way that it dealt with the judicial review and why it took the decisions that it took at particular times. The Government's legal is position is patent in the pleadings. For my part, I am content that I can be as open as can be in dealing with the Government's legal position and the considerations that came to bear on decision making at different points in the process. All that can be explained and explored without needing to see, as it were, the blow-by-blow internal thinking about who said what to whom, and which lawyer took which particular view.

The point that advice is only advice is important. The only certainty in a litigation is the decision that the court ultimately gives at the end of a case. Government has to determine what position it takes in a litigation—the position that it is prepared to defend in court. Ultimately, it is accountable in the court for that position, and it might be accountable in other forums. This is a forum in which the Government is clearly accountable for the decisions that it took in relation to the judicial review.

Alison Johnstone: Obviously, this is a very expensive judicial review for the public purse. On receipt of the petition, was an assessment made as to whether the former First Minister had a real prospect of success? What documentation and materials were used to inform that view?

The Lord Advocate: The Government assessed the grounds of the petition. In a judicial review, it is entirely routine that the Government—or any respondent—focuses on the allegations that are made. At that stage, the Government was focused primarily, but not exclusively, on the grounds in the judicial review. It was satisfied that it had a good solid basis for defending all those grounds, and that it should do so.

Alison Johnstone: Did the Scottish Government consider that the former First Minister's argument that the procedure was "procedurally unfair" had a real prospect of success? Was a complete analysis undertaken of the policy and how it had been applied—particularly application of paragraph 10? Paragraph 10 says that the person appointed as the investigating officer

"will have had no prior involvement with any aspect of the matter being raised".

However, in his note of 2 November, James Hynd said:

"The operation of this part of the Procedure is not meant to preclude an"

investigating officer

"being appointed who had some foreknowledge of the circumstances of the complaint".

To my mind, those two things seem to be at odds with each other.

The Lord Advocate: I will come to paragraph 10 in a moment, if I may. It is very important not to get a telescoped sequence of events, as it were, but to understand that the litigation developed sequentially.

As it was first raised, the petition said nothing about the role of the investigating officer and contact with the complainers. That was not one of the grounds on which the petition was raised. At that stage, the Government was focused primarily on the issues that were identified in the petition, which is entirely normal in any judicial review. At the end of October, the Government identified the issue relating to contact between the investigating officer and the complainer, and the Government, having recognised that that was an issue that should be addressed, had to do two things. First, it had to consider the interpretation of procedure—I will come back to that in a moment—and, secondly, it had to investigate the factual position; that is to say, it had to investigate the nature of the contact and the extent to which it might be regarded as creating a difficulty.

If one looks at the timeline, through November, both parties were adjusting their pleadings on that issue. I may say that Government made factual averments on 5 November about that contact, and voluntarily disclosed documents to the petitioner, because the Government recognised that it had an obligation and responsibility to be candid about the position. Then, in mid-November, the petitioner added that as a new ground of challenge in the judicial review. The process of adjustment of the pleadings continued, I think, into December.

Then, when that process of adjustment of proceedings had been completed in early December, the Government reviewed its legal position. Again, I note that it is entirely normal in any litigation process to undertake a process of investigation and consideration and then to review where you stand, and the Government reviewed where it stood. At that stage, it was satisfied that it continued to be proper to defend the judicial review on the new ground that had been stated, and that the issue could and should be put before the court for determination. Obviously, that changed a few weeks later, as a result of the documents that were disclosed in the commission process.

It is very important to appreciate that, when an issue is raised in the context of litigation, it is rarely a kind of binary point. Almost invariably, it is a matter that needs to be considered and investigated and, if there are facts that must be explored, they must be explored as far as they can be, before a conclusion is reached.

On the specific point about interpretation of the procedure, paragraph 10 of the procedure says of the investigating officer:

"That person will have had no prior involvement with any aspect of the matter being raised."

The critical phrase in that sentence is "the matter being raised". The Government's interpretation of that phrase was and is that it refers to the subject matter of the complaints; that is, the events that are being complained of. That interpretation is eminently supportable; it is a natural reading of the words. The context, as I understand it, is of an employment grievance procedure, in which it is not unusual for there to have been contact between a manager who is involved in investigating the matter and a complainer. On its own, that does not necessarily give rise to an issue in relation to the process. The Government's interpretation of that particular sentence in the procedure was that the fact that there had been contact between the investigating officer and the complainer did not amount to a procedural breach.

That was the Government's interpretation, but it became evident during the judicial review that it was possible to read the procedure in a different way—that is not particularly unusual in the context of a litigation, as one has to revisit one's legal analysis—and that if one focused on the words "any aspect of" rather than on "matter being raised", one could read the procedure in a broader sense that meant that contact with the complainer by the investigating officer would be a problem.

The Government was perfectly happy to put the interpretation issue before the court for determination, and its position was to address the critical wording "matter being raised", and to ask what the phrase meant. A natural reading of those words is about the "matter" which is "being raised" in the complaint—the subject matter of the complaint. In that view, the behaviour of the investigating officer, who—I think that I am right in this—was not in the Scottish Government at the time of the events about which complaints were made, was unproblematic with regard to the procedure.

There clearly was an issue of interpretation of the procedure, but the Government was entirely content to argue its interpretation before the court and to have the court adjudicate on the question. Decisions on disputed questions of interpretation are precisely the kind of thing that courts do daily.

A separate argument was, of course, advanced, which was that the nature and the extent of the contact between the investigating officer and the complainers was such as to justify the conclusion that apparent bias compromised the fairness of the procedure. The question whether that contact was right, wrong, defensible or not defensible critically depended on an understanding of the factual detail of that interaction.

Through November 2018, the Government identified documents that helped to disclose the nature of that contact. It investigated the nature of the contact, disclosed documents to the petitioner, then reviewed where it stood in early December after its engagement in that process, and after both parties had set out their stalls in the pleadings. The Government was content that it could properly defend the "apparent bias" argument on the factual information that was then available in the first or second week of December, but events then moved forward.

We come to the commission appointment and identification of two documents that disclosed additional contact between the investigating officer and the complainers, which had not previously been factored into the considerations. That led—entirely appropriately—to a review of the Government's position and, ultimately, to concession of the case.

Alison Johnstone: I do not want to take up any more time, but paragraph 10 of the procedure, which you have highlighted as well, says of the investigating officer that

"that person will have had no prior involvement with any aspect of"

the matter. The complainant and the investigating officer had had contact, however, so it seems risky for the Government to feel that it had robust grounds on which to contest that.

11:30

The Lord Advocate: All I can say is that the Government interpreted that sentence in the way that I have described. I have no difficulty with reading the phrase "the matter being raised" as being, in effect, squarely directed at the subject matter of the complaint.

In the context of an employment grievance process, I am advised that the fact that someone involved in the investigation and decision-making having had prior contact with the person who has raised the grievance would not, in itself, ordinarily be regarded as giving rise to any issue of procedural unfairness.

Because one reads any legal document in its context, that is part of the context in which one reads the sentence and, in particular, part of the context in which one reads the phrase "the matter being raised".

As I said a moment ago, the Government recognised, of course, that there was another point of view, when it—

Alison Johnstone: If someone else in the room had been putting that view forward, might a different conclusion have been reached? If, in relation to the words "any aspect of", someone had said, "Someone here has been involved in an aspect of it", would that have been flagged up as an issue?

The Lord Advocate: It was recognised. When in late October, as I understand it, those who were involved in the litigation appreciated that there had been contact between the investigating officer and the complainers, the interpretation of paragraph 10 was immediately focused on as a question that needed to be asked and answered. Although, as far as I understand it, the Government had, up to that point, been very clear about what the paragraph meant, and continued to be satisfied that it could properly defend that interpretation, it recognised that there was an alternative way of reading that sentence, and that it would have to be—as it was—prepared to argue the issue in court. That is what courts are for: to determine, among other things, the meaning of documents that are disputable.

The mere fact that an argument arises in a litigation does not mean that the litigation will be lost on that ground; the argument is to be addressed and considered, and one's response to it developed. As I have said, fully recognising that there was an argument to be had, the Government was prepared to submit that question to a decision by the court. If the Government ran away from every difficult argument that was raised in a litigation, that would certainly not serve the public interest.

Alison Johnstone: Thank you.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): Lord Advocate, I think that you indicated that some of the issues raised by this case meant that submitting any aspect of them to private arbitration would in your view—if I am quoting you accurately—have raised questions, given the accountability of Government to the public courts for its actions. Will you elaborate on what you meant by that?

The Lord Advocate: There are two points. The first is a technical point. I have to confess that I am not expressing any sort of concluded or final view but, as a general proposition, when one is dealing with judicial-review type challenges, it is proper that the issues are determined by a court. It seems to me at least doubtful whether a private arbitration can resolve such issues.

Quite separately, there is an issue of accountability, as you have alluded to in your question. Part of the process of accountability of Government is that it is accountable for the lawfulness of what it does before the public courts. If there is a serious challenge to the lawfulness of Government action, the right place for that to be resolved is in the public courts, and Government stands or falls by the outcome. That is all part of a proper constitutional democracy. Of course, Government is also accountable in this building for what it does. That is the other strand of accountability.

It is not for me to comment on how it would be viewed had this matter gone to a private arbitration and been dealt with confidentially, but questions might have been raised about the Government seeking to avoid the public scrutiny that comes from a formal court process.

Dr Allan: In that case, had the Government gone down that route—again, I can see that you are not keen to speculate on what-ifs—and the matter had been, as Mr Cole-Hamilton said, "dealt with quietly", would it have been possible to separate out the two issues in a way that would have avoided the controversies of the kind that you have mentioned?

The Lord Advocate: Again, it is very difficult to address a hypothetical question. The fact is that a decision was made not to proceed to arbitration. There were clearly questions as to whether an arbitration would truly achieve finality and there were, as I have said, other reasons why arbitration was not considered to be the right way to go.

Dr Allan: On another subject—I am not asking about your involvement or otherwise in this case, as I do not think that I will get an answer on that—will you explain whether the Lord Advocate would typically be involved in the process of taking decisions about whether to oppose commission in the case of a judicial review?

The Lord Advocate: To oppose a commission?

Dr Allan: Yes.

The Lord Advocate: I do not think that one can answer that in any general way. Although commission and diligence is pretty unusual in a judicial review, it is not a particularly unusual feature of litigation. In fact, it is a normal process in many litigations that the court approves a specification of documents and authorises a commission. That in itself often results in the disclosure of documents and no commission is held, but it is not unusual for a commission to be held.

I will put it this way. The committee will appreciate that the law officers have a wide range of responsibilities. The question of whether a particular decision in a litigation engages or demands the attention of a law officer at any given moment—as opposed to dealing with one or other of the many other things that might require the attention of a law officer—is, obviously, something that one cannot answer in the abstract.

Dr Allan: Finally, you mentioned the law officer convention about not commenting on whether legal advice has been given. You seemed to indicate a distinction in your view between the issues around legal advice relating to an inquiry, such as the one on the Edinburgh trams, and the issues around advice on litigation, in terms of the consequences for future Governments. Were you making a distinction, or am I reading too much into that?

The Lord Advocate: I would say that the starting point is that Government does not waive privilege—that is exceptionally rare. When an issue is raised, it obviously looks at the particular circumstances and context and has to weigh up the range of public interest factors. As I said earlier, I am very keen in anything that I say not to be thought to be pre-empting the process that Government is undergoing and of looking again at how that balance should be struck.

I think that I mentioned when I appeared before the committee in September that a particular set of issues arises in relation to litigation. The nature of

litigation is that the Government's previous legal position inevitably comes under scrutiny. An issue has been raised as to whether the Government got the law right previously. Inevitably, that may involve the Government having to reconsider whether it was right in the approach that it took. As I described in relation to the interpretation of paragraph 10, the Government may have to recognise that there is a serious argument to be had that it did not appreciate that it needed to have.

The nature of advice in the context of litigation is an assessment of risks and uncertainties. Advice is, of course, ultimately advice, and the only certainty is the certainty that the court gives you at the end of the day, if the case runs that far. There are judgments to be made in assessing the merits of particular arguments, and there are judgments to be made about the consequences of that assessment for how one should conduct the litigation.

By its nature, litigation is a highly dynamic uncertain process that is heavily informed by the legal considerations. It is a process in which it may be thought to be particularly important that Government can take views candidly, that alternative views can be expressed candidly and that a debate can be had about what the correct judgment is and, as a result, what position the Government should take in the litigation. There is a particular focus in litigation, which may be thought to be relevant to the public interest considerations.

As I say, though, I would not want the committee to think that that is in any sense pre-empting or prejudging the way in which the Government will approach the issue that it is looking at again at this stage.

Jackie Baillie (Dumbarton) (Lab): Good morning, Lord Advocate—it still is just about the morning.

I have a number of questions, so I will be content with short answers, and I will try to be as quick as I can. First, we understand the process outlined by the Deputy First Minister following the parliamentary vote, but have you received a request from the Deputy First Minister, or indeed anybody in the Cabinet, in relation to the release of legal advice following the vote in Parliament?

The Lord Advocate: I do not think that it would be right for me to either pre-empt or—

Jackie Baillie: I am not asking you to do that. It is a process question. I am very clear that I cannot ask you about the content, and I absolutely will abide by that. I am asking you about the process. I am keen to understand, in the process, whether you have been contacted yet by the Deputy First Minister.

The Lord Advocate: Again, I do not think that it would be right for me to discuss an on-going process that the Government is engaged in and which, ultimately, will result in a collective decision by ministers.

Jackie Baillie: Sure, but it is not the collective decision by ministers that I am asking about—that is very clear in the ministerial code. However, ministers need to consult you not as a minister but in your role as Lord Advocate, and I am merely asking a process question about whether they have consulted you yet. Have they picked up the phone, dropped you an email, chapped the door, gone on Zoom—anything? Have they been in touch with you about this?

The Lord Advocate: You say that I am consulted as Lord Advocate. The law officers require to be consulted. They are being consulted in their capacity as the Government's principal legal advisers in the context of that process, so I do not think that it would be right to get into the way in which the process is being taken forward at the moment. The Deputy First Minister has set out what the Government is doing.

Jackie Baillie: Indeed, and you referred to the process, which is why I am asking the question. I am not asking you to tell me the content of the deliberations; I am simply asking you whether anybody has contacted you about this yet.

The Lord Advocate: I am clearly aware of the process—

Jackie Baillie: That was not my question. I know that you are aware of the process because you are a smart man. My question was very specific: has anyone contacted you yet?

The Lord Advocate: I do not think that it would be consistent with the collective nature of the decision-making process for me—at this stage of an on-going process—to get into the ins and outs of internal discussions within Government.

Jackie Baillie: I was not asking you to get into the ins and outs but was asking one specific question. However, I have tried several times to get an answer from you, Lord Advocate, so I will not pursue that further.

I will take us to the process of the commission of documents. You have told us that information emerged in late December 2018 that made the Government's case impossible to sustain. What exactly was that information?

11:45

The Lord Advocate: I am not sure that I used exactly that phrase. In any event, what happened in the commission was the production of two documents. The committee has those as JR011

and JR017. Those documents disclosed additional contact between the investigating officer and the complainers that had not previously been appreciated. JR011 is a letter that referred to a meeting between the investigating officer and one of the complainers on the previous day—in effect, immediately before the formal complaint was made. The other document was an email chain that indicated arrangements between the investigating officer and the other complainer to meet.

On 21 December, the investigating officer gave evidence at the commission that she could not recall the meeting referred to in JR011. Disclosure of that material was damaging in several respects. First, it apparently revealed direct contact between the investigating officer and one of the complainers immediately before the formal complaint was made, and that altered the whole factual picture that the Government had when considering the question of whether the objective test for apparent bias was met—there is no suggestion of any actual bias.

The Government clearly had to review that question. One might say that that picture of additional contact called for an explanation. The Government was unable to explain it, because the meeting could not be recalled, which meant that the Government was not in a position to rebut the inferences that might be drawn.

Jackie Baillie: Can I interrupt you there? I have a lot of questions to run through and I am conscious of time.

The Lord Advocate: I am just trying to explain why the revelation of those documents was damaging.

Jackie Baillie: I understand that.

The Lord Advocate: It is just worth making the point that it was substantively damaging from the Government's perspective and, properly, prompted a review of the whole factual picture. The reference to an apparent meeting between the IO and one of the complainers on the day before the complaint was formalised contradicted a statement that the Government had made in its pleadings. The emergence of the documents at that very late stage also contradicted assurances that counsel had given to the court and their counterparts about disclosure of documents. There was an impact on the Government's presentation of the case as a whole.

The critical point is that, as a result of all of that, a review was prompted to factor in the additional facts to the whole factual picture and the Government concluded that it was no longer proper to defend that apparent bias allegation.

Jackie Baillie: Can I take you back? The Government opposed the commission of documents on 14 December. Why did it oppose the establishment of the commission? That was where those documents were revealed.

The Lord Advocate: At that stage, Government had gone through a process of voluntary disclosure of documents.

Jackie Baillie: However, at that stage, a senior civil servant told the court that there were no other documents to disclose.

The Lord Advocate: That is the point that I just made: the arrival, or discovery, of those documents in the course of the commission process contradicted assurances that had been given.

Jackie Baillie: If the Government had won its position on 14 December, we therefore would never have seen those documents. I am left wondering in whose interest it was to conceal them.

The Lord Advocate: There was never any intention or desire to conceal anything; as I said earlier, the whole approach that the Government took in November in relation to putting facts into the pleadings and disclosing documents voluntarily reflected a desire to be candid and transparent. We know from the way matters turned out that, regrettably, the investigations that were undertaken then to investigate all relevant documents and to get a full picture of the facts was not as robust as it should have been, and lessons have to be learned from that.

Jackie Baillie: At your last appearance before the committee, on 8 September, you said to Margaret Mitchell that

"there was no decision to withhold documents".—[*Official Report*, *Committee on the Scottish Government Handling of Harassment Complaints*, 8 September 2020; c 24.]

Why, then, did the Government oppose the motion to establish the commission?

The Lord Advocate: I think that I may have to follow up on the reasons for that decision in writing. However, it is an entirely routine part of the litigation process for a litigant to seek to oppose a formal order for the production of documents, inter alia, because it has already produced documents or on a variety of other grounds. It is not unusual for that to be a matter of debate.

Jackie Baillie: I accept that. However, clearly, the Government did not produce all the documents.

Moving on, it is clear from the timeline in my head and from the evidence that we have been given that the lack of independence of the investigating officer was known in late October.

Given that you are the Government's top legal adviser, did you know about that at that stage?

The Lord Advocate: I have already said that it would not be right for me to disclose my involvement or non-involvement in the process. However, from late October, the Government was well aware that that was an issue that required to be addressed.

Jackie Baillie: Although you probably will not be able to answer this question either, I will try nonetheless. Did you at any stage intervene in the process, particularly around the disclosure of information to the commission on documents? Did you email, send a memo, or pick up the phone to anybody to say, "We need to disclose information"?

The Lord Advocate: What I can say is that the Government was very clear that it required to be candid and transparent; that goes back to the initial point at which the issue was identified and to the work being done in November. As I said, it proactively put factual averments into the pleading and it voluntarily disclosed documents.

We know from what transpired in December that the process of investigation and identification of documents at that stage was not as robust as it should have been. There is no question: lessons have to be learned corporately by Government in that regard. However, at no point was there any intention, desire or wish not to be entirely transparent and, ultimately, have the Government's decision laid before the court fully—as in all Government litigation—and stand or fall by the decision of a court.

Jackie Baillie: As our most senior law officer, will you confirm that all documents—whether in relation to the documents commission or to the search warrant in the criminal case—have now been released by the Scottish Government?

The Lord Advocate: You used the phrase "all documents". I am not trying to be difficult here, but to which documents are we referring and release to whom are we considering?

Jackie Baillie: If I knew that, the committee would be over much quicker. I do not know that, which is why we are asking these questions of the Scottish Government.

The Lord Advocate: The Government carried out searches in November, those searches were clearly not robust enough and additional documents came to light in the course of the commission. I have been involved in litigation for nearly three decades now and it is not that unusual for documents to be identified in the course of a commission. However, it should not happen in a case of this sort and it should not happen when assurances have been given about the position. From evidence that the committee has already heard, it is aware that, even after the commission, further documents were identified, which, again, simply goes to illustrate that the process of identifying all the relevant material in November was not as robust as it should have been.

Jackie Baillie: We are told that the permanent secretary took the decision to concede the case after a report from Sarah Davidson. Ms Davidson told us that she did not meet any legal advisers. Did you ever see her report?

The Lord Advocate: Again, it would not be right for me to comment on what I have seen or not seen.

Jackie Baillie: I will try again in a slightly different way. According to the ministerial code,

"Ministers may acknowledge ... that they have received legal advice on a particular topic, but must not"

say

"who provided the advice or its content."

Did the permanent secretary receive legal advice on the case at the time of the Davidson report? I am not asking for the content of the advice or who gave it.

The Lord Advocate: That is a question that you would have to ask the permanent secretary. My understanding is that the report contained legal analysis, and I think that the committee has already had some evidence about the matters that were dealt with in the report. It would not be surprising if, thereafter, the permanent secretary sought additional legal advice.

Jackie Baillie: So, you are not aware of whether the permanent secretary did or did not seek legal advice.

The Lord Advocate: As I said, that is a question that would be better asked of the permanent secretary.

Jackie Baillie: I know, but you are here.

The Lord Advocate: I am very conscious that I am here. The question would be better asked of the permanent secretary, in the sense that I am not directly party to what she did or did not do.

Jackie Baillie: In the same vein, did the permanent secretary or ministers receive written legal advice after the activities of the investigating officer emerged in late October?

The Lord Advocate: As I said earlier, advice is a process. I think that I would be right in saying that there was both internal and external written advice and, of course, there were meetings at which advice might have been given verbally. In the normal course of things, that is part of how the

Government comes to a decision on the position that it will take on litigation.

Jackie Baillie: Your response to Alison Johnstone gave me the impression that there was a review in December. However—based on what you have just told me—there was on-going legal advice from late October to early December.

The Lord Advocate: In any hard-fought litigation, there is on-going legal advice at different stages.

Jackie Baillie: The names of the two external counsels are already in the public domain. I do not understand why we cannot see their written opinions when the public paid for them and the Parliament has voted for that to happen. You are unable to tell us whether, following the Parliament vote, you have had a request about that. When Roddy Dunlop gave his opinion, who did that go to? Was it to you, the permanent secretary or the First Minister? Was it channelled through you? What was the process for how that opinion arrived?

12:00

The Lord Advocate: Again, you are describing the situation as if there is a single piece of legal advice. In fact, advice is given and received constantly in different ways. In the ordinary process of government, there is no simple answer that can be given to that.

Jackie Baillie: Let me put the question in a different way. At key points, Roddy Dunlop would have given his opinion. Usually Queen's counsels' opinions are given in writing. On the occasions when those opinions were in writing, to whom did they go? Was it the permanent secretary? Was it the First Minister? Were they filtered through you?

The Lord Advocate: Again, I am not sure that I can give an answer to that. I certainly cannot give an answer here that I would be confident would be accurate about what was done in every case.

Jackie Baillie: It would certainly be the case that you could tell me in relation to yourself, as Lord Advocate, whether those opinions were filtered through you.

The Lord Advocate: As the committee knows, I am constrained in terms of what I can say about my involvement at different stages.

Jackie Baillie: Absolutely—and that is why I am not asking about content or who gave it. I am simply asking a process question about the flow of information. That is all I am asking.

The Lord Advocate: Again, I do not think that I can give an answer that I would be confident would be accurate and appropriate, given the range of circumstances in which advice was being tendered and the different ways in which it was being proffered.

The Convener: Ms Baillie, do you have many more questions?

Jackie Baillie: I have one more, convener, you will be pleased to hear.

The Convener: Oh, good!

Jackie Baillie: I rattle through my questions, convener.

According to paragraph 2.30 of the ministerial code, it is your job as Lord Advocate

"to ensure that the Government acts lawfully at all times."

Clearly, that did not happen in this case, because the Government's actions were described as "unlawful", "procedurally unfair", and "tainted by apparent bias". You now have the opportunity to look back, so why do you believe that, as some people have said to me, you failed in that most important of tasks?

The Lord Advocate: By way of general context, you are absolutely right that that is one of my responsibilities under the ministerial code. From time to time, the Government's actions are tested in court and, from time to time, judgments have been made against Government about its position.

The member will appreciate that law officers are at the apex of an enormous system of legal advice. The ministerial code makes it clear that most advice is tendered by others within the Government's legal directorate, albeit that the law officers are ultimately responsible. That system is in place to try to ensure, as far as possible, and as far as any system can, that legal considerations are properly taken into account in the actions of Government.

From time to time, the Government's actions are challenged in court and, from time to time, it is found to have acted unlawfully in different ways. It is in the nature of any human system that, from time to time, errors are identified that, with hindsight, one would always wish had been identified at a different point. That does not mean that there has been any failure of responsibility to account for what has been done. It is part of our constitutional system that the Government is open to scrutiny in the court, that its decisions are open to challenge, that serious arguments can be made, and that, from time to time, the Government will be found to have acted unlawfully. That is within the nature of constitutional democracy, and I am very happy to play my part in that.

Murdo Fraser (Mid Scotland and Fife) (Con): Good afternoon, Lord Advocate. We have covered a lot of ground this morning. I will follow up on some of the questions that my colleagues have asked, in order—I hope—to fill in a few of the

blanks, although I appreciate the constraints that you are under in relation to the legal advice.

I start by following up on some of Alison Johnstone's questions about paragraph 10 of the procedure. I will quote the wording, because it is relevant. It states:

"In the event that a formal complaint of harassment is received against a former Minister, the Director of People will designate a senior civil servant as the Investigating Officer to deal with the issue. That person will have had no prior involvement with any aspect of the matter being raised."

That is the issue on which the case fell.

Looking at it as an outsider, I would have thought that when it became apparent that the investigating officer had had prior communication with the two complainants, that would have been deemed quite quickly to be fatal to the Government's case. However, what you have said to us suggests that the Government had a different interpretation.

Next, I take you to the timeline for the judicial review that the Scottish Government has supplied to us. To put my question in context, I note that you said earlier that you came to understand towards the end of October that there was an issue with the investigating officer's prior engagement with the complainants. We also heard that in evidence from Paul Cackette, two weeks ago.

If we look at the timeline, we see that there was a meeting on 2 November 2018, which was

"a consultation with Counsel",

Elizabeth Lloyd, who was the First Minister's chief of staff, and the Scottish Government to discuss the new material that had emerged. Were you in attendance at that meeting?

The Lord Advocate: I will not say whether or not I was in attendance at the meeting, but I am very happy to answer fully the substantive questions that you have raised.

First, it is important that I make it clear that the issue on which the case was conceded was not interpretation of paragraph 10. It was conceded on the ground that, given the whole factual picture of contact between the investigating officer and the complainers, the objective test for apparent bias was met.

That is quite important because—as I said to Alison Johnstone—the Government was content, and continued to be satisfied, that the interpretation that it put on the sentence in paragraph 10 of its procedure was eminently defensible, and one that it would have been prepared to put before the court for adjudication. No concession was, or has been, made about the question of interpretation.

When the issue was identified in late October, people immediately went to paragraph 10 of the procedure. That was not considered to be fatal. It was identified that there was a debate to be had—any lawyer who is involved in litigation understands that many issues may arise that one may have to defend and argue in court—but the Government was content that its interpretation of that sentence was one that was capable of being argued and defended in court, and one that it would be right to submit to the determination of the court.

The issue of apparent bias depends ultimately on close knowledge of the facts. Regrettably, at the point where matters had been investigated in November and things were reviewed in the light of that, the full factual picture was not known.

There is another point that is worth making. The question of whether or not to concede a case is itself a difficult exercise of judgment, which is informed by consideration of the legal considerations and the legal position. I suppose that one has to ask what a concession would have looked like, or what its effect would have been, had Government conceded the case at a point where it considered that it had properly and responsibly stateable arguments.

We had two complainers, and we had complaints. As long as the Government had properly and responsibly stateable arguments, there was a strong interest in putting the matter to adjudication by a court, and having the clarity and certainty that would come from its decision. I say that partly because of the underlying interest of complainers whose complaints had apparently had determinations that were now under challenge, and partly because of the desirability of not conceding as long as there was a properly responsible argument to be made.

One also has to remember that this was a case in which there was a plethora of grounds for challenge—from those on the lawfulness of the procedure itself, to its application to a former minister, all the way through to particular issues about the way in which the procedure had been applied. Assuming, of course, that the Government's case could be responsibly defended, a determination by the court would have given clarity and certainty about precisely where any error lay, and on the position going forward—even if it had lost.

It might be worth reflecting on that range of considerations and, as I said earlier, the virtues of the Government's submitting its processes to an adjudication by the public court, whose job it is to tell us what the law is and how it applies and which, ultimately, is the only body that can do so definitively.

Murdo Fraser: Yes—although, of course, the case did not reach the stage of being determined by the court.

The Lord Advocate: It did not.

Murdo Fraser: It was conceded by the Government.

The Lord Advocate: Indeed.

Murdo Fraser: I want to go back to the meeting on 2 November and the subsequent events. I presume that, at that meeting, a fresh legal opinion would have been taken from counsel on the new facts that had emerged. That process would have developed over the following weeks. In that process, was there any point at which the decisions of the Government were contrary to the legal advice that was given?

The Lord Advocate: You are absolutely right to say that advice was being taken constantly. That is perhaps quite an important point about legal advice that is given to Government. There is also an issue about what we mean by such advice, which comes from a range of external and internal sources. The Government has to synthesise that range of advice and take a position.

In the course of that process, different lawyers might express different views—that is a normal part of it. At different times, the same lawyer might express different views, which, again, is normal. It was a feature of the process that we are discussing that different views were expressed and that, at different points, the same individual might have expressed different views. That is entirely normal. Ultimately, those views are synthesised and the Government reaches a position.

Murdo Fraser: Forgive me for trying to summarise, but you are saying that there might have been cases in which the view of counsel—in this case, senior counsel—was not followed by the Scottish Government.

The Lord Advocate: You will appreciate that I am not going to attribute any particular advice to any particular individual. What I am describing is the normal process for Government litigation—and, I suspect, for other parties who are engaged in litigation—in which different views might be expressed, the same person might express different views at different times and, ultimately, a position is taken. The Government has not waived its right to legal professional privilege, so I will not get into precise detail on that to-ing and fro-ing.

Murdo Fraser: We know that, when the award of expenses was made to Mr Salmond, that was done at the highest level which, in the words of Lord Dunlop, would be done only where the defence was conducted "either unreasonably or incompetently." How would you characterise the defence made by the Scottish Government? Clearly, something went far wrong with it. As is shown in the timeline, we know that, on 18 and 19 December, new documents that had not previously been identified were produced by an investigating officer regarding communications between her and the complainants. Was that incompetent?

12:15

The Lord Advocate: You said Lord Dunlop, but I think that it was Lord Hodge.

Murdo Fraser: Sorry—it was Lord Hodge. Too many lawyers have been getting involved.

The Lord Advocate: As when I answered a similar question in September, I will not attribute any particular adjective to the position. It was highly unsatisfactory—let us put it that way—that the Government should be in a position where, after it had set out its stall in pleadings, disclosed documents and given assurances to the court that full disclosure had been made, it transpired during the course of the commission that there were additional documents, which had not previously been disclosed, that bore substantively on the issues in the case. Indeed, as the committee has heard, further documents were identified even after that point.

That was not the way that I, as the Government's senior law officer, would like to see a Government litigation conducted. It is clear that, corporately, there was a failure to get to the bottom of all the documentation at the time when that should have happened—in the course of November.

I recognise the difficulties that can be involved in identifying all possible documents on different devices and in identifying documents that may have been deleted from some devices but not others, and so on. You would have to ask others about the details of recovery of documents, but I am alive to how challenging that can be in any large complex organisation. It is not unique to Government—that can be challenging for large corporations. However, that is not the way I would like to see Government litigation conducted.

Corporately, the organisation will learn lessons from the process, both in appreciating what is expected of Government in drilling into the fine detail of facts where facts are an issue and regarding its document storage and retrieval and so on.

Murdo Fraser: I appreciate that you do not want to use the word but, given what we have said about Lord Hodge's view on the expenses—that the award was either unreasonable or incompetent—it sounds like you are conceding

that it was incompetent. As I say, I appreciate that you might not want to accept that.

The Lord Advocate: Different judges use different adjectives or tests in this context and in others. The Government should not be in a position of having given assurances about full disclosure for those then to turn out to be inaccurate. That is not an appropriate outcome from a Government point of view, and certainly not from my point of view as the Government's senior law officer.

Murdo Fraser: I have a couple of questions about the legal advice issue, which a number of colleagues have raised. In the judicial review, two responders were named. The first named responder was the permanent secretary, Leslie Evans; the second responder was the Scottish ministers. Did the two responders take the same legal advice throughout the process?

The Lord Advocate: You are right that there were two respondents. They were jointly represented, and there was no conflict of interest between them. They were jointly represented throughout the process, both internally and externally, so there would be no differentiation between the advice and representation.

Murdo Fraser: We all understand, as we have discussed, why the ministerial code binds the ability of Scottish ministers to release their legal advice. That does not apply to Leslie Evans, does it?

The Lord Advocate: The permanent secretary is the permanent secretary to the Scottish Government and—as far as I understand it—that was the capacity in which she acted throughout the process. That was the basis on which there was joint representation. In effect, it is a process and a decision by the Government.

Murdo Fraser: The permanent secretary is not bound by the ministerial code. That is a fact.

The Lord Advocate: I would not accept that. Any civil servant operates within the framework of Government and Government operates collectively within the framework of the ministerial code.

Murdo Fraser: Is there any legal impediment to the Scottish Government releasing its legal advice?

The Lord Advocate: The decision whether to waive legal professional privilege is available to the holder of the privilege. As the committee is aware, Government does not ordinarily release such advice. In deciding on that matter, it operates within the parameters that are set out in the ministerial code. That code may not be law in the sense of being justiciable in court, but it is important in setting the constitutional parameters and framework within which ministers operate.

Murdo Fraser: To be clear, that is not a legal restriction; it is a convention. It is a political choice by ministers, who decide whether to release legal advice.

The Lord Advocate: It is a matter that is governed by the ministerial code, which is, as I said, an important document in setting out the constitutional framework within which ministers operate.

Murdo Fraser: Can you confirm that legal privilege rests with the client and not with the lawyer?

The Lord Advocate: Yes, precisely.

The Convener: I will allow a quick question from Alex Cole-Hamilton and a very quick one from Margaret Mitchell.

Alex Cole-Hamilton: My questions follow nicely from Murdo Fraser's. I have two questions that should have specific answers. Who was ultimately responsible for signing off the Government position on legal advice for the second responder, the Scottish ministers?

The Lord Advocate: I do not understand the question.

Alex Cole-Hamilton: Leslie Evans was clearly in the driving seat on the Government side of the defence, but we have heard that there were two responders. The Scottish ministers were the second responder. Ms Evans was not operating with total autonomy. She must have been checking her decisions about how to act on the legal advice with somebody senior from among the Scottish ministers. Was that the First Minister?

The Lord Advocate: The First Minister was certainly involved during the process.

Alex Cole-Hamilton: Was she the final sign-off on the decisions that were taken about the legal advice that the Government received?

The Lord Advocate: You are asking about decisions about the position that Government should take in litigation.

Alex Cole-Hamilton: She is the top of the Government. She is involved.

The Lord Advocate: That was resolved in the normal way in which things are resolved through Government. As I understand it, the First Minister was the minister who was directly involved in this case.

Alex Cole-Hamilton: That is helpful.

In your discussion about the slow discovery of evidence, you told Murdo Fraser that Government

had not disclosed everything. It must have been frustrating for the law officers and Government legal counsel that your client, the Scottish Government, had not given all the evidence at the start. It must have been embarrassing for senior counsel to keep having to go back to court with a disclosure of that information. It was a fraught environment and the working circumstances were difficult. Did anybody threaten to resign as a result of that tension?

The Lord Advocate: Against the background in which Government had determined to be candid and transparent, as it ought to be in litigation, finding itself in the position in which it found itself in the course of the commission and subsequently, with additional documents coming to life, was embarrassing.

Alex Cole-Hamilton: Did senior counsel threaten to resign?

The Lord Advocate: I am not going to get into advice given by lawyers.

Alex Cole-Hamilton: That is not advice; it is an event.

The Lord Advocate: I should perhaps say that one of the issues that might need to be addressed in the context of any litigation is whether an argument is properly stateable and advanceable. It often does not need to be said but if, in their responsible judgment, counsel consider that an argument is not properly stateable, the corollary is that counsel cannot, consistent with their responsibility to the court, advance it. In the course of any litigation, where one gets to that stage, counsel may have to say, "I could not advance this argument."

Alex Cole-Hamilton: So—

The Convener: Mr Cole-Hamilton, we are well over time. Margaret Mitchell has a quick question.

Margaret Mitchell: Given that it was the position of the Scottish Government that the application to proceed with the judicial review was time barred, why did it not oppose it?

The Lord Advocate: I would have to check this but, if I remember correctly, the Government considered only certain grounds to be time barred. When one goes to a permission hearing, where there might be a time-bar argument in relation to certain grounds and not others, one of the considerations is whether it is right to seek to resist particular grounds being included on that basis. I think that I am right in recalling that it was only particular ground that the Government wished to argue was time barred.

It is also fair to say that, if I remember correctly, the Government recognised that that was an argument that it was happy to advance but that there were serious things that could also be said on the other side, which meant, therefore, that that was not an issue that would be the basis for resisting the petition. It did not consider that it would see the petition off, because there were other grounds that were not time barred.

Margaret Mitchell: It just seems strange, because there would have been a definitive yes or no answer about whether it was or was not time barred. If you can add anything further to that, it would be helpful if you could do so in writing.

The Convener: I have some quick questions. I have been listening to all the evidence and have read a lot over the piece, and I would like a response to a few basic things.

The original judicial review was about the efficacy of former ministers being part of the provisions. That was deemed to be an unfairness. It was further down the line that the issue of the investigating officer came into play, for all the reasons that we have heard about today. When the judgment—I do not know whether that is the correct term; perhaps I mean decision—was laid down at the end of the process, the finding was that the process was "procedurally unfair and was ""tainted by apparent bias". We have always focused on the issue of the investigating officer and paragraph 10 of the procedure, which Alison Johnstone and Murdo Fraser have raised. Can you give us your view on the wider issue of the inclusion of former ministers in the overall policy? Is that part of the unfairness or is that something that is yet to be decided, if it is ever again challenged?

12:30

The Lord Advocate: It was not part of the basis for the concession. The Government was satisfied from the outset that that ground, and all the other grounds that were stated at the outset, were eminently defensible and ought to be defended.

The point that you have made, convener, about that not having been decided perhaps illustrates the observation that I made a few moments ago about the public benefit of a judicial decision. I am conscious that in this case we did not get to a judicial decision but, in deciding whether to continue to defend a case, it is a legitimate factor for Government to take into account that there is a substantial benefit in having the clarity that a judicial decision gives—as long as the case is properly and responsibly defensible. That is why it was only at the point where the Government concluded that it would not be proper to continue to defend the case that it conceded it. That, of course, is the responsible and right thing to do.

The Convener: There is another issue. A short while ago, you raised the issue of there having

been two complaints. It has been too easy to lose sight of that in some of the discussions that we have been having.

I know that, fairly early on in the process, there was an offer of mediation, which was rejected. Quite clearly, mediation would have involved the complainers. Further down the line, arbitration was offered; that is a very different thing and you explained that to us earlier. What effect, if any, would arbitration have had on the complaints or, potentially, the complainers?

The Lord Advocate: For the sake of argument, let us assume that there was an arbitration that could competently set aside the Government's decision, and let us assume that that had been the outcome. The complainers and the complaints would be in the same position as they are now, or as they would have been had the Government run the case to a conclusion and lost the judicial review.

You are absolutely right, convener, that, of course, at the heart of this are complainers and complaints that needed to be determined and which have, on the basis of the concession that was made for the reasons that we have discussed, never been resolved.

The Convener: Thank you very much for your evidence, Lord Advocate. We have kept you longer than was planned—I do not know whether that was because of your long answers or the fact that it was so interesting.

The Lord Advocate: I apologise if my answers have sometimes been longer—

The Convener: No—we all understand that they were necessary, and I think we have all found today's evidence very useful. I have taken a note that a couple of things are to be followed up in writing. If you can do that, it would be very much appreciated.

12:33

Meeting suspended.

12:40

On resuming—

The Convener: Good afternoon, permanent secretary. We kept you waiting longer than we should have, but the Lord Advocate was particularly interesting.

I invite the permanent secretary to make a solemn affirmation.

Leslie Evans *made a solemn affirmation.*

The Convener: I now invite the permanent secretary to make a brief opening statement.

Leslie Evans (Scottish Government): For the record, convener, I shall give evidence to the committee today on behalf of ministers and not in a personal capacity. Building on my previous statement on 8 September, I will set out key points on the Scottish Government's position and decision making in relation to the judicial review. I will then raise one point of procedure, if I may.

First, at every stage of the judicial review, I sought and acted on legal advice, as I am obliged to do to fulfil my obligations under the civil service code, and as ministers are obliged to do under the Scottish ministerial code. The Scottish Government's position was that there was a strong case to defend. The development of the procedure was informed by legal advice and human resources best practice; as such, the Scottish Government was confident about the prospects of success. Those prospects of success were kept under regular review throughout the judicial review, as is normal practice in these matters. Although the investigating officer's role became the subject of increased focus from late October and during November 2018, the Scottish Government's position at that time, informed by legal advice and by information that was requested and gathered in preparation for court hearings, supported the continued defence of the case.

As set out in the committee's timeline, in response to widened document search criteria from the commission, finalised on 14 December, additional documents were identified on 19 December. Two of those documents describe the contact between the investigating officer and those who had raised concerns. Although, on the face of it, the content of those documents was administrative in nature, their appearance at that stage in the proceedings cast doubt on the capacity of the Scottish Government to clearly evidence and explain the nature of every contact and contradicted earlier assurances. Therefore, at that point, it became clear that prospects had changed.

Although there was nothing to suggest that the investigating officer did not, in fact, conduct her duties in an entirely impartial way, the Scottish Government concluded that the totality of interactions between the investigating officer and complainers was such that the test of apparent bias was met. As a result, and in line with my responsibilities as principal accountable officer, I took the decision to concede the judicial review very rapidly—in fact, within a matter of a few days. In conceding, the Scottish Government acknowledged that one part of the internal procedure should have been applied differently. I have apologised to all concerned for that procedural failure, and my commitment to apply learning from the review led by Laura Dunlop QC

and from the review of corporate information management processes remains resolute.

I will close on a procedural point that was raised in the Deputy First Minister's letter of 6 November 2020, regarding the role of civil servants appearing before the committee on behalf of ministers. I take parliamentary scrutiny very seriously, as I know my civil service colleagues do, including those who have submitted evidence to date. We are providing oral evidence on detailed and highly sensitive, complex, often technical, and historical issues, much of which is constrained by legal restrictions. As such, and as is the long-established practice, I anticipate that civil servants will almost certainly need to follow up their appearance in writing, not least where further information or detail has been requested and where further clarification or, indeed, correction is required. As you know, convener, that is normal procedure that is intended to enable full and proper scrutiny by Parliament. I am keen to ensure that that practice is neither misunderstood nor misrepresented to the public as somehow devaluing or questioning the quality and integrity of the evidence provided to the inquiry by civil servants. With your permission, convener, we will continue to supplement our appearances before you with subsequent written information, in line with parliamentary practice and the civil service code and values.

12:45

The Convener: Thank you, permanent secretary. All your points are noted.

Before I move to questions from the committee, I will ask you a fairly straightforward question that follows on from something that the Lord Advocate said. He said that it is normal to investigate facts once a judicial review is under way. What struck me about that was that this is a bit different, in that the information required is internal—it is an internal matter. Why was all that information not gathered at the start?

Leslie Evans: I will make two points. First, we were clear which areas were being asked about when the judicial review came in. I think that the Lord Advocate gave some information about that; indeed, it is in the submissions to the committee. That did not include the role of the investigating officer—that was not part of the initial grounds for the judicial review. In fact, we, as the Scottish Government, identified and promoted that issue as one of importance later on in the judicial review proceedings.

Secondly, it is rarely the case that every single part of every document is produced at the beginning of any litigation process. That is possibly looking at the counsel of perfection. We had plenty of information at our hands and, in fact, through November and at very short notice in December, we continued to identify and produce that information. When the call for information and specific documents came, we responded to it. That was complex, and I am sure that I can give further information about the nature, detail and complexity of that ask during questioning.

The Convener: We move to questions from the committee. I remind everybody that we have to finish by quarter to 2 at the latest, so I ask people to be fairly succinct. I can come back to you if time allows.

Maureen Watt: Good afternoon, permanent secretary. I want to do some scene setting initially. What was the structure for decision making around the judicial review? Did your office co-ordinate the work? How did your office's involvement compare with the involvement of senior officials in human resources, officials in communications, the Scottish Government legal directorate and special advisers?

Leslie Evans: If it would help, the best way of describing that may be to look at the different kinds of meetings and processes that were in place.

First, there were meetings with counsel. I attended meetings with counsel in August and November and, as is my habit, I also met the First Minister regularly. There would have been discussions about the judicial review as part of that process.

Secondly, most of the meetings that took place as part of the continuing taking of legal advice were between counsel and legal representatives of the Government. As you would expect, there was a natural rhythm. There was mainly lawyer-to-lawyer contact about the handling of the JR and, as you will have heard from the Lord Advocate, about pleadings, reiterations of pleadings and changing of pleadings. That is the normal rhythm when legal advice is being taken.

The third element—I am sure that you will have heard some of this from your previous witnesses—was more to do with catch-up meetings and the administration behind all of that. It was more to do with communications, ensuring that we were sharing the right kind of information, and co-ordination of those strands of work, including elements such as gathering information for submission in response to document requests and so on.

My office attended the latter meetings a lot of the time, and I attended the first meetings most of the time. As you would expect, we were not involved in the lawyer-to-lawyer contact. However, my office was involved in a range of matters, not least in looking after my own interests and

responsibilities, but also as a haver of documents. We therefore did searches as well, as part of that process.

Maureen Watt: You say that your office was involved. If you were not specifically involved, who was involved in the process of the legal eagles getting together and working on the issue on a daily basis, in what we have heard from previous witnesses was a somewhat frenzied manner?

Leslie Evans: The legal process was carried out by legal staff. That did not involve my office; as you would expect, it was professionals who did that. They led on all aspects of the legal advice, on contact, and on producing and soliciting other information. People responded to that, particularly when particular requests for information were made.

My office, apart from supporting me, not just with this element but with the other things that were, of course, going on at the time, was co-ordinating the various strands of work. That included communications and drawing me in where that was needed.

However, my office was not in the lead on the legal aspects. It was involved in liaison with the legal aspects and making sure that there was a good thread and that a regular rhythm and pattern of communications took place between those who were involved in the JR.

Maureen Watt: So you were not involved daily, and I would not expect you to be. How often did you get updates on what was happening regarding the work? Did you communicate the information that you were getting to any ministers? If so, to whom did you communicate it?

Leslie Evans: The updates came pretty regularly. In the first instance, the meetings that I referred to earlier—the communications meetings—were a couple of times a week and, depending on what was happening, they became more frequent. People in my office attended those meetings and kept me posted as required with the level of information and detail that they felt I needed to know. That is normal practice. I was given reasonably regular updates on information.

Of course, if others wanted to see me on specific aspects or particular elements, or on particularly intense aspects of one part or another of the Government's interest in the issue, they would do that.

I report to the First Minister so, as I have mentioned before, I would, as normal, have regular meetings with the First Minister, usually after Cabinet, and we would have a discussion about information pertaining to the JR, informed by the legal advice.

Maureen Watt: Are you saying that you would have meetings about the judicial review with the First Minister on a weekly basis?

Leslie Evans: No—not on a weekly basis.

Maureen Watt: How often were they?

Leslie Evans: Usually, but not always, I meet the First Minister on a weekly basis. The issue may have featured in those meetings, but it is more likely that we would have had a meeting when we felt that it was appropriate, based on the legal advice that we were receiving.

Maureen Watt: So there were weekly meetings in which you discussed things orally. Were there written reports to the First Minister or other ministers? If so, how regular were they?

Leslie Evans: I cannot be exact, but written information and advice to ministers was undertaken.

Maureen Watt: Did that often come back notated with ideas, suggestions, comments or direction?

Leslie Evans: Most of it was about information and awareness of where we were at. There were, of course, key meetings at particular times. For example, when the concession was made, the conversations were very much to do with my advice and my decision in all that. The written information would have been about awareness raising, based on the legal advice that I was being supplied with on a constant basis.

Maureen Watt: Thank you.

Margaret Mitchell: When you appeared before the committee on 8 September, you confirmed that you took the decision that the complaints against the former First Minister should be referred to the police, and you confirmed that the First Minister would have been informed of that decision, but you could not remember whether you or someone else had done so, and you undertook to get back to the committee. In your letter of 11 September, you state that the information

"will be covered by the forthcoming written statement on the Scottish Government's investigation of the complaints which the Committee has requested."

As you are aware, the committee is still awaiting that information. Will you confirm who informed the First Minister? Was it you or someone else?

Leslie Evans: I informed the First Minister.

Margaret Mitchell: You did it. When did you inform her?

Leslie Evans: I would need to check the exact date; however, I think that it was on 22 August. That is my assessment, but I would not want it

quoted back at me and have it said that I misled the committee.

Margaret Mitchell: Okay. Would it be you, and you alone, who would inform her?

Leslie Evans: It would be me who would inform her.

Margaret Mitchell: Turning to the judicial review and the open record, page 31 states:

"The first respondent rejected the offer of mediation in her letter of 24 April 2018 before the complainers were asked whether they were willing to mediate".

Why?

Leslie Evans: I think that we are talking about mediation rather than arbitration. My understanding is that we asked the witnesses about—

Margaret Mitchell: That was later. This is the first offer.

Leslie Evans: There are two reasons why mediation was not a good idea, one of which is that it needs the complainants to be ready partners and to be prepared to do mediation. The original reason why I declined Levy & McRae's offer of mediation was because the process was still at a fact-finding stage; mediation would therefore not have produced anything, at that point. However, when a further offer of mediation came from Levy & McRae, we put it to the complainers, and they rejected it.

The other point, which I have mentioned, is that mediation is a voluntary process that can proceed only with the agreement of all parties, including the complainers. In her report on bullying and harassment of House of Commons staff, Dame Laura Cox said specifically that

"It is generally very difficult to use mediation in any case of sexual harassment, or in cases involving more serious bullying or harassment".

She also goes on to explain why that is the case, which was certainly the feeling in this instance.

Margaret Mitchell: I understand that. I will turn to arbitration and the basis for deciding against the offer of arbitration to deal with the dispute over the competency and legality of the procedure, which was made repeatedly by Levy & McRae and during the complaints process. What was that basis?

Leslie Evans: Do you mean what was the rationale for declining it?

Margaret Mitchell: Yes.

Leslie Evans: I think that the committee heard from the Lord Advocate—and, I suspect, from Paul Cackette, the former interim director of legal services—that the offer was rejected because it was about resolution of the procedure, not about resolution of the complaints. More particularly, the advice that I received was that it was not clear that arbitration would necessarily have been any cheaper or quicker. It also would not necessarily have removed the need to involve the courts at some point, or subsequent use of the route of a JR. Arbitration could also have taken longer; both sides need a mutual incentive to quicken the arbitration to resolve the dispute as quickly as possible, and it was not clear that that would be the case.

Acceptance of the offer would also have left us open to the accusation that we were diverging from the procedure that we had instigated, which does not, in itself, provide for arbitration. Just as serious is that if we had gone down that route, it could have led to us being accused of some kind of cover-up, and it would not have resolved the issue for the two complainants, at that stage. I think that the committee heard from the Lord Advocate earlier on—at length—about his view that arbitration is not usually an appropriate way to determine the scope of the Government's public law responsibilities. All that information led me to write back to Levy & McRae to say that we were declining its suggestion.

Margaret Mitchell: Is it therefore fair to say that it was a political consideration on the part of the Government, in that, if it acceded to arbitration, it might be accused of a cover-up?

Leslie Evans: No. That was one of the number of reasons that I have just listed why I thought, based on the advice that I was given, arbitration was not appropriate.

13:00

Margaret Mitchell: Let me put it to you another way. You were at the forefront of looking after the complainants' interests through the procedure and through all this debacle. Did you give any consideration to the fact that confidentiality requirements would have enabled the complaints to go forward and the complainants not to be subjected to the inevitable glare and speculation about their identity? We all knew that that would happen as soon as the judicial review was made public. Did that weigh in your consideration at all?

Leslie Evans: The interests of the two women who made complaints have always been at the forefront of my consideration throughout this process, and they continue to be. I have outlined exactly why I felt—and was advised—that arbitration was not the right route. It would not have given any assurances that a JR, in particular, would not have become required, nor that court proceedings would not have become required, so it was not a route that would have given sanctuary

or any assurance of the kind that you describe. On that basis, the offer of arbitration was declined.

Margaret Mitchell: Why were the two complainers never given the choice as to whether they would have liked to go with arbitration? Why was it not explained specifically that that, in deciding the legality and competence of the procedure, would have protected their confidentiality? To me, that seems quite outrageous, frankly.

Leslie Evans: That is the point, of course. The offer of arbitration was not like a mediation procedure that would have allowed the complaints to be quickly expedited and investigated. It was not that; it was a process that asked about the procedure. At that stage, it was not for the complainants to decide whether the procedure was right; they were not being asked about that—I suspect that they would not have been very interested in that. Their issue was their complaints. The request for arbitration was about the procedure; it was not about the complainants.

Margaret Mitchell: Surely, if you had the complainants at the very heart of everything that you did, the very least that you could have done was to have explained to them that arbitration was an option for looking at the procedure and whether it was lawful, and that it was an option that could be done confidentially. As you have confirmed, going forward with that option would not have affected the substance of the complaints. Was it your decision that the complainants would never be offered that explanation and choice?

Leslie Evans: It was my decision to respond to Levy & McRae and to say why—for the reasons that I have given—arbitration was not considered to be a good route or in the interests of addressing the complaints as quickly and effectively as possible.

Margaret Mitchell: I find that totally inconsistent with your previous evidence and assertions about having the complainants at the very heart of the process. I have no further questions, convener.

The Convener: Can I intervene, as convener? I think that, as we heard from the Lord Advocate earlier, there is a bit of confusion about arbitration and mediation in relation to how the complainers would be directly affected.

Margaret Mitchell: Can you explain the confusion, convener?

The Convener: No, Ms Mitchell. I suggest that you read some of the Lord Advocate's comments from this morning, when the *Official Report* is published.

Margaret Mitchell: Perhaps we should both do that, convener. I have no further questions.

The Convener: No, you do not have any further questions, Ms Mitchell. This is a public committee with a witness in front of us, so I expect courtesy all round in the way that we deal with things.

We move on to questions from Angela Constance.

Angela Constance: Good afternoon, permanent secretary.

We heard from the Lord Advocate this morning. Reflecting on his evidence, I could not help but come to the conclusion that, given the nature of the role of the law officers, there remains something quite opaque about their exact involvement in the process. However, your involvement is very visible from the beginning to the end.

We know from Sarah Davidson and Paul Cackette that, on at least two occasions, you have been described as the person co-ordinating the response to the judicial review. Is it normal that someone with no legal experience would oversee such a court case?

Leslie Evans: We should clarify what is meant by co-ordination. Some of the information that I gave Ms Watt might be helpful in that context.

Clearly, the people who were leading on the case and who were providing professional legal advice were lawyers. There was a continual process of updating, reiterating and questioning throughout the legal process and the interaction with other parts of the judicial review procedure.

The role that my office played—and that I was supported in playing—was one of assessing how we should respond to and support that process. As the committee will know—both generally and from this morning's evidence session—the JR is essentially a court process. It revolves around the court and around highly technical and legal issues on which I am not qualified to opine or to provide a view. My office was very much at the heart of co-ordinating the process of supporting the asks, the questioning, the pattern of the infrastructure, other meetings, and collection of information and so on that others were providing in response to requests from our colleagues in the legal team.

Angela Constance: I understand the role and purpose of legal advice. I also heard the comments that you made in your opening statement earlier, in which you said that you had sought and responded to legal advice at all twists and turns. My question was not so much about your office as about your role, given that you were the first responder; given that, according to Paul Cackette, you were the client; and given that, at various stages of the issue at hand, you were the principal decision maker.

Do you think that it is in the interests of good governance for the person who created a complaints procedure to oversee the response to a legal challenge against it?

Leslie Evans: There are two points to make. First, I did not create the procedure; it is a Scottish Government procedure that, quite rightly, was based on legal and HR advice at every step of the way. There seems to have come into being a tradition of calling it my procedure. It is not; it is a Scottish Government procedure—and one that has been agreed by Cabinet and is therefore part of an armoury of procedures that we have. That question is therefore largely irrelevant. The procedure was adopted by the Scottish Government and was based on clear professional advice at every stage.

Angela Constance: I will put it another way. The judicial review was reviewing a procedure that you, as permanent secretary—Scotland's numero uno civil servant—were overseeing. How could you possibly make objective assessments about the merits of the Scottish Government's position when you had overseen the procedure that was being challenged?

Leslie Evans: That is because at every step of the way I was being advised by legal and HR professionals about the nature of the procedure and its fortunes within the JR process. At every opportunity I was being advised by people whom I trust and who have the best professional advice about what the circumstances were and what the changing turns of the JR process were about. Ultimately, the decision that I took was to concede—indeed, that was also the advice that was given to ministers.

Of course, the office of permanent secretary is one that I hold at the moment. Ultimately, it will always be that office holder who leads on and takes fundamentally important decisions for the organisation. However, that role is dependent on and draws on a wide range of advice, responsibilities and challenging advice—which I think is a good thing—and it will continue to be so. That is just in the nature of the Government and the office of permanent secretary.

Angela Constance: Bearing it in mind that leadership is often about ownership, if the situation occurred again and the Scottish Government was defending a judicial review in relation to a decision and a procedure on which the permanent secretary's office had shown leadership, would you recuse yourself from any involvement with the judicial review, to prevent the possibility that in the future you would be unable to be objective?

Leslie Evans: I am sorry. I just do not understand that question.

Angela Constance: You were involved at every step and stair of the process.

Leslie Evans: Which process?

Angela Constance: I am not going to argue with you, permanent secretary. Maybe you would just like to reflect on the question; it might be helpful if I repeated it.

If this situation occurred again and the Scottish Government, or you, as first responder, had to defend a judicial review against a decision made under a procedure that you had overseen, would you recuse yourself from any involvement in the judicial review, to prevent the possibility that you would be unable to be objective?

Leslie Evans: I am still not sure that I understand the question. I am not trying to be difficult; let me see whether I can give you an answer that helps to illuminate the matter a little.

There are a thousand procedures in the organisation that I oversee; the one that we are talking about has, as you know, been more contentious than most, but there are many procedures and instances in relation to which legal action might be taken against the Scottish Government, across a range of circumstances. I am not called on on every occasion, or for every element and dimension of those procedures or the legal action that might be taken against them.

However, I am at the head of the organisation. I have never shied away from my responsibilities—not in the circumstances that we are discussing nor in any other circumstances—when the Scottish Government has demanded or required of me, at the top of the organisation, that I take a particularly tough decision.

There will always be questions. Indeed, I am sure that the Laura Dunlop review will look at, for example, the role of the permanent secretary as the deciding officer and whether that is the best thing for the procedure, on reflection. I would be surprised if she was not looking at that as part of her review of our implementation of the procedure. However, I refute, not just because I am a civil servant and work to civil service values and the civil service code, any implication—I am not sure that this is what you are implying—that I could be compromised in my decision making because I am involved in more than one aspect of Government business at any one time.

Angela Constance: As permanent secretary, on behalf of Cabinet, you had oversight of the development of the policy. We know from evidence that Ms Mackinnon reported directly to you on the matter and not to Sarah Davidson, and that Paul Cackette, although he was the Government's most senior lawyer, was, in practice, reporting to you instead of line

management, because of your co-ordinating role and other responsibilities and oversights. You were the key person in terms of the judicial review and, yes, you were receiving legal advice. On reflection, do you have concerns about whether a closer look is needed at the governance arrangements in and around all that?

Leslie Evans: Some of what you have described is normal practice. As I said, if there is a suggestion that we should look further at the governance part of the procedure that is under review by Ms Dunlop, I will have no issue with doing that.

I raise one issue, which I think gets to some of what you are pursuing. The placing of the permanent secretary in the deciding officer role in the procedure—which I did not design and oversee; it was designed and overseen by others with much better professional knowledge than mine—was deliberate, given the seriousness of the issue and the seniority of the people who would potentially come under scrutiny as part of the procedure.

As I said earlier, I wonder whether Laura Dunlop's review will look at that and ask whether that is the best place for governance to be seen to be undertaken and open to scrutiny. That is not because anything underhand has taken place, but because, once it gets to me, there is nowhere else for it to go.

13:15

In many procedures, as we have moved from being a small Administration to being a much bigger Government, I have divested myself of a range of responsibilities that have, predominantly but not entirely, come into the director general corporate role, which Sarah Davidson was occupying in a temporary capacity. That is a role that I have created.

Therefore, on the broader point of whether everything should come to the permanent secretary, the answer is absolutely not. The most important elements need to come to the office of the permanent secretary. There is room for us to look further at the procedure through the Laura Dunlop review, if she chooses to do that, to consider whether it will always be the permanent secretary who is the deciding officer in that respect. However, that is for the future, and I do not want to pre-empt anything that she might do.

Angela Constance: I am conscious of the time, convener. I just note that, from beginning to end, the one common denominator in the entire saga is the permanent secretary. However, I am conscious that there are many threads that colleagues will want to pick up on.

The Convener: Alasdair Allan is next.

Dr Allan: Thank you, convener.

We heard from the Lord Advocate this morning his take on paragraph 10 of the procedure. He briefly touched on that and the Government's view of it throughout the process. I appreciate that what I am going to ask you comes with the benefit of hindsight, but would you concede that that was a particularly unfortunately drafted piece of the procedure?

Leslie Evans: No, I do not think that it was unfortunately drafted. What has transpired is that it is open to a different kind of interpretation, which I think is what the Lord Advocate described this morning.

There is some compelling evidence before us as to what was intended by the description in paragraph 10. You will have seen some of that as part of the evidence that the Scottish Government submitted to the committee. You will have seen James Hynd's note of 2 November 2018. He is the author of the procedure, and, in that note, he describes what was intended—the more detailed nuance, if you like—and you will have seen other information that backs that up. I think that you have had documents from Nicola Richards as well, which made very clear that the appointment of the individual to that role was seen to be appropriate, based on that description, such as you have seen in the documents that I have referred to, because of the individual's having no involvement in the matters being raised, their being new to the organisation, their being qualified, and their being an experienced HR professional. Therefore, the intent and the description, as you will have seen from James Hynd's note, were very clear. Subsequently—later on, at the very end of October—it became apparent that it was open to a different interpretation.

Going back to the point that I made to Ms Constance, I do not want to pre-empt anything that Laura Dunlop QC might say with regard to the review of the procedure that is under way. However, if the procedure were to be implemented and required in the future, we would want to be absolutely crystal clear about that differential.

Dr Allan: Given the role that you had in all that, were you surprised when others came to the view that that paragraph was open to more than one interpretation? Did that come out of the blue to you?

Leslie Evans: Given the advice that we had taken in drafting from Nicky Richards and others—indeed, the Advisory, Conciliation and Arbitration Service guidance is in keeping with our description of the investigating officer role—yes, we were surprised; I was surprised.

Dr Allan: Should you have been surprised? Regardless of the debate about what those words mean, or could mean, would it normally, in terms of the principles, be acceptable, reasonable or normal to have somebody involved in investigating the same issue twice?

Leslie Evans: Going back to what I said earlier, we took legal and HR advice, and we looked at other guidance, such as the ACAS guidance, in the description of the role, and we based the procedure and paragraph 10 on all the advice that was taken. Clearly, there was a different interpretation. We understand that now but, at the time—we should remember the iterations that the paragraph went through—that was not seen as being an issue. Indeed, as you know, at the beginning of the JR, it was not raised as an issue; it was only subsequently that it was alighted on as a point of potential contention.

Alex Cole-Hamilton: Good afternoon, permanent secretary. I would like to start by covering some of the evidence that has emerged since we started this phase of our inquiry. When were you first made aware of the meeting between John Summers, the First Minister's private secretary, and one of the complainers, which took place immediately prior to her writing to you to expand the procedure to include former ministers?

Leslie Evans: I think that you are referring to meetings that took place in November. Is that correct?

Alex Cole-Hamilton: Yes, that is correct.

Leslie Evans: I do not remember being aware of those until way after the investigation.

Alex Cole-Hamilton: That is fine.

I want to bookend the discussion about arbitration. It strikes me that there was a crossroads, at which two possible roads could have been taken: there was the risk of proceeding and judicial review, which had been threatened; and there was arbitration. Did it come into your thinking that taking the arbitration route would not only have settled the lawfulness of the procedure but, crucially, would still have given the women at the heart of the complaints the opportunity for a reset and would have allowed those complaints to be given a fair hearing under a lawful procedure?

Leslie Evans: As you say, there has been quite a lot of discussion about that during the meeting. I go back to the advice that I was given about the advisability, and the purpose and intent, of arbitration on the procedure. I was advised that it would not necessarily have given any comfort that the matter would have been resolved quickly or any more cheaply—or, indeed, that it would not have ended up somehow going to JR or to court.

Alex Cole-Hamilton: Moving on to the judicial review itself, you have confirmed, as the Lord Advocate did, that when it came to the two responders to the petition—you and the Scottish ministers—it was Nicola Sturgeon, the First Minister, who was in the driving seat on the part of the Scottish ministers in taking decisions on that side of things. Would the sign-off on how to act on legal advice to define the Government position have been a co-production decision between the two of you? Would she have had the final say? How did that work?

Leslie Evans: I think that the fact that I was named is almost—I hesitate to use this word—incidental. I do not exist constitutionally, as a civil servant; I am there only to serve the Government. The differential between those felt somewhat academic. In all circumstances in decisions that I might purport to take and in the advice that I give, ultimately, it is ministers who take the final decisions and who agree or disagree with the advice.

Alex Cole-Hamilton: So, in this case, in deciding on the Government's position, ultimately, it was the First Minister who made that decision.

Leslie Evans: In terms of the concession—

Alex Cole-Hamilton: In acting on legal advice or, at any stage in the judicial review, in deciding whether to proceed or to contest the permission being given in the first place, ultimately, that would have gone to the First Minister.

Leslie Evans: At key points, including at the beginning of the procedure, she was engaged in that and was kept abreast in the way that I have described previously. I advised about my decision and proposal that we should concede very quickly, in the end, at the beginning of January. I did so directly to the First Minister.

Alex Cole-Hamilton: Following that concession, when it came to the settlement of legal fees by the parties, did she sign off on the final sum that was paid to Alex Salmond?

Leslie Evans: I would have to check the procedure on that, but it would have been something that I would have done on behalf of the Scottish Government, which she would have been aware of, following the conclusion of negotiations between legal parties.

Alex Cole-Hamilton: Okay. On the conduct of the judicial review, the Lord Advocate has defined the process of the discovery of evidence, and particularly the later discovery of crucial evidence that changed the dynamics of the Government's position, as unsatisfactory and embarrassing. Are you aware of whether, at any point, senior counsel threatened to resign during the conducting of the judicial review?

Leslie Evans: That is not something that I would be involved in or aware of.

Alex Cole-Hamilton: Okay. My final question goes back to paragraph 10 of the procedure. You have stated several times that part of the problem was that that was open to interpretation, but it is still open to interpretation. Paragraph 10 exists on the Scottish Government website, as it did two years ago, as the principle procedure for resolving complaints against former ministers. Given that no appending guidance has been put into it and there has been no annotation on its application, is it any wonder that no one else has come forward to complain about the behaviour of previous Scottish ministers? How could you expect anyone to have confidence in the procedure, which has cost the taxpayer so much money?

Leslie Evans: I will make three points. First, as you know, a review is under way, and I do not want to pre-empt it in what I say today or indeed with changes to the procedure before that review has been completed by Laura Dunlop. It is later than we would have liked—it is much later than I would have liked—but there are, as you will understand, particular reasons why it has come around later than might have been anticipated, not least the trial and then Covid. It is now under way and I look forward to hearing the recommendations from that review.

The second point is that nobody has come forward. I think that it is a good thing that people have not come forward, but the point that I would make on that is that, given the people survey and the data that we have, we have more evidence to show that people are more likely to come forward and that they have more confidence and are better prepared to raise issues of bullying and harassment than they have ever been before.

I have no evidence to show that people are not doing that. In fact, on the contrary, I have evidence to show that people are more comfortable with the inclusion and equality of the organisation and, importantly, are more prepared to make their voices heard about feeling bullied or harassed in their work. I would not say that that is a good thing, but it is a positive movement—knowing that people are, as our data tells us, more prepared to do that.

On your point about the application of the procedure now, if it was required in any event, it would need to be applied differently. We are absolutely clear about that, and absolutely clear that, if an individual was providing advice and support, even when that was being done impartially and objectively, they would not be appointed as the investigating officer.

Alex Cole-Hamilton: With respect, however, you are leaving it to potential complainers to infer that that would happen. It is now two years since the judicial review collapsed, but the procedure remains unamended on the Scottish Government website. I just think that it is a leap to think that the reason why nobody has come forward with a complaint about a former minister is that things are better. I think it is more about the fact that the Government still has that flawed document front and centre on its website as the only mechanism for justice or a fair hearing for a future complainer who comes forward. I do not understand why you have to wait for the review to conclude before you amend it in any remedial fashion.

Leslie Evans: The only thing that I can say to that is that it was the implementation of the procedure that was flawed and perceived to be biased, and not the procedure. I am perfectly clear that we would need to be very careful in implementing the procedure in future, but I am also clear—and I am encouraged, in as much as one can be with such circumstances and behaviours—that people in the organisation are telling us that they feel more entitled and more supported in coming forward with bullying and harassment complaints than they have ever felt before.

Jackie Baillie: Good afternoon, Ms Evans, and welcome back to the committee. I will start with a quick question about a text message. We have finally established, after a couple of false starts and with recovery by the Crown Office, your now infamous text message “We lost the battle but not the war”. We now know that that was sent to your friend and colleague Barbara Allison when she was on holiday in the Maldives on 8 January. I believe that that is the day on which the judicial review was lost. We understand from her that the battle was the judicial review. Given that you are under oath, what would you say was the war?

13:30

Leslie Evans: I think that I have made the point previously that that was about a long-standing approach of ensuring that the organisation that I lead is a Scottish Government that is open and supportive and that allows people to bring their whole selves to work and where people can work without fear of bullying or harassment. That has been part of the work that I have been leading since I took up post in 2015. It remains the case that that phrase was intended to demonstrate that I will continue to champion equality and inclusion in the organisation, not just because I think that it is right—although I think that it is—but because that is at the heart of the equalities policies that the Scottish Government embraces.

Jackie Baillie: Sure. I absolutely think that that is admirable, and I have no disagreement with you. It is perhaps not credible to say that you

would text somebody while they were on holiday about general equality issues. However, I accept your explanation.

Do you have the full text exchange?

Leslie Evans: Could I just make a point there? I was responding to a text from Barbara Allison, and I suspect that she was texting me because she knew that I was going to try and perhaps take a holiday at that point. It was not some grandiose statement; we know each other, and she knows what is important to me in the way that I lead the organisation. I am discouraged and, I suppose, disappointed that the text is regularly being brought back and presented as some sort of conspiracy on my part.

Jackie Baillie: No—

Leslie Evans: I know that that is not what you are saying—I absolutely understand that.

Jackie Baillie: Absolutely. I am simply exploring the issue with you. Obviously, Barbara Allison deleted the start of that exchange. Could you provide us with the full text exchange?

Leslie Evans: I have no idea what it was. I expect that it said, "How are you?"

Jackie Baillie: Have you deleted it?

Leslie Evans: This is from three years ago. I have probably changed phones since that time. I really do not know.

Jackie Baillie: I would be grateful if you would look. I am not good at technology, but all the information transfers between my phones when I renew them. If you had that, it would be helpful.

Leslie Evans: If I had it, I would provide it.

Jackie Baillie: Thank you. I will move on.

Has the Cabinet discussed the parliamentary vote to instruct the Scottish Government to provide its legal advice?

Leslie Evans: I would need to consult Cabinet minutes.

Jackie Baillie: It would be within the past two weeks.

Leslie Evans: Indeed.

Jackie Baillie: So I would hope that you would recall that.

Leslie Evans: I was not at all of the Cabinet meeting this morning, because I came here, for example, so I would need to consult Cabinet minutes. However, from what I recall in my time at Cabinet, the issue has not been discussed—that is probably the best way to describe that.

Jackie Baillie: So, within the past two weeks, it has not been discussed at Cabinet—

Leslie Evans: Not that I can recall.

Jackie Baillie: Was it on the agenda today?

Leslie Evans: It was not an item on the agenda.

Jackie Baillie: Okay—that is fine.

Do you know whether the Lord Advocate has been formally engaged for his view?

Leslie Evans: I cannot tell you—I do not know.

Jackie Baillie: You do not know?

Leslie Evans: I do not know.

Jackie Baillie: As the most senior civil servant you do—

Leslie Evans: I have not been party to it, and I would not be able to divulge it, for reasons that the Lord Advocate has given to you earlier.

Jackie Baillie: I accept that the Lord Advocate as a law officer might not want to divulge it, but I am asking a process question. I am asking you, as the permanent secretary—you are not a law officer.

Leslie Evans: Legal privilege means that I could not tell you that.

Jackie Baillie: Can you explain why you are asserting legal privilege over what is a process question? I am not asking about the fact or the content, or about who is being asked. I am asking whether that has happened. It is a process question. That is allowed under the ministerial code.

Leslie Evans: I cannot tell you, and I do not know. Both of those should suffice.

Jackie Baillie: Okay. Convener, I was asking for an explanation of legal privilege, which I understand that I am allowed to do if someone asserts legal privilege.

The Convener: I thought that Ms Evans answered the question when she said, "I do not know."

Jackie Baillie: But she said, "I cannot," as well.

Leslie Evans: If we are talking about legal privilege per se—

Jackie Baillie: It is in this case.

Leslie Evans: That is a ministerial decision. As we know, legal privilege is applied to a range of information. Indeed, many of the people round this table have been ministers and will understand how that is applied. As a civil servant, it is not at my hand to overturn legal privilege.

Jackie Baillie: Fine. Let me move on, because this is not productive.

I move on to the information that was given to us by Judith Mackinnon and Paul Cackette about the number of meetings that there were. In addition to the FOI request that revealed the 17 meetings with counsel, we understand from Judith Mackinnon that she was involved in meetings as often as three times a week. For Paul Cackette, that was daily. Those meetings were co-ordinated by your office. As you have a duty to keep a record, I would expect that there would be several pieces of paper, notes in Microsoft OneNote and minutes, yet none of those appear to have been provided to the committee. Why is that?

Leslie Evans: As we said earlier, there were different kinds of meetings. They were not all co-ordinated by my office, because of their different nature. The meetings that were co-ordinated by my office were predominately about communications, the sharing of information, co-ordination and so on. They were mostly transactional and—to my knowledge, although I did not attend them—about ensuring that people were up to speed with what could often be a fast-moving environment. I do not know whether minutes of those meetings were taken or whether people took their own meeting notes. I am sure that we could check that out and see whether that was the case.

Jackie Baillie: That would be helpful. I am sure that you could release that information to us, because of the nature of those meetings.

The meeting on 13 November was a pretty important one, I think, as it was attended by the First Minister, Elizabeth Lloyd, external counsel and you, as the permanent secretary. It was the third meeting running that the chief of staff attended. You previously told the committee that special advisers were not in attendance, but they clearly were. That cast list is quite impressive. What exactly was discussed?

Leslie Evans: I will just correct you on that, Ms Baillie. At the previous committee meeting, I was not completely clear in my recollection. I said what you just said that I had said about the attendance of SPADs but, subsequently, I wrote to the committee and corrected that for the record.

It was a meeting with counsel so, as you can imagine, it was about the judicial review.

Jackie Baillie: Okay. We know that there were clear issues of concern towards the end of October, as the lack of independence of the investigating officer had been revealed. Given that, is it reasonable to assume that that was discussed at the meeting on 13 November?

Leslie Evans: I will just correct you: the issue in October was not about the lack of independence of the investigating officer; it was about the procedure and the application of the procedure. I cannot divulge the discussions that took place at the meeting, because of legal professional privilege.

Jackie Baillie: You have described to us taking legal advice on a continuing basis, and it strikes me that that was a fairly significant meeting. You have also told us that, ultimately, it was the First Minister who took the decisions. Was it a decision point?

Leslie Evans: It was about looking at the prospects of success and looking at the whole picture of the legal advice that was being presented to us at that time. I cannot say anything more than that.

Jackie Baillie: Clearly, the decision was made to plough on, because we have more information that emerged from that.

I will go back to something that Angela Constance raised with you. It is becoming increasingly clear from other witnesses that you were the decision maker. You had a role in signing off the policy and a role in co-ordinating it. With the First Minister, you took the decision to proceed, and you advised her to concede the case. The legal advice came to you, did it not? I have to ask this: when are we likely to get the advice, because it is so central to everything that happened?

Leslie Evans: You are right—I took legal advice throughout the process, and acted on it. However, I cannot divulge to you what that legal advice was.

Jackie Baillie: On 14 December, your senior civil servants were prepared to swear on oath to the Court of Session that there were no further relevant documents to be provided to the court. Obviously, there has since been the commission of documents, from which not one or two but hundreds of documents have emerged. Those documents were so damning that you collapsed the case two weeks later. Given that it was your office that was responsible for disclosing and co-ordinating all the documentation, do you accept responsibility for that resulting in the court being misled?

Leslie Evans: Perhaps I could tell you what the procedure was for the provision and seeking of information. My office did not undertake the seeking of information. Jackie Baillie and others around the table will know about the tradition of the havers—those who have the information. It lies with them to find and locate the information and declare it. That cannot be done on behalf of havers—it has to be done by those who own that information, not just for legal reasons but for other reasons that are to do with data protection, for example. There was a very particular request and process from the specification, which was received on 14 December, which was a few days before people were appearing at the commission. The

specification was of a very particular nature in its timing and complexity and in the shift in what was asked for from what was asked for in November. A series of people, as havers of that information, were asked directly to provide that information for the commission, and that is what produced a lot of information, which came out during the week of 17 December.

It is not accurate to say that my office was responsible for that process. My office was responsible for ensuring that people knew what they needed to do, but things were up to individuals. That includes my own office, which was potentially a haver of information and documentation for the specification. That was not just particular documents; in fact, it was not about particular documents. Scanning thousands of documents was an incredibly complex process. The Scottish Government's electronic management system has 35 million documents at any one time, and there are 3,000 in my own permanent secretary mailbox at any one time. As you are aware, people were asked to go through not just their documents but calendar entries and text messaging. Each of those things then had to be checked by hand before they could be submitted to ensure that they were not going to produce inadvertent difficulties around the declaration of information. That was an incredibly complex process, but it was owned by the haver, not by my office.

Jackie Baillie: In hindsight, it certainly looks fairly embarrassing for the Scottish Government to have said that all the documentation had been provided when we later got hundreds of documents that clearly had not seen the light of day.

Leslie Evans: I am not sure that there were "hundreds", but I agree with you about that not being good.

Jackie Baillie: It was a lot. Given that you were involved from the beginning, that you knew about Ms Mackinnon's previous contact with the complainers—she made no secret of it; she told you and colleagues—and that she reported to you regularly, do you accept even just a tiny bit of responsibility for the court defeat?

Leslie Evans: I take responsibility for the Scottish Government's action and performance. That is my role, and that is why I am here.

To correct you again, Judith Mackinnon did not report to me regularly; in fact, she did not report to me, full stop. She was very well away from me as deciding officer in the procedure and I was not involved in the information that she was gathering as part of a very particularly set-out procedure. That is just a point of clarity.

I have never eschewed my responsibilities as head of the organisation. I was pretty disappointed. It was unhelpful to the Scottish Government's position for that information to appear at that point. I do not disagree with the Lord Advocate's assessment of that at all. That is why, having had advice and taken careful legal soundings and having taken other aspects into account, I very rapidly took the decision that I did. As you know, I asked Sarah Davidson to provide me with co-ordination of all the advice that I might need, and I felt that there was no choice but to concede at that point.

Jackie Baillie: Okay. I will move quickly on, convener. I am just about finished.

The Convener: Quickly, please.

Jackie Baillie: Okay. When Mr Cackette was here, he very helpfully told us that he could make an estimate of the cost of staff time that the in-house lawyers used. Will that estimate be provided to the committee? I recall that you said that that would be impossible to do, but Mr Cackette indicated that it would be possible to provide an estimate. Can we have a note of that? Given that you accept responsibility for the flawed procedure, do you accept responsibility for the extraordinary cost to the public purse? The court awarded higher costs because it considered that its time was wasted with the conduct of the case.

13:45

Leslie Evans: The Deputy First Minister has already replied to the committee on the point about Paul Cackette. I do think that I need to go back over that.

The procedure was not flawed. It is important to go back to the point that was raised earlier The problem was with the application of the procedure. I have apologised for the flawed application of the procedure. It was almost the first thing that I said to this inquiry. I have apologised more than once about that and—to go back to the deputy convener's point— I have also apologised to the two women who made complaints.

Alison Johnstone: You have suggested a couple of times that the procedure is not flawed. You have referred to the further detail from James Hynd about interpretation of paragraph 10. If we need documents to interpret one paragraph in a procedure, is not it the case that the procedure is not as clear as it might be? That has, sadly, been proved.

Leslie Evans: It is clear from the information and findings that became apparent in late October that a different interpretation was possible. There was discussion here today with the Lord Advocate about how one might look at a sentence in

paragraph 10 and interpret it differently. I do not dispute that.

The review of the procedure and its application started far later than I would have anticipated. I announced a review of the procedure early in January, when the point was conceded, because I felt that it was an important point of clarification. Because of the subsequent trial, and because Covid has rightly pre-occupied everybody, there has been a delay in getting the inquiry off the ground. It is now live and under way.

I do not want to pre-empt what that inquiry will say about application of the procedure, or whether the review will say that the procedure should be further clarified. I understand the differentiation of roles that would have to be applied if it was implemented now.

Alison Johnstone: It seems frustrating. The paragraph says that

"That person will have had no prior involvement with any aspect of the matter being raised."

I am sure that a lay person would think it surprising that that was not applied more rigorously.

When did you find out that Government lawyers considered prior contact with the investigating officer to be a potentially significant issue?

Leslie Evans: I was given updates on the legal advice throughout the process. That point was raised at around the end of October or the beginning of November. That was when—as Paul Cackette said—further work was carried out, looking at the exact nature of the role and the exact circumstances of how the role had been applied.

Alison Johnstone: That might have been avoided if all the documents referring to any potential previous engagement had been available. It was not until December that IT specialists were brought in to do a thorough search. It seems that that should have happened far sooner. We use so many communication platforms that that is a big job, but it is key to getting to the bottom of what happened.

Leslie Evans: We must differentiate between the different requests for information. I am not trying to dance on the head of a pin; I am trying to be helpful.

In November, and following the raising of the issue about the investigating officer and their role, many requests came in. They were responded to. I have the dates here. There were requests on 16, 19, 21 and 29 November. We were submitting documents in response to the work that Paul Cackette described when he was at committee, including the pleadings adjustments and clarification and quantification of that role. People were producing documents and advice, including the statement that James Hynd presented on 2 November, in an attempt to clarify understanding of and the intent around that role.

The request that came in after 14 December, which was a Friday—I remember it very clearly, because that was when the commission was announced and the first appearance of the commission would be the following week, on 19 December—was a very different specification. It was not finalised until 14 December and it was, as I said earlier, a much more detailed specification and a different kind of specification, because it was not asking for particular documents, but for anything that might fall within certain criteria. Those criteria had to be interpreted.

IT people were brought in. One of the important aspects of bringing them in was to ensure that we could use their knowledge at that point, as opposed to doing a document search, which could be done much more easily. However, there were concerns about whether the status of the havers—the persons who hold the advice; "haver" is a legally defined term—would be compromised by introducing IT people. In other words, would the IT specialists, in describing and locating the documents, have to go before the Scottish Information Commissioner as now being the havers, rather than the havers being people who actually owned the documentation?

I am perhaps not explaining the matter as clearly as I might. You can see how complex it was, even although we brought in IT people. I think that we would do such searches differently now—in fact, I know that we would. I am happy to share information about how I have changed the process to ensure that we have more effective interrogation of corporate information. We brought those people in as quickly as we could, in the three days that were available, but there were concerns about their legal status in that process.

Alison Johnstone: The appearance of the additional information led to a swift reassessment of the prospects for the case.

Leslie Evans: Yes, it did.

Alison Johnstone: How quickly did you make that decision, having received that information?

Leslie Evans: It was 21 December when I thought that I would need advice swiftly from a range of sources to decide whether conceding was the right thing, but that was my gut instinct at that time, so I made the decision quickly.

Alison Johnstone: How did you go about getting that advice?

Leslie Evans: I spoke to Sarah Davidson in the first instance because I thought that, given her

role, it would be useful for her to act as the collector of the advice that I would need. I articulated that on boxing day—on 26 December. The commission that I was giving her needed to be absolutely crystal clear, so I took a couple of days to think about it and to consult about how crystallising that commission could be well effected, and it was sent to her on 26 December.

The Convener: Mr Fraser—you are next. Can I ask you to keep an eye on the clock, please?

Murdo Fraser: I will, convener, although I am not responsible for our being at this particular point in terms of the time—

The Convener: Okay. That was obviously a dig at me, as convener—

Murdo Fraser: No, with all due respect, it was not a dig—

The Convener: I think that it was, but I will take it as a friendly dig. We were late in starting and we heard from the Lord Advocate for longer than the scheduled time because that was particularly useful. I know that you are feeling a bit peeved, but you didnae stick your hand up at all. So, there. Over to you—you have six minutes.

Murdo Fraser: Thank you. It was a friendly dig, convener. I will be brief. Perhaps Ms Evans can be brief with her answers, and we will get through this.

First, who took all the final decisions around the Government's position on the judicial review? Was it you?

Leslie Evans: On the decision to agree to pursue the judicial review and the decision to concede the review, I took the decision to concede the review and I was party to the advice and the decision to fight it.

Murdo Fraser: Did the Scottish Government act at all times in accordance with the legal advice that it obtained?

Leslie Evans: I took legal advice throughout the process and I acted on that advice.

Murdo Fraser: Did you act in accordance with the legal advice that you took?

Leslie Evans: I cannot tell you that, but I can say that I sought advice actively; I took it and I acted on it, throughout.

Murdo Fraser: Jackie Baillie asked you about the decision to settle the case. We raised with the Lord Advocate the fact that expenses were awarded on the basis that the defence was conducted "either incompetently or unreasonably", in the words of Lord Hodge. The Lord Advocate said that it was not the way that he would want to see a Government litigation being conducted. Clearly, something went badly wrong. Who do you hold accountable for that?

Leslie Evans: If I was being asked what the issue was, I would say that the tipping point—if I can call it that—was the collective failure to produce the right information at the right time. I have to be very up-front about that. The late information in itself caused concerns and issues, which you will have heard from the Lord Advocate. That is in addition to the paragraph 10 issue. The crystallisation of those two issues was the reason, as I said to Ms Johnstone, why I took the decision on 21 December to pursue concession of the judicial review.

Murdo Fraser: Thank you—but I am not sure that that answered my question. The timeline that we have seen makes it clear that documents that had not previously been identified emerged on 18 and 19 December. From what the Lord Advocate said, that was the point when it became clear that the case was no longer defensible. My question was this: who do you hold responsible for that happening?

Leslie Evans: The organisation as a whole has to be responsible for the conduct of the JR. I am in charge of the organisation and, as I said, I take responsibility for how the organisation performs in every respect, not just in a JR.

Murdo Fraser: The episode did not just damage the Scottish Government's reputation; clearly it will have been very difficult for the complainer and will have cost the taxpayer substantial sums of money in legal costs that were paid to Mr Salmond and in the costs that were run up by the Scottish Government. Has anybody been held accountable for that? Has anybody offered their resignation? Have you considered your position?

Leslie Evans: I would like to go back to the point that you made about finances. At every stage, when I was being given and taking advice from legal colleagues and acting on that advice, alongside that was the responsibility that I bear as principal accountable officer. At no stage, especially not at the conceding point, was I seeing any of this in isolation from other responsibilities. My role as principal accountable officer means that I am under an obligation, not just at the beginning of the process but throughout it, to evaluate and weigh up key elements of my responsibility in looking after the public purse. I was very clear about that, and that is one of the reasons why the decision to concede was such an important one for me to take.

I was not just looking at legal advice; I was looking at public policy considerations and principal accountable officer considerations. That is my role, as head of the organisation.

Murdo Fraser: Again, I am not sure that that answers my question, which was whether anybody has offered their resignation over the failure? Have you considered your position?

Leslie Evans: I cannot answer a question about human resources issues or people issues in the organisation. My responsibility is to lead the organisation through the process—and through Covid, at the moment. I carry a lot of other responsibilities on my shoulders as well, and I continue to do that.

Murdo Fraser: Okay. I will ask just two more questions, if I may, convener.

On the legal advice, you were the first named respondent in the judicial review. You did not take separate legal advice from the Scottish ministers. I take it that that was conjoined?

Leslie Evans: Yes.

Murdo Fraser: Are you, as a civil servant, bound by the ministerial code?

Leslie Evans: I need to pay adherence to it. I think that you will find, in the opening paragraph of the ministerial code, that the First Minister, who signed the foreword, expects civil servants to be—I do not have the exact wording in front of me—cognisant of it. Of course, I am bound by the civil service code.

Murdo Fraser: The civil service code is silent on the issue of legal advice that is offered to civil servants. You will appreciate the constraint that the committee is under: we have asked to see the legal advice and a vote in Parliament supported that. Ministers are currently considering that and they are citing the ministerial code as a blockage. However, the legal advice is also given to you, as a civil servant, and the restrictions in the ministerial code do not apply to you personally.

Leslie Evans: That is a false delineation. As I said earlier, I do not exist constitutionally. I report to ministers, and the foreword to the ministerial code exhorts civil servants to be cognisant of it.

The Convener: Thank you, Mr Fraser. I explain to anyone who might be listening in that we have to close this meeting at 2 o'clock because we are not allowed to sit at the same time as Parliament is meeting in the chamber.

I thank the permanent secretary for her evidence. I note that there will be some follow-up in writing, and the committee might choose, after discussion, to submit to the permanent secretary further questions in writing.

Meeting closed at 14:00.

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