OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 12 January 2021

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Pàrlamaid na h-Alba

Session 5

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COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT COMPLAINTS

1st Meeting 2021, 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)
*Murdo Fraser (Mid Scotland and Fife) (Con)
Alison Johnstone (Lothian) (Green)
*Stuart McMillan (Greenock and Inverclyde) (SNP)
*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Leslie Evans (Scottish Government)
Andy Wightman (Lothian) (Ind) (Committee Substitute)

CLERK TO THE COMMITTEE

LOCATION

Virtual Meeting

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 12 January 2021

[The Convener opened the meeting at 11:00]

Interests

The Convener (Linda Fabiani): Good morning, everyone, and welcome to the first meeting of the committee in 2021. First, I welcome Stuart McMillan, who replaces Angela Constance on the committee—congratulations to Ms Constance on her appointment as a minister. I invite Stuart McMillan to declare any relevant interests.

Stuart McMillan (Greenock and Inverclyde) (SNP): Thank you, convener. I have no relevant interests to declare.

Decision on Taking Business in Private

11:00

The Convener: Agenda item 2 is a decision on whether take item 5, a discussion of the committee's work programme, in private. Do members agree to take that item in private?

There are no indications otherwise—thank you. Item 5 will be taken in private.

Complaints Handling

11:01

The Convener: Our main public business today is an evidence session on the complaints-handling phase of our inquiry. We will also seek to cover the judicial review with the permanent secretary.

I do not intend to repeat all of my statement from the start of our meeting on 18 August 2020, but I remind all those present and watching that we are bound by the terms of our remit and the relevant court orders, including the need to avoid contempt of court by identifying certain individuals through jigsaw identification. The committee as a whole has agreed that it is not our role to revisit events that were the focus of the trial, as that could be seen to constitute a rerun of the criminal trial.

Our remit is:

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

The more we get into specifics of evidence, including times, people and cases, the more we run the risk of identifying those who made complaints. The more we ask about specific matters that were covered in the trial, including events that were explored in it, the more we run the risk of rerunning the trial. In asking questions, reference to specific dates and individuals should be avoided. Questions should be phrased in general terms, where possible, to avoid the risk of jigsaw identification of complainants. Please do not refer to civil servants by name unless absolutely necessary, and do not refer to civil servants by name below senior civil service level. I emphasise that the committee would be content to receive written supplementary points, should any witness to the inquiry have concerns that their response may stray into that territory.

Given the number of documents on complaints handling, for ease of reference, when asking a question, please mention the document number, the footnote reference and whether it is in batch 1 or 2.

I highlight the fact that the Government has provided a paraphrased version of the 29 December 2018 report, which provided advice to the permanent secretary on the judicial review. The committee has seen the full report on a confidential basis, and the paraphrasing of informative confidential sections is more limited than the committee had anticipated. I appreciate that the Government continues to assert legal professional privilege, but I encourage the permanent secretary to be as expansive as possible in her answers, so as to aid scrutiny.

At this point, I invite Alex Cole-Hamilton to say a few words.

Alex Cole-Hamilton (Edinburgh Western) (LD): There have now been two votes by the Scottish Parliament to insist that the Scottish Government waive legal privilege in this instance, and we are still involved in negotiation with the Scottish Government on that.

To allow us to proceed with our consideration, part of the negotiation covered opening a reading room before Christmas, when we saw what I think members agree was a helpful document from Sarah Davidson, which captured a lot of the legal advice and hinge points for decision making. The agreement was that we would at today's meeting cross-examine the permanent secretary on the decision making in relation to that legal advice, on the basis of a document that paraphrased it.

I understand that paraphrasing is defined as recasting remarks or text in an abbreviated original form that is an alternative to quoting but which still conveys the original meaning. However, what the Scottish Government gave us on Friday—that was the first time that any of us saw the document—was not a document that paraphrased but a document with redactions and a statement of the Government's legal position, which we have heard many times.

That has undermined our ability to question the permanent secretary effectively. The Government has behaved outrageously and with contempt for the Scottish Parliament. If needs be, we will revisit the issue in the chamber. We might as well ask Leslie Evans what she received for Christmas, for all that we will learn from questioning on the basis of the redacted and wholly unhelpful document that we have been presented with.

The Convener: That is all noted.

I welcome Leslie Evans, who is the Scottish Government permanent secretary.

Leslie Evans (Scottish Government) *made a solemn affirmation*.

Leslie Evans (Scottish Government): I shall give evidence on behalf of ministers and not in a personal capacity.

In January 2018, the Scottish Government received two formal harassment complaints and applied a Government procedure that had been developed in line with legal and human resources advice to investigate the issues that were raised.

The complaints could not be ignored. First, everyone has the right to a safe workplace that is

free from harassment. The Scottish Government recognises that as a legal and moral responsibility and as part of its duty of care to all employees. Secondly, the allegations were serious and specific—in fact, three of the alleged incidents were considered sufficiently serious that, on advice, it was deemed necessary to refer them to the police, in case they constituted not only behaviour that was unacceptable in the workplace but criminal behaviour.

The complaints were investigated internally over several months by an investigating officer, following due Government process and drawing on the statements of witnesses that the complainants and Mr Salmond provided. The Scottish Government was in regular contact with Mr Salmond's lawyers from 7 March 2018 when, following completion of the investigating officer's initial report, Mr Salmond was informed of the complaints, in line with the procedure.

Mr Salmond's full, fair and reasonable participation was sought in line with Government procedure and, as has been set out in evidence that has been provided to the committee, he was fully represented throughout via his lawyers. Timescales were extended on three occasions to allow him additional time to respond to the complaints. I specifically and personally instructed that the investigating officer's report should not be finalised until Mr Salmond had been given a further opportunity to present his position as fully as possible.

The Government procedure specifies the permanent secretary as the decision maker who is responsible for determining whether there is a reasonable belief that a complaint is well founded. That involves considering each cause for concern, weighing up all the evidence that is available, drawing on advice and extant legislation, and setting out the rationale in coming to a view that includes which complaints to uphold and which not to uphold.

I exercised that responsibility with care over several weeks. I questioned and challenged the detail, comprehensiveness, appropriateness, quality and robustness of all the evidence that was presented to me. In keeping with the Government procedure, I did not inform the First Minister that an investigation was under way, but I understand that Mr Salmond informed her. The First Minister did not make any attempt to influence the investigation at any point, nor did she receive a copy of the investigation or decision reports.

I would very much like to provide greater detail on the evidence and rationale for my decisions that are set out in the decision report but, as you know, I am unable to do so due to a dispute with Mr Salmond about whether the report, now reduced by the court, can be shared. However, what the Scottish Government can share, it has shared.

We have followed through on the Deputy First Minister's commitment in his letter of 26 October to provide the committee with as much material as possible to aid its deliberations. To date, we have provided 598 documents, totalling around 1,900 pages, and 19 hours of evidence by civil service witnesses. In addition, the Scottish Government has taken the unprecedented step of arranging confidential access for committee members to the summary of legal advice ahead of the decision to concede the judicial review on the single ground of a potential perception of bias.

This may be my final appearance at the committee, and I would like to close with three short fundamental points. First, as several of you who have served as ministers know, the civil service serves the Government of the day, which includes implementing Government procedures. The civil service code informs all civil service actions at all times and it requires me, as permanent secretary, to act lawfully, taking, and acting in accordance with, professional advice at all times. I assure the committee that I did just that. The civil service code, along with legal advice, guided and informed every Scottish Government action that is under the committee's scrutiny—in the development of the harassment procedure, in the investigation of the serious complaints and in the decision making that followed. As the Lord Advocate has confirmed, the position of the Government at all stages of the subsequent judicial review was informed by legal advice and, prior to the decision to concede, based on assessments that the case could be properly defended.

The civil service code and its values of

"integrity, honesty, objectivity and impartiality"

are statutory, and they are integral to our professional behaviour and judgment. Having spent half of my public service career in the civil service, I hold those values dear, as I know do all civil servants. Although I welcome the committee's scrutiny and challenge, I robustly and resoundingly reject any attempt to misinterpret, misattribute or misconstrue the role or motives of civil servants who carried out their professional responsibilities in good faith in order to improve the Scottish Government's workplace culture and, importantly, respond to serious and specific complaints.

That takes me to my second point. As permanent secretary, I am also responsible for the leadership, operation and performance of the organisation. That is why I have acknowledged and apologised on several occasions, rightly, for the procedural failing that came to light. That is also why I have committed to apply valuable

learning across the Scottish Government from the outcome of the judicial review, the forthcoming conclusions of the review led by Laura Dunlop QC, the findings of the committee's inquiry and our own internal review of information management, to ensure that staff have confidence in our commitment and approach to tackling sexual harassment in the workplace. Of course, there is no room for complacency, but you will find evidence that the Scottish Government is making headway in that endeavour in the recent public survey 2020 results, in which we have achieved strong improvement on leading and managing change, our highest-ever score on inclusion and fair treatment, and the lowest-ever proportion of colleagues responding that they had been bullied or harassed at work.

Finally, in my first appearance before the committee, I said that the Scottish Government did not choose the easy path, but it was, and remains, the right path. It was right to create the environment in which the complaints could come forward and it was right to challenge any culture of silence and tolerance, and provide channels to report harassment to ensure that victims feel heard and have their concerns validated. It was right to take the complaints seriously and investigate them fairly, and it was right to defend our actions in doing so in court. Doing nothing was not an option; indeed, if that had been the decision, it would have been strongly and justifiably criticised. I still stand firmly by that position and shall continue to champion the Scottish Government's work to support staff wellbeing and to build an environment where employees not only expect but are empowered to demand a safe working place free from harassment from wherever it might come. Indeed, convener, I am sure that you would expect nothing less.

11:15

The Convener: Thank you, Ms Evans. I move to questions from committee members. I will get round all members, but if any member wishes to come back in with further questions, I ask them to put an R in the chat box.

Margaret Mitchell (Central Scotland) (Con): I thank the permanent secretary for her opening comments. I merely comment that, yes, there has been a—[*Inaudible*]—by the Scottish Government, but I note and register the committee's—[*Inaudible*]—frustration at this and the fact that we received some of the handling of complaints information only on Friday last week and received even more stuff today. That is pretty unacceptable, I would have thought.

The permanent secretary to the Scottish Government—[*Inaudible*]—is a senior policy adviser to the First Minister and secretary to the Cabinet. You are also the principal accountable officer—[*Inaudible*]—and—[*Inaudible*]—responsible to the Scottish Parliament—[*Inaudible*]—for the—[*Inaudible*]—Scottish Government responsibilities. Can you confirm whether there was ever a public or parliamentary record of the procedure having been adopted? If not, why not?

Leslie Evans: Deputy convener, I am sorry, but I am not picking up all your comments, although I think that I have understood that question. I just register that I did not hear every part of what you said, so forgive me if I miss out on some aspects.

The procedure that was adopted is an employment procedure, so it would not go to the Parliament. However, there was a clear record of it having been signed off by the First Minister, who had commissioned it through the Cabinet.

Margaret Mitchell: Thank you.

Under the procedure, could the decision to make a complaint public be viewed as a form of reputational sanction on a former minister?

Leslie Evans: I am not sure about the premise of your question. Are you asking about whether it was made public or the basis for it being made public?

Margaret Mitchell: It is about whether a decision to make a complaint public could be viewed as a form of reputational sanction on a former minister. Clearly, in this instance, there was an interdict from the former First Minister—[*Inaudible*]—and it was not fair—

The Convener: Ms Mitchell, I am interrupting because your sound is very bad and we are not able to make out everything that you are asking. With your permission, we would like to turn your camera off, which might allow the sound to come through better.

Margaret Mitchell: Okay.

Clearly, the First Minister had originally put an interdict in because making complaints public is damaging to any minister's reputational standing. Under the procedure, could a decision to make a complaint public be viewed as a sanction on a former minister?

Leslie Evans: There are two issues there. First, the procedure does not have sanctions against ministers, as you pointed out. The procedure is intended to be an employment procedure that provides a mechanism to address complaints and grievances. That is its fundamental purpose.

On this occasion, as you will know, a freedom of information request was received in June about the allegations against Alex Salmond. Without going into detail about that, unless the committee

requires me to, that was the issue that prompted a public understanding, not of the complaints but of the fact that allegations had been made against Mr Salmond by employees of the Scottish Government.

Margaret Mitchell: In your role, if you thought that something was going to reflect very badly on the reputation of the Scottish Government, would it be paramount for you to seek to do something to mitigate or avoid it?

Leslie Evans: Clearly, the Scottish Government's reputation comes within my remit and responsibilities, but it does not overshadow or take precedence over the civil service code or legislation by which we are bound, such as freedom of information legislation or other legal requirements to make information available to the public, of which there are many. Although reputation is important, the law, the civil service code and the requirement for me to abide by both of those supersede any such issue.

Margaret Mitchell: When the decision was made to—[*Inaudible*.]—the complaints and refer them to Alex Salmond, he offered arbitration. You rejected that. Alex Salmond thought that the procedure was unlawful and he explained why. How did you weigh up what you were being informed by the former First Minister with the danger to the reputation of the Scottish Government if it turned out, as it eventually did, that in pursuing the case, the Government would be doing so in an unreasonable manner?

Leslie Evans: Again, I am not sure that I picked up all the points that you made, deputy convener. However, I can certainly talk about arbitration in the first instance and then about Mr Salmond's concerns about the procedure being unlawful or unfair.

The decision to reject arbitration was taken after taking legal advice, as I think you are aware. It was regarded as inappropriate and not the way to resolve public policy. It was also not clear that it would be cheaper or quicker or that it would avoid the courts or a judicial review. We can go into more detail about that, but I know that we spoke about it when I was previously in front of the committee.

On Mr Salmond's concerns about the procedure being unlawful and/or unfair, as you know from having seen the correspondence between us and Mr Salmond's advisers, we responded to those concerns and they formed part of the original judicial review grounds for challenging the procedure and investigation process. Our response to each of the concerns was set out in the open record that has been provided to the committee and was provided to the court at the time. We defended the procedure and the investigation process on each of the grounds of challenge, including whether it was unlawful and unfair.

Margaret Mitchell: I refer you to the evidence that you correctly say that you gave on 17 November, during which this issue was addressed. You said that arbitration was not provided for in the procedure and that that was a reason not to consider it. Surely it is the case that it did not have to be provided for and could still have been considered.

You also said on 17 November that the Scottish Government could have been accused of a "cover-up", but I think that that must be weighed against the Scottish Government's need to take every reasonable step—[*Inaudible*.]—in deciding whether its process was competent and legal. Arbitration would have resolved that.

I find it puzzling that you said that it was not for the complainers to decide whether the procedure was right, yet—[*Inaudible*.]—in her evidence on 1 December on the development of the procedure said that it was the permanent secretary's decision to consult Ms A and others—[*Inaudible*.]—the procedure, to offer lived experience. On one hand, you were quite happy to consult the complainants; on the other, you did not give them the opportunity even to consider arbitration.

Leslie Evans: I think that we are conflating two different aspects here: arbitration, which I shall come back to; and whether it was right to offer the complainants the opportunity to know about the procedure before the concerns that they had raised turned into complaints.

The option of arbitration is not set out in the procedure, but that was not a reason not to consider it. I took clear legal advice on the benefits or otherwise of arbitration, and I did not depart from that legal advice. I think that you have heard in detail about some of the advice. The Lord Advocate articulated some of that when he gave evidence on 17 November. In particular, he talked about whether it was appropriate to resolve an issue of this kind through a confidential procedure. Also, because arbitration is commonly used for contractual disputes, he questioned

"whether a public law dispute of this sort can appropriately be submitted to arbitration"—[*Official Report*, *Committee on the Scottish Government Handling of Harassment Complaints*, 17 November 2020; c 9.]

In addition, you heard from Paul Cackette, the former director of legal services, about the legal position being clear that arbitration would not necessarily prove to be a better way—it is not necessarily faster, cheaper or discreet and it does not necessarily lead to a quicker resolution—and it would not necessarily have meant that we would not still end up with a judicial review.

More to the point, we still had a duty of care to the two complainants, to whom you referred, and the complaints would still have required to be investigated. In the legal advice that I was provided with, arbitration was pretty roundly and robustly regarded as not a good solution.

On your point about whether it was appropriate for people who had raised concerns to be given the opportunity to comment on or understand the procedure, it is quite common for the Scottish Government and other employers to share with people who are indicating that they are likely to make a complaint what the procedure is likely to be. That is not unusual. I think that you know from other advice that has been brought to this committee that the procedure was not changed after those people had seen it. It was not that they were necessarily consulted on it. Rather, they were given an opportunity to understand what would happen if they decided to raise a formal complaint as opposed to a concern, as was the case at that point.

Margaret Mitchell: Clearly, arbitration would have been a win-win situation—[*Inaudible*.]—had it been found that the Scottish Government was acting with apparent bias and in the process was not giving the former First Minister adequate time or even a proper opportunity to respond to the complaints. I find it strange that you, as the accountable officer, with the huge responsibility—[*Inaudible*.]—this opportunity. If the Government was completely right in what it was doing, it would have gone ahead with the judicial review. If it was wrong, lots of taxpayers' money would have been saved.

11:30

I want to follow up in particular on the confidentiality issue and the involvement of—[*Inaudible*.]—because we know that—[*Inaudible*.]—of information that we have been given, and that specifically in FN 43, there were numerous emails that provided details of the consultation with Ms A and Ms B. I think that it is significant that Ms A said that

"a criminal process has never been an outcome I was actively seeking".

Ms B put forward what she hoped the procedure would gain for her:

"When I came forward about this it was in the hope that doing so it would mean that it would put in place measures that would help prevent this from happening again and for"

the former First Minister

"to face some consequences for his actions through the Party, as I know there is little the SG can now do. But I've never been motivated by seeking a criminal case for this."

In fact, I think that Nicola Richards said that it was your decision to refer it to the police and that—[*Inaudible*.]—the complainers would never have done that.

I therefore ask what consideration you gave of what was clearly an uncomfortable situation, as the complainers never wanted to go down the criminal route and never—[*Inaudible*.]—to be presented to the police. How could the views of the complainers have been weighed—and were they weighed—against the responsibilities of the employer in relation to a police referral?

The Convener: I will interrupt at this point, Ms Mitchell, because your sound is getting bad again. We have to make this the last question from you, and then we will move to Alasdair Allan.

Leslie Evans: Just to be clear on the previous point that was raised, I would not want us to conflate the issue of arbitration with the concerns about the procedure that Mr Salmond put forward and which we responded to at every stage. I will leave that point now, because we have given it quite a bit of time.

Ms Mitchell's main point, if I picked it up correctly, is about the referral of the case to Police Scotland and the Crown Office and whether that was against the wishes of the complainers. It was against the wishes of the complainers—I understand that. The decision to refer the matter to the Crown Office was consistent with the procedure. You will have seen that in paragraph 19 of the procedure.

As I set out in my evidence on 18 August and again on 8 September, it was decided that we had to balance the legal advice that was given to me, as the person who was going to take the decision, against careful consideration of the views of the complainers. I weighed that up very carefully. I was particularly concerned to allay some of the complainers' concerns about a potential referral to the police, and I took some time to find out whether we could do so. However, I also had to bear in mind the potential criminality of the allegations and advice that I was being given about them.

I absolutely understood and recognised—and I understand completely why you are making this point—the concerns and anxieties of the complainants. They are documented, as you have said. I understood that they were concerned about a loss of privacy, about media coverage and about how they might be required to revisit events that they would rather not. I know that they feared some backlash, criticism and retribution from some quarters of the public and also from some individuals. It was not something that I took lightly by any means.

However, you will be aware that it says in the procedure that the Scottish Government may decide to refer a complaint to the police even if the complainer does not want it. As Advisory, Conciliation and Arbitration Service's guidance also recognises,

"If they do not want to tell the police, you should still encourage them to do so. You might still need to report it but should always tell the person affected if you're going to do this."

That is what occurred.

Margaret Mitchell: Thank you for that answer. I understand that that was my final question, convener. I merely comment that—[*Inaudible*.]

The Convener: Thank you. If you want to come in later, and if time allows, we can see whether your connection is better then.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): Permanent secretary, as you have indicated, you have spoken to the committee on a number of occasions, but I want to return to the question of prior contact. You said that the extent of prior contact between the investigating officer and the complainers was not known until December 2018 and that you took action when the extent was known. Can you clarify whether you had any knowledge of prior contact before the investigating officer was appointed?

Leslie Evans: As you know, it is not my role to appoint an investigating officer—that is for the director of people. I knew that there had been some contact, but I did not know the nature of that contact or the detail of it. That is of course quite right because, as the deciding officer, I would not and should not know of that. I was aware that there had been some contact, but I was not aware of the nature of it that was subsequently brought to bear in some of the documents that were presented, although, as you know, all of that was in keeping with the spirit and intent of the investigating officer role.

Dr Allan: Nonetheless, do you have a view in hindsight about that appointment? Looking back, had you known that Judith Mackinnon had been in touch with the complainers before they made their formal complaints and before she was officially appointed as investigating officer, would you have been comfortable with that appointment being made?

Leslie Evans: As I said, I knew little of the contact, but the contact that I learned about subsequently was entirely in keeping with the intention and spirit of paragraph 10 of the procedure. I know that the committee has had evidence to demonstrate that. The intent was clearly demonstrated in the evidence given by James Hynd, who was the author of the procedure, and in paragraph 36 of our written statement on the judicial review, which talks about what we defined as prior involvement. I think that the director of people, Nicola Richards, also gave information in her evidence about why the individual was appropriate for the investigating officer role.

In relation to spirit and intent, the approach was appropriate. However, we now know through the JR process that it could be construed and interpreted differently. Therefore, were we to introduce the procedure again, it would need to be done on a very different basis with a different allocation of roles that separated things out much more clearly. However, at the time, which is what you asked about, the intent and spirit of paragraph 10 were clear, as were the role of the investigating officer and how that should be employed and deployed.

Dr Allan: On 1 December, in commenting on the complaints process, Judith Mackinnon said:

"We tried to keep the number of individuals who were involved limited".—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints,* 1 December 2020; c 12.]

I completely understand some of the reasons why you would want to keep the number of individuals limited in dealing with a complaint of this nature, given the subject matter. However, looking back, do you feel that there are certain dangers associated with having a small group of people? Did the group of people who were involved in looking at the matter have a wide enough range of experience to deal with the legal and other issues that were involved?

Leslie Evans: That is an important point. Clearly, the procedure defines roles precisely and so does not allow for a dispersal of roles or responsibilities across a wide range of people. It is very specific about the roles and functions that must be undertaken, and that was rightly respected. Indeed, the individuals involved were professionally qualified and were appropriately and professionally placed in those roles. However, as you are aware, we have asked Laura Dunlop QC to look further at the procedure and particularly at how certain aspects of it might be implemented in future.

One of the areas of import in that respect is the role of the permanent secretary as deciding officer. I am sure that Laura Dunlop will wish to look at that. We will be very open to recommendations from that review. If it is suggested that there should be a different distribution of roles and responsibilities in the future application of the procedure, we will take that on board.

Dr Allan: You have said just now and in the past that Laura Dunlop QC will be looking at the

role of the permanent secretary in deciding the policy that you have just described and how it will operate in the future. If there were to be another complaint in the future, would you be comfortable with the permanent secretary playing that role, given some of the issues that we have seen, including those that Nicola Richards described to the committee on 1 December?

Leslie Evans: I was not aware that Nicola Richards had said anything about the role of deciding officer in her evidence.

Dr Allan: I should clarify that she described the permanent secretary's role as follows:

"Obviously, for the permanent secretary ... everything eventually flows in that direction".—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints,* 1 December 2020; c 54.]

Do you take a view on whether that should be the direction of flow for all such matters in the future? If such a complaint were to be made in the future, should that not be the case?

Leslie Evans: As you said, I will be interested to know what Ms Dunlop makes of the matter. Unfortunately, all things—not just these matters but all matters—come to the door of the permanent secretary eventually. That is part of being at the head of an organisation and being the accountable officer, so it would be difficult for my role to be completely disentangled.

However, I have created another director general set of responsibilities, which were partially occupied by Sarah Davidson, whose handiwork the committee has been reading about. That role has now been consolidated, with that person responsible for issues of personnel, in-year finance and all the delicacies around sensitive information handling, so there has already been a shift in how we deal with some aspects of the supporting infrastructure for events of this kind. We want to ensure that that is taken into account by Ms Dunlop as she thinks about future roles and responsibilities.

I would never wish to step aside from or eschew my responsibilities as head of the organisation. When tough decisions have to be taken, it is my role to take them.

Alex Cole-Hamilton: Good morning, permanent secretary. Thank you for coming back to see us today. I hope that this will not be your final session with us, because I hope that the will of Parliament will finally be satisfied, and we will be able to see the legal advice without legal privilege and to ask you questions about it. As it is, I will try to make the best of what we have got.

I will ask a couple of questions about complaints handling, and then I will ask more substantive ones about the judicial review process. When you or the organisation first made Mr Salmond aware of the complaints against him, what information about the complaints was shared with him?

Leslie Evans: We first spoke to Mr Salmond about the allegations and the concerns that had been raised in March. At that point, information was set out about the allegations and the procedure that we would follow to investigate them. Mr Salmond was given an opportunity, with which he engaged, to provide information and witness statements and to have access to information on diary entries and all the information that he might wish in order to present his case.

Alex Cole-Hamilton: I would like to bottom out what you mean by saying that the information around the allegations was shared with Mr Salmond. Were the exact substantive complaints from the two women at the heart of this passed to him at that time?

Leslie Evans: I would need to confirm the exact wording of that, but once the investigating officer's report had been completed, which was in early March, that was communicated to Mr Salmond.

Alex Cole-Hamilton: Is it fair to say that, by early March, he had full sight of the verbatim account of the allegations that he was facing from the complainants?

Leslie Evans: He was given information about those complaints.

11:45

Alex Cole-Hamilton: Those two things are very different. "Verbatim account" refers to the blow-by-blow set of allegations that came from the women at the heart of this, while "information about those complaints" is very different, I think. We already know that the Government is not very good at paraphrasing documents. Is that what happened here?

Leslie Evans: The process that was followed and undertaken was in line with the procedure and good HR practice. As you will be aware, in highly sensitive cases such as this, we need to protect, as far as we can, the confidentiality of the complainers and the witnesses but, as you point out, we should also ensure that the subject of the complaint has sufficient information to allow them to respond reasonably and manage the risk of potential legal challenge. The advice that was taken to that effect followed both of those things.

With regard to what we were able to share, we knew, for example, that Mr Salmond was likely to know the individuals' identities, and we needed to ensure that there was sufficient specificity to allow for the events to be clearly understood; we also had a responsibility to protect appropriately the sensitive issue of identification of individuals. A

balancing act was required, but that drew on good HR practice and appropriate legal advice about how the procedure had been developed to address the matter and therefore about how it informed the information that was to be shared.

Alex Cole-Hamilton: To be clear, the information that was shared with Mr Salmond about the substance of the complaints had been underpinned by legal advice that you had received, and it was insulated, to your mind, against further legal challenge. It strikes me that, if you parse the substance of a complaint, somebody who is the subject of that complaint might have grounds, further down the line, to challenge that, based on the fact that it was not the full account of the complaints being levelled against him.

Leslie Evans: My point was that the development of the procedure that we followed to the letter was indeed informed, as you know, by legal advice all the way along. It was also informed by HR practice. It was good HR practice that we were following as to how we conducted the investigation and how the investigating officer undertook her task—including the sharing of information.

Alex Cole-Hamilton: So, the procedure was underpinned by legal advice, but the application of the procedure was not. That is what you are saying.

Leslie Evans: No. I am saying that the procedure was developed in line with HR and legal advice and that the investigating officer and I and others who were involved in important roles in applying the procedure took legal advice at every stage and did not depart from that composite legal advice.

Alex Cole-Hamilton: Okay—perhaps I will move on.

Who did you seek advice from on ascertaining—[*Inaudible*.]—criminality of the complaints?

Leslie Evans: I wonder if you are thinking about my decision report or if you are referring to the decision to refer to the Crown Office—or perhaps both.

Alex Cole-Hamilton: It is both, really.

Leslie Evans: Okay. I took and sought legal advice at every stage, in relation to my responsibilities as a deciding officer and certainly at particular key points, such as the decision that I referred to earlier in response to the deputy convener, regarding referral to the Crown Office. That advice was complete and thorough; it came from a variety of sources, as you will be aware; and I did not depart from that composite advice at any point.

For reasons that I outlined in my initial remarks, I am not able to share the decision report with you, but I am able to tell you what that procedure and process comprised without any content or any other aspects. If that is helpful, I will certainly go through that, as it would also give you an indication of what other sources of information and legislation I drew on in undertaking the role of deciding officer.

Alex Cole-Hamilton: Please do so.

Leslie Evans: The important thing is that I had to take three elements into account. The first was about how to approach the matter, and it is really important to emphasise that. The role was really important, for all sorts of reasons, which I do not need to go into, but I was determined to exercise a considerable responsibility with real care. I was determined to spend time—as was required—to pay attention to detail, particularly to challenge the comprehensiveness, robustness, quality and appropriateness of the evidence that was being presented to me.

That included the full text of witness statements, both on the side of the complainers and—quite rightly—on the side of Mr Salmond. That was the first element: an open mind and a critiquing and challenging approach.

Secondly, I had to decide whether each complaint was well founded. That was not carte blanche for all in or all out—each complaint had to be analysed separately and individually, and I had to weigh up whether, on the balance of probabilities and based on the available evidence, I should uphold the complaint. It is important to emphasise that that was done on an individual basis.

Thirdly and finally, I had to decide whether each alleged conduct amounted to harassment. In that process, I had to weigh up legal advice and extant legislation, including the Protection from Harassment Act 1997 and the Equality Act 2010. For example, the legislation asks whether

"conduct of a sexual nature"

had

"the purpose or effect of ... Violating"

the complainer's

"dignity, or ... creating an intimidating, hostile, degrading, humiliating or offensive environment".

It also demands consideration of whether the conduct in itself, which might not have constituted harassment, taken with other instances and other incidents, demonstrates a "course of conduct" that "a reasonable person" would consider amounted to harassment.

In addition to drawing on those legal definitions, I needed to look, as you would expect, at the

context of the complaints, the working environment and the nature of the professional relationship. I needed—very importantly—to take into account the impact on the individuals. I also needed to ask myself whether I was satisfied that an event had occurred, based on the evidence available and, if so, whether it took place in the manner described and—importantly—whether it was corroborated by other witness statements. As I mentioned in my opening remarks, all that was underpinned by my responsibility as a civil servant and the civil service code.

It was a demanding role, which I took incredibly seriously. I approached it with an open mind and complete clarity about whether individual concerns would be upheld, taking guidance and drawing on sources including legal frameworks, as well as taking into account the circumstances, the impact, and the corroboration of evidence. It was a very important role, and I had not undertaken a role of that nature before in my professional career.

Alex Cole-Hamilton: I am grateful for that helpful answer.

I go back to my original question—[*Inaudible*.] Did you speak to Police Scotland informally at any point to seek its advice on whether to assess the criminality of the allegations?

Leslie Evans: No.

Alex Cole-Hamilton: That is helpful.

I will move on to the judicial review. On the general question of the Government's approach to the legal action, would you say that it is normal practice for the Government to proceed with the defence of a judicial review if external counsel says that, although the case is statable, it is more likely that—[*Inaudible*.]—will lose, rather than win, the review?

Leslie Evans: At every stage, we needed to be clear, and the advice that I drew on needed to reassure me that the case was statable. The variety of advice sources, including legal colleagues in the Government—not only the Lord Advocate, but advice from counsel—is part of the composite advice that I drew on. At any stage, therefore, the prospects of success were kept under constant review. The Lord Advocate emphasised that in the information and evidence that he submitted to the committee on 17 November. At every stage, I was weighing up legal advice and taking into account public policy considerations and my role as principal accountable officer. At every stage, we were making sure that we were clear about why we would proceed and what the risks and opportunities were in proceeding, and ensuring that that was kept under regular review.

Alex Cole-Hamilton: In a future theoretical judicial review, there might be a situation in which external counsel told you that the case was statable but likely to be lost, and the Government, on a range of assessments, might still decide to proceed. Is that correct?

Leslie Evans: We need to look at that in a broader context. The Lord Advocate described it eloquently in previous evidence to the committee, as he would, of course. I think that he said that legal advice is not a single thing at a single point at any one time. As you know, different lawyers will have different views. Indeed, the same lawyer might take a different view as consideration of a case develops and at any time when more information and analysis comes to the fore. At any one time, one has to take composite advice on what the legal statability, circumstances and views are. That will continue to be the case in a judicial review or, indeed, in any other circumstance in which legal advice is being pled.

Alex Cole-Hamilton: Okay—thank you. I have a couple of more questions, convener.

The committee has learned a lot about duty of candour in legal proceedings—that is, each side has a duty to produce and evince all evidence that is asked of it. Was the duty of candour explained to the key personnel—namely, those who had been involved in the handling of complaints—who were involved in the preparation of the defence of the judicial review? If they were, why did the Government keep finding new seams of evidence to present to the court?

Leslie Evans: That has been a point of considerable discussion during the inquiry and one that I have thought about carefully. We are clear that there was corporate failure in our getting the right information at the right time. I have taken that to heart, and, as you know, I wrote to you last November about our review of information handling and how we would—[*Inaudible*.]—deploy information. That is now live.

I will make two points on that. First—I am not making excuses; I am just stating a fact—information handling, in any circumstance but particularly in difficult, sensitive circumstances of this kind, is, for a public authority, especially one the size of the Scottish Government, incredibly challenging, particularly in the digital world, and we need to get better at it. At any one time, there are about 35 million documents in the Government's electronic document management system and about 3,000 in my email account. We also get about 3 million emails a week coming through the Government's doors, as it were. Therefore, information handling is always challenging.

The specifications that we provided as part of the judicial review, those that were issued in response to consideration of particular elements of our case during October and November, and then the commission itself, which was a much more demanding and bigger call on our resources, were, without doubt, more challenging to respond to. Therefore, as I said, I put in place a review to make sure that we get better at that, and we already have got better. You might contest that, but we now have a specialised team that is responsible for ensuring that we provide information of the right kind, which is filtered through our responsibilities for data protection, court procedures and restrictions.

We have a team that works solely on that responsibility and on providing information to the inquiry. We will probably need to retain the team, in a smaller version, because public authorities need to respond, in relation to their responsibilities on information and open Government commitments, in that way.

Alex Cole-Hamilton: I understand entirely what you say about the mega haul of data that an organisation as big as the civil service possesses, but, with respect, this is not a constituent grumbling about hospital waiting times. The evidence that was incrementally produced in the final few days of December 2018 would ultimately be the smoking gun under which the judicial review collapsed. You must understand that the optics of that look pretty bad. In a way, a reasonable person, as you have described previously, might look at that and say that the Government had something to hide or was trying to hide that.

Leslie Evans: I can see why that might be construed—indeed, I believe that that has been alleged in some circumstances. That really is not the case.

12:00

I absolutely take the point that the speedy and effective sharing of information in any circumstances is important, not least in this case. Indeed, you will have seen from your reading of Sarah Davidson's report the speed at which I took a decision and asked for a commission to advise me rapidly after that information came to light. As we know, there was nothing new in that information about the way in which the investigating officer had played her role, which was entirely in keeping with the interpretation of the procedure. However, it was the timing of that information coming out that led, as you know, to my decision to concede, based on the fact that it contradicted some of the commitments that had been made earlier by our legal representatives and cast doubt on our ability to show other evidence in our case at the right time.

I therefore do not in any way try to reduce or somehow give less import to the information-sharing processes that the Government was challenged by in those circumstances. However, I would say in defence that they were particularly challenging circumstances, with broad, year-old material—[*Inaudible*]—but also information that would be hard to understand in terms of what exactly was required because it was thematic. It was not asking for a document; it was asking for any information of any kind.

As you know—this will be my final point on this because I am sure that others will want to come in—this was not something to which we could take a formulaic approach; it had to be done by individuals for their own accounts. As a haver of information—the legal term for the owner of the information—I was the only person who could look at that information and filter through it to decide what was and was not appropriate at that time and what was available to be able to be shared at that time. I am not trying to defend that completely; I am just trying to explain the circumstances of how that could have come into being.

Alex Cole-Hamilton: I have a final quick question that does not require a long answer. The committee has established from a range of sources that external counsel to the Government threatened to resign when that information came to light unless the Government collapsed the case. Was that the hinge point? Was that the reason why the Scottish Government decided to concede the judicial review?

Leslie Evans: My decision to concede was taken on a sifting of all the information at that point and, as I think I have already said, it was based on legal advice, public policy advice and, importantly, my role as principal accountable officer.

Alex Cole-Hamilton: Thank you, convener. That is fine for me.

The Convener: Murdo Fraser, please, then Maureen Watt.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning, permanent secretary. I have been having one or two technical issues at my end, so I hope that you are able to hear me. I want to ask some questions about the anonymity of the complainants and—[*Inaudible.*]—which were touched on by Alex Cole-Hamilton in his questions.

It was decided early on that the complaints process would be anonymous, but we know from concerns that were raised by Mr Salmond's lawyers that they were concerned that that meant that their client could not properly respond to the

complaints because there was a lack of specification in terms of the—[*Inaudible.*]—that remained. How do you think that the former First Minister or, indeed, any former minister could properly respond to complaints that were made if the identity of the complainants was not made available to them?

Leslie Evans: I apologise, Mr Fraser, but I am not sure that I caught all of your question. I think that you were asking about the anonymity of the complainants. Is that correct? I am not sure whether somebody else heard it more clearly.

The Convener: That is my understanding of what Mr Fraser asked about.

Leslie Evans: Okay. The point is that the procedure was introduced by the Scottish Government in order that people with concerns from their past and current experience could raise them as part of the context of working for the Government. Therefore, it was—and remains—an employment and an HR policy. From that point of view, as I mentioned earlier, it was always developed while taking into account and reflecting on legal advice. That policy will continue to reflect the needs and requirements of complainants.

As I think I mentioned in my response to the deputy convener, there will therefore always need to be a balance between ensuring that complainers' confidentiality is protected and ensuring that there is also sufficient understanding and information to allow specificity on what is being alleged. That is a difficult balance to achieve, and it was very much at the forefront when it came to the investigating officer's responsibilities and the information that was shared.

My second point is that we were at pains to ensure that Mr Salmond had every opportunity to engage with the procedure. Members will have seen that from the correspondence that has been shared with the committee. Mr Salmond was offered a meeting with the investigating officer, although I think that he declined that offer. On three separate occasions, I delayed and extended the procedure to ensure that he had ample opportunity to produce information and the contact details and accounts of witnesses that he felt that he would want to have as part of the information on which I would draw in my decision report. The first two occasions were in the early stages, but as I said in my opening remarks, I personally intervened and sought an opportunity for him to be asked to engage further, because I was concerned that he was not engaging on certain complaints.

There will always be a balance between protecting confidentiality and ensuring that the person against whom allegations are being made has the necessary information and the time and the opportunity to engage appropriately with the procedure. At every stage, we adhered to the procedure on that basis.

Murdo Fraser: Thank you for that helpful and comprehensive reply.

I want to follow up by asking a question about the submission that the former First Minister made to James Hamilton, which was provided to the committee and, as you will know, is now in the public domain. It is stated in that submission that the current First Minister's chief of staff, Liz Lloyd, named one of the complainants to Geoff Aberdein, who was formerly chief of staff to the former First Minister. Do you have any knowledge of that?

Leslie Evans: [*Inaudible.*]—

The Convener: Excuse me, Ms Evans, but I am going to interrupt here. First of all, it was really difficult to make out what Mr Fraser was saying. I believe that I got the gist of it—it was about the recent submission that is in the public domain. I point out to everyone here that that statement of information has not yet been processed by the Parliament to ensure that it is compliant with legal obligations, so I ask people to exercise some caution in making any reference to it. I know that that submission is in the public domain, but the Parliament still has a responsibility to abide by the terms of the order. Although the public domain issue impacts on that, we still need to evaluate the information that we choose to accept and publish in our own right.

I come back to you, Mr Fraser. I ask you to perhaps be a bit more circumspect in how you put your questions. We are trying very hard to make out everything that you are saying. You appear to have connection problems at your end.

Murdo Fraser: Thank you, convener. I think that I saw the permanent secretary indicate that she had knowledge of that. However, perhaps I could follow up by asking whether there is any reason why a special adviser—a political appointment—would be aware of the names of complainants.

Leslie Evans: As I have said, and as the convener said, I cannot comment on allegations from pieces of documents that I have not had an opportunity to see in detail or comment on appropriately. We did everything that we possibly could within the confines of the procedure, to the point where we have occasionally been slightly criticised by the committee, to maintain confidentiality to avoid any identification by any individuals. That was a really high priority for me, in terms of not just the duty of care, but the ethos and intent behind the procedure.

Murdo Fraser: Thank you. I am not sure that that was an answer to the specific question that I

asked. Why would a special adviser have access to the names of complainants?

Leslie Evans: I think that you would need to ask the special adviser if that were the case.

Murdo Fraser: I draw your attention to a document that we have seen, which is number—[*Inaudible*.]—315. It is a memo from Nicola Richards dated 3 November 2018. [*Inaudible*.]—reference to the need for consultation with individuals

"before disclosing to another party or the police"

any information

"because of the risk of the matter getting into the press and the individuals being identified."

Was that the approach that was adopted by the Scottish Government?

The Convener: Again, that question was really difficult to hear. Ms Evans, did you manage to pick up the gist of it?

Leslie Evans: I was not sure whether it was to do with individual people talking to other complainants. I am sorry—I could not catch the full question. Was that what it was about?

Murdo Fraser: I was quoting from a document—a memo from Nicola Richards dated 3 November 2018—that made reference to the need for the Scottish Government to consult with individuals

"before disclosing to another party or the police because of the risk of the matter getting into the press and the individuals being identified."

I asked whether that approach had been adopted.

Leslie Evans: Again, I did not get all of that. I think that it was to do with a referral to the police. If it was, the procedure is very clear—

Murdo Fraser: No—[*Inaudible*.]

The Convener: I am sorry, Mr Fraser—it is getting more difficult to hear you. I suggest that we move on to the next person. Perhaps you can use the chat box function for your question, and if you are not able to ask it when we bring you back in and you wish it to be put to the witness, we can do that. We will come back to you but, in the meantime, I will bring in Maureen Watt.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): Thank you, convener. I hope that you and Ms Evans can hear me.

Ms Evans, you mentioned paragraph 19 of the procedure, which is about your duty of care as an employer. Does that duty of care or the procedure itself require you to take complaints to the police if they contain something that you believe to be criminal? I will combine two questions and ask whether you would feel obliged to take the matter to the police in all circumstances, regardless of whether the complainer had consented to you doing so.

Leslie Evans: I think that I mentioned earlier in my response to the question about the decision to refer the matter to the police that the procedure says, in paragraph 19, that complainers should be informed. I felt that it was very important that they should be consulted and that we should give careful consideration to and take account of the views of the complainers, but that, equally, if the alleged conduct could amount to potential criminality, it would be very important for me to report it. In fact, I would be reneging on my duty and responsibility as permanent secretary, and as a civil servant, not to refer on allegations that involved potential criminality.

However, the point also needs to be made that I took legal advice on that, as I did—I have emphasised this—throughout every element of the procedure. I did not depart from legal advice. I think that I said earlier on that, although I was very cognisant of, and very empathetic to, the views that I had heard from the complainers and their concerns about being exposed, media exposure, potential retribution, commentary and potential criticism, I still felt, having taken advice, that I had to be cognisant of the potential criminality. It was not an easy decision, but I weighed it up very carefully, and it was in keeping with the procedure.

12:15

Of course, it would have been quite possible for the complainants themselves to have gone to the police earlier, but they chose not to. I think that some of the quotes that the deputy convener produced from information that has been shared with the committee illustrate why that was the case. I absolutely understood that.

Maureen Watt: I take it that what you are saying is that, having taken advice from the police and others, it would be your decision alone whether the matter should be taken to the police. If so, would you do that in your role as the deciding officer under the procedure or in your general role as head of the civil service?

Leslie Evans: I will correct you. I did not take any advice from the police, and I did not have contact with the police. I took legal advice, as you would expect.

My responsibility was twofold. First, I had a responsibility as the deciding officer in a role that is laid out very clearly, as part of a procedure that is laid out very clearly. It is a Government procedure, so I am obliged to comply with it. Secondly, I had a duty of care. As permanent secretary, I would be concerned that, if there were

allegations of potential criminality, I could be justifiably criticised for not declaring those.

Legal advice was very carefully taken and adhered to. I also had a responsibility as the deciding officer and as the permanent secretary to ensure, as a civil servant, not least that the organisation was cognisant of any potential criminality. I am sure that you would not expect anything less.

Maureen Watt: No. In the same vein, did you feel that your general duty of care as an employer or the procedure required you to reject the possibility of mediation without consulting complainers?

Leslie Evans: I will elaborate on what took place around mediation. We have talked about this in previous sessions, but I want to be absolutely clear.

Initially, I turned down the request of mediation that was made on behalf of Mr Salmond because, at that point—I think that that was around 23 April—the procedure and the process were still at a very early stage. It was still the fact-finding stage, so it would have been inappropriate and unhelpful to have considered mediation at that point. Therefore, I refused it on that basis. As members know, they came back very quickly again and asked further whether mediation could not be an option. It was at that point that it was agreed that we would put that question to the complainants. Having made it clear that it was too early, we asked the complainants—I think that the investigating officer, Judith Mackinnon, shared this information with the committee in her last session before it—whether they would be prepared to engage with mediation at any stage in the future. They came back and said no very firmly.

That said, it was very clear to me—I think that it is very clear to anybody who has been involved in such matters—that mediation is a voluntary process that requires both parties to participate voluntarily, and it was very clear that we could proceed only with the agreement of the complainers, which was not forthcoming.

I will make a final point about the appropriateness of mediation—again, I think that I have made this point before, but it is an important one to emphasise. In her report on the bullying and harassment of House of Commons staff, Dame Laura Cox said:

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

That is also upheld by our own fairness at work procedure, an extract of which says that

> "mediation may not be appropriate if there is a significant power imbalance between the parties which cannot be bridged."

It also lists a range of other reasons why mediation might not be appropriate.

To summarise, it was too early at the time, but when we asked the complainants whether they would be prepared to engage with mediation further on in the process, they said no. Mediation has to have both parties involved and it was quite clear that the complainants were not prepared to do that.

Maureen Watt: That has helpfully clarified that very well.

You said in your opening remarks that the procedure is shared with people who are likely to bring complaints, and that that is common practice. I agree that sharing the procedure is common practice, but we are talking about the draft procedure. In our meetings, we have talked an awful lot about sharing draft procedure with complainants in order to get their lived experience.

With hindsight, do you think that it was a mistake to get input from someone who might well have been going on to make a complaint under the procedure, rather than asking for input from stakeholder groups or other people who had been involved in complaints previously? I quite accept that everybody should be able to see a finalised procedure if they are going to make a complaint, but was it a mistake to ask people who would go through the procedure to get involved in drafting it?

Leslie Evans: I will pick up on the couple of points. First of all, we had, of course, spoken to people who had an interest in the procedure and who had a professional contribution to make. We had drawn on guidance such as that from the Advisory, Conciliation and Arbitration Service and we had spoken to Police Scotland. I did not speak to them, but those who were drawing up the procedure spoke to Police Scotland about how to put in place the most person-centred and appropriate procedure. We had already done that.

It was very late in the day when a near-final draft was shared with complainants; indeed, no further substantial changes were made after that. It was therefore not the case that they were being consulted on the basis that that would change it. They had the opportunity to look at a near-final draft in order to illustrate to them the kind of procedure that they would be engaging with and which we would be operating, should they decide to make complaints.

We were completely transparent about that; I think that the committee has seen a note on that. We were not hiding it—it was, from our point of view, part of normal business. On Ms Watt's

question about whether we could have waited until the procedure was completely finalised, that might well have caused problems in terms of timing. Hindsight is a wonderful thing; I find that learning is better than hindsight. I think that it was the right thing to do at the time, and I would be thoughtful of everything that we have learned from the procedure that we developed and implemented. I have been very open about that.

However, what we did was, and is, normal policy that was intended to be helpful to the individuals so that they would know what would be likely to unfold should they decide—some did and some did not—to make their concerns formal complaints.

Maureen Watt: Finally, was the policy shared only with an extremely limited group because of the wish to finalise the procedure as quickly as possible in order to respond adequately to the revelations of the #MeToo movement?

Leslie Evans: I am not sure that I quite understand the question. The intention was to finalise the procedure as effectively, professionally and appropriately as we could.

As I think you know, by the time we shared the procedure with the people who were raising concerns, it was well on in its development process. It had been being developed throughout most of November, so by that point, in early December, it was already well on its way to being finalised. In fact—as I said—there were no real changes made to it after it had been shared with the individuals who had concerns at that time.

Maureen Watt: Okay. Thank you.

Andy Wightman (Lothian) (Ind): Welcome, permanent secretary. I have a few areas to cover.

First, I apologise for having omitted to note the source of this information. Mr Salmond has claimed in evidence that has come to the committee that a particular allegation—allegation D, I think—by one of the complainers had already been dealt with under the fairness at work policy, while he was First Minister. There does not seem to be any stated provision under the new procedure for what would happen with a complaint coming forward that had already been dealt with under the previous procedure. Will you clarify what the policy is on that and whether, in fact, allegation D was one that you rejected, when you came to your decision report, on the basis that it had previously been investigated and dealt with?

Leslie Evans: There are three things to say on that. I should take care in specifying my decisions on particular allegations. More is the pity; I would be happy to provide more information and to share with the committee my decision report, but I am unable to do that.

I will make the second and third points. We should differentiate between Mr Salmond's views and the procedure per se. On what Mr Salmond has said, the complainers came forward because they felt that issues were still unresolved; I do not think that they would have come forward if they had felt that allegation D or any other of the individual concerns had been resolved, at the time.

At the very beginning of my presentation of evidence to the committee back in August, I made the point, I think, that it would have been unconscionable for us not to have investigated the complaints when they were raised. I have not seen any evidence that fairness at work informal resolution procedures were triggered at that point. He is relatively new to the committee, so Andy Wightman might not have heard the evidence, but other members have heard from Barbara Allison, Peter Housden, James Hynd and others, none of whom was aware of any record of any resolution having happened at the time Mr Salmond claims there was.

Informal resolution does not exclude the opportunity for an individual to come forward subsequently with a formal complaint. Although somebody from either side—the person who is making the allegation or the person against whom it is being made—might think, or recall, that it has been resolved, that does not stop an individual from taking forward a formal complaint under the procedure.

As part of that, as you will understand, the #MeToo movement clearly exposed, very graphically in some instances, what people felt about matters that might have been addressed at the time—perhaps somebody had said something or apparently closed an issue off, from their point of view. On reflection, having re-evaluated what it really meant for them, and whether it had given them resolution or closure, people were seeking to address how behaviour in the past was coming back to them in current times. There is no reason why somebody who felt that an issue had been resolved informally could not make a complaint. I intimate that that is what happened on this occasion—or, at least, that appears to have been the case.

12:30

Andy Wightman: That is helpful.

I move on to footnote 31 in batch 2, which is document INV270, which is a briefing in preparation for a meeting between you and the complainers in the week commencing 5 March 2018. The briefing invited you to thank them for coming forward, to clarify your role, to confirm whether they were content with the way in which

the investigation was being conducted and to acknowledge how important it was to address the allegations, et cetera. I think that you will be familiar with that, and I presume that you recall the meeting. For clarification, what part of the procedure did your meeting with the complainers in the week commencing 5 March 2018 sit within?

Leslie Evans: There is nothing in the procedure that prevents the deciding officer from having contact with the complainers, and particularly not at that time in the investigation, after I had taken a decision on the investigating officer's investigative report. Before then, such contact might have been more questionable, but I had taken a decision at that point. In fact, it is standard good practice for deciding officers to meet employees who have made a complaint, in order to explain the next stage of the procedure.

It was a very short meeting that took place after I had taken a decision on whether there were causes for concern that should be investigated further. I felt that I was, in the short term, the appropriate person to tell the complainers that, in order to reassure them of the duty of care that the Government, as their employer, still held for their interests, and to ensure that they had the right kind of information and support as the next stages of the procedure unfolded. That is exactly what I did. There is nothing in the procedure to say that that should not be done; indeed, as I said, that is good practice in HR and is frequently the case.

Just for information, I point out that I think that I met complainers on three occasions. In fact, I never met one of the complainers; I had only phone contact with that individual. Those were always short meetings or discussions of a few minutes, but they were always at very important times in the procedure. The first of them was after I had taken the decision that there were concerns to be investigated, after that first part of the procedure was complete.

Andy Wightman: Just to confirm, did you say that you had three contacts with one of the complainers and that the meeting in the week beginning 5 March—[*Interruption*.] I think that you want to confirm something.

Leslie Evans: I am sorry—that might have been confusing. I had three contacts with the complainers in the entirety of the procedure. I met only one of them face to face, and did not meet the other one in that way at all—it was always a phone conversation. As you said, the first of those conversations was in the week commencing 5 March. It would have been on 6 March or, possibly, the morning of 7 March when I had that conversation, after the report had been completed on that part of the investigation. Subsequently, I had contact in August, after the process had been completed and was being communicated more widely. I also spoke to the complainers very briefly at the time when we conceded the JR.

Andy Wightman: Thank you. You have answered my next question on that.

I want to move on to address the question of the appearance of a great amount of detail about the alleged incidents in the newspapers—specifically, the *Daily Record* and, I think, the *Sunday Post*, in August. The Information Commissioner's Office has undertaken an investigation into that, and we have seen some documentation from the Information Commissioner's Office in that regard. At what point during the whole process did information relating to the complaints come into the possession of persons outwith the Scottish Government? I am not talking about the alleged leak to the *Daily Record*. At what point did, for example, the Lord Advocate's office or other external people receive details of the allegations?

Leslie Evans: The detail of the allegations, the detail of the issues at stake and the evaluation of all those were contained in my decision report, which I am unable to share with the committee. That report had limited circulation, as you can imagine. There is quite particular detail about that in the procedure.

Mr Salmond received a copy through his lawyers. The complainants, Ms A and Ms B, had copies that were suitably redacted so that they related to their complaints and not to others. The legal lead and the director of people had copies, and as you know, the director of people subsequently shared a copy with the Crown Office. It was a very tight copy list, and quite rightly so. Those were the only individuals who had access to the decision report that contained that kind of information.

Andy Wightman: Okay. The Information Commissioner's Office's letter to Levy & McRae of 28 May—a request for a review of the decision by the criminal investigations team—outlines at paragraph 4.8 that the list of stakeholders who had access to the internal misconduct investigation report includes the original complainers, the QC, the First Minister's principal private secretary, the Crown Office and Procurator Fiscal Service, Mr Salmond, and Levy & McRae, as well as relevant Scottish Government staff members. That aligns with the answer that you have just given.

Did you ever undertake any investigations into how the information came to be in the possession of the *Daily Record* and the *Sunday Post*?

Leslie Evans: Without being too pedantic about it, we need to differentiate between the investigation report and the decision-making report, which is the most comprehensive analysis and presentation of details.

I recollect that we undertook not just a review but an investigation into the allegations of the leak.

Andy Wightman: What did you find?

Leslie Evans: We found no evidence of any civil servant leaking the information. That is in the information that the committee already has, but I am happy to share it again.

Andy Wightman: Your enquiries were strictly limited to establishing whether the leak came from a civil servant.

Leslie Evans: I would need to check the remit of the review. I would be happy to pass that information on to you. Investigations of this kind, which are not frequent but are important when they are undertaken, take a comprehensive look at electronic sharing of information—the electronic imprint, or footprint, of information across the organisation. It would therefore not be about whether the leak came from a civil servant; but about the mechanisms that might be used to share information. If it would be helpful and useful, I will happily give an account of how the investigations are undertaken and the remit of that particular investigation.

Andy Wightman: That would be helpful. That is all I have, for now, convener.

The Convener: Thank you, Mr Wightman. I am now going to go to Stuart McMillan, then we will try Murdo Fraser again.

Stuart McMillan: Permanent secretary, you talked about Andy Wightman being relatively new to the committee. I am a brand-new member, so one or two of my questions might have been covered in previous meetings. I am trying to get up to speed as quickly as I can.

You indicated that the decision report cannot be shared. Can you please explain why?

Leslie Evans: The procedure contains a fairly clear set of constraints and instructions about who can receive the decision report. That is the first point.

The second thing is that I am very mindful of the confidentiality of the information in the decision report; we would always be careful about sharing sensitive information of that kind.

Thirdly, the decision report was reduced as part of the court's ruling after the judicial review. Although the Scottish Government is of the view that we could still share some of that with the committee, Mr Salmond does not agree.

Stuart McMillan: Alex Cole-Hamilton and Maureen Watt asked some questions that tied in with the part of your opening statement in relation to the development of the process. You stated that you had legal and HR advice throughout the design of the new process, which was fairly short—it started in early November and the process was signed off on 20 December. In that period, there was some consultation, the draft report was sent to the council of Scottish Government unions on 14 December and you had a meeting with them on 19 December. That seems to me, as someone who is new to the committee and is looking at the issue afresh, to be a short timeframe for designing an extremely important process. Do you agree?

Leslie Evans: I am not sure that I do. When we receive a Cabinet commission, that clearly takes priority. We would not delay in executing and pursuing a commission from Cabinet—that is the first thing. The second thing is that we were not starting from a standing start, because we already had a fairness at work procedure, and we had had a lot of consultation and discussion with the unions about the adequacy or inadequacies of that.

We were aware of two elements, one of which was the interest and support from the unions in having a procedure that filled some of the gaps in the fairness at work procedure. They specifically said in their evidence to the committee, which I know that you will not have been party to, that they were very comfortable with the timescale and they wanted us to pursue that.

My other point on the timescale is that we were in the middle of the #MeToo campaign and there was a lot of activity and—[*Inaudible*.]—incidents already taking place. We knew about that at Holyrood and certainly at Westminster, where allegations were coming to the fore and concerns were being raised, so it was not something that we wanted to take too much time over, but we wanted to do it thoroughly.

I was being exhorted by my line manager, as were all permanent secretaries in the UK civil service by Sir Jeremy Heywood as cabinet secretary, who wrote to all of us and asked us to be sufficiently speedy as well as thorough, and to make sure that we had effective processes in place to deal with any issues that might come up as a result of the increased profile of the #MeToo campaign.

In short, it is not unusual for Cabinet commissions to be carried out speedily, but effectively and responsibly. There was a set of other circumstances including support from the unions, work that we had already undertaken and, in particular, exhortations from others to make sure that we had something in place that was going to be effective and appropriate in the circumstances that we found ourselves in.

Stuart McMillan: You said that you took legal and HR advice on the process. I assume that that

was internal. Did you take any external legal or HR advice as you worked through the process?

Leslie Evans: I was not developing the process. I say again that, as others round the virtual table will know, it was not my role to do that. However, I know that James Hynd, Nicola Richards and others whom you have heard from felt that it was appropriate to draw on other sources of expertise, which included documents and policy expertise from ACAS.

As I mentioned, and as I think she said in her evidence, Judith Mackinnon also spoke to Police Scotland at least once in a generic way about how to ensure that the procedure was as person centred as possible and was helpful to individuals who might come forward in distress, who were uncertain and who needed reassurance about the procedure's validity and effectiveness.

12:45

Stuart McMillan: I have a few other questions. Your role is to be the deciding officer. Will you explain exactly what that means under the procedure and what it means for you?

Leslie Evans: I shared that in response to an earlier question, but I am happy to summarise what I said. It was really important for me to carry out three functions. As I said earlier at more length, I was acutely aware of the deciding officer's responsibility. The role was delegated to me only—nobody else could do it. That was in the procedure so, even if I had wanted to, I could not have delegated the role or given it to others.

I needed to approach the situation with an open mind and to exercise the acute responsibility with great care. In doing so, I had to hold up to the light and interrogate the robustness, quality, appropriateness and detail of the evidence that was presented to me. I looked at the full text, which was not filtered in any way, of the witness statements that were presented to me from both sides.

I had to decide on and look at each complaint and allegation individually. I did not take a blanket approach; I looked at the complaints and allegations one by one and assessed one by one which I would uphold or not uphold. That is an important point to emphasise. On the basis of the witness information and other evidence, I had to decide whether each complaint or allegation merited being upheld.

The other areas that I drew on were the definitions of harassment in equality legislation, which I have mentioned, and particularly whether an intimidating, hostile, degrading, humiliating or offensive environment was being created. I took into account the context of the complaints and—most important—the working environment and the professional relationship between the individuals who were involved.

I very much took into account the impact on the individuals, which was very important. I still remember very clearly reading about the allegations; I was really affected by them. In counterbalance to that, I had to be satisfied on the basis of the evidence that an event had occurred—that was entirely evidence led—and, if I was satisfied, I had to consider whether the event occurred in the manner that individuals had described and whether that was corroborated by other witness statements.

As the decision maker, I had to ask myself whether there was enough evidence to form a reasonable belief that a complaint was well founded, after drawing on each cause for concern and weighing up all the evidence that was available, the advice and the definitions in legislation. I set out my rationale for coming to my view, which included which complaints I upheld or did not uphold.

That was the process that I went through. I would be happy to share more information on that, but I cannot do so other than to give what I have provided so far.

Stuart McMillan: I believe that you put the procedure in place. Given that, did you ever consider that someone else should be the deciding officer?

Leslie Evans: I did not design the procedure or put it in place; it was a Government procedure that was designed by experts from HR and experts who were supported by legal advice and the other sources that I have described. My role was described in the procedure to be the deciding officer, and I undertook it on that basis. It was a Government procedure and one that had been approved by Government like any other procedure or policy that has the head of the organisation involved in it in any way. I undertook my role as the deciding officer in complete adherence to that Government procedure, as described.

I said earlier that of course we are asking—[*Inaudible*.]—to see how we might implement it in the future. She might have views on that and whether the deciding officer needs to be somehow different. However, in terms of the Government procedure as it is at the moment, I took that role very seriously. The deciding officer role was not engaged in other aspects of the procedure. The investigating officer was gathering information, but she was not the deciding factor—she was not responsible for decisions. I was not responsible for or involved in gathering information, but I was the deciding officer. It was important that we adhered to those two different roles and responsibilities.

Stuart McMillan: As the deciding officer, was it your role to appoint the investigating officer?

Leslie Evans: No.

Stuart McMillan: Does the procedure require that the permanent secretary is always the deciding officer? Is there any scope in the procedure for someone else to play that role?

Leslie Evans: No.

Stuart McMillan: It appears that you were in regular contact with Levy & McRae, the former First Minister's lawyers, about the process. Were you communicating with them in your role as the deciding officer in the procedure or in your more general role as the permanent secretary?

Leslie Evans: I became the deciding officer once I had received the investigative report, but I was very alert to that responsibility throughout the whole of the lead-up. That is why I was not aware of large amounts of information of which I am now aware as a result of the information that has come to the committee. There was a very—[*Inaudible*.]—delineation to be held there. As a result, when people were responding on behalf of the Scottish Government to Levy & McRae, I would not be involved in or aware of what that kind of information was about. Quite often, such information is quite technical, and quite often it is to do with the investigation process, so it was given to the investigating officer to take forward.

I was acutely aware of the importance of the delineation of my roles and responsibilities in administering the process. I was able to step outside that at the appropriate time—uncontaminated by that, if you like—so that I could execute my role as deciding officer. That is not unusual, of course. There are many reasons why and examples of where that differentiation of roles and responsibilities takes place.

The other point is that if you look, as I am sure you have, at the exchanges between Levy & McRae and the Scottish Government, you will see that a very large number of them are on technical aspects. They are actually mostly about the procedure; they are not about the implementation of the procedure and certainly not about issues that would be relevant to the deciding report. They are mostly about Mr Salmond expressing views about the procedure, and not about the content that might eventually make its way into a deciding report.

It was not that difficult to differentiate, in that respect.

Stuart McMillan: That is helpful. In the future, should the deciding officer, who clearly has to make impartial decisions on a complaint, also be responsible for communicating with the lawyers for someone on one side of a complaint?

Leslie Evans: I have said previously that we will be looking at the implementation of the procedure. Ms Dunlop is already taking that on board, as we asked her to do. We will take Ms Dunlop's recommendations very seriously and we will respond to them.

The point that has to be made is that there was a whole process of administration taking place as part of the communication with Levy & McRae. That was not something that I was directly involved in; it was part of the administration and day-to-day management of what was a significant undertaking, but there was a lot of other business going on—as there always is in government—which I was responsible for leading on, undertaking and engaging in.

I could not and would not delegate the decision-making responsibility. That was laid down in the procedure and I was very aware of the importance of my impartiality in that regard. I have taken some time this morning to explain how I undertook that role with impartiality to the fore. The administration of the process was being dealt with by a team of people across a range of responsibilities and professional expertise. The two roles were very clearly delineated.

As I said, Ms Dunlop might have views on the procedure and how we might follow it in future. I will be very interested to hear such views and will respond to them in due course.

Stuart McMillan: Finally, who—other than you and the investigating officer—was involved in considering the complaint? You have probably touched on that. I am just asking for the benefit of my understanding.

Leslie Evans: It depends on what you mean by "considering the complaint". The investigating officer was responsible for the investigation and was given autonomy in undertaking the investigation process. That was her responsibility, and her contact with witnesses and so on was very much her domain. Analysing the evidence, information and facts that she had brought together and taking a decision as to whether to uphold the individual concerns and complaints was my responsibility, and I did not share that with other people.

Stuart McMillan: Thank you.

The Convener: We will try again to hear from Murdo Fraser before I bring in Jackie Baillie to ask the final questions.

Murdo Fraser: Thank you, convener. I hope that you can hear me better now. Members have covered a number of the issues that I was going to raise, so I will just ask a brief follow-up to Andy Wightman's question about the coverage of the

complaints that appeared in the *Daily Record* and the *Sunday Mail*.

I imagine that the publication of the detail of the complaints was very distressing for the complainants. It seems that only someone with detailed knowledge of the complaints could have provided the information to the media, and we might speculate that that was done to damage the former First Minister, with no thought being given to the impact on the complainants, who were being treated as collateral damage in the political war that was going on in the background.

Permanent secretary, you said that you conducted an inquiry into the matter. Did you interview individuals in the Scottish Government about the leak to the media?

Leslie Evans: I can only agree with you about the impact not just on the individuals but on me and on others who had been working closely on the matter. We had taken every effort to ensure that confidentiality and anonymity were preserved throughout what was quite a long time from the complaints being made in January to the decision report being complete in August. There had been no leak and no sharing of information throughout that process, even though it was live, complex and often very intense. I was pleased to see that the Information Commissioner's Office agreed with the finding that there was no evidence of the leak coming from the Scottish Government.

13:00

The inquiry would not be held by me. I am not the person who undertakes such inquiries. It is part of the responsibility of the director-general role that I described earlier—the senior information risk owner—to ensure that such investigations are undertaken. I have offered to share the process and the information around it with the committee, but the usual process involves a combination of electronic and digital footprint analysis—which involves tracking where a piece of information is at any time in the machinery of government, whether it is on somebody's email, whether it has been printed and shared with others and the status of the sensitivity of the information—and, often, interviews with individuals.

As I said, I do not and would not hold such investigations personally, but if there are no constraints on it, I will be happy to share suitably anonymised information on the procedure that we followed.

Murdo Fraser: That is a very helpful response. Would you be able to tell us, either now or subsequently, whether the First Minister's chief of staff, Liz Lloyd, was interviewed as part of that inquiry?

Leslie Evans: I cannot tell you that now and I do not know whether we will be able to give individuals' details as part of what I can share.

I will share all that I can about the inquiry on two counts. The first is about the procedure that we always follow. As I mentioned, there is a formula to the investigations that are undertaken, because they are technical and digital as well as individual. I will happily give you that information. If I am able to put more flesh on the bones of the particular investigation, I will do so. As you know, I am under constraints, as we all are, in relation to the identification of individuals and data protection, but I will share whatever I can.

Jackie Baillie (Dumbarton) (Lab): Good afternoon. Welcome back to the committee, permanent secretary. I will start by following up on Murdo Fraser's questioning. I am curious to know whether the names of the complainers were contained in either the investigation report or your decision maker's report. Further to that, who would therefore know the names of the complainers? Would it have been possible for a special adviser to know the names? I am quite content with short answers, given the time that you have already been with us.

Leslie Evans: The answer to your first question is no. "Ms A" and "Ms B" were the titles that were given from the very beginning. Indeed, I did not know the identity of either complainant until I had contact with them in early March, as I have described. There was no disclosure of names at any point.

Jackie Baillie: Who in the very tight circle that you are, I think, about to describe would have known the names of the complainers? I assume that it was a handful of people.

Leslie Evans: At the most, yes.

Jackie Baillie: If you are not able to say now, could you write to us to tell us who those people were? Specifically, would it have been possible for a special adviser to have known any of the complainants' names?

Leslie Evans: I will happily come back to you on who might have known. You are absolutely right in your assertion that it was, as it should have been, a very small number of people who were alert to the identity of the individuals—as I said, I quite rightly did not know their identity until I met and spoke with them in early March. That gives an indication of the care that we were taking. In fact, I still do not know the identity of one of them. I have never met them, and I am not sure that I ever will. A very important part of trust on the part of the individuals and the competence of the procedure was that we maintained a very tight understanding of individuals' identities—not just complainants, but witnesses, too.

Jackie Baillie: If you could write to us with specific information on that tight circle and confirm in writing whether it would have been possible for a special adviser to have known that information, that would be most helpful.

I want to ask about the duty of candour. Some of the documents that were released to the committee from the Davidson report suggest that, on 2 November 2018, external counsel were required to stress the importance of the Government's duty of candour and that, on 6 November 2018, in the Court of Session, Lord Pentland directed that he expected full candour and disclosure from the Government.

Bearing that in mind, could you tell us why, in all your previous appearances before the committee, you have never revealed to us that not one but both of your external counsel threatened to resign and walk off the case unless you conceded it by 3 January 2019?

Leslie Evans: I think that you are asking why the Scottish Government did not share the views expressed by counsel as part of previous sharing of information. I point you to the discussion and dialogue that has been taking place between the Scottish Government and Scottish Government ministers and the committee about how and when to share legally privileged information, and the rules, responsibilities and roles of the Government law officers. The information would fall into that category, but use of the reading room has enabled a wider amount of information to be shared with the inquiry than had previously been signed up to by the Government.

Jackie Baillie: We could argue about whether that is sufficient, but I will not waste time doing so. We did get hints of an answer from Paul Cackette when he appeared before the committee—that is clearly now confirmed to us. Therefore, let me press you again. You have a duty—an overriding duty—of candour. Why did you not tell us that information in line with that duty of candour?

Leslie Evans: I have already said why the information has not been shared by the Scottish Government. The other point, which seems to be implicit in what you are saying—but tell me if I am wrong—is about the reasons and rationale for my taking a decision to concede the judicial review, and the factors that I took into account, which I mentioned earlier. I will not rehearse those factors again, because I went through them in quite a bit of detail. The main issue that I needed to take into account was legal advice, and I would have been irresponsible not to have taken into account the composite legal advice. That was when I was in the process of commissioning that information on 21 December. That is an important date for me, because it was when I decided that I would need to take a decision about whether to proceed. I have been very up front during this session about what factors I took into account when taking that decision.

Jackie Baillie: Let me go back, as there are other important dates that I would like to discuss with you. In the same terms as the duty of candour, I will turn to discuss external counsel. When did they tell you that, on balance, you would be likely to lose? Was it in October, was it in the consultation meeting that was held with counsel on 13 November, which we know you personally attended, along with the First Minister and the chief of staff, or was it even earlier? I am not asking about composite legal advice; I am asking specifically about external counsel.

Leslie Evans: I am talking about composite legal advice, because that is what I—

Jackie Baillie: I am asking about external legal counsel—

Leslie Evans: —[*Inaudible*.]—that I can give. I always took composite legal advice. It would have been remiss of me to have listened only to one voice. At every stage, the legal advice that I was provided with was complete and thorough, and from a variety of sources. That is quite right and appropriate. The time to which I think you are referring, Ms Baillie—the middle and end of October—was a really important point, because the composite legal advice involved consideration of a new aspect, which was whether it was possible to interpret paragraph 10 differently, and whether our interpretation of it, which was in the spirit of how the paragraph was drawn up, was somehow capable of being made differently. That—

Jackie Baillie: If I may interrupt, that is not my question, and the permanent secretary understands that. My question is very specific—it is not about composite legal advice; it is about the advice from senior counsel. I am asking whether they said in October that, on balance, the Scottish Government would likely lose. Was that when they told you, or was it at the meeting on 13 November, which was attended by them, you, the First Minister and the chief of staff?

Leslie Evans: We had discussions with counsel and our legal advisers on the prospects of success throughout that period, as I have always said. That included those dates. I listened carefully to that advice, as did the First Minister. Those sources of advice were what guided us through and continued to inform our decision that the case was statable, until it was not, which was the point at which I asked for advice from a variety of sources again, on 21 December. Up until that stage, the advice that I was being provided with, from which I did not depart—that composite advice—was that the case was statable and that it was defensible

and should be defended. I think that you heard that from the Lord Advocate himself in his evidence on 17 November.

Jackie Baillie: I think that you perfectly understand what I am trying to pursue with you. It is not a question about the composite advice, which would include advice from Scottish Government lawyers; it is a question about what external senior counsel were telling you. I again ask my question, which is based on just that advice: did they say to you in October that, on balance, you would be likely to lose?

Leslie Evans: I cannot confirm legally privileged advice. As you know, I have constraints about what I can and cannot say on that score—that is still a subject of some consideration between the committee and Scottish Government ministers. I can say that I listened carefully to all legal advice from all sources at every single stage of the procedure, not just during the judicial review. I had really important roles and responsibilities to undertake, which demanded that I take that legal advice. I cannot uphold the civil service code without listening to that legal advice, and I could not be responsible, in my role as principal accountable officer. Of course that included external counsel advice, but it also included advice from the Lord Advocate and the Scottish Government legal team.

Jackie Baillie: Thank you for that, but you have not answered my question. That is unfortunate.

Let me move on and see whether I can make progress elsewhere. In terms of candour, the first revelation to Mr Salmond's legal team of any issue with the investigating officer was on 5 November 2018, I believe, yet, as I recall from your previous appearances, you have made much of the point that that issue was not in Mr Salmond's pleadings to the Court of Session. How could such issues have been in the pleadings if he was not aware of them—if your team did not tell him about them?

Leslie Evans: I think that it is for Mr Salmond to decide and share with you the basis on which the grounds of the judicial review were drawn up by his team. As I think I said earlier—[*Interruption*.]—the unlawful and—[*Interruption*.]—

The Convener: Excuse me, Ms Baillie and Ms Evans, but I will interrupt here. It is particularly difficult, when we are online, when you are both talking—you just turn into a big bubble of sound. I can understand the frustrations if it is felt that questions are not being answered, or that the questions are not what they should be, but the only way to deal with the matter sensibly is to listen to the question, then listen to the answer, and then have disagreements, if necessary, one by one.

I cannot remember who started that exchange, but let us go back to Ms Baillie, please.

Jackie Baillie: Thank you, convener. That serves to highlight—at least for me—how unsatisfactory it is to have virtual sessions. I see you nodding in agreement; that is something that we will discuss as a committee later.

I apologise for interrupting, but I am keen to ask some very fixed questions and to get short responses to them.

Let me move on. Given that Ms Mackinnon was perfectly open about her activities as the investigating officer, why did your civil servants not tell the courts until 5 November 2018, and why did they not even tell your own counsel until October 2018? Why so late?

Leslie Evans: Why did they not tell them what? Sorry; I am not sure about—

Jackie Baillie: About the activities of Ms Mackinnon as the investigating officer: that she had met with the complainants beforehand. Why was that never revealed?

Leslie Evans: It was not that it was not revealed. It was asked about at that point. That was the time, at the end of October and the beginning of November, when it became apparent from the legal analysis that a different interpretation was possible.

13:15

At that point, it was requested that a number of civil servants provide information to illustrate the intention behind that role. As I have said before, that has been talked about a lot around this table: what was actually meant by the spirit of paragraph 10, and what evidence could be brought to bear to show that. That was when the commission was undertaken, during quite a bit of November and into the information-gathering stage at the beginning of December. As a result, pleadings were adjusted. As you know, we voluntarily provided that information to the other counsel.

Jackie Baillie: Who asked about it, and when? When did paragraph 10 become open to interpretation?

Leslie Evans: The legal team was asking Judith Mackinnon and others—including James Hynd, whose note of 2 November you have seen—about the intent and the information to illustrate the intent, and the level of contact and why that was part of the implementation of the procedure. That was from the beginning of November onwards, and it continued into the beginning of December.

Jackie Baillie: But your own counsel knew in October, did they not?

Leslie Evans: I think that that was crystallised on 29 October—I may need to check. It was around that time when the legal team sought additional advice and information to illustrate our interpretation of that paragraph and how it had been applied.

Jackie Baillie: But the first disclosure was around 17 October, when Ms Mackinnon was interviewed by junior counsel, was it not?

Leslie Evans: I cannot be exact about the time, but I know that it was under discussion at the end of October—absolutely. In addition, as I said earlier, there was a period of time throughout November when there were significant amounts of information provided, and requests for further information, to illustrate the nature of the role, and when the intent behind the role was being established.

Jackie Baillie: I will move on. Some of the documents that we received showed us that you, as the impartial decision maker—this has already been covered—met both complainers personally in March 2018, which was, as I understand it, before Mr Salmond was informed about the procedure. Given your duty of candour, and given the strictures of Lord Pentland, why was that meeting not disclosed?

Leslie Evans: To whom?

Jackie Baillie: To anybody—to the courts, to Mr Salmond.

Leslie Evans: I do not believe that it was particularly concealed. The point was that it was part of the pause point in the procedure to allow me to be able to touch base with the individuals about the duty of care. There was no discussion about content or anything else. It was after I had taken my decision. That was all that the meeting was about. I cannot say finitely whether or not the commission for information included that meeting in it, but there was no attempt to conceal it. It is not something that would naturally be talked about; it was part of the duty of care to the complainers.

Jackie Baillie: So, it was not concealed, but neither was it disclosed. That is unfortunate, given the duty of candour that exists.

I will move us on. You said that it was "appropriate"—I do not want to misquote you—and "good practice" for you to work with the complainers. I understand that, but can you point to any clause in the procedure that says that the decision maker is meant to meet the complainers? The reason why I am asking is that, in your second appearance before the committee, you said that it would not be "appropriate" for you "as the decision-maker" if you had contact with the complainants.

Your policy was ruled "unlawful ... procedurally unfair" and "tainted with apparent bias" because the investigating officer met the complainers before the process started. Would that have happened on the discovery that you, as the actual decision maker, met them part way through?

Leslie Evans: We could get into semantics about what was actually ruled on regarding the procedure, but the ruling was about "apparent bias".

Many of the other points that had been raised as part of earlier judicial review grounds were not discussed or ruled on. However, on the point that you are making, when I was previously at this committee I was talking about the early stages—in particular, about the development of the procedure—and saying that I had not had contact with those who were raising concerns at that time. As soon as they had raised complaints, that would also, quite rightly, have put a constraint on my contact with them.

As I said earlier, the reason why I touched base with them during the week of 5 March was that it was, I think, a day or maybe some hours before Mr Salmond was made aware of the point that I had reached in the investigation. The reason that I met with them at that point was because I had taken the decision. I was not asking them about it, nor were they involved in it or could they have influenced it. That pause point in the procedure allowed me to touch base with them about my and the organisation's duty of care to them. It was therefore quite appropriate, and there was nothing in the procedure to say that that is not the case. I took, and still take, very seriously my responsibilities to them, but, equally, I was bound by my responsibility as the decision maker not to discuss it with them. That pause point in the procedure allowed me to talk with them without being compromised in my decision-making responsibilities.

Jackie Baillie: Okay. The Lord Advocate has told us that the collapse of the case was about more than just the wording of paragraph 10—that there was an assumption of perceived bias in common law. Do you think that a reasonable person might have a problem with the supposedly impartial decision maker meeting with just one side of a dispute, and then not revealing that to the other?

Leslie Evans: If you are talking about the basis on which the concession was made, the evidence that came forward at a very late stage in December would clearly have made it very difficult for us to rebut an inference of apparent—not actual—bias in the way in which the investigating officer's role had been implemented. We stand by that. Clearly, there is more to learn from it, but that

was the basis on which the concession was made, on which I took a decision.

Jackie Baillie: It feels like we are dancing on the head of a pin, but I will accept what you have said and move on.

I understand that a search warrant was served on the Scottish Government by the Crown Office, perhaps just over a year ago, to secure documentation in relation to the criminal case against Mr Salmond. I understand that that warrant specified recovery of all documents about any meetings between you, as permanent secretary, and the complainers. Were the documents about your meeting with the complainers furnished by the Government in response to the search warrant, or not?

Leslie Evans: The search warrant was complied with. That included a copy of the decision report.

If there are allegations or concerns about whether the Scottish Government complied with the warrant, I am not aware of them; we would need to respond to them accordingly.

The warrant, which I understand was served in September 2019, included some very specific requests for information. We complied with those, and that included my decision report.

Jackie Baillie: Let me take you back. I asked you about the judicial review. I am now asking about the criminal case. The warrant specified recovery of all documents about any meetings between you as permanent secretary and the complainers. It is very clear. Were the documents about your meeting with the complainers, about which we have just spoken, furnished by the Government in response to the search warrant or were they not?

Leslie Evans: I cannot tell you that at this stage. I could go back and ask the people who were responsible for complying with the warrant, but I cannot give you chapter and verse about which documents were provided.

Jackie Baillie: It would be very helpful if you could write to us in answer to that question.

I recall that you said to us at the very beginning that you really did not have that much to do with the policy and that it was not really your procedure at all. Today, you have said that it is the Scottish Government's procedure. I understand that. However, in a letter of 21 June 2018 to Levy & McRae, you said:

"the Procedure was established by me"—

so not by the Scottish Government, but by you. When Angela Constance questioned you on 17 November, she described your role as the

"common denominator in the entire saga".—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints,* 17 November 2020; c 51.]

However, you said that it was not really your procedure at all. When did it stop being your procedure? If it was the Scottish Government's procedure, at what meeting of Cabinet was it agreed and decided on? It has certainly never been debated in or disclosed to Parliament, so I am curious as to when the procedure was discussed and approved by the Cabinet.

Leslie Evans: It is an employment procedure. As I think that I said earlier, an employment procedure would not go to Parliament for approval. It is an employment procedure that emerged from a specific commission from the Cabinet, and it was signed off by the First Minister on or around 20 December.

We are in danger of splitting hairs here. As you know, constitutionally, civil servants do not exist and, as a civil servant, the procedure that I was responsible for ensuring was enacted and produced, in response to a Cabinet commission, was a Government procedure. It was and is a Government procedure. I am therefore bound by it because, as you know, as a civil servant, I serve the Government of the day and I serve the Government's commissioned procedures and policies.

I have made no secret of the fact that I am responsible for what goes on in the organisation, and I take that role and responsibility very seriously. I hesitate to say this, but there seems to be an attempt to personalise the issue in a way that is inappropriate and not right. I have never moved away from the need to be clear about my responsibilities as the head of the organisation, and I have never tried to do anything other than that. That involves ensuring that we serve the Government of the day and that we implement Government procedures, and that is what we did in this case. I took my role in that very seriously, and I still do.

Jackie Baillie: You will be pleased to hear that this is my final comment, convener. I suspect that the permanent secretary may regret the sentence that she wrote in her letter to Levy & McRae in which she said:

"the Procedure was established by me".

It now looks as though the failed procedure that was established by the permanent secretary is an orphan, with no one claiming ownership. That concludes my questions.

Leslie Evans: I will not respond to that comment.

The Convener: It is only fair for me to say here that everyone is entitled to their view and to state it

clearly along with what they believe to be the facts.

I am aware that time is moving on, but I have a couple of requests for questions. I ask members to be quick in asking them.

Margaret Mitchell: Permanent secretary, I return to document FN43, which contains numerous emails about complaints handling. Specifically, an email sent on 2 August 2018 to Ms B from someone whose name is redacted asks her to think about what she feels she needs to know about the police in the event of the incident being reported to them. It says:

"The question the Perm Sec is asking is—if the SG reports to the police, will you cooperate with the investigation?"

I wonder why you asked that, if your decision was taken to report the incidents to the police on the basis of the criminality, despite the overwhelming view of the complainants that they definitely did not want to go down that road and were not prepared to report the incidents themselves.

Leslie Evans: I mentioned earlier that I was keen to try to allay or address concerns or restrictions and constraints that the individuals might come up with as a result of their being clearly against going to the police.

As I said earlier, I do not think that I can add to that. I was very alert to their concerns and their preference not to go to the police. However, whether they would have co-operated was entirely in their hands, although not if the police required them to do so. I needed to take into account the issue of potential criminal responsibility. Trying to establish as best as I could the intensity of their feelings and their preparedness to engage if I had to take that decision was part of establishing and balancing the two competing demands.

13:30

Margaret Mitchell: You have made a distinction between the decision report and the final report of the investigating officer. Will you comment on the appropriateness of that report being offered to the police by the Crown Office, if that was the case? Will you explain your understanding of where else you thought the final report from the investigating officer would go, apart from landing on your desk? How did the Crown Office have it before the police had even carried out an investigation?

Leslie Evans: I think that a little bit of confusion is creeping in. Maybe I could try to clarify the differences between the investigation report and the decision report. The investigation report was on whether there were or were not causes for concern and whether an investigation and a decision report should follow on from there. The two reports were different. I am not being picky; I am just trying to be factually accurate, to clarify the committee's considerations.

I cannot comment on the Crown Office's decision on whether to take the report to the police; that is for the Crown Office to respond to. We took the decision, on the basis of legal advice, that the matter should be referred as potentially criminal, and Ms Richards wrote to the Crown Office and included a copy of the decision report at that point. As I said earlier on, that was the only decision report that went outwith a very small number of people who saw it at that time, in August 2018.

Margaret Mitchell: To be clear, what was offered to the police? Was that the investigating officer's final report or your decision report?

Leslie Evans: To my knowledge, the police were not offered anything. However, we shared the decision report, which was the final report, with the Crown Office, and it decided what to do with that.

Margaret Mitchell: It seems to me that it was a matter of putting the cart before the horse that it should seek to give that to the police after you made the complaint. Is that correct? I believe that Ms Richards said that it was you—[*Inaudible*.]

Leslie Evans: I did not make any complaints to the police. I took legal advice, having completed my decision report on the level and potential of criminality. Following that advice, it was agreed that the Crown Office should be alerted. As you know, Nicola Richards wrote to the Crown Office and included a copy of the decision report at that point. That was in August 2018.

Margaret Mitchell: I understand that you personally did not make a complaint, but it was a result of the procedure. I am asking about the appropriateness of that report being provided to the Crown Office before the police had the chance to investigate.

Leslie Evans: As I said, I took legal advice on the process and the decision, and I followed that.

Margaret Mitchell: Okay. I have a final question. In the email of 2 August from which I have quoted to a person whose name has been redacted—it is to Ms B—Judith Mackinnon said:

"I am keen to ensure that you have everything you need to help you come to a decision—so let me know if there is anything else. I am in ... today—so if you want to meet, let me know."

We know that Gillian Russell gave evidence in which she said that she had a checklist that Judith Mackinnon had provided and that it included the question whether there was any criminal content. To the reasonable person, it seems that she was

obviously totally involved in the complaints and their criminal aspects. Did you make a recommendation or comment about who should appoint the investigating officer? I think that it was Nicola Richards who appointed her.

When the lawfulness of the process and the issue of previous involvement were considered, did it even occur to you for a nanosecond that there might be a risk that the procedure could be interpreted in a different way and that that risk was actually not worth taking, given your senior position and your duty to ensure that the Government acted in the best possible faith at all times?

Leslie Evans: We have touched on the issue comprehensively in this and previous sessions. I did not appoint the investigating officer; that is not my role nor my responsibility, as set out in the procedure. Nicola Richards appointed her, in keeping with paragraph 10 and the qualities and qualifications of Judith Mackinnon in fitting the role.

I have also reflected on the interpretation of paragraph 10, and on the way in which the investigating officer conducted her professional duties in keeping with it. I am not sure what the references to the police were in that respect, because I was not involved in that process.

As far as I am aware, the police were not involved at all, expect when they were consulted on the policy at the beginning of the development of the procedure, then when the Crown Office was alerted to potential criminality as laid out in the decision report, and subsequently when they investigated Mr Salmond and asked to speak to civil servants as part of that investigation.

Margaret Mitchell: For the avoidance of doubt, my previous question was not really about the police. It is obvious that Judith Mackinnon, again, stepped in when, in an email exchange, you talked about whether the complainants would be comfortable going to the police and whether they would co-operate with that. In that exchange, it is clear that you asked a question—or whoever redacted the exchange says that you asked a question—so you were aware of the involvement of Judith Mackinnon in the handling process.

Did you raise any concerns when she was appointed? Did you think about it or make any comment? You were perfectly aware that previous involvement was an issue, so would you mind answering the question about whether the risk of the procedure being interpreted another way was worth taking? You perhaps have a different answer in hindsight.

Leslie Evans: I go back to what I have said before: I was not involved in the appointment of the investigating officer. Judith Mackinnon was carrying out her role as described and evidenced in intent to this committee, and the role of the investigating officer has a duty of care and responsibility.

Subsequently, through the judicial review, the different interpretation of that role, particularly how it might be implemented, was discussed and laid out, and one of the points of concession was that it could lead to apparent bias. We are going over the same ground here, perhaps from different perspectives.

The intent of the laying out of the role, responsibilities and procedure was clear, and Judith Mackinnon followed it. Looking back on that after the judicial review, it was clear that the procedure was open to a different kind of interpretation and that we would not implement it now on the same basis as we did then.

Margaret Mitchell: As a principal officer with all your experience, it comes as a surprise that that point did not occur to you and that you did not raise any objections then. That was my final question.

The Convener: I think that it was a statement.

I go to Alex Cole-Hamilton. I would appreciate it if you could be brief.

Alex Cole-Hamilton: Thank you for bringing me back in, convener. I am keen to follow up on Margaret Mitchell's questioning about the referral to the Crown Office. We have heard evidence from other civil servants that the matter was passed to the police. Can you confirm that it was passed to the Crown and that the Crown then passed it to the police? Is that how it happened?

Leslie Evans: That is my understanding, yes. I think that Nicola Richards's letter, which has been shared with you, confirms that. That may seem to be a false differentiation, but, as you will know, it is not; it is an important one.

Alex Cole-Hamilton: That is helpful. Secondly, you told the committee that the identity of the complainers was not known to you until late in the day. Did you know their identity before the report was passed to the Crown Office?

Leslie Evans: I knew their identity by the time that the report was complete, yes. I met one of them in March. I have never met one of them, but I have spoken to them. By the time that the report was passed to the Crown Office, I think that I had met them once—no, twice, because I met them when the decision report was complete, so that would be the second occasion. Just to be clear, I emphasise that it was on the basis of a need to have contact that I felt was appropriate, given my duty of care. Even then, the conversations were kept appropriately short and to the point.

Alex Cole-Hamilton: The complainers have been explicit that they did not want their complaints to follow a criminal route, but the report was taken to a criminal adjudicator in the Crown Office. Did you consider that that was removing the agency of the complainers and that going against their express wishes might act as a barrier to future complainers coming forward, if they knew that their complaints would end up in the hands of the police even if they had said they should not?

Leslie Evans: I have given chapter and verse on that. It was not at all an easy decision to make. I was weighing up two competing, difficult and very important sets of circumstances. I did not take the decision lightly. I took a considerable amount of advice on that, and I did not depart from that advice.

However, as you know from what I have said previously and from the conversations that were undertaken on my behalf in soliciting the complainers' views, I was mindful—and remain so, to be honest—of the impact on them of their loss of privacy and of their concerns and anxieties. I am very empathetic. Nevertheless, as the procedure sets out, there might be occasions on which such concerns and anxieties have to be weighed up against the potential of criminality and criminal proceedings.

While I was not making any prejudgments of that, I do not think that I would have been acting appropriately or, indeed, in keeping with the civil service code, if I had not taken that tough decision about a referral to the Crown Office for it to decide whether there were criminal proceedings to be pursued. That was not my decision. My decision was to send the information to the right authorities to take the decision, and that is what I did.

Alex Cole-Hamilton: Given that the flawed procedure is still in place and that you acted against the wishes of the complainers—the first two complainers ever to use the procedure—is it any surprise to you that there has not been a single complaint under that procedure in the past three years?

Leslie Evans: I am not surprised that people think carefully about coming forward. I think that they always will, despite the fact that I and others have done a huge amount to ensure a culture that is more open and supportive of those kinds of concerns. I will not go through it again, because we have been here for nearly three hours, but I mentioned earlier the people survey result for 2020, which is a new set of data since I first gave evidence to the committee back in August. It shows that our inclusion and equalities culture is the best it has ever been in terms of people feeling more included and more at ease with the nature of the organisation. I hope that having the procedure there and implemented appropriately will be a backstop, but I also hope that as much as possible we are doing our best to prevent any circumstances in which people feel that they may end up being sexually harassed at work.

Alex Cole-Hamilton: Thank you. I have no further questions.

13:45

The Convener: I also have a memory of it being said in evidence that the referral was to the police. That might just be a confusion between the roles of the Crown Office and the police, and "police" was used as a collective term for both organisations, but we will certainly check that out to make sure.

Leslie Evans: I believe that that is correct. I think that you are right that it was referred to as "the police". I hesitate to use the term loosely because it is not an appropriate term. However, the matter was referred to the police, and I think that you have communications to that effect.

The Convener: Yes. We will make sure that we have that right.

Andy Wightman assures me that his final supplementary question will be quick and relevant.

Andy Wightman: Paragraph 19 of the "Handling of harassment complaints involving current or former ministers" procedure states that

"if at any point it becomes apparent ... that criminal behaviour might have occurred the"

Government

"may bring the matter directly to the attention of the Police."

There is no reference in that paragraph about referring anything to the Crown Office. You mentioned earlier in evidence that you referred the matter to the Crown Office on the basis of legal advice. Can you say anything about why you referred the matter to it and not, as paragraph 19 says, to the police?

Leslie Evans: I cannot say anything further. I can say only that I was given legal advice and that I did not depart from that advice.

The Convener: I have some little issues that I would like to have on the record. We have heard an awful lot of talk today about duty of care. That is as it should be—the Government has a duty of care to those who come forward with complaints, whatever their nature. It also has a duty of care to its wider staff complement, to give confidence that they can come forward and discuss such matters. Do you consider that the Government met that duty of care on these issues?

Leslie Evans: There is work to be done and initiatives to be undertaken—I would call it a constant gardening process—to ensure that the

organisation's culture is supportive and inclusive. We know from the #MeToo movement and from some of the evidence that we heard at this inquiry that that has not always been the case in the Government, or, indeed, as #MeToo will confirm, in any organisation.

I have taken specific steps and made specific innovations in policy and in the culture of the organisation to ensure that our duty of care feels real to people, that they feel that they can bring their whole selves to work and that, if they are concerned about how they are being treated or about behaviour at work, they can call it out and something will be done about it.

The results of this year's people survey are giving us encouraging signs that that is how people feel. Will that work ever be complete? Will it ever be over? Probably not. However, it is important that it is carried out, and I feel that the organisation is in a different place now than it was a few years ago. The work is not by any means complete and there is no room for complacency.

The Convener: To refresh my memory, can you tell me when Laura Dunlop QC is likely to report on her review?

Leslie Evans: The Deputy First Minister will come back to you with a specific date. Laura Dunlop has asked for a bit longer, and we want to make sure that she is given every support in doing a thorough job. Therefore, I confirm that we will come back to you with an expected date of completion.

The Convener: Thank you for your evidence. It has been a long stretch—the session has been longer than we had anticipated it would be, and I thank you for giving us your time.

More generally, it has, at times, been particularly difficult carrying out business effectively when everyone is contributing remotely. However, that follows parliamentary guidance about virtual committee meetings. I make it plain to everyone that how we deal with our committee meetings is not entirely in the committee's hands, as we must always take into account the Parliament's rules and regulations, and the effect that it could have on many people if we were to have gatherings.

13:49

Meeting continued in private until 16:54.

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