



OFFICIAL REPORT
AITHISG OIFIGEIL

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 8 September 2020

Session 5



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COMMITTEE ON THE SCOTTISH GOVERNMENT HANDLING OF HARASSMENT COMPLAINTS

6th Meeting 2020, Session 5

CONVENER

*Linda Fabiani (East Kilbride) (SNP)

DEPUTY CONVENER

*Margaret Mitchell (Central Scotland) (Con)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Jackie Baillie (Dumbarton) (Lab)

*Alex Cole-Hamilton (Edinburgh Western) (LD)

*Angela Constance (Almond Valley) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Alison Johnstone (Lothian) (Green)

*Maureen Watt (Aberdeen South and North Kincardine) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Leslie Evans (Scottish Government)

James Wolffe QC (The Lord Advocate)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Committee on the Scottish Government Handling of Harassment Complaints

Tuesday 8 September 2020

[The Convener opened the meeting at 10:18]

Development of Policy on Handling Harassment Complaints

The Convener (Linda Fabiani): Good morning, and welcome to the 6th meeting in 2020 of the Committee on the Scottish Government Handling of Harassment Complaints.

Our first item of business is a follow-up evidence session with the permanent secretary, after her initial appearance before the committee on 18 August. The session will focus on phase 1 of the inquiry, which is on development of the policy on handling of harassment complaints.

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 being in contempt of court through 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 the focus of the trial, as that could be seen to constitute a rerun of the criminal trial.

Our remit is:

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

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

Wherever possible, can witnesses, as well as members, please avoid discussion of the specifics of concerns or complaints, including those that predated the harassment complaints procedure that was being produced, and avoid naming specific Government officials?

With that, I welcome the permanent secretary, Leslie Evans, and begin by inviting Ms Evans to make a solemn affirmation.

Leslie Evans made a solemn affirmation.

The Convener: Thank you for coming today. This is a continuation of our previous session.

Murdo Fraser (Mid Scotland and Fife) (Con): I will pick up on an issue that was left hanging at the end of the previous meeting.

Without going into individual cases, are you aware of any changes in working practices that resulted from concerns that staff expressed about behaviour, including the behaviour of ministers? If so, what were those changes?

Leslie Evans (Scottish Government): I am not aware of such changes. I would not necessarily be aware of such changes, unless I was particularly close to the office in which they occurred. That is not to say that changes do not take place, but I am not aware of any specifics. I am not sure whether you are talking about specifics; I appreciate that we do not want to get into those.

Murdo Fraser: You are not personally aware of any changes.

Leslie Evans: No.

Murdo Fraser: When the trade unions came to give us evidence last week, they told us that they were aware of a number of situations in which the civil service had, rather than try to resolve the situation, moved individuals who had raised concerns to different positions or departments, or had assigned them to work for a different minister. Is that something that you are aware of?

Leslie Evans: I am aware that when there is a local issue within an office or between individuals, we work as hard as we can to ensure that that is resolved informally. That is almost always the best way. It can happen through a range of processes; it might be done through mediation or through support from human resources staff, or by introducing some kind of third party. Sometimes, such a situation might not be resolved in the way that we would like it to be resolved.

You will know, and members who have been ministers will know, that moving people around in jobs happens quite frequently, anyway, usually after a few years. I would not say that that is a traditional route: it is an option. Our preference will always be to ensure that we can first spot and prevent issues, and then that we resolve those issues through a range of informal mechanisms, which include mediation and conversations of that kind.

Murdo Fraser: So, such cases would not necessarily escalate to a formal complaint. You are saying that they would be dealt with on an informal basis.

Leslie Evans: Best practice is to try to resolve things informally, wherever possible. That is the

approach that we take and it is what our polices reflect. It is named in that way in the fairness at work policy and in the 2017 process. Wherever possible, we try to get informal resolution through mediation, conversation or support, and by identifying any additional support that is required.

Murdo Fraser: The trade unions told us last week of their concerns about the level of complaints and concerns that had been raised with them. The level of complaints within the Scottish Government seemed to be very high, compared to that in the rest of the civil service.

Can you give us a flavour, from your experience, of the civil service? Is there a particular issue in the Scottish Government that is more acute there than it is in other parts of the civil service?

Leslie Evans: I found that to be quite puzzling. I am not complacent. You are right to differentiate between concerns and complaints. A complaint would normally mean that we have triggered the formal procedure.

There are two or three issues. First, I did not recognise some quite specific figures that the FDA union brought out about the numbers of ministers and the numbers of complaints over a period of something like ten years. I am not sure from the evidence which ten-year period that was. There was talk of multiple Administrations and there was quite a lot of conversation about all that. I do not recognise that, in the light of the hard data that we have now—in particular, going back to the people survey of 2019. That does not reflect what I know about the organisation.

As I said, we have very few formal complaints. In fact, over the past 10 or 13 years, we have had only a handful. I would expect that, for the majority of the time, informal concerns would be raised in the line, as we say, with a line manager, or with support from HR or through the union, which is a perfectly respectable and appropriate route for people to raise concerns through. In fact, people might prefer to go to the union than to somebody whom they know in HR. I understand that completely.

Many such issues will, rightly, have been resolved by a person saying, “I’m concerned about this, and I want you to hear what I have to say.” That is not to say that we should sit and watch that emerge; we should still take action—predominantly, preventative action. The data that is coming through at the moment perhaps shows that there is an increased appetite among people for being prepared to raise bullying and harassment concerns in other parts of the UK civil service. I think that it was Dave Penman from the FDA who said that he feels that the Scottish Government has done more in the area than the

House of Commons and the Cabinet Office have done.

Murdo Fraser: Were you, or are you currently, the reporting or countersigning officer for annual reporting of complaints?

Leslie Evans: I would have to check that. That would normally go through the head of HR and then to the person who is responsible for all corporate procedures, who is the director general in charge of that area. Clearly, if there is an issue or a reporting process to go through, I would be informed of that.

Murdo Fraser: But would there normally be such a process?

Leslie Evans: Yes—there would be somebody who would be aware of, and have responsibility for, checking on data and reporting of that kind.

Murdo Fraser: I have a final question. Did you, personally, ever experience bullying behaviour in your career in the civil service? For example, were you ever on the receiving end of shouting from a minister?

Leslie Evans: Over my career as a whole, I have had people shout at me. I suspect that very few people who are here today have not had that, and that includes the civil service.

Murdo Fraser: Was that from ministers?

Leslie Evans: Are you asking whether ministers have ever shouted at me?

Murdo Fraser: Yes.

Leslie Evans: Yes.

Murdo Fraser: They have?

Leslie Evans: Yes.

Murdo Fraser: Does that concern you?

Leslie Evans: Well, we need to put that in context. I am not suggesting that it is a daily occurrence—

Murdo Fraser: Of course, we have former ministers round the table today.

Leslie Evans: We do, indeed, and I have worked with many, if not all, of them.

We are talking about the unique relationship between civil servants and ministers; it is unlike anything else. That is not to say that it is not governed by conditions and criteria of good behaviour—of course it is. However, if you ask anybody in any organisation whether they have ever had a conversation with somebody else that has ended up with shouting, they will say that it has happened, although not very often.

I understand that people are passionate, committed and hard-working; that applies to

people in the civil service and the ministers with whom I have worked. However, there is a line to be drawn, and I would draw it. There is passion, commitment and the occasional loss of temper, and when behaviour crosses that line, that is different.

Murdo Fraser: Did it ever cross that line, in your experience?

Leslie Evans: Do you mean in terms of people shouting at me?

Murdo Fraser: Yes.

Leslie Evans: No, it did not.

The Convener: Maureen Watt wants to come in. Please do not shout at Ms Evans.

Maureen Watt (Aberdeen South and North Kincardine) (SNP): I just want to say that, when I resigned as a minister, Ms Evans wrote me a note saying how well I had dealt with staff, so there are both sides of the coin, among ministers.

The Convener: Is that it?

Maureen Watt: That is it.

Alex Cole-Hamilton (Edinburgh Western) (LD): Thank you very much for coming back to see us, Ms Evans.

Two weeks ago, we learned from James Hynd that, in his words, “things were said” to him as part of an informal hum of rumours about bullying and sexually inappropriate behaviour by Alex Salmond and other ministers. When did you first pick up on those rumours that were circulating about Mr Salmond’s behaviour?

Leslie Evans: I am not sure that I understand the question. Are you talking about James Hynd saying that there was water-cooler talk?

Alex Cole-Hamilton: There were water-cooler conversations. It was the scuttlebutt at the time. When did you first pick up on those rumours?

Leslie Evans: I cannot comment on when I picked up on rumours. I understand that there were rumours, but I cannot—

Alex Cole-Hamilton: Did you know about them?

Leslie Evans: Yes, I did—absolutely.

Alex Cole-Hamilton: Just to bookend Murdo Fraser’s final question, did Mr Salmond ever shout at you?

Leslie Evans: I do not remember him shouting at me.

10:30

Alex Cole-Hamilton: In his submission, Sir Peter Housden told us that when he was

permanent secretary he would deal personally and informally with allegations of bullying and harassment by ministers. Did he ever discuss that quiet handling of concerns about ministers either formally or informally with you, as the director general at the time?

Leslie Evans: We had conversations about conversations that I had had with individuals about Mr Salmond’s behaviour.

Alex Cole-Hamilton: You replaced Peter Housden as permanent secretary in summer 2015. Did you have any kind of handover with him prior to that?

Leslie Evans: Yes. I took over on 1 July, but I was aware of my appointment three or four weeks before that. We were working quite closely together, although I was still a director general.

Alex Cole-Hamilton: We all know that with a handover, there is always a formal date and an informal date, and on the informal date one might be told—I am saying this in quote marks—where the bodies are buried. As part of that, did he ever discuss either formally or informally with you how you might need to handle complaints against ministers, how he had done that in the past and how you might take things forward?

Leslie Evans: I do not recall that.

Alex Cole-Hamilton: Did he ever offer examples of occasions when he had raised concerns with ministers about their behaviour?

Leslie Evans: No, I do not recall that he did that, particularly. He might have done; I do not remember it.

Alex Cole-Hamilton: In your five years as permanent secretary, have you ever had to take similar action and handle concerns about ministers’ behaviour with them on an informal basis?

Leslie Evans: Yes—informally. As I said, very few formal complaints have come through. I think that there have been three since 2007.

Alex Cole-Hamilton: Was that matter concluded to the satisfaction of the person who raised the concerns?

Leslie Evans: Informal resolution will always be difficult, because you need to invest a lot of time in both parties. My intention would always be to ensure that people are comfortable about the informal resolution. Of course, if they are not, they have the option to move the matter on to a formal process.

Alex Cole-Hamilton: Can you quantify how many times you have had to address concerns informally?

Leslie Evans: I cannot really quantify that over five years. It is not a frequent occurrence, but it is one that I pay attention to.

Alex Cole-Hamilton: Has it been a handful of times or has it been more frequent than that?

Leslie Evans: I would say that that has probably happened around a handful of times. Relationships, such as between ministers and civil servants and between civil servants, are part of the warp and weft of how an organisation works.

Angela Constance (Almond Valley) (SNP): Good morning, Ms Evans. You will recall that the committee has requested a separate written statement that provides information about investigation under the procedure. We have had correspondence from the Deputy First Minister explaining that that has been delayed. Can you advise the committee when we can expect that information?

Leslie Evans: I think that the DFM has said that he will come back to us on that. I cannot give you an exact date, at the moment.

Angela Constance: Given that you are the principal policy adviser for the Scottish Government, do you have any inkling? Can you give us any reassurance that the information will be forthcoming in the not-too-distant future?

Leslie Evans: We would always want to make sure that things happen in the not-too-distant future, as you will understand. The issue that we have is that we are taking legal advice about what options are available, so we will need to come back to you.

Angela Constance: I would not make any assumptions about what I understand.

How confident are you that the review of the Scottish Government's harassments complaints procedure will be completed by the end of the year? I think that in correspondence you intimated that it could be extended. Can you give us some confidence about when that work will be completed?

Leslie Evans: The work will be undertaken by Ms Dunlop, as you know, who will be supported by senior civil servants. How long she feels she needs to undertake the review will be very much in her hands. I would prefer that it not be too long—not least because we are keen to learn from the recommendations that Ms Dunlop's analysis produces. We have our own lessons to learn, as well. I would like to combine that with what comes out of the inquiry, so that we can have the best assessment of what we need to reflect on, and the recommendations that are available for us to consider. I would prefer it to be sooner rather than later, but that is quite rightly very much in the

hands of the person who is undertaking the review—Ms Dunlop.

Angela Constance: I think that the correspondence intimated that the review would be done by the end of the year.

Leslie Evans: I will be delighted if it is done by the end of the year.

Angela Constance: Thank you. My final question is about the ninth version, or iteration, of the policy, which was recast by Ms Richards on 5 December. Can you confirm for the record that that version says, with respect to former ministers, that

"The Permanent Secretary will ... decide whether the complaint is well-founded"

and "also determine" what "action is required"?

Leslie Evans: I cannot say off the top of my head whether that is the final text, but it would be what we apply in terms of the procedure, as it is now.

Angela Constance: Thank you.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): Permanent secretary, I wonder whether you have had the chance to look at the evidence that the unions gave us last week and whether you have any reflections on some of what they said about the development of the policy. I am thinking particularly about the emphasis that they put on how they felt that an independent element to the whole process that we are talking about would have been helpful.

Leslie Evans: Yes. It is helpful to dwell on the point of independence generally because it has been talked about quite a lot, starting with the unions. I understand from HR that the unions raised in dialogue with HR colleagues the issue of independence, but it did not form part of their substantive amendments and evidence in relation to things that they would like to change as part of the complaints policy; and I do not think that they raised it as part of the proposal of work during the fairness at work considerations either. Although I believe that it was raised, it was therefore not part of their substantive changes, and my understanding is that we took 80 per cent of their proposals for changes on board either in spirit or word for word.

That is not to say, of course, that there are not opportunities to raise the issue. I know that, since that time, the FDA in particular has been vociferous about the element of independence in these kinds of procedures. I think that it would claim that its pressure on the Westminster procedure—the one that is now operating there—meant that it was revised in accordance with that. Since 2019, independence has played an element

in that procedure. However, although independence was raised, it was not part of the substantive changes that the unions wanted to see in the procedure here.

Dr Allan: One of the arguments that the unions made was that, although an independent element early on in the process would not be normal in another workplace, the unusual situation of the workplace in the Government with ministers who do not have a normal employment relationship with the people working around them meant that it would have been merited. Looking back, do you think that it would have been helpful to have introduced that into the process?

Leslie Evans: I agree that it is a unique relationship and it is unusual for any employer to introduce independence into a procedure of that kind; normally, that comes after the initial exploration and investigation. The other point that I would make is that there are issues of trust and confidentiality in encouraging complainers to come forward, and an independent element, depending on when it comes into the procedure, might have an impact on that. Of course, when we produced and developed the procedure, we were very cognisant of Police Scotland advice on confidentiality and, indeed, a complainant-centred policy.

My understanding is that the inquiry into bullying and harassment in the House of Lords found that a complaint being referred to the Parliamentary Commissioner for Standards was described as a nuclear option in the face of which members would close ranks, so I think that such action depends on the point and the stage of a complaint. However, I am aware that the review by Ms Dunlop, which we were talking about earlier, might well reflect on independence becoming part of the procedure in the future or on how it is applied. I am open to the recommendations of that review and, if independence comes into those, I agree that it would be something that we need to think very carefully about.

Dr Allan: The other question that the unions raised about the development process concerned the system by which the Government introduced lived experience into it. Again, I do not know whether you have had a chance to look at what they said about that—their reaction could be called unenthusiastic—but did you have any view at that time, or do you have a view now, on reflection, about what they said about some of the questions around how and when lived experience was introduced into the development process?

Leslie Evans: One of the things that we probably need to get correct here is that, as I mentioned before, lived experience is an important part of our policy development process. Actually, however, our main concern—I think that this came

up in Nicky Richards's evidence—was to ensure that we tested the procedures with staff who were likely to be using them. Admittedly, we were dealing with a draft process at that point, but that was important and is part of our traditional practice, in HR terms. We ensure that people understand what will happen if they take a particular decision or decide to go down a particular route.

Lived experience is still a valid and important part of how we develop policy in the Scottish Government as a whole. However, in the circumstances in which this was shared, it was very much to do with people being clear about what might happen, what the procedures would be and what to expect if they were to decide to turn their concerns into complaints—some did that and some did not, but it was important that they knew what would unfold if they did.

Jackie Baillie (Dumbarton) (Lab): Welcome back, Ms Evans. At our previous session, you referenced an incident in which Sky News was interested, in relation to which the former First Minister had contacted members of staff. Can you tell me when you told the First Minister about the Sky News issue? Was it just verbally? Was anyone else in the room? What was the outcome?

Leslie Evans: It was early in November, and it was verbally.

Jackie Baillie: Was anyone else in the room?

Leslie Evans: I cannot remember, to be honest.

Jackie Baillie: Okay, so there could have been.

Leslie Evans: There might have been.

Jackie Baillie: That is helpful.

Was one of the staff members who reported the contact by the former First Minister with regard to the Sky News interest one of the complainers?

Leslie Evans: Not to my knowledge, at that time. I came to know about the Sky News issue through two different sources: one person who had been contacted and another who had not but who knew that people had been contacted. At that time, those were the two routes through which I was alerted to this issue.

Jackie Baillie: Let me be clear, because you said:

“Not to my knowledge, at that time.”

Did any of them go on to be complainers?

Leslie Evans: I suppose that I am differentiating between then and now. Then, I had no knowledge; now, I do.

Jackie Baillie: So, one of them went on to be a complainer.

Leslie Evans: I am so not sure about that. I am choosing my words carefully not to be unhelpful but because I am alert to the constraints.

Jackie Baillie: I understand that. I would be happy if you wrote to the committee with that clarification.

Leslie Evans: I am happy to do that.

Jackie Baillie: In our previous session, you said:

"I was not close to the procedure development, as you would expect".—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 27.]

You have given me the impression of distancing yourself from the development of the policy and the procedure. I am sure that you did not mean to do that, because the documents that we have seen tell quite a different story. We have James Hynd reporting to you; HR was in regular discussion with you, keeping you informed; you made comments on the draft procedure as it developed; your private secretary was in email discussion with the First Minister's chief of staff—you know, there was a lot of activity. Indeed, you met directly with the First Minister to approve her letter of commission of 22 November. On that basis, and given that you are a key decision maker in relation to the policy, is it not the truth that you were driving the process, as I would expect, because it was a commission from the Cabinet?

Leslie Evans: No, because the person who drives the processes is the person who is the lead responsible officer for completing the task, particularly with something as important as a Cabinet commission. If I led and was involved with every Cabinet commission, I would not have time for very much else.

10:45

There is a process of delegation. James Hynd drove that process and took regular advice, as members know from previous HR and legal evidence. I was kept abreast of what was going on, which was important for two reasons. First, it was a Cabinet commission, and it is understandable that I would be kept abreast of it, as it was very particular and high profile. Secondly, I and my role featured in the procedure. Therefore, that would have been normal.

I am not trying to distance myself. That was a perfectly normal and traditional way of keeping me abreast of something that was important and on the First Minister's radar. Things that are pronounced on the First Minister's radar are, of course, important to me.

Jackie Baillie: Absolutely. However, there is nothing that I have said about those interactions that is incorrect.

Leslie Evans: Do you mean that people were briefing me and I was having meetings with them?

Jackie Baillie: Absolutely.

Leslie Evans: No. That would be a normal part of daily life. I should point out, of course, that neither James Hynd nor Nicola Richards reports to me; they report to their own line managers on their work.

Jackie Baillie: Sure, but there were numerous emails backwards and forwards with either you or your private secretary.

Leslie Evans: My private secretary and my private office were heavily involved on my behalf, as they are with most of the business that I undertake.

Jackie Baillie: Yes, but the private office is the extension of the minister. I have been a minister, and I know that that is how it operates.

Leslie Evans: They undertake work on my behalf on a regular basis.

Jackie Baillie: Sure. I want to move on to potential complainants. Were you aware that potential complainants were informed that Judith Mackinnon would be appointed as the investigating officer weeks before the policy was even signed off and more than a month before her appointment was made?

Leslie Evans: I was aware that she had contact before she was appointed as the investigating officer, as, indeed, the procedure enabled and recognised. I was not aware that she was talking to them closer to hand about the fact that she would be the investigating officer, but I was aware that she was following the procedure, as she would do, impartially, appropriately and professionally, in talking to and supporting any people with concerns who might decide to turn those into complaints about the options that were available to them at any one time, including how the procedure would move on.

Jackie Baillie: Finally, from your previous evidence and James Hynd's evidence, he was the first person to decide to propose the policy for former ministers, despite that not being mentioned in the Cabinet on 31 October 2017 or in the parliamentary statement of the same date. I understand that the first draft or the first iteration of the new policy specifically on former ministers was on 8 November. We know that James Hynd sent that directly to you on 10 November in an email. Is it not the case that you and your office had discussions with Judith Mackinnon and Julie MacFadyen on the question of producing a route

map including former ministers on 7 November, which was the day before 8 November, that that route map was sent to James Hynd on 7 November, and that he replied to you at 21:24 on 7 November? If that is correct, can we see the route map and any minutes and correspondence that are relevant to it? Unfortunately, I do not seem to be able to find that at all in the information that the Government has supplied to us, and that is of great concern. Can you advise whether that is correct?

Leslie Evans: There are a lot of dates and information there. I can tell you two things, which I think I mentioned in my previous evidence. The decision to include former ministers came from an analysis that was already under way and work that had already been undertaken on the fairness at work procedure. From the very beginning, it was agreed that the tidying-up—to use a colloquialism—or the making consistent of the fairness at work procedure would always address the issue of former ministers.

I am surprised if the route map has not been shared as part of our paperwork, because it was heavily promoted as part of showing people which routes were best for them to choose, including going to the unions and other places to gain support if they wished to raise such a concern. If the route map as produced has not been shared with the committee, I see no reason why we should not send it to you.

Jackie Baillie: It is not only the route map; it is the exchange of correspondence. On 7 November, a day before the first iteration of the policy, you were asking about former ministers in the context of the route map, and the route map was shared with James Hynd. He replied on the same day. I am keen to understand that exchange of emails. I do not just want the route map; I want the exchange of correspondence that underpins it, which would be very helpful for the committee.

Leslie Evans: I have not seen those documents, so I am not aware of them. If we can share them with you, and there are no constraints around them, I do not see why we would not.

Jackie Baillie: Excellent. I look forward to that. Thank you.

Leslie Evans: You are welcome.

Alison Johnstone (Lothian) (Green): I will pick up on points that were previously explored by colleagues.

Earlier this morning, you suggested that it was important to test procedures with staff who are likely to rely on them. I want to understand whether the same emphasis was placed on hearing from staff who had experience of reporting

a complaint or concern under the existing procedure.

Leslie Evans: I am trying to think carefully about what would be helpful to you here. I think that we had information already, although HR would be able to confirm for me. From people who had used the fairness at work procedure, which has been extant since 2010, in HR, we would know how the procedure had operated and how well it had operated. That is one of the reasons why we knew that we needed to reflect on how it might need to be revised. My understanding is that that reflection would include people who had used the fairness at work procedure and worked closely with HR in doing so. Our knowledge of previous procedures and whether they were working was very much based on how well they had operated and how they had felt to the people who had been engaged in them, and we would have used that information as part of our understanding of what needed to be addressed.

Between October and December 2017, when people were coming forward with concerns, we wanted to be as clear as possible about what might have helped them in the past, which we could then include in a subsequent procedure. As we developed the 2017 procedure, some of what we were thinking about enabled some things to be stopped short, prevented or reduced in some way. We always look to say that we will try to prevent any informal procedure, let alone a formal one, from being required. That was part of our conversations with people at the time.

Alison Johnstone: On the informal approach to dealing with concerns, do you regard moving individuals who raise concerns as the solution to a problem, or do you think that it would be more helpful to step back and address the broader problem? If moving people becomes habitual, is there enough oversight, such that someone would realise that there was a requirement to step back and find out why the moves were required in the first place?

Leslie Evans: As I mentioned earlier, it will always be preferable, important and part of our duty of care responsibility to get to the root of the issue. Merely moving somebody in the circumstances to which I think you are alluding will not do that. In my time as permanent secretary, I have been very clear about that. Wherever possible, we need to prevent such issues, but if they do arise, merely moving people does not, in itself, get to the root of the issues. One of the reasons why we are very keen to ensure that we offer and explore all options of mediation, support from HR, line management support and so on is to ensure that those issues are, if not prevented, at least spotted. We are now training our line

managers to spot the signs of such concerns, and, wherever possible, prevent them.

It is another reason why we have strengthened the line management, and the seniority of the line management, in supporting our private offices. One of the things that I have introduced is to have somebody in a pastoral care mode who oversees private offices, which often are places of great stress and involve working long hours. We are also making sure that people have the opportunity to raise concerns as part of our regular HR regime. Every single person in the Scottish Government should have a monthly conversation with their line manager. That approach was introduced by the previous permanent secretary, just before I become permanent secretary, and I have tried to embed it.

That is about wellbeing—not just about business or about how the organisation operates and how effectively that individual operates in their team and as an individual. We encourage people to use a template, which enables them not just to raise the business of the day—always the temptation—but issues that are of concern to them at work, in their relationships with the people with whom they work, or at home. I can give the committee a lot of other examples. We try to do specific things to ensure that people feel comfortable and confident in their working environment.

Alison Johnstone: A situation can obviously become the subject of a complaint despite the best efforts to prevent its arising or to deal with it informally. The trade unions raised concerns last week about the risk that the lack of an independent process continues to present. I am aware of the on-going review, but you surely agree that not to insist on independence in any future iteration of the policy would be surprising.

Leslie Evans: That point will be raised, as it was with the Westminster procedure. As I said earlier, we need to be careful as to when and how the independence of process would manifest itself. I absolutely agree that the relationship between civil servants and ministers is unique and that there is, of course, a power base to it. However, I want to be thoughtful about how and where independence is introduced so that it adds value and benefit, and addresses the issues that you have raised without becoming a burden.

We need to think carefully so that an independent process does not become so byzantine, complex and unyielding that it deters people from being prepared to use the formal procedure to bring a complaint if they wish to do so—we need to strike a balance. I nevertheless look forward to the results of the Laura Dunlop review, which might include independence of process.

Margaret Mitchell (Central Scotland) (Con): In your previous evidence of 18 August, you state that in developing the 2017 policy,

“we took advice from Police Scotland”.—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 35.]

Can you confirm to whom “we” refers?

Leslie Evans: “We” refers to HR.

Margaret Mitchell: Can you confirm who from Police Scotland was contacted with the request that they should give advice? Did the same person give that advice?

Leslie Evans: I cannot give you that information, but I am sure that we should be able to look into that, provided—

Margaret Mitchell: Was not that something that interested you? Did you not think to find out a little bit more about it?

Leslie Evans: The development of the procedure and the contact with the Advisory, Conciliation and Arbitration Service, Police Scotland and so on were within the remit of the project that James Hynd laid and supported, and with which HR helped under Nicola Richards. I was not involved.

Margaret Mitchell: You were interested in the content of that advice however, because you were able to tell us today that the process was to be victim-led, that the individuals who brought the concern or complaint would be to the fore, and that there should be confidentiality. Were you aware of anything else in that advice?

Leslie Evans: I have to reiterate that I was not involved in seeking that advice, nor would I have been. It is not my role to ask Police Scotland whether it will contribute to a policy: HR did that. I subsequently became aware that Police Scotland had contributed on areas in which it has experience. It was quite right and proper for HR to have those conversations with Police Scotland in that context, but I was not involved.

Margaret Mitchell: You were not involved, but you were aware of the advice.

Leslie Evans: I am now.

Margaret Mitchell: In 2017, the policy went on to allow, or to provide through the route map, that the Scottish Government could bring complaints directly to the attention of the police. On 18 August, you told the committee that

“three of the complaints should be referred to Police Scotland”.—[*Official Report, Committee on the Scottish Government Handling of Harassment Complaints*, 18 August 2020; c 36.]

Who took that decision?

Leslie Evans: When we said “three complaints”, we meant three incidences, which is correct. We now get into the investigative element of our committee discussions. The Scottish Government took that decision, based on legal advice.

Margaret Mitchell: The Scottish Government is not a person; people represent the Scottish Government. It might have been you representing ministers, or it might have been another person. Who was the person, or the group of people, who took the decision?

11:00

Leslie Evans: I represent the Scottish Government so, ultimately, all decisions that are taken by officials come through me—rather, they do not come through me, but they are represented by me. Based on legal advice towards the end of the investigative period we referred the matter to Police Scotland.

Margaret Mitchell: Did you inform the police, or did someone else?

Leslie Evans: I did not do that.

Margaret Mitchell: Do you know who informed the police?

Leslie Evans: I am not completely aware of who that might be. We could probably find out. I would not want to name them, of course, but I am sure that we could find out who took that decision.

Margaret Mitchell: Do you have the designation of the person who might have done that?

Leslie Evans: I suspect what will have happened, but I do not know for sure, but it would be expected that all the information be passed over to the Crown Office.

Margaret Mitchell: [*Inaudible.*]

Leslie Evans: I do not know who did that, but I can find out if that is necessary.

Margaret Mitchell: I refer you to document YY064, which contains a letter dated 10 November 2017 from you to Gillian Russell, in which you make some comment about briefing and working with Judith Mackinnon, to

“arrange for legal advice around the limits to confidentiality, process for note taking and when you would need to pass on information to Police/People Directorate.”

It seems from that that you had a very clear idea that the person would possibly be Gillian Russell. Can you remember whether that was the case?

Leslie Evans: I think that we are confusing and conflating two things here. There was a decision, which you rightly ask me about, regarding the

Scottish Government referring three specific instances to the police at the end of the investigative period—the investigation—after my decision report.

The period that you are talking about is to do with the role of Gillian Russell—I am sorry; I should not have mentioned her name. It is to do with the role of the individual who was acting as the confidante and sounding board at the time, which included ensuring that all parties who might come to her with concerns were clear about their options and where they might go. That might include their going to the police, which is included within the procedure. Individuals are able to go to the police at any time with concerns, if they feel that it is appropriate to do so. They do not need to do that through the Scottish Government.

Margaret Mitchell: So, you have confirmed that you took the decision that those complaints be referred to the police. Was the First Minister informed of that decision?

Leslie Evans: She will have been. I am pausing because I am not sure what the procedure was, but she will have been informed of that, yes.

Margaret Mitchell: Did you inform her?

Leslie Evans: I do not remember informing her; it was three years ago. It might well have been me, or it might well have been the Lord Advocate. A number of people could have been involved.

Margaret Mitchell: Could you, perhaps, check and come back to the committee?

Leslie Evans: I can check and see whether we can find out.

Margaret Mitchell: That would be very helpful.

The Scottish Government referred the complaints. Do you know what date they referred to?

I see that you do not know that.

Leslie Evans: Not off the top of my head.

Margaret Mitchell: Do you know who in Police Scotland was in charge of the investigation?

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

Margaret Mitchell: As head of the civil service, who would you expect to contact about something so serious?

Leslie Evans: We would not get into that level of detail with Police Scotland. That is an operational matter, and it is not something that I would expect to be involved in. Our role and responsibility would be to pass any information that we had to the Crown Office and Procurator Fiscal Service, at that point—and we did.

Margaret Mitchell: So, nothing would go directly to the police.

Leslie Evans: I cannot tell you at the moment about the detail of what was and was not sent to the police. I do not have that detail.

Margaret Mitchell: Could you explain the process? I am struggling to understand. You have decided that a complaint will go to the police. What happens then? Does someone contact the police, or does it go straight to the procurator fiscal? I would have thought that there would have to be an investigation by the police and that, on the basis of that, the information would be passed to the Crown Office and Procurator Fiscal Service and the sufficiency of evidence would be considered.

Leslie Evans: I cannot give you chapter and verse on the procedure and who did that at the time, but I am happy to write to you about what information we have on which individual took which phone call and made which reference at which point.

To my mind, that clearly comes within the role of the investigation, and it is closely associated with that. If the committee is interested in that element, it might well be that we can include it in the information on the investigation that we will submit to the committee in due course.

Margaret Mitchell: That also comes within operational responsibility. If you have a responsibility to contact the police, there should be some indication of who would do that. Obviously I would not expect you or the individual concerned to lift up the phone and speak to the desk sergeant—

Leslie Evans: No, indeed.

Margaret Mitchell: It would be very helpful, in looking at operational responsibility and how the policy played out, if you could come back with that information.

Leslie Evans: We will do that.

Maureen Watt: I have a very small question. If you are not the line manager of James Hynd and Nicola Richards, who is?

Leslie Evans: There are directors general who report to me. James Hynd reports to a director, who reports to a director general, Nicky Richards reports to a director general, and both those directors general report to me.

The Convener: I have a couple of wee quick questions that follow on from points that committee members have raised. I am interested in the point that the deputy convener raised. I thank you for the offer to send information, which will inform the next part of our inquiry.

At what point during an investigation would the Government take legal advice? Would it be when an alarm bell was rung that made you think, “Oh, gosh! This might be quite serious”? Would you take legal advice at that point, or would it be at the end of the investigation—perhaps after confirmation that a claimant wished to go further?

Leslie Evans: In respect of internal legal advice, we would keep in touch with our legal colleagues quite regularly, anyway, through a procedure of that kind. I am sure that human resources colleagues would do so, too—not frequently, but regularly, as the process continued—to ensure that they were keeping within the lines and keeping to the heart of the procedure legally.

The Convener: On an unrelated point, I am thinking about the many iterations of the policy as it went through the normal procedure. Regarding the process by which it was decided how complaints about former ministers would be dealt with by whomever was the current First Minister, can you take me through how that decision was made and what changes were made to what ended up in the final document?

Leslie Evans: The iterations of the document, in the final procedure, continued to refine and define what was going into the final document. From the very outset, as a result of the analysis and the work that had been undertaken on the fairness at work policy, and some of the gaps that had been identified as part of that process, the issue of former ministers was already inherent in the work that we had undertaken and was therefore quickly represented in the early iterations of the documents. The iterative process would have continued with James Hynd—as, I am sure, he shared with the committee—legal colleagues and HR colleagues, on the practicalities of ensuring that a procedure was applicable.

We are very aware that a procedure that might look fine on paper also needs to take into account issues such as when the ministerial code comes in, when people should be alerted and so on. The iterative process would have been live throughout all those versions of the document, but the issue of past ministers was already included at the very early stage.

I think that the committee has received copies of the iterative document. I am sure that we can give you further information about why changes were made at points, if you are interested in a particular version of when things were introduced, but I have outlined the broad-brush approach to development of the procedure.

The Convener: I am interested in a specific aspect. I do not have the document in front of me, but I remember that the final version—I think—

discusses how to deal with a situation in which the former minister is the same party as the current First Minister. I am interested in the development of that particular aspect of the policy and where it ended up.

Leslie Evans: I will need to come back to you on that. I was not involved, but I am sure that James Hynd or Nicola Richards will be able to give further information on that.

The Convener: Thank you.

I thank the permanent secretary for her evidence and for coming back to the committee. I note that we will get something in writing from you on quite a few things that have come out today. We will now have a comfort break, which will also allow the changeover of witnesses.

11:10

Meeting suspended.

11:17

On resuming—

Judicial Review

The Convener: We now move to our evidence session on phase 3 of the inquiry, which is on the judicial review.

The committee will not begin its detailed scrutiny of the judicial review until later in the inquiry, but it agreed that there was a need to hold this exploratory session with the Government. I have to say that that was due to the committee's frustration at the lack of information on the issue that was being shared with it by the Government.

The committee has been informed by the permanent secretary and the Deputy First Minister that receiving a limited amount of documentation does not prevent a full account from being provided in oral evidence. As such, the committee agreed to invite key representatives from the Government to come before it so that it could receive that level of detail.

I welcome the Lord Advocate, the Right Honourable James Wolffe QC, and welcome back the permanent secretary, Leslie Evans.

The Lord Advocate *made a solemn affirmation.*

The Convener: Lord Advocate, I should have realised that you would know the lines of the affirmation very well. [*Laughter.*]

I invite our witnesses to make short opening statements, starting with that of the Lord Advocate.

The Lord Advocate (James Wolffe QC): Thank you, convener, for the opportunity to make a short opening statement.

The petitioner in the judicial review challenged the lawfulness of the Government's harassment policy, and its application in his case, on a number of grounds. For the reasons set out in the Government's statement to the committee, the Government accepted that one of those grounds of challenge was well founded, and it conceded the case.

The Government has already publicly expressed its regret that its investigation in this case was flawed, and, on behalf of the Government, I reiterate that apology.

In its dealings with Parliament, the Government operates in a constitutional and legal framework, which includes: the principle of collective responsibility; the principle that, generally, ministers, not officials, are accountable for the actions of Government; the law officer convention; and legal professional privilege. None of those principles will prevent the Government from giving

the committee a full account of its decision making and legal position in relation to the judicial review.

The Government has made clear its commitment to co-operating as fully as possible with the committee's inquiry. It will provide the committee with a further written document, providing more detailed information about the judicial review. It is currently looking again at what steps it can take with a view to enabling the committee to have access, so far as possible, to relevant court documents. As for the Government's legal position, ministers are available—indeed, I am available—to answer questions from the committee on that as required.

All Governments lose high-profile cases from time to time. It is a vindication of basic principles of constitutional democracy that the Government's actions can be tested in court and that the Government accepts the outcome. If there are lessons to be learned from what happened, they should be learned, and the Government will learn any lessons that arise from this case.

I look forward to assisting the committee's inquiry.

The Convener: Thank you very much. I call Ms Evans to make her statement.

Leslie Evans: Given that today's exploratory session is on the judicial review, let me say at the outset that the Scottish Government conceded that one part of the internal procedure should have been applied differently. I repeat my unreserved apology to all concerned for that procedural failure and my commitment that we shall apply learning, including from the forthcoming review led by Laura Dunlop QC.

Convener, an apology is important, but so is an explanation. Although the meaning of the procedures paragraph 10 about the role of the investigating officer was clear to those involved in its drafting, development and operation, which is that they should not be involved in the matter being investigated, in the context of the judicial review, it became clear that the paragraph was open to a different interpretation—that is, to mean that the investigating officer should have no involvement in the subject matter of the complaint, and, in addition, no prior contact with the complainers themselves.

During the judicial review, it became evident that removing the scope for any different interpretation would have been beneficial.

The test of bias in the judicial review is whether

“the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the person judging the issue was biased.”

In December 2018, following legal advice, the Scottish Government concluded that interactions between the investigating officer and complainers were such that the test of apparent bias was met. Once that was clear, the decision to concede the judicial review was taken quickly.

However, and importantly, the basis for the Scottish Government's concession of the judicial review was the acceptance of apparent bias, not actual bias. The Scottish Government did not, and does not, accept any suggestion that the investigating officer acted in a partial way, or that either the investigation or the decisions that were reached were partial. At all times, those involved in the procedure acted in good faith.

The Convener: Thank you, permanent secretary. We move directly to questions.

Margaret Mitchell: My first questions are to the Lord Advocate. In your written submission, you state:

“I can also confirm on behalf of the Government that there was no decision to withhold documents relevant to the judicial review.”

Nonetheless, relevant documents were provided by the Scottish Government only as a result of commission and diligence. Why?

The Lord Advocate: The first thing that I should make clear is to reiterate that, as I set out in my written statement, there was no decision to withhold documents from the judicial review. Indeed, the Government introduced into the judicial review proceedings the fact that the investigating officer had had contact with the complainer at an early stage.

The process of the production of documents proceeded voluntarily. At a certain point, a court order was made, as it might be in order to provide for the process of a commission to take place. In my professional experience, it is not unusual for the process of commission and diligence to produce additional material. That process involves detailed line-by-line and point-by-point examination of individuals who have access to documents to ask them about the searches that they have undertaken and the places where they may have documents.

It would clearly have been more satisfactory if that material had been available at a much earlier stage. In due course, the committee may want to investigate further the searches that were undertaken and how the late identification of additional documentation came about. However, it is the fact of what happened. There was voluntary disclosure of documents and in due course further disclosure of documents leading to a fuller picture of the interactions between the investigating officer and the complainers than had previously been available, the reassessment of the Government's

position in the judicial review and a decision to concede. Decisions to concede litigation reflect a responsible attitude to dealing with issues that arise in the conduct of litigation.

As I say, there may be more questions to ask about the detail of the investigation and the search for documents, but that is the fact of what happened.

Margaret Mitchell: The Scottish Government statement of 20 July confirms that those documents included a text message and calendar entries. Will you expand on why those documents were relevant?

The Lord Advocate: I have come briefed to deal with this as an exploratory session looking particularly at further material that the Government may be able to provide. As I said in my opening statement, the Government will provide a more detailed account of what happened in the course of the judicial review. In particular, it is recognised that, in the chronology that was produced yesterday, the committee should be given more information about the period from September 2018 to January 2019 and the whole process of the disclosure of documents, recognising the fact that members' interest in that speaks to an understandable interest on the part of the committee. The committee can expect more information about that process in due course, which will provide an opportunity for the committee to ask pointed questions—no doubt—of myself and others about why particular pieces of information resulted in a particular conclusion being drawn.

Margaret Mitchell: Are you aware of how, specifically, the documents, including the text and calendar entries were recovered through the commission process? Did the commission have to go to a specific person to recover those documents?

The Lord Advocate: There are two separate questions within that. The first is about who was undertaking searches—which individuals. There is a separate question about the detail of what happened at the commission hearings. I am not sighted on those matters today and it would be fair to say that questions about precisely who was undertaking searches and how that was being done are better addressed to others.

I should say that I am not trying to resist those. As I said, the Government will make more information available, which I anticipate will facilitate questioning on the details of the sort that the member is pursuing.

11:30

Margaret Mitchell: My next question is for Leslie Evans. Who had overall responsibility for the management of the judicial review, and how was that responsibility managed?

Leslie Evans: The judicial review process, which kicked off at the end of August 2018 and concluded in January 2019, had two components. There was the legal advice under the Scottish Government legal directorate, which is our legal team. Members of that team were informing and advising other parts of the Government about the process, how the procedure would work and acting to the client, if you like, on the legal aspects of the case. My office was the co-ordinating point for much of the work, but the work also drew on HR, legal advice and other parts of the organisation as appropriate.

In relation to how information was produced, there are specific procedures that we operate in such circumstances for searches such as word searches. As the Lord Advocate has suggested, I am sure that we can share information about how the procedure works.

Margaret Mitchell: Was it the case that the Government was already aware of the documents that were recovered through the commission and diligence but did not produce them because it did not think that they were relevant?

Leslie Evans: We were asked at frequent intervals, but particularly at the beginning, to do searches for particular documentation. Normally, when a search procedure is carried out, as you would imagine, it involves keywords that are entered into the system. After the evidence commission was established on 14 December, we were asked to revisit that with additional granularity. I think that you mentioned texts and calendar entries. Those were particularly asked for as part of the process. At that point, some information that had not been previously asked for at that level of granularity was revisited, with a wider set of search criteria.

It is worth pointing out that we had, I think, two working days and a weekend to turn that round, which is pretty intense. We have email traffic each week in the Scottish Government of 2.7 million items and something like 30 million items in our electronic management system at any time.

Margaret Mitchell: The point is well made.

Finally, who took the key strategic decisions on the Scottish Government's response to the judicial review? Was it you, permanent secretary, or the First Minister?

Leslie Evans: I was cited and I was the decision maker in the procedure that was under scrutiny, so it was always going to be me who was

responsible for ensuring that we responded to the JR. Of course, however, ministers were co-cited and they were co-respondents. Therefore, at key points during the process, based on legal advice from our legal colleagues, from counsel and from the Lord Advocate, there were regular reviews of the prospect of success and so on. At key points, those reviews were shared with me and the First Minister.

Alison Johnstone: Lord Advocate, do you regard the Scottish Government's position on the information that we have been able to see so far as being in line with the principle of open and transparent government?

The Lord Advocate: The Government has provided the committee with a statement and relevant documentation. I have advised the committee this morning that, recognising the committee's interest, which was reflected in the questions from Margaret Mitchell, the Government intends to provide a detailed account, with a degree of granular information, about what happened in the course of the judicial review. The Government is also actively exploring what further steps it can take proactively to enable the committee to have access, so far as possible, to relevant court documents.

On the assumption that all that is made available to the committee, that will enable the committee to get a much more granular and detailed understanding of what happened in the course of this particular litigation.

Alison Johnstone: Can you comment on the legal authority that supports the Scottish Government's blanket statement that documents that form part of the court process or which have been lodged with the court are the property of the court and cannot be released without the court's permission?

The Lord Advocate: Perhaps I can answer that question in this way. The annex to the committee's letter of 11 August 2020 identifies a range of documents that the committee seeks in connection with the court process. The question of access to that wide range of documents is not straightforward. Different considerations apply to different types of documents, and that is overlaid by the particular restrictions that apply in this case, of which the committee is well aware.

Of course, the committee will appreciate that the interests of other parties, as well as of the court itself, are engaged. That is why—and I can confirm what the Deputy First Minister advised the committee yesterday—the Government is actively looking at what steps it can take proactively to ensure that, so far as possible, those documents are made available to the committee. Although I cannot guarantee what the outcome of that will be,

I will be disappointed if that does not result in the committee being able to have access to relevant court documents, so far as possible.

Alison Johnstone: That will be warmly welcomed. We want to understand documents that might have importance to the context of our inquiry, which we have not been able to benefit from so far.

My final question is on the investigator's independence—or otherwise—in the development of the process. Colleagues have already raised this morning the issue that complainers had been made aware that Judith Mackinnon would be the investigating officer. We have also heard comments from the permanent secretary about the ideal time to introduce that element of independence—that perhaps it might be off-putting to some and might be seen as an escalation, as it makes something that could be dealt with informally a bigger matter than it might otherwise be.

In this case, we have the impact of the apparent or actual lack of independence. Was that a concern to you, as the process was taking place? I hope that, at some point, the committee will be able to understand why it took so long for this to become the issue that it became.

The Lord Advocate: I absolutely understand the point about timing. That is well understood.

The committee will understand that I am not going to talk about when or to what extent I was or was not involved personally, for reasons that have been explained to you. On the Government's legal position, I can say that the Government—as I think that the permanent secretary has already said—interpreted its policy in a particular way, in terms of the absence of previous involvement of the investigating officer in the matters being investigated.

In any litigation against the Government, the Government's legal position comes under scrutiny and has to be looked at again. In the course of the judicial review, it was recognised that there was an alternative interpretation of policy and that there was an issue of interpretation. The Government was content that that issue of interpretation could and should be put before the court for a decision. There are often advantages in getting the clarity of a court decision.

That decision was taken at a particular stage in the process, as the Government statement made clear. The identification of further documents, and what that disclosed about the interactions between the investigating officer and the complainers, led to a review of the Government's position in the light of the additional common-law requirements in relation to the appearance of fairness.

As the permanent secretary has said, a conclusion was reached, in light of the fuller picture of those interactions that was then available, that that common-law test was met and that the actions should be conceded.

Alison Johnstone: At what point was the Government aware that the petition was being contested on particular grounds?

The Lord Advocate: The petition raised a number of grounds of challenge, both to the lawfulness of the policy itself and to the way in which it had been applied in this case. I hope that the Government will be able to give the committee more detail on that. The Government decided to contest the petition—to resist it on the grounds on which it was brought—at a later stage in the process. That is part of the further information that I expect the Government to make available to the committee.

At a later stage in the process, the Government adjusted its pleadings in a way that, among other things, disclosed the interaction between the investigating officer and the complainers. The Government put that into the domain of the litigation. The petitioner then revised his petition to add grounds challenging the application of the procedure because of that interaction. That then, in the course of the production of documents that looked at that particular issue, ultimately led to the concession.

The Convener: You have said to two committee members that we would get further information. Is that a decision that has now been made? When can we expect that further information?

The Lord Advocate: Yes, that decision has been made. The Deputy First Minister's letter to the committee on 7 September refers to a more detailed chronology.

As with previous requests to the permanent secretary, I am afraid that I cannot give the committee a date, but I can say that it is understood that the committee is taking an interest in the detail of the judicial review process. I suspect that the completion of that work may well have to be aligned with the steps that are being taken with a view to enabling the committee to have access to the court documents.

The convener will appreciate that an accurate understanding of the scope of, and any limits to, the ability to provide access to those court documents is something that the Government will have to make sure that it accurately reflects in the information that it provides.

The Convener: To accurately reflect what the committee has heard, are you saying that the additional information that you are talking about is

the chronology that was referred to in the Deputy First Minister's letter, and not anything further?

The Lord Advocate: It may take the form of a chronology or it could take the form of a written statement, but I anticipate that additional information about the progress, as it were, of the judicial review will be made available to the committee. That will be done both through steps that are proactively being taken to enable the committee to have access the court documents—I cannot today guarantee what the outcome of that will be, but I will be disappointed if that does not bear fruit—and through the Government providing additional information in response to the questions that the committee is asking.

The Convener: You have referred to the Deputy First Minister's letter, which talks about the chronology. However, you also said in response to Alison Johnstone that it is likely that the committee will get information at a later stage in the process.

The Lord Advocate: The key point is that the Government will provide additional information about the process of the judicial review in a much more fine-grained way than it did in its initial statement, in order to respond to questions such as those that Margaret Mitchell asked earlier.

The Convener: Hmm. Would the permanent secretary like to respond to my questions in relation to deadlines that were set and information that was requested but which has not arrived? I am sure that other members of the committee would like to pursue some of that further.

11:45

Leslie Evans: It feels to me as if there are two elements here. We have complied with deadlines so far. Although there have been question marks over whether that has been the case, I reassure you that we have complied with all three deadlines. The fourth deadline is to do with information on the investigation that is due to come out, which I know the committee is awaiting. That is connected to the work that is already under way, as the Lord Advocate mentioned, to ensure that we can share as much as possible with the committee. There is a connection, as part of that information on the investigation, which has an element of the request that the Lord Advocate made reference to, in terms of the court and undertakings that have been given to the court.

From our point of view, as the Lord Advocate said, the issue is to give the committee as much information as possible and, as far as possible, at the same time. However, that has a connection to the dealings with the court that the Lord Advocate referenced.

I do not think that I can add anything further to that.

The Convener: Okay; thank you for that. As I said, I am sure that other committee members would like to probe that further.

Murdo Fraser: I will pursue—initially with the Lord Advocate—issues around the Scottish Government’s legal position. I appreciate that we have not seen the legal advice—that is a matter of on-going discussion between the committee and the Government—but the Deputy First Minister and the Lord Advocate have said in correspondence to the committee that they will be happy to give a full account of the legal position at different points in time in relation to areas of interest to the committee.

In that vein, I will start at the end of the process and work back. I will look first at the issue of the expenses that were paid to Mr Salmond, which totalled £512,250. As you will be aware, Lord Advocate, under normal circumstances, in a litigation, expenses are usually awarded on a party and party scale but, in this case, they were awarded on the much higher scale of agent and client, client paying. In your written submission, you said:

“The rules on the recovery of expenses in litigation provide for payment of an additional fee in certain specified circumstances, and, in this case the Scottish Government accepted that an additional fee was justified on a number of heads.”

According to advice from Lord Hodge, with whom you will be familiar, those additional expenses would be paid

“where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense”.

Was your defence incompetent or unreasonable, or both?

The Lord Advocate: There are two issues in the question. One is the question of the additional fee element, and the other is the question of the agent and client, client paying scale. The quotation that you gave is related to the agent and client, client paying element. That was a reflection of the way in which the disclosure of documents emerged in the course of the litigation and the unsatisfactory circumstance in which, very late in the day, the Government conceded the case on the basis of information that, by that time, had come to light, but in a context in which it had taken some time for documents to be produced. Therefore, it is a reflection of the course that the litigation took and the legitimate expectation that, so far as possible, the Government will have identified the relevant material at an early stage. In this case, that did not happen, and the consequence followed.

On the additional fee element, various factors are taken into account in the rules of court, such as the complexity of the case, the skill, time, labour and specialised knowledge required of the solicitor, the number or importance of documents prepared, the importance of the cause or the subject matter to the client, and so on. There are a number of heads under the rules of court that fall to be considered in deciding whether an additional fee may be payable. In this case, it was clear that a number of those heads were satisfied and that it was entirely right that an additional fee be paid.

Murdo Fraser: If I heard you rightly, you have accepted that the Scottish Government’s handling of this was unsatisfactory. However, does that amount to incompetence or unreasonableness?

The Lord Advocate: I am not going to use any particular adjective, but, certainly, as the Government’s senior law officer, I would like to see circumstances in which the Government made the right decisions at the right time and at the earliest possible point in the context of a litigation.

However, the world is not perfect and things do not go as one might like them to. In this case, for reasons that I am sure that the committee will be interested in exploring, the decision was not made until a late point in the case. Such things happen in litigation, which is not a scientific exercise. I have already made the point that, in my professional experience, it is not unusual for a commission process to result in the identification and production of material that, in perfectly good faith, witnesses did not previously identify, and for that to cast a different light on a litigant’s position. The important thing is that, whether a litigant is a public authority or not, the issues are addressed on their merits as and when they arise.

Murdo Fraser: The petition was served on the Scottish Government on 31 August 2018. At that point, when legal advice was taken internally from you and your colleagues who are law officers, what was the consideration of the strength of the Scottish Government’s position in relation to defending the petition?

The Lord Advocate: At that point, the issue upon which the Government ultimately conceded was not part of the case. That is perhaps an important point to make. At that stage, the Government was entirely satisfied that it was right to contest the petition on all the grounds that were being advanced at that time, and, indeed, the concession ultimately made did not relate to any of those grounds.

Murdo Fraser: Is it correct that the Scottish Government took counsel’s opinion from a senior Queen’s counsel in September 2018 that advised that the case was not a strong one, and that the

Scottish Government did not have a good case to defend?

The Lord Advocate: As the committee is well aware, the Government does not disclose either the content or the source of its legal advice.

Murdo Fraser: Well, just to remind you, Lord Advocate, you wrote to us to say that you would be happy to give us a full account of your legal position at different points in time. I think that it is a relevant question whether you had taken counsel's opinion that guided your defence.

The Lord Advocate: There is a really important difference between the Government's position at any particular point in time and the process by which that position is arrived at. The normal process of Government decision making is that policy makers and decision makers seek legal advice and assess it. There may be competing points of view being advanced, so Government assesses the position and reaches a view with regard to the legal position that it is prepared to defend. Ultimately, the Government is accountable for that position first of all in court. It is quite important to note that, in this context, the Government was considering the position and deciding what position it was prepared to stand up and defend in court. Further, of course, the Government is ultimately accountable to parliamentarians and others for the legal position that it adopts.

It is a principle—it may be that we can touch on this further—that the Government is always entirely accountable for the legal position that it takes and for the legal considerations that underpin a policy decision. From whom particular legal advice is taken and the content of that advice in the context of reaching that position are not disclosed.

Murdo Fraser: I will move on to the period 19 to 21 December 2018, when the commission was being heard. At that point, there was a light-bulb moment—if I can call it that—and the Scottish Government realised that the case was no longer defensible. What was behind that change of opinion, and why was that flaw in the defence not spotted sooner?

The Lord Advocate: The committee will appreciate that the legal conclusion—the legal judgment—depends on the facts and the factual circumstances to which that judgment is being applied. The committee has already heard and is aware that documentation came to light in the course of the commission process that led to our reassessment of the Government's position—

Murdo Fraser: With respect, that was documentation that the Scottish Government already had.

The Lord Advocate: I do not for a moment question the interest that the committee will have in looking at the process of disclosure of documents. As I said earlier, litigation is a high-pressure process, and it is not a perfect process.

There was disclosure of documents, and there were further searches in due course. Particular documents came to light that had not previously been identified, which gave a fuller picture of the interaction between the investigating officer and the complainers, and that led to the conclusion to concede the litigation.

Murdo Fraser: The failure to spot to spot that fuller picture cost the taxpayer £512,000.

The Lord Advocate: There might be a question about the point at which it would have been reasonable to identify that and about what level of expense was incurred before and afterwards. I cannot really assist any further on that question.

Murdo Fraser: I have one more question, which is for the permanent secretary. It was reported that after the conclusion of the judicial review case, you sent a text message to a colleague that contained the words:

"We may have lost the battle, but we will win the war."

What did you mean by that?

Leslie Evans: That has been misinterpreted as having some kind of conspiratorial element to it. I clearly say that that is not the case.

I have been working, since I was first appointed as permanent secretary on 1 July 2015, to make the organisation a more inclusive and diverse one that respects everybody's right to come to work and have the right kind of conditions at work. I have worked to ensure that equality is at the heart of the business of government, and also at the heart of the organisational culture.

I was not referring to any individual when I sent that text. I was talking about a long-term commitment of mine, and indeed of the Scottish Government—as you will see from its policy documents—to ensure that equality lies at the heart of what it does and of how it operates as an organisation.

Murdo Fraser: So you were not at war with Alex Salmond?

Leslie Evans: No.

Angela Constance: I have two or three questions for the permanent secretary and then some questions for the Lord Advocate.

Permanent secretary, I have a couple of quick questions to begin with. I refer to the Scottish Government's written statement to the committee on its participation in the judicial review, which is dated 20 July 2020. I wonder whether you could

confirm something for the record. Paragraph 9 states:

“On 22 August 2018, following the conclusion of the investigation, the Permanent Secretary notified the former First Minister of her decision.”

Is that statement accurate? Do you stand by it?

12:00

Leslie Evans: I think that that is accurate, if it is in the submission.

Angela Constance: Paragraph 20 contains the following sentence:

“The Permanent Secretary is the decision-maker under the Procedure at issue in the proceedings.”

For the record, are you still content with that statement?

Leslie Evans: I am the decision maker under the procedure.

Angela Constance: I move on to paragraph 27. We know from paragraph 40 that

“The Permanent Secretary ... concluded on 2 January 2019 that the Scottish Government should concede the”

case. Paragraph 27 refers to:

“the terms on which settlement of the case had been agreed, including that the decision under review was unlawful in that it was taken in circumstances which were ‘procedurally unfair and tainted by apparent bias’.”

How does that fit with everything that the inquiry has heard to date about the development of the policy being lawful? When we see the term “procedurally unfair”, it is clear that the procedures that were developed by civil servants have been found wanting. How does that fit?

Leslie Evans: I think that I have never said anything other than to use the term “apparent bias” when I have spoken about the settlement of the JR. As I said in my opening statement, there was “apparent bias, not actual bias”—it is important to get that on the record.

The only other thing that I can say is that, as the committee has heard over its past three sessions, the procedure was developed by civil servants, who were professionals in their area, taking into account legal advice at all stages. The procedure was developed not in a vacuum, but through a professional process, which took into account advice from a range of sources but which also took legal advice into account throughout.

As you have heard from the Lord Advocate—I am not one to speak in these terms—judicial processes are not a science, and there will be different views taken on the application of procedures, as there was in this case.

Angela Constance: They are clearly not a science—I am sure that we will come on to that.

We have repeatedly heard about the split between “apparent” and “actual” bias. With regard to whether a policy is robust, fair or legal, is it not the case that perception of bias can be everything?

Leslie Evans: Clearly.

Angela Constance: I would like to ask a few general questions of the Lord Advocate to begin. As a non-legal person, I would find it quite helpful if you could set the scene. Is it the case that, more often than not—in general, for the purposes of government—legal opinion is more about shades of grey than black-and-white issues?

Would it be the case that, perhaps not as the norm, but on occasion, Government either disputes or ignores legal advice?

The Lord Advocate: Before I answer those two questions, I will pick up on Ms Constance’s question to the permanent secretary.

In the context of those questions, it is important to distinguish between the procedure itself and the way in which it was applied in this case. What went wrong in this case concerned a set of interactions that reflected individuals’ understanding at the time about what the procedure meant. There is a legitimate legal dispute about what it did or did not mean, but on examination, once the full picture was available, it was judged to meet the test for apparent bias, which overlays the appearance of fairness. That had to do with the nature and extent of the interactions rather than with something intrinsic to the procedure itself. No doubt the committee might wish to look at that in more detail in due course.

I turn to the questions that Ms Constance directed to me. On her first point, she is absolutely right that the range of legal work involved in government is vast and wide ranging in extent. It covers everything from current and future bills to subordinate legislation, policy making, legal issues that arise in the administration of policy, and litigation. In the context of legal advice generally—this is not peculiar to government, but it happens particularly in that context—it is not unusual that issues may not be definitive. Indeed, different legal views might be legitimately expressed and taken on particular issues. That is not at all unusual. The member is therefore absolutely right to refer to there possibly being shades of grey in legal advice.

So far as Ms Constance’s second question is concerned, the ministerial code makes clear the expectation that ministers and policy makers—

Angela Constance: To give an example at an elementary level, if I am having my will drawn up,

in a conversation with my lawyer I might say, “I want X, Y and Z.” He might reply, “No. That is completely unnecessary—you don’t want to do that, because there is a risk,” and I might then say, “Well, I hear what you’re saying, but in the context of my life I do want that,” because I think that the risk is less relevant. Do such conversations happen in Government circles, too?

The Lord Advocate: A basic point comes from the example that Ms Constance has given, which is that legal advisers advise and clients—in this case, policy makers and ministers—decide. However, it is inherent in Government, and the ministerial code makes clear the expectation, that

“Ministers and officials should ... ensure that their decisions are informed by appropriate analysis of the legal considerations and that the legal implications of any course of action are considered at the earliest opportunity.”

Within Government, there is a structure, of which the law officers are part, which reflects the importance of legal considerations being fully taken into account in the development of policy. Ultimately, though, it is ministers and policy makers who make decisions and who stand up and account for those day and daily in Parliament. They routinely account for the legal implications as well as for the policy decisions, in so far as the legal implications have informed such decisions. That is a routine part of Government action.

Angela Constance: Is the bottom line not that, at the end of the day, policy makers such as the permanent secretary and ministers do not have to accept every word of legal advice—they need to consider it?

The Lord Advocate: Of course they need to consider it. As I have said, ultimately, decision makers decide and policy makers make decisions. However, one of the features of Government is the responsibilities that Government lawyers have and those that law officers, as the ministers with particular responsibility in the area, ultimately have to assist Government to live up to its commitment to act lawfully.

Angela Constance is absolutely right: ministers and policy makers make the decisions. One of the jobs of the system of Government with law officers at the head is to ensure that the legal considerations are at least fully taken into account and fully bottomed out, that any shades of grey are recognised, and that the legal implications are considered. Does that always happen according to that perfect model? It is a human system.

Angela Constance: Ultimately, it comes down to fine decisions around judgments. Without seeing legal advice, how can the committee know whether the Government accepted that advice in all its detail? How can we hold the permanent

secretary and others to account on those finer judgments?

The Lord Advocate: The committee will have information about the legal position that the Government took at particular points, and that position can be tested. Indeed, the committee is already testing the decision that was made to defend the petition at the outset by looking at the concession that was made at the end of the process and asking why that concession was not made at an earlier stage. The Government will have to explain to the committee why that concession was not made at an earlier stage.

The Government is accountable in court and in Parliament for the legal position that it adopts, and it can be accountable without disclosing—I will come back to this in a moment—who said what to whom and what internal process of consideration there was. There is real importance in holding to that principle because, if one did not hold to it, a disincentive would be created for ministers and policy makers who are seeking legal advice and to be informed fully about the legal implications, and that would ultimately undermine the structure that I mentioned.

Angela Constance: It is clear that the Government was always intent on contesting the case, but it did not oppose the permission to proceed. Can you give us any indication of the Government’s considerations at that point?

The Lord Advocate: There are two questions in any judicial review. First, a judicial review does not get off the ground unless the court gives it permission to proceed. Because of the nature of that decision, the threshold for refusing permission is set at an appropriately low bar so that appropriately arguable cases will go forward to a full hearing. The Government took the view that the petition met that bar in terms of arguability and that the court would be likely to grant permission, but it was nevertheless content that the issues that were raised in the petition were ones that it should contest.

Angela Constance: It did that accepting that there was some case that you were going to have to defend.

We heard last week from trade unions about some of the difficulties in developing policy around the employment relationship between ministers and the Scottish Government. They talked about some of the practical difficulties that there are when people do not work for the Government or, indeed, when someone is a former minister. Can you say anything about the legal basis for the procedure and considerations in the judicial review process on that particular issue, given the difficulties with employment relationships—or lack of them?

12:15

The Lord Advocate: I apologise, but I am not clear about which particular issue the member is asking about.

Angela Constance: Last week, the trade unions said that when a policy is devised or proceeded with, if there is not a direct employment relationship between the accused—for want of a better word—and the Government, that is a tricky area to be in. How were those issues considered while the judicial review was being progressed?

The Lord Advocate: I mentioned at the outset that the petition presented a challenge on a number of grounds to the policy itself and to its application. The Government was content to defend the petition on all the grounds that were initially stated and, in particular, on all the grounds to do with challenging the legality of the policy itself. I would have to remind myself whether the particular issue that the member has raised was one of those grounds, but the Government was content to defend the petition on all the grounds to do with the lawfulness of the policy, as it were.

Angela Constance: We know on which ground the Government conceded, and a promise has been made to provide additional information. Will the additional information give the committee any insight into the grounds on which the Government was originally challenged, bearing in mind that it was challenged on a range of grounds?

The Lord Advocate: I have already said that the Government is actively looking at how it can make the court papers available to the greatest extent possible, and I would hope that that process will reveal that.

Angela Constance: With the convener's indulgence, I have a final question for the permanent secretary, which relates to paragraph 37 of the judicial review document. It states:

"The Deputy Director for People Advice, had contact, before her appointment as Investigating Officer, with the two members of staff who lodged concerns in advance of their decisions to make formal complaints."

What was the context of that contact? Was it specifically to do with concerns or was it more general contact through day-to-day Government business?

Leslie Evans: The contact, which took place alongside contact with a range of other people who had raised concerns, was about ensuring that those people knew what their options were—they could go to the police, but there was also a procedure that they could use—and what support was available.

I would like to make a short point in response to Ms Constance's point about taking legal advice. I will say two things. In my experience as a civil

servant, it is very unusual, as a policy maker, not to take legal advice. That is a constant ingredient in the way in which policy is developed. If legal advice was not taken into account, that would be clearly challenged on a number of levels. That would be very unusual indeed.

Angela Constance: I suppose that the issue is visibility to us.

Leslie Evans: I understand that.

The Convener: An hour has gone by and only three committee members have asked questions. I am not making comment on anyone's verbosity.

Alex Cole-Hamilton—I did not mean to say your name straight after using that term, Mr Cole-Hamilton.

Alex Cole-Hamilton: If the shoe fits ...

I want to follow up on a line of questioning that Murdo Fraser pursued with the Lord Advocate. You are observing the protocol that the Government does not talk about legal advice that it has received. However, I reckon that if no legal opinion existed that suggested that the Government was on unsafe ground in defending the judicial review, you could tell us that. Can you confirm that there was no legal opinion that said that?

The Lord Advocate: The Government does not disclose either the content or the source of its legal advice.

Alex Cole-Hamilton: Permanent secretary, I want to follow up on some of Angela Constance's questions about contact. I am keen to understand the steps that you took to satisfy yourself that the Government had acted properly and that its position was defensible, after it became clear that Mr Salmond intended to take the investigation to judicial review. In that context, when did you first learn about the contact between Judith Mackinnon and the complainer?

Leslie Evans: I am pausing only to think carefully about what I knew and when. I would have been aware that the investigating officer was having contact with people who were raising concerns.

Alex Cole-Hamilton: I am sorry; I should have said that I mean prior to her being appointed as investigating officer.

Leslie Evans: Yes, that was my point. I would be aware that Judith Mackinnon, in her professional capacity, would have had contact with many of those who had raised concerns, some of whom had decided to take them into complaints, and that the contact was pretty generic—of the kind that was mentioned by Ms Constance. However, I would not have known who the people were and I would not have known the extent of

that contact. That would have not been appropriate for me, as the decision-maker in the procedure, as Ms Constance pointed out, nor indeed in respect of my general day-to-day level of detail.

Alex Cole-Hamilton: Going through the procedure line by line, you would have recognised that improper contact between an investigating officer and complainer, prior to appointment as investigating officer, would have created an exposed flank for the Government. When the petition was lodged, did you interrogate all the contact that had happened between Judith Mackinnon and the complainer, or did you ask somebody else to interrogate that contact?

Leslie Evans: We need to go back to what the Lord Advocate said. When the petition was set out for the judicial review, the investigating officer and the role of the investigating officer did not appear in it.

Alex Cole-Hamilton: Okay. Did you see every piece of written correspondence, during the due diligence in preparing for the review? Although that was not part of the complaint at the time, it might have represented an exposed flank further down the line, but you did not take that belt-and-braces approach.

Leslie Evans: I was aware that there was an information-gathering process, of course, because my own access to information and emails was part of that. At that stage, there was a procedure that was calling for information quite early on about how the procedure was implemented, who was involved, who the key players were, what their roles were and so on. There were hundreds of documents, so if you are asking whether I looked at every single document, the answer is no, I did not. However, I would have expected that procedure to have been carried out by individuals doing searches using key criteria, and that is what happened.

Alex Cole-Hamilton: Were you aware that Nicola Richards and Judith Mackinnon had met complainers and had subsequently revealed to a potential complainer the existence of other complainers?

Leslie Evans: No. I do not think that I was aware of that at the time. I cannot recall being aware of it—put it that way.

Alex Cole-Hamilton: When did you become aware of that?

Leslie Evans: When did I become aware that Judith Mackinnon had mentioned other complainers to—

Alex Cole-Hamilton: Prior to anybody lodging a formal complaint—

Leslie Evans: I do not recall that coming up at all, during that time. Of course, however, it is not unusual to do that. It is not the case that this is a particularly extraordinary occurrence; it is not unusual for people to be told that other complainers are coming forward in other procedures.

Alex Cole-Hamilton: In retrospect, however, looking at those events, could they be seen as something of a fishing expedition in an effort to trigger a complaint?

Leslie Evans: No. It is so important that we get this on the record. There was no “fishing expedition”. I have learned that there were a number of people—10—who were raising concerns about their treatment and their experience in the Government at that time. Two of those people decided quite legitimately to take that into the procedure that was marked “Complaint”, and to formalise it. The apparent confection that there was some kind of “fishing” exercise encouraging people to do that or to be preyed upon in some way goes against everything that is in the DNA of a professional HR person.

Alex Cole-Hamilton: I take that in the spirit in which it has been offered, but we have to ask the questions.

Leslie Evans: Of course.

Alex Cole-Hamilton: Murdo Fraser referred to a “light-bulb moment”—the point at which the Government realised that it was going to lose the case. Lord Advocate—I think that you said that that was when certain information came to light. Permanent secretary, did you feel that that information was hidden from you when you were preparing the Government’s case for the judicial review?

Leslie Evans: That would imply that information was being deliberately kept from me. So no, I was not aware of the information, but do I think that it was being hidden from me? No.

Alex Cole-Hamilton: Has anybody in the Scottish Government been the subjected of disciplinary action as a result of their role in the flawed investigation that led to the judicial review?

Leslie Evans: We do not talk about disciplinary action in public, as you know.

Dr Allan: Could you clarify one point that has been discussed and has gone round the houses in the committee—the appointment of an independent party? I will not name them, although you will know who I am referring to. In some of the discussion at the committee, it has been suggested that you recommended an independent party, whereas some of the correspondence that we have had from James Hynd suggests that you simply put forward names of people who could fill

that role. Before we go any further, could you clarify that point, please?

Leslie Evans: I am happy to do that; it has perhaps got a little confused.

First, James Hynd did not propose that an independent element be introduced to the process; he responded to my request to consider how independence might be included. He returned to it and suggested names of senior civil servants, who would not be independent; they would not have been external to the Government, and they would not have been independent third parties.

More important, or as important, is that it is possible that those people might have been present at the time of the events taking place, which was a key part of the investigating officer description and role: the person should not have been party to the issues under discussion. More important is that those people would not have had the HR experience or qualification that could be considered to be essential for that kind of complex and difficult issue, which was likely to be considered as part of the procedure.

Dr Allan: I will move on to a different subject. You raised the issue about who was whose line manager. Can you say a bit more about the hierarchy of people who were, on a day-to-day basis, dealing with all this stuff and with the judicial review? How did that work?

Leslie Evans: There was a range of people involved. For those of you who are not familiar with what some might describe as the byzantine hierarchy of the civil service, the main points when it comes to senior civil servants are as follows. People at the deputy director level—the name of the investigating officer, Judith Mackinnon, who is a deputy director, has already been mentioned today—report to a director such as Nicky Richards, who is head of HR. James Hynd is a deputy director, and he would report to his director. All directors—a large number—report to directors general, and all the directors general report to me.

The important thing to mention—this is perhaps part of what you are interested in—is that people with a specialist responsibility, particularly in the corporate centre of the organisation, if I can call it that, have a roving responsibility across the organisation, in that they are not solely or uniquely focused on one policy area, but work across all of Government. They might be talking to me about something one day, and might be talking to another director general at another stage. They are a corporate resource, if I can put it that way.

Both the people from whom you have received evidence—James Hynd and Nicky Richards—are indeed corporate resources, and are among the

most professional people whom I have worked with in my career as a civil servant.

Dr Allan: Lord Advocate, you mentioned at the beginning that the Government, or all Governments, deal with many cases that come before them in the form of judicial review. Was there anything about this case, which externally appears to be so extraordinary, that was handled differently from all the other many cases that you have referred to, or was the process that was used in this case entirely the same?

12:30

The Lord Advocate: The member is absolutely right that the Government routinely deals with a significant volume of litigation. At any given time, there might be 100 or more cases to which the Government is party, at all levels of courts and with a wide range of complexity and profile. Some of the litigation is relatively routine and some of it is very high profile. Some has real significance for policy, and some, for other reasons, is very much in the public eye. Each litigation needs to be handled appropriately and in a manner that reflects the particular circumstances of the case.

In this case, there was nothing intrinsically out of the ordinary in the procedures that fell to be applied or the approach. As the committee is well aware, the case was very much in the public eye, and its significance in that sense was not lost on those who were involved. However, as a litigation, it had to be handled as other litigations are handled. Legal advice was taken, considered and assessed, the Government had to decide how to respond to the case, and decisions were made in the course of the conduct of the litigation. Ultimately, there was a review of the Government's position, which led to a concession.

Clearly, it would have been significantly better if those processes had been brought forward, but the processes were not peculiar to this case. From time to time, Governments lose cases and from time to time they concede cases. It is proper that they should do so, and that they accept the outcome.

Maureen Watt: What role, if any, did special advisers have in relation to the judicial review? Were the skills of special advisers sought?

Leslie Evans: They had none, that I am aware of.

The Lord Advocate: I am not sure that I can help with that question.

Maureen Watt: Are you both saying that, as far as you are aware, no special advisers were involved in any part of the judicial review?

Leslie Evans: I would not see a natural role for special advisers. I am not saying that there were not conversations with special advisers—I could not possibly say that on oath. However, I am not aware that that happened. It is not an obvious locus for a special adviser.

The Lord Advocate: In speaking about the Government's legal position, I cannot really comment on that. I cannot say anything other than what the permanent secretary has said. On oath, I could not say to the committee that there was no special adviser involvement, but I certainly do not recall any such involvement to which I could speak.

Maureen Watt: I will move on to ministerial oversight of the judicial review process. Were any Government ministers regularly advised of the process of the judicial review and what discussions were had?

Leslie Evans: The First Minister was kept apprised of key points during the judicial review.

Jackie Baillie: Lord Advocate, you have said that the Government will, at some point, explain to the committee why it did not fold earlier. Of course, you are the Government—you are a minister as well as the senior legal adviser—so I am wondering: why not tell us now?

The Lord Advocate: I rather thought that I had. It is also in the Government's statement. Searches were undertaken to produce relevant documentation, and additional documentation came to light that gave a fuller understanding of the interactions between the investigating officer and the complainers. The Government reviewed its legal position, as it does from time to time in any case, and it took the view that the right thing to do was to concede on the particular ground that it conceded on.

Jackie Baillie: Okay. I take you back to the Government's published response to a freedom of information request. It led to us to understand that there were 17 consultations with external counsel to discuss the judicial review. In response to my colleague Murdo Fraser, you said that you cannot tell us whether advice was given in September, but let us assume that it was given then. Just so that I understand these things, was it the same counsel throughout? Did you chop and change counsel? Was the advice that was given consistent, or was it wildly different?

The Lord Advocate: Throughout the judicial review the same counsel were instructed for the Scottish Government. I cannot speak specifically to the number of meetings nor, as the member recognises, can I say anything about the content of advice that may or may not have been tendered at different stages.

Jackie Baillie: If it were the same counsel, it would be reasonable for me to assume that it was the same kind of legal advice—that there would be consistency to it.

The Lord Advocate: There is a point that I have made, and I am making it very much in the generality—I would not want the committee to take anything in relation to this case—about the tendering of legal advice.

Ultimately, in any litigation, there is a process by which the Government determines the position on which it is prepared to stand in court. That is quite important—that it is a position that the Government is prepared to stand on in court. In the course of this case, for the reasons that the committee has been aware of, the Government took the view that it was not prepared to stand on the ground that it conceded.

Jackie Baillie: Can I take you back to the legal advice? I understand your limitations, but in response to a parliamentary question, I was told that you have given information on legal advice to a number of inquiries, including the child abuse inquiry and the contaminated blood inquiry. I wonder why you cannot give information about legal advice to a parliamentary inquiry.

The Lord Advocate: I am aware of the parliamentary question and the answer—

Jackie Baillie: Were you consulted on it?

The Lord Advocate: I could not possibly comment on whether I was or was not.

Jackie Baillie: No, indeed. That would be legal advice, would it not?

The Lord Advocate: Also, the Government does not disclose the involvement of law officers, or their non-involvement, in any particular matter—

Jackie Baillie: I will pretend that you are not here, then.

The Lord Advocate: There is an important point there. I am ministerially responsible for the Government's legal advice, whoever gave it. Therefore, which particular lawyer said what to whom is neither here nor there, because ultimately I answer for that legal advice.

To come back to the member's question, I suppose what that answer reveals is just how rare it is that the Government waives its position: those were the three occasions since devolution. I have been made aware of one additional case. The very first bill that was laid before the Parliament for debate was an emergency bill responding to a decision of the sheriff court in relation to the release of an in-patient in Carstairs. The then Lord Advocate, Lord Hardie, disclosed the content and source of legal advice in the course of debate, to

the effect that there was no legal means for reviewing the sheriff's decision. So—

Jackie Baillie: Sorry to interrupt. You will appreciate that you have revealed it in the past, and this is a parliamentary inquiry involving the current First Minister, the former First Minister and the permanent secretary. On what basis would you withhold the legal advice from a parliamentary inquiry? Are we not as important as a judicial inquiry? Does democratic accountability not count?

The Lord Advocate: I would not for a moment suggest that, and the member would not suggest that. On the contrary, I recognise the importance of democratic accountability. Of course, ministers appear in Parliament on the basis of the set of constitutional principles that I outlined in my opening statement.

It is really important to say that the assertion of legal professional privilege is routine. Its waiver is exceptionally rare, and it happens against the background of very strong reasons of public policy for maintaining that confidentiality, which facilitates and encourages the seeking and receipt of legal advice by policy makers and ministers on a basis of absolute candour.

I would be concerned, as a law officer, about any weakening of that position which might disincentivise the proper involvement of lawyers in policy making—

Jackie Baillie: Indeed, but I am sure that you would agree that these are exceptional circumstances.

The Lord Advocate: Well, as I think Dr Allan's question revealed, litigation with Government is not particularly exceptional—

Jackie Baillie: Parliamentary inquiries into it are.

The Lord Advocate: —and high-profile litigation is not exceptional.

In the context of a litigation, where inevitably the Government's previous legal position may come under scrutiny and test, it is particularly important that the Government is not disincentivised from seeking and obtaining legal advice on the basis of absolute candour. It is also fair to say that, the more an issue is a matter of live political debate, the greater is the risk that a waiver of privilege would undermine that.

The structures that are in place are designed to support the public interest in good government and to ensure that the Government, as far as it can, lives up to its commitment to act in accordance with the law and the proper administration of justice.

Jackie Baillie: Sure. I am conscious that the convener will shout at me if I take too long, so I will rattle through my other questions.

Going back to the 17 meetings—you were not aware of how many there were—did you attend any of them, most of them or all of them?

The Lord Advocate: As I said earlier, the Government does not disclose the involvement or non-involvement of law officers in any particular matter—

Jackie Baillie: Ah, so you could have been there. Okay. I—

The Lord Advocate: No. I am sorry. The member should take nothing from that one way or the other—

Jackie Baillie: Okay. I will take nothing from it. Let me—

The Lord Advocate: The Government simply does not—

Jackie Baillie: I will ask the permanent secretary, then, because she can answer, whether she was at those meetings.

Leslie Evans: I was not at all 17 meetings.

Jackie Baillie: Okay. You were at some of them, then.

Leslie Evans: I was at a few.

Jackie Baillie: Okay. Can you tell us who else was there, aside from law officers, because we should not know that. Were special advisers ever there?

Leslie Evans: I do not know. Not in the time of the meetings that I was at, that I can recall—no.

Jackie Baillie: Okay. Can somebody provide us with a list of those who were there, if it is appropriate to do so?

Leslie Evans: If it is appropriate, we will do so—

Jackie Baillie: Was the First Minister ever there?

Leslie Evans: I can give you a list of who might have been there—

Jackie Baillie: Okay.

Leslie Evans: —if I am allowed to do that.

Jackie Baillie: Can you say whether the First Minister was there?

Leslie Evans: The First Minister was present with me at two meetings that I can recall.

Jackie Baillie: Okay. Is it normal for First Ministers to get involved in judicial reviews, or discussions about them?

Leslie Evans: This is the only judicial review that I have been involved in, so I cannot comment on that.

Jackie Baillie: So you do not know about precedent in the organisation. I certainly cannot remember any First Minister being involved.

Leslie Evans: I do not have a corporate—

Jackie Baillie: I am assuming that it is not—

Leslie Evans: —memory of that kind, but I do not think that you should read anything into it.

Jackie Baillie: Okay. Well, if you can advise the committee of that, it would be helpful.

I will go back to the Lord Advocate—sorry, you did not get off so lightly. We have a letter from Levy & McRae, which acts on behalf of the former First Minister, and it says quite clearly that the Scottish Government's position, which is that whether the committee obtains documents is a matter for the courts, is in some way incorrect. The documents that you provided to the court are the Government's documents—the Government initiated them—and they could be provided to the committee, subject to the appropriate redactions. Is that correct?

The Lord Advocate: I should say that I was grateful for sight of that letter just before I came in. I suppose that that letter reveals that this is not an entirely straightforward process.

Jackie Baillie: Indeed. We are understanding that.

The Lord Advocate: I think that the member would accept that.

I made the point in answer to earlier questions that the committee has asked for a very significant volume of different categories of documents relating to the judicial review, and different issues arise in relation to each of those. There are other parties involved, as well as the court's interest. As I have told the committee, the Government is looking at the steps that it can proactively take to enable as much of that material as possible to be made available to the committee, and I hope that that enables some to be made available.

12:45

Jackie Baillie: Okay. I am hoping that, as a consequence of your intervention, the committee will now see something. Whether that is a chronology or all the appropriate documents we will need to wait and see.

Do you believe that withholding documents, other than those that should naturally be redacted, would be an unacceptable level of secrecy on the part of the Scottish Government?

The Lord Advocate: First, the member should not infer any particular level of involvement or non-involvement on my part, for the reasons that we have already discussed.

Jackie Baillie: Indeed, that is secret too.

The Lord Advocate: The Government has made clear its commitment to assisting the committee as fully as it can. The Deputy First Minister made it clear in his letter that the Government would take steps to enable the committee to have access to those particular documents; I think that he used the words "so far as possible". The committee is well aware that there are constraints and other interests that have to be accommodated and properly taken into account, but you have the Deputy First Minister's commitment in relation to those steps and I can confirm that they are being actively looked at.

Jackie Baillie: I have a couple of small questions for the permanent secretary. You said that the cost of the litigation in relation to the settlement for the former First Minister was £512,000 or thereabouts. Can you tell us the total cost to the Scottish Government? I am thinking of things such as in-house lawyers, civil servants and senior counsel. If you do not have that figure to hand, I would be happy for you to write to the committee about it.

Leslie Evans: I do not have the figure to hand.

Jackie Baillie: I suspected that it was a level of detail too far. Finally, I am conscious that you apologised to the committee for introducing an unlawful policy. Would you also like to apologise for costing the taxpayer an extraordinary amount of money?

Leslie Evans: I think that I have made my apology.

Jackie Baillie: Thank you.

The Convener: There is a short supplementary from Margaret Mitchell.

Margaret Mitchell: Picking up on Jackie Baillie's point, we know that the Government can waive legal privilege. If a failed contest to a judicial review costing in excess of half a million pounds and dear knows how much more and a trial against a former First Minister involving the most powerful people in the land from the Lord Advocate to the permanent secretary and onwards do not constitute exceptional circumstances and sufficient public interest for legal privilege to be waived, what on earth does? This inquiry must be one of the most serious that Scotland and the Scottish Parliament have ever seen. What would trump the circumstances that we are looking at, Lord Advocate? It seems to me that the public interest is being denied the accountability that it should have.

The Lord Advocate: First, there is nothing in the principles on which the Government deals with Parliament that prevents full accountability for the decisions that the Government took in this matter, any more than any other decision-making process or legal position that the Government adopts. That accountability does not depend on disclosure of internal legal advice or of which lawyer gave advice at which particular time. The Government can stand or fall on the position that it took in the judicial review and the committee can examine and test that. That is the first point: accountability can be secured without revelation of that material.

It is very important to recognise, certainly from my perspective, that there is no simple test in relation to the very unusual waiver of privilege. Waiver of privilege is something that would sometimes be politically convenient for ministers. However, all Governments of all political persuasions across the United Kingdom firmly hold to the importance of maintaining it, because it is part of a structure that—along with the responsibility of Government lawyers and, ultimately, with the law officers at the apex of that system—helps to ensure that Government properly absorbs legal considerations into its decision making on any issue, whether on a matter of policy or in the context of a litigation.

As I said earlier, particular pressures arise in the context of litigation and it would not be appropriate to take steps that would undermine the ability of the Government to seek and to obtain on the basis of absolute candour, internally or externally, the legal advice that it needs on any particular matter. Part of the reason for that is precisely to avoid the question of whether the Government has or has not taken legal advice—from whom and what the advice was—becoming a politicised issue in itself.

Margaret Mitchell: Are you trying to say to the committee that ministers explaining the legal advice is equivalent to the committee getting the advice that ministers might have decided to ignore?

The Lord Advocate: The key point is that Governments are accountable, as they always are in Parliament, for the legal position that they take, which might—

Margaret Mitchell: Forgive me; I think that that was a yes-or-no question.

The Lord Advocate: Well—

Margaret Mitchell: Is it the same thing? Ministers coming to explain legal advice is not the same thing as this committee seeing the legal advice, which ministers may or may not have ignored, is it?

The Lord Advocate: With respect, it is not—

The Convener: Even I, as a non-legal layperson, would not like to answer yes or no to that.

The Lord Advocate: I am grateful, convener. I have tried to convey—it is perhaps my fault for not doing so—that the Government takes a legal position, either implicitly or explicitly, when it adopts a policy decision. Legal positions underpin policy decisions and the Government takes a legal position in a litigation, for which ministers are answerable and accountable: the court might tell them that they are wrong, or a parliamentary inquiry or Parliament more generally might test them on it.

The process by which the Government arrives at that legal position is a different thing. The courts routinely recognise the purpose and key importance of the legal professional privilege, the litigation privilege and the law officers' convention in protecting the rule of law, the sound administration of justice and good government. Those doctrines protect the ability of the Government to seek and obtain on the basis of absolute candour the legal advice that it needs—perhaps competing advice, with different people expressing different views—to ultimately decide what its legal position should be and publicly stand or fall on that position.

Sorry—that has taken longer than answering yes or no, but I am afraid that that is my answer to the member's question.

The Convener: I would like to pick up on a couple of things before I wrap up the meeting. I know that the permanent secretary will look at some of the evidence that was given today and write to the committee with various details.

In relation to Maureen Watt's questions, I draw the permanent secretary's attention to the Government's statement on the judicial review. She could refresh her memory of paragraph 32, which notes that

"Special Advisers",

among others,

"were involved in aspects of this case."

Leslie Evans: Not to prolong matters, but I think that Ms Watt's question was particularly to do with the judicial review. Of course, if information that needs to come back to the committee includes the role of special advisers, we will certainly include it in our evidence.

The Convener: I would appreciate that. Thank you.

Lord Advocate, all the way through this session, there has been reference to additional information that we hope will come from the Government, based on the Deputy First Minister's letter, and the

chronological list. You said to “the greatest extent possible”. Who defines what is the greatest extent possible, and therefore what this committee should now receive automatically?

The Lord Advocate: On the convener’s previous point, it may well be that I will be looking at paragraph 32 corrected in relation to the role of special advisers. I am afraid that I cannot personally help the committee further on that question.

As the committee is aware, there are a number of constraints that need to be recognised, and I think that we all understand them. With regard to the production of court documents, the Government is proactively looking at how it can reveal as much of that material as possible. Those are the Deputy First Minister’s words—I cannot perhaps amplify on them. The particularities of the documents will have to be looked at against the range of restrictions and matters that need to be protected. I am not sure that I can elaborate further on that commitment.

The Convener: One of the things that we have repeatedly requested is a list of the documents that the Government holds. Surely that is something that could be given to us along with the chronology.

The Lord Advocate: I am perhaps not the person who is best able to answer precisely what issues there may or may not be with providing particular lists. I could see that questions might arise simply from the identification of a document, but I cannot trespass across one or more of the boundaries that have been set by the committee and by other factors in the inquiry. Whether that is the case is not something that I can answer, but it may be that the Government can write further on that specific issue.

The Convener: Perhaps the permanent secretary might like to respond to that last point, bearing in mind that this committee has been extremely careful with what is published in terms of redactions, and has in fact been more stringent in its redactions in publication than the Government has been in the publication of its freedom of information requests.

Leslie Evans: I would say that we have been equally careful about how we have redacted material. We have looked very carefully at making sure that we are not overly cautious but are responsible and disciplined in our redaction. I do not think that there is anything else that I can add with regard to the release of documents.

The Convener: What about the list of documents that the Government holds?

Leslie Evans: I would need to be advised about whether release is possible. If, in legal terms, it is possible, I am happy to do that.

The Convener: Thank you very much.

I thank the Lord Advocate and the permanent secretary for their attendance today. I think that it was the Lord Advocate who used the words “exploratory session”. Further on in this aspect of our inquiry, the committee will make a decision about who will be invited to give evidence.

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

12:58

Meeting continued in private until 13:29.

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