OFFICIAL REPORT
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Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 2 March 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT COMPLAINTS

14th 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:

David Harvie (Crown Agent)
Andy Wightman (Lothian) (Ind)
Rt Hon James Wolffe QC (The Lord Advocate)

LOCATION

Virtual Meeting

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 2 March 2021

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Linda Fabiani): Good morning, everyone, and welcome to the 14th meeting this year of the Committee on the Scottish Government Handling of Harassment Complaints. Our first agenda item was to consider whether to take evidence in private from the Lord Advocate before hearing from him in public.

The committee has always sought to carry out its work in a way that is open and transparent, which is not always easy, given the legal constraints on us, especially in relation to Lady Dorrian's order protecting the anonymity of complainers.

I am grateful to the Lord Advocate for his offer to provide evidence in private, which I believe would have allowed the committee to understand in more detail the background to the publication and redaction of the former First Minister's submission on the ministerial code.

However, despite the majority of the committee wishing to proceed in that way, in the absence of unanimity in the committee I have agreed with the Lord Advocate that we should move straight to evidence in public.

I understand that the deputy convener wishes to say something at this point.

Margaret Mitchell (Central Scotland) (Con): I say at the outset that I welcome the Lord Advocate's decision that today's evidence session, in which he is giving evidence as the Scottish Government's chief legal adviser, will be held fully in public.

Before that, however, he must first fulfil his duty as head of Scotland's independent prosecution service and give his view on whether it was justified for the Crown Office and Procurator Fiscal Service to send the letter to the Scottish Parliamentary Corporate Body in relation to the evidence from Alex Salmond that was published by the Parliament.

Last week, the Lord Advocate confirmed to Parliament that, in that role, as head of the prosecution service, all decisions that are taken by him and by the Crown Office and Procurator Fiscal Service are taken in the public interest. As head of the Crown Office, the holder of that office is responsible for all decisions that are taken by the Crown Office. The Lord Advocate and the Lord Advocate alone, regardless of whether they have recused themselves from any decision, has a duty to give their view of the decision and to explain whether it was justified. If any holder of that office, as head of Scotland's independent prosecution service, is unable to fulfil that duty, their position clearly becomes untenable.

In order to properly inform our next evidence sessions, and in the interests of openness, transparency and accountability, the Lord Advocate must now fulfil that duty.

The Convener: Thank you, Ms Mitchell. There are obviously questions in there that you wish to put to the Lord Advocate. I suggest that that be done after agenda item 3 actually starts and oaths have been taken. I shall come to you first, if you wish me to do so.

Margaret Mitchell: Yes. I would like to ask the Lord Advocate, as head of the prosecution service, his view on whether it was justified for the Crown Office—

The Convener: Ms Mitchell, we have been through this. That question should be put to the Lord Advocate when we have moved on to the appropriate agenda item and oaths have been taken. When the committee proceeds with the business of agenda item 3, I shall call you first.

Margaret Mitchell: Can I have clarification, convener? When taking the oath, will the Lord Advocate do so, in the first instance—this is the crucial point—as head of Scotland's independent legal service, as opposed to appearing as the chief legal officer for the Government? That conflict of roles has caused the problems, so we need to be clear about that.

The Convener: I suggest that you ask those questions under agenda item 3, after the Lord Advocate has taken the oath. I am not a legal person, but my view is that the oath is taken by the person; the person is agreeing to tell the truth. If you wish to put that to the Lord Advocate, you should do it under agenda item 3, when we move on to questioning. As I said, I will take your question first. I am sure that the Lord Advocate will address it.

Scottish Government Handling of Harassment Complaints

10:05

The Convener: Our next item of business is an evidence session on the Scottish Government's handling of harassment complaints, in which we will hear from the Lord Advocate, James Wolffe QC, and the Crown Agent, David Harvie.

I remind all those who are present and watching that we are bound by the terms of our remit and the relevant court orders, including the need to avoid contempt of court by identifying certain individuals, including through jigsaw identification.

The Committee as a whole has agreed that it is not our role to revisit events that were a focus of the trial in a way that could be seen to constitute a rerun of the criminal trial. Our remit is:

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

The more we get into specifics of evidence—that is, time, people and cases—the more we run the risk of identifying those who made complaints. The more we ask about specific matters that were covered in the trial, including events that were explored in the trial, the more we run the risk of rerunning the trial. In questions, reference to specific dates and individuals should be avoided, and questions should be phrased in general terms, where possible, to avoid the risk of jigsaw identification of complainants.

In addition, do not refer to civil servants by name unless it is absolutely necessary, and do not refer by name to civil servants 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.

With that, I welcome the Lord Advocate and invite him to make a solemn affirmation.

The Lord Advocate (James Wolffe QC) *made a solemn affirmation.*

The Convener: I also welcome the Crown Agent and invite him to take the oath.

David Harvie (Crown Agent) *took the oath.*

The Convener: I invite the Lord Advocate to make a short opening statement, and I ask members to indicate in the chat box if they wish to ask a question.

The Lord Advocate (Rt Hon James Wolffe QC): Thank you, convener. As you have reminded witnesses and members, the actions of the Crown are not within the remit of the committee. Nevertheless, comments have been made about the Crown that are without foundation, and the public is entitled to hear the truth about those matters from me.

As I am head of the system of criminal prosecution in Scotland, it is my responsibility to establish arrangements for the proper administration of criminal justice, and that is what I have done in relation to this case. From the outset, I have put its conduct entirely in the hands of the principal Crown counsel, Scotland's senior professional prosecutor. Like other Crown counsel, he holds the commission that authorises him to exercise, to the full, my prosecutorial powers as Lord Advocate, and to do so without any reference to me.

I also put in place specific arrangements so that the law officers had no personal involvement in the case. I did that to reinforce confidence in the absolute integrity of the administration of justice. For that reason, the decisions in relation to contempt of court, and other matters that have arisen since the trial, have also been put entirely in the hands of Crown counsel.

Any suggestion from any quarter that the Crown's decision making has, at any time, been influenced by irrelevant considerations or improper motivations would be wholly without foundation. Insinuations or assertions to the contrary are baseless.

The Crown has been criticised for actions that it has taken to protect the identity of the complainers at Mr Salmond's trial, so it is important that I explain the position.

The trial judge made an order to protect the complainers' identities. Any breach of that order by this Parliament, its members or anyone else would be punishable as a contempt of court. The Crown will seek to protect the administration of justice by advising publishers, including, if necessary, the parliamentary authorities, if it considers that a publication would breach the order. However, only the court can decide whether any particular publication is in contempt, and it is for publishers to decide for themselves what they can lawfully publish.

Last week, following an intervention by the Crown, the parliamentary authorities decided to redact certain evidence that had been provided by Mr Salmond. That was their decision, and they were right to take it. I wish to be clear that any restriction on what can be published by the

Parliament flows from the terms of the court's order, and that any suggestion that the Crown is seeking to limit the committee in that matter is incorrect. The court order specifically restricts the publication of information. It does not prevent the committee from considering that information.

Separately, Mr Salmond has stated that the Crown has tied his hands in respect of the use of the information that he holds. It is the law, not the Crown, that stays his hand. Let me be clear about why the law does that. In any criminal investigation, people may provide to the police and prosecutors information and evidence of the most sensitive and personal nature. It is the Crown's responsibility to treat that information with the greatest care. There are statutory provisions that oblige the Crown to disclose information to the solicitors for an accused, and that is right in order to ensure a fair trial. Those same legal provisions prohibit the use of that material by the accused or his solicitor for other purposes. That prohibition secures the confidence of people who provide information and evidence to the police, and it protects the administration of justice. The statute contains no exceptions. The prohibition applies to information that the Crown disclosed to Mr Salmond's solicitors. Mr Salmond, like anyone else in that position, is bound to observe the law, and the Crown, for its part, has a responsibility to maintain public confidence in the integrity of that important feature of our criminal justice system.

If the committee wishes to see that material, it may do so by serving a section 23 notice on the Crown, as it has done, which will be considered in accordance with the relevant legal rules. In some quarters, the legal restrictions on the material that can be placed before, or published by, the committee are viewed with frustration, but those restrictions serve important public purposes. In particular, they exist to ensure the confidentiality of sensitive information and the sound administration of justice. Enforcing the law, including the law that has been made by this Parliament, is a vindication of democracy, not its denial. Any suggestion that the professional prosecutors who are charged with these matters have been acting for any reason other than to ensure that the law is observed and to protect the administration of justice would be wholly without foundation.

In his evidence, Mr Salmond has questioned the conduct of the Crown Agent, who is here with me today. The Crown Agent is the professional head of the Crown Office and Procurator Fiscal Service. He is an exceptional public servant and a professional prosecutor of the utmost integrity. No one is more zealous in defending the independence of the Crown. No currency should be given to any imputation against his professional character. He has shown extraordinary leadership through a challenging period, and he has my fullest support.

As Lord Advocate, I am constitutionally accountable, including to this Parliament, for the actions of Scotland's public prosecutors. Most of the decisions for which I am accountable, including in the most sensitive cases, are made by professional prosecutors without reference to the law officers. The decisions that prosecutors make might be difficult and sometimes unpopular, but it is the job of prosecutors to take difficult decisions and to do so without fear or favour, impartially and without regard to any extraneous considerations. They do that in the public interest, and they do so on the basis of the law and the evidence. They act with complete and utter independence. That is what they routinely do, and that is what they have done in relation to this case. They have my absolute support and confidence, and they deserve the committee's trust, too. The Crown is a central institution of our criminal justice system.

By all means, hold me to account. I am sure that the committee will do so. However, the committee should not entertain any attack on the integrity of the Crown or of the hard-working people who work for it. I will be glad to answer your questions.

10:15

The Convener: Thank you, Lord Advocate. I will start, before we move on to questions from Ms Mitchell, the deputy convener.

Your role as a member of the Scottish Government is set out in the Scotland Act 1998, which was passed by the United Kingdom Parliament to create the Scottish Parliament. Can you run us through that element of the legislation, and quickly talk us through your role in Government? Please also explain a little of the role of the Crown Agent.

The Lord Advocate: I would be glad to do that, convener.

The office of the Lord Advocate, whoever holds that office from time to time, has a wide range of functions. Among those functions are the responsibilities of the Lord Advocate as head of the system of criminal prosecution and investigation of deaths in Scotland. In those functions, the Lord Advocate acts entirely independently of any other person.

The Lord Advocate is also, by statute, a member of the Government. That was true before devolution, when the Lord Advocate was a member of the UK Government. It has also been the position since devolution, since when the Lord Advocate has been a member of the Scottish Government.

Within Government, the Lord Advocate is the Government's senior law officer and is sometimes characterised as the Government's principal legal adviser. The role of a law officer goes beyond giving legal advice. As the Government's senior law officer I am—as I have explained to the committee in previous sessions—effectively responsible for the whole panoply of legal aspects of the work of the Government. I am supported in that by the Scottish Government legal directorate, by the parliamentary counsel office, and by my own secretariat. I am also responsible for helping the Government to maintain its commitment to the rule of law and the administration of justice.

The Convener: Thank you.

The Lord Advocate: Convener—

The Convener: I am sorry, Lord Advocate; you had paused.

The Lord Advocate: I am conscious that you also asked me about the role of the Crown Agent. In relation to my position as head of the system of criminal prosecution and investigation of deaths, that means that I have a ministerial responsibility to oversee that system and, as I have said, I fulfil that function entirely independently of anyone else.

The Crown Agent is the professional head of the Crown Office and Procurator Fiscal Service, which is the organisation that fulfils the principal functions of the system of criminal prosecution and investigation of deaths. He is a senior civil servant and he is a very experienced professional prosecutor. He is accountable to me, I suppose, as the relevant minister, and I exercise ministerial oversight of fulfilment, by him, of his wide-ranging and onerous responsibilities.

I am sure that the Crown Agent can speak for himself about his role, but it is perhaps important to note that he, like me, is the holder of an ancient and well-established office. The office of Crown Agent is an independent office, and one of his responsibilities is precisely to defend the independence and integrity of the Crown in its prosecutorial and investigation of deaths functions.

The Convener: Thank you, Lord Advocate. I am sure that the Crown Agent will be asked questions by the committee, and we now move to those questions.

I remind everyone that we are time-limited today and we have a lot to get through. I ask members who are asking questions to state whether the question is to the Lord Advocate or to the Crown Agent. We will start off with Margaret Mitchell, who will be followed by Alasdair Allan.

Margaret Mitchell: I thank the Lord Advocate for his opening statement.

I am familiar with both the Lord Advocate and the Crown Agent from my previous role as convener of the Justice Committee. We have had a good and productive working relationship in the past. However, it has to be made absolutely crystal clear that the Lord Advocate, as the head of our independent prosecution service, has a responsibility under the Scotland Act 1998 not only for all decisions that he, as the head of that prosecution service, takes in the public interest but also for those that are taken by the Crown Office and Procurator Fiscal Service. That being the case, he alone can answer—and he has a duty, under the Scotland Act 1998, to answer—for any decision taken by the Crown Office and Procurator Fiscal Service, regardless of whether he recused himself or had no part in that decision.

It is on that basis that I seek his view today on why the Crown Office and Procurator Fiscal Service, in sending the letter to the Scottish Parliamentary Corporate Body about its decision to publish the revised submission from the former First Minister, sought to impose more stringent restrictions on the Parliament and on its ability to publish than those that were deemed necessary for the *The Spectator* to follow.

Can the Lord Advocate confirm that he alone, as the head of the independent prosecution service, has that duty? Can he also explain whether that letter was justified and whether it is justified to seek to impose more stringent restrictions on the Parliament's publication policy than those followed by *The Spectator*? It published exactly the same material as the Parliament, but that was deemed lawful and there was no challenge to that, whereas the Scottish Parliament and its corporate body were challenged.

The Lord Advocate: It is entirely routine for me to be accountable for decisions in which I took no part. That is what I do all the time. Most prosecutorial decisions are taken by professional prosecutors, without reference to me. It is a great strength of our system that I commission Crown counsel, who exercise to the full my prosecutorial functions without reference to me. At the same time, I am entirely and solely—personally and constitutionally—responsible and accountable, including to this Parliament, for all those decisions. I would not want there to be any doubt in the member's mind, or anyone else's mind, about that.

I will explain the position in relation to dealing with contempt of court matters. It is necessary that the public and members have an accurate understanding of the position. Any restrictions on what can be published flow, in this case, from the court order that was made by Lady Dorrian. It is for anyone who is publishing material to satisfy themselves—including by taking their own legal advice—about what they can and cannot publish.

The Crown does not give legal advice, nor can the Crown give a ruling on whether any publication does or does not constitute a contempt; only the court can do that. Even if the Crown does not draw a potential contempt to the attention of the court, anyone else with an interest may do so.

That said, the Crown considers that, where a potential contempt is drawn to its attention, it has a responsibility to seek to ensure that court orders of that sort, which are made to protect the administration of justice and the interests of complainers, are observed by drawing the issue to the attention of the publisher. That is a routine feature of Crown work, albeit more usually in the context of pre-trial publicity. It is well understood and it is well respected, generally speaking, by the mainstream media. The Crown cannot, does not and, indeed, could not proactively police all media outlets; it can deal only with issues that come to its attention.

In relation to issues surrounding the present order and the challenge that is concerned with protecting the identity of the complainers, the issue arises because of what is called jigsaw identification, which is the potential for different pieces of information to be put together in a way that would result in a breach of the court order.

As far as what happened last week is concerned, the anticipated publication by the Parliament of the submission was the subject of representations to the Crown by complainers and their solicitors. The Crown reminded the parliamentary authorities—I am sure that they needed no reminding—of the order. It was only when the submission was published that the Crown was able to assess it in full, and it formed the view that certain parts of the submission were liable to be a breach of the court order. The Crown drew those concerns to the attention of the parliamentary authorities, and the parliamentary authorities took the decision that it was for them to redact certain material.

I am conscious of the point that the member has made—that other publications have taken a different view. It is fair to say that, in dealing with those publications, the Crown was focused on particular aspects of the submission in the context of the submission that appeared on the Parliament website. Additional matters were identified and drawn to the parliamentary authorities' attention, and the parliamentary authorities took the view that they did.

Margaret Mitchell: I thank the Lord Advocate for that explanation, but it does not explain why identical submissions were released by *The Spectator* and the corporate body yet it was only the corporate body that was subject to the Crown suggesting that there might be a contempt and, therefore, more stringent restrictions. Will the Lord Advocate explain why that was the case? Clearly, that is not a reasonable or satisfactory situation for the Parliament to find itself in when we are looking—independently, as a committee—to establish the facts of what took place and to receive the documents we need, which will not be a contempt of court, in order to carry out our remit.

The Lord Advocate: For the reasons I gave a moment ago, it is for *The Spectator* to take its own legal advice and to consider whether it should take the same course as the parliamentary corporate body. The Crown at no time gives any clearance or assurance that any particular publication is or is not a contempt, for the reason that I explained a moment ago.

I also make it clear that the restriction that the court order places is on publication; it does not prevent the Parliament taking into account material that has been provided to it. The issue is concerned only with what can be put up on the Parliament website and published to the world. As I said a moment ago, it is for publishers to form their own view as to what is or is not a contempt. The parliamentary corporate body has taken the view that it has; in my view, it was right to do so. The decision follows from its view, and it accords with the Crown's view of the court order.

10:30

Margaret Mitchell: I merely say that I think that people will wonder why the Crown sought to intervene in the Parliament's publication but not in *The Spectator*'s when it was aware that they were identical publications. Much greater legal minds than mine or the committee's will ponder over what has been said.

The Lord Advocate: Yes, can I—

Margaret Mitchell: However, I welcome the fact that the convener has allowed this discussion. The Lord Advocate has answered in his capacity as the head of Scotland's independent prosecution service.

The Convener: Thank you, Ms Mitchell. I will let the Lord Advocate add a short comment on what you have just said, because I saw that he tried to intervene.

The Lord Advocate: I want to be clear that the Crown has not cleared or given any assurance in relation to any other publication. It is correct that additional features of the submission were identified that had not previously been identified by the Crown in the context of the submission that was put up on the parliamentary website. It is a matter for other publishers to take their own legal advice and to consider what they should be doing in order to comply with the order of the court. I would like to think that all of us—including all

members of the committee—would be concerned to ensure that nothing be done, regardless of whether there was an order of the court, to identify the complainers in the criminal trial. As it happens, there is an order of the court, and it must be complied with.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I will address my questions to the Lord Advocate, but if he wishes to bring in the Crown Agent—[*Inaudible*.]—person to answer—[*Inaudible*.]—to include him in the conversation.

When the committee took evidence last week, there was a great deal of discussion about what section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 was intended to do. Of course, my understanding is that the relevant question is not what it was intended to do but what it says. Can you explain what that legislation actually does, what the restrictions are in it and how it relates to the materials that we are talking about in our inquiry?

The Lord Advocate: I am grateful to the member for that question. On the first point, he is absolutely correct. Legislation is interpreted according to the meaning, objectively considered, of the words that are set out in the act. The subjective intentions of those who passed it are neither here nor there when it comes to deciding what a piece of legislation means.

That particular provision imposes a duty, correctly, on the Crown to disclose to an accused person information that the police may have gathered in the course of a criminal investigation, or information that the Crown may have obtained, that may be of assistance to an accused person in the context of their defence against a criminal charge. That is done to ensure a fair trial, but the committee will appreciate that that may oblige the Crown to disclose to an accused person's solicitors—the material always goes to the solicitors and not to the accused person themselves—what may be highly sensitive and highly personal information that people have made available to the police and the Crown or that may have been required to be made available to the police and the Crown for the purposes of the proper administration of criminal justice.

The law therefore puts strict constraints on what the accused person or his solicitors may do with that material. The 2010 act says that they may use that material for the purposes of the criminal proceedings in relation to which it has been disclosed and in the context of any appeal. There is a provision that says that they may not use it for anything else, and a breach of that provision is itself a criminal offence.

As I understand it, it relates to the issues that are before the committee, because Mr Salmond has stated that his hands are tied in relation to material that he would like to provide to the committee. As I said in my opening remarks, if the committee wishes to see material, a mechanism is available to it by way of an order under section 23. Indeed, it was the Crown, in correspondence with the committee, that suggested that that would provide a mechanism that would allow the Crown at least to consider, according to the relevant legal rules, the provision of material to the committee. The committee has served such a notice on the Crown, and it is under consideration as we speak.

Dr Allan: You have set out, in your answer, some of the reasoning around section 162 of the 2010 act. Will you give a clear indication of whether some of the restrictions that you are talking about would apply equally to other parties who are involved—say, the solicitors of individuals—in the same way as they apply to the individuals themselves?

The Lord Advocate: The material is disclosed to the solicitor, who is the agent of the client. The restriction would apply to the accused and to the accused's solicitor. I should say that, as one would expect, there are also professional obligations that apply to solicitors in relation to the use of such material.

Dr Allan: We have already heard a little about the case involving *The Spectator*, and perhaps the Crown Agent might have a view on that as well. We have all heard about Lady Dorrian's judgment in the incidental application by *The Spectator*, which sought to vary the court order that was laid down in the case of Her Majesty's Advocate v Alex Salmond. What is your understanding of exactly what that judgment means in terms of how Lady Dorrian's decision compares with the pleas-in-law that were made by the applicants?

The Lord Advocate: I should say that Lady Dorrian's judgment is publicly available on the Scottish Courts and Tribunals Service website, so it can be read by anyone who wishes to read it.

As I have read the judgment, *The Spectator* invited the court to vary its order in two ways: by making a particular adjustment to the wording and by specifically excluding from the effect of the order evidence in the submissions to the committee and various other material. Lady Dorrian declined to accept the submissions of *The Spectator* in that regard. She made it very clear that the question of publication of the committee's proceedings was not a matter for her to rule on. Her only concern was whether the order that she had made was sufficiently clear and precise in terms of what it stated. She made a very minor adjustment to the order, which was not an adjustment that was suggested or sought by *The Spectator*, and she was clear that that minor

adjustment did not alter the practical effect or legal scope of the order.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning, Lord Advocate. I want to pursue two substantive issues with you. Before I do so, I will ask about the issue of the release of legal advice.

As the Lord Advocate will know, for months, this committee has been seeking sight of the external advice that was offered to the Scottish Government. At the end of last year, there were two votes in Parliament to ask the Scottish Government to release the advice to us. Only this week, subject to a threat of a vote of no confidence in the Deputy First Minister, has the Scottish Government agreed to release some legal advice to us. That was intimated to us last night. When did Mr Swinney ask you for your permission to release those documents to the committee?

The Lord Advocate: A submission was presented to the law officers yesterday.

Murdo Fraser: So when Parliament voted for it back in November and December, no approach was made at that time.

The Lord Advocate: The position is that ministers have formed a view that the first stage of the two-part process in the ministerial code is satisfied—that the public interest lies in favour of disclosure. At an earlier stage, ministers took the view that the public interest did not favour disclosure. Ministers have now reached that view. The question of law officer consent, in terms of the ministerial code, comes into play only at a point at which ministers are satisfied that the first stage is met.

Murdo Fraser: Thank you. That is very helpful. I think that we might deduce from that that what changed ministers' minds was the threat of a vote of no confidence rather than any other factor. However, we will leave that for the time being.

Can I ask you—

The Lord Advocate: I was just going to say that that is clearly not a matter that I am going to comment on.

Murdo Fraser: Indeed. Fair enough.

Are you aware of the content of the legal advice that will be supplied to the committee? We have not yet seen it and, as I understand it, we will not see it until this afternoon. At the end of last year, the committee passed unanimously a motion in the name of Andy Wightman, specifying the documents that we require to see. Do you know whether what we are going to see will meet the requirements of that motion?

The Lord Advocate: I am afraid that I cannot say one way or the other. I am aware in general terms of the material that is going to be released; however, on how it relates to the particular terms of the motion, I simply cannot comment.

Murdo Fraser: Thank you. Time will tell. I will move on.

I want to raise the issues that Alasdair Allan pursued with you a few moments ago about the application of section 162 of the 2010 act. The reason why it is significant is that, in his evidence to us on Friday, Mr Salmond made some very serious allegations that there was, in effect, a conspiracy against him by senior people in the Scottish Government and in the Scottish National Party. He put it to us that support for those allegations is contained in documents that his lawyers currently hold but which he cannot release to the committee because the operation of section 162 would make it a criminal offence to release them to us. I will just ask you this so that we are clear. Do you, as Lord Advocate, have discretion as to whether section 162 can be waived in a case such as this?

The Lord Advocate: Well, there are no exceptions to the provisions of the act.

Murdo Fraser: There have been no civil cases that you are aware of in relation to which you have agreed to waive the application of section 162 to allow evidence that was presented in a criminal case to be utilised in those civil cases.

The Lord Advocate: In the claims against me by Mr Clark and Mr Whitehouse, the question of the use of material that had been disclosed to them for the purposes of initiating a claim against me had to be addressed. The issue was dealt with through their taking a legal case and applying to the nobile officium of the court—an exceptional power that the court may exercise in particular circumstances. Through that process, the matter was dealt with so that they could use that material for the purposes of initiating a claim against me. That was a wholly different situation, and one in which the matter was dealt with in the way that I have just described.

Murdo Fraser: Thank you for that. When you said that there were no relevant exceptions, what you meant was that there are relevant exceptions if the case is pursued in a particular way.

I asked the question because we know that in the Whitehouse and Clark case, section 162 of the 2010 act was set aside to allow access to documents presented in a criminal case to be used in a civil case. We know that there is an exception—that has already been established. There are people who claim that the Crown Office is part of a cover-up, together with the Scottish Government, in not allowing the information to be

provided. Given that there is a precedent, why has it not been followed in this case?

10:45

The Lord Advocate: First, that is a wholly different set of circumstances, and secondly, it was dealt with through the process that I have just described.

I say, absolutely, that the Crown is not and would not be party to any improper conduct. As I understand it, we are concerned here with material that was not admitted into evidence in the course of the criminal proceedings. I have not seen the material, but I think that one can take it that it was not admitted in the criminal proceedings because the trial judge, Lady Dorrian, took the view that it was not relevant to the issues in the criminal trial. One can draw one's own conclusions on the bearing that the material would or would not have had, but one can take it that it was not relevant to the issues in the criminal trial.

The committee can obtain the material by serving a section 23 order on the Crown. In correspondence with the committee about the release of material, the Crown, recognising that there are legal constraints on its own use and disclosure of sensitive information, identified to the committee section 23 as providing a proper legal basis for that. It is in the hands of the committee to initiate those processes. I understand that the committee served a second section 23 notice on the Crown last week, which is being considered at the moment. The Crown responded in full to the committee's earlier section 23 notice.

I reject absolutely any suggestion about or attack on the integrity with which the Crown has conducted itself in relation to these matters. As I said in my opening statement, these matters have been put entirely in the hands of the most senior professional prosecutors in Scotland. Any suggestion of improper motive or improper behaviour is the most serious slur on their professional character and integrity and should not be entertained for a moment by the committee.

Murdo Fraser: As you say, we have served a section 23 notice on the Crown Office. Mr Salmond also suggested that we serve a section 23 notice on his lawyers, who already hold the material. If we were to do that and we recovered the documents and they were relevant to our inquiry, would the Crown Office have any objection to us publishing that information?

The Lord Advocate: I am not going to comment on that on the hoof. It would require consideration.

Murdo Fraser: The final issue that I want to cover is important and was raised in Mr Salmond's evidence. It relates to the recovery of documents that were held by the Scottish Government. Mr Salmond was at pains to discuss the duty of candour that applied to the Scottish Government. He said that a search warrant was served on the Government in October or November 2018 that asked for details of contacts between the permanent secretary and the complainants and that information was not disclosed by the Scottish Government pursuant to that search warrant. That would be an extremely serious matter were it to be true. Are you able to confirm whether Mr Salmond's evidence on that point is accurate?

The Lord Advocate: I have seen the reports in that regard. I may say that, although the Crown Office has been in touch with Mr Salmond's legal advisers in order to clarify what is being suggested, to date the Crown Office has not received any letter from him or his solicitors identifying the basis of his concerns or identifying the documents that he claims—and it is important to note that they are only claims and I express no view on them—that the Scottish Government failed to disclose in response to the search warrant. Therefore, the Crown Office is unaware of the detail of the complaint. If the Crown Office receives any correspondence in that regard, it will of course consider it carefully before determining the way forward.

Murdo Fraser: [*Inaudible*.]—a search warrant was served on the Scottish Government, and the Scottish Government did not comply with it and did not reveal information that it had, what would be the sanction?

The Lord Advocate: Well, that would require to be addressed by the Crown if and when it received details.

I should say that I should not be taken as accepting or, indeed, commenting one way or the other on, the suggestion that the Government did not respond to the search warrant. As I understand it, that was a particular process that was dealt with carefully—a commissioner was appointed to look at material and so forth—so I am not to be taken in any way as accepting the claim. However, if the claims are articulated to the Crown, the Crown will of course look at them.

Murdo Fraser: And that would be a criminal matter.

The Lord Advocate: It depends on the circumstances. I am not going to speculate in anticipation.

Murdo Fraser: But it could be a criminal matter.

The Lord Advocate: As I say, it would be entirely wrong for me to speculate in the abstract about this.

Murdo Fraser: Well, let me ask you then, in a hypothetical situation, whether failure to comply with a search warrant in these circumstances would potentially be the committal of a criminal offence.

The Lord Advocate: As I say, I am not going to discuss in the abstract what might or might not be a criminal offence. Failure to comply with a search warrant is clearly something that would require investigation, and it would be a serious matter if it were to have taken place, but I am not going to make any comment in the abstract on what might or might not be a criminal offence.

Murdo Fraser: Lord Advocate, with respect, you head the prosecution service in Scotland and I am asking you a very simple question. Is failure to comply with a search warrant a criminal offence in Scots law—yes or no?

The Lord Advocate: One would have to look at things such as the motivation and the circumstances. I am not going to comment on that in the abstract, because I know exactly, I am afraid, what the member is seeking to lead me to do, and I am not going to be led into it.

Murdo Fraser: Okay.

The Lord Advocate: Particularly, I should say, when the Crown has not been sighted on the detail of what is alleged.

The Convener: Before I bring in Mr Cole-Hamilton, David Harvie, the Crown Agent, would like to say a few words.

David Harvie (Crown Agent): Thank you, convener. I would like to comment on two matters relating to Mr Fraser's second question and to add one further comment on his final question.

In relation to the second question and the serious matters that Mr Fraser identifies as having been raised in Friday's session, I remind members that those matters were investigated by the police. The evidence was ingathered by the police and it was assessed by the police. It led to charges being brought, which were submitted to the Crown Office; thereafter a specialist precognition team of experienced lawyers considered that material, and it was thereafter considered by independent Crown counsel. The material about which the comments were made was disclosed by the Crown and it was thereafter put before the court for consideration and ruled on by Lady Dorrian. I think that it is important that the committee has a clear understanding of the nature of the material in terms of where it has been ingathered and who it was ingathered by, which was by the police during their investigation. It was then disclosed by the Crown and considered by the court.

On Mr Fraser's final question, if and when we get clarity on what is said to have happened, that matter will be considered seriously.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning to both the Crown Agent and the Lord Advocate. I have a number of questions for the Lord Advocate first, and I think that there is scope for the Crown Agent to come in on a couple of those questions.

I will first follow up briefly on Murdo Fraser's line of questioning about the search warrant. Lord Advocate, the search warrant was served on the Government in particular for the discovery of documents and evidence on contact between the permanent secretary and the complainers. That goes to the very heart of the matter and indeed of the issues that we are examining around bias and whether the process was applied appropriately. Can you explain how you advised the Government on the satisfaction—[*Inaudible*.]

The Lord Advocate: I am sorry—I lost the last part of Mr Cole-Hamilton's question.

Alex Cole-Hamilton: My apologies. What advice, if any, did you offer the Government on the satisfaction of that search warrant?

The Lord Advocate: As I am afraid the member will recall from previous sessions, the question of who has tendered any particular advice to the Government in relation to any particular matter is not something that any minister would disclose. What I can say is that the Government of course had legal advice in relation to the search warrant and was represented in dealing with that matter.

Alex Cole-Hamilton: I understand—thank you.

I will move on. We know that, at the end of the Government's investigation, the permanent secretary passed a number of allegations over to the Crown Agent—or passed the report and findings to the Crown Office. However, that was against the wishes of the two complainers.

One of the most striking allegations that Mr Salmond makes in his final submission is that you, Lord Advocate, instructed witness statements from those complainers. They were reluctant, but you asked them to give police statements to support the findings of the investigation. Would you like to respond to those allegations?

The Lord Advocate: Yes. I have made this clear in correspondence to the committee. I am not sure what power it is thought I would have to give such a direction, but I can be clear that I at no time gave any such direction.

Alex Cole-Hamilton: That is helpful.

I will move on. This is perhaps a question for David Harvie as Crown Agent. In determining what is investigated when complaints are made, we

have two relatively recent issues—this is all connected to our investigation and the work of our inquiry. We know that the Crown Office is currently pursuing the leak of the WhatsApp messages to the committee—they were WhatsApp or text messages, I think, in the name of Peter Murrell—about putting pressure on the police. However, no such action has been taken on the leak to the *Daily Record*, which arguably involves a greater public interest in terms of protecting the anonymity of complainers. Can you explain how that decision was taken?

The Lord Advocate: If that is directed at me in the first instance, I am happy to make the point that that leak was investigated, as I understand it, by the Information Commissioner's Office, which is the investigating authority that is charged by statute with investigating matters of this sort. As I understand it, the conclusion from the Information Commissioner's Office was, basically, that the evidence did not support the identification of any particular individual—[*Inaudible*.]—and, in those circumstances, the matter could not proceed any further.

Alex Cole-Hamilton: Okay. Thank you for that—

The Convener: May I interrupt you, Mr Cole-Hamilton? Mr Harvie wants to come in on that point.

Alex Cole-Hamilton: I was hoping that he would.

11:00

David Harvie: Thank you, convener and Mr Cole-Hamilton. Just to be clear—and again, this is one of those things that it is perhaps helpful to explain, for public understanding—in Scotland we have a unitary prosecuting authority. Unlike countries that have multiple prosecuting authorities, Scotland has only one. A number of agencies report allegations, such as the police, HM Revenue and Customs, local authorities and the Information Commissioner's Office. Had the Information Commissioner's Office identified criminality, in its investigation, that report would have come to the Crown Office for consideration.

Alex Cole-Hamilton: Thank you, that was very helpful.

I have a couple of minor follow-up questions. The first is for the Lord Advocate; the second might be more appropriate for the Crown Agent.

Lord Advocate, you have a dual role. You are the Government's lawyer, in effect, and you are the head of the prosecution service. As head of the prosecution service you must act in the public interest, but as the Government's lawyer you act in the Government's interests, so the roles clash and there is a tension. Can you tell us how you decide what—[*Inaudible*.]—has pre-eminence?

The Lord Advocate: Sorry, Mr Cole-Hamilton, I am afraid that I lost the end of your question again.

Alex Cole-Hamilton: We are beset by gremlins. I was asking about the tension that exists in your dual role, in that you act in the Government's interest as the Government's lawyer and in the public interest as the head of prosecutions in Scotland. When those roles collide, which interest is pre-eminent? Which is more important?

The Lord Advocate: Let me start by making this observation: the office that I hold has combined these various functions ever since devolution and long before it. Other models are available, but this is the model that we have and the office that I hold. Any suggestion that it cannot be held with integrity is wrong. I have been living in this office for the duration of this parliamentary session and I am satisfied that the different responsibilities and functions can be combined with integrity—as I said, other models are available.

The bottom line, for me, is that my fundamental and only responsibility is to the rule of law and the administration of justice. That is my function. It is the fundamental principle that underpins all my functions, whether they are functions within Government, as the Government's senior law officer, or the functions that sit with me alone. Once that is understood, any apparent tensions are resolved, because the overriding touchstone is what is the correct and right thing to do in terms of the rule of law and the proper administration of justice in Scotland.

Alex Cole-Hamilton: Thank you.

My final question is a process question, and both witnesses should feel free to answer. If you are watching evidence being given to our committee under oath and you see a witness say something that you know to be false, based on evidence that you have but which this committee has perhaps not seen, is it true to say that you are watching a crime being committed? What action would you take if you were aware that a false statement had been made?

The Lord Advocate: Again, I do not think that it would be right for me to comment on a wholly hypothetical situation.

Alex Cole-Hamilton: I am not asking about a hypothetical situation; I am asking about a matter of process. Is the situation that I suggested something that you would spontaneously start to investigate yourself, or would a complaint need to come forward from someone who suspected that a false statement had been made?

The Lord Advocate: With respect, Mr Cole-Hamilton, you are putting a hypothesis to me. The issue is clearly hypothetical in that sense. It would be wrong for me, with the various functions as I have just described, to be drawn into commenting on particular hypothetical situations.

Alex Cole-Hamilton: I think that David Harvie wants to come in here.

David Harvie: Thank you, Mr Cole-Hamilton. There is obviously relevant legislation et cetera under which complaints could be brought. With the best will in the world, the reality is that we do not sit and watch every parliamentary meeting with a view to policing it. With the greatest of respect, it is simply not our role to do that. We are in the realms of the hypothetical, but the reality is that it would be a matter for others to draw to our attention.

Alex Cole-Hamilton: Thank you.

The Convener: We have Andy Wightman now, to be followed by Jackie Baillie.

Andy Wightman (Lothian) (Ind): I welcome the Lord Advocate and the Crown Agent. I declare for the record that I am a member of the Scottish Parliamentary Corporate Body and therefore aware of the correspondence that has taken place between the Crown Office and the Scottish Parliamentary Corporate Body.

Lord Advocate, I wonder whether you can clarify something. You said in your opening remarks that it is the job of the Crown Office to advise publishers in relationship to contempt of court, but you went on to say that you do not provide legal advice. I understand that there is obviously a distinction, but can you clarify that your role in advising publishers goes no further than drawing to their attention your concerns about the possibility that a contempt might be being committed?

The Lord Advocate: Yes. I am really grateful to you for that, Mr Wightman, because that is exactly right. I thought that I had said that it is not the Crown Office's role to advise publishers. However, as I explained, the Crown Office will, in order to protect the integrity of the administration of justice, draw to the attention of publishers any concerns that the Crown has about the terms of any publication. It is then for the publisher to take its own legal advice, but ultimately only a court can decide whether a contempt has been committed. However, a publisher could, on its own legal advice, take the view that the Crown is wrong and run the risk that that might potentially have to be argued in court. Equally, the Crown simply cannot, and does not, purport to police the media; it relies in that regard on matters being brought to its attention. If things are drawn to its attention that give rise to a concern about contempt, it will, very properly, raise them with the publisher, who will then have to consider what the right thing to do is.

Andy Wightman: In respect of that, have you raised any concerns with *The Spectator* magazine further to your correspondence with it on 15 January this year?

The Lord Advocate: I am afraid that I am not aware of the current position in relation to *The Spectator.* I can perhaps follow that up with the committee, if that would be helpful.

Andy Wightman: That would be helpful.

On the question of contempt, do you accept that there has been limited litigation in this field and that it is difficult to understand where the lines are drawn in relationship to contempt? For example, on a spectrum where at one end no one says anything at all about anything that has any bearing whatsoever on the matter and there is complete opaqueness, and at the other end the names of the complainers are published on the front page of a newspaper, there is a substantial grey area, which may be of a differing length, where it is often hard for publishers to know where the line is that they might be crossing. For example, would the line be information that led just to one person identifying a complainer through jigsaw identification or would it be about 100 people or 1,000 et cetera? Do you accept, as a general principle, that the law in this area is unclear and might benefit from guidance in the future, perhaps from the Crown Office and others—particularly where it engages the Parliament, which has specific responsibilities—in order to better understand the parameters of what might constitute contempt in any particular case?

The Lord Advocate: Yes. I think that the touchstone has to be the terms of the order, in this case. Contempt issues more usually arise in the context of pre-trial publicity, where there are particular rules and where the Crown from time to time raises issues with publishers. You are absolutely right, Mr Wightman, that there has been little litigation in this area, principally because the media understands those rules and is generally extremely respectful of the need to comply with them.

In a case such as this, I suppose that the starting point is the terms of the court order, which is an order preventing the publication of the names and identity—and any information likely to disclose the identity—of the complainers in the particular criminal case with, now, the addition of the words:

"as such complainers in those proceedings".

I appreciate the point that the member is making. At one end of the spectrum would be a publication that named individuals and said that they had been complainers in the criminal

proceedings—an absolutely clear breach of the order. The difficult areas arise where information is published that, when put together with other information that is in the public domain, could identify those complainers. It is well-recognised that the order can be breached by doing that. One needs to be very clear that the publication of information that, when put together with other information in the public domain, would identify the complainers, is a breach of the order.

I appreciate that it is difficult for publishers, as it is for the Crown, because the Crown is not monitoring the media. The Crown has to proceed on the basis of matters that are drawn to its attention. It is the responsibility of publishers in this area to consider carefully what they are publishing. They know the terms of the order. It is for them to take a view, on the basis of their own legal advice. As you correctly pointed out, the Crown will draw any concerns that it has to the attention of publishers. The Crown cannot give a clearance or assurance, precisely because it is not monitoring the media as a whole.

Whether it is that the law needs clarification or some of the practical challenges of complying with the law is perhaps a question. One would hope that all publishers would, in good faith, seek at any cost to avoid putting themselves in a position where they disclose the identity of complainers in a criminal trial, both because it would be a breach of the order and because it would be the wrong thing to do.

Andy Wightman: Thank you. Can you just confirm as a matter of law that, for example, a publisher in Germany is not bound by the court order?

The Lord Advocate: I do not think that it would be wise for me to comment on German law.

Andy Wightman: Okay, thanks.

I move on to section 162 of the Criminal Justice and Licensing (Scotland) Act 2010. If one can characterise section 162 as a deep-freeze into which material is put that can only be extracted if the grounds in subsection (3) are met, or, as in the case that you noted, the office of the nobile officium of the court accesses it, can you explain the terms under which this happened? It was revealed in the ICO's report that there was a meeting on 21 August and that a statement was made by the detective chief superintendent whose name we do not know in relationship to the handling of the internal misconduct investigation of the Scottish Government. That was provided by Levy & McRae to the ICO. Is it correct that their ability to do that was because of section 131 of the Data Protection Act 2018?

11:15

The Lord Advocate: [*Inaudible*.]—whether it followed from that particular provision. What I can say is that, although the Crown was advised of Mr Salmond's intention to disclose the statement to the Information Commissioner's Office, it did not consent to that.

There are two points to make. That was the passing of one specific piece of information to an organisation charged with investigating what was a potential criminal offence under the Data Protection Act 2018. You perhaps have the advantage of me in having the section of the act in front of you, Mr Wightman.

Andy Wightman: I do not.

The Lord Advocate: I am afraid that I do not, either.

Andy Wightman: That is fine; we will leave that.

To be clear, you did not consent to that disclosure to the Information Commissioner's Office.

The Lord Advocate: No.

Andy Wightman: That contradicts Mr Salmond's statement, in which he said:

> "The reason we were able to give the ICO a copy of that statement is because the Crown Office permitted us to do so."—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 26 February 2021; c 100.]

In your view, that is not correct.

The Lord Advocate: I should be clear. I am told that, at a meeting between representatives of the Crown and of Mr Salmond, his representatives mentioned that they intended to do that. As I understand it, the Crown did not make any comment one way or the other.

Andy Wightman: I have a question for David Harvie. Detective Chief Superintendent [Redacted] was at the meeting on 21 August 2018, at which the police were offered a copy of the internal misconduct investigation report but refused to take it. At the meeting, the detective chief superintendent voiced concerns about the Scottish Government making a public statement about the outcome of its investigations. Were you present at the meeting?

David Harvie: Yes, I was. Would you like to know more about the meeting?

Andy Wightman: Yes, please.

David Harvie: You are quite right that the meeting was on 21 August 2018. It is useful for members to understand the timescale and chronology of events. Aside from me and the

detective chief superintendent, the chief constable was also in attendance. Candidly, in the room, there was the best part of 90 years' criminal justice experience.

The meeting took place in the morning. Earlier that morning, I had received a small bundle of hard copy material at my office, which was where the meeting was held. The hard copy material came from the Scottish Government. Broadly speaking, there were three parts to the material: a covering note, some statements and a report. In the short time that was available, I read the note, skimmed the statements and noted that there was a report. I did not read the report then and I have never done so.

When the police officers arrived, I apologised for the short notice of the meeting, which had been arranged the day before. They were entirely content about and appreciative of why they were there and the sensitivity of the issues that were to be discussed. I explained what I had received and that we would need to discuss a variety of issues, which we did, including issues in relation to the report. The chief constable and the detective chief superintendent skimmed through the note and statements, and we agreed that there would be an investigation into what, at that point, was potential criminality, which is what you would expect of any law enforcement agency or prosecution service in the world that was in receipt of such information.

We agreed that the priority was to establish early contact with those who had made the complaints, because it was understood that they were anxious. Because of the sensitivity of the issue, we agreed points of contact to ensure that the investigations that were being instructed were held as tightly as possible, and we agreed that a discrete police team would be set up.

We turned to the report and discussed what was to be done with it. I had no monopoly on wisdom in the room, which, as I said, had 90 years of experience in it. I had not read the report, which I told the officers. Bearing in mind that, at that stage, it was an investigation into potential criminality, I said that, if there were to be a subsequent prosecution, the report would have to be considered for disclosure, because I had it.

Thereafter, there was a discussion about what, if anything, we were to do with it. During that discussion, the detective chief superintendent suggested that the police not take it at that time. Everyone was comfortable with that and we moved on to discuss other arrangements, including the communication suggestion from the Scottish Government. There was going to be some message which was, at that stage, undefined. There was a clear preference in the room for there to be no reference made at all in any announcement to the matter being remitted to the police.

The meeting concluded. The report was safely secured and I have not read it to this day.

Andy Wightman: That is a helpful summary.

Can you confirm that, as the ICO report notes, it was a detective chief superintendent who voiced concerns about the Scottish Government making a public statement? For the record, did any other parties express concerns or was it only the DCS?

David Harvie: She did raise that. There was no disagreement in the room on anything relating to that or to any other aspect of how matters were to be handled.

Andy Wightman: Can you confirm that the material that you came into possession of, and that you were discussing, came into your possession because it was sent to you by Leslie Evans, the permanent secretary, the previous day?

David Harvie: It was hard copy material. It arrived that morning. The letter that I received was signed by someone else who has given evidence to the committee. Are you content for me to name that person?

I see the convener nodding. From my recollection, the letter was signed by Nicky Richards.

Andy Wightman: Can you confirm that it was you who arranged the meeting with the detective chief superintendent and the chief constable? Is that correct?

David Harvie: I called the chief constable in the late afternoon or early evening of the day before.

Andy Wightman: My final question is for the Lord Advocate. When speaking about the disclosure of the material to the Crown Agent, Leslie Evans, the permanent secretary, said that she took legal advice about to whom she should disclose it. As I understand it, following a decision that the material should be disclosed to law enforcement, it was decided not to disclose it to the police but to the Crown Agent. Can you say more about why that was? Is there a convention whereby the Scottish Government, as a matter of routine, does not report alleged crimes straight to the police? Why did it go to the Crown Agent?

The Lord Advocate: I can comment on that. The starting point was that the extreme sensitivity of the matter be recognised. It was a very unusual situation for the Government to have concluded that it should refer a potential criminal allegation to the police. The question how that should be done to ensure that it was, from the outset, handled with the care and integrity that such matters require was one that needed very careful thought.

I had a discussion with the Crown Agent. That took place entirely on the basis of anonymity, without identification of the potential suspect, and it happened at some point before the meeting that the Crown Agent described. The purpose of the discussion was to take his advice as to the best way for the Government to refer allegations of potential criminal conduct by a former minister to the police in order to ensure—I emphasise this—that the matter would be handled with the utmost integrity and with the sensitivity that any such allegation would require.

The key point was to ensure that, at the point when the material came into the hands of the police, it did so at the appropriate level and in a context in which, from the outset, arrangements could be in place to protect the interests of the potential suspect and any complainers.

I make it clear that at that stage—the time of that discussion—I did not disclose to the Crown Agent the identity of the individual concerned. The upshot was that I, as the head of the prosecution system, reached the view that the correct way to proceed, in order to ensure the integrity of the process, was for the material to be passed to the Crown Agent, on the basis that he could, because he deals operationally on a routine basis with the police at the highest level, ensure that arrangements of the sort that I have described were put in place from the outset.

The Government followed that procedure, and the Crown Agent has described how the material came into his hands. The committee should be very clear that at the point when the material passed from the Scottish Government to the Crown Agent, it was in the hands of the independent law enforcement and prosecutorial authorities, which work closely together in relation to any serious allegation of criminality. From that point, the Solicitor General and I took no part in the Crown's work on the case. The process was carefully considered and designed to recognise the sensitivity of the matter, to protect the interests of the potential suspect and to respect the interests of the complainers from the outset.

One must consider what the alternative approaches might have been. I have no doubt that an approach could have been made directly to the police. The Crown Agent will have his own comment to make on that, but I suspect that when the police receive an allegation of this sort and sensitivity, the first thing that they would do would be to speak to the Crown to ensure that the Crown and the police had arrangements in place to recognise the particular character of the case. I am sure that some committee members are aware that it is not unusual in Scotland for the Crown to be involved from the outset in more serious and sensitive cases, and to give directions and advice to the police as required.

That is the background and the genesis of what was done. There is nothing untoward in those arrangements. They were put in place for good reasons and they succeeded in achieving what was intended.

In relation to the passing across of the Government report, there is no criticism at all of the Crown Agent or the police for the very careful way in which they approached that. Equally, there was nothing untoward in that being tendered.

If one steps back from the case and thinks about an investigation by an employer into allegations that the employer concludes require to be passed to the police, one can readily envisage the employer giving the police whatever written report the employer had put together, which would no doubt help to inform the police. Ultimately, that is not primary evidence—it is not admissible evidence. The police would carry out their own investigation of the matter.

The Crown agent has explained already to the committee that there is an investigation. The police ingather primary evidence and assess that evidence. A report is then made to the Crown, and is considered and analysed by the professional and support staff of the Crown, who put together a document and supporting material called a precognition, which is a full description of the case and an analysis of the primary evidence. That material is then submitted to independent Crown counsel, who makes the decision about whether the evidence supports criminal charges and, if so, whether a prosecution should be brought and on what charges.

The idea that the outcome of that process would be affected by the receipt, in any context, of a report of the sort that we have heard about here is simply incorrect. That does not stand any scrutiny at all.

11:30

The Convener: Alex Cole-Hamilton has a short supplementary question on something that he heard in that evidence.

Alex Cole-Hamilton: Thank you for bringing me back in, convener. That was a useful section of questioning, but something in your answer jarred with something that you said earlier, Lord Advocate. In your answer to Andy Wightman just now, you said that you were acting in the interests of—[*Inaudible.*]—but the Government's passing the report to the Crown was done against the complainers' wishes. They had said that they did not want police involvement. You strenuously denied Alex Salmond's allegations, saying that

you instructed them to co-operate. Can you explain how the complainers were persuaded to co-operate with the police investigation, given that it was against their wishes?

The Lord Advocate: The first point to make is that I think that the permanent secretary might have given evidence about the reasons why the matter was referred to the police—the decision that was made in that regard—and why, notwithstanding the views of the complainers, the Government concluded that it was right, in this case, to pass the matter to those who are charged with investigating allegations of criminal conduct. Thereafter, of course, it was a matter for the police to speak to the complainers, and the Crown Agent touched on that. I am afraid that I cannot comment on that interaction, and I am not sure that it is appropriate to explore that.

David Harvie: On that point, it is a matter for individuals as to whether and to what extent they co-operate with a police investigation. Therefore, from the police's perspective, it is about establishing contact with them, with a view to seeking their co-operation. It is not a decision that is taken by others.

The Convener: I now move to questions from Jackie Baillie. I ask the deputy convener, Margaret Mitchell, to take over the chair for a few minutes.

Jackie Baillie (Dumbarton) (Lab): Good morning. I want to explore a couple of matters before I begin my questions. I will start with *The Spectator* article, because I think that, in referencing it, the Lord Advocate said that there would have been no clearance or assurance given by the Crown. However, I wonder whether that is strictly accurate, because my understanding is that in a pre-meeting discussion before Lady Dorrian's hearing, between Levy & McRae and Alex Prentice QC, Mr Prentice said that there were no other concerns with *The Spectator* article. Is that correct?

The Lord Advocate: My understanding is that in discussion of *The Spectator* article there was a particular focus on a particular paragraph of it. I cannot speak to precisely what was or was not said in that meeting, but I can say that the Crown cannot give clearance or assurance, because it is not in the Crown's gift to determine whether a particular article is contempt of court.

It is well understood by publishers that they have to take responsibility for their own publications. As I understand it, at the meeting, particular focus was on a particular paragraph. When the matter was revisited in the context of the material that was published on the Parliament's website, additional areas of concern were identified by the Crown. Those were drawn to the attention of the parliamentary authorities, which took the view that they have taken.

Jackie Baillie: The Lord Advocate, like myself, was not in the room, so we can only guess at what went on, although we have been written to by Levy & McRae, and that correspondence exists in our committee papers. There is a suggestion that Alex Prentice QC said that there were no other concerns with the article. Is it true that you, as the Crown Office, have not written to *The Spectator* since 15 January? Is that correct?

The Lord Advocate: I do not know whether the Crown Agent can help me with that. *The Spectator* will no doubt have been watching events; it is for *The Spectator* to form its own view about what it may lawfully publish and what it may not lawfully publish.

Jackie Baillie: I absolutely understand that, but I am suggesting that, given that the Crown Office has not written since 15 January, clearly there is not, by your actions, an urgent need to get *The Spectator* to redact more. I am pressing that point because the paragraphs that you sought to have redacted from the Scottish Parliament's evidence on its website are remarkably similar, if not identical, to the ones that people can see today on *The Spectator* website.

The Lord Advocate: As I have said before, I have no doubt that *The Spectator* and its legal advisers will have been watching and observing what has been happening. One may take it that they are well aware of the position, so it is for them to consider what they may lawfully publish and what they may not.

Jackie Baillie: Okay. Lord Advocate, you have just said to us that you knew about the complaints. Could you tell me when you were first told and who told you? You directed the permanent secretary to hand the material to the Crown Agent. Did I pick you up correctly on that point?

The Lord Advocate: I am sorry. Can I have clarity about what you mean by "the complaints"?

Jackie Baillie: You knew about the complaints coming in; you just said previously that you had had a discussion with the Crown Agent without naming whom the complaints were about. I am clarifying that you knew about the complaints and had been advised about them; I am asking when and by whom. You also said that you directed the Scottish Government—I assume that that was in the person of the permanent secretary—to pass that information to the Crown Agent.

The Lord Advocate: I was clearly aware that complaints had been made. I cannot now remember precisely at what point I was concerned and aware that consideration was also being given to referring the matter to the police. I was

concerned to ensure that arrangements could be put in place to ensure the integrity of that process. That is the context for the discussion that I mentioned a moment ago.

Jackie Baillie: Therefore, could you think about when you found out? You have not addressed the question of who told you. That is quite a significant moment, which I would certainly remember, so I wonder whether you could, with a bit of time, reflect on that and write back to the committee.

Could you tell us when you recused yourself from the criminal case against Mr Salmond?

The Lord Advocate: As I made clear a moment ago, the arrangements were put in place from the moment when matters were passed to the Crown Agent, so that neither I nor the Solicitor General for Scotland took any part in the Crown's work on the case.

Jackie Baillie: Can you explain, then, why an instruction was issued that two reluctant and unwilling complainers must provide statements to the police—and can you say who, if you did not do it directly, did it on your behalf?

The Lord Advocate: I simply do not know whether the factual premise of the question is true.

Jackie Baillie: Okay. Well, let me tell you that in evidence to the committee from a civil servant it was noted that you had intervened and wanted complainers to make statements to the police. Did she imagine that?

The Lord Advocate: I have given no such direction—

Jackie Baillie: Okay—

The Lord Advocate: —nor would I have the power to do so.

Jackie Baillie: Was it given on your behalf, Lord Advocate?

The Lord Advocate: I am not sure under what power it is thought that any such directions could be given.

Jackie Baillie: Okay. You can see how troubling it is that you are saying that—and I absolutely believe you—but a senior civil servant said to the complainers that the Lord Advocate wanted them to make statements. That is pretty powerful stuff. However, you are saying that none of it is true—so, actually, the complainants might have been misled.

The Lord Advocate: All I can say is that I gave no such direction and would have no power to direct someone to give a statement. I have to confess that I am not familiar with the evidence to which you have referred.

The Deputy Convener (Margaret Mitchell): I say at this point that the Crown Agent has indicated that he might want to come in.

Jackie Baillie: Can I ask—[*Inaudible*.]—hold that, because I have questions to—

The Deputy Convener: Absolutely. At the end of your questioning, I will give the Crown Agent the opportunity to come in.

Jackie Baillie: Perfect. Thank you, deputy convener.

Lord Advocate, regardless of who issued the instruction to the complainants that they needed to provide statements, did anybody in the Crown Office consider the distress and upset that that would have caused them?

The Lord Advocate: I am sorry, I slightly lost you, Ms Baillie. Will you repeat the question?

Jackie Baillie: Of course. I am thinking about the complainers, as we all should, and am wondering, given that they were unwilling, whether anybody considered the distress and upset that would be caused to them.

The Lord Advocate: I think that the permanent secretary has explained the Government's reasons for making the referral notwithstanding the views of the complainers. That issue engages prosecutors all the time. The Crown Agent has explained that, once the matter was referred to the police, it was a matter for the complainers to decide to what extent they wished to co-operate—or not—with the police investigation. That was entirely a matter for the interaction between the police and the complainers.

Jackie Baillie: Now that Mr Swinney appears to be giving the committee all the legal advice that we have been asking for, will you confirm that you gave legal advice to the Government on sisting the judicial review in September 2018 and, if that was the case, that we will receive that advice as well?

The Lord Advocate: I am not going to confirm the involvement of any particular lawyer in giving any particular advice at this stage. I can confirm that the Government considered at the outset of the judicial review process whether steps should be taken in relation to that process to avoid the risk that publicity attendant on the judicial review might prejudice the criminal investigation, and that consideration included the question of whether the judicial review should be sisted—that is, put on hold, essentially—or whether the matter could be dealt with adequately by restrictions on the reporting of the judicial review. At that point, as I think that I advised the committee at an earlier session, the Government was dealing with the petition as originally presented. It considered that it had good grounds for resisting all the allegations that were made in that petition.

11:45

By the end of September, the Scottish Government reached the view that the issue of the interaction between the civil and criminal process could be adequately dealt with using reporting restrictions. That was a matter of agreement with Mr Salmond's legal team, who enrolled a motion, which the Government did not oppose, for the placing of reporting restrictions on the judicial review. The Government did need to be represented at that hearing, because the matter was not controversial.

I should say that, when there is an interaction between a civil case and either a criminal investigation or a possibility for criminal proceedings in due course, it is entirely normal and appropriate to consider how that can be regulated in a way that avoids any potential risk to a future criminal process. That is precisely what was done.

Jackie Baillie: Thank you. I was not asking for a particular lawyer, but you have confirmed that the Government gave legal advice on the sisting of the judicial review.

I note that I am delighted that the Government did not oppose the motion to protect anonymity. However, it did not appear for it, which is slightly disturbing.

I will turn to the events of last week. You told me in the chamber that you had not approved the letter from the Crown Office to the SPCB and that you had sight of it only after it was sent. Why were you not asked for any guidance or direction from the Crown Office officials who were dealing with the matter?

The Lord Advocate: I will first answer the suggestion that it is "disturbing" that the Government did not appear at the hearing to deal with reporting restrictions. When a matter is agreed between parties and a motion is made that the other party does not oppose, it is entirely unremarkable that the other party should not appear. There is nothing "disturbing" in that. It is entirely unremarkable in the conduct of civil litigation.

In response to the second point, I explained in my opening statement that I put in place arrangements from the outset so that that matter would be dealt with by very experienced professional prosecutors on my behalf and without any personal involvement of the law officers. That was also true of the contempt of court and other matters that have arisen after the trial.

I did that to reinforce confidence in the absolute integrity of the administration of justice. Frankly, I wish that were not so. However, I recognise that, had I taken a different view, and had the law officers been personally involved, that would have been cast up as evidence of some inappropriate involvement or interference. I do not buy into that for a moment—I hope that nobody would. However, regrettably, I am afraid that the fact that the material being passed to the Crown Agent is being relied on as evidence of some improper blurring of boundaries means that the decision that I took to secure public confidence and the integrity of this process by putting it entirely in the hands of my most senior professional prosecutor has been vindicated.

Jackie Baillie: Was Mr Kenny Donnelly one of the officials involved, along with the Crown Agent, Mr Harvie? And who signed the letter?

The Lord Advocate: You described Mr Donnelly as an "official". He is an extremely experienced professional prosecutor.

Jackie Baillie: Absolutely. I made no comment about—

The Lord Advocate: Will you let me finish, Ms Baillie?

The Deputy Convener: Lord Advocate, if you could just hold on, the convener is now back and I am going to hand over to her. Please continue.

The Lord Advocate: Thank you, deputy convener.

Mr Donnelly is an extremely experienced senior professional prosecutor. As the correspondence made clear, the decisions on the matter were taken by Crown counsel, who are very experienced senior lawyers who hold a commission from me to exercise all the prosecutorial responsibilities of my office. They do that routinely and in the most sensitive cases without reference to the law officers. It is a great strength of our system that I am able to commission a cohort of the most able lawyers in the country to fulfil my functions as prosecutor and they fulfil those functions as necessary, and routinely in sensitive cases, without any reference to me.

The decision making on that matter, as in all matters in relation to the case, was in the hands of Crown counsel. Mr Donnelly, who is a senior procurator fiscal and a very experienced prosecutor, sent the letter.

Jackie Baillie: I thank the Lord Advocate for that response. I have had dealings with Mr Donnelly and I have found him to be completely professional. Please do not read my saying that someone is an "official" as a slight—I meant no such slight.

Lord Advocate, it is clear that you were involved in the judicial review, yet you took the decision to recuse yourself from the criminal case. It could be

argued that officials in the Crown Office needed your guidance and direction at that critical point. Lord Falconer, the former Solicitor General, criticised you as having been "absent without leave". What would you say to that?

The Lord Advocate: I do not accept that characterisation for a moment. As I said, it is a great strength of our system of criminal prosecution that I commission Crown counsel. My royal warrant appoints me and my deputes—Crown counsel—to exercise the responsibilities of Lord Advocate. The royal warrant makes it clear that I am wholly and personally responsible and accountable for their actions. It is entirely normal and routine in the most sensitive criminal cases for my decision-making functions to be exercised on my behalf by Crown counsel.

It may come back to the point about the multiple functions of the Lord Advocate. Regardless of whether I was involved in the consideration of the judicial review matter, I am a member of the Scottish Government and a minister—that is one of the functions that I hold alongside my independent prosecutorial functions. That being the case, and given the extreme sensitivity of the matter, consistent with a well-worn protocol for the Crown in cases that raise particular sensitivity, arrangements were made from the outset to ensure that those matters were dealt with entirely by professional prosecutors. With all respect to the former Solicitor General, who comes from a different system, that was a reflection of responsible leadership, rather than an abdication of such leadership.

Jackie Baillie: What about Lord Hope's criticism? Lord Hope is an extremely senior law officer and he was very surprised by Crown Office intervention in the proceedings.

The Lord Advocate: I have enormous admiration for Lord Hope, for whom I worked for a year early on in my career. I am afraid that he was not well informed when he made those remarks. I explained in my opening statement the basis for, and the reasons for, the Crown's approach to Parliament. Having been the convener of the cross-bench peers in recent years, he comes from the context of the UK Parliament, which has particular privileges and has a legal position that differs from that of the Scottish Parliament. That is the legal position; I make no comment on it one way or the other.

Jackie Baillie: I have a final question for the Lord Advocate. I am sure that he is delighted to hear that.

On 26 August 2018, *The Sunday Post* reported that it was, in fact, you who had ordered a referral to the police. I imagine that such a report is totally irregular. Was there an inquiry into the briefing that was given to the papers? If not, why not?

The Lord Advocate: I am afraid that I simply do not know the answer to that question.

Jackie Baillie: Okay. Let me put it in more general terms. If it was reported in any newspaper that you had ordered a referral to the police, the only people who could have known that would be within your office or within Government. On that basis, is it not hugely irregular that somebody would brief a newspaper of that fact? Given the confidential nature of the complaints, why was that never pursued? Was anything done about that?

The Lord Advocate: Ms Baillie is absolutely right that that was highly irregular. I remember the article, but I am afraid that I cannot now remember the response. Given the many things that have happened in the intervening period and my engagement with a range of challenges that the Government and the Crown face, I hope that I may be forgiven for not keeping every detail of these things in my mind. If there is anything that I can add, I will, of course, advise the committee of that.

Jackie Baillie: Thank you. I would be grateful for that, particularly in the context that the Lord Advocate was going to come back to us on when he knew about the complaints and who told him.

I have questions for the Crown Agent, but I am conscious of time. Can I rattle through them, convener?

The Convener: Yes—please do.

Jackie Baillie: Thank you.

Good morning, Mr Harvie. Why did you try to hand over the permanent secretary's decision report to the police on 21 August 2018?

David Harvie: [*Inaudible*.]—I had received it earlier that morning. I had not read it. I explained to the police in the context of a wider conversation that a variety of different aspects would have to be taken forward—including, as we have spoken about already, reaching out to the complainers, setting up appropriate points of contact and so on—and that that report had been received. I said specifically that I had not read it. I also indicated that, now that I had it, it would fall to be considered for disclosure at a later stage in the event that there were criminal proceedings. As I said, at that point there was simply an investigation into potential criminality.

Once we had discussed those various aspects, we turned to consideration of the report. As I said earlier, there was probably 90-odd years of experience in the room, and there was a proper conversation about it. I said that, if they were to have it, they were to have it, and then we would need to have a collective—[*Inaudible*.] During the

course of that discussion, the detective chief superintendent simply said that she did not want to take it at that time. That was fine. There was no great disagreement about that. There was no argument about it. Everyone was comfortable, including the chief constable, and we moved on to make other arrangements.

Jackie Baillie: You did not read the report and did not know its relevance, and you have confirmed that the police refused to take the report with them. That is helpful to know.

David Harvie: They said that they did not want to take it at that time. Indeed, in her evidence at the trial, the detective chief superintendent said, "To be honest, it was my suggestion that I didn't want to take it at that time." That is accurate.

12:00

Jackie Baillie: That is fine. What inquiries did you make with the complainers to check that they were content for the report to be handed over?

David Harvie: The report was not handed over. The allegations were referred to the police for consideration and so that they could approach the individuals concerned to establish contact with them and establish their wishes.

Jackie Baillie: However, your intention was to hand over the report and it was only when the detective chief superintendent said that she did not want it that it was not handed over, so did you—

David Harvie: No. My answer was that we had a discussion about what to do with it. During the course of that discussion, the detective chief superintendent said that she did not want it at that time. As part of that discussion, we discussed the status of the report, the fact that I had not read it and they had not read it, and the fact that, at that stage, regardless of whether anybody had read it, it would fall to be considered for disclosure. During the course of that conversation—

Jackie Baillie: So you were—

The Convener: Let Mr Harvie finish, please.

Jackie Baillie: Okay—no problem.

David Harvie: I said that, if the police were to have it, we would need a collective understanding of what it meant and what it was. We had a conversation about that and, during that conversation, the detective chief superintendent said that she did not want the report at that time.

Jackie Baillie: I understand what the detective chief superintendent said, but I am trying to establish that you were prepared to hand it over and no consultation had been undertaken with the complainers in advance of that.

David Harvie: No, I said that we had a discussion about what to do with it and what it was.

Jackie Baillie: So there was an option to hand it over.

David Harvie: We were seeking to understand what to do with it and what its status was. We reached the conclusion that it was not going to be passed over and it had not been read.

Jackie Baillie: Why would the Crown Agent be involved in a police inquiry? I understand that the circumstances are quite extraordinary, but is that not quite strange and not routine? I do not understand, so I am looking for your advice and guidance.

David Harvie: Although I am head of the prosecution service, I remain a prosecutor. There are cases in which the chief constable and I become involved for a variety of reasons, usually at a strategic level. He attended the meeting. When I spoke to him on the phone, he was entirely content to come. During the course of the meeting, he was entirely content to be there. In any discussions that I have had with him since, on this matter or anything else, it has been entirely unremarkable that that happened in this case. Everyone appreciated the sensitivity and the significance of how the matter had to be addressed, for everyone's interests.

Jackie Baillie: Of course. I absolutely understand that and I get why, at a strategic level, you and the chief constable would have a very close working relationship, but I would like to know how many individual cases you have been involved in with the chief constable. We are talking about an individual case, not a strategic consideration.

David Harvie: The chief constable and I have, on occasion, had to discuss individual cases.

Jackie Baillie: Can you give us an idea of how often? I want to understand whether it is unusual. Does it happen every day or every week?

David Harvie: It would be fair to say that we would be likely to have any such conversations only in the most high-profile or sensitive cases. There is no difficulty in this instance; it is what one might expect.

I would like to add one thing that might be of assistance. From a very early stage, I, the chief constable and others involved appreciated that this was a matter that was likely to be regarded as something of significance and subject to potential scrutiny, regardless of the outcome—whether it ended up as an investigation into potential criminality that came to naught, as frankly is often the case, whether it ended up as a case that was

reported on which the Crown took no action, or whether it ended up as a trial.

Another element in my consideration as to why I was involved was that, in the circumstances, if and when it arose, the scrutiny—which, it is fair to say, is one of the things that I did foresee accurately—was a matter that it was appropriate for me, as head of the service, to accept on my shoulders. Unfortunately, from my perspective, I was all too accurate in thinking that such scrutiny would arise.

Jackie Baillie: Thank you—

The Convener: Could you come to a close please, Ms Baillie?

Jackie Baillie: Can I ask—sorry, convener.

The Convener: Did you hear a voice from the void? I was just asking you to come to a close, because time is running on. You have had a good shift.

Jackie Baillie: I will try to do so swiftly. It is not Mr Harvie's fault, but other people have been giving long answers, which is great.

Can I ask you about the publicity? The police advised against any publicity. I assume that you raised that with them, recognising how high profile the case was. When they said that you should not take any publicity, did you relay that to the Scottish Government? Who did you relay it to, because two days later, they went to press?

David Harvie: My recollection is that it was raised. My expectation was that anything that was going to be issued would make no reference whatsoever to the referral to the police.

Jackie Baillie: Yes, but did you communicate that to Leslie Evans, the permanent secretary?

David Harvie: At no stage have I spoken to Leslie Evans about the case.

Jackie Baillie: Okay, so the comment by the police about no publicity was not conveyed to the Scottish Government, which went on two days later—

David Harvie: No. I did not say that. I said that I did not speak to Leslie Evans.

Jackie Baillie: Who did you speak to, then?

David Harvie: I am trying to recall who it was. It might have been—I am speculating. I will have to give some thought to it. I can provide that information. I will check. The information, with which I agreed, was fed back. My expectation was that, as and when any announcement was to be made—if an announcement was to be made, which would be a matter for Government—the one thing that would not be included was any indication of a referral to the police.

Jackie Baillie: For clarification, is your line manager the Lord Advocate or the permanent secretary?

David Harvie: At this stage, the arrangements are that there is no direct line management. I am accountable to the Lord Advocate. As at the point of the events in August 2018, my line manager was Leslie Evans.

Jackie Baillie: This is my final question—you will be pleased to hear that, convener.

The Convener: Yes.

Jackie Baillie: The Parliament, newspapers and Mr Salmond's lawyers keep getting letters from officials in the Crown Office threatening all sorts of dire consequences if information is given to this committee. There are a variety of names on those letters, but is it not the case that, actually, you are directing them?

David Harvie: I think that the Lord Advocate has already answered that. My involvement directly in this case has been relatively limited. The matters that you have identified are matters that are directed by principal Crown counsel, who have the full authority of his royal warrant.

Jackie Baillie: You have not been discussing this and you are not aware of this. It all happens without your knowledge.

David Harvie: Again, that is a different question.

Jackie Baillie: Indeed.

David Harvie: You are putting a different question to my answer. Yes, I am aware, but I do not take the decisions in relation to those elements that you have highlighted.

Jackie Baillie: But you would provide advice.

David Harvie: Of course.

Jackie Baillie: That would be your—

David Harvie: Yes.

Jackie Baillie: Okay. I keep asking questions in the hope that I get answers. Thank you, Mr Harvie.

David Harvie: I am trying to give you answers—

Jackie Baillie: Indeed you are.

David Harvie: —but the difficulty is that you summarise with a different question.

Jackie Baillie: Ah. I do not know who I learned that from. Thank you, convener.

The Convener: I have two questioners left and I am anxious that they both get the courtesy of the same time that others have had, so I thank everyone for their forbearance. We will go to Stuart McMillan, followed by Maureen Watt.

[*Interruption*.] Mr McMillan is talking, but we cannot hear him for some reason, which is always a tragedy, in my opinion.

Stuart McMillan (Greenock and Inverclyde) (SNP): Thank you, convener. My questions are for the Lord Advocate. However, before I ask them, I think that it is worth my while to remind anyone who is watching that Lord Falconer, whom Ms Baillie mentioned, was a member of the UK Government in the Labour Party a number of years ago.

My first question relates to the comments from the Lord Advocate about it being unremarkable when he spoke about turning up or not turning up, following some questions. It is about the process that has happened in the past in this type of situation. Has this been a consistent approach over the course of the devolved Parliament and prior to it?

The Lord Advocate: I am sorry—this is my fault—but I am not entirely sure what the precise focus of the question is when it comes to what has been consistent, but I can say three things that may, I hope, help to answer the question.

First, Lord Falconer is a very distinguished lawyer. He is a former Attorney General and I have great respect for him, but he does come from a different system in terms of the arrangements for both criminal prosecution and the structural arrangements in relation to law officers and so on. I certainly listen with interest to what he has to say, but it is important to have the perspective that he comes from a system that is different from ours in relation to these matters.

Secondly, if we are talking specifically about parties in a civil case appearing or not appearing at a court hearing, it is not unusual, if the matter is not contested or in debate, for one party to enrol a motion for the other side either simply to mark its consent in writing or simply to not oppose it. The motion will be enrolled in writing in the first place and the other party has to indicate in writing whether they are opposing it or not. If there then has to be a hearing, it would be unremarkable for a party that is not opposing or is consenting to a motion to take the view that it is not necessary to appear. That is unremarkable.

As for what has been done consistently or not since devolution and indeed before it, I do not know whether the member is looking more broadly at the arrangements for the role of law officers, but the role of law officers has been structurally the same since devolution in terms of the different functions that they fulfil. That replicates the structural arrangements that were in place for Scottish law officers before devolution within the United Kingdom Government.

Stuart McMillan: In my next area of questioning, I want to touch on the Scottish Parliamentary Corporate Body decision. Some of this was discussed earlier, but I seek some clarity on the process that would have happened.

Lord Advocate, earlier in your comments, you gave a short explanation as to the process that would have happened. I will paraphrase. Complainers would have gone to the Crown, the Crown would have gone to the Parliament and the Parliament would have acted the way it did by redacting information. As a consequence of that, would the Crown Office tell the Parliament's corporate body what it could or could not publish?

The Lord Advocate: [*Inaudible*.]—Crown to tell a publisher what it can and cannot publish. The publisher has to take responsibility for itself. The publisher knows the terms of the court order and it should have access to its own legal advice. The Crown will express concerns and it may express its own view about the interpretation of the court order, but it is always for the publisher itself to take its own view, not least because the only person who can determine whether a publication is in contempt of court is the court itself. That matter may be raised before the court not only by the Crown, but by other parties who have an interest.

Stuart McMillan: Would the advice that the Crown Office will have given to the corporate body following its publication have differed from the advice that the Crown Office will have given to *The Spectator* magazine or any other publisher following publication?

12:15

The Lord Advocate: As I explained in previous discussions, when the issue of *The Spectator* publication was being looked at, there was a focus on a particular paragraph, and that was addressed. Frankly, it was only when the matter came back in the light of the publication by the corporate body that certain other matters were identified that gave rise to concern.

The issue here is how one puts a particular piece of information and what one takes from it in light of other information, so the approach is not, "That is the position—that is the position." As I say, once those issues were identified by the Crown, it raised them with the corporate body and the corporate body clearly agreed or accepted that view.

Stuart McMillan: [*Inaudible*.]—the case regarding the corporate body, has the Crown been in receipt of any complaints about *The Spectator* or any other publisher about what it has published?

The Lord Advocate: I am afraid that I am not in a position to answer that at this moment.

Stuart McMillan: Okay—thank you. My next question is once again regarding the corporate body. For clarification, if the corporate body had simply decided to redact further than what the Crown Office had highlighted, that decision would have been taken by the corporate body rather than by the Crown. Is that correct?

The Lord Advocate: Ultimately, any decision, whether it reflects the concerns that the Crown has raised or is different, is taken by the publisher itself.

Stuart McMillan: I have one final question. Mr Salmond's submission was available from *The Spectator* online for an extended period, and not one Scottish publication decided to publish the submission until after it was published by the SPCB. Could that have been because of the legal advice that the newspapers received from their lawyers indicating that there was a legal prohibition in the court order regarding that particular submission?

The Lord Advocate: I did not hear the start of that question.

Stuart McMillan: Mr Salmond's submission was available on *The Spectator* website for an extended period, and not one Scottish newspaper decided to publish the submission until after the SPCB had published it. Would that have been because of the legal advice that the newspapers will have received from their private legal advisers, bearing in mind the legal prohibition on publishing in the court order?

The Lord Advocate: I can only presume that any publisher will take its own legal advice and make its own decision in the light of that advice. Obviously, one would have to direct to those publishers the question as to what actually happened.

Stuart McMillan: Thank you, Lord Advocate.

The Convener: Our last questioner is Maureen Watt.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): As I am last, a number of my questions have already been asked, so I will be as brief as possible.

Throughout the inquiry, we have heard a lot about legal professional privilege, or LPP. Lord Advocate, will you explain how LPP typically operates for the Scottish Government?

The Lord Advocate: Yes. Every client is entitled to take legal advice, and legal professional privilege is the doctrine that entitles any client to keep their legal advice entirely confidential. It is recognised routinely by the courts. It is such a strong privilege that, unlike other obligations of confidentiality, it cannot ordinarily be overridden. Any client is entitled to keep their legal advice wholly confidential. That is true of Government, as it is of others.

The ministerial code recognises that, in exceptional circumstances, the Government may decide to reveal its legal advice. The code sets out rules in terms of which the Government must address the question of whether it would be appropriate or not to release its legal advice.

It is fair to say that release of legal advice is exceptionally rare. That has been true of all Governments in the United Kingdom—of all political complexions—for many years. However, it does happen on occasion. When it is proposed that legal advice should be released, the code sets out the rules in terms of the tests that need to be met before legal advice can be released.

Maureen Watt: In my lifetime, it was asked that the legal advice on the Iraq war be published. That is the main example that we think about. In your experience, is it typical for Parliaments to pass motions asking for legal advice to be disclosed?

The Lord Advocate: I have experience of being in this office over the course of this session of Parliament and, so far as I am aware, it has only been in relation to this matter that there have been such motions in this Parliament. I am aware that there have been processes in the UK Parliament from time to time. You are right to mention the Iraq war example. As I said, it is exceptionally rare for Governments to release their legal advice, but on occasion they do so.

Maureen Watt: Yes, and matters that are a lot more important have come before this Parliament in this session.

I move on to the judicial review decision. It has been said in evidence that the judicial review declared the Scottish Government's policy in relation to harassment—the policy itself—unlawful. Is that your understanding of the decision that was reached in the judicial review?

The Lord Advocate: No. What happened in the judicial review—I think that the committee already has quite a lot of evidence about this—is that a concession was made in relation to the application of the policy in this particular case. The concession was made on one particular legal ground.

Mr Salmond's petition raised a large number of legal objections in relation to the lawfulness of the policy, its application to him and the way that it had been applied in the particular circumstances. None of the other grounds was ever ruled on by the court, so the court did not rule on the question of whether the policy itself was flawed in any way.

Maureen Watt: [*Inaudible.*]—brought up again in relation to that.

We have also heard a lot about the prospect of junior and senior counsel withdrawing in relation to the judicial review if the Government's case was not conceded. Much of what I have heard seems to suggest that this was somehow an additional pressure being brought to bear on the Government. However, will you clarify something for me: is it not always the case that a lawyer would withdraw if they thought that a client's case was unstateable—a conclusion that, based on the developments, internal and external counsel had all reached prior to the concession? If so, would the possibility of a withdrawal actually change anything?

The Lord Advocate: The member is quite correct that, if any professional lawyer reaches the view that an argument that they are being asked to run is unstateable—not properly one that can be put before the court—the lawyer would have to withdraw from acting. Therefore, if one gets to the point that the lawyer's advice is that the case is no longer stateable, the corollary is that the lawyer would say, "and I cannot present this for you."

Still speaking generally, every client in court is entitled to consider whether another lawyer will present the case for them, but that is not an issue that arose here. I suppose that it is worth observing that, with regard to senior and junior counsel, as I think I gave evidence on previously, there was consistency of representation by the Government throughout the judicial review. As I explained to the committee in a previous session, a point came when the Government concluded that, on the particular issue, it would no longer be proper to put the argument before the court, and thereafter a concession was made.

Maureen Watt: From your recollection, you would think that the Government's case in relation to the other aspects of the judicial review was robust—although we will never know, because they were not proved in court.

The Lord Advocate: The Government was content that all the arguments—all matters—could be responsibly and properly defended. On the particular issue about the involvement of the investigating officer, or her contact with the complainers, a point was reached, as more information came to light—I have given evidence about this in a previous session—where the Government concluded that it was no longer proper to seek to defend the case on that ground. No concession was made in relation to any of the other grounds. The Government would have been entirely content for a court to adjudicate on those, in the sense that it was satisfied that there were arguments that could be properly and responsibly advanced.

Maureen Watt: Thank you. I am thinking about what you just said in answer to Stuart McMillan. The SPCB redacted five paragraphs from Mr Salmond's submissions. You said that you, as the Crown, will draw attention to publishers on what they publish and what they do not. Was each of those redacted on your recommendation? If so, can you talk us through them?

The Lord Advocate: I cannot speak to the specifics of what the Crown was inviting the corporate body to do or what the corporate body has done. I certainly cannot get into the underlying rationale for any particular redaction, as that in itself would give rise to potential issues of disclosing things that I cannot properly disclose.

Let me put it this way. I do not understand there to be any difference between what the corporate body decided to redact and the issues that the Crown was raising, if that is the question. I would have to double-check in order to be absolutely sure.

Maureen Watt: Okay. We can take it up with the Parliament's lawyers, too. Thank you very much.

The Convener: Time is running on. I have three requests for quick supplementaries—please do make them quick.

Margaret Mitchell: Lord Advocate, the independent scrutiny of the Crown Office and Procurator Fiscal Service is carried out by Her Majesty's inspectorate of prosecution in Scotland. Who appoints the inspector and, when they carry out the report, who do they report to?

12:30

The Lord Advocate: I would have to check precisely who appoints the inspector. I suspect that she receives a warrant from Her Majesty. The Crown Agent might be able to advise on that.

The inspectorate reports to me, and any report is laid before Parliament.

Margaret Mitchell: I think that you will find that it is on your recommendation that the inspectorate reports.

You have dual roles. When you are unable to carry out your function as head of the independent prosecution service, who takes over your role? Because of the conflict, who takes over the role as independent head of the prosecution service?

The Lord Advocate: I am slightly disappointed that I was interrupted when I was seeking to answer the previous question, so I will finish my answer to that question first. The reason why the inspector reports to me is because it is for me, as Lord Advocate, and, as such, as head of the system of criminal prosecution in Scotland, acting

independently of any other person, to put in place the appropriate arrangements for the prosecution of crime in Scotland. It is not for anybody else to do that. That rests with the holder of the office of Lord Advocate and, therefore, constitutionally, it is entirely appropriate that the inspector reports to me.

Any such report is laid before the Scottish Parliament, and I am accountable for my stewardship of the office that I hold to the Scottish Parliament, as elsewhere. If there are issues that arise from the inspectorate's report, that is in the public domain, and the Parliament is in a position to hold me to account in that regard. That is the position in relation to the inspectorate.

On the second question, I remain at all times head of the system of criminal prosecution and it is for me to put in place appropriate arrangements to discharge that function. As I have already explained to the committee, it is a great strength of our system that I have the power to commission other lawyers to exercise all the functions of my office in the prosecution of crime and the investigation of deaths. Those are advocate deputes, and they are also known as Crown counsel. They are experienced lawyers who, routinely, in the most sensitive and difficult cases, discharge their onerous responsibilities, often without reference to the law officers, although there are decisions that come to law officers from time to time. Indeed, some decisions come to the law officers precisely because, in past times, commitments have been given to the UK Parliament in particular that certain decisions would only be taken on the instruction of a law officer. Across the piece, however, Crown counsel exercise the functions of my office in relation to the prosecution of crime and the investigation of deaths on their own responsibility without reference to me or to the Solicitor General for Scotland. That is a great strength of our system.

I, of course, remain accountable for what they do, and that is precisely what I am doing today in relation to a case where, for the reasons that I have explained, the conduct of the case was put entirely in the hands of one of our most experienced, eminent and senior Crown counsel. He has discharged his responsibilities in the conduct of this particular case, and I am accountable for what he has done. I may say that it is no chore for me to be accountable for the work done by the able professional prosecutors who conduct cases on my behalf. I trust them—[*Interruption*.]

The Convener: Ms Mitchell, please do not interrupt. Could you finish, please, Lord Advocate?

The Lord Advocate: Thank you. I trust them to fulfil the sometimes difficult and onerous responsibilities that fall on them, and they deserve the trust of you and of the public.

The Convener: Ms Mitchell, you can ask a final very short question, please.

Margaret Mitchell: My last question is, when you cannot carry out your function as head of the independent Crown Office and Procurator Fiscal Service, there is no one person in charge and it may go to a number of Crown agents to fulfil that duty. I think perhaps there is a weakness in transparency and accountability in the process that arises from that conflict, Lord Advocate.

The Convener: Would you like to respond, Lord Advocate?

The Lord Advocate: I would and I will try to be brief. I absolutely reject the premise of the question. At no time am I unable to discharge my responsibilities as head of the system of criminal prosecution. As head of the system, I do not have to be involved in every case—indeed, I could not possibly be involved in every case—and sometimes it is my responsibility as head of the system of criminal prosecution to put in place arrangements where I am not involved in a particular case. While this case is high profile, sensitive and significant, the Crown deals every day with high profile, sensitive and significant cases in which I have no personal involvement. That does not in any way prevent me from discharging my responsibilities as head of the system to put in place appropriate arrangements for the discharge of the functions of criminal prosecution in Scotland and to account to this Parliament and elsewhere for that, and at no time am I unable to fulfil them.

Dr Allan: [*Inaudible*.]—Lord Advocate, some of the reasons why anyone, Governments included, have privileged access to legal advice. You mentioned that there have been rare exceptions where that right to privacy has been waived—for instance, the Iraq war was mentioned. Is it still rarer, however, for the right to be waived on a matter—[*Inaudible*.]—a Government?

The Convener: We missed the end of your question, Dr Allan. Could you repeat the last part?

Dr Allan: My question was—without repeating the whole thing—although there are examples such as the Iraq war when the UK Government, or Governments around the UK, have released legal advice, is it rarer for Governments to do so in matters of litigation?

The Lord Advocate: The legal advice privilege issue is important across the whole range of Government work. As I explained to the committee on a previous occasion, there are some particular issues that arise in the context of litigation, not least because the nature of litigation is that it

involves a challenge to something that the Government has already done and therefore it is unsurprising that matters have to be looked at again. I gave evidence on the issue before. I have no statistical information about the frequency with which any particular piece of legal advice has been released; all I can say is that it is exceptionally unusual.

Stuart McMillan: I have one final brief question in relation to the Crown officers who will have been communicating with the Parliament. Can you confirm whether they are entirely independent of Government and do they make decisions on an impartial basis?

The Lord Advocate: Yes. The Crown Office operates entirely independently of Government. It is imbued in the culture of the organisation and is an article of faith for every professional prosecutor that they exercise their functions impartially without fear or favour in accordance with the law, the evidence and the public interest, and they operate entirely independently of Government.

As far as my position is concerned, it is my responsibility to exercise my functions, as head of that system, independently of any other person, and that includes Government.

As I told the Parliament the other day, ministers respect that independence. They do not seek to influence me in the exercise of my independent responsibilities as head of the system of prosecution. If any minister ever tried to do so, they would get short shrift from me, they would get short shrift from the Solicitor General for Scotland and they would get short shrift from the Crown Agent. No professional prosecutor in the system for which I am responsible would ever entertain any improper or inappropriate attempt to influence their impartial and independent decision making.

Stuart McMillan: Thank you.

The Convener: Lord Advocate, I have a quick question—honestly, it will be very quick—before we close. In response to Maureen Watt, you explained the determination of the judicial review and the unlawful aspect in relation to application and policy. In Mr Salmond's evidence, the term "unlawful" was used quite a lot, but I have seen the term "illegal" used when the public and even the press have discussed the policy and the outcome of the judicial review. Will you please very quickly explain for everyone the difference between "unlawful" and "illegal"?

The Lord Advocate: Yes. There are two different questions, when one is sorting out whether something is illegal or unlawful. In common parlance, if one talks about something being illegal one is probably thinking about something that is a breach of the criminal law—something that is prohibited. In the context of the judicial review or cases of that sort, these are civil law questions; the question is, in that case, whether a particular decision was made in accordance with the legal standards that govern decision making by Government. If a decision is made that does not satisfy the legal standards that apply to decision making by Government, then that decision is unlawful; it is, quite properly, set aside and it has no legal effect. That does not mean that it is illegal in the sense of being a breach of the criminal law; that is quite a different question. It is quite important to be clear when one is talking about unlawfulness or the nature of the unlawfulness that one is thinking about.

The Convener: Thank you.

That brings us to the end of our evidence session today. I thank everyone and I particularly thank the Lord Advocate and the Crown Agent for their evidence. You have both given us much of your time, which is appreciated.

We will pause before moving into private session.

12:43

Meeting continued in private until 13:55.

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